

Prosser v Patel

2018 NY Slip Op 33662(U)

July 13, 2018

Supreme Court, Westchester County

Docket Number: 50334/2017

Judge: Terry Jane Ruderman

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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.

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

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ALEXANDER PROSSER,

Plaintiff,

-against-

DECISION and ORDER

Index No.: 50334/2017
Motion Date: June 11, 2018
Seq. No. 2

TIFFANY PATEL,

Defendant.

-----X
RUDERMAN, J.

The following papers were read on this motion by defendant for an order (1) unsealing plaintiff’s criminal file in the action entitled *The People of the State of New York v Alexander Prosser*, Docket No. 2015KN029264, Supreme Court of the State of New York, Kings County (the “criminal proceeding”) and (2) permitting defendant to issue subpoenas ad testificandum directing the depositions of nonparties Police Officer Kevin Ermann (“Ermann”) and Assistant District Attorney Daniel R. Tibbets (“Tibbets”), and subpoenas duces tecum directing nonparties New York City Police Department (“NYCPD”) and Kings County District Attorney’s Office (“KCDA”) to produce documents responsive to the requests in the subpoenas.

Order to Show Cause - Affirmation in Support - Exhibits A-E
Affidavits of Service
Affirmation in Opposition by KCDA
NYSCEF File

Upon the foregoing papers and upon the proceedings on June 11, 2018, this motion is determined as follows:

The parties to this action were suitemates who shared an apartment with two other individuals in Brooklyn, New York.¹ The relationship between the parties became acrimonious and devolved, culminating on May 8, 2015 with plaintiff’s arrest based on defendant’s allegations that

¹ A detailed recitation of the facts is set forth in this Court’s (Ruderman, J.) September 22, 2017 Decision and Order.

plaintiff had assaulted her. Plaintiff was arrested by Officer Ermann. Following his arrest, plaintiff was held in police custody for 19 hours and defendant was provided an order of protection against plaintiff, precluding him from entering the apartment. The KCDA later brought criminal charges against plaintiff including assault, menacing, and harassment. Plaintiff was ultimately acquitted of the charges on January 11, 2016 and the file of the criminal proceeding was sealed.

Plaintiff commenced this action on January 10, 2017 by filing a summons and complaint. In this action plaintiff asserts causes of action for false imprisonment, malicious prosecution and negligent infliction of emotional distress. In its September 22, 2017 Decision and Order, this Court denied defendant's motion to dismiss the complaint. Defendant then served an answer on or about November 6, 2017.

Defendant now seeks to unseal the file in the aforementioned criminal proceeding and seeks to serve subpoenas duces tecum on the KCDA and the NYCPD to obtain documents concerning the criminal proceeding, and subpoenas ad testificandum to depose Ermann and Tibbets.² Defendant contends that the NYCPD records from plaintiff's arrest and Ermann's deposition testimony go to the heart of plaintiff's allegations of false imprisonment and malicious prosecution. Defendant further contends that records from the KCDA and Tibbets's deposition testimony are relevant to her defense against plaintiff's claims that the prosecution was initiated at defendant's insistence, that there was an absence of probable cause to bring the criminal proceeding, and that the proceeding was brought with malice.

Defendant has annexed to the motion proposed judicial subpoenas duces tecum for the NYCPD and the KCDA and proposed judicial subpoenas ad testificandum for Ermann and Tibbets. Defendant has submitted proof of service of the motion papers, including the subpoenas, on the nonparties.

Only the KCDA has submitted opposition to the motion.³ While the KCDA does not oppose unsealing the file of plaintiff's criminal proceeding, the KCDA objects to the subpoena duces tecum on the grounds that it is overbroad, unduly burdensome, and seeks materials that will become publicly available from other sources upon the unsealing of the criminal file. The KCDA also objects to defendant's subpoena to the extent it seeks any Grand Jury materials which are protected by CPL §190.25(4)(a), any documents and/or records that were provided to it on a confidential basis, or any documents or records that are shielded from disclosure by attorney-client, attorney

² Tibbets is an Assistant District Attorney with the KCDA's Office who was involved in plaintiff's criminal trial.

³ While not opposing the motion, at oral argument plaintiff's counsel requested that any documents provided in response to defendant's motion be provided directly to the court.

work-product, law enforcement, public interest and/or deliberative process privileges.⁴

“CPLR 3101(a) is to be liberally construed ‘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’ (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]). Pursuant to CPLR 3101 (a) (4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the ‘circumstances or reasons’ requiring disclosure” (*Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642 [2d Dept 2014]). “[D]isclosure from a nonparty requires no more than a showing that the requested information is ‘material and necessary,’ i.e. relevant to the prosecution or defense of an action” (*id.* [citing *Matter of Kapon v Koch*, 23 NY3d 32, 34 (2014)]).

CPL §160.50 provides for the sealing of records relating to the arrest and prosecution of an accused upon the termination of a criminal proceeding in his favor. The purpose of the statute is to create a privilege to protect those who have been charged but not convicted of a criminal offense from any stigma associated with having been the object of an unsustainable accusation (*Hynes v Karassik*, 47 NY2d 659 [1979]; *Kalogris v Roberts*, 185 AD2d 335 [2d Dept 1992]). When the information protected by CPL §160.50 is affirmatively put into issue upon the commencement of a civil action that privilege is effectively waived (*Kalogris*, 185 AD2d at 336).

By operation of law, the file in the criminal proceeding was sealed pursuant to CPL §160.50. By bringing this civil action, plaintiff has affirmatively placed the information in that file into issue (*id.*). Defendant has demonstrated that the file she seeks to unseal is material and relevant to the defense of the claims in the civil action. Additionally, Ermann, Tibbets, the NYCPD and the KCDA were adequately apprised of the “circumstances or reasons” requiring disclosure, and the requested testimony and information is relevant to the defense of this action. Accordingly, defendant is entitled to so-ordered subpoenas directing the testimony and production of the relevant information sought.

However, the proposed subpoena for the KCDA appended to defendant’s motion papers must be modified by defendant prior to being so-ordered. Specifically, the revised subpoena shall direct the KCDA to provide Bates-stamped copies of the requested documents directly to this Court (to the attention of the Compliance Part, Room 812) for in camera review no later than August 14, 2018, and shall further direct the KCDA to provide privilege logs in conformity with CPLR 3122 (b) in the event that the KCDA deems any of the requested documents to be privileged. Defendant shall provide the revised subpoena to this Court for signature no later than July 19, 2018. Following an in camera review of the subpoenaed records, the Court shall issue an order specifying which records (if any) shall be produced to defendant.

⁴ The KCDA has also objected to the production of court transcripts arguing, inter alia, that it would be cost-prohibitive for the KCDA to produce them to defendant. Although the KCDA did not appear at oral argument defendant’s counsel stated at that time that defendant will pay for the costs of copying the transcripts.

All other arguments raised and evidence submitted by defendant and the KCDA have been considered notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that the branch of the motion seeking to unseal plaintiff's criminal file is granted, to the extent that any and all records in the matter of *The People of the State of New York v Alexander Prosser*, Docket No. 2015KN029264 in the possession of the New York City Police Department and the Kings County District Attorney's Office are unsealed and access to those documents shall be provided as limited to the parties to this action and/or their counsel, and further limited as per the directives of this Court with respect to and of the KCDA documents, this Court deems to be privileged; and it is further

ORDERED that defendant is directed to pay costs associated with the copying of any trial transcripts produced pursuant to this Decision and Order by the Kings County District Attorney's Office in the matter of *The People of the State of New York v Alexander Prosser*, Docket No. 2015KN029264; and it is further

ORDERED that defendant is directed to provide a revised proposed subpoena with respect to the Kings County District Attorney's Office to this Court for signature no later than July 19, 2018; and it is further

ORDERED that the Kings County District Attorney's Office shall provide two sets (one set unredacted, and one set unredacted) of Bates-stamped copies of the requested documents directly to this Court (Room 812) for in camera review no later than August 14, 2018, and in the event that the Kings County District Attorney deems any of the requested documents to be privileged, it shall provide a privilege log in conformity with CPLR 3122 (b); and it is further

ORDERED that defendant shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff, and nonparties Police Officer Kevin Ermann, Assistant District Attorney Daniel R. Tibbets, the New York City Police Department, and the Kings County District Attorney's Office within five days of entry; and it is further

ORDERED that counsel for all parties shall appear for a conference in the Compliance Part, Courtroom 800, on August 21, 2018, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
July 13 2018


HON. TERRY JANE RUDERMAN, J.S.C.

To:

All counsel via NYSCEF

The following nonparties by First Class Mail:

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cc: Compliance Part Clerk