

<b>Simms v City of Buffalo</b>
2017 NY Slip Op 32834(U)
December 5, 2017
Supreme Court, Erie County
Docket Number: 800190/2015
Judge: John F. O'Donnell
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At a Special Term of the Supreme Court, held in and for the County of Erie at Buffalo, New York on the 22<sup>nd</sup> day of December, 2017.

**PRESENT: HON. JOHN F. O'DONNELL, J.S.C.**  
**JUSTICE PRESIDING**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

QUAMAIN SIMMS

**ORDER**

Plaintiffs,

v.

Index No. 800190/2015

CITY OF BUFFALO,  
BUFFALO POLICE DEPARTMENT, and  
RICKEY V. LARK, In Individual and  
Official Capacity

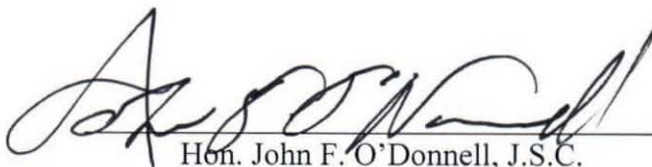
Defendants.

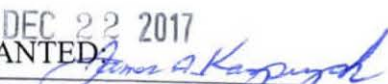
Upon reading and filing the annexed Notice of Motion to Compel submitted by Sean E. Cooney, Esq. of Dolce Panepinto, P.C., on behalf of Plaintiff September 5, 2017, and the Affirmation of Sean E. Cooney, Esq. dated September 5, 2017, together with all Exhibits; the Answering Affirmation submitted by David Lee, Esq. on behalf of the Defendants, dated October 3, 2017; and upon hearing oral argument by Sean E. Cooney, Esq. of Dolce Panepinto, P.C. appearing on behalf of the Plaintiff and David Lee, Esq. appearing on behalf of Defendants, and due deliberation had herein, in accordance with the order attached hereto, it is hereby

**ORDERED**, that Plaintiff's motion is Granted in part and Denied in part as set forth in the attached decision.

SO ORDERED:

**GRANTED**

  
Hon. John F. O'Donnell, J.S.C.

DEC 22 2017  
BY GRANTED:   
JAMES A. KASPRZAK  
COURT CLERK

STATE OF NEW YORK

SUPREME COURT : COUNTY OF ERIE

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**QUAMAIN L. SIMMS**

Plaintiff

**INDEX NO.: 800190/2015**

vs.

**CITY OF BUFFALO;  
BUFFALO POLICE DEPARTMENT; and  
RICKEY V. LARK,  
in Individual and Official Capacity**  
Defendants

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**MEMORANDUM**

APPEARANCES:

DOLCE PANEPINTO  
SEAN E. COONEY, ESQUIRE, of counsel  
Attorney for Plaintiff, **Quamain L. Simms**

TIMOTHY A. BALL, Corporation Counsel  
DAVID M. LEE, Assistant Corporation Counsel  
Attorney for Defendants

O'DONNELL, J., Supreme Court Justice

In this action concerning a shooting by Buffalo Police on January 13, 2013, the parties have consolidated two actions. In the first, plaintiff has claimed that in shooting the plaintiff, defendant Rickey Lark, while acting under color of law, deprived him of rights under the first, fourth, fifth and fourteenth amendments (§1983 claim). In the second, plaintiff asserts four causes of action: (1) that defendant City of Buffalo (City) and the Buffalo Police Department (BPD) used excessive force through their agent officers and injured the plaintiff; (2) that defendants City and BPD were negligent in that they failed to properly supervise their agents/employees; (3) failure to train; (4)

negligent hiring (failure to exercise reasonable care and creating an unreasonable risk of harm to the plaintiff).

Although the complaint makes no mention of dogs, it is apparently plaintiff's contention that he was shot by Lt. Lark when the latter was shooting a dog that was in proximity to the plaintiff.

This court previously issued an Order which denied requests for firearms reports in dog shooting incidents for 2010, 2011, 2012, denied requests for use of force records concerning animals shot by Rickey Lark, denied plaintiff's requests for defendant to provide the name of an individual who was identified in media reports as having dispatched twenty-six (26) animals in 2011, denied the request for personnel records of all officers involved in the shooting incident and denied a request for all communication, notes, memorandum or other documents regarding the City and the BPD analysis of their handling of animals.

In this motion to compel, plaintiff asks the court to direct defendants to produce the BPD Chief of Detectives or someone else with knowledge of training and policies for deposition, and renews requests for many of those items previously denied in requesting that defendant provide a response to a notice to produce served July 13, 2017 and provide updated responses to a notice to produce served November 10, 2015.

The defense advises that they will make the Chief available for deposition and asks that the deposition be limited only to his personal knowledge of the incident of January 13, 2013. Plaintiff indicates he is seeking to depose on a broad basis concerning this incident but also about the BPD's use of force with animals and the policies and training concerning same.

In part, the shooting and killing of a dog during the incident in which Mr. Simms was shot is alleged to play into the §1983 and negligence claims here. The defense is right in pointing out that

there is no "Monnell" claim alleged here, under which a municipality can be liable under §1983 only if there is a direct causal link between a municipal policy or custom and an alleged constitutional deprivation. Monnell v. Department of Social Services of City of New York, 436 US 658 (1978).

Defendants are also correct that the claims that an employee is acting within the scope of employment, as exists here, make a cause of action for negligent hiring, training and supervision subject to dismissal as a matter of law. (Green v. State, 39 Misc.3d 1239(A); Passucci v. Home Depot, Inc., 67 AD3d 1470 (4<sup>th</sup> Dept. 2009); defendant notes that if the employee committed no tort, there is no basis for liability on the employer and if the employee did commit a tort, the employer must pay the judgment under a theory of respondeat superior regardless of the adequacy of the training. (Affidavit of Lee p.10 citing also, Trader v. State, 277 AD2d 978 (4<sup>th</sup> Dept. 2000)). And further argues that an excessive force claim which points to defendant's intentional conduct is inconsistent with claims of negligence.

At this time however, there is no request for dismissal of claims and plaintiff is entitled to pursue inconsistent claims. (CPLR 3014).

Furthermore, the scope of discovery is broad, (See, Allen v. Crowell-Collier Pub. Co., 21 NY2d 403) there are elements of training and policy that may be relevant or lead to relevant material concerning the alleged negligence of violations by the defendant. The chief may be questioned on these issues as well. Such inquiry, however, shall be limited to the period of time that the defendant was on the Buffalo police force.

The defense shall cooperate with the plaintiff's request for 'all communication, notes, memorandum or other documents regarding the City and the BPD analysis of their handling of animals as referenced by Chief Dennis Richards in a news story may be obtained **to the extent that**

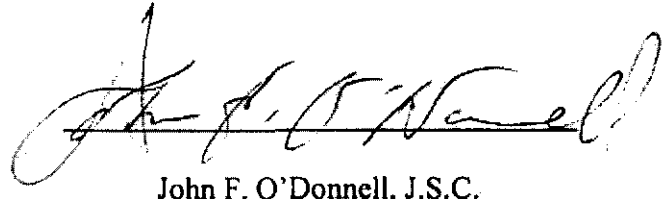
they reflect any incident in which Lt. Rickey Lark was present or involved and shall also turn over any use of force records involving animals shot by Lt. Lark.

However, the requests for personnel records of all officers involved in the shooting is beyond the reasonable scope of discovery in light of the causes of action set out here and in light of the protections of Civil Rights Law §50-a and is denied. So too, the name of the individual identified in media reports as having dispatched 26 animals in 2011 (two years prior to the subject incident), given the nature of the claims here, has not been shown to be related to this incident or likely to lead to relevant evidence, nor have the Firearms use reports where a dog was shot for 2010, 2011, 2012 and 2013. Requests for those and any remaining items are denied.

Submit Order in Accord with this decision.

Dated: December 5, 2017

cc: S. Cooney, esq.  
H. Lee, esq.



John F. O'Donnell, J.S.C.