

**Acosta v City of New York**

2024 NY Slip Op 31607(U)

May 7, 2024

Supreme Court, New York County

Docket Number: Index No. 157225/2022

Judge: Hasa A. Kingo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. HASA A. KINGO **PART** **05M**

*Justice*

-----X

JOHN X ACOSTA,

Plaintiff,

- v -

THE CITY OF NEW YORK, NYPD SERGEANT SEAN  
AMAN, NYPD MEMBER DOES # 1-7

Defendant.

-----X

**INDEX NO.** 157225/2022

**MOTION DATE** 04/24/2024

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, plaintiff John X. Acosta (“Plaintiff”) moves pursuant to to compel discovery and to strike the answer of defendant the City of New York (the “City”), and for leave to file an amended complaint. The City opposes. Upon review of the motion papers, procedural history and oral argument held on May 7, 2024, the motion is granted in part and to the extent set forth herein.

**BACKGROUND**

On August 23, 2022, Plaintiff commenced this action by filing a summons and complaint (NYSCEF Doc Nos. 1-2). In the complaint, Plaintiff alleges that he was arrested while participating in a lawful protest on May 25, 2021 (complaint ¶ 15). The complaint interposes causes of action for (1) excessive force, (2) First Amendment violation, (3) Due Process violation, (4) Equal Protection and Selective Enforcement violation, (5) deprivation of fair trial, (6) *Monell*, and (7) violations of New York state law. On July 25, 2023, the City filed an answer, which annexed various requests and discovery demands (NYSCEF Doc No. 5). Among these is a letter dated July 25, 2023 that indicates that Corporation Counsel “is unable to evaluation and review your client’s claims against [the City] without duly executed authorizations permitting to review records pertaining to your client’s arrest, incarceration, and or criminal proceedings” (*id.* at 6). The letter requests that the Plaintiff provide the following:

- Duly executed authorization permitting the Office of the Corporation Counsel to examine and copy the records, transcripts and certificates of disposition of any criminal proceedings concerning the claims alleged in the complaint;

- Duly executed authorization permitting the Office of the Corporation Counsel to examine and copy all records, created by, or in the possession of, the New York City Police Department, relating to the claims alleged in the complaint; and
- Duly executed authorization permitting the Office of the Corporation Counsel to examine and copy all records, created by, or in the possession of, the District Attorney’s Office, relating to the claims alleged in the complaint.

(*id.*). A blank authorization form is annexed to the letter (*id.*).

On December 4, 2023, Plaintiff filed the Request for Judicial Intervention (“RJI”) and made a motion for a default judgment against defendant NYPD Sergeant Sean Aman (“Sergeant Aman”) (NYSCEF Doc No. 6, 12). The City opposed the motion and cross-moved for an order compelling Plaintiff to accept an amended answer on behalf of the City and Sergeant Aman (together, “Defendants”) (NYSCEF Doc No. 16). The motion was denied and cross-motion granted by order of this court dated April 15, 2024 (NYSCEF Doc No. 24).

On April 24, 2024, Plaintiff filed the instant motion, brought by order to show cause (NYSCEF Doc No. 28). The motion seeks an order (1) directing Defendants to provide Plaintiff with the identities of the seven Doe defendants on or before May 20, 2024, (2) directing that failure to comply with such order may result in the striking of the amended answer without any further motion practice, (3) directing that, in the event of Defendants’ failure to comply with such order, Plaintiff shall file an affidavit to such effect on or before May 21, 2023 and email a copy of such affidavit to the court, (4) directing that Plaintiff is permitted to file an Amended Complaint to substitute the name of the identified officers on or before May 25, 2024; and (5) for such other and further relief as the court deems just and proper.

In opposition to the motion, the City submits an affirmation of counsel Madiha A. Ahmad, Esq., which annexes email correspondence between Plaintiff’s counsel (“Mx. Green”) and Assistant Corporation Counsel Joshua Copperman (“Mr. Copperman”) (NYSCEF Doc No. 37). As demonstrated by the email correspondence Mx. Green contacted Mr. Copperman on February 27, 2024 and requested that the City provide the names of the Doe defendants (*id.*). In response, Mr. Copperman inquired whether Plaintiff had provided the authorizations requested on July 25, 2023 (*id.*). Mr. Copperman made a second inquiry regarding the authorizations on April 23, 2024, which Plaintiff provided the next day (*id.*).

## DISCUSSION

Pursuant to CPLR § 3101(a), “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial” (*Roman Catholic Church of Good Shepherd v Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). The test is one of usefulness and reason (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). The trial court is invested with broad discretion to supervise discovery and to determine what is material and necessary (*id.*; *Madia v CBS Corp.*, 146 AD3d 424, 425 [1st Dept 2017]). Ultimately, it is incumbent on the party seeking

disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of admissible information bearing on the claims (*Gomez v State of New York*, 106 AD3d 870, 872 [2d Dept 2013]).

“If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response” (CPLR § 3124). On a motion brought pursuant to CPLR § 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412 [U], \*5 [Sup Ct, NY County 2015]). “[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure” (*Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD2d 451, 452 [1st Dept 2012]). Courts have found that a party is not required to respond to a discovery demand that is “palpably improper . . . [in that it is seeking] irrelevant information, or [is] overbroad and burdensome” (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 843 [2d Dept 2013]).

If a party refuses to obey an order for disclosure or willfully fail to disclose information which the court finds ought to have been disclosed, the court is authorized to issue appropriate sanctions upon motion of a party or the court’s own motion (CPLR § 3126; *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A party’s failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). A party may “tender a reasonable excuse to overcome [a] showing of willfulness” (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), but “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the answer” (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011]). “The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the Supreme Court” (*Lazar, Sanders, Thaler & Assoc, LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

By this motion, Plaintiff seeks to compel the City to disclose the names of seven doe defendants prior to the expiration of the statute of limitations on May 25, 2024.<sup>1</sup> In support of the motion, Plaintiff asserts that this case is “identical to” another matter before this court captioned *Hillary Wright v. City of New York, et al.*, Index No. 154194/2022. The plaintiff in *Wright* is represented by the same counsel in this action and the facts are similar in that the Plaintiff asserts causes of action for alleged civil rights violations in connection with her detention by the NYPD following her participation in a demonstration on February 12, 2021. *Wright* was commenced on May 12, 2022, and the City filed an answer on July 11, 2022. On October 15, 2023, the plaintiff filed a motion for a default judgment against a non-appearing defendant. The City then filed an amended motion on behalf of itself and the non-appearing defendant and cross-moved to compel the plaintiff to accept service of the answer. On January 3, 2024, the plaintiff filed an emergency order to show cause to compel the City to produce the names of doe defendants. The motion was denied on procedural grounds and the plaintiff filed a second order to show cause on January 30,

<sup>1</sup> It is noted that May 25, 2024 is a Saturday and is followed by Memorial Day on Monday, May 27, 2024. Therefore, the statute of limitations will expire on the following day, May 28, 2024 (General Construction Law § 25-a[1]).

2024. The second motion was granted by order dated February 12, 2024 (NYSCEF Doc No. 52, order, Adam Silvera, J.).

Here, Plaintiff asserts that he was prevented from obtaining the necessary discovery because of Sergeant Aman's default, which "irreparably" delayed the case and "prevented the parties from engaging in discovery" (NYSCEF Doc No. 26, Green affirmation in support ¶ 7). Plaintiff's counsel asserts that their office did not request a preliminary conference because "[o]ur understanding based on past practices is that the Court will not hold a preliminary conference until all parties have joined issue," and the City refused to engage in discovery prior to a preliminary conference or entry of a case scheduling order (NYSCEF Doc No. 26, Green affirmation in support ¶ 7).<sup>2</sup> This narrative, however, is not supported by the record and the case is distinguishable from *Wright*.

At the outset, there are no rules in this part, the CPLR, the New York Codes, Rules and Regulations, or any other authority that prevents appearing parties from requesting a preliminary conference or engaging in discovery when one party is in default. On the contrary, the Uniform Rules for the Supreme Court & the County Court specifically provides that "[a] A party may request a preliminary conference at any time after service of process" (22 NYCRR § 202.12). Parties who have appeared can, and should, proceed with discovery in the normal course without the defaulting party.

Although the nature of the dispute here is similar to *Wright*, this case is distinguishable because the delay in obtaining the names of the *Wright* defendants was ostensibly attributable to the City's failure to request an unsealing authorization from the plaintiff in a timely manner.<sup>3</sup> In this case, the City requested the authorization with its Answer filed on July 25, 2023, but it was not provided until April 23, 2024. The affirmations and email correspondence indicate that Plaintiff's counsel did not request the names of the doe defendants until February 27, 2024 when Mx. Green emailed Mr. Copperman to request same. Mr. Copperman responded on March 4, 2024 by inquiring whether Plaintiff had provided responses to the City's July 25, 2023 discovery demand, including providing authorizations. On April 23, 2024, Mr. Copperman confirmed that the City had not received unsealing authorizations and reiterated the request, and Mx. Green provided the authorization the next day.

---

<sup>2</sup> Plaintiff's reliance on *Wright* with respect to this point is misplaced. Although the court in *Wright* accepted Plaintiff's explanation for the delays in that matter, this does not supersede the statutory provisions and court rules that govern discovery in proceedings before this court.

<sup>3</sup> Pursuant to Criminal Procedure Law § 160.50(1)(c), all official records and papers relating to the arrest or prosecution on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency. CPL § 160.50(1)(d) further provides that such records shall be made available to the person accused, or to such person's designated agent. The City contends that it cannot obtain records regarding Plaintiff's arrest from the NYPD without a signed unsealing authorization. Plaintiff's counsel suggests that an unsealing authorization is not required for the City to obtain the requested information but does not expound on this point or provide relevant legal briefing. In any event, the record in this case and in *Wright* demonstrates that Plaintiff's counsel is aware of the City's position on this point and did not object to providing the authorization.



In light of the affirmations and evidence presented, it does not appear that any delay in this matter can be attributed to the City, particularly not to the degree necessary to warrant the severe sanction of striking the City's answer. However, it is unquestionable that the materials requested are relevant, material and necessary to the prosecution of this case, and Plaintiff would suffer substantial prejudice if the information is not provided prior to the expiration of the statute of limitations.<sup>4</sup> Therefore, the City is obligated to produce the requested information, and to make a thorough, diligent effort to do so prior to expiration of the statute of limitations, or a sanction may be warranted. Therefore, the motion is granted to the extent set forth below.

Plaintiff's motion to amend the complaint by adding the doe defendants to the caption is also granted. Pursuant to CPLR Rule 3025, a party may amend or supplement their pleading "at any time by leave of court or by stipulation of all parties" (CPLR § 3025 [a]). "Leave shall be freely given upon such terms as may be just" (*id.*). "[I]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Favourite Ltd. v Cico*, 208 AD3d 99, 108 [1st Dept 2022]). The City has not demonstrated any prejudice it would suffer due to the additional of the doe defendants. Therefore, the motion is granted.

Accordingly, it is

ORDERED that the motion to compel is granted to the extent that the City is directed to provide Plaintiff the identity of the seven doe defendants indicated in the caption by email to Plaintiff's counsel of record no later than May 21, 2024; and it is further

ORDERED that, in the event that the City does not provide the required information on or before May 21, 2024, the City shall file an affidavit on May 21, 2024 which outlines the thorough, diligent efforts taken by the City in an effort to obtain the required information and provide same by email to Plaintiff's counsel of record; and it is further

ORDERED that such affidavit shall be provided to Plaintiff's counsel of record and the court ([sfc-part5-clerk@nycourts.gov](mailto:sfc-part5-clerk@nycourts.gov) and [SFC-Part5@nycourts.gov](mailto:SFC-Part5@nycourts.gov)) by email no later than May 21, 2024; and it is further

ORDERED that failure to comply with the directives set forth herein may result in appropriate sanction to the City; and it is further

ORDERED that in the event that the City fails to identify the identity of the seven doe defendants indicated in the caption by May 21, 2024, the City, by agreement memorialized on the record during oral argument on May 7, 2024, shall have on or before August 5, 2024 to provide Plaintiff the identity of the seven doe defendants indicated in the caption by email to Plaintiff's counsel of record; and it is further

---

<sup>4</sup> The court is not persuaded by the City's argument that the Plaintiff should have filed a FOIL request to obtain the information during the pendency of the action. Plaintiff is certainly able to file such a request, but there is no requirement to do so. On the contrary, the CPLR clearly delineates that the City is required to produce all evidence material and necessary in the prosecution of the action (CPLR § 3101[a]).

ORDERED that should the City fail to identify the identity of the seven doe defendants indicated in the caption by May 21, 2024, the City, by further agreement memorialized on the record during oral argument on May 7, 2024, stipulates with Plaintiff that the City may not assert a statute of limitations defense if the seven doe defendants indicated in the caption are represented by the Office of the Corporation Counsel; and it is further

ORDERED that Plaintiff's motion to amend the complaint to add identified doe defendants to the caption is granted, and such amended complaint shall be filed no later than 10 days after Plaintiff's counsel receives notice of the additional parties, and no later than August 19, 2024; and it is further

ORDERED that the parties are directed to appear for a conference in the Differentiated Case Management Part (Room 103 at 80 Centre Street, New York, NY) on Tuesday July 23, 2024 at 2:00 PM.

This constitutes the order and decision of the court.

5/7/2024  
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: