

**Matter of Burns v Board of Elections
in the City of N.Y.**

2021 NY Slip Op 33933(U)

May 3, 2021

Supreme Court, Bronx County

Docket Number: Index No. 804611/2021E

Judge: John W. Carter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

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In the Matter of the Application of SELESTE BURNS, as a Citizen-Objector,

804611/2021E

- AND -

Action #1

**AHMADOU DIALLO, as An Aggrieved Candidate for the Public Office of
Member of the New York City Council from the 16th Council District, County
of Bronx, City and State of New York,**

Petitioners,

- AGAINST -

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

- AND -

**ABDOURHAMANE DIALLO as a purported candidate for the Public
Office of Member of the New York City Council from the 16th Council
District, County of Bronx, City and State of New York, as set forth in the
Schedule of Respondents annexed hereto and made a part hereof,**

Respondent(s)

**SEEKING AN ORDER INVALIDATING AND DECLARING NULL
AND VOID THE PURPORTED DESIGNATING PETITION OF THE
RESPONDENT CANDIDATE FILED WITH THE BOARD OF ELECTIONS,
PURPORTING TO DESIGNATE THE WITHIN-NAMED CANDIDATE
AS THE DEMOCRATIC PARTY CANDIDATE FOR THE PUBLIC OFFICE
OF MEMBER OF THE NEW YORK CITY COUNCIL FROM THE 16th**

**COUNCIL DISTRICT, CITY AND STATE OF NEW YORK TO BE
VOTED UPON IN THE DEMOCRATIC PARTY PRIMARY ELECTION TO
BE HELD ON JUNE 22, 2021, AND TO RESTRAIN THE SAID BOARD
OF ELECTIONS FROM PRINTING AND PLACING THE NAMES OF
RESPONDENT-CANDIDATE UPON THE OFFICIAL BALLOTS FOR
SAID PRIMARY ELECTION.**

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**In the Matter of the Application of AHMADOU DIALLO, as a candidate for
the Democratic Party designation/nomination for the Public Office of Member
of the New York City Council, from the 16th Council District, County of Bronx,
City and State of New York,**

Petitioner(s),

-against-

804619/2021E

Action #2

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK;

-AND-

**ALI SALAKIBOU, as objector, seeking an Order, pursuant to the Election Law
declaring invalid the petition designating the aforesaid named candidates for
the aforesaid described party and public offices,**

DECISION

Respondent(s),

-AND-

**Seeking an Order, pursuant to the Election Law, declaring valid the petition
designating the aforesaid named candidate for the aforesaid described public
offices and/or party positions, and ordering the Board of Elections to place the
name of said petitioner candidates upon the ballot to be used at the Primary**

Election of the Democratic Party to be held on June 22, 2021.

-----X

In the Matter of the Application of ALI SAKIBOU,

Petitioner-Objector

-and-

Index 804688/2021E

ABDOURHAMANE DIALLO,

Action #3

Petitioner-Candidate Aggrieved

804688/2021E

-against-

AHMADOU DIALLO

Respondent-Candidate

-and-

NEW YORK CITY BOARD OF ELECTIONS

Respondent,

For an Order Pursuant to Sections 16-100, 16-102 and 16- 116 of the Election Law, Declaring Invalid the Petitions filed by AHMADOU DIALLO a Candidate of the Democratic Party for the Public Office of Member of the New York City Council, 16th District, Bronx County at the June 22, 2021 Primary Election

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HON. JOHN W. CARTER:

These related matters all concern places on the ballot for the Democratic Party Primary for the 16th District for the New York City Council. Candidates Ahmadou Diallo

and Abdourhamane Diallo each seek to invalidate the candidacy of the other; Ahmadou Diallo also brings a petition and cross petition to validate his own candidacy.

The Board of Elections had reviewed the petition signatures of each candidate and found that candidate Ahmadou Diallo had 1271 valid signatures and that candidate Abdourhamane Diallo had 509 valid signatures. The requirement for a place on the ballot is 270 valid signatures.

At the call of the Bronx Election Matters calendar on April 13, 2021, these cases were referred to a Special Referee to hear and report with recommendations. The hearing was held on April 20, 21 and 22, 2021, with oral argument before the Special Referee on April 26, 2021. The Special Referee issued his report on April 27, 2021. In that report he recommended that the petitions to invalidate the candidacies be denied and the petition and cross petition to validate the candidacy of Ahmadou Diallo be granted. Oral argument as to whether the report should be confirmed or disaffirmed was held before this court on the afternoon of April 29, 2021.

Each party claims that the others' petitions are "permeated with fraud" and, conversely, each claims that his own petitions are free from such permeation.

"As a general rule, a candidate's designating petition will be invalidated on the ground of fraud only if there is a showing that the entire designating petition is permeated with fraud" (Matter of Volino v Calvi, 87 AD3d 657 [2d Dept 2011]).

Fraud must be proved by clear and convincing evidence (Matter of Butler v Duvalle, 32 AD3d 514 [2d Dept. 2006]). While a finding that a designating petition is "permeated with fraud" supports the invalidation of the entire petition (Matter of Tapper v Sampel, 54 AD3d 435 [2d Dept. 2008], where the irregularities in the petition are not found by clear and convincing evidence to have been the result of fraud, only the invalid signatures or improperly subscribed designating sheets should be stricken (Matter of Robinson v Edwards, 54 AD3d 682 [2d Dept 2008])).

Findings of permeation with fraud traditionally are based upon irregularities with signature gathering itself, and are supported with testimonial evidence (see, Matter of Harry v. Liblick, 119 AD2d 845 [2d Dept 1986][subscribing witness testified that he submitted one third of candidate petition sheets, which contained signatures not affixed in his presence]; Matter of Villafane v. Caban, 104 AD2d 579[2d Dept. 1984][candidate

herself testifies as to her own activities indicating that she was “closely involved in the petitioning process”]; Matter of Martinez v. Orlando, 153 AD2d 720 [2d Dept. 1989][three witnesses testify that signatures on petition sheets not theirs; fourth testifies candidate misrepresented to her the document she signed]; Matter of McHale v. Smolinski, 133 AD2d 520 [4th Dept. 1987][17 witnesses testify that supposed subscribing witnesses did not take their signatures]. Here, the court notes that although three witnesses testified from each of the campaigns, and were asked questions about the validity of certain signatures, no witnesses were called to testify as ostensible petition signers to state that the signatures which were purported to be theirs, were not, in fact, their actual signatures.

Abdourhamane Diallo argues that the petitions of Ahmadou Diallo were permeated with fraud based upon the testimony of three witnesses from the latter’s campaign. As to one he argues that the witness testified that he was paid on a per signature basis, which is violative of the Election Law. However, in his report the Special Referee states that the payment on a per signature basis was not established; that the witness testified that he earned between \$100 and \$300 per day depending upon how many signatures were gathered, but that such could be interpreted as being paid a greater amount for having spent more time in the act of signature gathering which would result, logically, the gathering of more signatures. This court agrees. Abdourhamane Diallo also argues that one of the other witnesses from Ahmadou Diallo’s campaign testified that she had gone to certain addresses on a given day, but then was confronted with petition sheets from that day showing that additional addresses were given by witnesses on petition sheets, such that it would have been impossible for her to cover all of the addresses to which she eventually testified during the hours she claimed to have worked that day. An additional witness of that campaign was questioned as to whether she had visited certain floors of apartment buildings on more than one occasion to gather signatures, and she eventually admitted that she may have done so although that was something she sought to avoid doing. The referee found these witnesses to be credible, and, even if the arguments raised as to their testimony are valid, the number of signatures in question would be relatively small and would not provide sufficient evidence of permeation with fraud for the Ahmadou Diallo campaign.

Ahmadou Diallo argues that the testimony elicited from members of the Abdourhamane Diallo campaign, including that of the candidate himself, supports a finding of permeation with fraud. The referee found the testimony of these witnesses to be not as credible, but concluded that the number of signatures which they took as subscribing witnesses, and which were challenged by the campaign of Ahmadou Diallo, was not great , and therefore did not provide ”clear and convincing evidence” that the signature gathering was permeated with fraud. This court agrees. Additionally, the Board determined that the candidate had 509 valid signatures, almost twice as many as would be required for a place on the ballot. The number which were challenged during the respective testimonies of the candidate himself and the two other witnesses produced from

his campaign, as well as those that Ahmadou Diallo asked the Special Referee to review, even if all were discounted, would not bring him below the number required for a place on the ballot. While the irregularities in the Abdourhamane Diallo designating petition are troublesome, "[I]t should be the purpose of the law, in a doubtful situation, to grant to the electorate the discretion of determining the bona fides of candidates and that elections should not be determined in the courts unless absolutely necessary." (Acosta v Previte, 51 AD2d 960 [1st Dept 1976]) aff'd 39 NY2d 720 [1976]).

Accordingly, the report of the Special Referee is confirmed, and the petitions to invalidate are denied. The petition and cross-petition to validate are granted.

This constitutes the decision and judgment of the Court.

Dated: 5/3/2021

John W. Carter J.S.C.

JSC