

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-

Seq. No. 1

THOMAS P. SULLIVAN,
Respondent-Candidate,

FILED & RECORDED

12/6/2022, 8:46:47 AM

-and-

**COUNTY CLERK
QUEENS COUNTY**

THE BOARD OF ELECTIONS IN THE CITY OF
NEW YORK,

Respondent.

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The following EF numbered papers read on this order to show cause by Petitioner-Candidate Aggrieved Stacey G. Pheffer Amato (hereinafter the petitioner or “Amato”) for an order, *inter alia*, directing respondent The Board of Elections in the City of New York (the “Board”) to preserve all absentee, affidavit, special, federal, military and emergency ballots (hereinafter “absentee ballots”); determining the validity of all ballots cast for the said General Election for Public Office of Member of the Assembly, 23rd Assembly District; determining the accurate tally under the recanvass of the votes cast on the voting machines, special ballot marking devices, and/or ballot scanners for said office; and declaring Petitioner duly elected to said office.

**Papers
Numbered**

Order to Show Cause, Petition, Exhibits and Service.....	EF 1 – 3, 8 – 9, 11 – 14
Reply Affidavits, Exhibits and Service.....	EF 6 – 7, 10, 16 – 17
Memoranda of Law, Exhibits and Service.....	EF 19 – 30, 31 – 32

Upon the foregoing papers and after oral argument heard on the record thereon of the attorneys for the respective parties on December 1, 2022, the application is determined as follows:

Petitioner, Stacey G. Pheffer Amato, the incumbent and a candidate for the Public Office of Member of the Assembly, 23rd Assembly District, commenced this special proceeding pursuant to Article 16 of the Election Law by filing a petition and Order to Show Cause on November 15, 2022. The petition alleges, *inter alia*, that as of the date of the petition, the unofficial returns for this particular election showed “that Respondent-Candidate was in the lead with 15,246 votes and

that Petitioner-Candidate was second with 15,000 votes, trailing by 246 votes with over 1,000 absentee and affidavit ballots to be counted.” The petition further alleges that the Board did not comply with its obligations under Election Law §9-209(3), by failing to notify voters of deficiencies in their absentee ballots or to provide these voters with an opportunity to cure these deficiencies. In light of these failures, the petitioner seeks, among other things, a determination of the validity “of all ballots cast for the said General Election for Public Office of Member of the State Assembly of the 23rd Assembly District in and for the County of Queens held on November 8, 2022” and an order directing the Board to fulfill its obligations under Election Law §9-209(3).

The petitioner subsequently submitted a bill of particulars (“BP”) which included a spreadsheet of voters whose absentee ballot was invalidated without having received a notice from the Board, as required pursuant to Election Law §9-209(3). The spreadsheet has separate columns for the voter’s name, VSN, election district, and assembly district, as well as the date that the voter’s absentee ballot was received by the Board and sets forth the reason why each absentee ballot was invalidated. Of the 93 absentee ballots which were invalidated, the spreadsheet notes that 62 of these ballots were invalidated because “Ballot Envelope Not Sealed.” For the remaining 31 ballots on the spreadsheet, these ballots were invalidated because “Ballot Not In Ballot Envelope.”

At the various hearings before this Court, the parties went to great lengths to explain what each of these designations means and how they are relevant to the process of voting by way of absentee ballot. From these explanations, the Court adduced the following facts: When a voter submits an absentee ballot, there are two envelopes that the voter is supposed to seal. The first envelope is used for the ballot itself. The voter places their completed absentee ballot inside this first envelope, seals it, and signs it. The election law and the regulations refer to this first envelope as the “ballot affirmation envelope” (*see* Election Law §9-209[3]; 9 NYCRR §6210.21[a]). The second envelope is a pre-paid postage envelope that the Board provides to each voter with their absentee ballot. Once the first envelope is signed and sealed, it is placed inside the second envelope, which is then sealed and mailed to the Board. This second envelope has been referred to as an “outer mailing envelope” (*see* 9 NYCRR §6210.21[g][2]). While the parties characterized these envelopes as “inner envelopes” and “outer envelopes” and the Election Law also uses the term “ballot envelope” (*see generally* Election Law §9-209; 9 NYCRR §6210.21), for the purpose of consistency, the Court will refer to the first and second envelopes as the “ballot affirmation envelope” and the “outer mailing envelope,” respectively.

According to the parties, the spreadsheet designation for “Ballot Envelope Not Sealed” was selected by Board employees where the outer mailing envelope was sealed, but the ballot affirmation envelope, which contained the voter’s absentee ballot, was not sealed. In addition, the spreadsheet designation for “Ballot Not In Ballot Envelope” was selected by Board employees where both the absentee ballot and the ballot affirmation envelope were included inside the outer mailing envelope, but the absentee ballot was not actually place inside the ballot affirmation envelope.

At a conference held on November 22, 2022, the Court was advised that although the petition indicated there was 246 votes that separated the candidates, as of that date there were only three (3) votes separating the two candidates. On the same date, the Court issued an order which, among other things, required the Board to “provide an affidavit/affirmation on or before Monday, November 28, 2022, with respect to aforementioned invalid ballots and provide the Court with the

following information: 1. The dates the ballots were received by Respondent Board; 2. The grounds for invalidating the ballots, stated with specificity; and 3. The type of notice (Notice to Cure, Notice of Rejection or Other) that was sent to the voters whose ballots were determined to be invalid and when said notice was sent.” and set the matter down for a hearing on December 1, 2022. In an affirmation filed on November 28, 2022, the Board conceded that no notices were sent to the absentee voters identified by the petitioners.

A hearing was held on December 1, 2022, at which time further arguments regarding the invalidated absentee ballots were heard and additional evidence was received. Petitioner, whose initial BP indicated there were 93 invalidated ballots, requested leave to amend her BP to include one more absentee ballot which had been discovered, bringing the total to 94 invalidated ballots. Accordingly, leave is granted to the extent that this absentee ballot falls into one of the two categories of invalidation discussed herein and this decision will address the 94 invalidated absentee ballots.

As an initial matter, the Court recognizes the gravity of the petition and its potential outcome. Due to the extremely narrow margin between the two candidates, the Board is required to commence a full manual recount of all ballots (Election Law §9-208[4][a][i]). Nevertheless, based on the number of invalidated absentee ballots at issue, the manner in which these are handled, if they are to be counted at all, will have a decidedly important impact on the Board determination in favor of either candidate. Moreover, in making this determination, the Court must strike a balance between protecting the integrity of the electoral process, safeguarding the right to vote, and ensuring that the Board complies with its own obligations in furtherance of these goals. To this end, the Court also notes that section 17-202 of the Election Law, which was enacted in June 2022, requires that “all statutes, rules and regulations, and local laws or ordinances “related to the elective franchise shall be construed liberally in favor of”, among other things, “protecting the right of voters to have their ballot cast and counted” (Election Law §17-202). Furthermore, Election Law §16-100(1) states: “The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, *which shall be construed liberally.*” [Emphasis added] This, therefore, is the framework under which the statutes and regulations at issue here must be analyzed.

Petitioner Amato contends that, under the circumstances, all 94 absentee ballots at issue must be opened and counted. Amato highlights the Board’s failure to timely send the requisite notices to votes whose absentee ballots had been invalidated prior to election day, the timing of this litigation, and the onerous process by which voters would need to correct these invalidated absentee ballots, and contends that failing to count all 94 absentee ballots at issue would effectively disenfranchise these voters. In opposition, Sullivan asserts that the lack of notice is of no moment with respect to the invalidated absentee ballots because the ballot defects at issue here do not constitute curable defects. Thus, because these voters would not have been provided with an opportunity to cure, the 94 absentee ballots at issue would not have been counted under any circumstances. The Board concedes that, with respect to the 94 absentee ballots at issue, no notices were sent out to these voters informing them that their absentee ballots had been invalidated. The Board, however, takes no position with respect to what remedy the Court should employ.

The Court will first address the group of challenged absentee ballots that were invalidated because the ballot affirmation envelopes were not sealed. Under Election Law §9-209, where a ballot affirmation envelope is received by the Board prior to the election and it is found to be

completely unsealed, it is invalidated (*see* Election Law §9-209[3][i]). Under these circumstances “the board shall notify the voter by mail . . . and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot” (*id.*).

Yet while the Election Law makes clear that this is a defect that would invalidate an absentee ballot (Election Law §9-209[i]), it does not specifically state whether this is a curable defect. In particular, Election Law §9-209 sets forth the following:

A curable defect *includes* instances where the ballot envelope: (i) is unsigned; (ii) has a signature that does not correspond to the registration signature; (iii) has no required witness to a mark; (iv) is returned without a ballot affirmation envelope in the return envelope; (v) has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter; or (vi) contains the signature of someone other than the voter and not of the voter (Election Law § 9-209[3][b] [emphasis added]).

In interpreting this statute, the Court finds that the use of the phrase “includes” in Election Law §9-209(b)(3) indicates that the six curable defects detailed therein are neither exhaustive nor exclusive. To the contrary, the regulations promulgated by the New York State Board of Elections further clarify that where the Board receives an unsealed ballot affirmation envelope, “such ballot envelope shall be treated as a ballot filed without an affirmation envelope and shall be curable by the filing of the cure affirmation” (9 NYCRR §6210.21[g][2]; *see* 9 NYCRR §6210.21[a][4]; 9 NYCRR §6210.21[c]).

The Court now turns to the second group of absentee ballots at issue here, which were invalidated because these ballots were not placed inside their respective ballot affirmation envelopes. The parties agree that, for each of these absentee ballots, the ballot affirmation envelope was included with the absentee ballot and sealed within the outer mailing envelope, but the ballot itself was not placed within the ballot affirmation envelope. While neither the Election Law nor the regulations promulgated by the New York State Board of Elections classify this as a curable defect, the Court finds that this is not a case where “there is no invitation for the courts to exercise flexibility in statutory interpretation” (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). In light of the statutory requirement that the Election Law be liberally construed in favor of protecting the right of voters to have their ballot cast and counted (*see* Election Law §17-202), and the inclusive – rather than exclusive – language employed when setting forth curable defects (*see* Election Law §9-209[3][b]), the Court finds that this situation is analogous to those where a ballot “is returned without a ballot affirmation envelope in the return envelope” (Election Law §9-209[3][b][iv]), and thus, is a curable defect.

In light of the foregoing, the Court rejects Sullivan’s argument that the aforementioned defects were not curable. However, even if the Court were to accept this argument, this does not mean that these absentee voters lacked any recourse to correct these errors. Indeed, even where a defect in an absentee ballot is not curable, the Board is nevertheless required to notify a voter that it was rejected the voter’s absentee ballot on this basis (*see* Election Law §9-209[h]). Under these circumstances, the Board is further required to “notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot” (Election Law §9-209[h]; *see also* Election Law §9-209[i]). Here, the spreadsheet submitted by the parties shows that, of the challenged absentee ballots, only 11 were received after election day. A significant number of these absentee ballots

were received at least two weeks prior to election day, and in some cases, the absentee ballots were received as early as four weeks prior to election day. Thus, regardless of whether either of these aforementioned defects were curable, in nearly all of these cases, the Board had ample time to provide the voters with an opportunity to cure, inform the voters of other options for voting, or provide the voter with a new ballot (*see* Election Law §9-209 [c], [d], [e], [h] and [i]). When questioned by the Court, regarding the sealing of the ballot affirmation envelope, which was contained in a sealed outer envelope, Counsel for the Board agreed that it did not affect the integrity of the vote. The Board in essence deprived these voters of their right to vote, essentially disenfranchising them in contravention of the Election Law (Election Law §17-200 *et seq.*)

In any event, the required notices were not sent, and thus, these voters were never provided with an opportunity to remedy their absentee ballots, submit new ballots or otherwise cast their vote in another matter. There is no question that the Board's failure to provide this required notice impaired these voters' ability to participate in the electoral process. Compounding this issue is the fact that election day occurred approximately four (4) weeks prior to this Court's decision in this matter, and yet the election for the New York 23rd Assembly District has yet to be determined. The Court must therefore impose a remedy that takes into consideration all of these attendant circumstances.

The New York State Legislature amended various provisions of Election Law §9-209 in response to the overwhelming number of absentee ballots that were used as a result of the Covid-19 pandemic during the 2020 election. The amended provisions of section 9-209, required the review and canvass of all absentee, military and special federal and presidential ballots within four (4) days of receipt, if received prior to election day and within one (1) day if received on or after the election (Election Law §9-209[2]) and all affidavit ballots must be reviewed and canvassed within four (4) business days of the election (Election Law §9-209[7]). The purpose in amending these provisions was "to obtain the results of an election in a more expedited manner and to ensure that every valid vote by a qualified voter is counted" (*see Amedure v State*, 2022 NY Slip Op 06096 quoting Sponsors Mem, Bill Jacket, L 2021, ch 763; Laws 2021, Chapter 763). The amendments to Election Law §9-209 were clearly not intended to disenfranchise voters but to establish a more expedient method for tallying ballots.

Counsel for Respondent-Candidate further alleges that Petitioner-Candidate's failure to lodge objections when the Board made its determination not to canvass the subject ballots, may be a condition precedent to commencing this action, after exhausting administrative remedies. This argument is without merit. While representatives of a candidate, political party or independent body may be present at the polls to observe the review of ballot envelopes, they must do so without objection (Election Law §9-209[5]), thereby negating any requirement of a condition precedent. Furthermore, pursuant to Election Law §16-106, the post-election refusal to cast an absentee ballot may be contested in a proceeding brought by a candidate, as is the case here. (*see* Election Law §16-106[1]).

Pursuant to Article 16 of the Election law, "[i]f the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed..."(*id.*). The determination that the person who cast such ballot was entitled to vote, has already been determined by virtue of having received an absentee ballot from the Board. (Election Law §8-402) ("Upon receipt of an application for an absentee ballot the board of elections shall...determine...whether the applicant is qualified to vote and to receive an absentee ballot, and

if it finds the applicant is not so qualified it shall reject the application after investigation.) It follows that, where the Board sends an absentee ballot to a voter who applied for one, the Board has made a determination that said voter is qualified to vote.

Here, because each of the 94 absentee voters at issue received an absentee ballot from the Board, the Board has therefore determined that each of these voters is qualified to vote. The parties do not challenge the qualifications of any particular absentee voter at issue here, and the Court will not substitute its judgment for that of the Board. In addition, because the last of these absentee ballots at issue was received by the Board on November 12, 2022, there is no issue concerning the timeliness of the absentee ballots (*see* Election Law §8-412). Under these circumstances, the Court is required to order that these ballots be cast and canvassed (*see* Election Law §16-106[1]).

With respect to the two (2) affidavit ballots as contained in the petition, from the evidence presented at the time of the hearing, the Board recognized, as does counsel for Respondent-Candidate, that the affidavit of voter Lynette Harrison-Braithwaite should, at a minimum, be further investigated whether she did indeed move from another location in the State prior to voting in Queens County. With respect to the affidavit ballot of Luis Matthews, accordingly to respondent- candidate, Mr. Matthews may have failed to establish Queens County as his electoral residency and may have voted in the State of Georgia, however there was no documentary evidence to support Sullivan's claim. With regards to the remaining four (4) affidavit ballots, the Board conceded that these four (4) affidavit ballots were mistakenly declared invalid, however the Board is unable to correct its mistake.

Based on the foregoing, it is hereby

ORDERED that the petition is granted to solely to the extent that the Board is directed to cast and count the ninety-four (94) absentee ballots annexed as Exhibit A (EF 17) to the Board's affirmation dated November 28, 2022 and as amended on the record; and it is further

ORDERED that the Board is directed to cast and count the four (4) affidavit ballots which were mistakenly marked as invalid; and it is further

ORDERED that the Board is directed to make a review Mr. Matthews' affidavit ballot based on the allegations presented by Respondent-Candidate at the hearing; and it is

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

This is the decision and order of the Court.

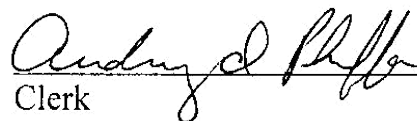
Dated: December 5, 2022


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

FILED & RECORDED

12/6/2022, 8:46:47 AM

**COUNTY CLERK
 QUEENS COUNTY**


 Clerk