

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32236
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_____AD3d_____

Argued - August 16, 2011

MARK C. DILLON, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2011-07190

DECISION & ORDER

In the Matter of Myrna P. Littlewort, et al., appellants,
v Board of Elections in City of New York, et al.,
respondents.

(Index No. 18400/11)

In a proceeding pursuant to Election Law § 16-102 to validate a petition designating Myrna P. Littlewort and Kevin Li as candidates in a primary election to be held on September 13, 2011, for the Republican Party positions of Female Member and Male Member of the Republican Party State Committee from the 30th Assembly District, respectively, the petitioners appeal from a final order of the Supreme Court, Queens County (O’Donoghue, J.), dated August 10, 2011, which, upon granting the application of Angel G. Munoz and Ruby K. Muhammed to dismiss the petition to validate on the ground that service thereof was jurisdictionally defective, inter alia, dismissed the proceeding.

ORDERED that the final order is reversed, on the law, without costs or disbursements, the petition to validate is reinstated, and the matter is remitted to the Supreme Court, Queens County, for further proceedings in accordance herewith, to be conducted forthwith.

In a proceeding pursuant to Election Law § 16-102, “[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with” (*Matter of Hennessey v DiCarlo*, 21 AD3d 505, 505; see *Matter of Del Villar v Vekiarelis*, 59 AD3d 642; *Matter of Master v Pohanka*, 43 AD3d 478). Here, the petitioners established that they served the petition to validate in accordance with the order to show cause, which permitted service, among other means, “by guaranteed express overnight delivery mail,” placed in the mail on or before August

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4, 2011. The petitioners submitted an affirmation of service indicating that copies of the petition to validate were dispatched by guaranteed express overnight delivery mail, and annexing the original receipts of mailing, addressed to each of the respondents, which reflected the use of guaranteed express overnight delivery mail and were date-stamped by the United States Postal Service on August 4, 2011. In support of their application to dismiss the petition to validate, the respondent objectors offered no evidence to contradict the petitioners' proof that the petition to validate was served in a manner authorized by the order to show cause.

With respect to the issue of whether service was completed within the period set forth in Election Law § 16-102(2), “[a] proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later” (Election Law § 16-102[2]). “A petitioner raising a challenge under Election Law § 16-102 must commence the proceeding and complete service on all the necessary parties within the period prescribed by Election Law § 16-102(2)” (*Matter of Wilson v Garfinkle*, 5 AD3d 409, 410; *see Matter of Green v Mahr*, 230 AD2d 873, 874). Here, all parties to the appeal agree that the last date to commence the proceeding and complete service of the petition to validate was August 5, 2011. The respondent objectors contended before the Supreme Court that they did not receive copies of the petition to validate until August 6, 2011. In opposition, the petitioners asked permission to present evidence that copies of the petition to validate were actually delivered to the respondent objectors by the United States Postal Service on August 5, 2011. The Supreme Court denied the petitioners' request to present such evidence and, among other things, dismissed the proceeding on the ground that there was a jurisdictional defect. Since the petitioners should have been afforded the opportunity to present evidence that service was completed within the period prescribed by Election Law § 16-102(2), we reverse the Supreme Court's final order, among other things, dismissing the proceeding, and remit the matter to the Supreme Court, Queens County, so that the petitioners may have an opportunity to do so (*see Matter of Oberman v Romanowski*, 65 AD3d 992; *Matter of MacDougall v Board of Elections of City of N.Y.*, 133 AD2d 198; *see also Matter of Nunziato v Messano*, _____AD3d_____ [decided herewith]; *Matter of Watch v Halloran*, _____AD3d_____ [decided herewith]) and, thereafter, if necessary, for further proceedings on the petition to validate.

The parties' remaining contentions are without merit.

DILLON, J.P., FLORIO, LOTT and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court