

**Hodge v County of Westchester**

2013 NY Slip Op 32774(U)

August 26, 2013

Sup Ct, Westchester County

Docket Number: 61572/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER – COMPLIANCE PART

-----X  
WILLIE B. HODGE,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 61572/2012  
Decision Date: Aug. 26, 2013  
Motion Seq. #2

COUNTY OF WESTCHESTER,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3124 to compel defendant and nonparties Turone Bason and District Attorney of Westchester County to release certain of Bason’s criminal, medical and psychiatric records:

- Order to Show Cause, Affirmation in Support
- Affirmation in Partial Opposition
- Affirmation in Partial Opposition (District Attorney)
- Affirmations of Service

Upon the foregoing papers and proceedings held on August 26, 2013, the motion is determined as follows:

Plaintiff Willie B. Hodge, while an inmate at the Westchester County Jail, alleges that he was assaulted by another inmate, Turone Bason, on November 7, 2011, while Bason was not restrained. Plaintiff’s complaint alleges that Westchester County negligently failed to protect plaintiff from Bason and, by such failure, is liable for plaintiff’s injuries and for civil rights violations (*see* 42 USC § 1983). Plaintiff moved by Order to Show Cause dated July 25, 2013, for an order pursuant to CPLR 3124 compelling defendant, Bason and the District Attorney of Westchester County to release Bason’s criminal, medical and psychiatric records. The gravamen of plaintiff’s argument is that these records may adduce evidence that defendant knew or should have known of Bason’s allegedly heightened propensity to violence. Plaintiff shows proper service on Bason, who has not submitted papers opposing plaintiff’s motion.

Westchester County does not oppose so much of plaintiff’s application as seeks release of Bason’s inmate file from Westchester County Jail pursuant to a so-ordered judicial subpoena pursuant to CPLR 2307, provided that the County first receives either a HIPAA-compliant release from Bason or judicial consent to redact so much of such file as contains privileged medical or psychological information concerning Bason.

The District Attorney opposes so much of plaintiff's application as seeks release of Bason's criminal records. The District Attorney notes that Bason has had a number of criminal cases in Westchester County, including an active criminal prosecution for drug-related charges (Docket No. 13-1324, Mount Vernon City Court); two that were sealed pursuant to CPL 720.35; and two others that appear to be unsealed and thus potentially eligible for disclosure (Westchester County SCI 11-1031, Docket No. 11-0833, Mount Vernon City Court). Given these multiple prosecutions against Bason, the District Attorney asserts that plaintiff's motion to compel disclosure of all of these criminal files is overbroad to even the most liberal construction of CPLR article 31 relevance; that files pertaining to pending criminal actions are privileged and statutorily protected from disclosure to third parties; that records relating to sealed criminal actions are protected from disclosure absent demonstration of a compelling and particularized need; and that unsealed files are otherwise privileged against disclosure.

Plaintiff is entitled to liberal discovery of "all matters material and necessary in the prosecution" of his action (CPLR 3101[a]), and the determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). Where discovery is sought from a nonparty, the nonparty must be given notice stating the circumstances or reasons that such disclosure is sought or required (*see* CPLR 3101[a][4]; *Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104, 109-110 [2d Dept 2006]; *Knitwork Productions Corp. v Helfat*, 234 AD2d 345 [2d Dept 1996]). Even assuming without deciding that plaintiff's discovery demands are relevant, plaintiff did not plead much less prove that plaintiff satisfied these notice requirements as to Bason. Accordingly, to the extent that any of plaintiff's application turns on compelling cooperation from Bason, such application must be denied. Thus, to the extent that Westchester County does not oppose so much of plaintiff's application as seeks release of Bason's inmate file from Westchester County Jail pursuant to a so-ordered judicial subpoena pursuant to CPLR 2307, plaintiff shall submit for judicial ratification, not later than 14 days hereafter, a subpoena *duces tecum* for such file with express provision for its redaction of all medical or psychological information concerning Bason, unless plaintiff shall first provide to this Court and defendant a HIPPA-complaint authorization executed by Bason authorizing release of such medical and psychological information.

Turning to Bason's criminal file, this Court agrees that plaintiff's demand is overbroad and precluded by statutory privilege. The file for the pending criminal action is expressly protected against disclosure (*see* Public Officers Law § 82[2][e][i]; *Pittari v Pirro*, 258 AD2d 202 [1999], *lv denied* 94 NY2d 755 [1999]; *cf. Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]). Moreover, inasmuch as the District Attorney alleges that the pending criminal action charges Bason with possession of a controlled substance with intent to sell rather than any violent offense, this Court perceives no basis that files concerning such charge would support plaintiff's claim that defendant knew or should have known of Bason's propensity to violence.

Likewise, the youthful offender files sealed pursuant to CPL 720.35(4) are protected against disclosure unless an unsealing applicant shows by "clear and convincing evidence" that the "applicant's interests [in the administration of justice] outweigh the statutorily granted protection interests of the youthful offender[]" (*People v John F.*, 174 Misc 2d 540, 545 [1997]);

*see Matter of Dondi*, 63 NY2d 331, 338). This application must be directed to the court that rendered the youthful offender adjudication (*see Gannett Suburban Newspapers v Clerk of County Court, County of Putnam*, 230 AD2d 741 [2d Dept 2006]). Not only does plaintiff direct the instant application to the wrong tribunal, but also makes no showing – much less by clear and convincing evidence – that plaintiff’s interests in disclosure outweigh Bason’s interests in preserving the seal on his youthful offender file.

The District Attorney does not object in principle to releasing non-privileged, official records and papers contained in two unsealed criminal files (Westchester County SCI 11-1031, Mount Vernon City Court 11-0833), excepting matters that may be protected by the public interest privilege, work product privilege and other common law or statutory privileges. The District Attorney shall transmit such records, redacted in light of all claimed privileges, along with a privilege log specifying the same, in accordance herewith. Accordingly, it is hereby


ORDERED that plaintiff’s CPLR 3124 motion is denied except to the extent that (1) not later than 14 days after the date hereof, plaintiff shall submit to the Compliance Part of this Court, on notice to defendant, a subpoena *duces tecum* consistent with CPLR 2307 for the Westchester County Jail inmate file of Turone Bason, with provision therein for redaction from such inmate file of all medical or psychological information concerning Turone Bason, and the instant motion and defendant’s papers in response hereto shall be treated as notice of such subpoena within the meaning of CPLR 2307; provided that such subpoena shall not provide for such redaction if plaintiff shall annex to the proposed subpoena *duces tecum* a HIPPA-complaint authorization executed by Bason authorizing release of such medical and psychological information consistent therewith; and (2) not later than 30 days after plaintiff shall serve this Decision and Order, with Notice of Entry thereof, on the District Attorney of Westchester County, the District Attorney shall serve on plaintiff copies of official criminal files Westchester County SCI 11-1031 and Mount Vernon City Court 11-0833, redacted for all claimed privileges, along with a privilege log specifying all withheld documents and the privilege(s) invoked for each; and it is further

ORDERED that not later than seven days after the date hereof, plaintiff shall serve this Decision and Order, with Notice of Entry thereof, by NYSCEF on defendant and by U.S. mail on nonparties Turone Bason and the District Attorney of Westchester County; and it is further

ORDERED that counsel for all parties are directed to appear in the Compliance Part, Room 800, of this Courthouse, at 9:30am on Thursday, October 10, 2013.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 26, 2013

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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CC: Conference Part Clerk