

1999 WL 33027

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Lakisha REYNOLDS, et al., Plaintiffs,
v.
Rudolph GIULIANI, et al., Defendants.

No. 98 Civ. 8877 WHP. | Jan. 21, 1999.

Attorneys and Law Firms

Marc Cohan, Rebecca L. Scharf, Welfare Law Center, Inc., New York, New York, for Plaintiffs.

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Mary Ellen Burns, Northern Manhattan Improvement Corp., New York, New York, for Plaintiffs.

Jonathan Pines, Assistant Corporation Counsel, New York, New York, for the City Defendants.

Vincent Leung, Assistant Attorney General, New York, New York, for the State Defendants.

Opinion

MEMORANDUM AND ORDER

PAULEY, J.

*1 By letter memorandum dated January 19, 1999, the City defendants move for an order, pursuant to Fed.R.Evid. 402 and 403, precluding the introduction of a declaration by Adrienne L. Holder (the “Holder declaration”) and a draft report prepared by the United States Department of Agriculture (the “USDA Report”)¹ in connection with the hearing on plaintiffs’ application for preliminary injunctive relief scheduled to begin on January 20, 1999. In addition, the City defendants seek to preclude two federal officials from testifying at the hearing concerning their review of the City’s Food Stamp and Medicaid programs. Those officials are Sue Kelly (“Kelly”) of the Health Care Finance Administration and Mary A. Ferris (“Ferris”) of the United States Food and Consumer Service.

¹ The Report is titled “New York Program Access Review November–December 1998” revised January 8,

1999.

By letter memorandum also dated January 19, 1999, plaintiffs stipulate that they will not proffer the Holder declaration as evidence at the hearing. Plaintiffs also state that Ferris’ testimony would be unnecessary if the USDA Report is admitted into evidence. Plaintiffs oppose the City defendants’ motion in all other respects.

The Court has reviewed the USDA Report. It should be noted that by memorandum and order dated January 15, 1999, this Court directed the City defendants to produce the USDA Report to plaintiffs, and thereby overruled the City defendants’ objections of inter-governmental and deliberative process privileges.

The City defendants’ present application to preclude its introduction at the hearing is denied. In view of the plaintiffs’ stipulation, Ferris will not testify at the hearing. The City defendants’ motion to preclude Kelly’s testimony is denied.

Discussion

1. The USDA Report

Fed.R.Evid. 803 provides, in relevant part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

... (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions and proceedings ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8). “This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports.” *Bradford Trust Co. v. Merrill Lynch Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir.1986).

The City defendants do not (and apparently cannot) dispute that the USDA Report sets forth “factual findings resulting from an investigation made pursuant to authority granted by law....” Fed.R.Evid. 803(8)(C). Instead, the

City defendants argue that the Report should be excluded because it lacks sufficient indicia of trustworthiness, and because its probative value is substantially outweighed by considerations of unfair prejudice and confusion. The City defendants also claim that introduction of the Report will upset the “candid exchange of opinions and information” among the USDA, City and State. *See* Defs.’ Letter Mem. at 3.

*2 “To exclude evidence which technically falls under 803(8)(C) there must be ‘an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify.’” *Bradford Trust*, 805 F.2d at 54 (quoting *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613, 618 (8th Cir.1983)). Four nonexclusive factors have traditionally been applied by courts in determining whether a report sought to be introduced under Rule 803(8)(C) is untrustworthy. These factors are: “(1) the timeliness of the investigation; (2) the investigator’s skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167n. 11, 109 S.Ct. 439, 449n.11 (1988) (citing Advisory Committee’s Notes on Fed.R.Evid. 803(8)). In *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D.N.Y.1990), *aff’d*, 926 F.2d 142 (2d Cir.1991), District Judge Weinstein added a fifth factor to this list: the finality of the findings. *See Gentile*, 129 F.R.D. at 450.

“As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court’s sound exercise of discretion in determining whether the hearsay document offered in evidence has sufficient independent indicia of reliability to justify its admission.” *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir.1981).

Applying the foregoing factors, the Court does not find the USDA Report to be untrustworthy. Rather, it is extremely timely and the apparent expertise, knowledge and methodology of the federal agency that prepared it all

weigh in favor of its admissibility. The fact that the Report is non-final does not render it untrustworthy. *See Gentile*, 129 F.R.D. at 458 (“in many instances non-final reports may be extremely useful and reliable so far as they go.”); *Meriwether v. Coughlin*, 879 F.2d 1037, 1039 (2d Cir.1989) (admitting into evidence the last page of an interim report). The City defendants are free to challenge the accuracy of the Report’s findings at the hearing.

Turning to the City defendants’ other objections, the Court finds that any “prejudice” to the City defendants based on ongoing federal and State agency reviews is outweighed by the plaintiffs’ need for the information in the Report. The City defendants’ arguments under Fed.R.Evid. 403 are rejected. The Court is confident that during the hearing, it can hear relevant evidence, weigh its probative value and reject improper inferences that could arise from the inclusion of any prejudicial matter. *See generally United States v. Zuber*, 118 F.3d 101, 104 (2d Cir.1997) (“We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors ...”).

2. The Testimony Of Sue Kelly

The City defendants offer no compelling reason to exclude the testimony of Ms. Kelly who, according to plaintiffs, has personal knowledge concerning the City defendants’ practices at issue here. Ms. Kelly will be permitted to testify.

Conclusion

*3 For the reasons set forth above, the City defendants’ motion in limine is denied.