

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

KENNETH YOUNG,

Plaintiff,

-vs-

TOWN OF CHEEKTOWAGA,

Defendant.

Index No. 803989/2024

Hon. Paul B. Wojtaszek, J.S.C.
Assigned Justice

PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

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-and-

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PRELIMINARY STATEMENT

“Pay no attention to that man behind the curtain!”

“The Wizard of Oz” (1939)

Defendant, the Town of Cheektowaga, would have this Court proceed to determine Plaintiff Kenneth Young’s motion for partial summary judgment and the Town’s cross-motion for summary judgment based on information in the record that is stale or otherwise incorrect – information the Town inexplicably continues to present even in the “amended” motion papers it filed on September 3, 2024. The Town would have this Court turn a blind eye to the facts that the Town began, but abandoned in August 2024, efforts to implement a ward-based voting system it had planned to adopt through a series of resolutions passed earlier that year and that the Town historically has used such a system despite its current claims that the implementation of such a system under the New York State Voting Rights Act (“NYVRA” or the “Act”) would be unconstitutional. The Town invites this Court to pretend as though the Town never stalled the effectuation of those resolutions; indeed, the Town wrongly continues to represent to this Court that its plans for a ward system continue. The Town hopes that by having any information regarding its abandonment of those plans “stricken,” its change of position will remain “off-the-record,” behind the curtain.

The Town tries to persuade this Court to erase this important, updated information from the record by claiming it is new matter submitted only in the way of a reply. That claim is simply wrong. Not only does the matter relate to and correct material previously submitted by both parties that calls for correction and further explication, but its submission was made not merely in reply but in principal opposition to the Town’s amended cross-motion and as Mr.

Young's only rebuttal to the points (including the factually incorrect ones) made in that cross-motion. In any event, correction and supplementation of the record by Mr. Young's October 7, 2024 papers was both procedurally appropriate under the CPLR and ethically required of counsel.

It is respectfully submitted that denial of the Town's motion to strike would be legally appropriate and an appropriate exercise of this Court's discretion. This is especially so because the Town had a fair opportunity to address the material in question in its subsequent reply memorandum but chose not to do so. It presumably can address the material during oral argument and obviously knew of the matter, as it was the one responsible for the change in circumstances to which the matter relates. Hence, the matter comes as no surprise and the Town has not been prejudiced in any way by its presentation.

In addition, consideration of the matter at this time would promote judicial economy and obviate the need for additional motion practice and associated costs.

FACTS¹

Throughout the course of this action the Town has contended that Mr. Young is not entitled to relief and that the Town is entitled to prevail because, following receipt of Mr. Young's December 12, 2023 letter notice of an NYVRA violation, the Town adopted a series of resolutions to remedy any possible violation of the Act. One of the remedies, which was addressed in Town Board resolutions from January to August 2024, was the very one Mr. Young had proposed, and one specifically endorsed by the Act itself: a change from an "at large"

¹ Familiarity with the facts presented in the papers submitted by the parties in regard to Mr. Young's motion for partial summary judgment and the Town's cross-motion for summary judgment is presumed. Those motions are scheduled to be argued herewith. Mr. Young's motion papers [NYSCEF Doc. Nos. 30-36, 83-139] are incorporated herein. (Duplicate sets of the materials included within Nos. 83-139 apparently appear on the docket due to the settings of the NYSCEF computer system.)

system of elections to a ward system. Indeed, the Town publicly said it had planned to put the adoption of a ward system up for a public referendum in November 2024. Mr. Young has contended in this action that the Town's efforts in that regard, although headed in the right direction, were insufficient to remedy any violation and otherwise comply with the Act.

Mr. Young moved for partial summary judgment on May 20, 2024. In his supporting papers he addressed in detail the Town's referenda and its announced efforts to move toward a ward election system.

On June 12, 2024, the Town responded to Mr. Young's motion and cross-moved for summary judgment. In its responding/moving papers, the Town argued vigorously and extensively that Mr. Young is not entitled to relief and that the Town has a full defense to the action because of its then-continuing efforts to move toward a ward system. The Town contended that those efforts put the Town into compliance with the Act and rendered Mr. Young's action premature, and that the present action therefore was tantamount to a request for an "advisory opinion" by this Court. The Town purposefully included in its motion papers copies of Town resolutions announcing that "the Town remains steadfast in its efforts to create a ward system of election" and intends "to enact and implement remedies, including a ward-based system of election, for any potential violation of the NYVRA that may exist" (emphasis added). See Affirmation of Daniel A. Spitzer, Esq., dated June 12, 2024 at 6, ¶ 26 and Exh G thereto at 2 [NYSCEF Doc. Nos. 39, 46]. The Town's counsel expressly advised this Court in that supporting affirmation that "On March 12, 2024, the Town Board passed Resolution 2024-138, which directed that a referendum to enact a ward system be held during the November 2024 election and listed specific steps for the creation of a draft ward plan. . . . If the referendum fails, the Town Board could ask the Attorney General to assist in implementing the ward system. . . ."

Id. at 6, ¶ 25. He further contended to this Court, “If the referendum is approved, then this Court will have wasted its resources and unnecessarily interfered in the election system since the ward system would be implemented absent Court action.” Id. at 7, ¶ 30. He added that this Court is being requested to take action in respect to the implementation of a ward system that “the Town is already taking.” Id. at 8, ¶ 35.

In August 2024, after Mr. Young’s and the Town’s competing motions were filed and after the Town repeatedly had touted its “steadfast” efforts to adopt a ward system, the Town did an about-face by abandoning its efforts to complete the purely administrative steps needed to place the ward referendum on the ballot. This prompted a remote pretrial conference with this Court on August 12, 2024, because the Town’s opposition to Mr. Young’s motion and its own cross-motion made so much of those previous efforts. Consistent with the arrangements agreed upon during that conference, a new briefing schedule was implemented to accommodate the Town’s submission of any revised/amended motion papers to account for the Town’s abandonment of those efforts. According to that schedule, on September 3, 2024, the Town filed “amended” cross-motion papers, including an amended notice of motion, an amended affirmation by Mr. Spitzer, an amended counterstatement of material facts, and an amended memorandum of law.

On October 7, 2024, Mr. Young then filed the papers as to which the Town’s present motion to “strike” is addressed. It is critical to recognize that, contrary to the suggestions made in the Town’s papers, Mr. Young’s October 7 papers were not only reply papers,² they also were papers responding to the Town’s cross-motion for summary judgment. This is made clear by

² At paragraph 10 of Attorney Spitzer’s October 18, 2024 Affirmation [NYSCEF Doc. No. 146] and pages 1 and 3 of the Town’s Memorandum of Law of the same date [NYSCEF Doc. No. 147], the Town all-too-cleverly abbreviates Mr. Young’s October 7 submissions as “Borek Reply Affirmation,” “Plaintiff’s Reply Memorandum of Law,” and “Plaintiff’s Reply Papers.” The Town would have this Court overlook or ignore the fact that those papers also served as Mr. Young’s response to the Town’s cross-motion for summary judgment.

both their contents and their full titles: “Affirmation of Gary D. Borek, Esq., in Further Support of Plaintiff’s Motion for Partial Summary Judgment and in Opposition to Defendant’s Cross-Motion for Summary Judgment”; “Memorandum of Law in Further Support of Plaintiff’s Motion for Partial Summary Judgment and in Opposition to Defendant’s Cross-Motion for Summary Judgment”; and “Plaintiff’s Response to Defendant’s Statement of Undisputed Material Facts 22 NYCRR 202.8-g” (emphasis added). By those papers Mr. Young responded, and had the right – indeed, he had a statutory responsibility under Rule 3212 of the CPLR – to adduce all relevant facts in opposition to the Town’s cross-motion.

On October 18, 2024, the Town made the present motion to “strike” material from Mr. Young’s October 7 response/reply papers. In support of that motion, Attorney Spitzer avers that “the Town’s Amended Opposition and Cross-Motion Papers neither discuss nor rely upon the Town’s prior efforts to enact a ward system.” Spitzer Affirmation in Support of Motion to Strike, dated October 18, 2024 [NYSCEF Doc. No. 146] at 2. Likewise, at page 5 of its Memorandum of Law in Support of Defendant’s Motion to Strike [NYSCEF Doc. No. 147], the Town represents to this Court that its amended cross-motion “does not contain any reference to the Town’s efforts to adopt a ward system” and that “[t]he Town’s August 2024 ward efforts are simply not an issue before this Court.” Those representations are demonstrably untrue. Mr. Spitzer either forgets or ignores the following averment he himself made only a month before in one of the very papers he references:

42. Plaintiff’s complaint demands that this Court, among other things, force the Town to adopt a district system of voting for all future elections – an action the Town is already taking.

Amended Spitzer Affirmation in Opposition to Plaintiff’s Motion for Partial Summary Judgment and in Support of Defendant’s Cross-Motion for Summary Judgment, dated September 3, 2024

[NYSCEF Doc. No. 56] at 9, ¶ 42 (emphasis added). Mr. Spitzer makes that averment under the heading “**A Remedy is Implemented – And Plaintiff Ignores It**” in furtherance of his effort to convince this Court Mr. Young’s action is premature and seeks some sort of “advisory opinion.” More specifically, Mr. Spitzer suggests that because the Town “is already” in the process of implementing a ward system of elections in response to Mr. Young’s letter notice of a NYVRA violation, this Court should decline to award Mr. Young relief in this litigation.

That is not the only such averment Mr. Spitzer makes in his amended motion papers. He likewise avers:

16. In response to the Letter, the Town immediately investigated Plaintiff’s allegations and established a plan to determine and implement the proper remedy(ies) for the potential NYVRA violation that, unlike Plaintiff’s proposed remedy, would comply with applicable laws.

17. On January 9, 2024, the Town Board passed Resolution 2024-34 to invoke the safe harbor provision of the NYVRA; state its intention to enact and implement a specific remedy; and establish steps and a timeline for the enactment and implementation of such, in compliance with N.Y. Elec. Law § 17-206(7). A true and accurate copy of Resolution 2024-34 is attached as **Exhibit B**.

18. On February 5, 2024, the Town Board passed Resolution 2024-50, which affirmed the Town’s continued review of the potential NYVRA violation and intention to enact and implement specific remedy(ies); reiterated the timeline for the enactment and implementation of such; and enumerated specific steps for the same. A true and accurate copy of Resolution 2024-50 is attached as **Exhibit C**.

* * * *

39. Notwithstanding these remedies, on March 8, 2024, Plaintiff filed the instant action alleging that the Town was in violation of the NYVRA.

(Emphasis added.) Because the only “remedy” mentioned in Resolution 2024-34 is the very ward system that had been proposed by Mr. Young and the only “remedies” mentioned in Resolution 2024-50 are the ward system and term limits, Mr. Spitzer’s averments unarguably

include and depend upon the ward system.³ Mr. Spitzer again attached the resolutions to implement the ward system to his September 3 “Amended Spitzer Affirmation.” Hence, contrary to Mr. Spitzer’s representation, his most recent summary judgment papers indeed both “discuss [and] rely upon the Town’s prior efforts to enact a ward system.” [Docket No. 146 at 2, ¶ 9; 3, ¶ 22].

Like the Amended Spitzer Affirmation, the Town’s September 3, 2024 Amended Counterstatement of Material Facts [NYSCEF Doc. No. 67], which, too, was submitted after the Town abandoned efforts to implement a ward system, continues to reference such efforts and utterly fails to disclose that those efforts had been abandoned within the preceding few weeks.

See p. 6, Response No. 17:

. . . Resolution 2024-34 repeatedly and specifically stated the Town’s intention to implement the appropriate remedy(ies). See Spitzer Aff. ¶ 17 (Ex. B, §§ 3-4). Further, the State has implemented a remedy ignored by Plaintiffs—the recent amendment to Town Law § 80. The Resolution also specifies a ward plan as a specific remedy. See Spitzer Aff. ¶ 7 (Ex. B, §§ 4).

(Emphasis added.) See also pp. 6-7, Response No. 18:

Resolution 2024-34 lists a number of steps the Town would undertake to approve and implement the specific remedy including, but not limited to, engaging expert consultants and holding public hearings to obtain input from citizens regarding the composition of new election districts. Spitzer Aff. ¶ 7 (Ex. B §§ 1-4). And the Town took those steps.

(Emphasis added.) See also p. 7, Response 21:

Resolution 2024-50 contains an intention to enact and implement specific remedies—a ward voting system and term limits. See Spitzer Aff. ¶ 18 (Ex. C

³ Although Referendum 2024-50 mentions term limits as a possible remedy, the Town does not argue that such a measure has any bearing on this case. Moreover, although that referendum, after addressing a ward system as a possible remedy, says the Town will “consider [the] impact [of] higher voting turnout during state elections, which in the future will be held at the same time as Town elections,” the referendum does not present such consideration or the New York State Legislature’s amendment of Town Law § 80 as any sort of “remedy” to the Town’s NYVRA violation. [NYSCEF Doc. No. 59]

§§ 1-2).

(Emphasis added.)⁴

Hence, the Town continues in its “amended” motion papers to reference the efforts to implement a ward system. As shown above, it goes so far as to represent (upon information and belief, falsely) that the Town is still “taking” measures to adopt such a system.

The Town then, after having had over a month to consider Mr. Young’s October 7, 2024 response/reply papers, including all the matters it addresses in its motion to “strike,” submitted its reply memorandum on November 11, 2024.

As discussed further below, given the facts that: (1) the Town’s prior efforts to implement a ward system already had been addressed in detail in Mr. Young’s original moving papers of May 20, 2024; (2) those efforts were touted in the Town’s original cross-motion papers of June 12, 2024; (3) the Town jettisoned those efforts in August 2024 after the filing of those papers and during the pendency of the summary judgment motions; and (4) the Town continues to reference those efforts and incorrectly suggests they continue in its “amended” cross-motion papers of September 3, 2024, it was imperative for Mr. Young to ensure the correctness and integrity of the record by advising this Court of the Town’s abandonment of those efforts and to discuss the Town’s about-face in responding to the Town’s “amended” cross-motion. The Town’s abandonment of those efforts prior to a hearing of the present summary judgment motions is a critical change in circumstances of which this Court needed to be aware. The record otherwise would have led this Court to believe that the Town maintains a “steadfast”

⁴Remarkably, the Town continues in its amended cross-motion to tout its effort to adopt a ward system while, out of the other side of its mouth, arguing in the same papers that the adoption of that very remedy in the circumstances of this case would violate the Fourteenth and Fifteenth Amendments to the United States Constitution. See, e.g., Town’s Amended Memorandum of Law [NYSCEF Doc. No. 68] at 23-24 and discussion infra at 10-12.

commitment to a ward system and to proceed to resolve the pending motions based on incorrect and incomplete knowledge of the true and current facts.

DISCUSSION

I. THE TOWN MISCHARACTERIZES THE PROCEDURAL POSTURE, NATURE, AND PURPOSE OF THE SUBMISSIONS AT ISSUE.

As stated above, the Town's motion to strike is premised on the incorrect and misleading assertion that Mr. Young's October 7, 2024 papers are simply reply papers. In an effort to support that artifice, the Town even ignores the actual titles of the documents and abbreviates them as "replies." But both the contents and full titles of those papers show that they also are submitted as principal and direct opposition to the Town's cross-motion for summary judgment. Consequently, they may contain any facts, statements, exhibits, and arguments Mr. Young considers relevant in responding to the Town's cross-motion.

In this regard, it has been firmly established that "[i]n opposing a motion for summary judgment, once a prima facie showing has been made,⁵ it is incumbent . . . to come forward with matters of an evidentiary nature to demonstrate the presence of a triable issue. The [non-moving party] is required to assemble, lay bare and reveal his proofs. . . ." Chemical Bank v. Queen Wire & Nail Inc., 75 A.D.2d 999, 1000, 429 N.Y.S.2d 100, 102 (4th Dept. 1980). Especially because the Town persists in its amended cross-motion papers to reference its efforts to establish a ward system and leaves a misimpression on the record that those efforts continue, it has been

⁵ Here, the Town has not made a prima facie showing of its entitlement to summary judgment, Mr. Young has, and there are no triable issues of fact in respect to the partial relief Mr. Young requests; however, common sense and conservative strategy have dictated that Mr. Young nonetheless come forward with relevant facts in opposing the Town's cross-motion.

necessary for Mr. Young, in meeting his burden under Rule 3212 of the CPLR, to correct the record and present the true and current facts to this Court.

Indeed, under the circumstances, it was imperative that Mr. Young bring to the Court's attention that, during the pendency of the present summary judgment motions, the Town jettisoned wholesale one of the remedies it has been touting as complying with the NYVRA and rendering Mr. Young's motion premature. It was imperative to correct any false impression left by the Town's most recent papers, which were submitted after the Town abandoned the implementation of a ward system, that the Town was and is somehow continuing to pursue such a remedy. It can be ventured to say that if the parties failed to disclose this critical change in circumstances and the Court later learned about it only after rendering a decision on the summary judgment motions, the Court would have quite pointed – and quite apt – questions of counsel as to why no one previously had brought the developments to the Court's attention.

Citing the Second Department's decision in Citimortgage, Inc. v. Espinal, the Town acknowledges that even reply papers properly may respond to new allegations raised in opposition papers. Here all the allegations raised by the Town were new, insofar as they were raised for the first time in the Town's cross-motion, to which Mr. Young was responding for the first time.

The material in question is highly relevant to the issues raised in this action. Indeed, one of the Town's principal defenses and arguments in its cross-motion is that the NYVRA is unconstitutional, across-the-board and on its face, because it calls for the implementation of district voting systems. The Town argues, wrongly, that any such implementation necessarily would involve the use of race as a predominant factor, would constitute impermissible gerrymandering, and would require the Town to violate constitutional rights. See, e.g.,

Defendant's Amended Memorandum [NYSCEF Doc. No. 68] at 16 ("the NYVRA forces municipalities to eliminate their at-large election systems and adopt electoral systems that elevate the votes of minority voters over that of the votes from the racial majority"); *id.* at 18 (the NYVRA unqualifiedly "calls for racial gerrymandering"); *id.* at 23 ("Where, as here, the remedy at issue involves establishing districts, race becomes the 'predominant factor motivating the [municipality's] decision to place a significant number of voters within or without a particular district.'") (citation omitted); *id.* ("the NYVRA improperly compels, or at the very least coerces, racial gerrymandering where the implementation of districts or wards is deemed the appropriate remedy for a NYVRA violation"); *id.* at 24 ("... [T]he NYVRA inevitably coerces municipalities to engage in racial gerrymandering to avoid NYVRA liability."); Defendant's Reply Memorandum [NYSCEF Doc. No. 153] at 14 ("The purpose of the imposition of districts will be to effectively reserve seats for candidates supported by a particular protected class—i.e., racial groups. This is in direct conflict with the Fourteenth Amendment and Article I, Section 6 of the New York State Constitution."). In view of these defenses and arguments, it is unquestionably relevant that the Town itself passed a series of resolutions in 2024, as well as prior historical measures, to implement precisely the sort of ward system it claims is unconstitutional. It did so in reliance on ward maps proposed by Mr. Young and its own consultant, and it was comfortable that the system, using those maps, would be NYVRA-compliant and otherwise proper. It is unquestionably relevant that those resolutions remain on the books and have not been rescinded despite the Town's abandonment of efforts to proceed with implementation. It is certainly relevant to show that the Town Board still has not followed-through with any acceptable remedy for the NYVRA violation.

The material Mr. Young included in his October 7 response to the Town's cross-motion for summary judgment relating to the Town's prior implementation and use of a ward system likewise is relevant in this respect. It demonstrates that the Town historically has used such a system and the ease with which it was implemented. Mr. Young was not required to include this evidentiary material in his complaint or his original motion papers; he appropriately submitted it in response to the Town's cross-motion. In any event, the Town certainly had an opportunity to address the material in its November 11 reply memorandum but for whatever reason elected not to do so. It should not now be heard argue that this Court should strike material it chose to ignore.

II. INFORMING THE COURT OF CHANGED/RECENT DEVELOPMENTS WAS NOT ONLY APPROPRIATE BUT ETHICALLY REQUIRED.

Even if Mr. Young's October 7 papers had been submitted only for the purpose of reply, it nonetheless would have been both proper and necessary for him to bring the matters in question to the Court's attention. Developments and new facts discovered during the pendency of a motion can and should be brought to the Court's attention in reply papers if they have the potential to affect the Court's ultimate decision. See Glenmark, Inc. v. Carity, 34 Misc.2d 874, 877, 229 N.Y.S.2d 255, 258 (S. Ct. N.Y. County) ("Yet facts which came to plaintiff's attention during the pendency of this motion, and which they themselves submit in a reply affidavit, require a denial of this branch of the motion."), modified on other grounds, 17 A.D.2d 126, 232 N.Y.S.2d 444 (1st Dept. 1962). Here, the state of the record, including the averments and statements made in the Town's amended cross-motion papers, if left uncorrected and unrebutted, would have left this Court with the impression that the Town's measures to adopt a ward system continue. See, e.g., Amended Spitzer Affirmation [NYSCEF Doc. No. 56] at 9, ¶ 42 ("Plaintiff's

complaint demands that this Court . . . force the Town to adopt a district system of voting for all future elections – an action the Town is already taking”) (emphasis added). There was a risk the Court would decide the motions based on stale and erroneous information. The Town’s implication that Mr. Young should have let such untrue information remain in the record uncorrected is absurd.

More fundamentally, the material in question simply does not constitute the type of “new matter” that ordinarily should not be included in reply papers. It is simply an update of matter that already had been addressed in both Mr. Young’s original motion papers and the Town’s original and amended cross-motion papers, i.e., the full history of the Town’s 2024 resolutions relating to the adoption of a ward system, and a statement of relevant prior history relating to the Town’s implementation and use of such a system. For this reason as well, inclusion of such material does not fall within the ordinary disinclination against including new matters or issues in reply papers, and the material should not be stricken.

Moreover, Rule 3.3 of the New York Rules of Professional Conduct, 22 NYCRR Part 1200, provides in relevant part:

CONDUCT BEFORE A TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]
- * * * *
- (3) offer or use evidence that the lawyer knows to be false. If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The New York State Bar Association’s Comment 10 to the Rule states in relevant part: “A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. . . . In such situations, . . . the lawyer must take reasonable remedial measures.”

The Rule reasonably must be read to require a lawyer to inform a court if any facts the lawyer previously presented have ceased to be true. Here, facts presented by both parties regarding the status of the Town’s efforts to implement a district system ceased to be true in August, when the Town abandoned those efforts. The Town’s attorneys certainly should not have continued in their amended cross-motion papers to suggest that the efforts continued, but in any event, Mr. Young’s counsel had an obligation to update facts previously put on the record and should not be faulted for doing so.

III. THE COURT SHOULD CONSIDER THE MATERIAL IN QUESTION AS A MATTER OF DISCRETION, PARTICULARLY AS THERE HAS BEEN NO PREJUDICE TO THE TOWN.

The Town had more than ample opportunity to address the material in question in its reply memorandum, which it submitted on November 11, 2024, and this Court presumably will afford the Town further opportunity at the time of oral argument to try to explain why, in its view, its abandonment of efforts to implement a ward system do not undermine its position in this action. Consequently, the Town’s motion to “strike” should be denied. See Bayly v. Broomfield, 93 A.D.3d 909, 910-11, 939 N.Y.S.2d 634, 636 (3d Dept. 2012) (“[R]egardless of how the [reply] affidavit is characterized, the fact remains that defendant had ample opportunity to respond to it during oral argument As a result, the court did not abuse its discretion by considering it. . . .”); Ellison v. Chartis Claims, Inc., 53 Misc.3d 1203, 46 N.Y.S.3d 474, 2016

WL 5375664 at *20-21 (S. Ct. Kings County, September 23, 2016) (denying motion styled as one to “strike” portions of reply papers where moving party had opportunity to respond to the material raised therein and was afforded opportunity to address it at oral argument).

The Town has experienced no unjustified prejudice, nor will it experience any. The Town has known of the information in question at all times, and it comes as no surprise. On the contrary, Mr. Young has been prejudiced by the Town’s failure to acknowledge its abandonment of a ward system during the pendency of the present motions, its failure to correct the record in this regard, its continued implications on the record it has continued to pursue a ward system, and his consequent need to present these developments on the record and respond to the Town’s misguided motion to “strike.”

The Town plainly made a tactical decision not to address its abandonment of efforts to implement a ward system in its November 11 reply memorandum and instead to make this motion to strike matter from Mr. Young’s papers relating to the Town’s change of position and its legal implications. Recognizing that its change of position has wholly undermined its litigation position, the Town has sought to scrub any reference to it from the record. By this tactic the Town has sought to have this Court decide the summary judgment motions ignorant of this important change in circumstances. It is respectfully submitted that such gamesmanship should not be countenanced.

**IV. DECLINING TO CONSIDER THE MATERIAL AT ISSUE
AT THIS TIME WOULD RESULT IN ADDITIONAL MOTION
PRACTICE AND A WASTE OF JUDICIAL AND PARTY RESOURCES.**

Granting the Town’s motion to “strike” and declining to consider the highly relevant material at this phase could lead to unsalutary results and would be wholly inconsistent with

judicial economy. Should the Court decline to consider the material and deny Mr. Young's motion for summary judgment, he would have the opportunity to move to renew the motion to include the material consistent with Rule 2221(e)(2) of the CPLR (motion to renew premised on "new facts not offered on the prior motion"). This Court should obviate the risk of such needless additional litigation, which would only consume more of the Court's time, prolong the proceedings, and unjustifiably increase litigation costs. That is especially so because the Town has had ample time to respond to the material in question.

CONCLUSION

It is respectfully submitted that the Town's motion to "strike" should be denied.



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CERTIFICATION PURSUANT TO SECTION 202.8-b(c)
OF THE UNIFORM CIVIL RULES FOR THE
SUPREME COURT AND THE COUNTY COURT

I certify that the foregoing document contains 5,098 words, including the caption, signature block, and any table of contents or table of authorities and complies with the combined word count limits in Section 202.8-b(a) and (e).

Dated: Buffalo, New York
May 30, 2025



Mark R. Uba

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