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 17th day of May 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

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: 5/2/2024
Motion Seq. No.: 1

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Defendants to dismiss the Complaint pursuant to CPLR §3211(a)(1) and (7):

Notice of Motion/Memo of Law/Affirmation/Ex. 1.....1-4
Opposition Affirmation/Memo of Law/Ex. A-B.....5-8
Amicus Brief of the NY Attorney General.....9
Reply Memo of Law.....10

Summary of the Decision

Defendants failed to establish that Plaintiffs' Complaint does not set forth a claim for a violation of the John Lewis Voting Rights Act of NY ("NYVRA" or "the Act"). Defendants' challenge to the Complaint is based only upon whether the instant lawsuit was filed prematurely. Had Defendants passed a timely resolution that satisfied the requirements of the Act, it would have triggered the Act's 90 day "safe harbor" during which Plaintiffs could not file suit.

However, the resolution that Defendants passed does not satisfy the three elements in the Act because it lacks the intention to enact and implement specific remedies, the steps to accomplish that process, and a timetable for implementation. Defendants' resolution is bereft of

any remedy, specific or otherwise, for Plaintiffs' claims. Instead, Defendants enacted only a plan to investigate whether a violation of the Act is ongoing, a process that the Act does not authorize and that does not satisfy the requirements to trigger the 90-day safe harbor.

Therefore, the lawsuit is not premature. The Complaint states a claim for a violation of the Act. Defendants' motion to dismiss is DENIED.

Facts Underlying the Complaint

Plaintiffs are residents of the Defendant Town of Newburgh ("the Town"). They are members of the Black and Hispanic communities, which comprise a minority of the population of the Town. Plaintiffs assert that the two communities combined comprise 40 percent of the population.

The Town holds elections on a periodic basis for voters to choose members of Defendant Town Board of Town of Newburgh ("the Board"). The election process provides for voters living anywhere in the Town to vote for each of the open Board seats in each election. Plaintiffs assert that no member of their two communities has ever been elected to the Board, dating to the Town being founded in 1788. They also assert that no members of their communities have been candidates for election in the Town since 2011 because of the alleged impracticability of becoming elected. Plaintiffs allege that most of the population will not vote for Black or Hispanic candidates.

As discussed in greater detail, infra, New York passed the Act as a means by which an aggrieved person can petition their municipality to make changes to the voting system to enhance the potential for the election of members of a qualifying minority population. The first step in that process is sending a letter to assert violations of the Act. The receiving municipality then has 50 days in which to take action on the letter, during which time no lawsuit can be filed. If

the municipality passes a resolution within those 50 days that includes certain elements, the claimants cannot file a lawsuit for an additional 90 days.

Plaintiffs sent a letter to the Town and the Board on January 26, 2024. The letter notified the Town and the Town Board of Plaintiffs' intention to file a lawsuit for violations of the Act in order to seek remedies that would change the current voting system. An excerpt reflects the following text:

> **VIA CERTIFIED MAIL**
>
> **Lisa M. Vance-Ayers, Newburgh Town Clerk**
> **1496 Route 300**
> **Newburgh, NY 12550**
>
> **Re: Violation of the New York State Voting Rights Act**
>
> **Dear Town Clerk Vance-Ayers:**
>
> **We are writing on behalf of our clients Oral Clarke, Romance Reed, Grace Perez, Peter Ramos, Ernest Tirado, and Dorothy Flournoy, who are Hispanic and African American voters in the Town of Newburgh, to advise you that the Town's current method of electing Town Council Members, by at-large elections, violates the John R. Lewis Voting Rights Act of New York, also known as the New York State Voting Rights Act ("NYVRA"). If the Town does not cure that violation, we intend to commence an action under NYVRA to compel the Town to elect Council Members by district, cumulative voting, ranked choice voting, or other alternative voting systems.**
>
> **The New York State Voting Rights Act**
>
> **NYVRA specifically forbids the use of at-large methods of election where the voting patterns of**

The Board passed a resolution concerning the letter from Plaintiffs on the 49th day thereafter, March 15, 2024 ("the Board Resolution"). The Board Resolution contained a number of initial "whereas" clauses, followed by these action items:

NOW, THEREFORE, BE IT RESOLVED by the Town Board of the Town of Newburgh as follows:

Section 1: The Town Supervisor and the Attorney for the Town are hereby directed to work with Sokoloff Stern, LLP and the authorized experts it retains in the review and investigation of the current at-large election system employed by the Town for members of the Town Board, to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist. The Town is availing itself of the "Safe Harbor Provision" under the NYVRA. See NYS Election Law 17206(7).

Section 2: The findings and evaluation directed in Section 1 shall be reported to the Town Board within thirty (30) days of the date of this Resolution. If, after considering the findings and evaluation and any other information that may become available to the Town — including, without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).

Section 3. Following a Town Board finding that there may be a violation of the NYVRA, and in consultation with Sokoloff Stern, LLP and the experts it retains, the Town Board shall cause a written proposal of the selected remedy(ies) that comply with the NYVRA (the "NYVRA Proposal") to be prepared and presented to the Town Board within ten (10) days of the Town Board's finding of the potential violation.

Section 4. Within thirty (30) days of the presentation of the NYVRA Proposal, the Town Board shall conduct at least two (2) public hearings within a thirty (30) day timeframe at which the public shall be invited to provide input regarding the NYVRA Proposal and the proposed remedy(ies) set forth therein believed to be necessary and appropriate by the Town including, without limitation, the composition of proposed new election districts and shall undertake such amendments to NYVRA Proposal based upon the public input received as the Town Board determines appropriate

Section 5. Following the close of the last Town Board public hearing and within ninety (90) days of date of this Resolution, the Town Board shall approve the completed NYVRA Proposal and submit the NYVRA Proposal to the Civil Rights Bureau of the Office of the New York State Attorney General.. The Town Board's schedule for enacting and implementing the proposed remedy(ies) shall in any event comply with NYS Election Law 17-206.

Section 6. This Resolution shall take effect immediately.

After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit on March 26, 2024.

Procedural History

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint consists of 160 paragraphs and asserts detailed allegations as to the composition of the Town population, voting history and trends, community issues that have established a pattern of racially motivated behavior by the Defendants, and other data related to alleged disenfranchisement. For purposes of this motion, most of the alleged facts are not relevant to deciding if the instant lawsuit was filed prematurely, in contravention of the 90-day safe harbor that can be available pursuant to the Act.

In sum, the Complaint pleads two causes of action. Both causes of action allege illegal "vote dilution" in a Town that employs "at-large" voting for the Board. 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. Plaintiffs also pled that the Board Resolution did not satisfy the Act and therefore the lawsuit was timely filed.

Defendants filed the instant motion in lieu of an Answer. The instant motion asserts that the claims in the Complaint are conclusively refuted by documentary evidence, to wit, the Board Resolution. Alternatively, Defendants assert that the Complaint fails to state a claim. The sole predicate for the motion to dismiss is that Plaintiffs allegedly were prohibited by the Act from filing this lawsuit until the expiration of the aforementioned 90-day safe harbor.

Purpose of the NYVRA

The New York State Senate proposed a bill in the 2021-2022 session that provided for changes in the voting systems of political subdivisions, in certain enumerated circumstances, to address lack of representation among elected officials from certain specified populations. Senate Bill 2021-S1046E. The bill was amended five times, passed by both the Senate and Assembly, and signed into law by the Governor in 2022. That series of statutes that were passed as part of the NY Election Law 17-200 et seq. comprise the Act. The Act became effective in July 2023.

The Act states that its purposes are:

> 1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
> 2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

NY Election Law 17-200. The Act provides a broad mandate as to the interpretation of any other New York law that concerns the right to vote:

> [A]ll statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting.

NY Election Law 17-202.

The legislative history of the Act corroborates these goals and the means to achieve them:

> PURPOSE:
>
> The purpose of the act is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, and language-minority groups shall have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elective franchise; to improve the quality and availability

> of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final).

Prohibitions Created by the NYVRA

The Act prohibits certain actions, or the effects of such actions, on the voting process in a "political subdivision". NY Election Law 17-206(1). "Political subdivision" is defined to include any town in New York. NY Election Law 17-204(4). Plaintiffs assert that Defendant Town is a "political subdivision" encompassed by the Act.

One such prohibition of the Act is a bar to any law, regulation, etc. that "results in a denial or abridgement of the right of members of a protected class to vote" ("Unlawful Abridgment"). NY Election Law 17-206(1)(a). A "protected class" is defined as "members of a race, color or language-minority group". NY Election Law 17-204 (5). The Complaint asserts that Plaintiffs are Black and Hispanic residents who comprise less than a majority of the population of the Town, even when combined, and are therefore a "protected class".

A plaintiff can establish an Unlawful Abridgment by showing that members of a protected class have "less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections". NY Election Law 17-206(1)(b). Plaintiffs herein allege in the First Cause of Action that Defendants' historic and continuing process for voting constitutes an Unlawful Abridgement.

The Act also makes it unlawful for a town, etc. to "use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" ("Unlawful Vote Dilution"). NY Election Law 17-206(2)(a). One means to prove Unlawful Vote Dilution is where a town:

> (i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; . . . .

NY Election Law 17-206(2)(b). "At-large" method of election includes "a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; . . . ." NY Election Law 17-204(1). Plaintiffs assert, and the Town admits in its motion, that the Town employs "at-large" voting.

"Racially polarized voting" means voting in which "there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." NY Election Law 17-204(6). The Act specifies nine ways in which a reviewing court must weigh and consider evidence of Unlawful Vote Dilution. NY Election Law 17-206(2)(c)(i)-(ix). Plaintiffs assert in their Complaint that racially polarized voting has occurred in the Town elections.

Regarding an allegation of either Unlawful Abridgment or Unlawful Vote Dilution, the Act lists 11 factors that a court may consider when deciding whether a violation of the Act has occurred. NY Election La w 17-206(3)(a)-(k). This list is not exclusive. Id. Plaintiffs allege in their Complaint that some of the circumstances described in these factors have occurred in the Town.

Timing of a Lawsuit for Violation of the NYVRA

The Act requires that a person or group claiming a violation of the Act must, before filing a lawsuit, satisfy certain requirements. First, the prospective plaintiff(s) must "send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does

not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of [the Act]". NY Election Law 17-206(7). That written notice is referred to as a "NYVRA notification letter". Id. Plaintiffs herein completed this requirement by sending the certified mail letter to the Town and the Board on January 26, 2024.

The Act also prohibits a prospective plaintiff from filing a lawsuit against a political subdivision within fifty days of sending a NYVRA notification letter. Id. The Act allows the receiving entity to pass an "NYVRA resolution" either before receiving the NYVRA notification letter or within fifty days of it having been mailed. NY Election Law 17-206(7)(b). Here, the Board Resolution was passed on March 15, 2024. The parties do not dispute that the Board Resolution was timely passed within 50 days after Plaintiffs mailed a NYVRA notification letter.

If the Board Resolution qualifies as a "NYVRA resolution", the Town and the Board would be afforded 90 days thereafter "to enact and implement such remedy". Id. During those additional 90 days, the prospective plaintiffs cannot file a lawsuit. Id.

For the Board Resolution to qualify as a "NYVRA resolution", it must satisfy the following criteria:

> (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy.

Id. Here, the Defendants asserts that the Board Resolution meets the three criteria. Plaintiffs disagree.

Instant Motion to Dismiss

Plaintiffs filed the instant lawsuit less than 90 days after Defendants passed the Board Resolution. On the instant motion, Defendants assert that the Board Resolution qualifies pursuant to the Act and therefore this lawsuit would not be timely to file until 90 days after the Board Resolution was passed on March 15, 2024. Plaintiffs oppose on the basis that the lawsuit is timely because Defendants never passed a qualifying NYVRA resolution.

To prevail on a motion to dismiss based on documentary evidence, CPLR 3211(a)(1), the data must "conclusively dispose of the [party's] claim". *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). Thus, the evidence that Defendants submit in the form of the Board Resolution must conclusively establish that they met all three elements for an NYVRA Resolution and are thereby entitled to the 90-day safe harbor.

On a motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002); *Leon v. Martinez*, 84 NY2d 83 (1994). A complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated. *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995). Thus, if the Board Resolution does not satisfy the Act as Plaintiffs have pled, upon "any reasonable view" of their Complaint, then the motion must be denied.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent." *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022) (citations omitted). "[T]he clearest indicator of legislative intent is the statutory text". Id. Therefore, the starting point in any case of interpretation must always be the

language itself, giving effect to the plain meaning thereof. Id. The plain meaning of the language of a statute must be interpreted 'in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage". Id.

The wording of Subsection 7 of Section 17-206 describes three elements for a resolution to qualify for the 90-day safe harbor moratorium on a potential plaintiff filing a lawsuit. All three elements are required because the word "and" is used to join them.

Intention to Enact and Implement a Remedy.

The first element for an NYVRA resolution is "the political subdivision's intention to enact and implement a remedy for a potential violation of this title". NY Election Law 17-206(7)(b). Defendants assert that the Board Resolution satisfies the Act:

> **If, after considering the findings and evaluation and any other information that may become available to the Town — including, without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).**

However, the "If" at the beginning of that sentence means that Defendants do *not* intend to enact and implement the "appropriate remedy(ies)" unless they conclude "after considering the findings and evaluation … including, … any analysis that Abrams Fensterman may provide …that there "may be" a violation of the NYVRA. The Board resolution calls for an investigative act not an intentional or remedial act. The Board Resolution's delay of an intention to enact and implement -- past the 50 days -- finds no support in the plain wording of the Act. The plain wording of the Act requires an expression of intent to enact and implement the appropriate remedies by Defendants within the 50 days, not on some date after that 50-day window expires.

Defendants do not cite to any wording in the Act that allows them to investigate and determine whether a violation of the Act "may be occurring". First, they lack any authority to make such a finding. Defendants are not authorized by law to determine if a person or entity has violated a New York statute. Only the judiciary branch of government has that authority.

Moreover, Defendants' use of the present tense ("there may be") in the Board Resolution is misplaced and finds no support in the Act. A current and ongoing violation of the Act is not a prerequisite for a violation. For example, Unlawful Vote Dilution is based in part on a defendant having "used" at-large voting, i.e. employing that system *in the past*. Additionally, one means to prove Unlawful Vote Dilution is by voting "patterns" of members of the protected class. NY Election Law 17-206(2)(a). A "pattern" in this context can only refer to *past* votes of members of that class. Thus, whether the Defendants "may be" currently violating the Act is not a sine qua non for a violation.

Had the Legislature decided that a political subdivision such as Defendants need not express their intention to act within 50 days unless it makes its own finding as to a violation of the Act, the Legislature would have so stated in the Act. The Legislature would have provided the process for Defendants to make such findings. It did neither.

The Court finds the wording of the first element in the Act to be clear and unambiguous. Neither party has cited to any decision of any court applying the Act to any dispute. The Court is not aware of any such decision. Thus, no contrary precedent appears to exist that would conflict with this Court's analysis, rationale, and conclusion herein.

If any ambiguity did exist in the wording of the Act, the Court could examine the legislative history. NY Statutes, Section 125; *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022). That history can include the

memorandum prepared by the sponsor of the bill. *E.g., Cohen v Bd. of Appeals*, 297 AD2d 38 (2d Dept 2002); *Matter of Emmanuel S. v Joseph E.,* 161 AD2d 83 (2d Dept 1990). Here, the sponsor's memorandum on Subsection 7 is brief and provides little guidance:

> The bill also contains notification requirements and provides a safe harbor for judicial actions. So that political jurisdictions can make necessary amendments to proposed election changes without needing to litigate in court.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final). If any insight into intent exists in that very summary, the sponsor's reference to "amendments" to proposed election changes indicates that the Legislature intended parties to use the 90 days to modify proposed remedies *already passed* in a NYVRA resolution within the first 50 days.

For these reasons, Defendants have not satisfied the first element of the Act's requirements for a NYVRA resolution. On that basis alone, their assertion that the instant lawsuit is premature fails. However, even assuming arguendo that Defendants did indeed satisfy the first element, the Court examines whether Defendants satisfied the other two elements.

Specific Steps to Facilitate Approval and Implementation of a Remedy.

The second element requires a NYVRA resolution to state "specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy". NY Election Law 17-206(7)(b). Examples of 16 different types of a "remedy" are set forth in the Act. NY Election Law 17-206(5). The list is not exhaustive. Id.

The only "remedy" as required by the second element that would comport with the purpose of the Act generally, and with the other two requirements, is an actual, defined remedy. There would be no means by which the political subdivision could state "specific" steps for implementation of a remedy if it had not resolved what comprises the remedy. The Act alone lists 16 types of remedies, and more options exist. Defendants cannot state their "specific steps"

unless they already decided which of those 16 options (or some other remedy) they have resolved to implement.

Defendants assert they have provided the "specific steps" required by the Act because the Board Resolution provides certain actions that Defendants will undertake to investigate if a violation of the Act occurred. Those steps in the Board Resolution do *not* relate to implementing a remedy, which is what the Act requires. Therefore, the Board Resolution does not satisfy the second element of the Act.

Schedule for Enacting and Implementing a Remedy

The third element of a NYVRA resolution requires "a schedule for enacting and implementing such a remedy". The Board Resolution provides a schedule -- but not regarding enacting and implementing a remedy. The schedule concerns the Defendants' timetable for investigating whether a violation of the Act may be occurring.

For the reasons already set forth as to why the Board Resolution does not satisfy the second element, the same reasoning applies to the third required element. Defendants cannot create a schedule for a remedy if they have not yet decided upon the remedy. The Act requires that Defendants create the schedule within the 50 days after Plaintiffs mailed their NYVRA letter. Defendants failed to satisfy this third requirement.

Thus, regarding each of the three elements, the Board Resolution does not "conclusively" show that they complied with the Act. Therefore, the motion to dismiss as based upon Subsection (a)(1) of CPLR 3211 fails. If the Court accords the Plaintiffs the benefit of every possible favorable inference as required on a motion to dismiss, Plaintiffs would be entitled to their relief upon any reasonable view of the facts pled. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98

NY2d 314 (2002); *Leon v. Martinez*, 84 NY2d 83 (1994). Therefore, the motion to dismiss as based upon Subsection (a)(7) of CPLR 3211 also fails.

Further Proceedings in Accordance With the Act

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. This is required "[b]ecause of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials." Id. In light of these requirements, the parties will appear as already ordered on May 29, 2024, to address how they intend to comply with the mandated expedited timing for resolution of the lawsuit.

Upon the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is **DENIED,** and it is further

ORDERED that the parties will appear for a status conference on May 29, 2024, at 9:15 a.m. to discuss the expedited schedule for the completion of discovery and setting of a trial date that complies with NY Election Law 17-216.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 17, 2024
Goshen, New York

ENTER:

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