Mooney v Webster Hall Entertainment Corp.
2018 NY Slip Op 32091(U)
August 23, 2018
Supreme Court, New York County
Docket Number: 161297/2014
Judge: Alexander M. Tisch

At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 23rd day of AUGUST 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

P.O. MAUREEN MOONEY,

Plaintiff,

-against-

WEBSTER HALL ENTERTAINMENT CORP. d/b/a WEBSTER HALL NIGHT CLUB & CONCERT VENUE, et al.,

Defendants.

JOHN PIRO,

Counterclaim Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Counterclaim Defendants.

MOTION SEQ. # 2

INDEX NO.: 161297/2014

The following papers read on this motion:	NYSCEF Doc. Nos.
Order to Show Cause, Affirmation & Exhibits	49–65, 71
Affirmation in Opposition; Notice of Cross-Motion, Affirmation in Support of Cross-Motion/Opposition to OSC, Exhibits	73; 76–97
Reply Affirmation & Exhibit	100–01

Alexander M. Tisch, J.:

Upon the foregoing papers, counterclaim defendants Maureen Mooney Shield 2705 (Mooney), Jeffrey Lehn Shield 2286 (Lehn), Richard Carrera Shield 87 (Carrera), Frank Rizzo Shield 5599 (Rizzo) (collectively the officers), and the City of New York (collectively City defendants) move by order to show cause for a protective order pursuant to CPLR § 3103 to prevent the further depositions of Lehn, Carrera, Rizzo, and Christopher Tabb, and to limit any further deposition of Mooney solely to her capacity as a plaintiff. Defendant/counterclaim plaintiff John Piro cross-moves for an order striking the City defendants' answer for failing to provide discovery.

For the reasons set forth herein, the City's motion is denied and Piro's cross-motion is partially granted.

Order to Show Cause for a Protective Order

As an initial mattter, the Court denies the motion with respect to officers Lehn and Tabb. These officers are no longer in the case, and would not be subject by court order to further depositions as parties to the action. The parties are free to subpoena Lehn and Tabb as nonparty witnesses.

The City failed to provide an affirmation of good faith as required by 22 NYCRR § 202.7(a). The Court finds that the motion should be denied on this basis, as the City "failed to identify any recent meaningful attempts to resolve the parties' discovery disputes before raising them for the first time in their motion" (Jackson v Hunter Roberts Constr. Group, L.L.C., 139 AD3d 429, 429 [1st Dept 2016]; see JPMorgan Chase Bank, N.A. v Levenson, 149 AD3d 1053, 1054–55 [2d Dept 2017] ["the Supreme Court properly denied the motion of the defendant . . . on the ground that he failed to submit an affirmation of good faith pursuant to 22 NYCRR 202.7 (a) (2)"]). Notably, the parties appear to agree that Mooney needs to be further deposed in her capacity as the plaintiff in this action because she was only deposed as a defendant in Piro's federal action regarding Piro's claims against her and the other City defendants. Additionally, Piro's counsel's affirmation in opposition to the motion states that Piro "does not intend to and will not conduct a re-deposition of the Counterclaim defendants, and this office so advised defense of that before this motion was filed" (NYSCEF Doc. No. 78, Flamm aff, ¶ 47). Thus, it appears to this Court that Piro and the City defendants are essentially on the same page with respect to not eliciting duplicative testimony.

Whether the parties could have found more common ground, preventing the need for making

this motion, the Court will never know. In any event, for the purpose of moving the case forward, the Court will resolve the more contentious aspects of the motion. Specifically at issue is whether all officers should be deposed further in their capacity as counterclaim defendants when they were already deposed in the federal action, which alleged identical claims.

A protective order "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR § 3103 [a]). "An individual or entity who seeks a protective order bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery" (Liberty Petroleum Realty, LLC v Gulf Oil, L.P., — AD3d —, 2018 NY Slip Op 05624, *2 [1st Dept Aug. 2, 2018]). The City defendants woefully failed to meet their burden, as it could hardly be argued that the officers' deposition testimony is irrelevant or could not otherwise lead to legitimate discovery. The City defendants also failed to meaningfully identify any claim of prejudice or other reason for the protective order.[1] All that can be gleaned from the papers is that, as the City defendants argue, further depositions of the officers in their capacities as counterclaim defendants would be duplicative of the testimony elicited in the federal action and that Piro should not be permitted to gain a second "bite at the apple."[2]

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[1] The City defendants assert a putative argument regarding prejudice in their reply papers, claiming that forcing the officers to be deposed a second time more than four years after the subject incident would be prejudicial because their memories may have faded and their testimony could potentially conflict with the testimony already given. Aside from the fact that "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992]), this argument in support of the protective order regarding potentially conflicting testimony is without merit.

[2] The Court notes that the City defendants made no mention of the fact that the Webster Hall defendants were not parties to the federal action and did not have an opportunity to depose the officers.

The Court finds that granting such an order on this basis would prematurely limit certain questions that may not even be asked. As noted above, Piro does not intend to duplicate the deposition held in the federal action. Indeed, this Court presumes that counsel for all parties will conduct the depositions in such a manner so as to not be duplicative and a general waste of time. Thus the Court is not persuaded that a protective order is necessary.

Furthermore, Piro claims that he should be entitled to further depose the City defendants "using information not disclosed or available during the federal litigation or about topics which were off limits in the federal matter" (NYSCEF Doc. No. 78, Flamm aff, ¶ 47). While the City defendants claim that Piro failed to identify what information was not available during the federal deposition or topics that were "off limits" (NYSCEF Doc. No. 100, Barnes reply aff, ¶ 6) — it is clear to this Court much discovery remains outstanding (as discussed *infra*). Thus, the parties have not had an opportunity to depose the officers about evidence that has not yet been exchanged. Accordingly, the Court finds that the parties should be permitted to further depose all City defendants in their capacity as counterclaim defendants, in addition to Mooney being further deposed as plaintiff.[3]

Cross-Motion to Strike City Defendants' Answer

"If any party, or a person who . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article . . . the court may make such orders . . . as are just" (CPLR § 3126). "A court may strike an answer as a sanction where the moving party establishes that the failure to comply was 'willful, contumacious

[3] The Court notes that this ruling is not based upon the Webster Hall defendants' arguments that they should be permitted to depose the officers because they were not parties to the federal action. It is unclear what Webster Hall defendants stand to gain from deposing the officers in their capacity as counterclaim defendants, concerning Piro's claims against them, given that no claims are asserted by and between the Webster Hall and City defendants (except as Mooney's capacity as plaintiff against Webster Hall). In any event, the ruling should sufficiently resolve their concern.

or in bad faith.' Upon such showing, the burden 'shifts to the nonmoving party to demonstrate a reasonable excuse'" (Fish & Richardson, P.C. v Schindler, 75 AD3d 219, 220 [1st Dept 2010] [citations omitted]).

Piro served a notice dated October 19, 2015, which, inter alia, asserted a demand for the production of documents (NYSCEF Doc. No. 83). A Case Scheduling Order (CSO) dated November 10, 2015 was issued at the parties' preliminary conference, which also directed the City defendants to provide a number of documents (NYSCEF Doc. No. 43). A total of five (5) compliance conference orders were issued dated April 12, 2016, August 30, 2016, January 17, 2017, May 23, 2017, and September 12, 2017, which directed all parties to comply with outstanding discovery demands within a specific time, including the City defendants' obligations to comply with the CSO and Piro's demand (see NYSCEF Doc. Nos. 44–48). Piro claims that the City defendants failed to respond in a timely manner, despite these orders and two good faith letters dated March 10, 2017 and July 27, 2017 (NYSCEF Doc. Nos. 85–86).

The City defendants eventually provided a response dated August 18, 2017 to the CSO and Piro's demands. However, Piro claims that they are inadequate. For example, the response contains objections to nearly every request and claims that a search is being conducted — yet these items were requested nearly two years prior. With respect to the officers' disciplinary history and personnel file, Piro argues that they should be directly discoverable without a need for an in camera review.

In opposition to the cross-motion, the City defendants provided no excuse for the delay but claim that a response was provided; therefore, they have not acted in willfully or contumaciously, or in bad faith. They do not address the specific items that allegedly remain outstanding as listed in

Piro's affirmation in support of the cross motion (see NYSCEF Doc. No. 78, Flamm aff, ¶¶ 62–66), but claim that there are no deficiencies in their response. They also point to Piro's own failings to comply with his discovery obligations (NYSCEF Doc. No. 100, Barnes aff, ¶ 13). With respect to the officers' disciplinary history and personnel file, the City defendants argue that only recent, substantiated complaints should be submitted to the court for an in camera review to determine whether they are material and relevant to Piro's claims.

The Court does not find that the City defendants' conduct is so egregious as to warrant the striking of the answer (see Daimlerchrysler Ins. Co. v Seck, 82 AD3d 581, 582 [1st Dept 2011] ["The drastic remedy of striking an answer is inappropriate, absent a clear showing that defendant's failure to comply with discovery demands was willful or contumacious"]). Although the Court acknowledges that there was a significant delay, it appears as though other parties, including Piro, were also delayed in responding to discovery demands, "making a unilateral sanction inappropriate" (id.).

However, the Court will not tolerate responses stating that a search is finally being conducted when the same documents were requested nearly two years earlier. Responses should not be provided for the sake of submitting a response; they should be meaningful to the extent possible. In order to ensure the parties' compliance with discovery obligations (see Figdor v City of New York, 33 AD3d 560, 561 [1st Dept 2006]), the Court will address each item that Piro claims remains outstanding from "Demand 1" under the first section of his notice dated October 19, 2015, demanding the production of documents (see NYSCEF Doc. No. 83) at the parties' next compliance conference on **September 6, 2018**. If discoverable, the Court will direct the City defendants to provide the same or a *Jackson* affidavit within a specific time, or the City defendants may face

preclusion or other sanction (see Mendez v City of New York, 7 AD3d 766, 767 [2d Dept 2004] [noting that the nature and degree of a penalty issued pursuant to a motion under CPLR § 3126 is within the discretion of the court]).

Concerning Demand 2, Piro's demand for the officers' disciplinary records, Piro correctly contends that N.Y. Civil Rights Law § 50-a does not shield disclosure in this action, where Piro asserts violations under federal law (see Mann v Alvarez, 242 AD2d 318, 320 [2d Dept 1997]; Svaigsen v City of New York, 203 AD2d 32 [1st Dept 1994]; King v Conde, 121 FRD 180 [ED NY 1988]; see also Ramos v City of New York, 285 AD2d 284, 306–07 [1st Dept 2001]). In such instances, "it is appropriate that the court follow Federal law when assessing the discoverability of documents sought by plaintiff" (Svaigsen, 203 AD2d at 33). "Under Federal Rules of Civil Procedure, rule 26 (b) (1), which governs discovery with regard to the causes of action asserted pursuant to 42 USC [§ 1983], the information sought should be reasonably calculated to lead to the discovery of relevant and admissible evidence" (Mann, 242 AD2d at 320).

Piro's demand sought "[t]he central personnel index, I.A.B. Resume and C.C.R.B. history regarding the counterclaim defendants" (NYSCEF Doc. No. 83, p 8 [Demand 2]). The City defendants responded indicating that they have "requested a search be conducted for CCRB history regarding the incident and will supplement its response, if any." They objected to the remainder of the request claiming the documents are privileged under Civil Rights Law § 50-a and that a court order directing an in camera review is necessary to determine the relevancy of the documents (see NYSCEF Doc. No. 89, p 4–5).

"In order to assert a claim of privilege against disclosure of police materials to a plaintiff raising federal civil rights claims against a police defendant, the officers or the police department

must do more than alert the court to the state privilege law or the generalized policies which support it. The police must make a 'substantial threshold showing' that there are specific harms likely to accrue from disclosure of specific materials" (King, 121 FRD at 189, quoting Kelly v City of San Jose, 114 FRD 653, 669 [ND Cal 1987]). The court in King described at length the burden upon the party seeking to invoke a privilege. For example, the party must specify the exact document(s) subject to a privilege and explain why. The reason for nondisclosure must be stated with sufficient particularity, and be supported by competent declarations or affidavits, under oath and penalty of perjury, from an official with personal knowledge of the matters attested to in the affidavit explaining, in detail, his/her familiarity with the evidence, the nature of the privilege, what specific interests are at stake, and the harm or injury expected from disclosure (see King, 121 FRD at 189–90). If the threshold burden is not met, "direct disclosure is in order" (id. at 190).

Here, the Court finds that the officers' central personnel index, IAB Resume, CCRB history, as requested, that contain allegations similar to Piro's claims should be directly disclosed without the need for an in camera review. Namely, the allegations similar to Piro's claims include those concerning "unlawful stops, . . ., arrests, prosecutions, threats of violence and violence, abuse, discourtesy, . . . false statements or other acts of dishonesty, and supporting or corroborating false statements or other dishonesty" (NYSCEF Doc. No. 78, Flamm aff, ¶ 77). The disclosure should be made, regardless of the disposition of the complaints and allegations (see Barrett v City of New York, 237 FRD 39, 41 [ED NY 2006] ["Disciplinary records involving complaints of a similar nature, whether substantiated or unsubstantiated, could lead to evidence that would be admissible at trial and, thus, are discoverable"]). Additionally, the Court finds no reason to limit the disclosure to the past three years as the City defendants suggest, as opposed to the ten years pre-incident and

post-incident complaints, as Piro requests (see id. [discussing how "post-incident investigations regarding a police officer defendant in a section 1983 case may be 'relevant to issues of pattern, intent, and absence of mistake'"], quoting Moore v City of New York, 2006 WL 1134146, *1 [ED NY 2006]).

However, Piro has not persuaded the Court that the officers' personnel files as set forth in Demand 4 are relevant to Piro's claims against them,[4] and will not order the City defendants to disclose that information at this time.

In conclusion, it is hereby ORDERED that the City defendants' motion for a protective order is denied; and it is further

ORDERED that Piro's cross-motion to strike the City defendants' answer is granted solely to the extent that the Court directs, in the alternative, that the City defendants directly disclose the items requested in Piro's Demand 2 from his demand dated October 19, 2015 as set forth above within sixty (60) days; and it is further

ORDERED that the parties meet with the Court during their next compliance conference on September 6, 2018 to discuss the outstanding items listed in Demand 1 from Piro's demand dated October 19, 2015 as set forth above, and any other discovery issues; and it is further

[4] Piro's counterclaims allege, inter alia, that he was subject to unreasonable search and seizure, falsely arrested, falsely imprisoned, subject to excessive force, maliciously prosecuted, and that the officers falsified evidence. Piro also asserts a negligence claim against the City (see NYSCEF Doc. No. 15).

ORDERED that any relief requested and not specifically addressed herein is denied.

This shall constitute the decision and order of the Court.

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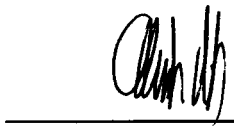

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A.J.S.C.

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