

**Matter of Mintz v Board of Elections of the City of
N.Y.**

2018 NY Slip Op 31994(U)

August 15, 2018

Supreme Court, New York County

Docket Number: 157145/18

Judge: Carol R. Edmead

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35**

In the Matter of the Application of

INDEX NO. 157145/18

PENNY MINTZ,

DECISION AND ORDER

Candidate,

Mot. Seqs. 001 & 003

For an Order Pursuant to Sections 16-100, 16-102 and 16-116, Of the Election Law, Declaring Valid the Petition Designating Penny Mintz Candidate for the Public Office of Female Member Of the Democratic State Committee for the 66th Assembly, New York County, New York, in the Democratic Party Primary Election to be held September 13, 2018, and to Order Respondent Board of Elections of the City of New York to Print and Place the Name of Candidate Upon the Official Ballots of Such Primary Election,

-against-

BOARD OF ELECTIONS OF THE CITY OF NEW YORK,
Respondent.

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Petitioner commenced this proceeding by Order to Show Cause seeking, *inter alia*, an Order declaring valid the petition designating the Petitioner-Candidate, Penny Mintz, as a candidate for Female Member of the State Democratic Committee for the 66th Assembly District of New York, in the Democratic Primary Election to be held September 13, 2018, and directing Respondent to place the name of Penny Mintz upon voting machines and ballots to be used at the Democratic Primary Election to be held September 13, 2018 (Motion Sequence 001). Thereafter, Respondent moved to dismiss the Petition pursuant to CPLR 3211 on the grounds that the Verified Petition, which was electronically filed, was not properly verified as required by Election Law 16-116 (Motion Sequence 003). Motion Sequence 002, wherein Ms. Rachel Lavine

moved for an order granting leave to intervene in this proceeding, was granted on August 8, 2018.

Jurisdiction

Respondent's Cross-Motion to Dismiss

Respondent's notice of motion for its pre-answer motion to dismiss asserts that this court lacks jurisdiction pursuant to CPLR 3211 (see, Notice of Motion). Specifically, Respondent argues that the Verified Petition was not properly verified because the e-filed verification only contains an "/s/" with Petitioner's name printed beneath it, and not her actual signature (Affirmation of Stephen Kitzyner in Opposition to the Order to Show Cause ¶ 7). Counsel for Respondent maintains that the Uniform Rules of the Trial Courts (the Uniform Rules) require Petitioner's verification to "be completed with an actual signature, not merely by the use of an /s/" (*id.* ¶ 9). It is further argued that § 202.5-b(e) of the Uniform Rules requires an image of a person's actual signature for electronic filing, and that no exception exists for the acceptance of an /s/ in lieu of an actual signature, thus rendering Petitioner's verification both defective and invalid (*id.* ¶¶ 10-12).

At oral argument held on August 8, 2018, Petitioner's counsel, Arthur Z. Schwartz, stated on the record that his practice when filing documents electronically is to use "/s/" on all signature lines, and when requested by the court or an adversary, Mr. Schwartz produces the original signed document. Following additional colloquy on the issues presented, the court directed that counsel for both parties submit additional papers in support of or in opposition to the arguments presented (the supplemental papers). Petitioner's supplemental papers were made due and were received on August 13, 2018. Respondent's supplemental papers were made due and were received on August 14, 2018.

The contents of Petitioner's supplemental papers are nearly identical to what was articulated on the record during the August 8 appearance. Mr. Schwartz states his practice of using /s/ on all signature lines in e-filed documents, and states that when requested, he produces the copy of the original signed document (Affirmation of Arthur Z. Schwartz in Opposition to Motion to Dismiss ¶ 2). Counsel notes that he is not aware of any rule prohibiting the practice of using /s/ on signature lines in NYCEF filings (*id.* ¶ 3). He also states under oath that Petitioner reviewed the subject Petition and signed the verification prior to its filing (*id.* ¶4). The original verification, which counsel states was being filed electronically, is annexed to Petitioner's supplemental papers as Exhibit A (*id.* ¶ 5, Exhibit A).

With respect to the jurisdictional argument, Respondent's supplemental papers are also nearly identical to what was placed on the record on August 8. Specifically, Mr. Kitzinger focuses on the lack of Petitioner's signature "on the version of the Petition that was filed on July 31, 2018" (Reply Affirmation of Stephen Kitzinger in Further Support of Respondent's Motion to Dismiss the Petition ¶ 3) and the applicability of §202.5-b of the Uniform Rules (*id.* ¶ 4). Counsel additionally asserts that Petitioner's signature on the verification that was filed was required by law in order for the verification to be properly verified (*id.* ¶ 7, 10), and maintains that the lack of verification is not something which can be cured after the expiration of the applicable statute of limitations (*id.* ¶ 11). Counsel's papers also include what appears to be a new claim concerning Petitioner's actions on the return date of the Order to Show Cause (*id.* ¶ 8).

Electronic Filing

The court begins its review of the issues presented by first noting that this special proceeding was commenced by electronic filing.

Electronic filing in New York was introduced as a pilot program in 2002 and over the last fifteen years has become an established method of commencing certain types of cases in this State. The rules governing what can and cannot be filed currently remain in a state of flux, and the program has been expanded and adjusted in an attempt to keep pace with current technological advances.

Voluntary and mandatory use of e-filing is currently governed by two sources, § 202.5-bb of the Uniform Rules, and by Administrative Order of the Chief Administrative Judge of the Courts (Administrative Order). The most current version of Uniform Rule § 202.5-bb excepts Election Law proceedings from mandatory filing (Uniform Rule §202.5-bb (a)(2)(ii)). The most recent Administrative Order, effective May 23, 2018, prohibits both mandatory and consensual electronic filing of Election Law proceedings in New York County (see, 5/22/18 Administrative Order of the Chief Administrative Judge of the Courts (applicable to all cases commenced after May 23, 2018) and Appendix, p. 8).¹ Stated differently, Petitioner should not have been able to commence this Election Law proceeding electronically.

Had Respondent made this argument in its motion to dismiss, the court would have had been compelled to dismiss the proceeding in its entirety.² However, as the court is disinclined to award relief not requested in the moving papers (*Condon v. Condon*, 53 A.D.2d 622 [2d Dept. 1976] [award of relief not requested in moving papers deemed abuse of discretion in matrimonial action]; *Carney v. Am. Fidelity Fire Ins. Co.*, 29 A.D.2d 795 [3d Dept. 1968] [dismissal of first,

¹ The administrative order is found at <https://iappscontent.courts.state.ny.us/NYSCEF/live/legislation/AO.192.18.pdf>

² It bears noting that this is not a uniform rule throughout the State. By current Administrative Order, Election Law proceedings may currently be e-filed on consent in Jefferson, Lewis, Livingston, Monroe, Onondaga, Ontario, Oswego, Otsego, Putnam, Warren, Tompkins, and Washington counties. There also appears to be no prohibition to e-filing Election Law proceedings on consent in Chenango, Delaware, Seneca, Steuben, Tioga, and Wayne counties.

second, and third causes of action deemed improper because relief was not requested in moving papers]; CPLR 2214(a)), this inquiry cannot simply end here.

The fact that the County Clerk, in error, allowed this case to be electronically filed in New York County is not automatically fatal to this proceeding. The record makes clear that Respondent acknowledges the validity of the proceeding as commenced: it concedes the application's timeliness, admits service of the within Petition, and relies upon the actual e-filed petition as the basis of its motion to dismiss (see Respondent's motion and supporting papers). Respondent also acknowledges that counsel for Petitioner properly used a /s/ marking as a substitution for his own signature in accordance with Uniform Rule § 202.5-b (e)(1)(iii) (Reply Affirmation of Stephen Kitzinger in Further Support of Respondent's Motion To Dismiss the Petition, Footnote 1). In the absence of evidence supporting the finding that Respondent was somehow prejudiced by the error of the County Clerk in issuing an index number upon this matter being electronically filed, this court can, and does, disregard the error of the County Clerk, which it deems ministerial (CPLR 2001; *McCord v. Ghazal*, 43 Misc.3d 767, 984 N.Y.S.2d 572 [Sup. Ct., Kings Co. 2014]; *Grskovic v. Holmes*, 111 A.D.3d 234 [2d Dept. 2013]).

The sole argument initially advanced by Respondent in its pre-answer motion to dismiss is that the electronically filed Petition uploaded to the NYCEF system is not signed by Petitioner with a full signature but an "/s/," thereby rendering the document not properly verified and thus, invalid. The only legal support offered by Respondent for this argument, is Uniform Rule 202.5-b (e)(1)(i), (ii), (iii), and (vi) which read in entirety as follows:

(e) Signatures.

(1) Signing of a document. An electronically filed document shall be considered to have been signed by, and shall be binding upon, the person identified as a signatory, if:

(i) it bears the physical signature of such person and is scanned onto an electronic format that reproduces such signature; or

- (ii) the signatory has electronically affixed the digital image of his or her signature to the document; or
- (iii) it is electronically filed under the User ID and password of that person; or [...]
- (vi) it otherwise bears the electronic signature of the signatory in a format conforming to such standards and requirements as may hereafter be established by the chief administrator

This court has conducted an exhaustive search of available legal sources and finds no rule, statute or case law that precludes NYCEF documents from being e-filed and uploaded onto the NYCEF system using the “/s/” marking in place of any actual signature. The only rule that this court is aware of which suggests that a full signature *may* be required on commencement documents in an electronically filed case is § 202.5-b (f)(1) of the Uniform Rules, which reads as follows:

(f) Service of Documents.

(1) Service of initiating documents in an action. Initiating documents may be served in hard copy pursuant to Article 3 of the CPLR, or in tax certiorari cases, pursuant to the Real Property Tax Law, and shall bear full signatures as required thereby, or by electronic means if the party served agrees to accept such service. In the case of a proceeding to review a small claims assessment where the petition has been e-filed by the submission of a text file as provided in subdivision (b)(1) of this section, a hard copy of the petition, fully completed and signed as set forth in that subdivision, shall be mailed, and shall be served upon the assessing unit or tax commission, as provided in Section 730 of the Real Property Tax Law, unless otherwise stipulated. A party served by electronic means, shall, within 24 hours of service, provide the serving party or attorney with an electronic confirmation that service has been effected.

(emphasis added).

Here, it is clear, and Respondent concedes, that the Petition uploaded to the NYCEF system in this proceeding was uploaded by Petitioner’s counsel. The credible proof further supports the finding, which again Respondent concedes, that the “/s/” taking the place of Petitioner’s signature on the electronically filed verification is notarized by Petitioner’s counsel. Having considered the only apparently applicable rules on this issue, and finding no case law

supporting the proposition that an “/s/” mark on an e-filed document uploaded to the NYCEF system is tantamount to the uploading of an unsigned document or that an e-filed verification must be filed with an actual signature unless there is an exception provided by law, the court finds no jurisdictional basis to grant Respondent’s motion to dismiss.

The court declines to address Respondent’s claim concerning Petitioner’s actions on the return date for the Order to Show Cause in this proceeding, advanced in its Reply papers, as it is at best a veiled attempt to raise an argument not advanced in the original moving papers.

(*Dannasch v. Bifulco*, 184 A.D.2d 415 [1st Dept 1992]).

Lastly, insofar as Respondent elected to make a pre-answer motion to dismiss pursuant to CPLR 3211(e), all jurisdictional defenses not raised in the initial moving papers are now deemed waived (*McGowan v. Hoffmeister*, 15 A.D.3d 297 [1st Dept. 2005]).³

Elected Office Designation

The Office sought by Petitioner in this Proceeding is “Female Member, Democratic Party State Committee from the 66th Assembly District” (see, Petition). Respondent argues that Petitioner’s failure to properly designate the office she seeks renders her Petition defective. Respondent also argues that this omission cannot be cured with the argument offered by Petitioner that “Penny” is, by definition, a female name (see Petition ¶ 15), and offers support that the name Penny is a unisex name, not unlike others currently in use in society (Affirmation of Stephen Kitzinger in Opposition to the Order to Show Cause (¶¶ 24-29).

The Court is constrained to follow *Bosco v. Smith*, 104 A.D.2d 462, *aff’d* 63 N.Y.2d 698, 468 N.E.2d 1118 [1984]). *Bosco* has not been superseded by any new caselaw or legislation in

³ The belated argument offered by Respondent at oral argument on August 15, 2018, that verification in this proceeding is a subject matter jurisdictional defect, which cannot be waived, is found to be unpersuasive, inapplicable, and without merit.

opposition to its findings. Female designation for State Committee person is “content,” not form (*Bosco*, 104 A.D.2d at 463). Therefore, the Court is mandated to find that the designating petitions are invalidated.

CONCLUSION


Accordingly, it is hereby

ORDERED that the motion of Respondent, Board of Elections of the City of New York to dismiss the Petition (mot. seq. 003) is denied. It is further

ORDERED that the order to show cause of petitioner, Penny Mintz for an order: (a) declaring valid the petition designating the Petitioner-Candidate, Penny Mintz, as a candidate for Female Member of the State Democratic Committee for the 66th Assembly District of New York, in the Democratic Primary Election to be held September 13, 2018; and (b) directing Respondent Board of Elections of the City of New York to place the name of Penny Mintz upon voting machines and ballots to be used at the Democratic Primary Election to be held September 13, 2018 (mot. seq. 001), is denied, and the Petition is dismissed.

This constitutes the decision and order of the Court.

Dated: August 15, 2018



Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.