

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 16th day of January 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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: 12/8/23
Motion Seq. # 13

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.

VAZQUEZ-DOLES, J.S.C.

The following papers were read on the motion of Respondents Village of Tuxedo Park (“Village”), Elizabeth Doherty, Joshua Scherer and Paul Brook (collectively, “Movants”) for an order pursuant to CPLR 2214, 6314 and 6315 awarding legal fees and costs:

Notice of Motion/Affirmation Gilbert/Ex. A-I/Affirmation Doherty/Ex. A-E/
Affirmation Brooke/Ex. A-B/Affirmation Gilbert/Ex. A/Affirmation Burger/Ex. A/
Affirmation Burns.1-25
Opposition Affirmation (Citrin).....26
Opposition Affirmation (Guazzoni).....27
Reply Affirmation.....28

Summary Of the Decision And Order

This cases arises from a dispute over the mayoral election in the Village of Tuxedo, NY.

Claims were asserted by Petitioner Claudio Guazzoni de Zanett and Cross-Petitioner Marc Citrin. All claims that were not heretofore granted were subsequently dismissed by this Court's Decision and Order dated September 18, 2023 ("the Decision").

The Movants on the instant motion seek an order awarding legal fees and costs incurred in the defense of this special proceeding on the basis that the claims of Petitioner, which included an application for a temporary restraining order, and the claims of Cross-Petitioner constituted malicious prosecution. Movants failed to establish some of the required elements for malicious prosecution and therefore the motion is DENIED. Movants' assertion of a right to seek damages in this Court, for the legal positions of the parties before the Appellate Division, is lacking in jurisdiction and DENIED. Movants make reference in their supporting papers, although omit from their Notice of Motion, a request for relief on the alternative basis that the entire litigation constituted frivolous conduct. Movants failed to provide notice of this basis for relief and also did not establish that any particular claim, motion or other action by Petitioner or Cross-Petitioner was frivolous within the definition of 22 NYCRR 130-1.1. Therefore this aspect of the motion is also DENIED.

Facts Underlying The Instant Motion

The facts that concern the instant motion were set forth in the Decision and are summarized here. 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. Petitioner and Cross-Petitioner claimed that certain absentee ballots should not have been issued and therefore should not be canvassed.

Petitioner filed a Petition on June 20, 2023 that sought, inter alia, a Temporary Restraining Order as to counting absentee ballots and certifying the election. The Court granted

the TRO in an 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. The Court did not require Petitioner to submit an undertaking for the TRO and no application to require an undertaking was filed thereafter by any Respondent.

The Appellate Division's first Decision and Order, dated August 9, 2023, stayed this Court's TRO. The Village then completed the canvass of the votes, including absentee ballots. The Appellate Division's second Decision and Order, dated September 11, 2023, directed that the certification of the election by the Village proceed.

Respondent Citrin received the most votes. A recanvass was conducted by the Orange County Board of Elections (hereafter "BOE") and the ballot count was unchanged. The BOE released its results on August 15, 2023. Cross-Petitioner Citrin was installed as Mayor after this Court dismissed a challenge to the absentee ballot vote count in a separate lawsuit filed by the incumbent (Respondent McFadden).

Claims Of Petitioner And Cross-Petitioner

Petitioner filed the instant Petition with a proposed order to show cause on the Village election day, June 20, 2023. After the Court granted the aforementioned TRO, Petitioner filed an Amended Petition on June 22, 2023. The first Amended Petition contained 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.

Respondent Citrin filed an Answer with (proposed) Cross-Claims against the Village and

the Clerk on June 28, 2023. Respondent Citrin filed an Amended Answer with (proposed) Cross-Claims on July 5, 2023. The next day Respondent Citrin filed Motion #3 for leave to assert his cross-claims, which was granted *nunc pro tunc* on the record on July 19, 2023, thereby making him a Cross-Petitioner. The claims of Cross-Petitioner Citrin alleged that certain absentee ballots should not be canvassed for reasons related to voter eligibility. Cross-Petitioner did not seek injunctive relief.

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 to the Amended Petition on July 10, 2023. Respondent McFadden filed his Answer to the Amended Petition on July 24, 2023.

The parties appeared before this Court on July 19, 2023. 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, some of the Respondents raised the issue of whether Petitioner lacked standing to seek an order, before the canvass occurred, to exclude absentee ballots. The Court made no ruling on standing at that time. The Court directed the parties to file briefs on the standing issue by September 29, 2023.

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 then issued its Decision on September 18, 2023, which disposed of all pending applications and all remaining claims.

Resolution of the Claims of Petitioner and Cross-Petitioner

Petitioner's First Cause of Action, which was related to the pre-canvass exclusion of certain absentee ballots (cast by persons not registered to vote by the required cutoff date) was dismissed as moot because the canvass and recanvass had already occurred. The Second Cause of Action for an order safeguarding the absentee ballots from any tampering had already been granted in this Court's June 20, 2023 Order. The Decision held that Petitioner had not established a basis for his Third Cause of Action, seeking a reference to the NY Attorney General, because the relief in the First and Second Causes of Action were either moot or already granted. The Fourth Cause of Action for an order related to how to serve the Amended Petition was moot because service had already occurred and was not contested by any party.

Petitioner's motion to file a Second Amended Petition was denied because, inter alia, Petitioner did not plead all elements required for a fraud claim. The other counts were redundant of the First Amended Petition or were moot. Cross-Petitioner's claims were dismissed as moot.

Notably, the Court did not reach the merits of the Petitioner and Cross-Petitioner claims that certain absentee ballots should not be canvassed. The Decision did "not reach that legal issue of absentee application requirements here because the causes of action that implicate that issue (First and Fourth) are moot" Nor did the Court reach the issue of standing because "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." Likewise, in neither of its Decisions and Orders did the Appellate Division rule upon Petitioner's standing or the merits of the claims of Petitioner and Cross-Petitioner, apart from staying the TRO.

The Instant Motion

Movants seek recovery of legal fees and expenses for claims asserted in this Court and for claims/positions asserted in the Appellate Division. Movants' notice of motion refers only to CPLR 6314 and 6315 as grounds for their relief. Within one of their five supporting affirmations, Movants also rely upon 22 NYCRR 130-1.1. The Court first addresses whether the Petitioner and Cross-Petitioner's claims asserted herein at the trial level constitute malicious prosecution.

CPLR 6313 provides for the granting of a temporary restraining order on application of a party. The requirement of an undertaking is in the discretion of the Court. CPLR 6313(c). A defendant enjoined by a TRO may move, with or without notice, to modify it. CPLR 6314. The motion can include an application for an undertaking by the plaintiff/petitioner. *Id.*

As noted *supra*, the Court granted a TRO upon application of Petitioner. By the date that the Court granted the motion of Cross-Petitioner to file his cross-claims, the TRO had already been issued. Thus, Cross-Petitioner did not plead for and did not receive relief of a TRO. No Respondent ever moved to modify the TRO by seeking an undertaking.

In instances where a TRO (or preliminary injunction) has caused damages to a defendant/respondent, that affected party may move for recovery of damages. CPLR 6315. However, if no undertaking was required for the TRO, then the party seeking damages must establish that the plaintiff/petitioner engaged in a malicious prosecution. *City of Yonkers v Federal Sugar Refining Co.*, 221 NY 206 (1917); *Lawton v Green*, 64 NY 326 (1876); *Samra v Sikh Center of New York, Inc.*, 16 AD3d 659 (2d Dept 2005). This rule exists because "at common law, where injunctive relief was erroneously obtained by one acting in good faith, there could be no assessment of damages." *Brooklyn Consolidated Lumber v City Plastering Co.*, 236 AD 799 (2d Dept 1932).

Movants acknowledge this rule of law in the instant motion. Movants generally allege that Petitioner and Cross-Petitioner acted with malice, relying upon, inter alia, Petitioner's alleged ill-intent due to his historical involvement in Village politics. Movants also rely upon various docket filings during the short, three-month course of this litigation. However, proving a claim of malicious prosecution requires much more than just general allegations of bad intent. Movants fail to address that such a claim has multiple required elements, to wit: 1) the prosecution of a civil action against them, 2) that the Petitioner and Cross-Petitioner were the proponents of that civil action, 3) a lack of probable cause, 4) malice, 5) the civil action was terminated in favor of the Respondents, and 6) special injury. *347 Central Park Associates, LLC v Pine Top Associates, LLC*, 144 AD3d 785 (2d Dept 2016); *see also Realty by Frank Kay, Inc. v Majestic Farms Supply*, 160 AD2d 789 (2d Dept 1990) (defining the special injury element as two elements, injury and interference with person or property).

The Court addresses each element in turn. Movants failed to list these elements and assert how they satisfied each, a burden that rests on the Movants and not on the Court. Thus, the Court is left only to glean from the supporting papers, generally, what evidence would support each element.

The first two elements are not at issue. Petitioner and Cross-Petitioner filed claims in this special proceeding against Movants.

The third element of probable cause requires Movants to show "an entire lack of probable cause" in this special proceeding. *347 Central Park*, 144 AD3d at 786. Thus, where at least some of the causes of action have "potential merit", a claim for malicious prosecution will not lie. *Id.*, citing *Perryman v Village of Saranac Lake*, 41 AD3d 1080 (3d Dept 2007). The Court of Appeals has described proof of the probable cause element (as well as the malice element) as

“no easy feat”. *Engel v. CBS, Inc.*, 93 NY2d 195, 204 (1999). The high bar is intentional: “to alleviate the fear of retaliation in bringing novel suits as well as to block an endless series of malicious prosecution claims.” *Id.* at 204.

Reviewing Movants’ supporting papers *in toto*, they fail to establish a lack of probable cause for every claim asserted. There is no dispute that this Court is authorized to take certain specific actions in regard to elections where expressly authorized by the Election Law. *Mondelo v Nassau County Board of Elections*, 6 AD3d 18 (2d Dept 2004). Among those permissible actions is reviewing the validity of challenges to absentee ballots pursuant to Election law 8-506. *Id.* at 21. Petitioner’s claims relied in part upon NY Election Law 8-506, which on its face allows a challenge “during the examination of absentee . . . ballot envelopes” by “any . . . registered voter properly in the polling place” upon various grounds. The claims in this proceeding included that some of the challenged ballots were cast by persons not residing in the Village, which might be evident from or supported in part by data on the ballot envelope. Moreover, Petitioner’s Second Cause of Action to secure ballots from tampering was granted by this Court. Thus, at least some of the claims had potential merit to succeed and therefore Movants did not establish an “entire lack” of probable cause.

While the failure to establish any one element is fatal to Movant’s application, the Court nonetheless reviews the remaining elements. The fourth element of malice has been defined as “a purpose other than the adjudication of a claim”. *Engel*, 93 NY2d at 204, *citing* Restatement Second of Torts, Section 674. As evidence of malice, Movants refer to Petitioner’s alleged animosity toward certain Respondents and the Village government generally. While some of those facts may be true, asking the Court to determine that such alleged ill will was the exclusive motivation for Petitioner’s lawsuit requires a judicially unauthorized journey into the land of

speculation. As noted supra, at least some of the claims had potential foundations in statutory election law.

Movants also cite to Petitioner and Cross-Petitioner's alleged awareness of potential absentee ballot issues days or more before election day, but waiting until election day to file a challenge in the form of this lawsuit. Movants try to have their bread buttered on both sides. Movants simultaneously assert that the Petition is meritless because no absentee ballot challenge is ripe (per Election Law 9-209) until those ballots are counted, but then impute bad faith to the claimants because they did not file this lawsuit even earlier than election day.

Movants also rely heavily on *Hughes v Delaware County Board of Elections*, 217 AD3d 1250 (3d Dept 2023) as their proof that Petitioner and Cross-Petitioner "knew" their claims could not prevail due to lack of standing and the permissible timing to challenge absentee ballots. This argument is based upon several mistaken premises. First, *Hughes* was not issued until *after* this special proceeding was filed, to wit, not until June 23, 2023. Second, there is absolutely no evidence that Petitioner *himself* or Cross-Petitioner *himself* knew that the *Hughes* lawsuit existed when they filed their claims herein or immediately thereafter. While one attorney for Petitioner also appeared in *Hughes*, Movants ask the Court again to engage in speculation, this time into the realm of attorney-client privilege, to impute to clients all knowledge of their counsel. Third, *Hughes* was decided by a different Appellate department. The parties herein required some reasonable time after *Hughes* was published to assess whether any precedent from the Second Department contravenes *Hughes* in any way. Fourth, *Hughes* is not necessarily dispositive of all claims herein, even if binding on this Court, because it does not address Election Law 8-506 and whether a ballot challenge thereunder must proceed within the framework of Election Law 9-209. Compare *Gross v Albany Board of Elections*, 3 NY3d 251 (2004) (addressing both 8-506

and 9-209 as vehicles for the challenge of absentee ballots).

Further, Cross-Petitioner occupied a different position as a candidate and Respondent than did Petitioner. Claims with a legal basis, filed by a candidate because they want to win the election, is per se not borne from malice, but a desire to prevail in the election. Cross-Petitioner, who was originally pro se, retained counsel who had no involvement in *Hughes*. Thus, Movants fail to establish malice in the filing of any claims herein by Petitioner or Cross-Petitioner.

The fifth element requires that this case was terminated in favor of Movants. Movants argue that the Appellate Division's stay of this Court's TRO ultimately led to a termination of the case in favor of Movants. However, the dismissal of this lawsuit occurred as a function of Cross-Petitioner prevailing on the vote tally after the canvass and recanvass. The Petition and Cross-Petition claims were then moot and dismissed for that reason. *Compare JA Preston Corp. v Fabrication Enterprises*, 68 NY2d 397, 404 (1986) (the "finally determined" requirement of CPLR 6312(b), for seeking damages caused by an injunction, is not triggered where dismissal occurs for a reason arising subsequent to the grant of the injunction).

Moreover, neither the Appellate Division nor this Court addressed the issue of standing of Petitioner, which Movants cite as a primary reason for his alleged lack of good faith to proceed with his claims. Nor was the aforementioned interplay between the two Election Law sections ever reconciled, again because the canvass in favor of Cross-Petitioner mooted this legal issue. Based on this complex history, Movants require case precedent or other legal authority to support their assertion of having "prevailed", which is absent from the supporting affirmations.

On the final element of "special injury", Movants do not submit any evidence. Movants assert damages only in the form of attorney fees and expenses to defend this special proceeding. A defendant must establish some "concrete harm" other than the demands of defending a

lawsuit. *Engel*, 93 NY2d at 205. This special injury element also serves as a “buffer to insure against retaliatory malicious prosecution claims and unending litigation”. *Id.* Movants neither allege nor establish such a “concrete injury”.

The Movants failed to establish several of the elements for a malicious prosecution claim and therefore their application is DENIED. With respect to the assertion of a right to damages for the actions of the litigants before the Appellate Division, this Court lacks jurisdiction to hear such a claim. Any such application would need to be filed in the Appellate Division. Therefore, that branch of the motion is also DENIED.

The only remaining contention of Movants is a reference in one of five supporting affirmations to a claim of frivolous conduct in violation of 22 NYCRR 130-1.1. CPLR 2214 requires that the relief demanded be set forth in the notice of motion. Here, the notice of motion has no reference to that regulation and therefore no such relief is available.

However, even if the Court were to consider the reference to this regulation in one of Movants’ supporting papers, Movants fail to satisfy the standard of proving that the claims herein were “frivolous”. 22 NYCRR 130-1.1(c). An award of sanctions lies within the discretion of the Court. *LeCadre v Lockwood Realty*, 148 AD3d 1130 (2d Dept 2017). “Raising genuine legal disputes is not sanctionable conduct.” *Id.* at 1131.

For reasons already discussed, the claims were not completely without merit and could be supported by arguments of existing statutory and common law. *Id.* at (c)(1). Nor were the claims undertaken primarily to harass or maliciously injure Movants. *Id.* at (c)(2). Movants do not identify any specific fact in the Petition or within a motion that is false, apart from asserting that Petitioner held himself out as “public advocate” when he did not hold any such elected position. *Id.* at (c)(3). While Petitioner’s vague wording of the Amended Petition in that respect is not

laudable for transparency, his failure to note that his title was self-appointed does not rise to the level of sanctionable conduct. For these additional reasons, the Court would not, even upon a duly noticed motion, exercise its discretion to award sanctions.

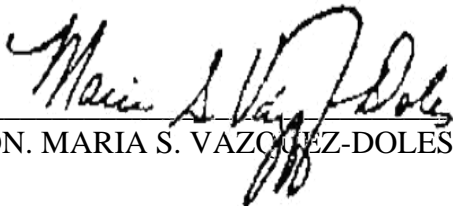
Upon the foregoing, it is hereby

ORDERED that the motion for recovery of legal fees and expenses is **DENIED**.

This Decision constitutes the Order of this Court.

Dated: January 16th, 2024
Goshen, New York

ENTER:



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