

**Jou v Schwartz**

2021 NY Slip Op 31430(U)

April 22, 2021

Supreme Court, New York County

Docket Number: 100296/2021

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

*Justice*

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JACOB JOU,

Plaintiff,

- v -

ARTHUR SCHWARTZ, NEW YORK CITY BOARD OF  
ELECTIONS

Defendant.

-----X

INDEX NO. 100296/2021

MOTION DATE 04/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 36, 37, 38

were read on this motion to/for ELECTION LAW - INVALIDATE PETITION.

Upon the foregoing documents, and in accordance with the "So-Ordered" Transcript April 22, 2021 (Lori Sacco, Court Reporter), it is hereby

ORDERED that Petitioner Jacob Jou's petition is dismissed in its entirety; and it is further

ORDERED that Respondent Arthur Schwartz's counterclaim is dismissed without prejudice; and it is further

ORDERED that Petitioner's Reply (NYSCEF doc No. 19) and Respondent's response thereto (NYSCEF doc No. 21) shall not be considered; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

## MEMORANDUM DECISION

In this Election Law proceeding brought pursuant to Election Law §16-102, Petitioner Mr. Jacob Jou (Petitioner) seeks, by Order to Show Cause (“OSC”), an order: (i) declaring that the designating petitions naming Respondent Mr. Arthur Schwartz (Respondent) as a candidate for City Council Member for the 3rd City Council District of New York City (“City Council”) as insufficient, ineffective, false and invalid; and (ii) restraining and enjoining the New York City Board of Elections (“Board of Elections”) from printing the name of Respondent on the official ballots for the Primary Elections to be held on June 22, 2021.

## PROCEDURAL BACKGROUND

Briefly summarized, petitioner alleges that Respondent’s designating petitions, filed with the Board of Elections on March 22, 2021, contain the wrong zip code, and lack the minimum number of signatures required under the Election Law and therefore should be invalidated. Petitioner filed his General Objections and Specification of Objections with the Board of Elections on March 30, 2021 (Affidavit in Opposition to Petition (NYSCEF Doc No. 4), Exhibits F, G and H (NYSCEF Doc Nos. 10, 11,12)).

At the time of the filing of this invalidating petition on April 2, 2021, the General Objections and Specification of Objections had been marked by the Board of Elections as having been filed late (*id.*) and the issue as to the timeliness of Petitioner’s Objections and Specification of Objection was pending before the Board of Elections. This is noted in Respondent’s opposition papers, submitted on April 5, 2021, which primarily focus on the claim that that Petitioner’s filings with the Board of Election were untimely, thereby rendering this Court without jurisdiction in this Special Proceeding (*see* NYSCEF doc No. 4, ¶¶ 6-7). Respondent’s opposition papers further maintain that even if timely, the General Objections and Specification of Objections were defective

on technical grounds, due to improper identification of the challenged petition volumes, and lacking in merit, as petitioner claimed to have more than the requisite 270 signatures for the elected office of City Council (*Id.*, ¶¶8-11).

Without leave of Court, and notwithstanding the OSC's language disallowing the filing of a reply, Petitioner filed his Reply on April 7, 2021 (NYSCEF doc No. 19). The Reply raised new arguments which Respondent responded to on April 8, 2021 (NYSCEF doc No. 21). This Court declines to consider Petitioner's Reply and Respondent's response thereto as both constitute improper filings (*see Loeb v Tanenbaum*, 124 AD2d 941 [3d Dept 1986] ["[A] court may refuse to consider improperly submitted papers."]; *see also WILD WATERS Ltd v Martinez*, 148 AD2d 847 [3d Dept 1989] [papers could be furnished up to time of argument except when OSC contains court direction limiting the time to answer]). Moreover, it is settled that arguments raised for the first time in reply papers are not to be considered (*see e.g., Aboutaam v Dow Jones & Co.*, 180 AD3d 573 [1st Dept 2020], *citing Shia v McFarlane*, 46 AD3d 320 [1st Dept 2007]).

On April 21, 2021, Respondent filed his Answer and Counterclaim (NYSCEF doc No. 39).

#### **April 8, 2021 and April 22, 2021 Microsoft Teams Appearances**

This Court initially scheduled this matter for oral arguments on April 8, 2021 (the April 8 appearance), agreeing to adjourn this hearing until the Board of Elections issued its ruled on the General Objections and Specification of Objections filed by Petitioner, and directed that an update be provided to the Court after said rulings were made. At the same appearance, Petitioner's counsel alleged that Respondent had contacted Petitioner directly, at which time this Court directed Petitioner to file a supporting affidavit as to those claims for consideration. Petitioner filed a supporting Affidavit with exhibits as to this issue on April 8, 2021 (NYSCEF docs No. 25, 26). Respondent submitted opposition to these papers on April 11, 2021 (NYSCEF docs No. 27-29;

32-25). It is noted that at the end of the April 8 appearance, this Court coordinated the next appearance with the Board of Elections, as it was understood that the Board of Elections was required to issue its rulings prior to the next Court appearance for this matter. The Court further indicated on the record that it was anticipated, but not directed, that Counsel would be contacting the Court to convey said rulings after they had been made (Transcript, April 8, 2021).

On April 14, 2021, the Board of Elections ruled on the General Objections and Specification of Objections filed by Petitioner.

On April 22, 2021 (the April 22 appearance or oral arguments), this Court heard oral arguments, again conducted virtually, after which it dismissed this Petition and dismissed Respondent's Counterclaim without prejudice. This decision provides the rationale therefor.

## DISCUSSION

### **Claims as to Timeliness of General Objections and Specifications of Objections**

At the April 22 oral arguments, this Court was advised that while the Board of Elections found the General Objections and Specification of Objections to have been timely filed (4/22/2021 Tr. p. 16), the Specifications of Objections were dismissed because they failed to properly cite the petition volume numbers being challenged (*id.* Tr. p. 6-7, 9, 13). In view of this ruling, the issues raised by Respondent as to both the timeliness of the General Objections and Specification of Objections filed and the technical defects contained therein are deemed moot.

### **Application to Invalidate Petition**

As a preliminary matter, the Court notes that although Petitioner's papers, and indeed his arguments on the record suggest that he is challenging all elected offices sought by Respondent, the only references articulated in the papers identify a challenge to the elected office of City Council (*see* NYSCEF doc No. 1, ¶¶ 1, 2 and 3). Respondent's opposition papers, the Board of

Elections records (Exhibits A-H; NYSCEF docs. No 5-12), and the transcripts of this Special Proceeding confirm that Respondent is indeed running for two elected offices: (1) as Council Member From The Third Council District, New York County, City of New York (City Council); and (2) as Male Assembly District Leader of the 66<sup>th</sup> Assembly District, Part A, New York County, New York State (District Leader).

The Court has fully reviewed the Petition in this matter and finds that it fails identify the elected office of District Leader (*see* NYSCEF doc No. 1, ¶¶ 1, 2 and 3) and only states that it seeks to invalidate “the designating petition purporting to designate [Mr. Schwartz] as candidate of the Democratic Party **for the public office of City Council**, representing the Third District of the City of New York.” (*see* NYSCEF doc No. 3; emphasis added). As such, in accordance with prevailing State law requiring that the petition allege sufficient facts to “establish the petitioner’s right to the particular relief sought,” (*Matter of Murray v Suffolk County Bd. of Elections* (98 AD3d 624 [2d Dept 2012]; Election Law §16-102) this Court deems the within Petition as a challenge solely to Respondent’s candidacy for the elected office of City Council.

As previously stated, Petitioner in this Special Proceeding seeks the invalidation of two of the designating petition volumes filed by Respondent with the Board of Elections, volumes NY2103744 and NY 2103745. It is claimed that both designating petition volumes are invalid because they (1) reflect the wrong zip code for Respondent’s home address; and (2) contain an insufficient number of signatures to support Respondent’s candidacy for City Council.

*Incorrect Zip Code*

With respect to the first prong of his challenge to the number of signatures obtained by Respondent for the elected office of City Council, it is noted that at the April 22 oral arguments, Petitioner conceded that in the absence of proof that Respondent, or those soliciting signatures on

his behalf, intended to confuse those who were invited to sign the designating petitions, or proof that Respondent's address was not located within the proper district,<sup>1</sup> the inclusion of an improper zip code on the cover sheet for the challenged petition volumes was insufficient for invalidation of the challenged petitions (*Matter of Ferris v. Sadowski*, 45 N.Y.2d 815 [1978]; *Merber v Board of Elections*, 172 A.D.3d 624 [1st Dept. 2019]; *Matter of Shahzad v Montesano*, 98 AD3d 625 [2d Dept 2012]). As such, Petitioner withdrew his claims that the challenged petition volumes were invalid predicated upon inclusion of the improper zip code (4/22/2021 Tr. p. 20-21).

### Insufficient Signatures

Petitioner's remaining ground for invalidation of Respondent's designating petitions for City Council is predicated upon a finding that designating petition volumes NY2103744 and NY2103745 are void for insufficient number of signatures.

It is well articulated in Board of Elections' rules that the elected Office of City Council requires 270 valid signatures to remain on the ballot. Given the Board of Elections April 14 decision to keep Respondent on the ballot after Petitioner's challenge to only three of Respondent's designating petition Volumes, and in absence of proof that said decision was not supported by fact, this invalidating petition must be and is, dismissed for failure to meet the requisite burden of proof.

### **Respondent's Alleged Improper Behavior**

Although not part of the instant petition, as a result of representations made on the record at the April 8 appearance, this Court heard the parties as to Petitioner's claim that Respondent engaged in an improper behavior when he contacted Petitioner directly regarding the Objections.

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<sup>1</sup> Even if proof existed that Respondent's residence was not within the district, there is no requirement that the candidate be a resident of the district at the time of the filing of the petition; the only requirement is that the candidate be a resident at the time of the election (Election Law 6-122(3)); *Matter of Clark v. McCoy*, 196 AD2d 607 2d Dept 1993]).

Based on the chronology of events as narrated by the parties at both the April 8 and 22 appearances, the Court finds that further intervention is not warranted as there are other remedies available to the parties, such as the filing of a grievance complaint, which is not within this Court’s purview. For the same rationale, Respondent’s counterclaim for damages is dismissed without prejudice to his right to bring a separate action therefor.<sup>2</sup>

**CONCLUSION**

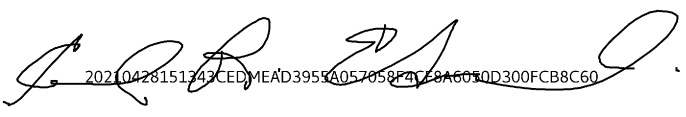
Based on the foregoing, and in accordance with the “So-Ordered” Transcript dated April 22, 2021 (Lori Sacco, Court Reporter), it is hereby

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<u>4/22/2021</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE

<sup>2</sup> At the April 22, 2021, Respondent orally moved to have his counterclaim dismissed without prejudice.