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

PRESENT: HON. PAUL G. FEINMAN PART 52

Justice

Index Number : 111026/2004

PRESTANO, CHARLES

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 002

COMPEL

INDEX NO. 111026-04

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

were read on this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits Oral argument transcript | 3 |

Cross-Motion: ☐ Yes ☑ No

FILED

APR 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

Motion is DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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

Dated: 3/28/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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CHARLES PRESTANO,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

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Index Number 111026/2004
Mot. Seq. No. 002

**DECISION AND ORDER**

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**For the City of New York:**
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Papers considered in review of this motion for an order to compel disclosure:

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Defendant's Affirmation in Opposition | 2 |
| Transcript of Oral Argument | 3 |

**PAUL G. FEINMAN, J.:**

Plaintiff moves to compel defendant City of New York to provide a supplemental response to plaintiff's notice for discovery and inspection dated July 23, 2007. For the reasons which follow, plaintiff's motion is granted to the limited extent of directing the City to file its Answer in the *Ortiz* matter with the County Clerk within 15 days of entry of this order and is otherwise denied.

***Factual Background***

Plaintiff Charles Prestano, a former New York City Police Officer, allegedly was injured on September 26, 2003, when he tripped and fell on a broken step while walking down a flight of stairs (Aff. in Supp. of Not. of Mot., ¶ 3). Plaintiff fell on the first step of the staircase between the third and fourth floors of the building located at 1267 Park Avenue, New York (Aff. in Supp.

of Not. of Mot., ¶¶ 3, 4). Plaintiff commenced this suit for personal injuries on July 30, 2004 (Not. of Mot. Ex. B, Ver. Compl.).

Plaintiff learned that seven months prior to plaintiff's own accident, a minor child was allegedly injured when she too, fell on the bottom step of the staircase between the third and fourth floors of the building located at 1267 Park Avenue, New York (Aff. in Supp. of Not. of Mot., ¶ 7). The child's accident occurred on the same step and at the same location where plaintiff fell (Aff. in Supp. of Not. of Mot., ¶ 8). A Notice of Claim was filed on behalf of the child on May 3, 2003. Subsequently, a lawsuit was commenced on the child's behalf against the City in 2004 (Aff. in Supp. of Not. of Mot., ¶ 7).

On or about June 2007, plaintiff served the City with a Notice to Admit to the existence and genuineness of the Notice of Claim filed prior to the action being filed in *Joline Ortiz, by her Parent and Natural Guardian Josephine Corliss v The City of New York*, Index No. 111026/2004 (Aff. in Supp. of Not. of Mot., ¶ 15; Aff. in Opp. to Not. of Mot., Ex. A). The City responded by denying the Notice to Admit as to the existence or genuineness of the Notice of Claim (Aff. in Supp. of Not. of Mot. ¶¶ 15). Subsequently, the City amended its response to the Notice to Admit to indicate that the Notice of Claim was received by the New York City Comptroller's Office on May 2, 2003 (Aff. in Opp. to Not. of Mot., Ex. B).

On July 23, 2007, plaintiff made a demand on the City for discovery and inspection, in which plaintiff seeks a copy of the *Ortiz* Notice of Claim and copies of all pleadings, including the bill of particulars relating to the *Ortiz* matter (Not. of Mot., Ex. D; Aff. in Supp. of Not. of Mot., ¶ 9). On October 17, 2007, at a compliance conference, the City provided a response to plaintiff's demand for discovery and inspection which included an objection to the disclosure of

the information plaintiff requests (Not. of Mot., Ex. E). (Aff. in Supp. of Not. of Mot., ¶ 9; Not. of Mot., Ex. E).

Plaintiff seeks to obtain from the defendant in this matter, copies of all pleadings in the *Ortiz* matter, including the bill of particulars (Aff. in Supp. of Not. of Mot., ¶ 9; Not. of Mot., Ex. D). Plaintiff argues that he is entitled to the *Ortiz* bill of particulars because the document contains information relevant to his case (Aff. in Supp. of Not. of Mot., ¶ 10). Plaintiff further argues that the City's contention that the production of the bill of particulars should not be compelled because it contains confidential or privileged material is unsupported by case law (Aff. in Supp. of Not. of Mot., ¶¶ 20, 22). Plaintiff asserts that, if the bill of particulars indeed contains such privileged or confidential information, then it should be subject to *in camera* review and the confidential information redacted (Aff. in Supp. of Not. of Mot., ¶ 21).

In opposition, the City argues that a bill of particular filed in another matter is irrelevant to plaintiff's case, and contains potentially confidential or privileged information (Aff. in Opp. to Not. of Mot., ¶¶ 10, 13). The City also argues that the *Ortiz* case is still pending before the court, and as such, the bill of particulars contains many disputed factual allegations that may not be resolved prior to trial (Aff. in Opp. to Not. of Mot., ¶ 11).

Because the *Ortiz* Notice of Claim that plaintiff seeks is admittedly now in his possession, and the City has conceded its genuineness, the only remaining issue concerns plaintiff's demand that the City provide him with copies of the pleadings in the *Ortiz* case, including the bill of particulars.

***Legal Analysis***

Pursuant to CPLR 3124, any party may move the court for an order to compel discovery.

The CPLR defines the scope of discovery, and provides for full disclosure of all evidence necessary and material in prosecution and defense of an action (CPLR 3101 [a]). This broad scope of the discovery statutes permit "open and far-reaching pretrial discovery" (*Poole v Consolidated Rail Corp.*, 81 NY2d 835, *cert denied* 510 US 816 [1993]). Trial courts liberally interpret the words "necessary" and "material" in the statutory language to permit discovery of any facts and documents pertaining to the controversy in issue that will assist a party in its preparation for trial, providing the documents sought are not protected from discovery (*see, Anonymous v High School for Environmental Studies*, 32 AD3d 353 [1st Dept. 2006]). The test for materiality is one of "usefulness and reason" (*Shutt v Pooley*, 43 AD2d 59, 60 [3rd Dept. 1973]).

Under the provisions of the discovery statutes and relevant case law, "competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanaugh v Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 [1998] quoting, *O'Neill v Oakgrove Constr.*, 71 NY2d 521, 529, *rearg denied* 72 NY2d 910 [1988]). Thus, discovery may be compelled by the court only if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available (*O'Neill v Oakgrove Constr.*, 71 NY2d at 527).

The first issue to be addressed is whether the court should compel the City to provide plaintiff with copies of the pleadings in the *Ortiz* matter. Here, the City need not provide all of the pleadings of this other action as part of discovery as it is "otherwise available" (*see, In re Petroleum Prods. Antitrust Litig.*, 680 F2d 5, 9 [2d Cir], *cert denied sub nom. Arizona v McGraw-Hill, Inc.*, 459 U.S. 909 [1982] [holding that disclosure may not be compelled if the

material sought is pertinent merely to an ancillary issue in the litigation, not essential to the maintenance of the litigant's claim, or obtainable through an alternative source]). Generally, pleadings are a matter of public record, and are available through the Clerk of the Court. Indeed, a one-minute search by the Court revealed that the Summons and Complaint in the *Ortiz* matter are scanned and available in the SCROLL (Supreme Court Records On-line Library) system. *See*, http://10.132.37.7:8080/iscroll/SQLData.jsp?IndexNo=105163-2004 and therefore available to any lawyer with internet access. It is not the responsibility of a defendant to make and provide copies of all of the pleadings in a matter unrelated to the instant case, when such materials are otherwise available, and can be rather easily obtained. However, the SCROLL index of the County Clerk Minute Book's file reveals that an Answer was not filed with the County Clerk and would therefore not be available to plaintiff if he sent someone to the County Clerk's record room. Therefore, this branch of plaintiff's motion is granted only to the extent of directing the City to file its Answer in the *Ortiz* matter with the County Clerk.within 15 days of entry of this order. This, of course, is without prejudice to the defendant City seeking a sealing order from the Justice overseeing the *Ortiz* case in the event it can establish "good cause" which would warrant sealing of that file under the uniform rule for sealing files, 22 NYCRR 216.1.

The next issue to be resolved in this case is whether plaintiff is entitled to disclosure as to the bill of particulars in the *Ortiz* case. The general rule is that where a party's conduct is alleged to have been negligent, "he is entitled to particulars as to the specific acts of negligence which will be claimed" (*Paldino v E.J. Korvettes*, 65 AD2d 617, 618 [2d Dept. 1978]). This is consistent with the statutory purposes of a bill of particulars, which are to amplify the pleadings, limit the proof, and prevent surprise at trial (*Gausney v General Motors Corp.*, 115 AD2d 455,

456 [2d Dept. 1985]; *Hughes v General Motors Corp.*, 106 AD2d 703 [3rd Dept. 1984]). Again, it is well-settled that the object of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial *(Di Lorenzo v Ellison,* 114 AD2d 926 [2d Dept. 1985]). It is not intended to assist a litigant in obtaining evidentiary material (*Kenler v Weissbach*, 61 AD2d 976 [2d Dept. 1978]; *see also*, *Palazzo v Abbate,* 45 AD2d 760 [2d Dept. 1974] [holding that defendants demands for bills of particulars sought much irrelevant matter and directed the production of evidentiary materials as opposed to a "general statement of the acts or omissions constituting the negligence claimed"]).

While the court recognizes that the Notice of Claim, Summons and Complaint and Answer in the *Ortiz* matter are being sought by this plaintiff, *inter alia,* as evidence of notice of the defective condition, plaintiff has not clearly articulated his purpose in seeking the *Ortiz* bill of particulars. Generally, a bill of particulars contains the date and time of the accident, its approximate location, a general statement concerning the acts or omissions constituting the negligence, whether notice is claimed, and a statement of the injuries, length of time in bed and away from work, along with amounts claimed (CPLR 3043). Because the plaintiff now has a copy of the Notice of Claim, he already knows when and where the accident occurred, and how it occurred, and can see whether prior notice is claimed. Thus, compelling disclosure of the *Ortiz* bill of particulars will lend no more assistance to the plaintiff than the documents already discussed.

Furthermore, compelling disclosure of the *Ortiz* bill of particulars would put the City in the position of revealing the mental or physical condition of a non-party to *this* litigation. There is no entitlement to the medical records of another person unless that person places his condition

in controversy (CPLR 3121 [a]). Plaintiff did not receive authorization from Ms. Ortiz' parent or guardian, waiving either her rights to privacy or her privilege against disclosure of protected information. Because the child did not put her medical condition into controversy in the instant action, there can be no automatic waiver of the privilege (*see, Hoenig v Westphal*, 52 NY2d 605, 608-609 [1981 ]). Indeed, at oral argument counsel for plaintiff in this matter conceded that, quite to the contrary, when requested, the plaintiff in the *Ortiz* matter refused to provide him with an authorization. Plaintiff cites no authority for holding that a plaintiff, by beginning an unrelated action for personal injuries, waives her privilege concerning disclosure of her medical records in all subsequent actions (*see, e.g., Scalone v Phelps Memorial Hosp. Ctr.*, 184 AD2d 65, 70 [2d Dept. 1992] [finding that the mere fact that the plaintiff has commenced the action as a personal representative and distributee is insufficient to effect a waiver of her privilege]).

In sum, plaintiff's request for the *Ortiz* bill of particulars is neither necessary nor material to making out his case. While prior accidents at the same location are indeed discoverable and relevant, plaintiff is not being denied access to all pleadings in the *Ortiz* case, which as previously discussed, are available through the Clerk of the Court. Thus, plaintiff's motion to compel disclosure of the bill of particulars in the *Ortiz* litigation is denied. It is therefore

ORDERED that the plaintiff's motion for an order to compel disclosure is granted only to the extent of directing the City to file its Answer in the *Ortiz* matter with the County Clerk within 15 days of entry of this order, and, without prejudice to the defendant City seeking a sealing order from the Justice overseeing the *Ortiz* case pursuant the uniform rule for sealing court records in civil actions, 22 NYCRR 216.1, and is otherwise denied.

ORDERED that the parties are to appear at the previously scheduled compliance

conference on April 16, 2008, at 2:00 p.m. in 80 Centre Street, Room 103.

This constitutes the decision and order of the court.

Dated: March 28, 2008
New York, New York

J.S.C.