

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED AND ENTERED
ON 10-4- 2011
WESTCHESTER
COUNTY CLERK

-----X
MATTHEW RICE & HOWARD ARDEN,

Petitioners,

- against -

DECISION

Index No. 14277/11

BOARD OF ELECTIONS IN THE COUNTY OF
WESTCHESTER and DOUGLAS COLETY,
REGINALD LAFAYETTE, JEANNIE PALAZOLA
and NANCY MEEHAN

AND

GENE MATUSOW, as objector herein,

Respondents.

For an Order pursuant to the Election
Law of the State of NY Declaring valid,
proper and legally effective a nominating
Petition which nominated or qualified
the Petitioners and Directing the Board
of Elections to place the name of the
Petitioners upon the official ballots
and voting machines as a candidate for
such office in the General Election to
be held on November 8, 2011

-----X

Lefkowitz, J.

Petitioners request an order invalidating the respondent Board of
Elections' (the "Board") determination which sustained objections to the
nominating petition of the petitioners-candidates of the Libertarian
Party for the position of Town Councilman and Town Supervisor in the
Town of North Castle on the ground that the petitioner Howard Arden had
signed a petition in support of a Republican Party candidate for the
same office.

The Board argues that the last day to commence the proceeding was September 19, 2011. The Board of Elections made its determination on September 14, 2011 and communicated that fact by mail that day. The parties disagree whether telephone communication occurred. Nevertheless, petitioner Rice, an attorney, filed an order to show cause, affirmation and verified petition on September 19, 2011. The Court did not sign the order to show cause when presented because Mr. Rice, as a party, was not authorized to affirm. CPLR 2106.

Petitioner Rice submitted an amended order to show cause the next day, September 20, 2011, which was executed and served on September 21, 2011, within the time permitted by the order to show cause. Apparently, petitioners did not serve a copy of the petition on respondents.

Respondents move to dismiss the proceeding as time barred, for failure to serve the petition and failure to state a cause of action.

Treating these arguments in inverse order, the Court holds that the reasoning of Justice Drury in DiPietro v. NYS Bd. of Elections, 30 Misc. 3rd 449 (Supreme Ct. Erie 2010) persuasive in holding that the 2009 amendment to Election Law §6-140 (1) (b) permits a person to sign different petitions for different parties to the same office. Therefore, a cause of action exists. Cf. Matter of Bergman v. Berger, 219 AD2d 599 (2d Dep't 1995).

The failure to serve a copy of the petition is a mere irregularity here as respondents were not prejudiced since the affidavit contained all the information set forth in the petition. CPLR 2001.

As to timeliness in election law matters, the proceeding must be commenced and the parties served within the time prescribed by statute. At bar, that is within three business days of the Board's determination. Election Law §16-102 (2). Thus, even if the Court treated the proceeding as commenced on September 19, 2011 by the filing of the petition (CPLR 304 [a]), service was made beyond the literally required time period and the fact that the order to show cause permitted such service does not extend the time for service. Matter of Kurth, 65 AD3rd 642 (2d Dep't 2009); Matter of Grace, Supreme Court, Westchester County (Lefkowitz, J.), Index No. 13040/11, decided August 5, 2011.

Petitioners argue that an estoppel to assert the time bar should be applied because they were informed by the Board's determination too late to effectuate timely service. The Board contends otherwise; and it is clear, that had petitioners presented an affidavit with the order to show cause on September 19, 2011, it would have been signed and service provisions could have directed electronic service (or personal service on the Board at its location within two blocks from the Courthouse) on September 19, 2011. Consequently, no estoppel applies under these circumstances.

However, it has been held that the three business day period (Election Law §16-102 [2]) does not begin to run until the petitioners receive notice of the Board's determination. Matter of Schultz v. Niagra County Bd. of Elect., 76 AD3rd 798 (4th Dep't 2010). That occurred on September 16, 2011. Therefore, three business days from that date is September 21, 2011. General Construction Law §20. Consequently, petitioners argue that under the Schultz rationale, the

proceeding herein was timely commenced.

The Board, in turn, relies upon Matter of Wilson v. Garfinkle, 5 AD3rd 409 (2d Dep't 2004) where the Appellate Division, Second Department held that since the petitioner received the notification two days after it was made by the Board, the petitioner had enough time (the third day) to timely bring the proceeding but failed to do so, instead having an order to show cause signed on the third day and provide for service on the next day.

Accordingly, upon the authority of Matter of Wilson v. Garfinkle, supra, this Court is constrained to hold that this proceeding was untimely as the petitioner had an opportunity to comply with the three day statute from the date of the Board's determination and failed to do so.

Therefore, the petition is denied, and the motion to dismiss the petition is granted.

Submit order on notice.

DATED: October 4, 2011
White Plains, NY

ENTERED:


JOAN B. LEFKOWITZ, J.S.C.

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