At an IAS Term of the Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 17th day of June 2022.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

HARRY WILSON,

Petitioner,

-against-

DECISION AND ORDER
Index No. 904292-22

LEE ZELDIN & NANCY MARKS,

-and -

NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

APPEARANCES: Law Office of Aaron S. Foldenauer
Attorneys for Petitioner Harry Wilson
(Aaron S. Foldenauer, Esq.)
30 Wall Street, 8th Floor
New York, New York 10005

Jeffrey T. Buley, Esq.
Attorney for Respondents Lee Zeldin and Nancy Marks
(Jeffrey T. Buley, Esq., and John Ciampoli, Esq., of Counsel)
32 Grayston Drive
Voorheesville, New York 12186

Kevin Murphy, Esq.
Deputy Counsel, New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, New York 12207

MCNALLY, J.

This matter came before this Court by order to show cause signed on June 10, 2022. The matter was returnable on June 16, 2022. On the return date, this Court heard oral argument on the verified petition and motion to dismiss filed by respondents, Lee Zeldin and Nancy Marks. This Court denied petitioner's request for a preliminary injunction enjoining respondents from "making [any further] expenditures in advance of the Primary Election where the underlying funds were contributed to only a General Election contribution limit." The Court reserved decision on respondents' motion to dismiss. The motion argues this court should not reach the merits of the verified petition as it is procedurally flawed and should be dismissed. For the reasons stated below the verified petition must be dismissed.

In this matter, petitioner, Harry Wilson, is a registered voter in the State of New York and registered member of the Republican Party. Petitioner formed a campaign committee to run for Governor of the State of New York. Petitioner is not the endorsed Republican candidate but has gained access to the ballot through the petitioning process. Respondent, Lee Zeldin, is endorsed by the Republican Party as its candidate for governor of the State of New York. The primary election to determine which republican candidate will move ahead to the general election is slated to be held on June 28, 2022. Early voting starts on Saturday, June 18, 2022.

Petitioner alleges that: (1) the multi-candidate committee "Zeldin Esposito 2022" has unlawfully transferred $721,578.92 to the "Zeldin for New York" campaign committee, (2) Zeldin's federal campaign committee "Zeldin for Congress" unlawfully transferred "455,000.00" to "Zeldin for New York," and (3) that "Zeldin Esposito 2022" unlawfully accepted contributions from Stephen Wynn and Andrea Wynn who each donated $74,558.00, which

petitioner claims exceeds the limit an individual can donate to a political campaign.

Petitioner further alleges that respondents' violations of campaign law will unduly influence the outcome of the primary election. Petitioner implores this Court to act as there is no pre-election mechanism that exists to correct "the impact of illegal spending" and that the Enforcement Counsel at the New York State Board of Elections ("NYS BOE") can only provide a remedy after the fact. This Court notes that petitioner filed a formal complaint with the Chief Enforcement Counsel, Division of Election Law Enforcement, NYS BOE, dated June 13, 2022.

Aside from the request for a preliminary injunction, petitioner seeks a declaratory judgment pursuant to CPLR 3001. CPLR 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." The general purpose of the declaratory judgment is often described as "to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Walsh v Andron*, 33 NY2d 503, 507 [1974] [internal quotation marks and citation omitted]).

Respondents' motion to dismiss seeks dismissal on the following procedural grounds: (1) petitioner failed to join necessary parties, and (2) petitioner failed to obtain a bond or undertaking as required by Election Law § 16-114. In addition, respondents' motion contends the verified petition fails to state a cause of action.

First, it is well settled that dismissal of a pleading for failure to join a necessary party should be granted only as a "last resort" (*see Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 821 [2003], *cert denied* 540 U.S. 1017 [2003]; *Communications Corp. v*

SafeNet, Inc.,45 AD3d 1, 11 [1st Dept 2007]). When the issue is raised, the court must first determine whether the missing party is a necessary party under CPLR 1001 (a) (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). Next, the court must determine whether the party can be joined, and if that is not possible, whether non-joinder should be excused under CPLR 1001 (b). If the court determines that the missing party is necessary and that joinder of that party is not excusable, the action must be dismissed for failure to join an indispensable party.

Here, respondents argue that the political committees petitioner claims engaged in the unlawful transfers of campaign funds, namely "Zeldin Esposito 2022," "Zeldin for Congress," and "Zeldin for New York," should have been named as respondents and their absence requires dismissal of the verified petition. This Court disagrees. Petitioner has named and served respondent Nancy Marks, who is the treasurer for all three political committees. As such, this Court finds that naming the officer of the entity is sufficient and there are no missing parties that are necessary to be joined (CPLR 110 [a]). Ms. Marks is represented by counsel who has advocated a position on behalf of the political committees (i.e., the transfers called into question by petitioner are legal and comply with Election Law § 14-100 [10]) for which she is the chief officer.

Second, respondents contend petitioner failed to obtain or file an undertaking in conjunction with initiating the instant proceeding, which is fatal to his case and requires dismissal. Respondents cite Election Law § 16-114, which states:

> In every proceeding instituted under this section, except a proceeding to compel the filing of a statement by a candidate for nomination to a public office at a primary election or for election thereto, or by the treasurer of a political committee, who has failed to file any statement, the petitioner or petitioners, *upon the institution of the proceeding shall file with the county clerk an*

> *undertaking in a sum to be determined and with sureties to be approved by a justice of the supreme court conditioned to pay any costs imposed against him or them*; provided, however, that no such undertaking shall be required in a proceeding instituted by the state or other board of elections" (Elections Law 16-114 [4]) (emphasis added).

Here, given early voting in the primary election begins imminently, and having already decided Zeldin cannot be enjoined from making further expenditures of campaign funds in the primary election, this Court waives the requirement that petitioner file an undertaking (Election Law § 16-114 [4]; *Matter of Avella v Batt*, 33 AD3d 77, 81 [3d Dept 2006]). The Court will not dismiss the petition on this basis.

In addition to the procedural grounds for dismissal, respondents motion contends the verified petition otherwise fails to state a cause of action. When addressing such a motion, the court must accept the facts alleged therein as true and give plaintiff the benefit of every possible favorable inference (*Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Lazic v Currier*, 69 AD3d 1213, 1213-1214 [3d Dept 2010]). With respect to, "a pre-answer motion to dismiss a declaratory judgment action, the only issue presented for consideration is whether a cause of action for declaratory relief is set forth, not . . . whether the plaintiff is entitled to a favorable declaration" (*Matter of Dashnaw v Town of Peru*, 111 AD3d 1222, 1225 [3d Dept 2013]).

In the verified petition, petitioner claims that information provided by the NYS BOE website provides for separate campaign spending limits for primary elections and the general election. Respondents argue that if this interpretation were correct, it would limit transfers between campaign committees for the same candidate in a single campaign cycle and would not permit candidates to access monies raised in past campaigns for use in future campaigns.

Petitioner asserts that when a candidate receives a maximum contribution from an individual donor ($60, 824.00) that the NYS BOE imposes a construct whereby "a campaign is permitted to spend only the first "$13,724" during the primary, with the remaining funds ($47,100) "to be used by the campaign for the General Election." This Court would note that petitioner is self-funding his campaign for New York State Governor, and thus would not be subject to such spending limitations. In support of his argument that respondent Zeldin has utilized monies during the primary election in excess of, what he argues, are spending limitations imposed by NYS BOE, petitioner has failed to provide any statutory authority or case law on point. This Court agrees with respondents, that no such spending limitation exist. As such, respondents' motion to dismiss is granted, as petitioner has failed to set forth a sufficient cause of action for declaratory relief. The cause of action alleged by petitioner is not justiciable as it has no basis in law or fact.

Finally, although petitioner implores this Court to act as there is no pre-election mechanism that exists to correct, what petitioner claims, are campaign finance violations committed by respondents, a court's ability to intervene in election matters is circumscribed by the powers expressly granted by statute (*see Matter of Korman v New York State Bd. of Elections*, 137 AD3d 1474, 1475 [3d Dept 2016]). When no such power exists, it would be improvident for a court to act or otherwise it could be used as pawn in the politics of a given election.

This Court has considered all remaining arguments and contentions and find them to be without merit.

Accordingly, it is

ORDERED, that defendant's motion to dismiss is granted and the verified petition is hereby dismissed.

The Court has uploaded the original Decision and Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Rensselaer County Clerk.

Counsel for the respondents is not relieved from the applicable provisions of CPLR 2220 or the Uniform Rules of Supreme and County Courts § 202.5b (h) (2), insofar as it relates to service and notice of entry of the filed document upon all other parties to this special proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Uniform Rules of Supreme and County Courts § 202.5b (b) (2) (i) directs that service upon nonparticipating parties must be made in hard copy.

SO ORDERED!
ENTER

Dated: June 17, 2022
Albany, New York

RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

NYSCEF Docketed numbers 1-23.