No. 181
In the Matter of Frances J. Angletti,
Respondent,
v.
Marcus Morreale,
Appellant,
Lora Allen and Jennifer Fronczak, as Commissioners constituting Niagara County Board of Elections,
Respondents.

Jerome D. Schad, for appellant.
John Ciampoli, for respondent Angletti.
Claude A. Joerg, for respondents Allen et al.

PER CURIAM:

On July 8, 2015, a designating petition was filed with the Niagara County Board of Elections (Board), naming respondent Marcus Morreale as a Democratic Party candidate for the office of Niagara County Legislator, Eighth District. Morreale initially declined the designation, thereby creating a vacancy.

Thereafter, upon Morreale's consent, the Committee to Fill Vacancies filed a certificate of substitution, purporting to designate Morreale as the substitute candidate to fill the vacancy created by his own declination of the earlier designation (see Election Law § 6-148). The certificate was received by the Board on July 17, 2015. Petitioner filed a formal objection with the Board, which was rejected.

On July 22, petitioner commenced this proceeding seeking to invalidate the designating petition and to enjoin the Board from placing Morreale's name on the ballot. Supreme Court signed an order to show cause dated the same day, authorizing service upon the candidate by one of ten methods. Petitioner utilized "nail and mail" service and, under the order to show cause, was required to affix the papers to the door of Morreale's residence "AND [enclose] the same in a securely sealed and duly prepaid wrapper addressed to [Morreale] at the address set forth in his . . . designating petition, and depositing the same with a depository of the United States Postal Service via Express Mail on or before the **23rd day of July, 2015.**" The July 23 date was the last day to commence the proceeding under the 14-day period authorized by Election Law (see Election Law § 16-102 [2]). Morreale answered, raising several affirmative defenses, including that the action was not timely commenced.

Supreme Court granted the petition and ordered the Board to strike Morreale's name from the ballot. The Appellate

Division affirmed, concluding that the proceeding had been timely commenced (2015 NY Slip Op 06616 [4th Dept 2015]). Two Justices dissented and would have reversed on the basis that the mailing had to have been made at an earlier time when receipt could reasonably be expected to occur within the statutory period. Morreale appeals as of right pursuant to CPLR 5601 (a) and we now affirm.

Though the two-Justice dissent gives us jurisdiction to review the entire matter, we address with specificity only the issue upon which the dissent was grounded, inasmuch as we find Morreale's other arguments without merit.

Under Election Law § 16-116, a petitioner is required to provide notice "as the court or justice shall direct." As we have previously held, "this requirement calls for delivery of the instrument of notice not later than on the last day on which the proceeding may be commenced" (Matter of King v Cohen, 293 NY 435, 439 [1944]).

We agree with the courts below that this proceeding was properly commenced in a timely manner. Here, there is no dispute that petitioner complied with the terms of the order to show cause by nailing the papers to the door of Morreale's residence on July 22, 2015 and mailing the papers to that residence by express mail on July 23. Morreale maintains that mailing on the last day of the statutory period was jurisdictionally defective since delivery inevitably would occur outside of the statutory

period. However, where the instrument of notice has been delivered by another prescribed method within the statutory period, we have rejected such contentions concerning mailing (see Matter of Serri v Heffernan, 298 NY 629 [1948]; Matter of O'Connor v Power, 30 AD2d 926 [2d Dept 1968], affd 22 NY2d 889 [1968]).

To the extent Matter of Buhlmann v Le Fever (83 AD2d 895 [2d Dept 1981], affd for reasons stated 54 NY2d 775 [1981]) may appear to reach a different result, that case is distinguishable. There, the petitioner attempted to accomplish both nailing and mailing on the last day service could be made. The Court observed that the papers were nailed to the outside wall of the residence instead of the door. The Court then stated that attempted service by mail on the final day "was inadequate and ineffectual to institute the proceeding" (Buhlmann, 83 AD2d at 896). By contrast here, as noted above, the instrument of notice had been properly delivered prior to the deadline.

Moreover, there is no sound reason to adopt a rule that would effectively shorten the very brief period of limitations applicable to election cases -- ranging from three to fourteen days (see Election Law § 16-102 [2]) -- where the proceeding has already been timely commenced by filing, respondent already has notice thereof by the nailing method of service, and imminent delivery of the mailing made within the limitations period can be expected.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

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Order affirmed, without costs. Opinion Per Curiam. Chief Judge Lippman and Judges Pigott, Rivera, Abdus-Salaam, Stein and Fahey concur.

Decided August 26, 2015