

Everett v Eastchester Police Dept.
2013 NY Slip Op 33907(U)
October 7, 2013
Supreme Court, Westchester County
Docket Number: 27659/10
Judge: Joan B. Lefkowitz
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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.

**FILED
AND
ENTERED**
ON 10-8-2013
WESTCHESTER
COUNTY CLERK

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

-----X
GAIL M. EVERETT, as proposed Administratrix of
the Estate of Andre LaSalle Everett, Deceased,
GAIL M. EVERETT, Individually, AMANI EVERETT and
MARY EVERETT,

Plaintiffs,

-against-

EASTCHESTER POLICE DEPARTMENT, TOWN
OF EASTCHESTER AND EASTCHESTER POLICE
OFFICER JAMES PILEGGI, JR.,

Defendants.

-----X
LEFKOWITZ, J.

DECISION AND ORDER

Index No. 27659/10
Motion Date: Oct. 7, 2013
Seq. No. 7

FILED

OCT - 8 2013

**TIMOTHY C. IDON,
COUNTY CLERK
COUNTY OF WESTCHESTER**

The following papers were read on this motion by plaintiffs for an order compelling defendants, Eastchester Police Department (the PD) and Town of Eastchester (the Town) (together to be referred to as defendants) to comply with various discovery requests and directing the deposition upon oral questions of James Pileggi Jr (to be referred to as Pileggi)¹.

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Affirmation in Opposition	10
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¹By Decision and Order filed and entered August 22, 2013, this Court (Lefkowitz, J.), dismissed the complaint insofar as asserted against Pileggi.

²Plaintiff's Reply submitted to this Court on September 17, 2013, has not been considered insofar as the Briefing Schedule dated July 26, 2013, did not provide for a reply.

Upon the foregoing papers and upon oral argument heard on October 7, 2013, this motion is determined as follows:

This action arises from a shooting that occurred on November 3, 2009, when plaintiffs' decedent was killed by Pileggi. Pileggi was a police officer with the PD, hired in 2007, but at the time of the shooting he was off duty. Pileggi was convicted of second degree manslaughter in this matter and is currently imprisoned.

Plaintiffs commenced this action on or about November 1, 2010. The causes of action that presently remain in this action are those claims that allege negligent hiring, supervision and retention, liability under respondeat superior and wrongful death.

Plaintiffs state that the only party witness produced by defendants was Police Chief Tim Bonci. During his deposition, Bonci refused to answer questions about former police officer Ramon Rosado on the grounds that such information was privileged. Bonci refused to discuss past disciplinary action taken against Rosado. By affidavit verified August 23, 2013, Ramon Rosado states he was employed by the PD as a police officer from 2004 to 2010. By this affidavit he authorizes plaintiffs' counsel to discuss his disciplinary and personnel records, in regards to the instant matter, with defendants. He also authorizes plaintiffs' counsel to obtain the entirety of his disciplinary and personnel record in defendants' possession.

Presently, plaintiff seeks an order compelling defendants to produce Bonci for a further deposition to answer questions about Rosado and any other follow up questions that arise therefrom.

Plaintiffs also note that they have served notice on defendants to produce Eastchester Town Supervisor Anthony Colavita and Police Sergeant Luke Yankowski for depositions. Plaintiffs would like to depose both of these witnesses but they assert that it is absolutely necessary for them to depose Colavita. Plaintiffs assert that Colavita possesses information as it relates to their claims of negligent hiring. Plaintiffs note that Colavita nominated Pileggi for a probationary appointment to the position of police officer in September, 2007. Plaintiffs state that the pre employment psychological screening outlined some problems. Furthermore, plaintiffs state that insofar as it is the responsibility of the Eastchester Town Board to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges made against police department members, it was Colavita as Town Board Supervisor who shirked his duties in not taking appropriate action in February 2009 when Pileggi was disciplined but not suspended or terminated for using illegal drugs.

Plaintiffs also seek a copy of all Eastchester police manuals in effect from 2007 to 2009. They also seek Eastchester police records associated with blotter 802-10 that, according to plaintiffs shows another incident, that occurred on February 3, 2010, where the PD failed to properly investigate a criminal matter.

Plaintiffs also seek to depose Pileggi. Insofar as he is in prison, plaintiffs seek leave of court to take his deposition. They assert that his deposition is material and necessary especially as it relates to the circumstances of his hiring, supervision and retention.

Defendants oppose all branches of plaintiffs' motion except for that branch by which plaintiffs seek to conduct the deposition of Pileggi. As to that branch of the motion, defendants take no position.

Defendants note that on or about January 6, 2011, the Town and Rosado executed a stipulation whereby it provided in paragraph 7 thereof that, "Rosado's personnel file with the Town shall be deemed sealed and the contents thereof shall not be released without Rosado's consent or as otherwise required by law". The stipulation addressed, among other things, disciplinary charges against Rosado and a federal employment discrimination lawsuit that had been commenced by Rosado against the Town. Defendants assert that based upon the clear language of the stipulation, Bonci properly refused to answer questions regarding Rosado. Defendants furthermore assert that there is no reason to require Bonci to submit to a further deposition for the purpose of answering questions about a matter that is clearly irrelevant to this case. Additionally, although plaintiffs have access to Rosado's personnel records they have not asserted any argument for the materiality or necessity of pursuing further discovery on the topic of Rosado. Defendants request that should this Court determine that Rosado's employment and disciplinary history is relevant to plaintiff's claims, then defendants should be permitted to speak freely about the entirety of his personnel file.

Regarding plaintiffs' request to depose additional witnesses; that is, Colavita and Yankowski, defendants assert that plaintiffs have failed to show that Colavita possesses knowledge that Bonci lacked. Plaintiffs failed to identify even one question that Bonci failed to answer for which Colavita possesses knowledge.

Regarding plaintiffs' request for additional documents, defendants assert that plaintiffs have not shown why blotter 802-10, a police record that post dates the relevant events of this case, is relevant and should be produced. Defendants note that the requested blotter relates to the PD's response to a domestic issue involving a public figure employed by the Town. Defendants assert that plaintiffs' request in regards thereto is nothing more than an attempt to embarrass defendants and has no relevance to the claims in the instant action.

Defendants state that, contrary to plaintiffs' assertions, they have already provided to plaintiffs all of the police manuals they have requested.

Defendants request that sanctions be imposed against plaintiffs' counsel and that they be granted an award of costs and disbursements for his frivolous conduct in pursuing this discovery which they allege he did so to harass, embarrass and prejudice them. Furthermore, defendants' assert that plaintiffs' motion should be denied insofar as it failed to include an affirmation of good faith.

CPLR 3101 (a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, 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” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The Court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). With these principles in mind the Court notes that plaintiffs, although they have access to Rosado’s disciplinary and personnel files, have failed to demonstrate how they are relevant to the present matter or that they need to further depose Bonci to question him about Rosado. On this record it appears that the matter between defendants and Rosado is irrelevant to the issues in this case.

A corporate entity has the right to designate, in the first instance, the employee who shall be examined (*Thirstino v County of Suffolk*, 78 AD3d 927 [2d Dept 2010]). Furthermore, a party moving for additional depositions has the burden of demonstrating (1) that the representative already deposed had insufficient knowledge or was otherwise inadequate and (2) that there is a substantial likelihood that the person sought for a deposition possesses information which is material and necessary to the prosecution of the case (*Gomez v State of New York*, 106 AD3d 870 [2d Dept 2013]). Plaintiffs have not provided a copy of the transcript of Bonci’s deposition testimony for this Court’s review. They have failed to demonstrate that Bonci, defendants’ representative, who has already been deposed had insufficient knowledge about this matter or that he was otherwise inadequate. Plaintiffs failed to show that Bonci lacked relevant information concerning the discipline, suspension and termination of Pileggi or that Colavita has knowledge of any facts about which Bonci was asked but was unable to answer. Moreover, they have made no showing whatsoever regarding the necessity to depose Yankowski.

Plaintiffs admit that the police blotter they are requesting, # 802-10, refers to an incident that occurred on February 3, 2010, an incident that occurred after the shooting at the heart of the present matter, wholly unrelated to the present case. Furthermore, the relevant issue in the present case is whether defendants negligently hired, supervised and/or retained Pileggi. This requested document clearly is not material or relevant to the issues of this case. However, plaintiffs are entitled to the manuals of the PD from 2007 (the year Pileggi was hired) to 2009 (the year the shooting occurred). The documents provided by defendants to plaintiffs, include documents from Human Resources regarding, among other things: (1) recruitment, selection and appointment policies; (2) pre-employment background investigations; employee personal

history ; etc. However each of these documents states that the “date issued” was September 15, 2009 and the effective date thereof was September 15, 2009. Defendants should provide PD manuals that were in effect from 2007 through 2009.

The Court finds that Pileggi’s testimony in this matter is material and relevant to the prosecution of plaintiffs’ case. Pursuant to CPLR 3016 (c) the deposition of a person confined under legal process may be taken only by leave of court. The purpose of this rule requiring a motion and leave of Court to take a deposition of a prisoner is to prevent disruption of the prison routine and to provide a mechanism for court oversight (*see Nalbach v McDonald*, 244 AD2d 536 [2d Dept 1997]). Pileggi shall be deposed pursuant to further issuance of an order of this Court.

The Court will not impose sanctions against plaintiffs’ counsel as requested by defendants in their opposition papers to this motion. Furthermore, defendants’ argument that plaintiffs’ failure to include an affirmation of good faith pursuant to 22 NYCRR 202.7, is fatal to their motion, is unavailing. The record unequivocally indicates that plaintiffs unsuccessfully attempted, under the auspices of the Court, to reach an accommodation with defendants regarding the issues raised on this motion. The parties appeared for a compliance conference on July 30 2013, at which time plaintiffs were directed to proceed with this motion. The Westchester Supreme Court Differentiated Case Management Protocol, Part Rules, specifically provides that no discovery or discovery compliance motion may be interposed until a preliminary conference has been held and a pre-motion conference has been requested and held in the compliance part. The protocol specifically provides that the parties are expected to attend such conferences and are expected to “attempt in good faith to resolve all discovery disputes”. In essence that is what 22 NYCRR 202.7 also seeks; that is, that before making the motion, moving counsel confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. Clearly, plaintiffs properly complied with this Court’s protocol and conferred in good faith with defendants to resolve the present issues. Their effort in this regard obviates the need for an affirmation of good faith (*see N. Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490 [1st Dept 2011]).

In light of the foregoing, it is:

ORDERED that plaintiffs’ motion is granted only to the limited extent that on or before October 21, 2013, and to the extent they have not already done so, defendants are directed to provide to plaintiffs the PD manuals that were in effect from 2007 through 2009; and it is further,

ORDERED that on or before October 21, 2013, plaintiffs are directed to submit to this Court, a proposed order on notice to defendants specifying that it is an order pursuant to CPLR 3106 (c) to take the deposition of James Pileggi Jr., including the name of the prison where he is incarcerated, its location and, the time and date of the deposition. Plaintiffs are

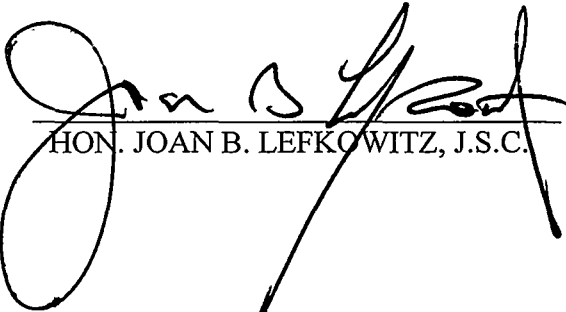
directed to contact the prison's Warden to determine the appropriate time and date; and it is further,

ORDERED that plaintiffs are directed to serve defendants with a copy of this order with notice of entry within ten (10) days of entry; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on October 25, 2013, at 9:30 A.M.

The foregoing constitutes the Order of this Court.

Dated: White Plains, New York
October 7, 2013


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

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cc: Carolyn Carpenito, Compliance Part Clerk