

STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

KENNETH YOUNG,

Plaintiff,

v.

Index No.: 803989/2024

TOWN OF CHEEKTOWAGA,

Hon. Paul Wojtaszek, J.S.C.

Defendant.

**MEMORANDUM OF LAW IN SUPPORT
DEFENDANT'S MOTION TO STRIKE**

HODGSON RUSS LLP

Attorneys for Defendant

Daniel A. Spitzer

Emanuela D'Ambrogio

Cheyenne N. Freely

140 Pearl Street

Buffalo, NY 14202

Phone: 716.856.4000

dspitzer@hodgsonruss.com

adambrogio@hodgsonruss.com

cfreely@hodgsonruss.com

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND.....	1
ARGUMENT	1
POINT I. THE COURT SHOULD STRIKE PLAINTIFF’S NEW EVIDENCE & ARGUMENTS OFFERED FOR THE FIRST TIME ON REPLY.	1
A. Plaintiff’s Evidence & Arguments Regarding the Town’s 1953 Ward Efforts Improperly Supplement Plaintiff’s Initial Moving Papers.	3
B. None of the Exhibits and Evidence Regarding the Town’s August 2024 Ward Efforts Respond to Any Arguments By the Town.....	4
CONCLUSION.....	5

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

	<u>PAGE</u>
State Cases	
<i>Citimortgage, Inc. v. Espinal</i> , 134 A.D.3d 876 (2d Dep’t 2015)	2
<i>Jackson v. Vatter</i> , 121 A.D.3d 1588 (4th Dep’t 2014)	2, 3, 4
<i>Mikulski v. Battaglia</i> , 112 A.D.3d 1355 (4th Dep’t 2013)	2
<i>Paul v. Cooper</i> , 45 A.D.3d 1485 (4th Dep’t 2007)	2, 4
<i>USAA Fed. Sav. Bank v. Calvin</i> , 145 A.D.3d 704 (2d Dep’t 2016)	2
State Statutes	
N.Y. Elec. Law § 17-210(5)(f)	2

RETRIEVED FROM DEMOCRACYDOCKET.COM

PRELIMINARY STATEMENT

Plaintiff cannot simply introduce new evidence and arguments on reply that he wishes he had included in his initial papers. And yet, that is precisely what he has done.

On March 18, 2024, Plaintiff filed his Summons and Complaint, with twenty-one exhibits. NYSCEF Doc. Nos. 1-22. Plaintiff filed his motion for summary judgment approximately two months after filing his complaint. He did so without the benefit of any discovery. In support of his motion, Plaintiff submitted two exhibits. Now, on reply, Plaintiff submits several new exhibits and arguments. These new exhibits and arguments serve no purpose beyond trying to attack the Town's credibility—they are irrelevant and improper.

The Court should not reward Plaintiff's clear disregard for the rules of procedure and the basic principle of fairness. Defendant, the Town of Cheektowaga (the "Town") respectfully requests that this Court strike Plaintiff's new evidence and arguments offered for the first time on reply.

FACTUAL BACKGROUND

The facts relevant to the motion are set forth in the Affirmation of Daniel A. Spitzer, dated October 18, 2024. These facts are incorporated herein by reference.

ARGUMENT

**POINT I. THE COURT SHOULD STRIKE
PLAINTIFF'S NEW EVIDENCE &
ARGUMENTS OFFERED FOR THE FIRST
TIME ON REPLY.**

Plaintiff's Opposition and Reply papers (collectively referred to as "Plaintiff's Reply Papers") contain a slew of improper new evidence and new arguments that should be

struck. It is black letter law that “the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for the motion.” *USAA Fed. Sav. Bank v. Calvin*, 145 A.D.3d 704, 706 (2d Dep’t 2016) (striking “new arguments in support of the motion, new grounds and evidence for the motion” made in reply papers); *see, e.g., Jackson v. Vatter*, 121 A.D.3d 1588, 1589 (4th Dep’t 2014) (holding that arguments raised for the first time in reply before the motion court were not proper); *Paul v. Cooper*, 45 A.D.3d 1485, 1486 (4th Dep’t 2007) (where initial motion for summary judgment was deficient, “Defendants’ reply papers could not serve to supplement their initial moving papers . . .”); *Mikulski v. Battaglia*, 112 A.D.3d 1355, 1356 (4th Dep’t 2013) (holding that contentions raised for the first time in defendant’s reply were not properly before the court). Reply papers are not meant to supplement initial moving papers. *Paul*, 45 A.D.3d at 1486. Although an exception to the rule exists where the evidence is submitted in response to new allegations raised in opposition papers, *cf. Citimortgage, Inc. v. Espinal*, 134 A.D.3d 876, 878 (2d Dep’t 2015), that is not the case here.

Plaintiff commenced the instant action with “urgency” and “subject to expedited pretrial and trial proceedings[.]” *See* N.Y. Elec. Law § 17-210(5)(f); NYSCEF Doc. No. 1 ¶ 3. In support of his Complaint, Plaintiff submitted twenty-one exhibits. *See* Spitzer Aff. ¶ 4. Rather than engage in discovery—as other NYVRA cases around the State have done—Plaintiff moved for Partial Summary Judgment (“Plaintiff’s Motion”), based solely on the initial filing and two additional exhibits. Spitzer Aff. ¶ 7. He retained no experts and largely ignored the direct language of the NYVRA as to what showing a Plaintiff must make. As in *Paul*, Plaintiff now attempts to cure its deficient, initial motion papers with new documentary evidence and

arguments raised for the first time in Plaintiff's Memorandum of Law in opposition to the Town's Cross-Motion and in further support of Plaintiff's Motion ("Plaintiff's Reply Memo of Law") and the Affirmation of Gary D. Borek, Esq. in opposition to Defendant's Cross-Motion and in further support of Plaintiff's Motion and ("Borek Reply Affirmation").

Courts strike new theories, arguments or documentary evidence raised or introduced for the first time in reply. *See Jackson*, 121 A.D.3d at 1589. Plaintiff's new evidence and arguments can be grouped into two categories: (1) 1953 Ward Efforts, and (2) August 2024 Ward Efforts. Evidence and arguments regarding the 1953 Ward Efforts should be struck as new evidence submitted for the first time on reply. Evidence and arguments addressing the August 2024 Ward Efforts should be struck as the improper introduction of a new theory on reply. The Court should strike these improper submissions.

A. Plaintiff's Evidence & Arguments Regarding the Town's 1953 Ward Efforts Improperly Supplement Plaintiff's Initial Moving Papers.

Exhibits 1 and 15 to the Borek Reply Affirmation fall into the first category. Exhibits 1 and 15 are the Town of Cheektowaga Board Meeting Minutes from October 8, 1953, and a news article that purportedly appeared in the Cheektowaga Times on October 15, 1953 regarding election law issues in the Town over 70 years ago, respectively. Spitzer Aff. ¶¶ 12, 20. At paragraphs 4 through 7 and 23 of the Borek Reply Affirmation, Plaintiff improperly introduces these new documents for the first time in his reply. Spitzer Aff. ¶ 11. Neither of these exhibits were included in Plaintiff's Motion papers or his Complaint. Spitzer Aff. ¶ 21.

These new arguments and new exhibits are a transparent attempt to supplement Plaintiff's initial moving papers. Plaintiff raised the argument that a ward system was

considered by the Town in 1953 in his initial moving papers. *See* Doc. Nos. 20, 32 ¶ 38. Due to the irrelevance of this evidence and the lack of cognizable argument from Plaintiff on the matter, the Town's Opposition to Plaintiff's Motion and Cross-Motion for Summary Judgment (collectively referred to as the "Town's Amended Opposition and Cross-Motion") does not address it. Plaintiff cannot credibly argue that this new evidence, which could have been submitted in Plaintiff's initial moving papers, responds to any new arguments raised by the Town. Because it does not. It was filed for the impermissible purpose of supplementing Plaintiff's initial moving papers. *See Paul*, 45 A.D.3d at 1486. Therefore, the Court should strike Exhibits 1 and 15, as well as any and all argument referencing them, including paragraphs 4 through 7 and 23 of the Borek Reply Affirmation.

B. None of the Exhibits and Evidence Regarding the Town's August 2024 Ward Efforts Respond to Any Arguments By the Town.

Exhibits 4 through 10 to the Borek Affirmation fall into the second category of improper evidence introduced for the first time on reply. These exhibits deal with the Town's efforts to enact a ward system in August 2024. *See Spitzer Aff.* ¶¶ 13-19. Plaintiff's new arguments that reference these exhibits are contained in paragraphs 15 through 31 of the Borek Reply Affirmation and on page 11 of Plaintiff's Reply Memo of Law. *See Spitzer Aff.* ¶¶ 11, 23. Plaintiff's filing of these exhibits and these new arguments fly in the face of the purpose of a reply.

The apparent purpose of this evidence is to support Plaintiff's baseless accusation that the Town never intended to hold a referendum. *See* Doc. No. 117 ¶ 30. Reply papers are meant to respond to arguments contained in the opposition, *see, e.g., Jackson*, 121 A.D.3d at

1589, not to advance new theories, and certainly not to wage irrelevant attacks against the defense. Indeed, the Town's Amended Opposition and Cross-Motion does not contain any reference to the Town's efforts to adopt a ward system. *See Spitzer Aff.* ¶ 22. That defense was abandoned when the Town amended its opposition and cross-motion papers. As such, Plaintiff's reference to the Town's August 2024 ward efforts is a new theory on reply that should be disregarded.

To the extent Plaintiff attempts to defend the exhibits and arguments regarding the August 2024 ward efforts, they are indefensible. Plaintiff may try to argue that because the events from which these exhibits and arguments originate postdate Plaintiff's initial motion, they should be considered. This argument would stumble from its first step. The Town's August 2024 ward efforts are simply not an issue before this Court. Now, their only functions are to attack the Town's credibility and paint the Town as an invidious actor. Not only are these arguments and exhibits outside of the record of Plaintiff's proceedings, but they also do not support the causes of action raised in the Complaint. Accordingly, the Court should strike paragraphs 15 through 31, including Exhibits 4, 5, 6, 7, 8, 9 and 10, and all argument referencing these paragraphs and exhibits.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court grant its motion to strike, along with such other and further relief as the Court deems just and proper.

Dated: October 18, 2024

HODGSON RUSS LLP
Attorneys for Defendant

By: 

Daniel A. Spitzer
Emanuela D'Ambrogio
Cheyenne N. Freely

140 Pearl Street
Buffalo, NY 14202
Phone: 716.856.4000

dspitzer@hodgsonruss.com
adambrogio@hodgsonruss.com
cfreely@hodgsonruss.com

RETRIEVED FROM DEMOCRACYDOCKET.COM

Word Count Certification

The Court and the parties have agreed to waive the word limit contained in 22 N.Y.C.R.R. § 202.8-b. I hereby certify that the total number of words herein, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block, is 1,412. In making this certification, I relied on Microsoft Word’s “Word Count” tool.

Dated: October 18, 2024
 Buffalo, New York



Daniel A. Spitzer, Esq.

RETRIEVED FROM DEMOCRACYDOCKET.COM