STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

WILLIAM C. MCDONALD,

Petitioner,

-vs-

SENECA COUNTY BOARD OF ELECTIONS,
CARL J. SAME, Commissioner,
TIFFANY S. FOLK, Commissioner,

Respondents.

Decision and Order

Index No. 52795

Petitioner commenced this Special Proceeding under the Election Law seeking three different invalidations based upon his objections to the Board of Elections and the Board's determinations:

1. Designating petitions for multiple positions within the Conservative Party[1]
2. Designating petitions for Lee Davidson for Republican Member of the State Committee, 132 Assembly District
3. The invalidating of his own designating petition as a candidate for Republican State Committee Person (Male)

Petitioner commenced this action by Order to Show Cause and Verified Petition, which was filed on April 18, 2019. Election Law § 16-102 [2] provides that a proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a

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[1]Petitioner withdrew this challenge at oral argument.

determination of invalidity with respect to such petition, whichever is later. Here, the last day to file a petition was April 4, 2019 and Petitioner's own designating petitions were invalidated on April 12, 2019. As a result, April 18, 2019 was the last date on which to file this action, the Court issued an Order to Show Cause directing service by April 18, 2019. Other than filling in the return date and the date for service, the Court signed the Order to Show Cause as presented by the Petitioner.

In the Affidavits of Service provided to the Court by the Petitioner, the Affidavit of Service indicates that substituted service was made upon Respondent Carl J. Same by affixing the "INITIATING PAPERS FOR THE OTSC" to his residence and by mailing a copy to Same's residence on April 19, 2019. According to the Affidavit of Service, the process server affixed the papers at 7:30 pm. There is no indication whether the process server made multiple attempts.

In order to resort to "affix and mail" service, the Petitioner was required to show diligence in making attempts under CPLR 308[1] and CPLR 308[2], and the signed Order to Show Cause did not dispense with those requirements (see *Hennessey v DiCarlo*, 21 AD3d 505, 506 [2d Dept 2005]). As there is no indication that the process server made any diligent attempts to serve Respondent Same

personally under CPLR 308[1] or under CPLR 308[2], the Petitioner could not resort to "affix and mail" service (*McGreevy v Simon*, 220 AD2d 713, 714 [2d Dept 1995]). In this Election Law Proceeding, Petitioner was obligated to commence and to serve Respondents within the prescribed 14 days (*Davis v McIntyre*, 43 AD3d 636, 636 [4th Dept 2007]). Assuming *arguendo*, that the Petitioner could resort to "affix and mail" service, the second step of service – in this case mailing – did not occur until after the 14-day period expired (cf. *Angletti v Morreale*, 25 NY3d 794, 798 [2015] ("affix and mail" service in Election Law proceeding was timely when the mailing occurred on the last day for service)). Jurisdiction over both of the Commissioners of the Seneca County Board of Elections is required (*Mullen v Fucciollo*, 153 AD2d 711 [2d Dept 1989]). Thus, the failure to complete service on Respondent Same within the 14-day period is a jurisdictional defect mandating dismissal (see *Gagliardo v Colascione*, 153 AD2d 710 [2d Dept 1989]).

Petitioner suggests that the Court can consider his *pro se* status and grant leeway to forgive any errors in service. While it is the case that "courts generally allow pro se litigants some leeway in the presentation of their case, pro se litigants must still abide by court procedures and calendars" (*Stoves & Stones, Ltd. v Rubens*, 237 AD2d 280, 280 [2d Dept 1997]The Second Department has held that such leeway cannot extend to the manner in which the court obtains

jurisdiction over a party to an action, holding a "pro se litigant acquires no greater rights than those of any other litigant and cannot use such status to deprive defendant of the same rights as other defendants" - which would include service requirements under CPLR Article 3 (*Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1st Dept 1996]). In *Goldmark*, the Appellate Division held that the pro se plaintiff failed to properly obtain jurisdiction over the defendant and that service requirements of an order to show cause are strictly construed (*Goldmark v Keystone & Grading Corp.*, 226 AD2d at 144; see also *Brown v Midrox Ins. Co.*, 108 AD3d 921, 922 [3d Dept 2013] (plaintiff failed to obtain jurisdiction over the defendant and "plaintiff's *pro se* status and defendant's actual notice of the action provide no basis for a different result")).

Even assuming *arguendo* that the Petitioner properly served Respondent Same within the required 14-day period, the action would still be subject to dismissal as the Petitioner failed to join other necessary parties, including but not necessarily limited to, the individual whose designations the Petitioner seeks to invalidate and the respective parties from the Republican Party (see *Buckley v Bd. of Elections of Livingston County*, 265 AD2d 866, 867 [4th Dept 1999]; *Curcio v Wolf*, 133 AD2d 188, 189 [2d Dept 1987]; *Miranda v Erie County Bd. of Elections*, 59 AD2d 643, 643 [4th Dept 1977]).

Based upon the foregoing, it is hereby ORDERED that the Petition is dismissed in all respects.

Dated: April 30, 2019

The Honorable Daniel J. Doyle
Supreme Court Justice