

**Matter of De Zanett v Village of Tuxedo Park**

2023 NY Slip Op 33214(U)

September 18, 2023

Supreme Court, Orange County

Docket Number: Index No. EF004013-2023

Judge: Maria S. Vazquez-Doles

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At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at 285 Main Street,  
Goshen, New York 10924 on the 18th day of September 2023

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE**

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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

In the Matter of Application of  
CLAUDIO GUAZZONI DE ZANETT,

Petitioner,

**DECISION & ORDER**

-AGAINST-

Index No. EF004013-2023  
Motion date: 9/18/23  
Motion Seq. # 1, 4, 5, and 6

THE VILLAGE OF TUXEDO PARK, ELIZABETH  
DOHERTY, Village Clerk AND Chief Village  
Election Official, DAVID C. MCFADDEN, MARK D.  
CITRIN, JOSHUA S. SCHERER and PAUL A. BROOK,

Respondents.

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**VAZQUEZ-DOLES, J.S.C.**

The following papers were read on the pending applications for relief in this special proceeding:

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## SUMMARY OF THE DECISION AND ORDER

In this election law special proceeding, Petitioner alleges he is a resident and a registered voter in the Respondent Village of Tuxedo Park (hereafter “the Village”).<sup>1</sup> The first Amended Petition #1 seeks an order i) preemptively excluding from the canvass of votes for the June 20, 2023 election certain absentee ballots, ii) requiring the safeguarding of all ballots until resolution of this special proceeding, iii) referring Petitioner’s claims to the Attorney General if the Court deems warranted, and iv) allowing an alternate means of service of the Petition. The relief demanded is moot in light of i) the canvass and recanvass of the absentee votes conclusion pursuant to the Decisions and Orders of the Appellate Division, ii) an order from this Court which already required the preservation of ballots, iii) the lack of necessity for a referral to the Attorney General, and iv) service of the Petition having been completed. For these reasons, the First Amended Petition#1 is DISMISSED. The Cross-Claims of Respondent Citrin are MOOT for the same reasons.

The motions of the Village #4 and Respondents Brooke and Scherer #5 to vacate a TRO were withdrawn. Motion #6 of Petitioner to file a Second Amended Petition as to alleged fraud is DENIED on the basis that Petitioner has not pled all elements of a claim for fraud and has not pled any of the elements with the requisite detail. The other proposed causes of action are either moot or seek relief that the Court already granted. Therefore, with no viable cause of action pled by Petitioner, Motion #6 is DENIED in its entirety and this special proceeding is DISMISSED.

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<sup>1</sup> Petitioner is the self-described “Public Advocate” for the Village. However, he provides no support by affidavit or otherwise to explain and support that contention of fact, whether as an office he created and filled by self-appointment or as a position created by the Village. Respondent Village asserts in its Answer that Petitioner is not “the Public Advocate” and no such position exists in the Village.

## FACTS UNDERLYING THE SPECIAL PROCEEDING

The parties' submissions on the various applications for relief generally find agreement on the facts relevant to this special proceeding. The Village held an election on June 20, 2023 for various offices, including mayor. Prior to election day, Respondent the Village Clerk, Elizabeth Doherty (hereafter "the Clerk") distributed absentee ballots to certain persons. After the polls closed on election day, the Village began the canvass, i.e. the review and counting of the ballots.

The Court issued a Temporary Restraining Order as to counting absentee ballots and certifying the election. Order dated June 20, 2023, *modified in part by, Village of Tuxedo Park v. Guazzoni, et al*, 2023-06463 (2d Dept 2023) Slip Opinions dated Aug. 9 and Sept. 11, 2023. This Court's Order of June 20, 2023 also required the Clerk to maintain custody of all absentee ballots and related envelopes. Once the Appellate Division stayed this Court's TRO, the Village completed the canvass of the votes.

The canvass included the review and determination of whether to count each of the absentee ballots. Certain absentee ballots were not counted for various reasons. After all votes were canvassed with regard to the office of mayor, Respondent Citrin received 201 votes and Petitioner McFadden received 195 votes. *McFadden v. Orange County Board of Elections et al.*, Index EF005663-2023 (Orange Cnty 2023) (hereafter "*McFadden Case*") at Ex. A to Citrin Affirmation in Support of Motion #2.<sup>2</sup> A recanvass was conducted by the Orange County Board

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<sup>2</sup> The related lawsuit was filed by Respondent McFadden herein, as discussed *infra*. The *McFadden Case* is also pending before the undersigned Justice in Part 5. None of the pending applications addressed in this Decision and Order include the results of the canvas and recanvass (although they were attached to two proposed show cause orders that the Court declined to sign). Therefore, the Court cites to the relevant exhibits in the *McFadden Case*.

of Elections (hereafter “BOE”) and the ballot count was unchanged (Id. at Ex. B to Citrin Affirmation in Support of Motion #2). The BOE released its results on August 15, 2023. Id. The Clerk administered the oath of office to Respondent Citrin on August 15, 2023. (Testimony of Marc Citrin, Transcript EF004013-2023 of Aug. 16, 2023 at p.7). Citrin attempted to file the oath the following day but the Clerk did not accept the filing on the advice of counsel for the Village (*McFadden Case* at Ex. C to Citrin Affirmation in Support of Motion #2).

### **PROCEDURAL HISTORY**

Petitioner filed the instant Petition with a proposed order to show cause on the afternoon of election day, June 20, 2023. The Petition was verified only by counsel, not the Petitioner. As noted, *supra*, the Court signed its Order that same evening. The Court sent the Order to all parties as an attachment to a NYSCEF notice because an index number had not yet been issued. The Order was posted to the NYSCEF EF004013-2023 docket on June 21, 2023.

Petitioner filed an Amended Petition on June 22, 2023, prior to any party filing an Answer or moving against the original Petition. Like the original Petition, only counsel signed the verification.<sup>3</sup> The first Amended Petition is the current operative pleading in this special proceeding, containing four causes of action: First) excluding from the canvas of votes for the June 20, 2023 election absentee ballots of persons who were not registered to vote on or before June 9, 2023; Second) safeguarding all ballots until resolution of the special proceeding; Third) a referral to the Attorney General if the Court deems warranted, and Fourth) an alternate means of service of the Petition.

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<sup>3</sup> Petitioner himself has not filed a single affidavit or sworn statement in this special proceeding, not among the numerous applications he has filed or otherwise, never attesting to any of the facts related to the process of absentee ballots issued to potential voters in the Village.

Respondent Citrin filed an Answer with (proposed) Cross-Claims against the Village and the Clerk on June 28, 2023. He filed an Amended Answer with (proposed) Cross-Claims on July 5, 2023. The next day Citrin filed a Motion #3 for leave to assert his cross-claims, which was granted *nunc pro tunc* on the record on July 19, 2023. The Village and Clerk filed a unified Answer to the Amended Petition, and a separate unified Answer to the Citrin Cross-Claims, on July 9, 2023. Respondents Brooke and Scherer filed a unified Answer on July 10, 2023. Respondent McFadden filed his Answer on July 24, 2023.

The parties appeared before this Court on July 19, 2023. A discussion ensued on the record with regard to the scope of claims in the first Amended Petition, specifically whether Petitioner was alleging fraud in regard to the distribution of absentee ballots. Petitioner's counsel stated his intention to plead fraud and asked the Court for leave to file a motion to further amend his Amended Petition by July 31, 2023. The Court set that motion for a return date of September 18, 2023.

At that same status conference of July 19, 2023, Respondents raised the issue of whether Petitioner lacks standing to seek an order excluding – before the canvass occurs – absentee ballots. In the event that the instant case were to continue past a Decision and Order on Motion #6 to further amend the Petition, the Court directed the parties to file briefs on the standing issue by September 29.

Prior to the parties appearing again on August 16, 2023 for a status conference, the Appellate Division stayed the TRO and the canvass was completed, as well as the recanvass by the BOE. This Court noted on the record at the same conference that, absent an amending of the current Amended Petition to include a fraud count, no issues appeared to remain for resolution. Respondent McFadden stated he planned to challenge the decision of the BOE not to count

certain absentee ballots.

McFadden as a petitioner filed a plenary action, EF005663-2023, on August 18, 2023 to challenge the BOE recanvass results. When McFadden filed, he did not indicate in the RJI that a related proceeding existed. See *McFadden Case*, RJI dated Aug 18., 2023 at p.2. Due to McFadden's error, the case was randomly assigned to a different justice, the Hon. David J. Squirrell, who signed an Order on August 21, 2023 that temporarily restrained the Clerk and Village from certifying the results of the election. Once the existence of the instant action became known to Justice Squirrell, an order of transfer was entered. See *McFadden Case*, Order dated Aug. 28, 2023.

Respondent Citrin filed a Motion to Dismiss #2 in the *McFadden Case* on the basis that it was not timely initiated. The Court granted Citrin's motion to dismiss the *McFadden Case* in a Decision and Order dated September 15, 2023. In the Decision and Order, the Court lifted the TRO issued by Justice Squirrell and authorized the Clerk of the Village to certify the election, administer the oath to Citrin and file the certification of his oath. That Decision and Order ended the process of canvassing ballots for the Village election mayoral contest.

### **THE (FIRST) AMENDED PETITION**

Special proceedings generally are commenced by the filing of a petition. CPLR 402. The Court shall make a summary determination based upon the pleadings and other papers where no triable issue of fact exists. CPLR 409(b). Here, the claims and relief pled in the (first) Amended Petition can be ruled upon as a matter of law, because no facts relevant to the determination of the Amended Petition are in dispute.

The First Cause of Action seeks relief related to the pre-canvass exclusion of absentee ballots that were submitted by persons who were not registered to vote by the alleged cutoff date

of June 9, 2023. The canvass and recanvass already occurred. Thus, the relief of excluding any such ballots is moot. Once votes are counted, those votes cannot be “uncounted”. Election Law 9-209.

The Second Cause of Action seeks an order safeguarding the absentee ballots from any tampering, etc. The Court already granted that relief in its June 20, 2023 Order.

The Third Cause of Action seeks a reference to the NY Attorney General if the Court deems that necessary and warranted. Since the relief in the First and Second Causes of Action are either moot or already granted, no such reference is needed.

The Fourth Cause of Action seeks an order related to how to serve the Amended Petition. Service already occurred and has not been contested by any party. This cause of action is therefore moot.

No relief remains to be granted for any of these causes of action. Therefore, because the Court is denying a further amending of the Petition in Motion #6 as set forth *infra*, the Amended Petition #1 is DISMISSED.

### **MOTION TO FURTHER AMEND THE PETITION**

Petitioner moves to file a Second Amended Petition, which asserts the following causes of action: First) Clerk’s failure to check absentee ballots for voter registration; Second) preservation of ballots; Third) Constitutional claims; Fourth) undue influence of prior Mayor McFadden on voting process; Fifth) errors related to duplicative voting; Sixth) canvassing in violation of the TRO; and Seventh) fraud. The Court addresses each section of the proposed Second Amended Petition in turn.

The First Cause of Action seeks relief related to exclusion of certain ballots on a pre-canvass basis, a cause of action already addressed in the First Amended Petition as moot. The



Second Cause of Action likewise seeks relief as in the First Amended Petition that was already granted. The Third Cause of Action seeks a referral as necessary to the NY Attorney General. For reasons set forth *infra*, no such referral is warranted because the Sixth Cause of Action fails to satisfy the law on pleading fraud. The Fourth Cause of Action seeks the same relief as the First and is therefore also moot. The Fifth Cause of Action seeks exclusion of certain ballots on an alternative basis related to duplicative voting but is likewise moot in light of the canvass having already occurred. The Sixth Cause of action is moot because the TRO was stayed.

The Seventh Cause of Action asserts that past Mayor McFadden and at least one other person asked persons to submit absentee ballots under false pretenses. More specifically, the claim is that McFadden and his agents asked persons who were not allowed to vote in the Village to request an absentee ballot and falsify the accompanying application with reasons for seeking that ballot.

Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit. *Maldonado v. Newport Gardens, Inc.*, 91 A.D.3d 731 (2d Dept 2012); *Longo v. Long Is. R.R.*, 116 A.D.3d 676 (2d Dept 2014). As a general rule, leave to amend a pleading rests within the trial court's discretion and should be freely granted absent prejudice or surprise. In assessing the merit of a proposed amendment, however, the proponent is required only to make an evidentiary showing sufficient to support the proposed claim. *McFarland v Michel*, 2 AD3d 1297, 1300 (2d Dept. 2003).

### **The Requirements for Pleading Fraud**

Here, Petitioner fails to make an evidentiary showing sufficient to support a claim of fraud. The elements of a fraud claim require proof of a material misrepresentation of fact,

knowledge of its falsity, an intent to induce reliance, justifiable reliance by the counterparty, and damages. *Eurycleia Partners LP v. Seward & Kissel*, 12 NY3d 553 (2009). A claim rooted in fraud must be plead with particularity. *Id.*; CPLR 3016.

First, it is noteworthy that none of the allegations in the proposed pleading are supported by an affiant with personal knowledge. The verification was signed by counsel, on the basis that his office lies in a county different than where Petitioner resides. However, counsel lacks personal knowledge of any facts as they concern how McFadden communicated with potential voters, when that occurred, where and what was stated. His verification is based on his client communications, which remain unknown, and documents, which remain undefined.

The pleading lacks any specificity of the basic factual components of a fraud claim. The agents of McFadden, save one, are never identified. Where, when and how McFadden and his alleged unnamed agents communicated his alleged ill-intent to the various potential voters is never set forth. The pleading is replete with vague innuendo and lacks any details of facts of this alleged misrepresentation.

Apart from that lack of first hand knowledge, the pleading is bereft of the basic elements of a fraud claim. McFadden himself is not accused of misrepresenting any facts. The claims assert he urged persons not eligible to vote to obtain ballots. Those persons, not McFadden, eventually filed applications attesting to eligibility. Thus, Petitioner would have needed to name those individual voters as Respondents, which he has failed to do. This is also a requirement of the Election Law as it concerns a challenge to the registration of a voter. Election Law 16-108(2). The closest the pleading reaches to alleging misrepresentation is a vague and unsupported allegation that “McFadden himself prepared the false applications” (Second Amended Petition at Par. 137). But that allegation lacks any specificity and is pled “on

information and belief”, hardly a basis to satisfy the stricter pleading requirements in CPLR 3016.

Additionally, the pleading does not explain with any details how McFadden knew the persons he allegedly approached were not registered or eligible by election day to vote. To the contrary, Petitioner’s own “investigation report” at Exhibit H to his proposed pleading reveals that virtually every person who voted absentee owns property in the Village. To assert that McFadden knew they were not eligible to vote would therefore require that he somehow knew all the other facts that must be considered as to voting eligibility. No such facts are alleged. For example, the requirement of a “residence” as defined by Election Law 1-104(22) requires inquiry into the intent of the person registering as to whether they intend to return to living in the Village despite absences, and therefore might be entitled to vote there. *People v. O’Hara*, 96 NY2d 378 (2001). Petitioner does not allege this level of knowledge by McFadden for the various absentee applications at issue.

Even assuming McFadden wanted Petitioner to rely on McFadden’s alleged misrepresentations. Petitioner does not allege that he justifiably did rely on McFadden’s actions. To the contrary, Petitioner filed the instant *pre*-canvass lawsuit to exclude these very absentee ballots from being canvassed. He asserts that he never relied on anything McFadden undertook with respect to absentee ballots and was aware of the alleged fraudulent “harvesting” of ballots from the outset.

Lastly, Petitioner must allege damages. He pleads no damages, nor are damages set forth among the facts of the pleading. As noted above, McFadden lost the mayoral contest. No cause of action will lie for the margin of loss to be greater than it was at the canvass and recanvass.

The allegations in the Seventh Count as they concern the Village Clerk fail for similar

reasons. Allegations as to the Clerk's alleged failure to disclose McFadden's actions fail because Petitioner has not pled any actionable wrongdoing by McFadden. The allegation that the Clerk did not refuse to issue absentee ballot applications pled only a purely legal matter as to what level of scrutiny the Clerk can and should exercise when deciding whether to send a ballot application to a resident of the Village. No fraud was alleged in this regard, at most an alleged unwitting error by the Clerk under the Election Law. The Court does not reach that legal issue of absentee application requirements here because the causes of action that implicate that issue (First and Fourth) are moot, as noted *supra*.

Lastly, the Court need not reach the issue of standing. Petitioner's standing or lack thereof to challenge specific absentee ballots prior to the canvass was mooted by the stay of the TRO and the completion of the canvass and recanvass. Therefore, the briefing required by September 29, 2023, as so ordered on the record on July 19, 2023, is no longer relevant to any claims or defenses and that directive of the Court is hereby VACATED.

For all the foregoing reasons, the causes of action First through Sixth in the proposed Second Amended Pleading are moot and the Seventh is palpably insufficient and devoid of merit. Therefore Motion #6 is DENIED.

#### **OTHER REMAINING CLAIMS AND MOTIONS**

The Cross-Claims of Respondent Citrin are a subset of the claims in Petitioner's first Amended Petition. Citrin alleged that certain absentee ballots should not be canvassed for reasons related to voter eligibility. As noted *supra*, the canvass and recanvass are complete. Citrin prevailed in the election. Therefore all claims in his pleading are now MOOT.

Motions #4 and #5 were WITHDRAWN by the movants.

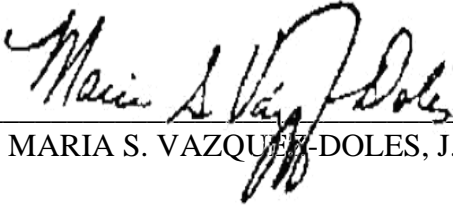
Upon the foregoing, it is hereby

**ORDERED** that the Amended Petition #1 is hereby **DISMISSED**, and it is further **ORDERED** that the Cross-Claims of Respondent Citrin are **MOOT**, and it is further **ORDERED** that Motions #3 and #4 are **WITHDRAWN**, and it is further **ORDERED** that Motion #6 to further amend the Petition is **DENIED**, and it is further **ORDERED** that so much of the July 19, 2023 order that required briefing due on September 29, 2023 is hereby **VACATED** and this special proceeding is **DISMISSED**.

This Decision constitutes the Order of this Court.

Dated: September 18, 2023  
Goshen, New York

ENTER:

  
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HON. MARIA S. VAZQUEZ-DOLES, J.S.C.