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

PRESENT: PAUL G. FEINMAN Justice

PART 52

Index Number : 122261/2003

MADISON, MICHAEL

VS

CITY OF NEW YORK

Sequence Number : 001

COMPEL

INDEX NO. 122261/03

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ... is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

FILED

JAN 24 2008

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/17/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

☑ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
MICHAEL MADISON,
Plaintiff,

against

THE CITY OF NEW YORK and P.O. DAISY AGOSTINI,
Defendants.
----------X

Index Number 122261/2003
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
The Cochran Firm
By: Gregory J. Cnnata & Associates
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For the Defendant:
Michael A. Cardozo, Esq.
Corporation Counsel of New York City
By: Jacob R. Levin, Esq.
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Papers considered in review of this motion to preclude and compel:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1
Answering Affirmation.....	2
Replying Affirmation.....	3

PAUL G. FEINMAN, J.:

Plaintiff moves to preclude defendants from offering certain evidence at trial, and to compel them to produce certain other records or to submit them for *in camera* review. For the reasons which follow, the motion is granted in part and otherwise denied.

Facts

Plaintiff was an employee at a fur store in New York County on December 23, 2002 when store was the scene of a two-person armed robbery. According to plaintiff's testimony at his "50-h Hearing," held on April 22, 2003, he and his employer were forced into the sales vault, handcuffed, and taped, and one of the gunmen hit plaintiff in the head with his gun (Not. of Mot. Ex.3 [hereinafter Madison Hearing] 7). Plaintiff was able to free himself and ran to the street,

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but the two men got away (Not. of Mot. Ex. 6, Examination before Trial of Michael Madison, Aug. 11, 2006 [hereinafter Madison EBT] 18). Upon return to the store, several police officers were on the scene (Madison Hearing 8). Plaintiff's employer indicated that one of the assailants had left a gun on the bottom of the fur rack, and plaintiff observed it there (Madison EBT 33). According to plaintiff's 2003 testimony, Officer Agostini picked up the gun, put it on the desk, and the gun went off (Madison Hearing 8). According to his 2006 deposition testimony, plaintiff did not see the gun being picked up and was only aware that it had been moved after he was shot (Madison EBT 35). He turned to the location from where the bullet had traveled and saw the smoking gun on the desk, with Officer Agostini "behind it with her hands over the metal;" the officer apologized (Madison EBT 37). Plaintiff was hit in the left groin area (Madison Hearing 8-9).

Officer Agostini was deposed on August 11, 2006 (Not. of Mot. Ex 8 [hereinafter Agostini EBT). Agostini testified that she had received firearms training as part of her police academy training and every year thereafter she received requalifying training (Agostini EBT 16, 18). She testified as to past experiences handling guns at scenes of crimes (Agostini EBT 28-31, 32-33), and unloading her weapon (Agostini EBT 89-91). On the day in question, she was assigned to evidence collection (Agostini EBT 28). At the scene, she was instructed to pick up the weapon to determine its type (Agostini EBT 43). She took a couple of photographs of the gun before she picked it up (Agostini EBT 44). She picked it up with her left hand on the barrel and her right hand on the butt (Agostini EBT 49). She could not tell if the slide had been pulled back and did not know if there was a safety (Agostini EBT 49, 50). She held it with her fingers and placed it evenly on the table (Agostini EBT 64). She did not place it pointed in any

particular position (Agostini EBT 56-57). When she placed it on the desk, the gun went off (Agostini EBT 51). She did not touch the trigger and did not know why the gun fired (Agostini EBT 55, 54). Agostini was taken to Columbia-Presbyterian and treated for tinnitus (Agostini EBT 67, 75, 77-78).

On February 26, 2003, plaintiff filed a notice of claim upon the City of New York alleging negligence and personal injuries (Not. of Mot. Ex. 1). He alleged that he was carelessly and negligently shot by a then-unknown female police officer acting with the scope of her duties, and that the City and the New York City Police Department had negligently hired, trained, and supervised the officer, and should have known she was unfit to perform her duties. As noted above, his "50-h hearing" was held on April 22, 2003. Plaintiff commenced an action by filing a summons and verified complaint on December 31, 2003 (Not. of Mot. Ex. 4). Issue was joined on about February 17, 2004, with the City's Law Department representing the individual defendant (Not. of Mot. Ex. 5). Thereafter, defendants served their demands for a bill of particulars and the plaintiff responded on about April 25, 2005 (Not. of Mot. Ex. 6).

According to the New York City Police Department's supervisor in charge of the Manhattan Property Clerk's Office, the department records show a .22 caliber automatic handgun was vouchered on about December 23, 2002 under invoice number L559737, and categorized as "investigatory" (Not. of Mot. Ex. 18, Affidavit of Daniel Hussey of May 30, 2007] ¶¶ 1-2). The gun was held until May 6, 2005 when it was delivered to the Pearson Place warehouse for disposal (Hussey Aff. ¶ 3). The records show that the gun was destroyed on August 25, 2005 (Hussey Aff. ¶ 3).

The Police Department gunsmith who tested the gun testified on April 11, 2007 (Not. of

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Mot. Ex. 9 [hereinafter Albanese EBT]). Detective Steven Albanese's duties include inspecting firearms that unintentionally or accidentally discharge (Albanese EBT 20). He examined the gun in question in January 2003. It had already been tested in the ballistics lab and having been fired four times, was found to be operable (Albanese EBT 33). He conducted various tests, including trying to reproduce the events that caused the gun to discharge (Albanese EBT 34 et seq., 54). When he completed his assessment, the gun was returned to the unit handling the overall investigation (Albanese EBT 57). Albanese found that the gun had a light trigger pull of between one and three quarters and two pounds (Albanese 38). It discharged inappropriately (Albanese EBT 54-55). When asked whether he could render an opinion to a reasonable degree of firearm certainty as to the cause of the discharge, he stated that the gun's sear was defective and did not sufficiently hold the hammer in position which would result in a discharge if there was impact to the weapon (Albanese EBT 64). He noted that the gun was likely dropped to the floor which may have caused the hammer and sear to shift and thus would not have required a lot of impact for it to go off (Albanese EBT 50). He could not determine whether the gun being dropped on the floor as distinguished to its being placed on the table was the proximate cause of its discharge (Albanese EBT 64-65). When asked whether based on his examination, the placing of the gun gently on a table would cause it to discharge, he said "Probably not." (Albanese EBT 49:9). He stated it was possible that an examination of the weapon might assist in determining what would be the proximate cause (Albanese EBT 65). Photographs would not help (Albanese EBT 65-67, 69, 73-74). He was read a portion of Officer Agostini's deposition in which she circled the areas of the gun that she had touched, and one of the areas was the slide (Albanese EBT 81). Albanese had not known that fact when he tested the gun and if he had, he would have

tested it by trying to get it to discharge by handling the slide (Albanese EBT 78-79).

Motion to Preclude

Plaintiff moves to preclude defendants from presenting any evidence at trial regarding the testing or condition of the gun. The gun was destroyed more than two years after he filed his notice of claim and more than a year and a half after commencing his lawsuit. He argues that he is severely prejudiced because it was never made available for independent testing. He cites *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213 (1st Dept. 2004), for its discussion of spoliation, in particular that under New York law, sanctions including dismissal have been found appropriate where a litigant intentionally or negligently disposes of crucial items of evidence prior to the adversary's having an opportunity to inspect them (14 AD3d at 218-219, citing *Healey v Firestone Tire & Rubber Co.*, 212 AD2d 351 [1st Dept. 1995], *rev'd on other grounds*, 87 NY2d 596 [1996] [dismissal of negligence and strict liability claims against defendant tire manufacturer where another defendant destroyed tire rims suspected of being involved in causing an exploding truck tire, causing injury to the plaintiff; manufacturer "fatally prejudiced" in it ability to defend itself], and *Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1st Dept. 1997] [dismissing third-party action where defendant third-party plaintiff negligently disposed of a stove in a wrongful death action, and then commenced a third-party action against the company that installed the stoves in the apartment complex; the destruction was held so prejudicial to the stove installer that claim was dismissed as against it]).

Sanctions, including striking the pleading, may be applied even when the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation (*DiDomenico v Aeromatick*, 252 AD2d 41, 53 [2d Dept 1998]

[citations omitted]). Defendants argue that preclusion or sanctions are not warranted. They cite *Ortega v City of New York*, 11 Misc. 3d 848 (Sup. Ct., Kings County 2006), which concerns spoliation by the third-party City of New York of a vehicle involved in a crash; the court dismissed the plaintiffs' spoliation claim in part because there was confusion as to what vehicle was at issue, and they had not established that the evidence would have led to the success of their case or that they were unable to prove their claim without it. They also cite *Gitlitz v Latham Process Corp.*, 258 AD2d 391 (1st Dept. 1999), which denied the defendant-manufacturers' motion to dismiss based on spoliation, holding that from the inspection report and deposition of plaintiff's expert who inspected the machine before the action was commenced, and from their own blue prints and designs, the defendants might obtain the evidence necessary to prove the original design was altered and thus establish a defense. In addition, defendants cite *Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 (1st Dept. 2001), which denied the motion to dismiss on the ground of spoliation as it did not appear that the plaintiff was unable to prove his case without certain missing documents provided by defendant, or that the defendant had gained an unfair advantage.

All three cases are distinguishable from the facts here. Unlike *Ortega*, there is little question as to what the missing evidence is and what its existence might show, as well as what its destruction means for plaintiff's case. Unlike *Gitlitz*, plaintiff has no outside evidence concerning the gun other than the photographs which Sergeant Albanese testified were not useful in assessing the gun's condition prior to its discharge. In addition, Albanese stated that based on his examination, he could not tell whether the gun discharged because it had been dropped on the floor or placed on the table. Had he known that Agostini had handled the gun's slide when

picking up the weapon, he would have done different testing on the gun to reflect that fact. These are all questions that plaintiff explored with the defendants' witness, but is stymied from pursuing his own investigation. Unlike *Tawedros*, here plaintiff's theory is based on both Agostini's negligent handling of the gun, and the City's negligence in hiring, training, and supervising her. Without the gun, defendant has gained an unfair advantage over plaintiff who cannot test Albanese's conclusions as to the gun's condition and defect.

Accordingly, given that plaintiff is severely hindered in prosecuting his claim because the gun which shot him is no longer in existence, although it was in the City's possession and destroyed more than a year and a half after the action was commenced, plaintiff's motion to preclude testimony and evidence concerning the condition of the gun is granted.

Motion to Compel

In general, there shall be "full disclosure of all matter material and necessary" to prosecute or defend an action (CPLR 3101[a]). Discovery procedures are to be liberally construed (*Rios v Donovan*, 21 AD2d 409 [1st Dept 1964]). The words "material and necessary" have been interpreted to "require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *The test is one of usefulness and reason*" (*Allen v Crowell-Collier Publishing Co*, 21 NY2d 403, 406 [1968], emphasis added). Full disclosure permits disclosure between all parties in the litigation regardless of the burden of proof (*Lombardo v Pecora*, 23 AD2d 460 [2d Dept 1965]).

Certain matter is not discoverable. Privileged matter, attorney's work product, and material prepared for litigation are not discoverable (*Barber v Town of Northumberland*, 88

AD2d 712 [3rd Dept 1982]). If a party claims exemption or immunity of particular records, he or she has the burden of justifying it (*Zimmerman v Nassau Hospital*, 76 AD2d 921 [2d Dept 1980]). This burden is imposed because full disclosure is favored as a matter of public policy (*Koump v Smith*, 25 NY2d 287, 294 [1969]).

Plaintiff's seek production of (1) copies and transcripts of all tape recordings of interviews of all police and non-police witnesses related to the subject incident; (2) a copy of the "Final Report" concerning the subject incident; (3) authorization to obtain Officer Agostini's medical records for the date of the incident, and (4) training materials for handling of guns at crime scenes or for recovery of guns at crime scenes.

Items (1) and (2)

Plaintiff notes that defendants have admitted that the 911 tapes were destroyed in the general course of business, the request to preserve having been made too late; they have provided the sprint reports (Reply Aff. Ex. A-C). It is unclear whether there was a subpoena or other request for the tapes within the time the tapes still existed and thus the court cannot determine whether any remedy need be fashioned..

Plaintiffs seek the investigatory tapes and transcripts, arguing that they were produced in the regular course of business of the Police Department and contain eyewitness accounts of the events at issue. Defendants argue that the agency conclusions contained in the Final Report, and the tapes and transcripts of interviews that make up the GO-15 hearings, are protected by the public interest and law enforcement privileges. They also argue that personnel records, and Internal Affairs records are confidential under Civil Rights Law § 50-a, as are records of disciplinary actions taken against officers. They attach a redacted copy of the Final Report as

exhibit D in its opposition papers, and argue that other than what is produced in that report, the remaining materials should not be disclosed, citing among others, *Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 117 (1974), and *Matter of World Trade Centre Bombing Litigation*, 93 NY2d 1 (1999).

Civil Rights Law § 50-a exempts intra-agency materials from disclosure, and such records are discoverable only pursuant to court order following a hearing and *in camera* inspection, upon "a clear showing of facts sufficient to warrant the judge to request records for review" (Civil Rights L. § 50-a [2]). Plaintiff bears the initial burden under the statute to demonstrate a good faith factual predicate that warrants the intrusion into the personnel records of the officers (*Telesford v Patterson*, 27 AD3d 328, 329 [1st Dept. 2006]; *Taran v State of N.Y.*, 140 AD2d 429, 432 [2d Dept. 1988], *lv denied*, 83 NY2d 756 [1994]). Plaintiff argues that the interviews will include testimony that Agostini dropped the gun, in contrast to her deposition testimony (Reply Aff. ¶ 15). To the extent that there appears to be no evidence yet produced as concerns what others may have witnessed, the plaintiff has established a factual predicate. However, plaintiff's request is much too broad. What is relevant would be eyewitness statements of Agostini's partner, and any other eyewitnesses to the event, including Agostini's and plaintiff's, commencing with the moment the officer was told to pick up the gun through the moment she apologized to plaintiff for his getting shot. Accordingly, defendants are directed to produce, for *in camera* inspection, tapes and transcripts *only* of eyewitnesses to the events as delineated above. The transcripts are to be Bates-stamped and shall be produced within 60 days of the date of entry of this decision and order.

As concerns the "Final Report," defendants' argument is pertinent as concerns the need to

assure free speaking among agency personnel so as to foster open discussion, recommendations of corrective actions, and the taking of responsive steps (*Martin A. v Gross*, 194 AD2d 195, 203 [1st Dept. 2003]). The redacted portions of the Report clearly are statements and conclusions of Agostini and the investigators, and those statements should remain privileged. Accordingly, the branch of plaintiff's motion seeking production of an unredacted copy of the Final Report is denied.

Item (3)

Defendants are to provide an authorization within 10 days of entry of this decision and order for the release of Agostini's December 23, 2002 visit to Columbia-Presbyterian Hospital and to arrange for these records to be produced to the court for *in camera* review to determine if they contain information as to statements recording what Agostini said as to the way the accident causing her injury occurred.

Item (4)

Defendants' counsel has agreed to direct a further search for police training materials (Reply Aff. ¶ 11). As noted, plaintiff seeks the training materials addressing the handling and recovery of guns at crime scenes. However, his attorney's reply affirmation asks not only for these materials but also a witness to be deposed on "the limited issue of training provided to NYPD Officers and members of the Crime Scene Recovery Unit, or, if no materials are found, then . . . to produce an individual with knowledge who undertook the search for the training materials." (Reply ¶ 11). Plaintiff's request for a witness is denied as it was not part of the initial relief requested in his motion. Defendants are directed to search diligently and produce any pertinent training materials within 45 days of the date of entry of this decision and order. If

no materials are found, defendants shall produce an affidavit signed by the person or persons who undertook the search within the same 45-day period,, and shall detail the qualifications of any person who undertook the search, provide a detailed description of the reasonable efforts used to locate and produce the materials, including the date, time, and place of each search, and a meaningful explanation as to why such materials are not available or do not exist (*see, Lewis v City of New York*, 17 Misc. 3d 559, 569-570 [Sup. Ct., Bronx County 2007]). It is

ORDERED that the branch of plaintiff's motion seeking to preclude defendants from presenting any evidence at trial regarding the testing or condition of the gun that shot plaintiff, is granted; and it is further

ORDERED that the branch of the motion seeking copies of tapes and transcripts produced during the investigation of this incident, is granted to the extent that defendants are directed to produce for *in camera* inspection within 60 days of the date of entry of this order, copies of tapes and Bates-stamped transcripts of the eyewitnesses' testimony to the events as delineated above, and is otherwise denied; and it is further

ORDERED that the branch of the motion seeing an unredacted copy of the "Final Report" of the investigation is denied; and it is further

ORDERED that the branch of the motion seeking Agostini's medical records is granted to the extent that defendants are to provide an authorization within 10 days of entry of this decision and order for the release of Agostini's December 23, 2002 visit to Columbia-Presbyterian Hospital, with the records to be sent to the court for *in camera* review (Supreme Court, 80 Centre Street, room 289, New York NY 10013); and it is further

ORDERED that the branch of the motion seeking copies of training materials as to the

handling and recovery of guns at crime scenes, is granted to the extent that defendants are directed to search diligently and produce any pertinent training materials within 45 days of the date of entry of this decision and order and, if no materials are found, to provide an affidavit signed by the person or persons who undertook the search within the same 45-day period, containing details as set forth above; and it is further

ORDERED that in addition to the foregoing all other outstanding discovery is to be completed within 120 days of entry of this order; and it is further

ORDERED that upon completion of discovery, but not later than 120 days after entry of this order, plaintiff may file a note of issue; and it is further

ORDERED that any summary judgment must be *filed* within 60 days of the *filing* of the note of issue.

This is the decision and order of the court.

Dated: January 17, 2008
New York, New York

Paul G. Feinman
J.S.C.