

Pryor v Serrano

2007 NY Slip Op 33194(U)

October 4, 2007

Supreme Court, Greene County

Docket Number: 0001617/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

NICHOLAS PRYOR, by and through his Mother
and Natural Guardian, NICOLE SIANOS, and
NICOLE SIANOS, Individually, CHRISTOPHER
D. OATHOUT, DEVIN JOHNSON, by and through
his Mother and Natural Guardian, KAREN PAGAN,
and KAREN PAGAN, Individually,

Plaintiffs,

-against-

Index No.: 01-0617
RJI No.: 19-01-9833

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, "JOHN DOE" and "JANE
DOE", said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

LORETTA KUDLACK, Individually and as
Administratrix of the Estate of GARY WILGUS, JR.,
and EMANUEL RIVERA, by and through his
Mother and Natural Guardian, NORMA AGOSTO,

Plaintiffs,

-against-

Index No.: 01-0750
RJI No.: 19-01-9838

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, GREENE COUNTY SHERIFF'S
DEPARTMENT, "JOHN DOE" and "JANE
DOE", said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

In the Matter of the Claim of BRANDON LEONARD,
by and through his Mother and Natural Guardian,
GAIL LEONARD, and GAIL LEONARD, Individually,

Plaintiffs,

-against-

Index No.: 02-0208
RJI No.: 19-02-0112

JOSE SERRANO, COUNTY OF GREENE, and
COUNTY OF GREENE DEPARTMENT OF
SOCIAL SERVICES, GREENE COUNTY SHERIFF'S
DEPARTMENT, "JOHN DOE" and "JANE
DOE", said names being fictitious and unknown
to the plaintiffs but intended to be employees of
the County of Greene and/or the Greene County
Department of Social Services,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

DREYER BOYAGIAN LLP
Attorneys for Plaintiffs
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Attorneys for County of Greene and "John and Jane Doe"

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiffs in the above actions have by a single order to show cause sought a judicial subpoena duces tecum requiring disclosure of numerous unspecified documents. Plaintiffs have not submitted any proposed subpoenas, nor have they clearly defined the scope of the requested discovery. The Greene County defendants have cross moved to quash the subpoenas and for a protective order.

The failure of any of the parties to submit all of the subject subpoenas makes it impossible for the Court to determine whether the scope of the subpoenas is appropriate or whether the information could be obtained from other sources (see Moran v McCarthy, Safrath & Carbone, P.C., 31 AD3d 725, 726 [2d Dept 2006]; Matter of Ehmer, 272 AD2d 540, 541 [2d Dept 2000]). It is clear, however, that plaintiffs are seeking documents made confidential pursuant to Social Services Law §§ 372 and 422 (see Catherine C. v Albany County Dept. of Social Servs., 38 AD3d 959, 961 [3d Dept 2007]). Plaintiffs seek records of all reports of abuse by defendant Jose Serrano. Such demand on its face would include reports which were determined to be unfounded, if any. Pursuant to Social Services Law § 422 (5), such reports are to be sealed and may only be disclosed to specified agencies engaged in providing child protective services, the subject of the

report¹, a District Attorney or a police officer. Plaintiffs clearly do not fit into any of these categories nor have they offered any authority for the proposition that such materials are discoverable. As such, defendants are entitled to a protective order with respect to any reports which were determined to be unfounded.

With respect to the remaining social services records, the procedures for obtaining such discovery were recently set forth in Catherine C. v Albany County Dept. of Social Servs., (38 AD3d at 960-961). First, the application for disclosure must be on notice to all interested persons, including the parents or guardians of any alleged non-party infant witnesses identified in the records. Second, the records must be provided to the Court for *in camera* inspection, and third, a hearing must be held to determine the extent of the disclosure. The instant application was not made on notice to any of the non-party witnesses' parents or guardians, who apparently could have been identified by the plaintiffs or from the transcript of the criminal trial of defendant Jose Serrano.

CPLR § 2307 provides that a subpoena duces tecum to be served upon a department or bureau of the state or a municipal corporation must be on notice to the department, bureau or officer having custody of the documents sought. It is unclear upon what entities plaintiffs wish to serve their subpoenas, but their wherefore clause includes a demand for the Department of Criminal Justice's full criminal record on Jose Serrano. The submissions from the County Attorney of Columbia County and the County Attorney

¹The subject of the report is defined in Social Services Law § 412 (4) to be one who causes injury to a child, not the victim.

of Ulster County also indicate that plaintiffs seek information from such counties' District Attorneys, their Sheriff's Departments, Departments of Social Services, Probation Departments and their Family Courts. The order to show cause issued herein only provided for service upon the Family Courts of the respective counties. Plaintiffs have not shown that service was effected upon any of the other bureaus or departments. As such, the plaintiffs may not compel disclosure of any records relating to non-party witnesses or from departments or bureaus which were not served.

While it appears that plaintiffs would be entitled to their own records, defendants provided copies of records with many of the infant plaintiffs' names redacted. Since all of the infant plaintiffs are represented by the same attorneys, there is no need or reason to redact the names of other plaintiffs from the records of specific plaintiffs. Such redactions render the disclosure ambiguous and could lead to significant wasted resources in trying to correlate the statements with plaintiffs or possible non-party witnesses. Moreover, defendants submitted an affidavit from the Director of Children and Family Services for Greene County alleging that all unredacted responsive documents were turned over to their attorneys. There is no indication that they are not still in their possession. Any claim that production of the records would be excessively burdensome is without merit. As such, defendants are not entitled to a protective order with respect to such records.

It is also noted that plaintiffs have requested the attorneys who represent the

Greene County defendants with respect to the claims of plaintiff Oathout to supply their own responses to all discovery demands. Relief with respect to such issue has not been raised by either notice of motion or cross-motion. However, there is no indication that the attorneys representing the Greene County defendants with respect to all other plaintiffs have not submitted all relevant records with respect to plaintiff Oathout. Plaintiffs have not shown any need for the duplication of responses from the same defendants, nor have they shown that the responses would be in any way different from those already received. As such, plaintiffs' request shall be denied.

It is further noted that the instant motion was made contemporaneously with the filing of the note of issue, which has now been stricken. As such, further discovery by plaintiffs is not precluded.

Accordingly it is

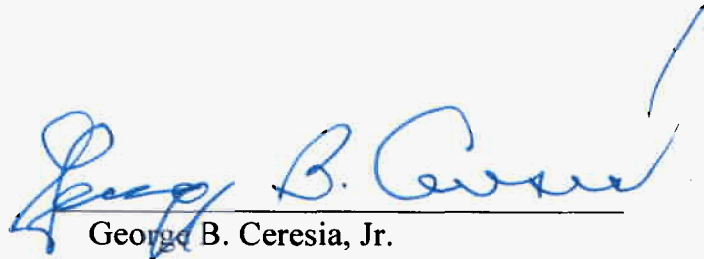
ORDERED that plaintiffs' motion for the issuance of judicial subpoenas duces tecum is hereby denied without prejudice to renew on submissions consistent herewith within 20 days of the date hereof, and it is further

ORDERED that defendants' cross-motion for a protective order is hereby granted with respect to any reports of abuse which were determined to be unfounded and is otherwise denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendants who are directed to enter this Decision/Order without

notice and to serve plaintiffs' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
September 4, 2007
~~OCTOBER~~ 4



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Order to Show Cause dated April 24, 2007;
Affidavit of April M. Wilson, Esq. sworn to April 19, 2007 with Exhibits A-Q annexed;
Memorandum of Law dated April 19, 2007;

Affirmation of Christina M. Bookless, Esq. dated June 11, 2007 with Exhibits A-C annexed;

Notice of Cross-Motion dated June 12, 2007;
Affidavit of Crystal R. Mennillo, Esq. sworn to June 12, 2007 with Exhibits A-F annexed;
Affidavit of Daniel Hall sworn to June 12, 2007;
Memorandum of Law dated June 12, 2007;

Affirmation of Tal G. Rappleyea, Esq., undated with Exhibits A-D annexed; Affirmation of Benjamin A. Shaw, Esq. , undated;

Affirmation of Joshua N. Koplovitz, Esq. dated June 26, 2007;

Reply Affidavit of April M. Wilson, Esq. sworn to June 19, 2007 with Exhibits A-F annexed.