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| Everett v Eastchester Police Dept. |
| 2014 NY Slip Op 33520(U) |
| July 21, 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. |

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 7-23 2014
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: July 21, 2014
Seq. No. 8



FILED
JUL 23 2014
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 - 16 were read on this motion by plaintiffs for an order pursuant to CPLR 3124 compelling defendants, Eastchester Police Department (hereinafter the "EPD") and the Town of Eastchester to produce the entire disciplinary and personnel file of nonparty, former EPD Officer Richard Hoffman (hereinafter "Hoffman") or, in the alternative, for said records to be delivered to this court for an in camera inspection and for such other and further relief as this court deems just and proper.

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| Amended Order to Show Cause - Affirmation | 1-2 |
| Exhibits | 3-10 |
| Affirmation in Opposition | 11 |
| Exhibits | 12-16 |

Upon the foregoing papers and oral argument heard on July 14, 2014 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 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 Decision and Order filed and entered August 28, 2012 (Lefkowitz, J.), this court granted that part of plaintiffs' motion to compel production of certain personnel records and documents of Pileggi to the extent that defendants were to produce said records to this court for an in camera review. By Decision and Order filed and entered January 9, 2013 (Lefkowitz, J.), the court directed defendants to provide to plaintiffs certain, enumerated pages from Pileggi's personnel file and his in-service training file. According to plaintiffs, a redacted "Internal Affairs Report" of the EPD was provided to them. On page two thereof it states that on November 13, 2009 the EPD received confidential information from a confidential source that Pileggi had supplied steroids to an unidentified person (the name has been redacted). This incident had occurred 14 months earlier. It also stated that as of November 11, 2009, Pileggi intended to resign from the EPD and on November 17, 2009 the Town Board by resolution accepted Pileggi's resignation.

At his criminal trial Pileggi admitted that in 2008 he injected another EPD officer with illegal steroids.

By letter dated December 1, 2009 the Department of Public Safety of the Westchester County Police wrote to the EPD with a status update on its investigation into Pileggi's activities. The letter stated that the EPD contacted the Westchester County Police Special Investigations Unit on June 18, 2009 and asked for assistance in regards to an anonymous letter containing allegations of Pileggi being involved in the sale of narcotics including steroids and cocaine. The letter noted that a confidential informant supplied unconfirmed information about Pileggi during the investigation.

At his deposition on June 24, 2013 Chief Timothy J. Bonci of the EPD testified, among other things, that after the subject shooting death incident he became aware that in 2008 Pileggi injected another police officer with steroids. Bonci testified that Hoffman admitted to him that Pileggi injected him.

In his affidavit dated May 30, 2013 Officer Jeffrey Meyer of the EPD stated that he was the PBA union president from 1998 to 2008 and as union president he became familiar with several issues concerning personnel, disciplinary matters and overall department policy and custom. Meyer stated that at all times through Pileggi's employment with the EPD which commenced in 2007, the EPD was well aware of Pileggi's violations of their rules and regulations. Meyer stated that in the months before the subject shooting, Pileggi was found to have violated various rules and regulations which led to his being disciplined. Meyer further stated that Hoffman told him that Pileggi injected him with steroid drugs at the facilities of the EPD.

Hoffman's resignation from the EPD was accepted by the Town Board on February 17, 2012.

Presently plaintiffs seek Hoffman's personnel and disciplinary records. They assert that they are entitled to these records insofar as it is clear that Pileggi sold and injected Hoffman with steroids while Pileggi was a member of the EPD. Plaintiffs note that despite his criminal behavior in 2008, Pileggi was never disciplined, supervised, suspended or terminated by the EPD for the acts involving Hoffman. Plaintiffs assert that had proper action been taken against Pileggi the subject shooting would not have occurred.

This motion is opposed by defendants. They note that Hoffman is a former police officer of the EPD and that a court order to produce the sought after records is required. Defendants assert that plaintiffs have not demonstrated a factual predicate that warrants an intrusion into the nonparty's personnel and disciplinary files pursuant to the Civil Rights Law § 50-a. Defendants note that Hoffman is not the person who is alleged to have been negligently hired, retained or supervised. Defendants additionally note that they were not aware of the information regarding Pileggi and Hoffman until after the subject shooting and after Pileggi was discharged from the EPD. Defendants note that plaintiffs already have Pileggi's file. Hoffman has nothing to do with this matter. Defendants also note that plaintiffs seek post-incident records since the investigation into Hoffman's alleged steroid use occurred after the subject shooting. Defendants state that plaintiffs have not shown the relevancy of post-incident discovery in relation to their claims.

Civil Rights Law § 50-a, which declares police personnel records to be confidential, provides that upon "a clear showing of facts sufficient to warrant the judge to request records for review" (Civil Rights Law § 50-a [2]), an in camera inspection is to be conducted. The initial burden is upon the party seeking discovery to demonstrate a factual predicate warranting the intrusion into the personnel records of a police officer (*Flores v City of New York*, 207 AD2d 302 [1st Dept 1994]). The standard of a "clear showing of facts sufficient to warrant the judge to request records for review" must be viewed liberally, as "a party seeking discovery will, of course, not know precisely what pertinent information is within a personnel record; thus a strict reading would render the statute meaningless" (*Cox v New York City Hous. Auth.*, 105 AD2d 663, 664 [1st Dept 1984]). If, after an in camera review, the court determines that the personnel records contain information that is relevant and material to the action, the court shall make those parts of the record available to the party requesting disclosure (Civil Rights Law § 50-a[2], [3]; *see, People v Gissendanner*, 48 NY2d 543, 551 [1979]; *Lawrence v City of New York*, 118 AD2d 758, 759 [2^d Dept 1986]).

In the context of an action alleging claims for the negligent hiring, training, retention and/or supervision of police officers, the courts have found that plaintiffs demonstrated a factual predicate warranting an in camera review of the records of the police officers involved in the underlying incident based upon these allegations since the officers' records may contain information that is relevant and material to those claims (*Pickering v State of New York*, 30 AD3d 393, 394 [2^d Dept 2006; claimants brought personal injury and wrongful death action

against State after passenger in vehicle stopped by state police was shot by the state police investigator]; *Cox v New York City Hous. Auth.*, 105 AD2d 663, 664 [1st Dept 1984; action was brought against housing authority and one of its police officers to recover injuries plaintiff sustained as result of being shot by the officer while off duty---plaintiffs claimed that the authority negligently hired and supervised the officer and court stated that officer's personnel record should be provided for an in camera review]; *see also Blanco v County of Suffolk*, 51 AD3d 700 [2d Dept 2008; plaintiffs brought action against county, county police department and others seeking to recover for, among other things, negligent hiring, retention and supervision arising from the assault they incurred from three police officers employed by the department---court directed production for an in camera inspection the personnel records of the police officers involved]). Notably, the courts have directed an in camera review of the records of police officers who were not named as defendants, but were involved in the underlying incident, where, as here, the plaintiffs alleged a cause of action for negligent training and supervision (*see Pickering v State of New York*, 30 AD3d 393; *Flores v City of New York*, 207 AD2d 302 [1st Dept 1994]).

In the present action the only remaining claims are negligent hiring, supervision, retention, liability under respondeat superior and wrongful death. Plaintiffs have not demonstrated a factual predicate that nonparty Hoffman's records may contain information which is relevant and material to these claims. Hoffman was not involved in the subject shooting and the only connection plaintiffs demonstrated between Hoffman and this matter is that Pileggi administered steroids to Hoffman in 2008, a fact unbeknownst to defendants until after the subject shooting occurred.

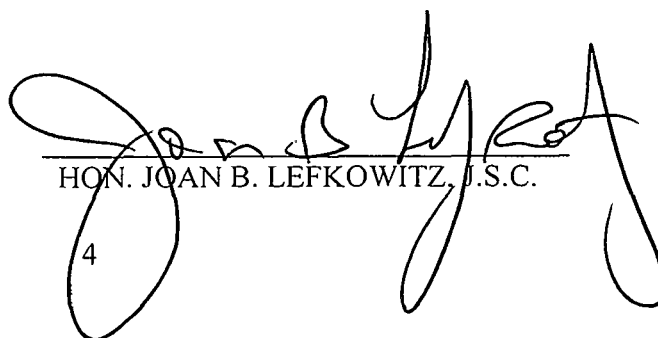
Accordingly, it is:

ORDERED that plaintiffs' motion for an order compelling defendants to produce the entire disciplinary and personnel file of former Police Officer Richard Hoffman or, in the alternative, for said records to be delivered to this court for an in camera inspection is denied in its entirety; and it is further;

ORDERED that plaintiffs are directed to serve defendants and nonparty Richard Hoffman with a copy of this order within seven days of entry; and it is further,

ORDERED that the parties are directed to appear in the Compliance Part, Room 800 on August 7, 2014 at 9:30 A.M.

Dated: White Plains, New York
July 21, 2014


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