

Santana v County of Suffolk

2011 NY Slip Op 33481(U)

December 5, 2011

Sup Ct, Suffolk County

Docket Number: 08-30581

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 7-22-11

ADJ. DATE 8-4-11

Mot. Seq. # 002 - MotD

----- X

LUCAS X. SANTANA :

Plaintiffs, :

- against - :

COUNTY OF SUFFOLK, SUFFOLK COUNTY :

POLICE DEPARTMENT, POLICE OFFICER :

JOHN G. WILLIAMS, POLICE OFFICER SEAN C. :

WALSH, and JOHN DOES #1-6, names being :

fictitious and said persons being unknown members :

of the Suffolk County Police Department, :

Defendants. :

----- X

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Upon the following papers numbered 1 to 20 read on this motion and cross motion to compel; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-20; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (002) by the plaintiff, Lucas X. Santana, for an order pursuant to CPLR 3101 and 3125 compelling the production of Suffolk County Internal Affairs Bureau (hereinafter IAB) Detectives Fitzgerald and Fasano for examinations before trial; compelling disclosure of documents demanded in plaintiff's notices for discovery and inspection within thirty days, or for an order striking the defendant's answers for failure to submit to depositions and to respond to the discovery demands, is granted to the extent that the County of Suffolk is directed to produce IAB Detectives Fitzgerald and Fasano for examinations before trial within forty-five days of service of this order with notice of entry upon the defendants by the plaintiff; and is denied as to those items which the defendant claims are privileged and confidential, and to which the defendant objected, as set forth in its "Response to Preliminary Conference Order" (Exhibit Q), dated November 25, 2008, which was served in response to "Plaintiff's Combined Demands" as to items # 4. (a), (b), (d), (I) and (k), and in response to "Plaintiff's Further Notice for Discovery and Inspection" as to items # 3, 6, 10.

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In this action, it is claimed that on October 28, 2005, at about 11:00 a.m., at 192 Strong Street, Brentwood, Suffolk County, New York, the plaintiff, Lucas X. Santana, was negligently and recklessly attacked and assaulted, and then arrested, by the Suffolk County Police Officers. It is claimed that there was contact between the pedestrian plaintiff and the police car being operated by a Suffolk County Police Officer, causing the plaintiff to sustain injury for which he seeks damages. It is further claimed that the officers used excessive force in arresting the plaintiff. The police report indicates that while the police were pursuing Santana, a known felon, Santana ran into the street and into the side of the police vehicle.

During the discovery phase of this action, the plaintiff served a demand for discovery and inspection dated January 19, 2007, and a further notice for discovery and inspection dated March 14, 2007. Pursuant to the Preliminary Conference Order dated March 12, 2007, party depositions were to be conducted by June 20, 2007. The additional directives, annexed as part of that order, provided that the defendants will produce for deposition all officers, including any supervising officers, at the scene or who responded afterwards to the scene. Pursuant to a "So Ordered" stipulation dated September 27, 2007 (Kerins, J), the parties agreed, inter alia, to comply with all directives in the PC order dated March 12, 2007, and the defendant was to provide responses to all previously served discovery demands within 60 days. By stipulations dated March 6, 2008, and May 15, 2008, the defendant agreed to comply with all directives in the PC order of March 12, 2007, inter alia, including responses to all previously served discovery demands and subsequent court orders dated September 27, 2007 and March 6, 2008, to further provide, inter alia, responses to all previously served discovery demands, and to produce for depositions all officers, including any and all supervising officers at the scene or who responded afterwards to the scene. Again, on August 13, 2008, another stipulation was entered into between the parties wherein the defendant was to comply with all directives in the PC order dated March 12, 2007, and subsequent court orders dated September 27, 2007, March 6, 2008 and May 15, 2008, to provide responses to all previously served discovery demands, and to produce for depositions all officers, including any and all supervising officers at the scene or who responded afterwards to the scene. The parties' stipulation dated July 30, 2009, provided that the defendants will produce for depositions, all police officers including any and all supervising officers, at the scene or who responded to the scene afterwards, including but not limited to P.O. John Williams, Sean Walsh, and Sgt. George Englehardt (unless retired). It is noted that this stipulation included, but then omitted, IAB Detectives Fitzgerald and Fasano. The stipulation further provided that the plaintiff was to provide, in writing, the need for depositions and subject matter sought from IAB Detectives Fitzgerald and Fasano, with regard to their investigation.

By response dated November 25, 2008, the defendant served responses to the Preliminary Conference Order, the Plaintiff's Combined Demands, and Plaintiff's Further Notice for Discovery and Inspection. In response to the "Plaintiff's Combined Demands," the defendant objected to items # 4 (a), (b), (d), (l) and (k). In response to "Plaintiff's Further Notice for Discovery and Inspection," the defendant objected to items # 3, 6, and 10. All objections were on the basis that the information sought in those items is privileged and confidential.

CPLR 3101 (a) generally provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The term, material and necessary, is to be given a liberal interpretation in favor of the disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. However, a party is not required to respond to discovery demands which are palpably

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improper. A demand is palpably improper if it seeks information which is irrelevant or confidential or is overboard and unduly burdensome (see, *T.A. Ahern Contractors Corp v Dormitory Authority of the State of New York*, 24 Misc3d 416, 875 NYS2d 862 [Sup Ct, New York County 2009]). Discovery determinations are discretionary and each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure. Therefore, the party who seeks a protective order bears the burden of showing that a privilege applies or that discovery is otherwise improper (*Mabrouk v Jamaica Hospital Medical Center*, 2009 NY Slip Op 30260U [Sup Ct, Queens County 2009]). In the instant action, the defendant has set forth in its responses that certain of plaintiff's demands, as noted above, are privileged and confidential, and objected to discovery of the same.

The plaintiff now seeks an order compelling the County of Suffolk to produce Suffolk County IAB Detectives Fitzgerald and Fasano for examinations before trial, and for documents and information previously demanded but objected to as confidential and privileged. It is noted in plaintiff's letter dated July 31, 2009, that counsel for the plaintiff requested that the County of Suffolk voluntarily produce IAB Detectives Fitzgerald and Fasano for depositions because the officers interviewed all witnesses, as well as the plaintiff and defendant officers in this matter. Counsel for the plaintiff continues that a tape recording of Detectives Fitzgerald and Fasano's interview of the plaintiff was provided, but the recording did not include the initial minutes of the interview. The plaintiff seeks to question the detectives regarding their observations of the plaintiff, about any evidence obtained by them during the course of their investigations, including, but not limited to, how they came to know of any other witnesses, and whether their investigation of any other witnesses resulted in further evidence, outside the realm of privilege.

The plaintiff demanded in his discovery demand dated January 19, 2007, at item # 4 (a), any and all files regarding previous civilian complaints against police officers John G. Williams and Sean C. Walsh; (b) all defendant police officers Williams and Walsh's unit transfer application records; (d) departmental incident reports and/or documents regarding this matter; and (I), all Internal Affairs Bureau files regarding this matter, including any and all tapes; (k) copies of personnel files for police officers, John G. Williams and Sean C. Walsh to the extent they contained any false arrest, brutality, civilian complaint records and/or other disciplinary records. The defendant objected to these demands. In response to the plaintiff's further notice for discovery and inspection, the defendant objected to item 3, which demanded all supervisor reports prepared by any supervisor regarding the subject incident, including but not limited to, every witness statement obtained regarding this matter; item 6 which demanded all writings and documents between the Suffolk District Attorney's Office and any member of the police department regarding the accident or plaintiff's arrest; and item 10 which demanded copies of personal files for all officers that were initially involved in the attempt to apprehend plaintiff, including, but not limited to all records pertaining to their discipline and vehicle driver training and updates. The defendant objected to those demands as well.

Pursuant to Civil Rights Law §50-a subsection 1, "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state...shall be considered confidential and not subject to inspection or review without the express written consent of such police officer...except as may be mandated by lawful court order." Subsection 2 of § 50-a, provides that "[p]rior to issuing such court order, the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review." Subsection 3, provides that "[i]f after such hearing the judge concludes that there is a sufficient basis, he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and

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make a determination as to whether the records are relevant and material in the action before him” (*see, Pardo-Payne v County of Nassau, Nassau County Police Department*, 2010 NY Slip Op 33533U [Sup Ct, Nassau County]).

In *Matter of Prisoners’ Legal Services of New York v New York State Department of Correctional Services*, 73 NY2d 26, 538 NYS2d 190 [1989], the Court agreed with the Appellate Division’s reasoning that the legislative purpose of protecting police and correction officers from harassment and reprisals would be served by granting the statutory protection of Civil Rights Law §50-a before, as well as after, commencement of an action. The court continued that records pertaining to inmate grievances would fall within the statute as they are documents containing personal, employment-related information about a public employee which are received, processed and maintained as part of a correctional facility’s, and that they are clearly relied upon in evaluating the employee’s performance. It continued that whether a document qualifies as a personnel record under Civil Rights Law § 50-a (1) depends upon its nature and its use in evaluating an officer’s performance, not its physical location or its particular custodian (*see also, Schuster v City of New York*, 20 Misc2d 515, 191 NYS2d 884 [Sup Ct, Kings County 1959]).

Public Officers Law § 87 Access to agency records, provides in pertinent part:

2. Each agency shall, in accordance with its published rules, make available for public inspection...all records, except that such agency may deny access to records or portions there that:

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings; ii. deprive a person of a right to a fair trial or impartial adjudication; iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f), if disclosed could endanger the life or safety of any person;

(g) is for inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations...

Records prepared in conjunction with an investigation constitute intra-agency materials not subject to disclosure within the meaning of Public Officers Law § 87 (2) (g), insofar as they consist of opinions, advice, conjecture, recommendations and the like and thus, they can be withheld. However, factual information is available for inspection, except to the extent that such information falls within the various grounds for denial provided in the statute. Further, findings and conclusions may be available for inspection when they constitute final agency determinations (Comm on Open Gov’t FOIL-AO-7549; *see also, Comm on Open Gov’t FOIL-AO-AO-12561*).

In *People v Gissendanner*, 48 NY2d 543 , 423 NYS2d 893 [1979], the court determined that the defendants must proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory. It was additionally stated that the relevant and material facts in a criminal trial are those bearing upon the unreliability of the criminal charge or of a witness upon whose testimony it

depends. In *People v Kozlowski*, 11 NY3d 223, 869 NYS2d 848 [2008], the court cited to *People v Gissendanner*, supra, and stated that while *People v Gissendanner* does mandate that defendants point to specific facts demonstrating that a reasonable likelihood that relevant material may be disclosed in response to a subpoena and that they are not engaged in a fishing expedition, the court must give due regard to the accused's right to a fair trial. The *Gissendanner* court also set forth that access to police personnel records is denied in cases in which the defendant fails to demonstrate any theory of relevancy and materiality, but, instead, merely desires the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information will enable him to impeach a witness.

Here, it is determined that those items which the defendant claims are privileged and confidential, and to which the defendant objected, as set forth in its response dated November 25, 2008, served in response to "Plaintiff's Combined Demands" as to items # 4. (a), (b), (d), (l) and (k), and in response to "Plaintiff's Further Notice for Discovery and Inspection" as to items # 3, 6, and 10 are not discoverable. There has been no demonstration by the plaintiff of relevancy and materiality, but, instead, merely the desire for the opportunity for an unrestrained foray into confidential records in the hope of unearthing some unspecified information. Thus, plaintiff's application for the aforementioned demands are denied.

It is further determined that the defendant County of Suffolk shall produce IAB Detectives Fitzgerald and Fasano for examinations before trial within forty five days of service of this order with notice of entry upon the defendants by the plaintiff. At the respective examinations before trial of Detectives Fitzgerald and Fasano, the defendant may object to, and seek a ruling as to any questions it deems delves into areas which are privileged or confidential.

Dated: 12/5/11



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION