

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 12th day of May 2025

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.

ORDER

Index No.: EF002460-2024

Motion date: 10/18/2024

Motion Seq. No.: 5

Defendants assert by letter of April 28, 2025 that Motion Seq. #5 remains undecided. However, Defendants fail to establish that they preserved their alternative ground for summary judgment in Seq. #5, to wit, alleged compliance with the New York Voting Rights Act (“NYVRA”). The Opinion and Order from the Second Department explicitly noted Defendants’ failure to preserve that issue. Nor does the remittitur direct this Court to address any other aspects of Seq. #5. Moreover, Defendants declined to move in limine or otherwise to renew pursuant to CPLR 2221(e) on the basis of the Opinion from the Appellate Division. For these reasons, Motion Seq. #5 is MOOT.

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint asserts facts as to the composition of the population in Defendant Town of Newburgh (“Defendant Town”), voting history and trends, community issues that have established a pattern of alleged racially motivated behavior by the Defendants, and other data

related to the alleged disenfranchisement. The Complaint pleads two causes of action that allege violations of the NYVRA.

Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. The Court denied the motion on May 17, 2024. Defendants filed an Answer on May 28, 2024.

Defendants later filed Motion Seq. #5 seeking summary judgment. Defendants asserted first that the NYVRA violates the US and NY constitutions. Defendants asserted alternatively that they have been and continue to be in compliance with the NYVRA. The Court granted the motion in a Decision and Order dated November 8, 2024 on the sole basis that the NYVRA violates the US and NY constitutions.

The Appellate Division reversed the order granting summary judgment in an Opinion and Order (2024-11753) (“the Opinion”) dated January 30, 2025 and held that summary judgment is denied. In its Opinion, the Appellate Division noted Defendants’ alternative basis for judgment asserted in the trial court only, to wit, alleged compliance with the NYVRA. The Opinion stated that “defendants do not mention this argument or advance it as an alternative ground for affirmance (*cf. Parochial Bus Sys. v Board of Educ. Of City of N.Y.*, 60 NY2d 539, 545-546; *Olden Group LLC v. 2890 Review Equity, LLC*, 209 AD3d 748, 750).”

That Opinion was the remittitur to return the case to this Court. See Decision and Order dated May 12, 2025 at NYSCEF #_____. In its remittitur, the Appellate Division did not instruct this Court to conduct any further proceedings in relation to Seq. #5. Had it intended such, it would have so directed this Court. The language in the decretal paragraph controls the extent of the remittitur. See *In Re Country-Wide Insurance Co. v Hills*, 218 AD3d 678, 80 (2d Dept 2023). If Defendants had any doubt as to the intentions of the Appellate Division, they

should have sought clarification as to the scope of the remittitur. *See id.* at pp. 679-680 (“If the remittitur is erroneous in any respect, or if there is any uncertainty as to the effect of the language employed, the appropriate remedy is an application to amend it”).¹

Plaintiff filed notice of entry of the Opinion in this Court on January 30, 2025. A series of letters to the Court followed by Plaintiffs and Defendants, starting that same day, in which they contested only whether a remittitur had issued and the trial date. Defendant submitted additional letters on February 3, February 7, 2025 and April 11, 2025, none of which mentioned Seq. #5 and any alleged additional action on that motion by this Court.

On April 17, 2025, the Court issued a Court Notice that set a trial date for May 12-16, 2025. The Court issued a Pretrial Order on April 17, 2025. That Order required all motions in limine to be filed by April 25, 2025. Defendants did not file any motions in limine.

It was not until their letter of April 28, 2025 that Defendants first asserted that their alternative basis for relief in Seq. #5 must be decided by this Court. That letter, which is not a CPLR 2214 application for relief, came more than two months after the Opinion from the Second Department and on the eve of trial. Defendants did not cite any legal authority for their informal assertion. By April 28, the cutoff for trial motions in limine had passed. Defendants declined to seek additional time to file a motion in limine. As of today, Defendants have yet to make a CPLR 2214 application, in writing or orally, for any relief in relation to Motion Seq. #5.

Where a party becomes aware of new legal authority that has been issued subsequent to a ruling on a motion, the party can seek leave to renew the motion. CPLR 2221(e). Defendant

¹ Despite a barrage of informal communications by letter and email over the course of months contesting whether a remittitur has issued, neither Plaintiffs nor Defendants filed a simple motion to amend with the Second Department.

was aware of the Opinion as of February 4, 2025 when it was uploaded to NYSCEF but has never moved this Court to renew Seq #5 on the basis of the Opinion. For that reason, no application to decide any allegedly remaining part of Seq. #5 is pending before this Court.

Moreover, even if their letter of April 28 can be construed as a motion to renew, Defendants would need to address their waiver of that alternative ground for relief. In its Opinion, the Second Department cited *Parochial Bus Sys. v Board of Educ. Of City of N.Y.*, 60 NY2d 539, 545-546 (1983), which held that a party not aggrieved by a trial court order can nonetheless seek affirmance (when it is appealed by the aggrieved party) based upon an alternative ground that the trial court had rejected. The Second Department has taken that doctrine one step further and held that a party can seek affirmance on the basis of an alternative ground that the trial court did not reach. *Olden Group LLC v. 2890 Review Equity, LLC*, 209 AD3d 748, 750 (2d Dept 2022). Moreover, the alternative ground can be a fact-intensive analysis, such as a summary judgment motion. *E.g., Despinos-Cadet v Stein*, 209 AD3d 978 (2d Dept 2022).

Thus, Defendants herein had a clear right to assert in the Second Department that the judgment in their favor should have been affirmed on the alternative ground of compliance with the NYVRA. The Second Department, as in *Despinos-Cadet*, would have then reviewed that ground and determined if the judgment should be affirmed despite the constitutionality of the NYVRA. But Defendants declined and did not preserve their alternative ground for relief during the appellate process.

The Court is not aware of a case deciding whether such a failure of the non-aggrieved party to raise their alternative argument on the appeal constitutes a waiver upon remand to the

trial court. However, a waiver is a consequence of the Appellate Division's refusal to address Defendants' alternative argument during the appeal that comports with finality. Were Defendants' correct, and their failure to preserve during the appeal not a waiver upon remand, Defendants could now seek a ruling on Seq. #5 based upon their alternative argument of compliance with the NYVRA. Taking Defendants' argument to its logical conclusion, if this Court were to deny Seq. #5 on that alternative ground, Defendants could appeal such an adverse order, an appeal that would raise the very alternative ground that the Appellate Division already held was *not* preserved for appeal. Defendants' cite no law to controvert their waiver.

Upon the foregoing, it is hereby

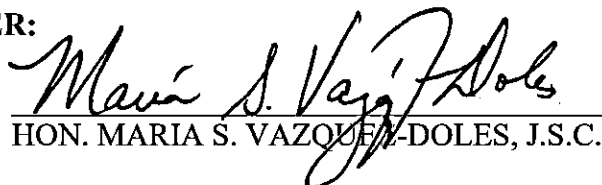
ORDERED that Motion Seq. #5 is **MOOT**.

This Decision constitutes the Order of this court.

Dated: May 12, 2025

Goshen, New York

ENTER:


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