

<b>Everett v Eastchester Police Dept.</b>
2014 NY Slip Op 33519(U)
February 10, 2014
Supreme Court, Westchester County
Docket Number: 27659/10
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

**FILED**

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.

FEB 11 2015  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**FILED  
AND  
ENTERED**  
ON 2-11 2015  
**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 & ORDER**

Index No. 27659/10

Motion Date: Feb. 10, 2015

Seq. No. 13

The following papers numbered 1 to 12 were read on this motion by plaintiffs for an order pursuant to CPLR 3124 compelling defendants to produce Eastchester Police Sergeant Matthew Kiernan for a deposition.

Order to Show Cause-Affirmation in Support-Exhibits A-D	1-2, 4-7
Affirmation in Opposition-Exhibits A-D	8-12
Affirmation of Service	3

Upon the foregoing papers and the proceedings held on February 10, 2015 this motion is determined as follows:

This action arises from a shooting that occurred on November 3, 2009, when plaintiffs' decedent was killed by James Pileggi Jr. (hereinafter "Pileggi"). Pileggi was a police officer with the Eastchester Police Department (hereinafter "EPD") hired in 2007, but at the time of the shooting he was off duty and shot his off duty weapon. 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 negligent hiring, supervision and retention, liability under respondeat superior and wrongful death.

By court order dated January 8, 2013, this court, after an in camera review, directed defendants to produce certain pages from Pileggi's personnel file and his in-service training file. Among the documents produced by defendants pursuant to the order was an EPD Internal Affairs

Report dated February 11, 2009, with redactions, including the name of the author. The report set forth that an investigation was conducted by EPD with respect to the arrest of an individual in Suffolk County, later identified as Michael O'Brien. The report stated that at the time of the arrest, O'Brien was driving a motor vehicle belonging to Pileggi and in which Suffolk County Police found drugs, including steroids and a handgun. The report stated that the author of the report interviewed a detective from the Suffolk County Police and O'Brien, both of whose names were redacted. The report further stated that Pileggi was interviewed regarding "the situation." Although the report indicates that the author of the report was present during Pileggi's interview, it also indicates that another person, whose name was redacted, questioned Pileggi.

Thereafter, plaintiffs deposed Timothy Bonci, Chief of EPD, on June 24, 2013 and July 15, 2013. At his deposition, Chief Bonci testified that he did not assist with the investigation "hands on," but gathered the information from the investigation (*Id.* at 93). He further testified that he was briefed daily on the investigation and personally interviewed Pileggi along with the investigating officer (Ex. C, Transcript of Bonci Transcript 102, 107, 143, 154-155). When asked who from the EPD conducted the investigation, Bonci responded "one of my detective sergeants" (*Id.* at 83, 92). He further testified that he assigned the "detective sergeant" to contact the Suffolk County Police Department internal affairs to gather information (*Id.* at 93). Counsel for defendants directed Chief Bonci to identify the person who conducted the investigation by rank in light of the court's order directing defendants to produce certain documents in Pileggi's personnel file with identities redacted (*Id.* at 85-86). Plaintiffs' counsel did not object and agreed on the record to the foregoing (*Id.* at 86). When asked if he was familiar with a "slip of paper" found in Pileggi's motor vehicle during the February 11, 2009 arrest, which "had the handwritten name 'Jimmy' on it, and ... appeared to be an accounting for steroid sales," Bonci responded "[y]es, as a customer of the person arrested that had the steroids ... [a]mongst the name Jimmy were several other names" (*Id.* at 160).

On or about May 22, 2014, according to plaintiffs' counsel, plaintiffs received documents from the Westchester County Department of Public Safety pursuant to a FOIL request. Among the documents released to plaintiffs was a redacted copy of the EPD Internal Affairs Report dated February 11, 2009. In this copy of the report, the name of the author of the report, Sergeant Matthew Kiernan, was not redacted. Additionally, the name of the Suffolk County detective who Sergeant Kiernan interviewed was also not redacted and Detective Daniel Murphy was identified as the detective.

On October 21, 2014, a further limited deposition of Chief Bonci was held pursuant to court order regarding the EPD manual in effect from 2007 to 2009, insofar as the manual was produced in October, 2013, after Chief Bonci's prior deposition in June and July of 2013.

On December 4, 2014, Detective Murphy was deposed regarding the arrest on February 11, 2009. At the deposition, Detective Murphy produced a copy of a purported handwritten invoice for steroids found in Pileggi's motor vehicle after the arrest. Plaintiffs contend that this

was the first time the purported invoice had been produced, and note that it had not been produced by defendants with Pileggi's personnel and disciplinary file.

By the present motion, plaintiffs now seek an order directing defendants to produce Sergeant Kiernan for a deposition as a necessary party witness.

### The Parties' Contentions

Plaintiffs contend that Chief Bonci, the only party witness produced by defendants, claimed not to have firsthand knowledge of the investigation into Pileggi. Plaintiffs rely upon Bonci's deposition testimony that one of the detective sergeants conducted the investigation and that he assigned the detective sergeant to contact the Suffolk County Police Department internal affairs and gather information about the incident. Plaintiffs also contend that Sergeant Kiernan is in possession of information regarding the purported handwritten invoice for steroid sales found in Pileggi's motor vehicle. Plaintiffs assert that "[f]or some unknown reason, Bonci and Keirnan [sic] decided not to make this highly relevant document part of Pileggi's disciplinary file" (Plaintiffs' Affirmation in Support at ¶ 24). Plaintiffs rely upon Bonci's testimony that the handwritten invoice was not made a part of Pileggi's disciplinary file (Ex. C, Transcript of Bonci Deposition at 161). Plaintiffs further contend that Sergeant Kiernan is a necessary party witness as someone who has knowledge regarding the claims of negligent retention and supervision since he interviewed Detective Murphy, O'Brien and Pileggi.

Defendants oppose the motion. Defendants contend that plaintiffs have already produced Chief Bonci who had knowledge of the investigation into Pileggi, and assert that plaintiffs have not demonstrated why the deposition of Sergeant Kiernan is material and necessary. Defendants further contend that plaintiffs have not alleged, nor established, that Chief Bonci did not possess sufficient knowledge or that he was unable to provide material and necessary information. Defendants assert that Chief Bonci's testimony demonstrates that he was heavily involved in the investigation and testified as to his first-hand knowledge of the investigation. Defendants note that Chief Bonci testified at his deposition that he interviewed Pileggi with the investigating officer and testified as to Pileggi's responses at the interview. Defendants assert that it is well established that a municipal or corporate defendant has the right to choose the witness or witnesses it will produce for a deposition.

As to the purported invoice found in Pileggi's motor vehicle after the arrest of O'Brien, defendants assert that the purported invoice was part of the documents provided to the court for in camera inspection and the court did not order the production of the purported invoice. Accordingly, defendants contend that this court has already determined that the document was not relevant and material to this case and discovery of the document was not warranted. Defendants further contend that, in any event, the document is irrelevant to the present motion and does not provide a reason for an additional party deposition since information as to the purported invoice for steroid sales, which included the name "Jimmy" was included in documents previously provided to plaintiffs. Defendants also note that plaintiffs deposed Chief

Bonci regarding the purported invoice and he testified that he was familiar with the facts and circumstances of the document. He specifically testified that it contained five or six names, including Jimmy (*Id.* at 161). Defendants further assert that, as noted in the court order dated January 8, 2013, Pileggi's employment file, which was provided to the court for in camera review, was divided into 17 sub-files, including a disciplinary sub-file and an investigatory sub-file. Defendants assert that the purported invoice was not part of the disciplinary sub-file, but was part of the investigatory sub-file. Chief Bonci responded to the question as to whether the document was made part of Pileggi's disciplinary file as follows: "No. Why would it be? I'm sure in the investigation ... Not his disciplinary file" (*Id.* at 161). Defendants, therefore, contend that plaintiffs claim in the present motion that Bonci and Kiernan purposefully omitted the purported invoice from Pileggi's employment file is baseless and false.

Defendants also assert that plaintiffs could have noticed the deposition of the author of the Internal Affairs Investigation Report two years ago when it received the report, and it was not necessary for plaintiffs to discover the identity of the author to seek the deposition. Moreover, defendants contend that even if plaintiffs were under the mistaken impression that they needed the name of the author of the report to demand a deposition, plaintiffs were aware of Sergeant Kiernan's identity as the author of the report when Chief Bonci by mistake identified the author of the report as Sergeant Kiernan during his July 15, 2013 deposition (*Id.* at Defendants' Ex. D), and upon receipt of the report through FOIL which included Sergeant Kiernan's name, which plaintiffs contend was in May, 2014.

Moreover, defendants contend that the court has the discretion to limit repetitious, collateral or clearly irrelevant testimony. Defendants contend that the Sergeant's deposition testimony would be repetitious of Bonci's and Detective Murphy's testimony about the Suffolk County incident. Defendants note that Kiernan obtained his information about the incident from Detective Murphy and Bonci obtained his information about the incident from Kiernan. Therefore, defendants argue that Kiernan's testimony would clearly be repetitious.

Finally, defendants assert that they will be prejudiced by being required to produce Sergeant Kiernan since the additional deposition will cause defendants' additional expense and delay completion of discovery.

#### Analysis

Defendants correctly contend that a municipal or corporate defendant has the right to designate the representative who it shall produce for a deposition (*Trueforge Global Mach. Corp. v Viraj Group*, 84 AD2d 938, 940 [2d Dept 2011]; *Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2d Dept 2010]). Moreover, defendants correctly contend that a party seeking an additional deposition of a municipal or corporate defendant must establish that (1) the representative already deposed had insufficient knowledge, or was otherwise inadequate, and (2) there is a substantial likelihood that the person or persons sought to be deposed possess information which is material and necessary to the prosecution or defense of the case (*Giordano*

*v New Rochelle Mun. Housing Auth.*, 84 AD3d 729 [2d Dept 2011]; *Nunez*, 71 AD3d at 968; *Carter v New York City Bd. of Educ.*, 225 AD2d 512 [2<sup>nd</sup> Dept 1996]).

Contrary to defendants' contention, however, plaintiffs have demonstrated that Chief Bonci, who was the only witness produced for a deposition by defendants, did not possess personal knowledge of information as to certain facts which Sergeant Kiernan, as the investigating officer of the Suffolk County incident, would possess. Notably, Chief Bonci was not present at the interviews of Detective Murphy or Michael O'Brien, which were conducted by Sergeant Kiernan. Although plaintiffs have deposed Detective Murphy, plaintiffs are entitled to a deposition of a party witness with knowledge of the relevant facts. Accordingly, plaintiffs are entitled to depose Sergeant Kiernan regarding his interviews of Detective Murphy and Michael O'Brien. Although Chief Bonci gave testimony regarding the contents of the purported invoice for steroids found in Pileggi's motor vehicle by the Suffolk County Police, plaintiffs are entitled to depose Sergeant Kiernan regarding his receipt of the invoice and any information he obtained about the invoice during his interview of Detective Murphy. Plaintiffs, however, are not entitled to depose Sergeant Kiernan with respect to the interview of Pileggi. Chief Bonci, who was also present at the interview, has been deposed by plaintiffs regarding the interview, and plaintiffs have not established that he had insufficient knowledge regarding the interview (*see Ayala v City of New York*, 169 AD2d 530 [1<sup>st</sup> Dept 1991] [plaintiff not entitled to depose second of two police officers at interview since first police officer already deposed]).

Although this court agrees with defendants that plaintiffs could have demanded the deposition of Sergeant Kiernan months ago and the discovery in this matter is not proceeding expeditiously, the prejudice experienced by defendants due to the delay and additional expense does not outweigh the prejudice which plaintiffs would sustain if they are unable to depose Sergeant Kiernan, who investigated the Suffolk County incident. The court, however, shares defendants' frustration with the slow pace of discovery in this action, which was commenced over four years ago. Accordingly, the parties are directed to complete the deposition of Sergeant Kiernan and any remaining nonparties on or before March 17, 2015.

In light of the foregoing, it is

ORDERED that the motion is granted to the extent that defendants shall produce Sergeant Matthew Kiernan for a deposition limited to his interviews of Michael O'Brien and Detective Murphy, including his receipt and discussion of the purported invoice for steroid sales recovered by the Suffolk County Police, on or before March 17, 2015; and it is further

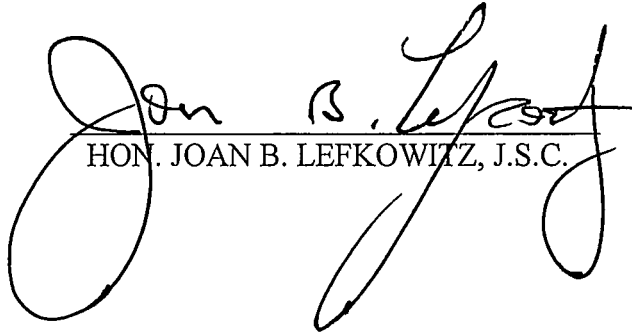
ORDERED that the parties are directed to complete all nonparty depositions on or before March 17, 2015; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on March 24, 2015 at 9:30 A.M.; it is further

ORDERED that plaintiffs shall serve a copy of this decision and order with notice of entry upon defendants within 10 days of entry,

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
February 10, 2014



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

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