

People v Alvo

2010 NY Slip Op 33983(U)

January 25, 2010

Supreme Court, New York County

Docket Number: 6425/2008

Judge: Rena K. Uviller

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Indictment No.
6425/2008

- against -

MITCHEL ALVO,
SALVATORE DEPAOLA,
THE JOHN GALT CORP. and
JEFFREY MELOFCHIK,

DECISION & ORDER

Defendants.
-----X

R. UVILLER, J.:

On August 18, 2007, a fire occurred at the Deutsche Bank building at 130 Liberty Street in Manhattan, taking the lives of two firefighters. The Deutsche Bank building had been severely damaged as a consequence of the September 11th terrorist attack at the World Trade Center. At the time of the fire the defendants were employed by companies engaged in the demolition and asbestos abatement of the building. They have been indicted for Second Degree Manslaughter and related crimes in connection with their work at the building.

Defendant Jeffrey Melofchik moves for the issuance of two judicially ordered subpoenas duces tecum on the New York City Department of Investigation (“DOI”). *CPL §610.20; CPLR §2307*. DOI opposes the issuance of both subpoenas and has moved for a protective order. *CPLR §3101(a); CPL 240.50*.

The First Subpoena

Subsequent to the fire the New York County District Attorney (DANY), with the assistance of DOI personnel, conducted an investigation into the fire and the deaths of the two firefighters (the Criminal Investigation). The first so-ordered subpoena Melofchik seeks to serve on DOI demands production of “[a]ll documents and communications regarding DOI’s participation in the DANY criminal investigation ... as well as any other document or communication concerning the fire.”

The Second Subpoena

After DANY concluded its criminal investigation the Mayor's Office directed DOI to conduct its own independent investigation (the Administrative Investigation), with entirely separate personnel from those who had participated in the Criminal Investigation. The Administrative Investigation resulted in a DOI report issued in June, 2009 (the DOI Report). That Report is available to the public. It makes policy and procedural recommendations to the New York City Fire Department (FDNY) and the New York City Buildings Department, and suggests that several New York City employees face non-criminal disciplinary charges for their actions regarding the fire.

The second subpoena demands from DOI production of "all documents relating to the . . . [DOI] Report . . ."

Prior and subsequent to the instant request for the so-ordered subpoenas, DANY had provided Melofchik and his co-defendants with a massive amount of discovery, including literally millions of pages of documents, several hundred hours of audio and video recordings and copies of, or access to, the Grand Jury exhibits. In addition, the People have agreed to provide, or have already provided, thousands of additional pages of notes and memoranda pertaining to witness interviews conducted by DANY, NYFD and others. These interviews, notes and memoranda pertain not only to all of the individuals who testified before the Grand Jury, but also to many other persons who did not testify.

Much of the foregoing material DANY provided to the defendants had been received by DANY in response to its own subpoena served on DOI in August of 2009. In fact, the judicial subpoena Melofchik now seeks regarding the DOI Report mirrors the DANY subpoena to DOI.

The crux of DOI's opposition to Melofchik's two subpoenas is that an insufficient predicate has been proffered for their issuance; that the defense is invoking the Court's subpoena power in an effort to circumvent New York discovery provisions in Article 240 of the Criminal Procedure Law.

DOI also argues that the material for which DOI seeks a protective order is covered by the public interest privilege, sometimes referred to as the deliberative process privilege (*See, In re World Trade Center Bombing Litigation*, 93 NY2d 1; *Cirale v. 80 Pine Street Corp.*, 35 NY2d 113), as well as the attorney- client privilege.

CONCLUSIONS

Subpoena Power/Discovery

In support of Melofchik's motion for the first subpoena relating to the Criminal Investigation, he asserts that the "information *may be* exculpatory." *Affirmation of Edward Little, Esq., dated Oct. 7, 2009 (the Little Affirmation) at ¶21*. Also, that it is material and relevant to proof that defendant's disregard of the risk was not a gross deviation from the standard of conduct in the field of demolition and asbestos abatement. *Little Affirmation, at ¶21* In support of the second subpoena regarding the Administrative Investigation and the DOI Report, defendant asserts that the requested material "*may very well* exculpate defendant." *Little Affirmation at ¶16*.

Discovery in a criminal case is governed by Criminal Procedure Law, Article 240. *People v. Colavito*, 87 NY2d 423. A subpoena duces tecum "may not be used for the purpose of discovery or to ascertain the existence of evidence." *Matter of Terry D.*, 81 NY2d 1042, 1044; *People v. DiLorenzo*, 134 Misc 2d 1000. Rather, the purpose of a subpoena is "to compel the production of specific documents that are relevant and material to fact at issue in a pending judicial proceeding." *Matter of Terry D., supra, citing Matter of Constantine v Leto*, 157 AD2d 376, 378, *aff'd* 77 NY2d 975; *See, People v. Bagley*, 279 AD2d 425-427, *lv denied* 96 NY2d 711; *People v. Scott*, 60 AD 3d 1296, *lv denied* 12 NY3d 821; *People v. Reddick*, 43 AD3d 1334, *lv denied* 10 NY 3d 815.

In light of the enormous, indeed overwhelming, amount of information already provided to defendants by DANY, and by DOI via its response to DANY's subpoena, defendant's requests are over-broad and his assertions regarding their relevance and exculpatory value are speculative. The

requests amount to the classically impermissible “fishing expedition” preempted by the New York discovery statute. *CPL Article 240*. See *People v. Gissendanner*, 48 NY2d 543; *Decrista v. State Police Laboratory*, 182 AD2d 930,931; *Matter of Brown v. Grosso*, 285 AD2d 642, *lv denied* 97 NY2d 605 (defendant charged with attempted murder of a police officer following a struggle not entitled to subpoena documents from the Civilian Complaint Review Board, the police department or the prosecutor which might support his defense that the officer shot himself).

Defendant’s assertion that the information “may” exculpate him or “may very well” exculpate him” does not provide the necessary factual predicate sufficient to demonstrate that the materials sought from DOI, a non- party to this prosecution, are in fact reasonably likely to be relevant and exculpatory. *Matter of Terry D.*, *supra*, citing *Matter of Constantine v. Leto*, *supra*. Nor has he demonstrated that the material sought through subpoena is not duplicative of the vast amount of information already produced. *People v. New York City Health and Hospitals Corp. (In re Grand Jury Subpoena Duces Tecum)*, 272 AD2d 214.

Defendant’s claims that he requires the internal documents underlying the Criminal Investigation in order to establish that he did not deviate from the reasonable standard of care in its work at the Deutsche Bank building. The performance of other individuals, agencies, and officials relating to conditions at the building prior to and on the date of the fire have been documented in the DOI Report, a public document. That document is available to the defendant insofar as it will assist him in that aspect of his defense.

Privilege

DOI further maintains that the materials are protected by the public interest privilege (*see, In re World Trade Center Bombing Litigation, supra; People v. Cirale, supra*), as well as the attorney-client privilege. DOI asserts that the materials defendant seeks consist solely of emails and memoranda discussing investigative strategy; internal legal research memoranda; draft reports

relating to the Administrative Investigation; chronologies and other internal work product of DOI attorneys and investigators; notes and memoranda summarizing testimony of witnesses reflected in the recorded interviews and transcripts provided to DANY (and which DANY has provided to defendants); emails and inspection reports related to current practices at 130 Liberty Street and emails and memoranda related to the manner in which the Administrative Investigation would proceed. *Affirmation of Marjorie Landa, Esq., dated November 12, 2009, in Opposition to Defendant's Motion (the Landa Affirmation) at ¶18.*

DOI argues that the foregoing documents “reflect the thought process of the investigators and advice of attorneys assisting in the investigation, [and] are privileged from disclosure based on the public interest/deliberative process privilege and the attorney-client privilege. *Landa Affirmation at ¶17.*

The purpose of the public interest privilege is to encourage open and uninhibited internal debate by governmental officials and agencies where the public interest requires it. *See, In Re World Trade Center Bombing Litigation, supra; Cirale v. 80 Pine Street Corp., supra; Gould v. N.Y.C. Police Department, 89 NY2d 267; In the Matter of Sea Crest Construction Corp. v. Stubing, 82 AD2d 546.* The privilege also ensures that persons in advisory roles can express their opinions freely to agency decision makers, which will in turn benefit the public. The privilege applies to criminal as well as civil litigation. *See, Cirale v. 80 Pine Street Corp., supra at 118; People v. N.Y.C. Health and Hospitals Corp. (In re Grand Jury Subpoena Duces Tecum), supra; Matter of Langert v. Tenny (Commissioner of Investigations of the City of New York), 5 AD2d 586, 589, lv denied, 6 AD2d 777, app. dismissed, 5 NY2d 875; People v. Norman, 78 Misc.2d 644. See also, Concepcion v. Federal Bureau of Investigation, 606 F. Supp.2d 14; United States v. Fernandez, 231 F.3d 1240; Fortunati v. Campagne, 2009 U.S. Dist. Lexis 10729; United States v. Cicilline, 2008 U.S. Dist. Lexis 10509.*

The public interest privilege is a qualified one, which requires a balancing of the needs of the parties. The harm to the public interest from disclosure must be weighed against the litigant's need for the information. Once it is shown that disclosure would be more harmful to the public interest than to the litigant seeking disclosure, non-disclosure is favored. *Cirale v. 80 Pine Street Corp., supra at 118; In Re World Trade Center Bombing Litigation, supra at 9.*

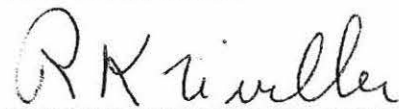
Here, it was and is essential that a full and free discussion be held amongst City officials regarding the cause of the fire and the means to prevent similar tragedies in the future. Disclosure of those internal discussions would be compromised if the concerns and frank opinions by investigators and government officials could be disclosed indiscriminately. *See, In Re World Trade Center Bombing Litigation, supra at 8; Cirale v. 80 Pine Street Corp., supra.* The public interest in preventing similar future disasters outweighs defendant's need for the material, especially in light of the vast amount of material already in his possession.

Finally, it is unnecessary to conduct an *in camera* inspection of the documents defendant seeks. DOI has stated the purpose for which the materials were gathered and has provided a description of the material sought. A sufficient basis exists to determine that the assertion of the public interest privilege is warranted. *See, Cirale v. 80 Pine Street Corp., supra at 119.*

For all of the foregoing reasons, defendant's motion for the two so-ordered subpoenas is **denied** and the protective order sought by DOI is **granted**.

This constitutes the Decision and Order of this Court.

DATED: January 25, 2010



RENA K. UVILLER, J.S.C.

PEOPLE: ADA Noah Genel
ADA Brian Fields

DEFENSE: Edward J.M. Little, Esq.
Susan Hoffinger, Esq.
Rick J. Pasacreta, Esq.
Catherine L. Redlich, Esq.