

NYSCEF DOC. NO. 145

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11/1/2024

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Denied. The Defendants had the Dr. Barreto report months before it filed its Summary Judgment motion and could have included the contents thereof into its motion but chose not to do so. The motion to exclude the expert came after the motion for Summary Judgment and the court will address the motion as originally filed. The court will schedule the trial in the Summary Judgment decision and order if it is unfruitful. Until then, the parties are directed to follow the court's previous directive with regard to Dr. Barreto's further EBT and Defendant's supplemental expert report, if any.

November 1, 2024

Judge Maria S. Vazquez-Doles
New York Supreme Court, Orange County
285 Main Street
Goshen, New York 10924

So Ordered,
Maria S. Vazquez-Doles, J.S.C.

Re: Oral Clarke, et al. v. Town of Newburgh, et al. (Index No. EF002460-2024; Orange Cnty.)

Dear Justice Vazquez-Doles,

We represent Defendants Town of Newburgh and Town Board of the Town of Newburgh (together, "Defendants") in the referenced matter. Defendants respectfully request the opportunity to supplement their pending Motion for Summary Judgment to address conclusions and data contained in Dr. Matt A. Barreto's September 3, 2024 "Expert Report Addendum" (the "Addendum"), Dr. Barreto's forthcoming deposition testimony, and Defendants' potentially forthcoming supplemental expert report(s). The grounds for this request are as follows.

On October 16, 2024, Defendants filed a motion *in limine* to exclude the Addendum and any related testimony at trial. NYSCEF Doc. No. 126. The basis for the motion was that the Addendum was untimely, and Plaintiffs had not sought leave of Court to issue it. Defendants therefore objected to the Addendum and informed Plaintiffs of their position. Plaintiffs never requested leave to file the Addendum.

On September 25, 2024, Defendants filed their Motion for Summary Judgment. NYSCEF Doc. No. 70. At that time, Plaintiffs still had not filed leave to issue the Addendum and, therefore, Defendants did not address it in their briefs in support of summary judgment. NYSCEF Doc. Nos. 70, 129. Plaintiffs, however, referred to it extensively in their opposition brief. NYSCEF Doc. No. 73.

On October 25, 2024, the Court denied Defendants' motion *in limine* to exclude the Addendum but, "to ameliorate any prejudice to Defendants," adjourned the trial dates so that Defendants could (i) depose Dr. Barreto concerning the Addendum, and (ii) supplement their expert reports to respond to "facts, issues and opinions" contained in the Addendum. NYSCEF Doc. No. 141 ("Order") at 5. Pursuant to the Court's October 25, 2024 Order, Defendants have noticed Dr. Barreto's deposition for November 14, 2024 and intend to supplement their expert reports in advance of the Court's November 25, 2024 deadline. Order at 5.

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Given that Defendants' pending motion for summary judgment has the potential to resolve this case before trial, and, further, as the Court's decision permitting the Barreto Addendum and directing additional discovery was issued after prior briefing on the pending motion for summary judgment was completed, Defendants now request the opportunity to supplement their pending motion to address the Barreto Addendum based on the additional discovery and supplemental reports that this Court permitted.

The opportunity to supplement the summary judgment briefing is entirely consistent with the Court's Order. Specifically, permitting Defendants to supplement their pending motion in this manner will (i) mitigate the prejudice this Court identified, Order at 1, 5, and (ii) permit the Court to rule on the motion "fully on its merits," Order at 1. Defendants request the opportunity to supplement their Motion for Summary Judgment by December 20, 2024. Plaintiffs do not consent to the relief requested herein.

Finally, Defendants are aware that this Court intends to reschedule this trial for "as soon as practicable based upon a completion of the remaining expert disclosure." Order at 5. To that end, Defendants request that trial be rescheduled no earlier than January 1, 2025, because counsel for Defendants will be in trial in a different case between December 9 and 20, 2024.¹ Plaintiffs have long been on notice of Defendants' counsel's other trial, including when discussions about scheduling the prior trial date took place. Indeed, in a letter to Your Honor dated August 26, 2024 (NYSCEF Doc. No. 39, p.1), Plaintiffs expressly referenced this conflict when requesting a November trial date:

Counsel for the defendants are on trial, however, from December 9, 2024 through December 20, 2024, in representing the County of Nassau in *Hazel Coads et al v. Nassau County et al*, Index No. 611872/2023 (Nassau Cnty. St. Sup. Ct.) a separate challenge to their county legislature district maps (also under the New York State Voting Rights Act). Because counsel for the defendants are unavailable in December, and as they are available in November with the exception of the week of November 25, a November court date is necessary.

On behalf of Defendants, we thank the Court for the opportunity to address this issue.

Respectfully submitted,

/s/ Bennet J. Moskowitz
Bennet J. Moskowitz

¹ The pretrial conference in *Hazel Coads et al v. Nassau County et al*, Index No. 611872/2023 (Nassau Cnty. St. Sup. Ct.) is scheduled for December 4 and 5, 2024.