

Fields v Nicholson

2011 NY Slip Op 34313(U)

February 1, 2011

Supreme Court, New York County

Docket Number: 100647/09

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X

KIM FIELDS,

Index No. 100647/09

Plaintiff,

DECISION AND ORDER

-against-

ROBERT NICHOLSON, *et al.*,

Defendants.

-----X

BARBARA JAFFE, JSC:

For plaintiff:
Spencer H. Herman, Esq.
Spencer H. Herman, P.C.
80-02 Kew Gardens Rd., Ste. 5001
Kew Gardens, NY 11415
718-897-2282

For defendants:
Peter C. Lucas, ACC
Michael A. Cardozo
City of New York Law Dept.
100 Church St., 4th Fl.
New York, NY 10007
212-442-6851

On July 31, 2008, plaintiff was allegedly injured while crossing East 124th Street at its intersection with Lexington Avenue in Manhattan when she was hit by an unmarked New York City Police Department (NYPD) vehicle, driven by defendant Police Officer Robert Nicholson. Defendants have alleged that at the time of the accident, Nicholson was engaged in an emergency operation, thus entitling him to the benefit of the standards set forth in Vehicle & Traffic Law 1103 and/or 1104. (Letter dated Dec. 21, 2010 from Spencer H. Herman, Esq. [Herman Letter]).

During the course of discovery, City produced a copy of a police accident report related to the accident. Redacted from it are: the investigating/witnessing officer's determination as to whether Nicholson's actions contributed to the accident and/or was at fault for it, the Executive Officer's determination as to whether Nicholson and/or plaintiff were at fault, and the Executive Officer's and Board's recommendation. (Herman Letter). Plaintiff seeks an unredacted copy of

the report.

By letter dated December 3, 2010, City objects to producing an unredacted copy of the report, contending that the opinions of the non-witnesses are speculative and prejudicial and thus ~~not discoverable, and that statements relating to any disciplinary action taken against Nicholson~~ are privileged, irrelevant, and constitute subsequent remedial measures. (Letter dated Dec. 3, 2010 from Peter C. Lucas, ACC).

By letter dated December 21, 2010, plaintiff maintains that an unredacted copy of the report is necessary and material to her claim that Nicholson acted recklessly, that the investigating witness' conclusions are not speculative, that the report is an admissible business record, and that any opinions and conclusions contained therein constitute admissions against defendants' interests. (Herman Letter).

As the observations, conclusions, and opinions of the investigating/witnessing officer concerning the circumstances and cause of the accident are relevant and material, they are discoverable. (*Compare Matter of Travelers Indem. Co. v Morales*, 188 AD2d 350 [1st Dept 1992] [police accident report made by officer who witnessed incident admissible, including his statements about intentional nature of incident], *Turner v Spaide*, 108 AD2d 1025 [3d Dept 1985], *lv denied* 66 NY2d 601 [police accident report admissible if officer witnessed accident], *with Figueroa v Luna*, 281 AD2d 204 [1st Dept 2001] [police accident report prepared by officer who was not eyewitness to accident inadmissible for purpose of establishing cause of accident]). And even if the officer did not witness the accident, to the extent that he was under a business duty to prepare the report and did so based on his own on-the-scene observations, the report is admissible. (*See Westchester Med. Ctr. v Progressive Cas. Ins. Co.*, 51 AD3d 1014 [2d Dept

2008] [police accident report describing circumstances of accident admissible as based on officer's personal observations and officer had business duty to make it]; *Holliday v Hudson Armored Car & Courier Svce., Inc.*, 301 AD2d 392 [1st Dept 2003], *lv denied* 100 NY2d 636 [same]; *D'Arienzo v Manderville*, 106 AD2d 686 [3d Dept 1984]. [police accident report based on officer's personal observations of scene properly admitted in evidence]).

The report is also admissible if it contains admissions against defendants' interests or conclusions based on the analyses done by trained investigators. (*Miller v Alagna*, 203 AD2d 264 [2d Dept 1994], *lv denied* 84 NY2d 805 [officer qualified to give opinion about accident based on years of training and experience]; *Murray v Donlan*, 77 AD2d 337 [2d Dept 1980], *lv denied* 52 NY2d 1071 [1981] [officer's opinion in report would be admissible if officer's opinion based on post-accident expert analysis]).

Moreover, evidence relating to possible disciplinary action taken against Nicholson is also relevant and discoverable. (*See Butler v City of New York*, 15 Misc 3d 1134[A], 2007 NY Slip Op 50974[U] [Sup Ct, Kings County 2007] [finding post-incident investigations and inquiries discoverable; even if "some adverse action was taken against one or more of the police officer defendants that would qualify as a remedial measure as to the City, the consequence would be limited to the negligence claim against the City [and] [t]he information and records would yet be discoverable as to other causes of action asserted against the City and the officers in accordance with the usual disclosure rules").

Thus, plaintiff is entitled to an unredacted copy of the report. (*See eg Wimbish v New York City Tr. Auth.*, 305 AD2d 586 [2d Dept 2003] [court properly admitted in evidence defendant's internal memorandum which contained description of accident and conclusion as to

its cause]; *State v Sand and Stone Assocs.*, 282 AD2d 954 [3d Dept 2001] [accident reports prepared in normal course of investigator's duties discoverable]; *see also Rios v City of New York*, 9 Misc 3d 1106[A], 2005 NY Slip Op 51423[U] [Sup Ct, Bronx County 2005] [police report prepared by investigating supervisor admitted in evidence at trial, including supervisor's determination that driver of police vehicle failed to use due care and yield right of way at intersection]).

Accordingly, it is hereby

ORDERED, that defendants are directed to provide plaintiff with an unredacted copy of police accident report within 20 days of the date of this order.

ENTER:



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

DATED: February 1, 2011
 New York, New York