

Short Form Order/Judgment

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI  
A. J. S. C.

SPECIAL ELECTION PART 3

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In the Matter of the Application of

Index

Number: 724059/2022

STACEY G. PHEFFER AMATO,  
Petitioner-Candidate Aggrieved,

-against-

**DECISION/ORDER**

THOMAS P. SULLIVAN,  
Respondent-Candidate,

-and-

THE BOARD OF ELECTIONS IN THE CITY OF  
NEW YORK,  
Respondent.

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Following a mandatory manual recount of the ballots for the 23<sup>rd</sup> Assembly District, Petitioner filed a Supplemental Bill of Particulars, alleging the respondent The Board of Elections in the City of New York (“the Board”) incorrectly invalidated sixteen (16) ballots. The Petitioner claims that the Board declared thirteen (13) of the sixteen (16) ballots invalid deeming them to be “overvotes” with the remaining three (3) ballots being voided on the grounds that the ballots contained identifiable marks. The petition also challenges the Board’s invalidation of two affidavit ballots. Petitioner now seeks an Order directing the Respondent Board to cast and count each of the subject ballots. Petitioner’s application is determined as follows:

By Order dated December 9, 2022, the parties were directed to appear for a hearing on December 15, 2022 to determine the validity of the subject ballots and the Board was directed to appear with said ballots.

A hearing was held on December 15, 2022, at which time the parties stipulated that the sixteen (16) ballots be marked into evidence as Respondent Board’s “Exhibit A” through “Exhibit P”. In addition, the parties stipulated to the marking of Respondent Board’s “Exhibit Q” and “Exhibit R” which represent the two (2) affidavit ballots.

The hearing commenced with oral arguments addressing each ballot individually. It should be noted that Petitioner withdrew her objections to the voiding of ballots identified as Respondent’s Exhibits E, F, M and N. Therefore, the Court will only address the remaining twelve (12) ballots.

Initially, the Court notes that there is no allegation that the disputed ballots were marked by the voters with any fraudulent intent (*see generally Matter of Fallon*, 197 NY 336, 338 [1910]; *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 23 [2d Dept 2004]). With respect to the ballots designated as Exhibits A, D, G, H, I, J, K and O, the voters selected “Stacey G. Pheffer Amato” by filling in the bubble next to the corresponding party line but also filled in the bubble for a write-in candidate. Of these ballots, several have write-ins for “Stacey G.”, others have write-ins for “Stacey Pheffer Amato”, some have write-ins for “Stacey G. Pheffer Amato” and one has a write-in for “Stacey Pheffer”. Exhibit B is similar to these in that “Stacey G. Pheffer Amato” was selected as a candidate on a party line and also has a write-in for “Stacey G. Pheffer Amato,” but in this instance, the bubble for a write-in candidate is not actually filled in.

With respect to the ballots designated as Exhibits L and P, the voters here selected “Thomas P. Sullivan” by filling in the bubble next to the corresponding party line for “Thomas P. Sullivan,” but also filled in the bubble for a write-in candidate. In these instances, the voters here also wrote in “Thomas Sullivan.”

Based on these facts, the Board invalidated the votes for the 23<sup>rd</sup> Assembly District on each of these aforementioned ballots because it determined that they were over-votes (*see* 9 NYCRR §6210.13[a][5]). Petitioner argues that the ballots at issue are not over-votes because the regulations promulgated by the New York State Board of Elections state that where a voter writes in a candidate that appears on a party line for that office, this vote is not counted. However, Petitioner contends that where the voters wrote in the full name of the candidate but also selected that candidate on the party line, the write-in vote should not be counted and the party line vote should be counted. Petitioner further asserts that where the voters wrote in an abbreviated name but also selected that candidate on the party line, the Court can reasonably determine that these voters intended to vote for the candidate on the party line. Thus, Petitioner urges that these write-in votes should also not be counted, and the party line votes here should be counted.

In opposition, Respondent-Candidate argues that the Court should defer to the Board’s determination that the subject votes for the 23<sup>rd</sup> Assembly District are invalid. Respondent-Candidate further asserts that, in instances where an abbreviated name is present, the determination to invalidate these ballots was correct because the abbreviation renders the identity of the write-in candidate impossible to determine.

Under the Election Law, when a voter improperly marks a ballot for one particular office or contest, “his or her vote shall not be counted for such office or position . . . but shall be returned as a blank vote thereon” (Election Law §9-112[6]). Under these circumstances, the entire ballot is not deemed void. Instead, only “the vote for that candidate or ballot question shall be considered void” (9 NYCRR §6210.13[a][2]; *see* 9 NYCRR §6210.13[a][5]; *cf.* Election Law §9-112[1]; 9 NYCRR §6210.13[a][1]). Thus, the aforementioned ballot errors only impact the election for the 23<sup>rd</sup> Assembly District.

Here, the Court finds that the Board should not have invalidated the ballots designated as Exhibits A, B, D, G, H, I, J, K, L, O, and P as over-votes. With respect to the ballots designated as Exhibits B, D, I, K, L, and O, the parties agree that the write-in name was an exact match to the candidate that was also selected on the party line. In these circumstances, only the party line vote may be counted (*see* Election Law §9-112[3]; 9 NYCRR §6210.13[a][12][i]; *Tenney v Oswego County Bd. of Elections*, 71 Misc 3d 400, 414 [Sup Ct, Oswego County 2021]). With respect to

the ballots designated as Exhibits A, G, H, J, and P, the fact that these voters did not write-in the full name of the party candidate is of no moment. “A voter need not write in the first and last name of a candidate in every situation; the standard is whether the election inspectors can reasonably determine the intent of the voter when they cast their ballot” (9 NYCRR §6210.13[a][12][iv]). Where the write-ins consist of “Stacey G,” or “Stacey Pheffer,” or the voter did not write in the full name of “Stacey G. Pheffer Amato,” each of these voters also selected “Stacey G. Pheffer Amato” on a party line. When considering these facts, Petitioner is the only individual for whom these voters reasonably could have intended their write-in ballot to be cast (*see* 9 NYCRR 6210.13[a][12][iv]; *Matter of Rosenblum v Tallman Fire Dist.*, 117 AD3d 1064, 1066 [2d Dept 2014]). Therefore, only the party line vote may be counted (*see* Election Law §9-112[3]; 9 NYCRR 6210.13[a][12][i]; *Tenney*, 71 Misc 3d at 414).

Turning to the second category of invalidated ballots, Petitioner withdrew her objections to two of the three ballots which were invalidated because the Board determined that they contained identifiable marks. Yet with respect to the ballot designated as Exhibit C, Petitioner argues that the markings on one side of the ballot are inadvertent scribbles and cannot be considered identifiable marks sufficient to invalidate the entire ballot. In opposition, Respondent-Candidate contends that these markings consist of intentionally drawn letters or phrases which distinguish the ballot, and thus the Board was correct in determining that the entire ballot was invalid.

The Court finds that the Board properly invalidated the ballot designated as Exhibit C. “[E]xtraneous marks on ballots that could serve to distinguish the ballot or identify the voter, as opposed to inadvertent marks, will render a ballot blank as to the relevant office if the mark[s] are confined to the voting square pertaining to that office, or render a ballot invalid as a whole if the mark[s] appear[ ] outside of the voting square” (*Matter of Brilliant v Gamache*, 25 AD3d 605, 606-607 [2d Dept 2006], *lv denied* 6 NY3d 783 [2006]; *see* Election Law §9-112[1]). Here, a review of the ballot designated as Exhibit C reveals that, as Respondent-Candidate correctly points out, the ballot contains what appear to be letters and other writings outside of the voting squares. These markings appear to be intentional and could distinguish this ballot or identify the voter (*see* Election Law §9-112[1]; *Matter of Brilliant*, 25 AD3d at 607; *Matter of Mondello*, 6 AD3d at 25).

Finally, with respect to the two affidavit ballots designated as Exhibits Q and R, the Board invalidated these ballots because it determined that these voters were not lawfully registered to vote in Queens County. However, “[i]n a proceeding pursuant to Election Law §16-106 for judicial review of the canvass of votes in a general election, the Supreme Court lacks the authority to render a determination as to whether a voter was ‘lawfully registered and eligible to vote’” (*Matter of Mondello*, 6 AD3d at 20-21, quoting *Matter of Corrigan v Board of Elections of Suffolk County*, 38 AD2d 825, 827 [2d Dept 1972], *affd* 30 NY2d 603 [1972]; *see Matter of Delgado v Sunderland*, 97 NY2d 420, 423 [2002]). The Court therefore lacks the authority to direct the Board to count the affidavit ballots designated as Exhibits Q and R.

Accordingly, it is

**ORDERED**, that the application is granted solely to the extent that the Board is directed to cast and count the ballots designated as Exhibits A, B, D, G, H, I, J, K, L, O, and P; and it is further

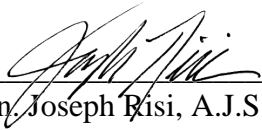
**ORDERED**, that the Board is directed to cast and count the aforementioned ballots at the same time as it counts any remaining affidavit ballots and/or the absentee ballots upon receipt of the cure affirmations; and it is

**ORDERED**, that the Board is directed to contact Chambers at [qscpart3@nycourts.gov](mailto:qscpart3@nycourts.gov) by 2:00 pm on Friday, December 23, 2022 to make arrangements for the return of its exhibits; and it is

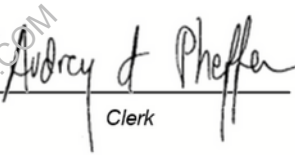
**ORDERED** that all other relief not expressly granted herein is denied.

This is the decision and order of the Court.

Dated: December 22, 2022

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

**FILED & RECORDED**  
12/22/2022  
2:08 PM  
COUNTY CLERK  
QUEENS COUNTY

  
\_\_\_\_\_  
Clerk

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