Gryncwajg v County of Westchester
2017 NY Slip Op 32933(U)
February 7, 2017
Supreme Court, Westchester County
Docket Number: 70827/2015
Judge: Joan B. Lefkowitz
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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.

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

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HANNA GRYNCWAJG and BRUCE WEINSTEIN,

Plaintiffs,

-against-

THE COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION AND CONSERVATION, and VILLAGE OF BRIARCLIFF,

Defendants.

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DECISION & ORDER

Index No. 70827/2015
Motion Date: Feb. 27, 2017
Seq No. 1

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs seeking an order compelling defendants The County of Westchester and Westchester County Department of Parks, Recreation and Conservation[1] ("Westchester County") to produce all the redacted names/identities, email addresses, street addresses, telephone numbers, and any other information defendants have in their possession concerning the persons who made complaints to defendants regarding the conditions of the North County Trailway ("NCT") as set forth in plaintiffs' discovery demands, reasonable attorneys fees, and any additional relief the court deems warranted herein. Defendants oppose the motion.

Order to Show Cause - Affirmation in Support - Exhibits 1-8
Affirmation in Opposition - Exhibits A-F

Upon the foregoing papers and the proceedings held on February 27, 2017, this motion is determined as follows:

This action seeks damages for personal injuries allegedly suffered by plaintiff Hanna Gryncwajg ("Gryncwajg") on May 23, 2015 when the bicycle she was riding on the NCT hit an allegedly hazardous condition that caused her to be thrown from her bicycle. Plaintiff Bruce Weinstein is Gryncwajg's spouse and is suing derivatively for loss of services. Plaintiffs claim

[1] The action was discontinued as to defendant Village of Briarcliff Manor pursuant to a Stipulation of Discontinuance filed on August 1, 2016.

that Gryncwajg's bicycle struck a portion of the NCT that was worn away, creating a hazardous condition. Plaintiffs allege that Gryncwajg sustained a broken wrist and broken shoulder which required surgeries to repair. Plaintiffs further allege that defendants had actual and/or constructive notice of the condition of the NCT which caused Gryncwajg to fall. Defendants deny having notice of the allegedly defective condition of the NCT, and assert this lack of notice as an affirmative defense to plaintiffs' allegations. Plaintiffs filed a Notice of Claim dated July 7, 2015.

On or about July 8, 2015, plaintiffs made their first Freedom of Information Law ("FOIL") request from defendants. By correspondence dated September 24, 2015, defendants responded to the request. On December 21, 2015, plaintiffs filed a summons and complaint. On December 23, 2015, plaintiffs submitted their second FOIL request, which included among other things, a demand for "All complaints received by Westchester County, Westchester County Department of Parks, Recreation & Conservation and any of its agents concerning pavement defects, potholes, damages and/or any other conditions on the North County Trailway in Westchester County whether received by email, letter or any other source." By correspondence dated February 1, 2016, defendants responded to this request providing, among other things, electronic copies of documents responsive to the aforementioned request. In so responding defendants advised that the "copies provided to you have been redacted in order to delete any information that would be an unwarranted invasion of personal privacy. See NYSPOL §87(2)(b)." On or about May 24, 2016, plaintiffs served their combined discovery demands, which included, among other things, a demand for names, addresses, and email addresses, which had been redacted from defendants' responses to the second FOIL request ("demand #7"). Specifically, plaintiffs sought the names, addresses and email addresses for the individuals who submitted emails concerning the NCT dated: May 24, 2010, October 10, 2010, September 4, 2012, July 10, 2013, and August 31, 2015.

The parties appeared for a preliminary conference on July 7, 2016. The so-ordered Preliminary Conference Stipulation provided, among other things, for defendants to respond to plaintiffs' combined discovery demands by August 30, 2016. On or about September 20, 2016, defendants served their response to plaintiffs' discovery demands, wherein defendants objected to demand #7 on the ground that it was "overly broad, vague and palpably improper. Without waiving said objection, the County does not know of any witnesses to the alleged defective condition where Gryncwajg claims she had her accident." On December 13, 2016, the parties appeared for a compliance conference at which time plaintiffs were provided a Discovery Motion Briefing Schedule pursuant to which the instant application is made.

Contentions of the parties:

Plaintiffs bring the instant application seeking to compel the identifying information of those persons who wrote the emails contained in demand #7. Plaintiffs argue that proving defendants had notice of the allegedly hazardous condition of the NCT is essential to their case. Plaintiffs aver that the hazardous condition which allegedly caused Gryncwajg's accident might

be included as one of the complained of conditions in the emails provided by defendants to plaintiffs. Plaintiffs argue that pursuant to the CPLR they are entitled to all discovery that is material and necessary to the prosecution of this action including discovery regarding the names and identities of any persons who would have notice of the alleged hazardous condition. Plaintiffs contend that they have no other way of obtaining the information concerning the witnesses who made those complaints.

In opposition, defendants argue the motion must be denied because plaintiffs failed to challenge the redaction of the identifying information from the emails produced by exhausting the administrative remedies under FOIL and then, if necessary by commencing an Article 78 proceeding. It is defendants' contention that as a result plaintiffs have waived their ability to obtain the names, addresses and email addresses of those persons who authored the emails provided by defendants in response to plaintiffs' second FOIL request. Defendants also argue that notwithstanding plaintiffs' failure to follow proper procedure, plaintiffs' motion should be denied, because the information sought by plaintiffs is irrelevant to the issues raised by plaintiffs in their notice of claim. Defendants state that according to plaintiffs' notice of claim, the accident occurred on "the NCT in Briarcliff Manor, approximately 120 feet south of mile marker 6, and about 50 feet east of a utility pole on the east side of South State Road and that the nearest street address to the aforesaid location is the premises known as 230 South State Road in Briarcliff Manor." Defendants argue that the subject emails are irrelevant to plaintiffs' claims as they do not involve the area of the NCT where the accident occurred or are generic complaints against the NCT. Additionally, defendants state that they have attempted in good faith to resolve this dispute. To wit, defendants aver that they advised plaintiffs that their counsel could question defendants' witness from the Department of Parks Recreation and Conservation about the alleged complaints to determine if disclosure of the personal identifying information would lead to information that was "material and necessary" in the prosecution of the action. Defendants contend that the instant motion is unnecessary and seek costs and sanctions .

Analysis

At the outset, it is noted that this motion to compel disclosure is made pursuant to CPLR 3124 in accordance with the briefing schedule issued by this Court for such purpose. While defendants are correct that an administrative appeal, and article 78 proceeding, if necessary, is the proper procedure for an alleged violation of FOIL, that is not applicable to the instant application which seeks discovery in a civil action. So while defendants' argument is legally accurate, it does not provide grounds for denying plaintiffs' current application (see *Tait v Curban Realty Corp.*, Sup Ct, Westchester Co, Oct. 6, 2014, Lefkowitz, J., Index No. 28838/10).

Moving on to whether plaintiffs are entitled to disclosure of the identifying information of the persons who wrote the emails produced by defendants, CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the

issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Here, demand #7 seeks the identifying information of the individuals who sent the following five emails to defendants:

An email dated May 24, 2010, responded to on June 2, 2010, complained that the NCT and South County Trailway both had "many holes and ruts." A response from the Westchester County Parks Customer Relations ("Customer Relations") stated that "asphalt resurfacing has begun on the North Trailway and the contractor is working from north to south."

The next email dated October 10, 2010 states "the condition of the pavement of the North County Trailway continues to be unacceptable and frankly, a potentially dangerous safety issue for cyclists, joggers, and inline skaters." The writer continued, "Last year, the North County Trailway had so many potholes and cracks in its pavement, the ride was quite jarring and uncomfortable." Customer Relations responded on October 28, 2010, "We share your frustration with the conditions of the North County Trailway. The New York State Department of Transportation, which owns the trailway, has chosen not to carry out the capital improvements needed so Westchester County Parks, which maintains the trailway has prepared a capital project to resurface the entire NCT. Unfortunately, this project is not slated for several years."

In an email dated September 4, 2012, the writer advises that the NCT has "numerous potholes and large bumps... It is really quite dangerous, especially for bicycle riding ... This past weekend I bicycled from Briarcliff Manor to the Tarrytown Lakes and there were several places where I hit bumps so large I almost lost control of my bike." In a response dated September 7, 2012, Customer Relations reiterated its statement from the above October 28, 2010 reply.

Plaintiffs also seek the name, address and email address of the individual who sent emails dated July 10, 2013 and August 11, 2013, stating that they used the NCT from Route 35 to Baldwin Place and complained that they "had to go into a oncoming bikes [sic] path because of flooding or more [sic] over again into that part because the trail is worn away and I would be in danger of falling."

The last email dated August 31, 2015 complains about "the deplorable condition of the North County Trailway. The path is in sore need of repair and paving, and there are many dangerous potholes and rough patches."

A review of the emails submitted indicates that some of the complaints may have a bearing on plaintiffs' allegations and as such, plaintiffs are entitled to the names, addresses and email addresses of the authors of those emails as they may lead to information concerning plaintiffs' allegations regarding the condition of the NCT at the time of the accident. The emails dated May 24, 2010, October 10, 2010, September 2, 2012 and August 31, 2015 contain statements concerning the conditions of unspecified parts of the NCT or parts of the NCT near the place of the accident. However, the emails dated July 10, 2013 and August 11, 2013 concern a part of the NCT which is not near the area of the NCT where the accident occurred and therefore is not relevant to plaintiffs' case.

In view of the foregoing, it is

ORDERED that plaintiffs' motion seeking to compel the release of names, addresses, and email addresses of the authors of certain emails previously provided to plaintiffs is granted to the extent that on or before March 17, 2017, defendants are directed to provide the names, addresses and email addresses, to the extent that they are in possession of this information, of the authors of the emails dated May 24, 2010, October 10, 2010, September 2, 2012, and August 31, 2015, which emails were previously provided to plaintiffs by defendants; and it is further

ORDERED that the motion is denied in all other respects; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 23, 2017 at 9:30 a.m.; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants within ten (10) days of entry.

Dated: White Plains, New York
February 27, 2017

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