

**Flikier v 530 W. 26th Street, LP**

2007 NY Slip Op 32053(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0101446/2004

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

MANDY FLIKIER,  
Plaintiff,

- v -

530 W. 26<sup>th</sup> STREET, LP d/b/a CROBAR, CAL FORTIS,  
KEN SMITH, TERIBON, LLC d/b/a PHANTOM  
SECURITY and RICHARD MUND,

Defendants.

INDEX NO. 101446/04  
MOTION DATE  
MOTION SEQ. NO. 008  
MOTION CAL.NO.

**FILED**  
JUL 06 2007

The following papers, numbered 1 to 5 were considered on this motion for an order for the issuance of judicial subpoenas for the depositions of four police officers and for the production of documents:

Papers  
Notice of Motion/Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_  
Sur-reply \_\_\_\_\_

Numbered  
NEW YORK  
COUNTY CLERK'S OFFICE  
3, 4  
5  
6

Cross Motion: [ ] Yes [X] No

Plaintiff commenced this action to recover damages she allegedly sustained on December 12, 2003, in a brawl that erupted in defendant 530 W. 26<sup>th</sup> Street, LP's nightclub, Crobar, where she was a patron. Plaintiff asserts that, *inter alia*, defendants lacked proper security and failed to make the night club premises reasonably safe.

In this motion,<sup>1</sup> plaintiff seeks an order for the issuance of judicial subpoenas for the depositions of four police officers<sup>2</sup> who issued civil citations and violation notices/summons to defendants on the night plaintiff sustained her alleged injuries, as well as for the production of such police officers' original summonses, memo books and all written documentation pertaining to their police activity with respect to defendants, on the evening of the subject incident.

<sup>1</sup> The Court notes that in seeking the within requested relief, plaintiff's counsel makes reference to prior orders issued by this Court rendered in conjunction with plaintiff's prior motion for a judicial subpoena and the City of New York's motion to quash the subpoena (§4, Affirmation in Support), but has failed to supply the Court with copies of such orders.

<sup>2</sup>

Plaintiff seeks the depositions of police officers Bucky Rhode, Dennis DeQuatro, Sean Knoerzer and Bernadette Enchautequi.

By order dated May 8, 2006, this Court denied a motion by plaintiff which sought to find the City of New York in contempt for the failure to comply with a judicial subpoena requiring the production of all records concerning a specific complaint and aided report, including records pertaining to police involvement/intervention on the premises at the time of the incident in question, arrests made at that time and all witness statements, detective notes and investigative materials.

The discovery plaintiff seeks in this motion does not pertain to the arrest or criminal records of the alleged assailants, which plaintiff acknowledges has been sealed. Rather, the discovery at issue in this motion relates to documents plaintiff obtained from the New York State Liquor Authority ("SLA"), during the course of discovery. [Exh. B, Notice of Motion]. Specifically, the documents which provide a basis for the within requested relief, are four pages, each labeled "POLICE ACTION LICENSED/UNLICENSED PREMISES", and each are signed by "Dennis DeQuatro, Captain". All but one of such documents make reference to, *inter alia*, summonses issued on the evening plaintiff sustained her injuries, for: disorderly premise, failure to control crowd and employing unlicensed security.

Plaintiff argues that the testimony of the police officers as well as their written materials from the subject evening are germane to the allegations of this lawsuit, and therefore requests the issuance of the appropriate subpoenas.

Defendant Crobar objects to plaintiff's request arguing that, *inter alia*, the summonses issued to Crobar on the evening of December 12, 2003, were dismissed and sealed by the Criminal Court of the City of New York, County of New York, pursuant to Criminal Procedure Law ("CPL") §160.50. In support, Crobar submits original Orders of Disposition, demonstrating that the summonses issued to Crobar on the evening of December 12, 2003 were dismissed and sealed by the Criminal Court. [See Exh. A, Crobar Affirmation in Opposition]. Crobar maintains that by virtue of the sealing order issued by the Criminal Court, pursuant to CPL §160.50(1) ( c), all documents that relate to the summonses/citations are also sealed, including the information sought by plaintiff in the submitted proposed judicial subpoenas. Moreover, Crobar maintains that plaintiff cannot establish an entitlement to the discovery sought since none of the exceptions listed in CPL §160.5(1)(d) are applicable to this case. Crobar further argues that the records plaintiff relies upon in the within motion were also sealed and therefore plaintiff should not have had access to such documents.

Defendant Phantom maintains, *inter alia*, that the subject citations/summonses were not issued to Phantom. In addition, Phantom argues that there has been no showing that the issued summonses were upheld against whomever they were issued; thus, Phantom argues that the depositions of the four offices should not be permitted.

Significantly, subsequent to the filing of the within motion by plaintiff, the parties entered into a stipulation dated October 17, 2006, whereby they *agreed* that the documents relied upon by plaintiff in support of this application from the State Liquor Authority, *should in fact be sealed*. Thus, based upon such stipulation and at the parties' request, this Court issued an order which indicates as follows:

“the motion, opposition and reply papers on plaintiff’s motion to depose the New York City police officers are sealed, pursuant to Uniform Rules of the Trial Courts section 216.1, for good cause shown, as plaintiff inadvertently annexed documents sealed by the New York City Criminal Court”.

Criminal Procedure Law (“CPL”) §160.50(1) provides that: “[u]pon the termination of a criminal action or proceeding against a person in favor of such person,...the record of such action or proceeding shall be sealed...”. Section (c) of section §160.50(1) further provides that:

“all official records and papers including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, 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”.

Plaintiff argues that CPL §160.5(1) does not apply to the discovery which is the subject of this motion, since the “sealing statute” was enacted to protect the reputations and employment prospects of individuals, not corporate entities. However, the documentation submitted by Crobar - specifically the Orders of Disposition pertaining to the summonses issued on the evening plaintiff sustained her injuries - clearly indicate that such summonses were dismissed and *sealed* by the Criminal Court *pursuant to CPL §160.50*. [See Exh. A, Crobar Affirmation in Opposition]; thus, the “sealing statute” was in fact applied by the Criminal Court, despite that defendants are corporations.

In addition, CPL §10.00(7) defines a “person”, for purposes of the CPL, as a “human being, and where appropriate, a public or private corporation...”. Thus, this Court cannot conclude that CPL

§160.5(1) does not apply to the subject summonses and police records, merely because defendants are corporate entities, rather than individuals.

Moreover, even if this Court was persuaded that the subject records should be unsealed, this Court lacks the statutory authority to unseal the records in the Criminal Court matter, which would be necessary to obtain the documents requested in plaintiff's proposed judicial subpoena. *See Wilson v. City of New York*, 240 AD2d 266 ( 1<sup>st</sup> Dept 1997); *Lauricella v Tanya Towers, Inc.*, 8 AD3d 153 (1<sup>st</sup> Dept 2004).

In addition, as indicated above, this Court has already ruled, by order dated May 8, 2006, that the records pertaining to the police involvement/intervention at the subject premises on the evening plaintiff sustained her injuries, the arrests made at that time and all witness statements, detective notes and investigative materials, have been sealed in conjunction with the arrest or criminal records of the alleged assailants. Thus, to allow plaintiff to obtain the police records in conjunction with this application would be circumventing this Court's prior order, which specifically denied the release of such records.

Based upon the above, this Court declines to issue the judicial subpoenas proposed by plaintiff with respect to the production of the requested documents. The Court will, however, order that the deposition of Captain Dennis DeQuatro be conducted as detailed below, as he was at the subject premises on the evening plaintiff sustained her injuries and prepared the report obtained by plaintiff from the SLA; such testimony, is material and necessary to this case. *See CPLR §3101; Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406-07 (1968). Moreover, should plaintiff seek depositions of any of the additional police officers called to the premises on the evening at issue, plaintiff may file a subsequent motion, upon a proper showing, which shall include a copy of the deposition transcript of Captain Dennis DeQuatro; such motion shall be filed within 45 days of the deposition of Captain DeQuatro, *or further depositions will be deemed waived.*


Accordingly, it is

ORDERED that plaintiff's motion for the issuance of judicial subpoenas is granted, only to the extent that this Court will issue the proposed subpoena for the deposition of Dennis DeQuatro, Captain, 10<sup>th</sup> Police Precinct, as modified by the Court, which shall be scheduled on

July 24, 2007 [or a date to be held before August 15, 2007, if on consent], *or such deposition will be deemed waived*; it is further

ORDERED that within 30 days of entry of this order, defendants serve a copy upon plaintiff with notice of entry.

Dated: 6/26/07

  
Doris Ling-Cohan, JSC

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST  REFERENCE

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