

**Nunez v City of New York**

2010 NY Slip Op 30943(U)

April 19, 2010

Supreme Court, New York County

Docket Number: 114904/08

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
CYNTHIA S. KERN

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 114904/2008

NUNEZ, RYAN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

COMPEL

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

FILED

APR 21 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/19/10

CYNTHIA S. KERN J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----x  
RYAN NUNEZ,

Plaintiff,

Index No. 114904/08

-against-

THE CITY OF NEW YORK, ET AL,  
Defendants.  
-----x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers

Notice of Motion and Affidavits Annexed.....  
Answering Affidavits and Cross Motion.....  
Replying Affidavits.....  
Exhibits.....

Numbered  
**FILED**  
APR 21 2010  
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NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff commenced this action to recover damages for personal injuries he sustained stemming from an arrest by the New York City Police Department. He has brought claims for false arrest, false imprisonment, assault and battery, malicious prosecution, negligence and violation of his civil rights. Plaintiff has brought the present motion to compel the City of New York to respond to his discovery demands. The City has voluntarily agreed to produce most of these documents, including Internal Affairs Bureau records and CCRB records regarding the incident in question. The issue still in dispute is whether the City is required to turn over the personnel records of the officers who were involved in the incident. As will be explained and described more fully below, the City is ordered to turn over the personnel records of the officers

involved in the incident solely to the extent that they discuss this particular incident and do not involve the mental health of the officers.

Plaintiff's primary argument is that the personnel records of the officers involved in the incident are material and necessary for the prosecution of his *Monell* claim pursuant to 42 U.S.C. section 1983. To recover on a 1983 claim against the City, plaintiff must plead and prove an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right. *Monell v Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Liability may be imposed against a municipality only where the conduct complained of "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. The issue in a 1983 claim is not whether the employee acted improperly but whether the municipality acted improperly. *Ramos v City of New York*, 285 A.D. 2d 284 (1<sup>st</sup> Dept 2001). The plaintiff must "show the existence of a constitutionally offensive policy or custom and its casual connection to the injury." *Id.* at 302.

In 1983 actions asserting a deprivation a deprivation of constitutional rights, discovery of police personnel files is governed by the Federal Rules of Civil Procedure, rather than the New York Civil Rights Law. *Mann v Alvarez*, 242 A.D. 2d 318 (2d Dept 1997). Under the Federal Rules of Civil Procedure, the information sought should be reasonably calculated to lead to the discovery of relevant and admissible evidence. *Id.* In *Mann*, the Second Department specifically held that the officer's medical, psychiatric, rehabilitation and counseling files would not have to be turned over as the complaint was devoid of any allegations warranting the discovery of such information. According to the court, the plaintiff's allegations of excessive force and false arrest, do not by themselves place the officers' mental health into issue. *Id.* at 320.

In the present case, the court finds that plaintiff has established that the personnel records should be turned over solely to the extent that these records contain documentation regarding the incident in question but that the City is not otherwise required to turn over the personnel records and is not required to turn over any medical, psychiatric, counseling or rehabilitation files of these officers. Under the Federal Rules of Civil Procedure, which govern plaintiff's *Monell* claim, the city is not required to turn over any records unless the records are calculated to lead to the discovery of relevant and admissible evidence. At this juncture in the case, plaintiff has failed to establish that the entire personnel files of these police officers will lead to the discovery of relevant and admissible evidence regarding plaintiff's *Monell* claim. Plaintiff has failed to show that producing the personnel files of these police officers in their entirety will lead to relevant evidence regarding whether the City, as opposed to the individual police officers, had a pattern and practice of violating constitutional rights. Moreover, as the Second Department specifically held in *Mann*, it would be inappropriate to require the City to turn over the personnel records regarding the mental health of the individual officers as the mere fact that the plaintiff made allegations regarding excessive force and false arrest does not place the mental health of the officers in issue.

The court notes that it is not currently making any substantive determination as to the viability of plaintiff's 1983 claims as there is no motion before this court either to dismiss the claim or to amend the complaint to amplify the allegations regarding the 1983 claim. All that the court is deciding is that the allegations currently stated in the complaint, which do not contain any specific allegations as to what actions were taken by the City which constituted a pattern and practice of violating constitutional rights, do not support plaintiff's argument that the personnel

files of the individual police officers (except to the extent that they discuss this individual incident) will lead to the discovery of relevant and admissible evidence.

Based on the foregoing, and the agreement by the City to turn over the IAB records and the CCRB records, it is hereby ordered that plaintiff's motion is denied except that the City should turn over any personnel records of the individual officers which involve this particular incident, except to the extent that they involve the officer's mental health. If no such documents exist, the City should provide plaintiff with an affidavit which so states. This constitutes the decision and order of the court.

Dated: 4/19/10

CK

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.

**FILED**  
APR 21 2010  
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