

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

D33860
O/kmb

_____AD3d_____

Argued - January 23, 2012

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
PLUMMER E. LOTT
ROBERT J. MILLER, JJ.

2011-11826

DECISION & ORDER

In the Matter of Anthony Coviello, appellant,
v Frances Knapp, et al., respondents.

(Index No. 7482/11)

In a proceeding pursuant to Election Law article 16, inter alia, to preserve for judicial review certain ballots cast in a general election for the public office of Highway Superintendent of the Town of Beekman, and to contest the casting and canvassing or the refusal to cast those ballots, the petitioner Anthony Coviello appeals, as limited by his brief, from so much of a final order of the Supreme Court, Dutchess County (Pagones, J.), dated December 19, 2011, as denied that branch of the petition which was to prohibit the casting and canvassing of a certain absentee ballot designated as Exhibit 8, and denied that branch of the petition which was to direct the casting and canvassing of an alleged abandoned ballot designated as Exhibit 1.

ORDERED that the final order is modified, on the law, by deleting the provision thereof denying that branch of the petition which was to prohibit the casting and canvassing of the absentee ballot designated as Exhibit 8, and substituting therefor a provision granting that branch of the petition and directing the Dutchess County Board of Elections not to cast and canvass the absentee ballot designated as Exhibit 8; as so modified, the final order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court erred in determining that a certain absentee ballot designated as Exhibit 8 should be cast and canvassed. The election was held on November 8, 2011. The ballot envelope is postmarked "Philadelphia, PA," but it is undisputed that the date of the postmark cannot be ascertained. On the back of the envelope, there is a "Statement of Voter" which is signed by the voter with the handwritten date of "11/9," one day after the election. The envelope is stamped

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“Received” by the Board of Elections with the date November 14, 2011. Election Law § 8-412(1) states: “The board of elections shall cause all absentee ballots . . . contained in envelopes showing a cancellation mark of the United States postal service . . . with a date which is ascertained to be not later than the day before election and received by such board of elections not later than seven days following the day of election to be cast and counted.” Since the date of the postmark cannot be ascertained, and the receipt of the ballot six days after the election did not establish that it had been timely mailed, the ballot may not be cast and canvassed (*see Matter of Nicolaysen v D’Apice*, 100 AD2d 501, 502; *see also Matter of Gross v Albany County Bd. of Elections*, 10 AD3d 476, 479, *affd* 3 NY3d 251; *Matter of Carney v Davignon*, 289 AD2d 1096, 1096; *Matter of Kroening*, 187 AD2d 1045).

In addition, under the circumstances of this case, the petitioner failed to establish that the ballot designated as Exhibit 1, found approximately six days after the election in a ballot marking device at the warehouse of the Dutchess County Board of Elections, was an “abandoned ballot” left by a voter at the voting machine or system such that it should be cast and canvassed pursuant to 9 NYCRR § 6210.13(A)(11). Accordingly, the Supreme Court properly determined that the ballot designated as Exhibit 1 should not be cast and canvassed.

SKELOS, J.P., LEVENTHAL, LOTT and MILLER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court