

Reiner v City of New York

2011 NY Slip Op 30149(U)

January 21, 2011

Sup Ct, New York County

Docket Number: 111462/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

Index Number : 111462/2009
REINER, ROBERT
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
COMPEL

CAL # 71

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for compel

PAPERS NUMBERED
1, 2
3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/21/11
JAN 21 2011

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----x
ROBERT REINER,

Plaintiff,

-against

Index No. 111462/09

Motion date: 11/30/10

Motion seq. no.: 002

DECISION & ORDER

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER JOHN MCKIERNAN,
POLICE OFFICER JOHN DOE, POLICE OFFICER JOHN
ROE,

Defendants.

-----x
BARBARA JAFFE, JSC:

For plaintiff:
Neil Wollerstein, Esq.
59 Maiden Lane, 43rd Fl.
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212-412-4705

FILED
JAN 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

For defendants:
Lynn M. Leopold, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007

By notice of motion dated August 20, 2010, plaintiff moves pursuant to CPLR 3124 for an order compelling defendant McKiernan to appear for a further deposition. Defendants City of New York, New York City Police Department (NYPD), and McKiernan (collectively, defendants) oppose the motion and, by notice of cross-motion dated September 22, 2010, move pursuant to CPLR 3103 for a protective order denying, limiting, conditioning, or regulating the plaintiff's questioning of McKiernan at a deposition and precluding plaintiff from conducting another deposition of McKiernan.

I. CONTENTIONS

Plaintiff commenced the instant action to recover damages for false imprisonment,

malicious prosecution, negligent hiring and retention, assault, battery, and violations of 42 USC 1983. On April 29, 2010, during McKiernan's deposition, plaintiff's counsel asked several questions relating to whether he had ever been charged with or convicted of a crime, disciplined at work, had a complaint filed against him with the Civilian Complaint Review Board (CCRB) alleging excessive force or false arrest, and had been referred to alcohol treatment or stress management. Defendant's attorney objected on the ground that the questions were "palpably improper" and directed McKiernan not to answer.

Plaintiff argues that the questions asked of McKiernan are relevant to his claims, especially as McKiernan had a prior alcohol-related criminal conviction. He also maintains that moments before McKiernan's deposition, defendants' counsel provided him with 10 pages of documents related to a search warrant application and that he had insufficient time to examine the documents and thus should be permitted to ask questions related to the new documents. (Affirmation of Neil Wollerstein, Esq., dated Aug. 20, 2010).

Defendants argue that as McKiernan's prior conviction for driving under the influence occurred in 1988, more than 20 years before the incident at issue here, and five years before he became a police officer, it is irrelevant and prejudicial, and observe that he already testified that he had not been convicted of a crime since becoming a police officer. They deny that plaintiff is entitled to information related to any prior CCRB complaints or disciplinary actions involving McKiernan absent any claim of excessive force or complaint by plaintiff to the CCRB or the NYPD about the instant incident, and contend that in any event records of disciplinary actions or prior CCRB complaints are confidential and that as McKiernan was acting within the scope of his employment at the time of the incident, plaintiff may not maintain a negligent hiring or

training claim. Defendants object to any questions related to McKiernan's treatment for alcohol or stress management on the ground that such information is privileged and irrelevant absent any issue as to his physical or mental condition. Defendants also deny that plaintiff had insufficient time to review the documents, observing that counsel asked many questions about them.

(Affirmation of Lynn M. Leopold, ACC, dated Sept. 22, 2010).

In reply, plaintiff denies that he was able to question McKiernan sufficiently about the search warrant documentation, observing that had he received the documents earlier, he would have had an expert examine them. He argues that Civil Rights Law § 50-a protects the confidentiality of a police officer's personnel records and does not confer any testimonial privilege, and that in any event, as he has asserted a federal civil rights law claim, the more liberal federal discovery rules govern here. (Reply Affirmation, dated Oct. 15, 2010).

II. ANALYSIS

A. Prior criminal convictions or charges

While McKiernan's conviction for driving under the influence occurred over 20 years ago, such evidence may be admissible at trial to impeach his credibility, and thus plaintiff is entitled to question McKiernan about it at a deposition. (CPLR 4513 [convictions may be used to cross-examine witness]; *see Morgan v Ntl. City Bank*, 32 AD3d 1264 [4th Dept 2006] [court did not err in permitting questioning of plaintiff regarding prior conviction for driving while intoxicated]; *Cruz v Long Island R.R. Co.*, 22 AD3d 451 [2d Dept 2005], *lv denied* 6 NY3d 703 [2006] [court erred in not permitting evidence of plaintiff's prior criminal conviction for impeachment purposes]; *Sauer v Diaz*, 300 AD2d 1136 [4th Dept 2002] [court in its discretion could have permitted impeachment of party by prior conviction for driving while under influence

of alcohol]). For the same reason, plaintiff is entitled to ask McKiernan about any other convictions. (*See Vernon v New York City Health & Hosps. Corp.*, 167 AD2d 252 [1st Dept 1990] [any of plaintiff's convictions would have been admissible under CPLR 4513. "which grants a civil litigant broad authority to use the criminal convictions of an adverse witness to impeach the credibility of that witness"]]).

Moreover, a witness may be examined about a "specific immoral, vicious or criminal act, if there is a reasonable factual basis for it." (58A NY Jur 2d, Evidence and Witnesses § 949 [2010]; *see also 1515 Summer St. Corp. v Parikh*, 13 AD3d 305 [1st Dept 2004] ["witness can be cross-examined with respect to specific immoral, vicious or criminal acts that bear on his or her credibility"]). Thus, plaintiff may question McKiernan about any prior criminal charges to determine if there is a factual basis for impeaching him by a specific immoral, vicious, or criminal act. (*Donahue v Quickrete Cos.*, 19 AD3d 1008 [4th Dept 2005] [court did not err in allowing defendant's attorney to ask plaintiff whether he had committed act of bribery; factual basis for question existed]; *Pope v New York City Tr. Auth.*, 244 AD2d 263 [1st Dept 1997] [defendant properly impeached plaintiff's credibility by proof criminal convictions and bad acts]; *Simon v Indursky*, 211 AD2d 404 [1st Dept 1995] [defendant could be questioned about prior drug use and license revocations]; *Murphy v Estate of Vece*, 173 AD2d 445 [2d Dept 1991] [plaintiff properly cross-examined regarding arrest on drug charge]; *cf Dance v Town of Southampton*, 95 AD2d 442 [2d Dept 1983] [repeated attempts to impeach witness based on arrest warrants and criminal charges not accompanied by showing of convictions based on accusations, and no foundation was laid for evidence of specific acts of misconduct]).

B. CCRB complaints or disciplinary actions

If McKiernan had been acting within the scope of his employment at the time of the alleged incident, defendants City and NYPD may not be held liable for negligently hiring, supervising, or retaining him as an employee. (*Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010]; *Ashley v City of New York*, 7 AD3d 742 [2d Dept 2004] [dismissing negligent hiring and retention claim against City and NYPD]). However, City and the NYPD in their answer deny knowledge or information sufficient to form a belief as to whether he was acting within the scope of his employment. Thus, absent a clear concession that McKiernan was acting within the scope of his employment, plaintiff is entitled to information relating to any prior disciplinary records or complaints made against McKiernan. (*Pickering v State*, 30 AD3d 393 [2d Dept 2006] [without “clear concession by the defendant that the officer acted completely within the scope of his employment,” plaintiff entitled to officer’s personnel file]; *Butler v City of New York*, 15 Misc 3d 1134[A], 2007 NY Slip Op 50974[U] [Sup Ct, Kings County] [as City’s answer denied allegation as to officer’s scope of employment, plaintiff entitled to information from officer’s personnel file]).

Moreover, as plaintiff has asserted a claim under 42 USC § 1983, and given the more liberal discovery afforded in cases involving federal civil rights claims (*Ramos v City of New York*, 285 AD2d 284 [1st Dept 2001]; *King v Conde*, 121 FRD 180 [ED NY 1988]), plaintiff is entitled to question McKiernan about any prior complaints made and disciplinary actions taken against him (*Gibbs v City of New York*, 243 FRD 95 [SD NY 2007] [as plaintiffs asserted 1983 claims, they were entitled to discovery of prior complaints against officers and officers’ employment histories]; *Younger v City of New York*, 2006 WL 1206489 [SD NY 2006] [plaintiff

entitled to officers' CCRB complaints and disciplinary records]; *Ramos*, 285 AD2d at 307 [plaintiff entitled to information relating to internal discipline or other remedial action]; *Mann v Alvarez*, 242 AD2d 318 [2d Dept 1997] [internal affairs and CCRB records were relevant to plaintiff's federal claims and thus discoverable; plaintiff entitled to have officer answer questions related to federal claims]).

C. Alcohol treatment or stress management

Plaintiff fails to set forth any factual basis for questioning McKiernan about any prior alcohol treatment or stress management that he may have received. (*See McFarlane v County of Suffolk*, 912 NYS2d 297, 2010 NY Slip Op 09107 [2d Dept 2010] [disclosure of officers' psychological evaluations should have been denied as their mental health was not placed in issue]; *Mann*, 242 AD2d at 320 [plaintiff's allegations against officer did not, by themselves, place officer's mental health in issue, and thus plaintiff not entitled to officer's medical, psychiatric, rehabilitation, or counseling files]; *cf Butler*, 15 Misc 3d 1134[A], 2007 NY Slip Op 50974[U] [questions regarding anger or stress management courses relevant to plaintiff's claim of negligent retention to extent officer was encouraged or required to attend by NYPD]).

D. Untimely production

Finally, defendants' last-minute production of the search warrant documents entitles plaintiff to depose McKiernan again and ask him questions about them.


III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to compel and defendants' motion for a protective order are both granted in part and denied in part to the extent that McKiernan is directed to

appear for a further deposition and answer any questions related to any prior criminal convictions, criminal charges, CCRB complaints, and disciplinary actions taken against him, and to the search warrants documents produced by defendants.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: January 21, 2011
New York, New York
JAN 21 2011

FILED
JAN 24 2011
NEW YORK
COUNTY CLERK'S OFFICE