

Stora v City of New York

2013 NY Slip Op 33123(U)

November 22, 2013

Supreme Court, New York County

Docket Number: 117071/2008

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

SKIBOKY SHAVER STORA

INDEX NO. 117071/2008

-v-

MOTION DATE _____

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC., FTC SECURITY SERVICES, INC., and MARCUS SERRANO

MOTION SEQ. NO. 003

The following papers, numbered 1 to 8, were read on this motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 4, 3

Answering Affidavits — Exhibits _____ | No(s). 2, 4, 6

Replying Affidavits _____ | No(s). 5, 7-8

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court grants the motion by defendant FTC Security Services, Inc., for summary judgment, but denies the cross-motion by defendants City of New York, New York City Department of Homeless Services, and Volunteers of America - Greater New York, Inc., for summary judgment, pursuant to the accompanying decision. C.P.L.R. § 3212(b).

FILED
DEC 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/22/13

Lucy Billings, J.S.C.

LUCY BILLINGS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

SKIBOKY SHAVER STORA,

Index No. 117071/2008

Plaintiff

- against -

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,
VOLUNTEERS OF AMERICA - GREATER NEW
YORK, INC., FJC SECURITY SERVICES,
INC., and MARCUS SERRANO,

Defendants

FILED

-----X

LUCY BILLINGS, J.S.C.:

DEC 04 2013

I. BACKGROUND

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff sues to recover for personal injuries sustained August 17, 2005, when defendant Serrano shot plaintiff while at a men's shelter on premises owned by defendants City of New York and New York City Department of Homeless Services (DHS) and operated by defendant Volunteers of America - Greater New York, Inc. Volunteers of America contracted with defendant FJC Security Services, Inc., to provide security at the shelter. After plaintiff and Serrano engaged in an altercation at the shelter, Serrano left the premises, secured a firearm, and returned to the shelter by climbing over a tall wrought iron fence that surrounded the shelter grounds.

FJC Security Services moves for summary judgment dismissing all claims against this defendant. C.P.L.R. § 3212(b). The City defendants and Volunteers of America cross-move for summary

judgment dismissing plaintiff's claims against these defendants and for summary judgment on Volunteers of America's cross-claim against FJC Security Services for contractual indemnification. Plaintiff separately moves: (1) to preclude defendants from presenting any evidence regarding past unlawful narcotics activity by plaintiff and (2) to impose penalties for defendants' noncompliance or compel their compliance with disclosure demands. C.P.L.R. §§ 3124, 3126(3). For the reasons explained below, the court grants FJC Security Services' motion in its entirety, denies the City defendants' and Volunteers of America's cross-motion, reserves a decision on plaintiff's motion to preclude evidence until trial testimony is heard, and denies his motion to impose penalties for nondisclosure or to compel disclosure.

II. SUMMARY JUDGMENT STANDARDS

Defendants, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendants satisfy this standard, the burden shifts to plaintiff and any opposing co-defendant to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v.

Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the defendants' motion and cross-motion, the court construes the evidence in the light most favorable to plaintiff and any opposing co-defendant. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If defendants fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

III. FJC SECURITY SERVICES' MOTION FOR SUMMARY JUDGMENT

As a contractor providing services to co-defendants, FJC Security Services is liable to plaintiff for its negligence or other culpable conduct in performing the contract, when its breach of a contractual duty caused plaintiff's injury, only under one of the following sets of circumstances. (1) FJC Security Services displaced the duty of City defendants or Volunteers of America to maintain their premises in a safe condition. (2) Plaintiff detrimentally relied on FJC Security Services' performance of its contract. (3) FJC Security Services launched the "instrument of harm" that effected the assault on plaintiff. Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140 (2002); Rahim v. Sottile Sec. Co., 32 A.D.3d 77, 80-81 (1st Dep't 2006).

The parties stipulated at oral argument that the court may consider the contracts presented in support of or in opposition

to summary judgment as authenticated and admissible for purposes of determining the motion and cross-motion for that relief. The contract dated August 5, 2003, between Volunteers of America and FJC Security Services determined what security the latter party was to provide. Section 6.1(c) of that contract provides:

It is understood and agreed by and between the parties that: FJC is not a property insurer; . . . that FJC is being paid hereunder for a guard system intended to deter certain risks of loss and that all amounts being charged hereunder by FJC are not sufficient to guarantee that no loss or damage will occur; that FJC makes no warrant or guarantee that the services supplied will avert or prevent occurrences; and that FJC's liability for loss of property shall be limited to damages resulting from the negligence or other wrongful conduct of an FJC officer or employee.

Aff. of Peter Read Ex. H, at 6; Aff. of Albert E. Risebrow Ex. D, at 6.

In the contract dated July 1, 2005, between the City and FJC Security Services, under Agreement § III(3) FJC Security Services agreed "to perform all the services described in the Specifications attached hereto as Part I of the Proposal for Bid." Read Aff. Ex. H § III(3). Under the Specifications for unarmed security guards, § I(3.0), FJC Security Services' personnel are "accountable to the Shelter Director and shall comply with the written and verbal instructions received from the Contract Administrator, Shelter Director, and Shift Supervisor." Id. § I(3.0). Section I(2.0) defines the holders of each of these three titles as DHS representatives. Specifications § I(13.1) further provides that: "Posts shall be determined by DHS, however [sic] the Agency may consult with the contractor regarding the appropriateness of any individual post or the

overall security plan and placement of guards at any DHS site." Id. § I(13.1). Consistent with this last provision, Melvin Howard, a DHS inspector, testified that DHS officers sometimes took over the FJC Security Services guards' duties manning the metal detectors and x-ray machines at the building entrances.

FJC Security Services' contracts do not displace the obligations of the City defendants or Volunteers of America to maintain safety on the shelter premises. Espinal v. Melville Snow Contrs., 98 N.Y.2d at 141. Under the contract between FJC Security Services and the City, DHS determined where FJC Security Services' guards were to be posted. At most, DHS retained discretion, but was not required, to consult with FJC Security Services about the posts. Consistent with the City contract, the contract between FJC Security Services and Volunteers of America required FJC Security Services' guards to follow DHS employees' directions. FJC Security's disclaimer of any obligation to prevent "occurrences," along with DHS's exclusive determination and, at most, FJC Security Systems' joint consultation with DHS, at its discretion, regarding FJC Security Systems' duties, further demonstrates that the latter's obligations did not displace the obligations of the City defendants and Volunteers of America. Read Aff. Ex. H, at 6; Risebrow Aff. Ex. D, at 6. See Rahim v. Sottile Sec. Co., 32 A.D.3d at 78, 82.

As for the second basis on which FJC Security Services may be liable to plaintiff, plaintiff himself fails to allege any facts supporting his detrimental reliance on FJC Security

Services' contractual performance. Espinal v. Melville Snow Contrs., 98 N.Y.2d at 141. Nor does anything in the record of other parties' and witnesses' testimony and documentary evidence sustain such a claim. Plaintiff testified that he was aware of, but never reported, persons entering the shelter grounds by climbing over the fence. He never observed security personnel at the shelter's perimeter, yet also never reported or complained about any such a lapse. See Rahim v. Sottile Sec. Co., 32 A.D.3d at 81. Assuming that FJC Security Services negligently performed its contractual obligations, no evidence demonstrates that such conduct placed plaintiff in a more vulnerable position than if FJC Security Services had never provided security. Murshed v. New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr., Inc., 71 A.D.3d 578, 579 (1st Dep't 2010); Rahim v. Sottile Sec. Co., 32 A.D.3d at 82.

While plaintiff does claim FJC Security Services' negligence in failing to perform its duties under its contracts, the record also does not support that any nonperformance by FJC Security Services affirmatively propelled Serrano into his attack on plaintiff, as opposed to passively allowing it to occur. Plaintiff and Serrano confirmed their earlier altercation. Serrano detailed how he departed from the shelter; secured a firearm outside the shelter grounds, independent of any shelter personnel; returned to the shelter; and deliberated on his own over his planned attack on plaintiff. Thus any failure of FJC Security Services to perform its contracts did not launch the

dangerous force that inflicted injury on plaintiff. Espinal v. Melville Snow Contrs., 98 N.Y.2d at 142; Rahim v. Sottile Sec. Co., 32 A.D.3d at 81. See Ravallese v. JMED Holdings, LLC, 109 A.D.3d 705 (1st Dep't 2013).

Nor does plaintiff identify any specific contractual duty that FJC Security Services negligently performed or failed to perform. The absence of security personnel at the time when and place where Serrano shot plaintiff is not enough to raise an inference that FJC Security Services failed to perform its contractual duty if the personnel were performing other required duties. James v. Jamie Towers Hous. Co., 99 N.Y.2d 639, 641 (2003). See Maheshwari v. City of New York, 2 N.Y.3d 288, 295 (2004). FJC Security Services' contract with the City governs the parties' duties to determine the guards' posts and assigns that duty to the City's DHS. DHS inspector Howard testified that DHS patrolled the courtyard outside the shelter buildings. He observed FJC Security Services' guards outside, too, but they did not patrol. Michael Jordan, FJC Security Services' site manager, testified that FJC Security Services performed only hourly checks of the grounds' perimeter, and Volunteers of America did not post any guards outside in the courtyard. Thus any further patrol of the courtyard was left to DHS.

Finally, Serrano testified that, after climbing over the perimeter fence, he roamed in the courtyard for several hours brandishing and firing his gun long before approaching plaintiff and firing the shot that injured him, yet in the interim

encountered no shelter or security personnel. No evidence indicates, however, either that FJC Security Services was responsible for patrolling the courtyard or that FJC Security Services' employees actually observed Serrano, but allowed the obvious danger to escalate. The absence of such evidence further supports the conclusion that FJC Security Services did not exacerbate the danger that inflicted injury on plaintiff.

Espinal v. Melville Snow Contrs., 98 N.Y.2d at 142; Rahim v. Sottile Sec. Co., 32 A.D.3d at 81.

Since neither Volunteers of America nor plaintiff identifies how FJC Security Services' performance or nonperformance under the contract caused plaintiff's claimed injury, Volunteers of America's cross-claim for contractual indemnification fails together with plaintiff's claims against FJC Security Services. Chunn v. New York City Hous. Auth., 83 A.D.3d 416, 418 (1st Dep't 2011); Mohammed v. Silverstein Props., Inc., 74 A.D.3d 453, 454 (1st Dep't 2010). Under § 6.2(b) of its contract with Volunteers of America, FJC Security Services agreed to indemnify Volunteers of America for any liability only "as a result of an act or omission of FJC." Read Aff. Ex. H, at 6; Risebrow Aff. Ex. D, at 6.

III. THE CROSS-MOTION FOR SUMMARY JUDGMENT

A. By the City of New York and Its DHS

A state or local governmental entity will not be liable when acting in its governmental capacity unless the governmental entity owes plaintiff a special duty. Applewhite v. Accuhealth,

Inc., 21 N.Y.3d 420, 423-24 (2013); Metz v. State of New York, 20 N.Y.3d 175, 179 (2012); Sebastian v. State of New York, 93 N.Y.2d 790, 793 (1999); Wittorf v. City of New York, 104 A.D.3d 584, 585 (1st Dep't 2013). See Bonner v. City of New York, 73 N.Y.2d 930, 932 (1989). If the governmental entity, here a municipality, is acting in a proprietary capacity, the principles governing private landowners' liability apply. Miller v. State of New York, 62 N.Y.2d 506, 511 (1984). See Sebastian v. State of New York, 93 N.Y.2d at 793; Wittorf v. City of New York, 104 A.D.3d at 585. The municipal defendants may act simultaneously in both capacities as the owner of a facility where they also provide police protection to maintain order. Sebastian v. State of New York, 93 N.Y.2d at 793-94; Clinger v. New York City Tr. Auth., 85 N.Y.2d 957, 959 (1995); Miller v. State of New York, 62 N.Y.2d at 511. The act or omission plaintiff claims caused his injury and the capacity in which the municipal defendants committed that act or omission determine liability, rather than their overall proprietary activity on or control of their premises when the injury occurred. Matter of World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 447 (2011); Miller v. State of New York, 62 N.Y.2d at 513; Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 182 (1982); Wittorf v. City of New York, 104 A.D.3d at 586. See Sebastian v. State of New York, 93 N.Y.2d at 794.

Services ordinarily performed by private premises owners relating to the ownership and maintenance of the premises are considered proprietary, Sebastian v. State of New York, 93 N.Y.2d

at 795; Wittorf v. City of New York, 104 A.D.3d at 586, including the security of entrances against intruders. Miller v. State of New York, 62 N.Y.2d at 513. On the other hand, functions to protect and secure the safety of the public are purely governmental. Sebastian v. State of New York, 93 N.Y.2d at 793; Wittorf v. City of New York, 104 A.D.3d at 586.

Plaintiff alleges defendants' insufficient security procedures, including (1) the construction, repair, and care of the premises and its equipment to maintain security; (2) the hiring, training, and supervision of security personnel; and (3) searches and screening of persons entering the shelter grounds. While the first category of insufficient security procedures unquestionably claims the negligence of a landowner, Miller v. State of New York, 62 N.Y.2d at 511, the second and third categories involve defaults in both the proprietary and the governmental functions of the municipal defendants. Any large facility in an area exposed to potential intruders needs adequate personnel maintaining security. Screening of visitors is a common procedure even on private premises, while magnetometers and other forms of searches usually are reserved to private retail businesses or public premises. Failures to allocate police resources, to conduct surveillance, to warn of criminal activity, to close an area where criminal activity occurred, and to control traffic are governmental functions. Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d at 182; Wittorf v. City of New York, 104 A.D.3d at 586.

Although plaintiff claims the overall inadequacy of defendants' security system, which may be a governmental function, Matter of World Trade Ctr. Bombing Litig., 17 N.Y.3d at 448; Clinger v. New York City Tr. Auth., 85 N.Y.2d at 959; Bonner v. City of New York, 73 N.Y.2d at 932, premises' security, as illustrated above, also may be strictly proprietary, see Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 519 (1980); Williams v. Citibank, 247 A.D.2d 49, 53 (1st Dep't 1998), and plaintiff's principal focus is on the inadequate maintenance of the perimeter fence, a proprietary function. It is an isolated measure to protect the residents inside, rather than broader measures to protect the public outside the fence. See Sebastian v. State of New York, 93 N.Y.2d at 795; Miller v. State of New York, 62 N.Y.2d at 512. All the evidence in the record of prior criminal activity by intruders reveals that it flowed from their access over the fence, substantiating that the insecure fence, rather than an overall lack of security, was the cause of plaintiff's injuries. See Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 550 (1998); Clinger v. New York City Tr. Auth., 85 N.Y.2d at 959. Finally, FJC Security Services' site manager Jordan testified that "maintenance" repaired repeated breaches in the perimeter fence, suggesting a proprietary function by either the site owner or its site manager. Read Aff. Ex. F, at 61; Risebrow Aff. Ex. H, at 61.

The City defendants' failure to respond to FJC Security Services' warnings about the fence's inadequacy that plaintiff

emphasizes also may derive from a governmental function: City defendants' executive policy decision based on their analysis of the costs and benefits of allocating resources and the risk of harm. Matter of World Trade Ctr. Bombing Litig., 17 N.Y.3d at 448-49; Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d at 182; Riss v. City of New York, 22 N.Y.2d 579, 581-82 (1968). The current record, however, does not reveal evidentiary facts to support a conclusion that City defendants engaged in any policy determination at all. Moreover, such a weighing of "the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" is the very analysis a private landowner acting reasonably must engage in to meet its duty to maintain its premises in a safe condition. Peralta v. Henriquez, 100 N.Y.2d 139, 144 (2003); Masillo v. On Stage, Ltd., 83 A.D.3d 74, 79 (1st Dep't 2011); Hayes v. Riverbend Hous. Co., Inc., 40 A.D.3d 500, 501 (1st Dep't 2007). See Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001).

Whether City defendants' proprietary functions were merely incidental to controlling governmental functions will depend on whether the evidence at trial pinpoints a proprietary function, such as their inadequate maintenance of the perimeter fence, as the cause of plaintiff's injury. See Bonner v. City of New York, 73 N.Y.2d at 932-33. If the evidence, at best, attributes his injury to DHS's failure to allocate police resources, surveil the shelter grounds, or screen or search persons entering the premises, then City defendants may be immune from liability. The

current record does not permit that evaluation. Therefore it must await the evidence adduced at trial.

B. By Volunteers of America

Owners and operators of premises owe their occupants a duty to maintain minimal security measures to prevent foreseeable criminal intrusion. Maheshwari v. City of New York, 2 N.Y.3d at 294; Burgos v. Aqueduct Realty Corp., 92 N.Y.2d at 548; Miller v. State, 62 N.Y.2d at 513; Florman v. City of New York, 293 A.D.2d 120, 124 (1st Dep't 2002). See Rivera v. 760-770 E. Tremont Ave. Hous. Dev. Fund Corp., 21 A.D.3d 321 (1st Dep't 2005)). For the danger of an intrusion to be foreseeable, the operator of the premises must know or have reason to know that persons outside or entering onto the premises are likely to endanger persons lawfully there. Jacqueline S. v. City of New York, 81 N.Y.2d 288, 294 (1993); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d at 519; Florman v. City of New York, 293 A.D.3d at 124; Williams v. Citibank, 247 A.D.2d a 51. The obligation to provide reasonable security measures does not require implementation of the most advanced security systems, Florman v. City of New York, 293 A.D.3d at 124, or provision of flawless security. Johnson v. New York City Health & Hosps. Corp., 246 A.D.2d 88, 97 (1st Dep't 1998).

Volunteers of America demonstrated its adequate security measures on the shelter grounds through its contract with FJC Security Services, providing for security 24 hours per day, the use of metal detectors at the entrance, and deployment of guards

at fixed posts and of roving patrols. James v. Jamie Towers Hous. Co., 99 N.Y.2d at 641; Djurkovic v. Three Goodfellows, 1 A.D.3d 210 (1st Dep't 2003); Johnson v. New York City Health & Hosps. Corp., 246 A.D.2d at 94-95. Jordan testified not only to the regular repairs of repeated breaches in the fence, but also that FJC Security Services escorted persons discovered climbing over the fence to the entrances, where they were screened and routinely found to have transported weapons. See Johnson v. New York City Health & Hosps. Corp., 246 A.D.2d at 90, 96. FJC Security Services also recommended a remedy to both Volunteers of America and DHS for these unauthorized entries, but both ignored the recommendation.

To avoid liability, Volunteers of America must demonstrate its lack of notice of persons entering the shelter grounds by climbing over the fence. Osorio v. City of New York, 44 A.D.3d 553, 554 (1st Dep't 2007). Plaintiff, Serrano, and Jordan all observed persons climb over the fence to enter the shelter grounds. Plaintiff also observed that the persons climbing over the fence were well within view of unidentified shelter staff and that an unidentified supervisor escorted one such intruder to security personnel. The fact that Tere Pettitt, Volunteers of America's vice president and chief operating officer, denied her personal awareness of anyone climbing over the fence does not negate its actual notice through a supervisor or other staff on the shelter site or its constructive notice of this repeated and readily observable activity.

Based on a review of documents in this action and records from the criminal prosecution against Serrano and an inspection of the shelter, plaintiff's expert in security measures, Leslie Cole, concluded that any fence so easily compromised was insufficient to prevent weapons and other contraband from being transported into the shelter. Although Cole's inspection was long after plaintiff's injury, and no evidence establishes that the shelter site was in the same condition as when plaintiff was injured, see Pomahac v. TrizecHahn 1065 Ave. of Ams., LLC, 65 A.D.3d 462, 466 (1st Dep't 2009); Gilson v. Metropolitan Opera, 15 A.D.3d 55, 59 (1st Dep't 2005), aff'd, 5 N.Y.3d 574 (2005); Machado v. Clinton Hous. Dev. Co., Inc., 20 A.D.3d 307 (1st Dep't 2005); Budd v. Gotham House Owners Corp., 17 A.D.3d 122, 123 (1st Dep't 2005), this particular conclusion is not necessarily dependent on an inspection. E.g., Wayburn v. Madison Land Ltd. Partnership, 282 A.D.2d 301, 304 (1st Dep't 2001). See Maria S. v. Willow Enters., 234 A.D.2d 177, 179 (1st Dep't 1996). This evidence expert that plaintiff presents, plus testimony from Volunteers of America's co-defendants and other portions of the evidence outlined above, raises factual issues regarding Volunteers of America's notice of persons climbing over the fence to gain entry to the shelter. Jacqueline S. v. City of New York, 81 N.Y.2d at 295; Wayburn v. Madison Land Ltd. Partnership, 282 A.D.2d at 304; Carmen P. v. PS&S Realty Corp., 259 A.D.2d 386, 388 (1st Dep't 1999). See Marrero v. City of New York, 102 A.D.3d 409 (1st Dep't 2013); Djurkovic v. Three Goodfellows, 1

A.D.3d at 211; Maria S. v. Willow Enters., 234 A.D.2d at 179.

In light of Jordan's testimony that shelter guards recovered abundant forms of contraband, including 500 to 600 weapons, entering the shelter over the fence, the absence of evidence that an intruder ever shot anyone or climbed the specific area of the fence where Serrano entered does not render Volunteers of America's notice inconsequential. To be foreseeable, criminal activity at a particular location need not have been of the same type or at the same location as the criminal activity that harmed plaintiff. Jacqueline S. v. City of New York, 81 N.Y.2d at 294; Miller v. State of New York, 62 N.Y.2d at 509; Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 519-20; Florman v. City of New York, 293 A.D.3d at 126.

V. PLAINTIFF'S MOTIONS REGARDING EVIDENCE

Plaintiff moves to preclude defendants from presenting evidence of his possession, use, or distribution of narcotics or any arrest in connection with such activity, on the ground that such evidence is irrelevant and unduly prejudicial. Defendants claim this evidence is relevant because it reveals Serrano's motive for attacking plaintiff and also seek to use this evidence to impeach either plaintiff or Serrano, should he change his prior testimony, at trial.

Without hearing either plaintiff's or Serrano's trial testimony and knowing whether it will be consistent with the witness' deposition or plea allocution, a determination whether this evidence will serve any impeachment purpose is premature.

See CMRC Corp. v. State of New York, 270 A.D.3d 27 (1st Dep't 2000). Assuming any narcotics activity by plaintiff would explain Serrano's motive for attacking plaintiff, defendants have failed to show the relevance of his motive.

Part of defendants' defense is that Serrano was intent on harming plaintiff and therefore on evading any and all security measures to gain entrance to the shelter, despite whatever precautions defendants took. The success of this defense, however, does not depend on why Serrano sought to harm plaintiff. The fact that Serrano wanted to harm plaintiff or harbored a motive or animus may be relevant to the defense that Serrano sought to evade security by any means possible, but why he was so motivated or why there was animosity between him and plaintiff is unnecessary to that defense.

Plaintiff also moves for penalties due to defendants' noncompliance or to compel compliance with plaintiff's demands to produce a DHS Peace Officer Guide and DHS Peace Officer Training Manuals. C.P.L.R. §§ 3124, 3126. Plaintiff's filing of a note of issue October 1, 2010, certifying that disclosure was complete, waived any right to further disclosure. Fernandez v. City of New York, 84 A.D.3d 595, 596 (1st Dep't 2011); Chichilnisky v. Trustees of Columbia Univ. in City of N.Y., 52 A.D.3d 206 (1st Dep't 2008); Melcher v. City of New York, 38 A.D.3d 376, 377 (1st Dep't 2007); Escourse v. City of New York, 27 A.D.3d 319 (1st Dep't 2006).

While unusual or unanticipated circumstances would allow

disclosure after plaintiff filed the note of issue, he fails to demonstrate any such circumstances. 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607 (1st Dep't 2012); Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181 (1st Dep't 2005). See Cuevas v. 1738 Associates, L.L.C., ___ A.D.3d ___, 2013 WL 5942517, at *1 (1st Dep't Nov. 7, 2013). Defendants insist that no recently disclosed witness will rely on the documents plaintiff now seeks. Any DHS regulations that may have governed defendants' actions are published and thus publicly available to plaintiff. Consequently, absent plaintiff's entitlement in the first instance to the disclosure demanded, plaintiff is not entitled to penalties for defendants' noncompliance with his demands for that disclosure. Escourse v. City of New York, 27 A.D.3d 319.

VI. CONCLUSION

For all the reasons explained above, the court grants the motion by defendant FJC Security Services, Inc., for summary judgment and dismisses all claims against this defendant, but denies the cross-motion by defendants City of New York, New York City Department of Homeless Services, and Volunteers of America - Greater New York, Inc., for summary judgment. C.P.L.R. § 3212(b). The court denies plaintiff's motion to preclude evidence, without prejudice to a similar motion at trial, and denies his motion for penalties due to defendants' noncompliance or to compel compliance with his demands to produce a DHS Peace Officer Guide and DHS Peace Officer Training Manuals, without prejudice to a similar motion if defendants rely on those

documents at trial. C.P.L.R. §§ 3124, 3126. This decision constitutes the court's order.

DATED: November 22, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
DEC 04 2013
NEW YORK
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