STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHIRLEY MORTON,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7659-09
RJI NO. 01-09-98819

KEVIN McKENNA, PETER NOONAN,
JAMES TUFFEY and THE CITY OF ALBANY,

Defendants.

Supreme Court Albany County All Purpose Term, November 18, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Greenberg & Greenberg
Mark Greenberg, Esq.
Attorneys for Plaintiff
Four East Court Street
Hudson, New York 12534

DerOhannesian & DerOhannesian
Paul DerOhannesian, Esq.
Attorneys for Defendant Kevin McKenna
677 Broadway, Suite 202
Albany, New York 12207

Rhefuss, Liguori & Associates, PC
Stephen J. Rehfuss, Esq.
Attorneys for Defendants Peter Noonan, James Tuffey and The City of Albany
40 British American Boulevard
Latham, New York 12110

TERESI, J.:

On January 2, 2008, Plaintiff alleges defendant Kevin McKenna (hereinafter "McKenna") pointed Peter Noonan's (hereinafter "Noonan")[1] handgun at her. Plaintiff commenced this

[1] Both McKenna and Noonan were City of Albany police officers. While Noonan is a named defendant in this action, Plaintiff's complaint against him was dismissed by this Court's Decision and Order, dated February 11, 2010.

action, as is relevant here, against The City of Albany (hereinafter "Albany") and its then Chief of Police James Tuffey (hereinafter "Tuffey") alleging causes of action sounding in negligent hiring, retention and supervision of McKenna and Noonan and gross negligent supervision and training of McKenna and Noonan. Issue was joined by all Defendants, discovery has been conducted and is nearing completion.

Plaintiff now moves to compel the production of documents created as part of McKenna's "disciplinary proceedings... stemming from the incident of January 2, 2008." Defendants oppose the motion, with McKenna moving for a protective order in the event such documents are disclosed. Plaintiff opposes McKenna's motion. On this record, because Plaintiff failed to demonstrate her entitlement to the documents she seeks, her motion is denied. As such, McKenna's motion for a protective order is also denied, as moot.

Additionally, Defendants move to amend their respective answers. McKenna, Albany and Tuffey all move to add the affirmative defense of "exclusivity of Worker's Compensation Benefits," while McKenna also moves to add the affirmative defenses of res judicata and collateral estoppel. Plaintiff opposes the motions. While McKenna, Albany and Tuffey all demonstrated their entitlement to add the affirmative defense of "exclusivity of Worker's Compensation Benefits," McKenna did not demonstrate his entitlement to add the affirmative defenses of res judicata or collateral estoppel.

Considering first Plaintiff's motion to compel production, all parties agree that the documents Plaintiff seeks are "personnel records" subject to Civil Rights Law § 50-a's restrictions on disclosure. Contrary to Plaintiff's contention, Plaintiff has "the initial burden... to demonstrate in good faith, some factual predicate warranting the intrusion into the[se] personnel

records." (Dunnigan v. Waverly Police Dept., 279 AD2d 833, 834 [3d Dept. 2001]; Flores v. City of New York, 207 AD2d 302 [3d Dept. 1994]; Civil Rights Law § 50-a[2]; *see also* Blanco v. County of Suffolk, 51 AD3d 700 [2d Dept. 2008]; Pickering v. State, 30 AD3d 393 [2d Dept. 2006]; Petroski v. Petroski, 6 AD3d 1194 [4th Dept. 2004]).

Here, Plaintiff failed to set forth any "factual predicate" for her motion to compel. She submits no affidavit of fact to support her motion, relying solely upon her attorney's affirmation, which is of limited probative value. (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]). While Plaintiff's attorney alleges that the documents sought "are relevant and material to plaintiff's causes of action for negligent hiring, retention and supervision" such allegation is wholly conclusory. Moreover, his allegations about what the "the evidence has shown" is unsupported by any factual demonstration of the evidence. Similarly, unsupported is Plaintiff's attorney's statement that the "Defendants in their depositions have offered conflicting accounts of the central events that gave rise to this litigation," because the deposition transcripts are not attached and the conflict is not explained. Plaintiff's attorney's speculation about what the sought documents "may contain," fails to establish the necessary factual predicate for Plaintiff's motion to compel.

Accordingly, Plaintiff's motion to compel production is denied.

Turning next to the Defendants' motions to amend their answers, it is well established that "[l]eave to amend pleadings is freely granted (see CPLR 3025[b]) so long as there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit." (Paolucci v. Mauro, 74 AD3d 1517 [3d Dept. 2010] quoting Shelton v. New York State Liq. Auth., 61 AD3d 1145 [3d Dept. 2009][internal quotes omitted]). As is specifically applicable to a motion

to amend an answer to add an "exclusivity of Worker's Compensation Benefits" affirmative defense, the burden is upon "Plaintiff... to establish prejudice accruing to [her] as a consequence of defendant's failure to timely assert the defense, and to include a showing that the prejudice could have been avoided if the defense had been timely asserted." (Caceras v. Zorbas, 74 NY2d 884 [1989]; Smith v. Oneida Sales and Service, Inc., 26 AD3d 809 [4th Dept. 2006]). Moreover, "[i]n determining the merit of the proposed amendment, [the court] must accept as true the facts alleged and draw all reasonable inferences in favor of [the movant]." (Shelton v. New York State Liq. Auth., supra at 1150).

On this record, McKenna, Albany and Tuffey all demonstrated the merit of their proposed "exclusivity of Worker's Compensation Benefits" amendment and Plaintiff failed to demonstrate prejudice. Accepting as true Defendants' allegations that Plaintiff received worker's compensation benefits for the injury she sustained from the January 2, 2008 incident with McKenna, such allegations set forth a viable bar to her claim against Albany and Tuffey. (Werner v. State, 53 NY2d 346 [1981]; Feltt v. Owens, 247 AD2d 689 [3d Dept. 1998]). Such allegations similarly set forth a viable bar to Plaintiff's negligence claims against McKenna. (Durkee v. Renaud, 63 AD3d 1328 [3d Dept. 2009]; Hernandez v. Sanchez, 40 AD3d 446 [1st Dept. 2007]; *but see* Hanaford v. Plaza Packaging Corp., 2 NY3d 348 [2004][the exclusivity of Worker's Compensation Benefits does not bar Plaintiff's intentional tort claims against McKenna]). As such, McKenna, Albany and Tuffey's proposed "exclusivity of Worker's Compensation Benefits" amendment is not plainly lacking in merit. Moreover, Plaintiff offered no proof nor any allegations of prejudice arising from Defendants' late assertion of this affirmative defense. Accordingly, McKenna, Albany and Tuffey' motions to amend their

answers to add the affirmative defense of "exclusivity of Worker's Compensation Benefits" is granted.

McKenna, however, failed to demonstrate the merit of his proposed collateral estoppel or res judicata affirmative defenses. Although McKenna explicitly seeks such an amendment, no proof nor any allegations demonstrating the merit of either of these affirmative defenses was set forth. As McKenna "fail[ed] to make an evidentiary showing that th[is] proposed amendment has some merit," his motion to amend his answer to add collateral estoppel and res judicata affirmative defenses is denied. (Gersten-Hillman Agency, Inc. v. Heyman, 68 AD3d 1284, 1289 [3d Dept. 2009]).

Additionally, in accord with the Preliminary Conference Stipulation and Order, dated March 7, 2010, Plaintiff shall file a note of issue on or before December 1, 2010. Thereafter, on December 28, 2010 at 8:30 A.M. at the Albany County Courthouse - Room 256, this Court will hold a final conference in this matter. At least three days before the final conference each party shall deliver to the Court, by a means other than fax, a two page statement of contentions.

Due to the age of this case I am unable to reschedule the conference.

Please confer with your clients, experts, witnesses and each other for an agreed trial date.

If you are unable to personally attend the final conference because of a scheduling conflict, local counsel with authority to act may attend.

This Decision and Order is being returned to the attorneys for the Albany and Tuffey. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 24, 2010
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 30, 2010, Affirmation of Mark Greenberg, dated September 30, 2010, with attached Exhibits A-F.
2. Notice of Cross-Motion, dated October 14, 2010, Affirmation of Paul DerOhannesian, dated October 14, 2010, with attached Exhibits A-B.
3. Affidavit of Stephen Rehfuss, dated October 12, 2010, with attached Exhibits 1-2.
4. Affirmation of Mark Greenberg, dated October 20, 2010.
5. Notice of Motion, dated October 1, 2010, Affidavit of Stephen Rehfuss, dated October 1, 2010, with attached Exhibits A-C.
6. Notice of Motion, dated October 8, 2010, Affirmation of Paul DerOhannesian, dated October 8, 2010, with attached Exhibits A-B.
7. Affirmation of Mark Greenberg, dated November 9, 2010.