

Matter of Dilan v Salazar
2018 NY Slip Op 32495(U)
August 7, 2018
Supreme Court, Kings County
Docket Number: 700010/18
Judge: Edgar G. Walker
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At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of August, 2018.

P R E S E N T:

HON. EDGAR G. WALKER

Justice.

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In the Matter of the Application of

MARTIN MALAVE DILAN,

Candidate -- Aggrieved

-- and --

HELINE LEONARDI,

Citizen-Objector,

Petitioners

- against -

Index No. 700010/18

JULIA SALAZAR,

Candidate,

-- and --

BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Designating Petition Purporting to Designate Respondent-Candidate for State Senate for the 18th Senatorial District in the City and State of New York in the Democratic Party Primary Election Kings County, Borough of Brooklyn, City and State of New York to be held September 13, 2018, and to Restrain the said BOARD OF ELECTIONS from Printing and Placing the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

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FILED
AUG 07 2018
KINGS COUNTY CLERK'S OFFICE

Upon respondent-candidate Julia Salazar's motion to consolidate the special proceedings commenced under index numbers 700010/18 and 700014/18 and her supporting papers,¹ and upon petitioners' oral application to withdraw and/or discontinue the special proceeding commenced under Index Number 700010/18, and due deliberation had, it is now

ORDERED that petitioners' oral motion to withdraw and/or discontinue the special proceeding under index number 700014/18 is denied; and it is further,

ORDERED that the portion of respondent Salazar's motion requesting consolidation is granted to the extent that the special proceedings commenced under index number 700010/18 and index number 700014/18 are consolidated for all purposes under index number 700010/18; and it is further,

ORDERED that the Clerk of Kings County is directed to consolidate the file of index number 700014/18 into that of index number 700010/18; and it is further,

ORDERED that the pleadings in each special proceeding shall stand as the pleadings in the consolidated special proceeding; and it is further

ORDERED that the caption in the now consolidated special proceeding, as amended to reflect that it is the 18th Senatorial District at issue in this campaign, shall read as follows:

¹ The notice of motion also requested that the court accept late filed answers and/or amend the answer. This portion of the motion was granted by the court orally on the record during the proceedings on August 1, 2018.

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In the Matter of the Application of

MARTIN MALAVE DILAN,
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- and -

HELINE LEONARDI,
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Index No. 700010/18

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BOARD OF ELECTIONS OF THE CITY OF NEW YORK,
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In these special proceedings brought pursuant to Article 16 of the Election Law, the petitioners Martin Malave Dilan, candidate aggrieved, and Helene Leonardi, citizen-objector, seek to declare invalid the designating petition purporting to designate

respondent-candidate Julia Salazar for the public office of state senate for the 18th Senatorial District in the City and State of New York in the Democratic Party Primary Election to be held on September 13, 2018 on the ground that the respondent Salazar does not meet the residence requirements of Article III, Section 7, of the New York State Constitution.

Petitioners commenced the proceeding under index number 700010/18 on July 23, 2018 with the filing of the original petition. As allowed by the order to show cause, this original petition and the order to show cause were served on respondents by regular mail on July 23, 2018. The caption of this original petition, however, erroneously identified the respondent-candidate Julia Salazar as a candidate for the 19th Senatorial District, when in fact, Ms. Salazar is a candidate for the 18th Senatorial District.² On July 26, 2018, before any answer was filed, petitioners filed with the court an "Amended Petition" that changed the senatorial district identified in the caption from the 19th Senatorial District to the 18th Senatorial District. In addition to correcting the erroneous senate district, the amended petition added allegations regarding the expiration of Ms. Salazar's Florida driver's license and her request and obtaining a new Florida license under a Florida address (amended petition ¶¶ 20 and 21).³ Petitioners have supplied an affidavit of

² The court notes that, in the body of the original petition, petitioners correctly identified the district at issue as the 18th Senatorial District (original petition ¶¶ 1, 3, 5, and 9).

³ The amended petition also removed a statement contained in the original petition that petitioner Dilan is entitled to vote in the 59th Assembly District (original petition ¶ 1; amended petition ¶ 1). In comparing the original and amended petitions, the court has identified no other

service for the amended petition showing that the amended petition was personally served on respondent on July 26, 2018.

In addition to filing and serving the amended petition under index number 700010/18, on July 26, 2018 petitioners commenced a separate election law proceeding on July 26, 2018 under index number 700014/18. The petition in the proceeding under index number 700014/18 (014 petition) appears identical to the amended petition under index number 700010/18 (010 amended petitioner), requests the same relief as the 010 amended petition, and has the same paragraph numbering as the 010 amended petition. This 014 petition and the accompanying order to show cause were personally served on Ms. Salazar on July 26, 2018, at the same time the 010 amended petition was served on Ms. Salazar.

At the calendar call on the July 31, 2018 return date of the respective petitions, counsel for Ms. Salazar filed with the court and served on counsel for petitioners an answer bearing the index number 700010/18. Ms. Salazar's counsel, however, did not have an answer bearing the index number 700014/18. During the on-the-record colloquy regarding the proceedings under both index numbers, it became apparent that Ms. Salazar's counsel had not realized that the 010 amended petition and the 014 petition bore separate index numbers and constituted separate proceedings until she was before the

changes than the correction of the election district in the caption, the additional allegations contained in paragraphs 20 and 21 of the amended petition, and the removal of the allegation that petitioner Dilan is entitled to vote in the 59th Assembly District.

court. Once Ms. Salazar's counsel realized her error, she requested that the answer under index number 700010/18 also be deemed responsive to the 014 petition. Counsel for petitioners, however, opposed this request, arguing that in failing to submit an answer under index number 700014/18, Ms. Salazar was in default under that index number. Petitioners' counsel then proceeded to state that he was withdrawing the proceeding commenced under index number 700010/18 and would proceed under index number 700014/18. The court made no rulings at that time and took the requests by counsel for the parties under advisement.

At the continued proceedings held on August 2, 2018, Ms. Salazar submitted her written motion for the court to accept the late answers and for consolidation of the proceedings under index numbers 700010/18 and 700014/18. At the same time, petitioners' counsel renewed his request to the withdraw/discontinue the proceeding under index number 700010/18 and proceed solely under index Number 700014/18. The court, on the record, granted the portion of Ms. Salazar's requesting permission to file of a late answer, denied petitioners' oral motion to withdraw/discontinue the preceding commenced under index number 700010/18, and granted the portion of Ms. Salazar's motion requesting the consolidation of the actions. The court notes that after the court denied petitioners' oral motion to withdraw/discontinue the proceedings under index number 700010/18, petitioners did not oppose Ms. Salazar's motion to consolidate the actions. This decision and order addresses the grant of consolidation and the denial of

petitioners' request to withdraw/discontinue the proceedings under index number 700010/18.

As there are now two pending special proceedings involving the same parties and in which the petitioners seek the same relief from the respondents, the court, upon a motion to dismiss pursuant to CPLR 3211 (a) (4), would normally dismiss the action that was commenced later (*see e.g. Stevens v Law Off. of Blank & Star, PLLC*, 155 AD3d 917, 918 [2d Dept 2017]; *Matter of Willmus*, 101 AD3d 1036, 1037 [2d Dept 2012]). Petitioners' counsel, however, requested that he be allowed to withdraw and/or discontinue the proceedings under index number 700010/18, rather than those under index number 700014/18, because of concerns that an Appellate Court might view the failure to properly identify the appropriate senate district in the original petition as a jurisdictional defect that was not corrected by the 010 amended petition. It would appear, however, counsel's reason for withdrawing proceedings index number 700010/18 also arises from his view that Ms. Salazar failed to timely answer the 014 petition and thus, that she is in default under index number 700014/18.

In view of Ms. Salazar's having undisputedly filed and served a timely answer to the 010 amended petition, however, petitioners cannot simply discontinue the proceeding under index number 700010/18 by giving notice, but rather, must obtain a stipulation of all the parties or a court order (CPLR 3217 [a], [b]; *Motalto v Colgate Scaffolding Corp.*, 128 AD3d 916, 917 [2d Dept 2015]; David D. Siegel, Supp Practice Commentary,

McKinney's Cons Laws of NY, Book 7B, CPLR C3217:4, 2017 Supp Pamph at 846). While petitioners' may have legitimate reasons for preferring to proceed under index number 700014/18 rather than index number 700010/18, the court declines to exercise its discretion to allow the discontinuance of the action under index number 700010/18 given that the proceeding under index number 700010/18 is the one in which Ms. Salazar has undisputedly filed and served an answer (*see* CPLR 3217 [b]; *Turco v Turco*, 117 AD3d 719, 720-721 [2d Dept 2014] [court may deny motion to discontinue where discontinuance may prejudice a substantial right of a party]). Under these circumstances, and in view of petitioners' consent to consolidation of the separate proceedings after this court's denial of their motion to discontinue, the court grants the motion to consolidate both Election Law special proceedings under index number 700010/18 (CPLR 602 [a]; *see also RCI Plumbing Corp. v Turner Towers Tenant Corp.*, 152 AD3d 723, 723 [2d Dept 2017]; *Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2016]).

This constitutes the decision and order of the court.

ENTER FORTHWITH



JSC **HON. EDGAR G. WALKER**