

Goodman v City of New York
2007 NY Slip Op 32150(U)
July 12, 2007
Supreme Court, New York County
Docket Number: 0106739/2007
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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RONALD GOODMAN and PHYLLIS GOODMAN,

Petitioners,
-against-

Index no.: 106739/2007
Motion seq.: 001
Motion date: 07/12/2007

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, and P.O. DAVID MORIARTY and
MICHAEL GOLOD,

Respondents.

DECISION AND ORDER

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Petitioners' motion for pre-action discovery including an order to preserve potential evidence is granted.

Petitioners brought the instant special proceeding, in the form of a motion by Order to Show Cause, to preserve potential evidence consisting of "...any and all audio tapes and/or recordings, including but not limited to 911 call records, kept in the regular and ordinary course of business by the respondents concerning a motor vehicle accident which occurred April 27, 2007 ... as well as any and all video tapes and/or recorded records from video cameras monitoring the vicinity of the roadway located at 42nd Street and 5th Avenue, ... at approximately 18:45 hours...".

Respondents oppose the motion contending only that any recording devices at the described intersection are designed only to provide live feed and no recordings of the feed are made or kept. Therefore, the respondents contend that a portion of the records the petitioner seeks to have preserved do not exist and never existed and petitioner's motion should be denied.

This proceeding was brought by an Order to Show Cause accompanied by an affirmation of petitioner's counsel. The court has reviewed the affidavit of service of the Order to Show cause and finds that there has been compliance with the service requirements set forth in the Order. Those requirements provided for service directly upon the respondents pursuant to the provisions of the C.P.I.R. in order to obtain jurisdiction over them.

The application seeks only the preservation of certain described records which are limited in scope to a date, approximate time and location. There is nothing onerous or unduly burdensome within the request. The respondents only oppose the request to the extent they perceive it to be seeking records which do not exist. In fact, the request is only for the preservation of existing records. To the extent that records do not exist, there is nothing to preserve. Therefore, the nonexistence of some of the records petitioners are seeking is not a basis to deny petitioners' motion. Accordingly, it is;

ORDERED that petitioners' application is granted, and it is further;

ORDERED that petitioners shall serve of a copy of this order, together with notice of entry hereof, upon the respondents and respondents shall preserve such of the records requested herein as are within their custody or control, in their existing condition, pending further order of this court.

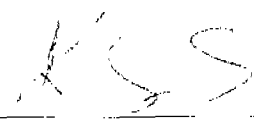
Although there is some authority for the proposition that a pre-action discovery request may be brought on a motion brought by Order to Show Cause, better and typical practice would be the institution of a special proceeding (see McKinney's Practice Commentary C3102:6). In the interests of clarity and avoiding a potential jurisdictional issue upon the filing and service of any subsequent summons and complaint, this court will allow the instant application by motion

but petitioner is advised that this is a final disposition of the matter bearing the index number above. Any subsequent proceedings will require the purchase of a new index number.

The foregoing constitutes the decision and order of this court.

Dated: July 11, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
JUL 18 2007
NEW YORK
COUNTY CLERK'S OFFICE