

Everett v Eastchester Police Dept.

2014 NY Slip Op 33521(U)

October 6, 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 10-7-2014 WESTCHESTER COUNTY CLERK

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

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.

LEFKOWITZ, J.

DECISION AND ORDER

Index No. 27659/10 Motion Date: Oct. 6, 2014 Seq. Nos. 9 and 10

FILED OCT - 7 2014 TIMOTHY C. IDONE COUNTY CLERK COUNTY OF WESTCHESTER

The following papers numbered 1 to 22 were read on this motion (sequence number 9) by plaintiffs for an order imposing sanctions against defendants Eastchester Police Department and Town of Eastchester (hereinafter "defendants") for multiple spoliation violations and other discovery abuses and compelling the witness for defendants, Police Chief Timothy J. Bonci (hereinafter "Bonci") to answer further questions at an oral deposition and for such other and further relief as this Court deems just and proper.

Table with 2 columns: Document Name and Page Numbers. Includes Order to Show Cause-Affirmation (1-2), Exhibits (3-18), Affirmation in Opposition (19), Exhibits A-K (20-30).

The following papers numbered 30-53 were read on this motion (sequence number 10) by defendants for an order precluding plaintiffs from offering evidence at trial as to any claimed wrongful death damages due to their failure to timely provide complete discovery response with regards to financial records supporting said damages or, in the alternative, compelling plaintiffs to fully respond to the discovery demands of defendants and granting such other and further relief as this court deems just and proper.

Table with 2 columns: Document Name and Page Numbers. Includes Order to Show Cause-Affirmation (31 and 31 A), Exhibits (32-46), Affirmation in Opposition (47), Exhibits (48-53).

Upon the foregoing papers and oral argument heard on October 6, 2014 these two motions are 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 almost four years ago, 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.

Motion Sequence Number 9:

By Decision and Order dated August 27, 2012 this court (Lefkowitz, J.), among other things, directed defendants to provide to the court for an in camera review, Pileggi's personnel records and documents relative to Pileggi's annual in-service training. After an in camera review the court, in another Decision and Order, this one dated January 8, 2013 directed defendants to provide to plaintiffs certain enumerated pages from Pileggi's personnel file and his in-service training file including, Tab # 14, pages 274-281.

The documents provided to plaintiffs included portions of the EPD manual that were not effective until September 15, 2009. Other documents included an Internal Affairs Report (hereinafter "IAR") dated February 11, 2009 (that stated that Pileggi tested positive for steroids) and an IAR dated May 15, 2009 (that stated that an anonymous source alleged that Pileggi was dealing steroids and possibly cocaine).

Bonci was deposed on June 24, 2013 and again on July 15, 2013.

Plaintiffs point out that insofar as the September 2009 manual did not relate to the IARs dated February and May of 2009 they requested EPD manuals in use for the years 2007 through the present date. By Order to Show Cause dated August 26, 2013 plaintiffs moved for an order compelling defendants to comply with certain of their demands including their demand for the EPD manuals. In its Decision and Order dated October 7, 2013 (Lefkowitz, J.), this court, among other things, directed defendants to provide to plaintiffs the EPD manuals in effect from 2007 through 2009. Defendants complied with the court's order and under cover letter dated October 22, 2013 provided to plaintiffs a copy of the EPD manual effective at the time Pileggi was hired (in 2007).

Plaintiffs allege that the present motion arises from the alleged discrepancies present between two versions of the IAR dated February 11, 2009. Plaintiffs state that a different version of that IAR had been faxed to them on February 24, 2011 than the one defendants provided to them pursuant to the court's order of January 8, 2013. One difference is that the later submitted

IAR had an added sentence on the 2/23/09 heading: "He advised us that Pileggi did not need any physical follow-up to his original examination, and that he did not require any counseling or further treatment, for the type of steroid he tested positive for".

Plaintiffs assert that this added sentence is relevant as it relates to the causes of action of negligent supervision and negligent retention. In other words, if defendants prove that they took proper steps related to counseling and treatment for Pileggi once he admitted to steroid use, they bolster their defense.

Plaintiffs note that Bonci was asked about these discrepancies. Plaintiffs assert that the only logical conclusion is that Bonci altered the record to provide defendants with a stronger defense. Plaintiffs assert that Bonci gave other questionable responses during his depositions. Plaintiffs assert that Bonci committed perjury throughout his two day deposition. Plaintiffs note that the IAR dated February 11, 2009 had a notation under 4/06/09 that "...Pileggi was notified that he would have to take a leave of absence. He submitted a letter of leave of absence..." Plaintiffs now state that they questioned Bonci at his deposition about the letter and asked for its production. Defendants objected. On or about March 5, 2014 plaintiffs made a request for "all records related to a leave of absence" by Pileggi to the Eastchester town clerk who responded that no such records exist. Plaintiffs assert that this letter has been intentionally suppressed by concealment or destruction.

Plaintiffs note that the IAR dated May 15, 2009 states that an anonymous letter was received that Pileggi was dealing steroids and possibly dealing cocaine. As a result thereof the matter was referred to the Westchester County Department of Public Safety (hereinafter "WCDPS"). Plaintiffs state that they sent a FOIL request to WCDPS for the investigation report. A review of this Executive Summary of Investigating Report (hereinafter "ESI") shows that on 9/16/09 Commissioner Belfiore telephoned Sergeant Reich and stated that Bonci called him. Plaintiffs state that it is notable that there is no mention in the May 2009 IAR of a phone conversation with Belfiore and that this indicates alteration, concealment or destruction of the IAR record.

Plaintiffs assert that based upon the alteration of the IARs and the suppression of Pileggi's leave of absence letter they believe that defendants have committed other spoliation violations. Plaintiffs seek that sanctions be imposed against defendants for their spoliation of evidence and other discovery abuses. They ask for, among other things, an evidentiary hearing, a subpoena for unredacted records, attorneys' fees and an adverse inference jury instruction. They also ask this court to punish Bonci with civil contempt for his fraudulent and perjurious conduct during his depositions.

Plaintiffs further assert that Bonci must be deposed again to be further questioned regarding portions of the EPD manual that were not timely provided to them and that defendants should bear the cost of the further deposition.

This motion is opposed by defendants. Defendants assert that the arguments plaintiffs' counsel now asserts relating to the two editions of the EPD manual being different were asserted before the Appellate Division, Second Department on plaintiffs' cross motion to strike certain portions of defendants' appellate brief. In that cross motion plaintiff also sought sanctions related to defendants' willful and contumacious conduct concerning discovery violations. As defendants now state, by Decision and Order dated July 10, 2014 the Appellate Division held in abeyance that branch of plaintiffs' cross motion to strike portions of the defendants' brief and referred it to the panel of Justices hearing the appeal for determination upon the argument thereof and the motion and cross motion were otherwise denied.

Defendants note that plaintiffs' allegation that the IAR dated 2/11/09 was intentionally altered by Bonci is based upon plaintiff counsel's disbelief of the explanation proffered by Bonci regarding the same at his deposition. Defendants further assert that plaintiffs' accusations are not only false but that alterations would have been unnecessary for defendants to mount their defense. They assert that Bonci as police chief would not risk his career to alter a document. Defendants assert that Bonci's credibility should be litigated before the trier of fact. Defendants assert that it is the conduct of plaintiffs' counsel that is frivolous and should be sanctioned. They note that plaintiffs' counsel's characterization of Bonci as a perjurer exceeds the bounds of zealous advocacy.

Defendants note that they provided the 2007 edition of the EPD manual in October 2013. Since then, plaintiffs filed another discovery motion (on June 9, 2014 by which they sought the entire disciplinary and personnel file of nonparty, former EPD Officer Richard Hoffman) that never mentioned the need to re-depose Bonci. Defendants note that plaintiffs waited about a year before raising the issue relating to the need for a further deposition. Finally, defendants note that any issue plaintiffs have with their rejected FOIL request is outside this proceeding.

Analysis:

Contrary to plaintiffs' assertions, the court does not find that defendants have obstructed the discovery process in this matter or that they negligently or intentionally destroyed or concealed key evidence. A sanction under CPLR 3126 depends on a number of factors including, but not limited to, the knowledge and intent of the spoliator, the existence of an explanation for the loss of the evidence and the degree of prejudice to the opposing party (*Samaroo v Bogopa Svc. Corp.*, 106 AD3d 713 [2d Dept 2013]). This court notes, as plaintiffs concede, that Bonci was questioned at his deposition regarding the difference in the IAR dated 2/11/09 (between the copy provided to plaintiffs pursuant to this court's order and the copy that had earlier been faxed to them) under the notation for 2/23/09. Furthermore, although plaintiffs may assume, they have not shown, that the absence of "the leave of absence letter" or the absence of a notation on the IAR record dated 5/15/09 referring to a call between Commissioner Belfiore and Sergeant Reich is attributable to defendants' actions and /or that these things in some way have prejudiced their prosecution of this action. Their assertion that Bonci has perjured himself is simply an assertion and any issue of credibility can be explored at trial. On this record and at

this juncture, it is improper to impose any sanctions against defendants for what plaintiffs can only allege are spoliation violations and discovery abuses.

However, as plaintiffs point out, at the time defendants' witness, Bonci, was deposed, they did not have a copy of the EPD manual that was in effect in 2007 when Pileggi was hired. Defendants state that this issue has been raised and determined by the Appellate Division of the Second Department. By Decision and Order dated August 22, 2013 this court (Lefkowitz, J.), among other things, denied defendants' motion to dismiss the complaint (insofar as asserted against them). Defendants filed a Notice of Appeal on or about August 29, 2013 regarding this part of the court's determination. Plaintiffs cross moved before the Appellate Division for an order imposing sanctions against defendants for, among other things, their willful and contumacious conduct concerning discovery violations. In support of that part of their motion, plaintiffs stated that the withholding of the relevant EPD manual illustrated defendants' counsel's violation of the rules of professional conduct. By Decision and Order dated July 10, 2014 the Appellate Division held in abeyance that branch of plaintiffs' cross motion to strike portions of the defendants' brief and referred it to the panel of Justices hearing the appeal for determination upon the argument thereof and the motion and cross motion were otherwise denied. Contrary to defendants' assertions herein, the appellate court did not determine the precise issue that is present herein; that is, the necessity for a further deposition of Bonci based upon the 2007 EPD manual provided to plaintiffs after Bonci had already been deposed.

Parties to an action are entitled to reasonable discovery of facts that are relevant to the controversy at issue and CPLR 3101 (a) permits discovery of "all matter material and necessary in the prosecution or defense of an action." Pileggi was hired in 2007. The remaining causes of action in this matter are negligent hiring, supervision and retention, liability under respondeat superior and wrongful death. The IAR reports indicate that defendants knew about Pileggi's steroid use at least as of early 2009. Despite their delay in demanding this discovery, plaintiffs should nonetheless have the opportunity to question defendants' witness about defendants' knowledge and their actions regarding Pileggi as it pertains to what is set forth in their own EPD manual that was in effect from 2007 onwards.

Motion Sequence Number 10:

Defendants state that insofar as plaintiffs have asserted a wrongful death cause of action, they are entitled to discovery of records supporting this claim. In their amended complaint dated April 11, 2013, plaintiffs asserted, among other things, that plaintiff Gail Everett, the decedent's mother, had a reasonable expectation of support from the decedent and was entitled to his comfort and the enjoyment of his society. At her deposition plaintiff Gail M. Everett (the decedent's mother) testified, among other things, that at the time of his death, her son was working at a real estate brokerage firm. However, she could not say if he got paid a commission. She did say he didn't get a salary. She further testified that her son owned his own car detailing business.

According to defendants, plaintiffs provided to them decedent's 1099 form for the year 2007 only as well as copies of checks allegedly earned as commission for the rental of various properties. By letter dated July 26, 2013 defendants asked plaintiffs for, among other documents, authorizations for decedent's employment records and his tax returns for the years 2006-09. By letter dated July 29, 2013 defendants also requested, among other documents, copies of all household bills, expenses, mortgage vouchers and the like for the three years prior to the decedent's death, together with proof of income and tax returns for all family members for the same period. By letter dated December 31, 2013 plaintiffs provided to defendants a "monetary list" of the bills the decedent allegedly paid for the three years preceding his death but was not accompanied by any bank statements, credit card statements or checks to support the items on the list.

In its notice for discovery and inspection dated March 4, 2014 defendants requested: authorizations to obtain records of all checking and bank accounts into which the decedent made deposits and/or from which household or other expenses were paid for a three year period prior to his death; copies of all bank accounts maintained by decedent for a three year period prior to his death; and authorizations to obtain copies of employment records from any employer of the decedent for a three year period prior to his death. Defendants state that at a conference held on April 10, 2014 plaintiffs' counsel provided to them blank authorizations in response to their demand for employment and bank records stating that he was unaware of the identifying information for any of the decedent's records.

By letter dated April 29, 2014 defendants requested: authorizations to obtain records for all checking and banking accounts into which decedent made deposits and/or from which household or other expenses were paid for a three year period prior to his death; copies of any bank accounts maintained by decedent for a three year period prior to his death; authorizations to obtain copies of employment records from any employer of the decedent for a three year period prior to his death; and, authorizations to receive copies of the decedent's tax returns for three years preceding his death.

Defendants acknowledge that on the morning of August 22, 2014 plaintiffs' counsel provided to them the following documents: Bank of America authorizations where, plaintiffs' counsel stated, the decedent maintained a checking and a savings account; an authorization for decedent's employer; one page from a Bank of America checking account statement from 2005; one page from a Bank of America saving account from 2005 and 2006; and, a request for a copy of decedent's tax return (IRS form 4506) for "November 3, 2009". Later that day plaintiffs further provided tax returns for plaintiff Mary Everett for 2007, 2008 and 2010; authorizations to obtain bank statement records for joint accounts held by plaintiffs Gail and Mary Everett; an HSBC bank statement from June 2014; and, a correct form 4506 for the decedent.

Presently defendants seek an order of preclusion against plaintiffs on the basis that plaintiffs failed to timely provide complete discovery responses with regard to financial records supporting such claimed damages or, in the alternative, compelling plaintiffs to fully respond to their various discovery demands.

This motion is opposed by plaintiffs. Firstly they note that defendants have waived their right to raise the issues they now raise since the submission date of the instant order to show cause was listed in the briefing schedule as August 28, 2014 and no adjournment was granted by this court. In any event, plaintiffs state that they have already provided defendants with decedent's financial information and that they have consistently provided information throughout this litigation including requested bank records.

Analysis:

Defendants concede that at the compliance conference on August 7, 2014 the court attorney referee drafted a briefing schedule for the instant motion which called for the submission of the order to show cause on or before August 28, 2014. Defendants state that notwithstanding this, they received a notification from the court indicating that the submission date had been adjourned to September 8, 2014 and that they received a notification to this effect. In fact a review of this court's case management system supports defendants' assertion. The date of submission was set as September 8, 2014.

CPLR 3126 states that if any party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them, an order prohibiting the disobedient party from supporting or opposing designated claims or defenses. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). CPLR 3124 states that if a person fails to respond to or comply with any type of discovery request, the party seeking disclosure may move to compel compliance or a response.

With these principles in mind and in light of the circumstances of this case, the court finds that in light of plaintiffs' cooperation in the discovery process any sanction pursuant to CPLR 3126 is improper. However, it is proper to issue an order compelling plaintiff to comply with outstanding discovery demands (*see Rollner v Cannon*, 42 AD2d 964 [2d Dept 1973; in an action for wrongful death and conscious pain and suffering, business records and receipts, as they pertain to the issue of future earnings are discoverable]; *compare Deans v Jamaica Hosp. Med. Ctr.*, 64 AD3d 742 [2d Dept 2009; defendant establishes its prima facie entitlement to judgment as a matter of law dismissing so much of the wrongful death action as was to recover for pecuniary loss based upon alleged earnings by submitting decedent's tax returns showing zero income]). A review of the record reveals that, as requested by defendants, plaintiffs already have provided: (1) an authorization to Home Sweet Home Properties Inc. for decedent's employments records; (2) a request for copies of the 1040 tax returns for the years 2006, 2007, 2008, 2009 and 2010 (form 4506); and, (3) two authorizations to Bank of America for decedent's bank account and checking account records, respectively, for the three years preceding his death. Plaintiffs should also provide decedent's W-2's and 1099's from 2006 to 2009; copies of checks referring to commissions earned by decedent from 2006 to 2009; and credit card statements and/or checks and/or other receipts that support plaintiffs' assertions set forth in their letter dated December 31, 2013 provided to defendants, of the "monetary list" of the bills (mortgage and household) the

decedent allegedly paid for the three years preceding his death accompanied by plaintiffs' counsel's affirmation outlining which "receipt" or "check" relates to which exact household expense.

In light of the foregoing, it is:

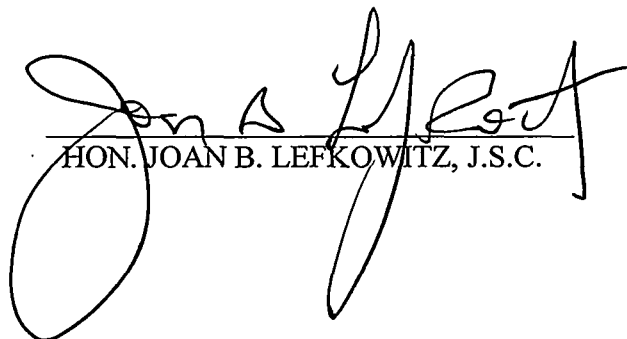
ORDERED that plaintiffs' motion is granted only to the limited extent that on or before October 24, 2014 defendants are directed to produce their witness, Police Chief Timothy J. Bonci, for a further deposition limited to an inquiry as to the application of the terms in the EPD manual from 2007 to the time of the shooting as they apply to defendants' actions regarding Pileggi, and their hiring, supervision and retention of Pileggi, and that such further deposition occur at a time and place convenient to the parties; and it is further,

ORDERED that defendants' motion is granted only to the limited extent that on or before October 24, 2014 plaintiffs are directed to provide to defendants, if they have not already done so, the following: (1) decedent's W-2's and 1099's from 2006 to 2009; (2) copies of checks referring to commissions earned by decedent from 2006 to 2009; and (3) credit card statements and/or checks and/or other receipts that support plaintiffs' assertions set forth in their letter dated December 31, 2013 provided to defendants of the "monetary list" of the bills and expenses (mortgage and household) the decedent allegedly paid for the three years preceding his death accompanied by plaintiffs' counsel's affirmation outlining which "receipt" or "check" relates to which exact household expense; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on October 28, 2014 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 6, 2014


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