

Klarberg v Grossman
2014 NY Slip Op 32349(U)
September 3, 2014
Supreme Court, New York County
Docket Number: 160509/13
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

-----X
Ryan S. Klarberg,

Index No. 160509/13
Decision and Order

Plaintiff,

-against-

Victoria Grossman, et al.,

Defendants.

-----X

Ellen M. Coin, J.:

Plaintiff moves for an order issuing subpoenas to the New York City Police Department and the District Attorney of New York County (DANY). The Police Department has not served any opposition to the motion; thus, so much of the motion as seeks the issuance of a subpoena to the Police Department is granted on default.

DANY opposes the motion. In reply papers and at oral argument plaintiff restricted his subpoena request to DANY to the following categories of documents: videotapes from the Hotel Chantelle; minutes of the Grand Jury testimony of Victoria Grossman; Grossman's proffer and the notes or correspondence of any Assistant District Attorney of such proffer session.

Previously, by order dated July 3, 2014, this Court granted partial summary judgment to plaintiff against defendant Grossman on his claims for battery and assault. Remaining adjudicated

are Klarberg's claims against Grossman for negligent infliction of emotional distress, intentional infliction of emotional distress; his claims against the Amber Avalon Corporation for unlawful service of alcohol to Grossman and negligence; and his claims against the John Doe defendants (bartenders or servers) for negligence.

As plaintiff has narrowed the scope of the documents he seeks, the objections of DANY to the proposed subpoena on the ground that it is overbroad are moot.

DANY's position is that Grossman's Grand Jury testimony and the Hotel Chantelle videotape¹ are Grand Jury material, which may not be disclosed. CPL §190.25(4)(a). However, Grand Jury secrecy "is not absolute." (*People v Di Napoli*, 27 NY2d 229, 235 [1970]). Thus, the Criminal Procedure Law authorizes disclosure of Grand Jury proceedings upon written court order. CPL §190.25(4)(a). In order to breach the secrecy an applicant must show a compelling and particularized need. (*People v Robinson*, 98 NY2d 755, 756 [2002]).

DANY argues that the instant motion should be directed to the judge who supervised the Grand Jury, citing *Matter of Lungen v Kane*, 217 AD2d 849, 850 (3d Dept 1995), *affd*, 88 NY2d 861 (1996) (court in Sullivan County properly determined motion for

¹DANY fails to allege any facts to support its argument that the Hotel videotape is Grand Jury material. For purposes of determination of this motion, the Court will assume that it is.

disclosure of testimony before Sullivan County Grand Jury); *People v Astacio*, 173 AD2d 834, 835 (2d Dept 1991) (Kings County Supreme Court had jurisdiction over Kings County Grand Jury minutes); *Ivey v State of New York*, 138 AD2d 962 (4th Dept 1988), *affd*, 80 NY2d 474 (1992) (Court of Claims is court of limited jurisdiction, cannot order production of Grand Jury minutes); *but see Mullgrav v Santucci*, 195 AD2d 786, 787 (3d Dept 1993) (Ulster County Supreme Court did not lack jurisdiction to entertain Article 78 proceeding seeking production of minutes of Queens County Grand Jury). Here, however, Grossman was indicted in July of 2013, more than one year ago, and has since pled guilty to two counts of felony assault and has been sentenced. Thus, the Grand Jury has been discharged for some time and the reasons for keeping the proceedings secret in an ongoing proceeding no longer exist.

Those reasons most frequently mentioned by courts and commentators are: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will

be kept secret so that they will be willing to testify freely. (*People v Di Napoli*, 27 NY2d at 235; *Melendez v City of New York*, 109 AD2d 13, 17 [1st Dept 1985]; *Ruggiero v Fahey*, 103 AD2d 65, 67-68 [2d Dept 1984]).

In this case, flight is no longer an issue, as Grossman has been indicted, pled guilty, and sentenced to conditional discharges. Jurors can no longer be tampered with. The integrity of the proceeding cannot be compromised. Klarberg, the complainant in the criminal case, consents to disclosure of all information demanded in the subpoenas.

Contrary to its own position that only the judge who supervised the Grand Jury should determine this motion, DANY simultaneously suggests that Hon. Maxwell Wiley, who presided at Grossman's plea and sentence, should determine it. However, Grossman's prosecution concluded with her sentence, and no notice of appeal has been filed. The issues that remain for determination--the extent of Klarberg's injury and the potential liability of Amber Avalon Corp., the John Doe defendants, and additional liability of Grossman on the unadjudicated claims--will be for this Court to determine. (See e.g. *Ostroy v Six Sq., LLC*, 29 Misc 3d 470, 472-73 [Sup Ct, New York County 2010]).

The need to maintain the secrecy of the Grand Jury proceeding does not outweigh plaintiff's interest in disclosure of the Hotel Chantelle videotape. (*SSAC, Inc. v Infitec, Inc.*,

198 AD2d 903, 903 [4th Dept 1993]). Plaintiff has adequately established that the video is available only from DANY and that it may shed light on the extent of the negligence, or lack thereof, of Amber Avalon Corp. and its employees. While DANY argues that plaintiff can resort to other information such as Grossman's credit card bills and the hotel bar's tab to show how much she drank, such evidence, if it exists, will not demonstrate other evidence material and necessary to plaintiff's claims, such as whether on the night of the incident defendant Amber Avalon Corp. failed to employ sufficient staff to control the crowd and noise, limit the number of patrons in the bar, or provide lighting to ensure that staff could assess and respond to incidents. Thus, plaintiff has made the initial showing of a compelling and particularized need sufficient to warrant disclosure of the videotape. (*Matter of District Attorney of Suffolk County*, 58 NY2d 436, 444 [1983]).

Plaintiff seeks Grossman's Grand Jury testimony for purposes of impeachment and cross-examination. Grand Jury testimony may properly be used to impeach witnesses and to refresh their recollections, if necessary. (*People v Di Napoli*, 27 NY2d at 237; *Matter of Nelson v Mollen*, 175 AD2d 518, 520 [3d Dept 1991]; *Ruggiero v Fahey*, 103 AD2d at 70). Here plaintiff cites the transcript of the plea proceeding, in which the Assistant District Attorney stated that Grossman made a "queen for a day"

statement that differed from what appeared on the videotape, and that Grossman gave a different version in her Grand Jury testimony. While DANY argues that other documents can furnish the information contained in Grossman's Grand Jury testimony, such as a letter to the sentencing court from the assigned Assistant District Attorney detailing the assault and a letter from Grossman's defense attorney containing her version of the assault, DANY does not contend that either of these documents necessarily jibes with Grossman's Grand Jury testimony. Nor does DANY contend that the letter of its Assistant District Attorney could furnish a good faith basis for impeachment of Grossman on cross-examination. Thus, plaintiff has demonstrated a compelling and particularized need to obtain Grossman's Grand Jury testimony.

DANY opposes the production of Grossman's proffer statement on the grounds of the public interest privilege and attorney work product privilege. "It is settled that statements made by a witness to the District Attorney's office are protected by the public interest privilege." (*Sanchez v City of New York*, 201 AD2d 325, 326 [1st Dept 1994]). However, the privilege is qualified and is to be treated in the same manner as Grand Jury testimony for the purposes of disclosure, requiring a balancing of the litigant's need for production against the potential harm to the public from such disclosure. (*Id.*) The party seeking disclosure

must demonstrate a compelling and particularized need for access.

(*Id.*)

Here DANY itself demonstrated the compelling and particularized need for access, in pointing out to Justice Wiley in the criminal proceeding that Grossman's proffer statement differed from the contents of the videotape and from her Grand Jury testimony. Clearly Grossman's proffer statement is fruit for impeachment by plaintiff, should she testify at trial. Accordingly, it must be disclosed.

However, any notes by DANY of interviews of Grossman are attorney's work product, absolutely exempt from discovery. (*Smith v City of New York*, 49 AD3d 400, 401 [1st Dept 2008]; *Siemens Solar Indus. v Atlantic Richfield Co.*, 246 AD2d 476, 476 [1st Dept 1998]; *Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1st Dept 1989]).

It is therefore

ORDERED that the motion of plaintiff for an order issuing a subpoena to the New York City Police Department is granted without opposition; and it is further

ORDERED that the motion of plaintiff for an order issuing a subpoena to the Office of the New York County District Attorney is granted with respect to the videotape made by The Amber Avalon Corp. d/b/a/ Hotel Chantelle, the Grand Jury testimony of Victoria Grossman, and the proffer statement of Victoria

Grossman, and to such extent only.

Upon presentation to the Court of subpoenas drafted in accordance with this decision and order, the Court will so order the subpoenas.

ENTER:

Dated: September 3, 2014



Ellen M. Coin, A.J.S.C.