

## Failure to Qualify for a Primary Election Because of Filing Defects

*Matheson v. New York City Board of Elections*  
(*Edward R. Korman*, 1:03-cv-4170), *Marchant v. New York City Board of Elections* (*Kiyo A. Matsumoto*, 1:11-cv-4099), and *Marchant v. New York City Board of Elections* (*Roslynn R. Mauskopf*, 1:10-cv-3847) (E.D.N.Y.) and *Marchant v. New York City Board of Elections* (*Katherine Polk Failla*, 1:13-cv-5493), *Escoffery-Bey v. New York City Board of Elections* (*Jesse M. Furman*, 1:13-cv-5656), *Keeling v. Sanchez* (*Paul A. Engelmayer*, 1:13-cv-5731), and *Newsome v. New York City Board of Elections* (*Ronnie Abrams*, 1:13-cv-5787) (S.D.N.Y.)

On August 22, 2003, 11 voters filed a federal complaint in the Eastern District of New York seeking an injunction placing Everly Brown on the September 9 Democratic primary election ballot for New York's city council, alleging that some of the candidate's ballot petition signatures were improperly ruled invalid.<sup>1</sup> Judge John Gleeson set the case for hearing before Judge Nicholas G. Garaufis on August 28.<sup>2</sup> On August 25, the court reassigned the case to Judge Edward R. Korman.<sup>3</sup>

At a three-hour proceeding on Wednesday, August 27, Judge Korman concluded that there might have been enough valid signatures improperly invalidated, and because inspection of voting machines was scheduled for early the following week, there was time to remedy a ballot exclusion error.<sup>4</sup> Judge Korman and the parties agreed that they would reassemble in two days, after the parties clarified the factual record.<sup>5</sup> Judge Korman and the parties discussed and debated the facts for a few hours on Friday.<sup>6</sup>

On September 2, Judge Korman ruled from the bench that the plaintiffs should be granted a preliminary injunction.<sup>7</sup> As there was only one other candidate for the office at issue in the primary election, an erroneous finding in favor of the plaintiffs could easily be cured by declaring the opposing candi-

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1. Complaint, *Matheson v. N.Y. City Bd. of Elections*, No. 1:03-cv-4170 (E.D.N.Y. Aug. 22, 2003), D.E. 1.

2. Order to Show Cause, *id.* (Aug. 22, 2003), D.E. 2.

3. Docket Sheet, *id.* (Aug. 22, 2003).

4. Audio Transcript, *id.* (Aug. 27, 2003).

5. *Id.*

6. Audio Transcript, *id.* (Aug. 29, 2003).

7. Audio Transcript, *id.* (Sept. 2, 2003) [hereinafter *Matheson* Sept. 2, 2003, Audio Transcript; Order, *id.* (Sept. 5, 2003), D.E. 14.

date the victor, which would be the same result as keeping the plaintiffs' candidate off of the ballot.<sup>8</sup> Determining that the two previous proceedings amounted to a de facto evidentiary hearing, because participants had firsthand knowledge of facts, although no one was sworn, Judge Korman concluded that Brown had filed 901 valid signatures, one more than required.<sup>9</sup> These included 56 signatures that were invalidated because of what Judge Korman concluded was a scrivener's error included when Brown cured a filing error of omitting a cover sheet.<sup>10</sup> Judge Korman also included 16 signatures invalidated because of what another judge had previously concluded was an unconstitutional requirement that signature witnesses be members of the party conducting the primary election.<sup>11</sup> Judge Korman denied a stay pending appeal.<sup>12</sup> In 2007, the City of New York agreed to pay the plaintiffs' counsel \$20,000 in attorney fees.<sup>13</sup>

An amended complaint filed on May 26, 2006, challenged the constitutionality of the New York City Board of Elections and how New York State Supreme Court judges are selected.<sup>14</sup> Judge Korman dismissed the complaint on December 18, 2007.<sup>15</sup>

Eight voters filed a federal complaint and an application for an "Order to showcase" on August 20, 2010, seeking to put Brown on the September 14 Democratic primary election ballot for state senate.<sup>16</sup> The voters alleged that disqualification of ballot petition signatures for the plaintiffs' voter registration defects violated the National Voter Registration Act and the Help America Vote Act.<sup>17</sup> Judge Carol B. Amon set the case for hearing before Judge

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8. *Matheson* Sept. 2, 2003, Audio Transcript, *supra* note 7.

9. *Id.*

10. *Id.*

11. *Id.*; see Amended Opinion at 28, *Kaloshi v. N.Y. City Bd. of Elections*, No. 1:02-cv-4762 (E.D.N.Y. Sept. 13, 2002), D.E. 9, 2002 WL 31051530, *rev'd on other grounds*, *Kaloshi v. Spitzer*, 69 F. App'x 17 (2d Cir. 2003).

Following a 2008 Supreme Court decision in *New York State Board of Elections v. López Torres*, 552 U.S. 196 (2008), that selecting partisan nominees for judicial offices in New York by primary-election-informed party convention rather than direct primary election did not violate the constitutional rights of potential candidates disfavored by party leaders, the court of appeals ruled that New York could require signature witnesses to be party members, *Maslow v. Bd. of Elections*, 658 F.3d 291, 294 (2d Cir. 2011), *cert. denied*, 565 U.S. 1275 (2012).

12. *Matheson* Sept. 2, 2003, Audio Transcript, *supra* note 7; see Order, *Matheson v. N.Y. City Bd. of Elections*, No. 03-7920 (2d Cir. May 12, 2004) (dismissing an appeal as moot), *filed as Order*, *Matheson*, No. 1:03-cv-4170 (E.D.N.Y. May 24, 2004), D.E. 23.

13. Stipulation, *Matheson*, No. 1:03-cv-4170 (E.D.N.Y. Jan. 18, 2007), D.E. 47.

14. Amended Complaint, *id.* (May 26, 2006), D.E. 36.

15. Opinion, *id.* (Dec. 18, 2007), D.E. 61.

16. Complaint, *Marchant v. N.Y. City Bd. of Elections*, No. 1:10-cv-3847 (E.D.N.Y. Aug. 20, 2010), D.E. 1 [hereinafter *Marchant* 2010 Complaint].

A 1997 election action by Brown was unsuccessful. Docket Sheet, *Brown v. Cohen*, No. 1:97-cv-6064 (E.D.N.Y. Oct. 21, 1997).

17. *Marchant* 2010 Complaint, *supra* note 16; see NVRA, Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511 (2015); HAVA, Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145 (2015). See generally Robert Timothy Reagan, Motor Voter: The National Voter Registration Act (Federal Judicial Center 2014);

Roslynn R. Mauskopf on September 2.<sup>18</sup> On August 26, one of the plaintiffs announced that he would proceed pro se.<sup>19</sup> At the hearing, Judge Mauskopf denied the plaintiffs immediate relief.<sup>20</sup> Judge Amon signed a stipulated dismissal of the action on February 16, 2011.<sup>21</sup>

Twenty-four supporters of Brown's candidacy for Queens County's district attorney in the September 13, 2011, Democratic primary election filed a pro se federal complaint on August 23, challenging the invalidation of ballot petition signatures for mismatches between signers' and witnesses' petition addresses and their registration addresses.<sup>22</sup> Judge Sandra Townes set the case for hearing before Judge Kiyo A. Matsumoto on August 30.<sup>23</sup>

At the hearing, the first-named plaintiff appeared pro se, and an attorney appeared on behalf of 14 plaintiffs, but he never filed a notice of appearance.<sup>24</sup> On September 2, Judge Matsumoto denied the plaintiffs immediate relief.<sup>25</sup> Judge Matsumoto signed a stipulated dismissal of the case on June 18, 2012.<sup>26</sup>

Just over one month in advance of the September 10, 2013, Democratic primary election for mayor of New York City, Brown and seven other voters filed a pro se federal complaint in the Southern District of New York seeking to overturn Brown's disqualification from the election for errors and omissions in his ballot application papers.<sup>27</sup>

On August 7, the day after the complaint was filed, Judge Katherine Polk Failla issued an order to show cause on August 14 why relief should not be

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Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

18. Order to Show Cause, *Marchant*, No. 1:10-cv-3847 (E.D.N.Y. Aug. 20, 2010), D.E. 3.

19. Notice, *id.* (Aug. 26, 2010), D.E. 5.

A 1996 action by the pro se party was resolved by stipulation placing him on the Republican primary ballot for state senate. Docket Sheet, *McCabe v. Comm'rs of Elections*, No. 1:96-cv-4121 (E.D.N.Y. Aug. 20, 1996).

20. Minutes, *Marchant*, No. 1:10-cv-3847 (E.D.N.Y. Sept. 2, 2010), D.E. 12.

21. Stipulated Dismissal, *id.* (Feb. 16, 2011), D.E. 17.

22. Complaint, *Marchant v. N.Y. City Bd. of Elections*, No. 1:11-cv-4099 (E.D.N.Y. Aug. 23, 2011), D.E. 1; *Marchant v. N.Y. City Bd. of Elections*, 815 F. Supp. 2d 568, 571-73 (E.D.N.Y. 2011).

23. Order to Show Cause, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. Aug. 25, 2011), D.E. 5; *Marchant*, 815 F. Supp. 2d at 572.

24. Transcript at 3-6, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. Aug. 30, 2011, filed Sept. 14, 2012), D.E. 41; *Marchant*, 815 F. Supp. 2d at 574.

25. *Marchant*, 815 F. Supp. 2d 568.

On December 3, 2013, Judge Jack B. Weinstein dismissed a pro se complaint filed by Brown on May 3 challenging various ballot petition requirements preventing Brown's attorney general candidacy. Opinion, *Brown v. N.Y. City Bd. of Elections*, No. 1:13-cv-2729 (E.D.N.Y. Dec. 3, 2013), D.E. 21, 2013 WL 6248451; see Amended Complaint, *id.* (May 14, 2013), D.E. 7; Complaint, *id.* (May 3, 2013), D.E. 1.

26. Stipulated Dismissal, *Marchant*, No. 1:11-cv-4099 (E.D.N.Y. June 18, 2012), D.E. 39.

An appeal was dismissed for lack of prosecution. Order, *Marchant v. N.Y. City Bd. of Elections*, No. 11-4453 (2d Cir. May 8, 2012), D.E. 37.

27. Complaint, *Marchant v. N.Y. City Bd. of Elections*, 1:13-cv-5493 (S.D.N.Y. Aug. 6, 2013), D.E. 2.

granted.<sup>28</sup> At the conclusion of the August 14 hearing, Judge Failla asked counsel for the board of elections to order a copy of the transcript.<sup>29</sup> Judge Failla announced that she would review the filings and the transcript and rule within a week.<sup>30</sup>

On August 16, Judge Failla denied the plaintiffs immediate relief, finding no violations of equal protection or due process in the city's stringent filing requirements.<sup>31</sup> On September 25, Judge Failla accepted the plaintiffs' dismissal of the action.<sup>32</sup>

Meanwhile, four voters filed a federal pro se action on August 13 challenging the exclusion of a candidate from the Democratic primary election for city council.<sup>33</sup> The court initially referred the case to Judge Failla as possibly related to the mayoral primary case, but three days later the court assigned the case to Judge Jesse M. Furman.<sup>34</sup> On the day that he got the case, Judge Furman ordered service on the defendant city board of elections and a response from them by August 23.<sup>35</sup> On August 27, observing no record of service or response, and noting a "reason to believe that Plaintiffs have obtained the relief they were seeking here in a parallel state court action," Judge Furman ordered the plaintiffs to show cause by September 4 why the case should not be dismissed as moot.<sup>36</sup> Observing no response to this order, Judge Furman dismissed the case on September 9.<sup>37</sup>

On August 15, a prospective candidate for city council filed a pro se federal complaint challenging her exclusion from the primary ballot.<sup>38</sup> The defendants explained that the candidate was disqualified for filing too few petition signatures.<sup>39</sup> Judge Paul A. Engelmayer issued an order that defendants show cause on August 23 why relief should not be granted.<sup>40</sup> At the hearing, Judge Engelmayer denied the plaintiffs immediate relief.<sup>41</sup> Because the plaintiff filed nothing further in response to three orders to show cause,<sup>42</sup> Judge Engelmayer dismissed the case on January 21, 2014.<sup>43</sup>

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28. Order, *id.* (Aug. 17, 2013), D.E. 4.

29. Transcript at 59, *id.* (Aug. 14, 2013, filed May 15, 2014), D.E. 13.

30. *Id.*

31. Opinion, *id.* (Aug. 16, 2013), D.E. 9, 2013 WL 4407098.

32. Order of Discontinuance, *id.* (Sept. 25, 2013), D.E. 12.

33. Complaint, *Escoffery-Bey v. N.Y. City Bd. of Elections*, No. 1:13-cv-5656 (S.D.N.Y. Aug. 13, 2013), D.E. 1.

34. Docket Sheet, *id.* (Aug. 13, 2013).

35. Order, *id.* (Aug. 16, 2013), D.E. 2.

36. Order, *id.* (Aug. 27, 2013), D.E. 3; *see* Jennifer H. Cunningham & Denis Slattery, *Off to the Races*, N.Y. Daily News, Sept. 3, 2013, at 28.

37. Order, *Marchant*, 1:13-cv-5493 (S.D.N.Y. Sept. 9, 2013), D.E. 4.

38. Complaint, *Keeling v. Sanchez*, No. 1:13-cv-5731 (S.D.N.Y. Aug. 15, 2013), D.E. 2.

39. Defendants' Brief, *id.* (Aug. 22, 2013), D.E. 12.

40. Order, *id.* (Aug. 15, 2013), D.E. 3.

41. Order, *id.* (Aug. 23, 2013), D.E. 18.

42. Order, *id.* (Dec. 17, 2013), D.E. 22; Order, *id.* (Nov. 14, 2013), D.E. 21; Order, *id.* (Sept. 30, 2013), D.E. 19.

43. Order, *id.* (Jan. 21, 2014), D.E. 23.

A fourth federal pro se complaint filed on August 16, 2013, challenged the exclusion of one of the three plaintiffs from the city council primary.<sup>44</sup> Again, the problem was errors and omissions in the ballot petition filing.<sup>45</sup> Judge Ronnie Abrams issued an order that the defendant board of elections show cause why relief should not be granted on August 29.<sup>46</sup> Later, the hearing was moved to September 6.<sup>47</sup> At the hearing, Judge Abrams denied the plaintiffs immediate relief.<sup>48</sup> Judge Abrams dismissed the action on May 23, 2014, for failure to prosecute, because the plaintiffs did not respond to the board's September 27, 2013, motion to dismiss the complaint.<sup>49</sup>

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44. Complaint, *Newsome v. N.Y. City Bd. of Elections*, No. 1:13-cv-5787 (S.D.N.Y. Aug. 16, 2013), D.E. 2.

45. *See* Defendant's Brief, *id.* (Sept. 3, 2013), D.E. 14.

46. Order, *id.* (Aug. 16, 2013), D.E. 3.

47. Order, *id.* (Aug. 26, 2013), D.E. 6.

48. Order, *id.* (Sept. 6, 2013), D.E. 18.

49. Order, *id.* (May 23, 2014), D.E. 24; *see* Order, *id.* (Apr. 21, 2014), D.E. 23; Order, *id.* (Jan. 6, 2014), D.E. 22; Motion to Dismiss, *id.* (Sept. 27, 2013), D.E. 19.