

Clarke v Town of Newburgh
2024 NY Slip Op 35543(U)
October 25, 2024
Supreme Court, Orange County
Docket Number: Index No. EF002460-2024
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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 located at 285 Main Street,
Goshen, New York 10924 on the 25th day of October 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

VAZQUEZ-DOLES, J.S.C.

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.

DECISION & ORDER

Index No.: EF002460-2024

Motion date: 10/29/2024

Motion Seq. No.: 7

The following papers were read on this motion by Defendants to preclude an expert
report and related testimony by Dr. Matt A. Barreto and for such other relief as the Court finds
just and proper:

Notice of Motion/Memo of Law/Affirmation/Ex. A-L.....1-15
Opposition Affirmation/Memorandum/Ex. A-C.....16-20
Reply Affirmation

Defendants failed to establish intentional conduct by Plaintiffs that would support
preclusion at trial the addendum to the expert report of Dr. Barreto (“Barreto Addendum”) and
any testimony that is based upon it. Moreover, any prejudice can be cured by additional time for
Defendants to rebut the new data. Although, Plaintiffs did fail to seek leave for this late expert
disclosure, the Court wants to hear this case fully on its merits and will allow it in. As a result,
the Court i) grants leave for one or both of Defendants’ designated experts for trial to supplement
their prior reports with regard to data addressed by the Barreto Addendum, ii) orders Plaintiffs to

produce Dr. Barreto for a continued deposition as to the Barreto Addendum only, and iii) adjourns the trial of October 31, 2024. Accordingly, the motion is DENIED IN PART.

Plaintiff filed a Complaint that pleads violations of the John Lewis Voting Rights Act of NY (“NYVRA” or “the Act”). The underlying facts are set forth in the Court’s Decision and Order on Motion Seq. #1, dated May 17, 2024. Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The first cause of action asserts that “racial polarization” creates dilution. The second cause of action asserts that under the totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice is impaired. Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer, then filed an Answer on May 28, 2024 after Motion Seq. #1 was denied.

The Act requires that “actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference”. NY Election Law 17-216. In light of those requirements, the Court ordered the parties to appear on May 29, 2024 in order to implement mandated expedited scheduling of the lawsuit. A Preliminary Conference Order was entered on May 10, 2024. The Order required Plaintiffs to disclose experts reports by June 28, 2024 and Defendants to do so by July 2, 2024.

Plaintiff disclosed a report of Dr. Barreto by the June 28 deadline. Plaintiffs then disclosed the Barreto Addendum on September 4, 2024. The Barreto Addendum was the first instance where either of the experts of Plaintiffs in this case set forth a single member district voting system as an example of what might replace the current at-large system. Notably, Plaintiffs acknowledge that such a proposed alternative is an absolute requirement for their claims to proceed:

theory, Plaintiffs must *also* prove that one or more reasonable alternative policies exist that would improve the protected class's representation relative to the status quo. This element follows from the NYVRA's statement of the "[p]rohibition against vote dilution." *Id.* § 17-206(2). A challenged

See Opposition Memorandum of Plaintiffs to Motion Seq. #5. Thus, the Barreto Addendum was critical to the viability of the Complaint herein and was not merely a supplement with some modified wording or tangential opinions of their expert.

Defendants sent an email to Plaintiffs that same day of September 4 rejecting the Barreto Addendum as untimely. Dr. Barreto was deposed as scheduled on September 13, 2024 by Defendants. Defendants explicitly declined to question him on the content of the Barreto Addendum when the witness mentioned it. Ex. N to Motion Seq. #5 at pp. 9-10.

The Court set this trial to begin on October 31, 2024. Defendants filed a motion for summary judgment on October 10, 2024 (Seq. #5). Plaintiffs' opposition to Motion Seq. #5 includes the Barreto Addendum. (The instant motion, however, is directed only to the preclusion of the Barreto Addendum at trial and has no bearing on the pending summary judgment motion.)

A party aggrieved by the failure of another party to comply with discovery demands or orders concerning the demands can seek relief pursuant to CPLR 3124. The Court has discretion to impose discovery sanctions, including the striking of a pleading or the preclusion of evidence, where a party refuses to obey a discovery order or willfully fails to disclose information that ought to have been disclosed. CPLR 3126, *Galarza v. 25 Hope Street Assoc.*, 209 AD3d 984 (2d Dept 2022). The nature and degree of the penalty lies within the sound discretion of the Court. *Id.*

“CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.”

Aversa v Taubes, 194 AD2d 580 (2d Dept 1993). The exclusion of an expert at trial based on late disclosure is consequently rarely imposed as a form of relief.

In *Rowan v Cross-Country Ski and Skate*, 42 AD3d 563 (2d Dept 2007), the court denied a motion to exclude an expert where “disclosure of the expert information was not made on the eve of trial since the plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin” and “potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial.” Compare *Krimkevitch v Imperiale*, 104 AD3d 649 (2d Dept 2013) (expert report exchanged “immediately before trial” justified exclusion of expert testimony because opposing party had “no opportunity” to prepare or rebut the report).

Here, the Barreto Addendum was served almost two months before trial, four times as long as the two weeks in *Rowan* that the Second Department held was sufficient. The Barreto Addendum was dated September 3, 2024, the day before it was served, indicating that it was not prepared earlier in the case and then held by Plaintiffs until they disclosed it late. To the contrary, Defendants themselves posit that Dr. Barreto realized his report needed further data upon review of a similar case and expert report filed in another county.

Defendants preserved their objection to the untimely disclosure in both their email and at the Barreto deposition the following week. However, they filed the instant motion one and a half months after receiving the Barreto Addendum as a motion in limine, within 15 days of trial. As a result, the Court exercises its discretion to deny the relief requested by Defendants to preclude

Dr. Barreto's testimony in light of the lack of intentional conduct and the ability of the Court to ameliorate any prejudice to Defendants.

The Court will allow the Addendum of Dr. Barreto and any related testimony, adjourn the October 31, 2024 trial, and allow Defendants, to the extent they so choose, to amend the reports of their two experts for trial by modifying and supplementing those reports as to the facts, issues and opinions in the Barreto Addendum. Although Defendants received the Barreto Addendum nine days before his deposition and 45 days before trial, the Court will allow Defendants adequate time to prepare for a further deposition of Dr. Barreto limited to the Addendum.

As a consequence of this further discovery, which is required to hear the case fully on its merit, the trial of October 31, 2024 is adjourned *sine die*. The Court is mindful of the requirements of NY Election Law 17-216 and the requirement of a calendar preference for this trial. Therefore, the trial will be rescheduled for as soon as practicable based on the completion of the remaining expert disclosure.

Upon the foregoing, it is hereby

ORDERED that Defendants' motion is **DENIED IN PART**, and it is further

ORDERED that Plaintiff's expert report addendum of Dr. Barreto is allowed for trial through the Court's discretion despite its untimely submission, and it is further

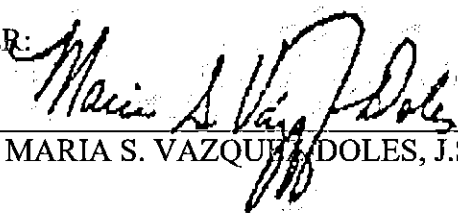
ORDERED that Defendants are allowed to supplement their expert reports no later than November 25, 2024 and further depose Dr. Barreto only on his Addendum on a date mutually agreed with Plaintiffs that is no later than November 25, 2024, and it is further

ORDERED that the trial date of October 31, 2024 is adjourned *sine die*.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 25, 2024
Goshen, New York

ENTER:


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