

**Matter of Cook v Benjamin**

2024 NY Slip Op 32320(U)

May 3, 2024

Supreme Court, Queens County

Docket Number: Index No. 707938/2024

Judge: Joseph Risi

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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI

IA PART 3

A. J. S. C.

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In the Matter of the Application of

VIVAN E. COOK as Aggrieved Candidate, and  
FRANK SMITH as Objector,

Index

Number: 707938/2024

Petitioners,

Motion Date: May 3, 2024

-against-

Motion Seq. Nos. 1 & 2

LATOYA R. BENJAMIN,

-and-

THE BOARD OF ELECTIONS OF THE CITY OF  
NEW YORK,

**ORDER and JUDGMENT**

Respondents,

**FILED & RECORDED**  
5/3/2024  
4:45 PM *CR*  
COUNTY CLERK  
QUEENS COUNTY

For an Order declaring invalid the DESIGNATING  
Petition which purports to designate the above  
named candidate-respondent as Democratic  
candidate for the Public Office of MEMBER OF  
THE ASSEMBLY 32<sup>nd</sup> Assembly District Queens  
County, New York and which bears the  
identification numbers of: QN2400365.

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The following numbered papers read on: (1) the application by the petitioners Vivian E. Cook, as Aggrieved Candidate, and Frank Smith, as Objector, pursuant to Article 16 of the Election Law, to invalidate a petition designating the Respondent-Candidate Latoya R. Benjamin a candidate for the public office of Representative in the New York State Assembly from the 32nd Assembly District in the upcoming primary election for the Democratic Party, which is to be held on June 25, 2024; and (2) the motion by the Respondent-Candidate Latoya R. Benjamin to dismiss the proceeding pursuant to CPLR §3211(a)(1).

Petition – Order to Show Cause .....	Papers <u>Numbered</u> EF1-5
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Answer .....	EF 9
Notice of Motion – Affidavits – Exhibits .....	EF 16-20
Answering Affidavits – Exhibits .....	EF 28-30
Reply Affidavits .....	EF 34

Upon the foregoing papers, it is ordered that the determination of the petition and the motion are consolidated for the purpose of a single order and judgment, as follows:

The petitioners commenced this invalidator proceeding pursuant to Election Law § 16-102 by filing a verified petition on April 13, 2024. The petition, in paragraph two, alleges,

“[t]hat on or about April 2, 2024 a certain paper purporting to be a Designating Petition of the Democratic Party was filed with the Board of Elections of the City of New York, which purported petition named [Benjamin] as candidate for the Public Office [of Representative in the New York State Assembly from the 32nd Assembly District] and which bears the identification number(s) as follows: QN2400365” (NY St Cts Elec Filing [NYSCEF] Doc No. 1).

The petition, in paragraph three, further alleges “[t]hat said paper purporting to be a designating petition of the Democratic Party for the Public Office set forth herein does not comply with the provisions and requirements of the Election Law” (*id.*).

On April 25, 2024, hours before the initial appearance on this proceeding, Benjamin filed an answer which did not contain any affirmative defenses or other claims. The court notes, however, that Benjamin’s answer admits the allegations in paragraphs two and three of the petition. That morning, the petitioners also submitted a timely bill of particulars which specifies 82 signatures on Benjamin’s designating petition which the petitioners allege are invalid.

This matter was heard at the call of the calendar of Part 3 on April 25, 2024, and May 3, 2024. At the April 25, 2024 hearing, Benjamin’s primary contention was that the 82 challenged signatures are not properly before the court because the petitioners failed to raise their objections to these signatures before the respondent Board of Elections of the City of New York (Board of Elections). During the hearing, the court pointed out that Benjamin’s answer made certain material admissions to the allegations in the petition. However, Benjamin did not seek leave to amend her answer during the April 25, 2024 hearing.

The following day, Benjamin filed an amended answer without leave of court. The amended answer asserts, as an affirmative defense, that the proceeding was not properly commenced because the petition and bill of particulars were not verified, as required by Election Law § 16-116. The amended answer also sets forth a cross-claim, denominated as a counterclaim, to direct the Board of Elections to validate her designating petition. Notably, the amended answer also admits the allegations in paragraphs two and three of the petition.

Benjamin subsequently filed a motion to dismiss the petition pursuant to CPLR §3211(a)(1). In her motion, Benjamin argues that the attorney verifications annexed to the petition

and the petitioners' bill of particulars are defective because they do not comply with CPLR §2106. Because the Election Law mandates that a proceeding be brought upon a verified petition, Benjamin asserts that the defective attorney verifications are fatal to the petition. Benjamin therefore contends that the petition must be dismissed, and that the petitioners' bill of particulars should be stricken.

In opposition, the petitioners assert that Benjamin waived her objection to the purportedly defective verification because she failed to comply with the due diligence requirements of CPLR §3022. The petitioners point out that Benjamin, although represented by counsel when she was served with the petition in this proceeding, did not return the petition or the bill of particulars as defective, and waited nine days after service of the petition before raising her objection. The petitioners further argue that the verifications in the petition and bill of particulars contain substantially similar phrasing as required by CPLR §2106, and that the verbiage requirements in CPLR §2106 were intended for laypersons rather than attorneys. In reply, Benjamin argues, among other things, that her objection to the defective verification in the petitioners' bill of particulars was made promptly.

The motion to dismiss is denied, as it suffers from numerous procedural defects. First, Benjamin's original answer fails to raise an objection or affirmative defense pursuant to CPLR §3211(a)(1). Thus, a defense predicated on documentary evidence was waived (*see* CPLR §3211 [e]). In addition, even if such a defense had been properly asserted in the original answer, a motion pursuant to this subdivision cannot be brought after issue is joined (*see id.*).

Moreover, Benjamin's amended answer—which attempts to raise this objection for the first time—was improperly filed. Inasmuch as the Board of Elections did not invalidate Benjamin's designating petition, the applicable statute of limitations expired on April 18, 2024 (*see* Election Law §16-102[2]). Benjamin was therefore required to obtain leave of court before filing her amended answer, which she failed to do (*see* CPLR §402; *Matter of Nagubandi v Polentz*, 131 AD3d 639 [2d Dept 2015]; *Matter of Curcio v Kelly*, 193 AD2d 738 [2d Dept 1993]; *Matter of Coster v Lewins*, 77 AD2d 939 [2d Dept 1980]). Thus, the amended answer is a nullity (*see* CPLR §3025[b]; *Matter of Hendricks v Annucci*, 179 AD3d 1232, 1234 [3d Dept 2020] *Walden v Nowinski*, 63 AD2d 586, 586 [2d Dept 1978]). To the extent that the parties submitted additional papers which address the amended answer and the counterclaim denominated therein (*see* NY St Cts Elec Filing [NYSCEF] Doc Nos. 24-27, 32-33), they have not been considered by the court in rendering its determination.

Nevertheless, Benjamin waived her objections to the purportedly defective verifications in the petitioners' pleadings because she failed to raise these objections with due diligence. Where, as here, a pleading is required to be verified (*see* Election Law §16-116), "the recipient of an unverified or defectively verified pleading may treat it as a nullity provided that the recipient 'with due diligence' returns the petition with notification of the reason(s) for deeming the verification defective" (*Matter of Miller v Bd. of Assessors*, 91 NY2d 82, 86 [1997], quoting CPLR §3022). Thus, "[a] defendant who does not notify the adverse party's attorney with due diligence waives any objection to an absent or defective verification" (*Lepkowski v State of New York*, 1 NY3d 201, 210 [2003]).

Although the Court of Appeals has “never specified a uniform time period by which to measure due diligence” (*Lepkowski*, 1 NY3d at 210), it has “been variously interpreted as ‘immediately’ and ‘within twenty-four hours’ ” (*Matter of Ladore v Mayor & Bd. of Trustees of Vil. of Port Chester*, [70 AD2d 603](#), 604 [2d Dept 1979], quoting Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3022:2, p. 396, and *Matter of O’Neil v Kasler*, [53 AD2d 310](#), 315 [4th Dept 1976]). Notably, however,

“[t]he text of CPLR 3022 says ‘due diligence,’ which by its very nature, requires that the court examine the facts and circumstances surrounding the service and rejection of the pleading. Obviously, those facts might include the amount of time elapsed between service of the faulty pleading and the return; reasons for, and reasonableness of time elapsed; whether the party rejecting the pleading already had counsel or is an attorney; whether the issue was raised at the first opportunity, whether in writing or in court; whether a statute of limitations or other deadline has expired during the time elapsed; and the credibility of the party in its pleadings and testimony given, if any. Ultimately, due diligence requires prompt attention, no undue delays, and no whiff of gamesmanship” (*Rodriguez v Westchester County Bd. of Elections*, 47 Misc 3d 956, 962 [Sup Ct, Westchester County 2015]).

When examining the facts and circumstances here, the court finds that Benjamin failed to assert her objection with due diligence, as required by CPLR §3022 (*see Matter of Lee v Orange County Bd. of Elections*, 164 AD3d 717, 718 [2d Dept 2018]). “Election Law proceedings are subject to severe time constraints, and they require immediate action” (*Matter of Master v Pohanka*, [44 AD3d 1050](#), 1052 [2d Dept 2007]). As the petitioners correctly contend, there is no evidence that Benjamin promptly rejected the petition or the bill of particulars, or that she otherwise informed the petitioners that she intended on treating these pleadings as a nullity (*see Matter of Lee*, 164 AD3d at 718; *Matter of Master*, [44 AD3d at 1052](#)). Further, Benjamin did not raise her objection to the verification in the petition at the first opportunity. The objection to the verification in the petition was not asserted in Benjamin’s original answer, nor did she raise this contention during the initial appearance on April 25, 2024 (*see Matter of Ladore*, [70 AD2d at 604](#)). To the contrary, because her amended answer is a nullity, Benjamin effectively raised this objection for the first time in her motion to dismiss, which was filed after the initial appearance in this proceeding. The court also notes that Benjamin does not allege that she would be prejudiced by the purportedly defective verification (*cf. Matter of Rose v Smith*, 220 AD2d 922, 923 [3d Dept 1995]).

In any event, the court finds that the attorney verifications submitted with the petitioners’ petition and bill of particulars are not defective. The content of a verification is governed by CPLR §3021, which states, in relevant part, that “[t]he affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true” (CPLR §3021; *see also* CPLR §3020). With respect to defective verifications, the Second Department has made clear that “the mere fact that a petition does not use the exact words set forth in CPLR §3021 does not mean that the petition is not verified, so long as the language used has the same effect as a verification” (*Matter of Francois v Rockland County Bd. Of Elections*, 205 AD3d 847, 848-849

[2d Dept 2022]). When examining the attorney verifications at issue here, the court finds them to be sufficient (*see* CPLR §3021; *Matter of Francois*, 205 AD3d at 848-849).

Regardless, to the extent that the petitioners assert that CPLR §2106, as amended, was not intended to apply to attorney verifications, the court agrees (*see* Assembly Mem. in Support of 2023 Assembly Bill 5772 [“The requirement that litigants and other court participants have documents notarized is unduly burdensome, and federal law removed such requirements for federal courts decades ago. . . . This bill will align NeW York (sic) with the over 20 states that follow federal practice. It will relieve unnecessary burdens on litigants, non-party witnesses, county clerks, and courts”]). Regardless, even if the recently revised CPLR §2106 (*see* L 2023, ch 559, § 1) were controlling here, the court finds that the rationale set forth in *Matter of Francois* would also apply to CPLR §2106, as this provision states that an affirmation “shall be in *substantially* the following form” (CPLR §2106 [emphasis added]). Thus, for the reasons previously stated, the attorney verifications at issue here would also pass muster under CPLR §2106.

Finally, the court finds that Benjamin’s admission in her answer that her designating petition does not comply with the provisions and requirements of the Election Law is tantamount to an admission that her designating petition is invalid. Critically, Benjamin did not move for leave to amend her answer to correct this defect.

Accordingly, it is

ORDERED and ADJUDGED that Benjamin’s motion to dismiss is denied; and it is further,

ORDERED AND ADJUDGED that the petition of the petitioners Vivian E. Cook, as Aggrieved Candidate, and Frank Smith, as Objector, for an order invalidating, declaring void and striking out the Designating Petition filed with the respondent Board of Elections of the City of New York purporting to designate the Respondent-Candidate Latoya R. Benjamin as a candidate for the public office of Representative in the New York State Assembly from the 32nd Assembly District in the upcoming June 25, 2024 primary election for the Democratic Party is granted; and it is further,

ORDERED AND ADJUDGED, that the respondent Board of Elections of the City of New York is hereby enjoined, restrained and prohibited from placing the name of Latoya R. Benjamin on the ballot as a candidate for the public office of Representative in the New York State Assembly from the 32nd Assembly District in the June 25, 2024 Democratic Primary Election; and it is further,

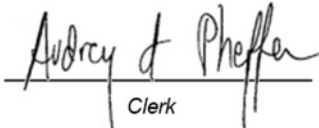
ORDERED that all other relief not expressly granted herein is denied.

This constitutes the order and judgment of the court.

Dated: May 3, 2024

**FILED & RECORDED**  
5/3/2024  
4:45 PM *RR*  
COUNTY CLERK  
QUEENS COUNTY

  
Hon. Joseph Risi, A.J.S.C.

  
Clerk