

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

D32271
W/kmb

_____AD3d_____

Argued - August 30, 2011

WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2011-07459

DECISION & ORDER

In the Matter of Joseph A. Turdik, et al., petitioners-respondents, v Ira L. Bernstein, appellant, Anita S. Katz, et al., respondents-respondents, et al., respondents.

(Index No. 22300/11)

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a Certificate to Fill Vacancy designating Ira L. Bernstein as a candidate in a primary election to be held on September 13, 2011, for the nomination of the Conservative Party as its candidate for the public office of Member of the Town Council of the Town of Brookhaven, 3rd Council District, Ira L. Bernstein appeals from a final order of the Supreme Court, Suffolk County (Kent, J.), dated August 11, 2011, which granted the petition, invalidated the Certificate to Fill Vacancy, and directed the Suffolk County Board of Elections to refrain from placing his name on the ballot.

ORDERED that the final order is affirmed, without costs or disbursements.

The Suffolk County Board of Elections (hereinafter the Board of Elections) determined that a petition designating Ira L. Bernstein as a candidate was invalid, and no judicial proceeding was ever commenced seeking to validate that designating petition. Since, pursuant to Election Law § 6-148(1), a valid designating petition is a prerequisite to the creation of a vacancy (*see Matter of Testa v Ravitz*, 84 NY2d 893, 895), no vacancy was created which the Committee Authorized to Fill Vacancies named in Bernstein's designating petition was authorized to fill. In this procedural posture, we need not reach the issue of whether the Board of Elections properly invalidated Bernstein's designating petition (*see Matter of Cotton v Greene County Bd. of Elections*, 65 AD3d 810, 811).

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In any event, even if a vacancy had been created, the Committee Authorized to Fill Vacancies could not, as it attempted to do here, name Bernstein to fill the purported vacancy, since he is the same person who was originally named in the designating petition. “The Election Law plainly contemplates that the candidate designated to fill a vacancy shall be a person other than the person originally named” (*Matter of Nestler v Cohen*, 242 App Div 726, 726; see *Matter of Proud v Relin*, 176 AD2d 1197).

Accordingly, the Supreme Court properly invalidated the Certificate to Fill Vacancy.

Bernstein’s remaining contention is not preserved for appellate review.

MASTRO, J.P., LEVENTHAL, HALL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court