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| Harris v City of New York |
| 2019 NY Slip Op 31450(U) |
| May 23, 2019 |
| Supreme Court, New York County |
| Docket Number: 159610/2014 |
| Judge: Deborah A. Kaplan |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 40
Justice
INDEX NO. 159610/2014
ERIC HARRIS, ASHA HARRIS, MOTION DATE 05/22/2019
Plaintiffs, MOTION SEQ. NO. 005
- v -

THE CITY OF NEW YORK,

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178 were read on this motion to/for DISCOVERY

In this action to recover for assault and battery, as well as derivative claims, the plaintiffs move, by order to show cause, for an order permitting them to inspect and photograph relevant areas within the 28th Precinct, including the sergeant's desk and holding cells. The defendant opposes.

The plaintiffs claim that, on August 4, 2013, police officers employed by the defendant forcibly removed him from his vehicle during a traffic stop, pointed weapons at him, and shouted racial epithets. They further maintain that plaintiff Eric Harris (hereinafter Harris) was then handcuffed and taken by patrol car to the 28th Precinct for intoxication testing. The plaintiffs contend that Harris was brought to a holding cell and, despite a lack of testimony to suggest that he was self-injurious or physically dangerous, he was removed to a hospital. The plaintiffs assert that, while Harris was at the hospital, blood was forcibly drawn, a search warrant was

1 Although there were initially other claims, the defendant successfully moved for partial summary judgment dismissing the complaint with respect to all but the causes of action for assault, battery, and loss of services.

subsequently obtained, and Harris's blood was used as a central piece of evidence in a criminal prosecution against him.

By disclosure conference order dated August 20, 2015, this court (D'Auguste, J.) directed that the parties schedule an on-site inspection of the 28th Precinct. The defendant moved in September 2015 to vacate that directive and, by decision and order dated July 14, 2016, said court granted the motion. It ruled that a site inspection was "premature" and that, following the deposition of the desk sergeant, the plaintiffs were permitted to move, by order to show cause, for the requested relief since, at that time, "a greater showing for this type of discovery may be demonstrated." Said court also held that, in such an order, the parties should address the elimination of confidentiality concerns which had been previously raised by the City.

In July 2016, Sergeant Charley Abreu appeared for a deposition and testified as to the layout of the 28th Precinct, as did Officer Loomis. The note of issue was filed on January 19, 2018.

The plaintiffs now seek to renew their prior request for an order permitting them to take photographs of the precinct in order to have a basis on which to impeach the credibility of the officers, including Sergeant Abreu, who will be called to testify in this matter. The plaintiffs maintain that the vantage point that Sergeant Abreu and the other officers would have had in relation to the holding cell where Harris was detained is of importance with respect to the officers' credibility.

The defendant opposes and argues that, since the plaintiffs' claims are now limited to assault and battery, which is only alleged to have occurred during the traffic stop, and not later during the detention, this evidence is no longer relevant to their claims. The defendant further asserts that the request for a site-inspection is barred by collateral estoppel, because of Harris's

criminal conviction, by guilty plea, as well as the order granting partial summary judgment dismissing the complaint. Next, the defendant argues that the plaintiffs' motion is untimely, since it is being brought on the eve of trial, and more than one year since the note of issue was filed. Finally, the defendant argues that photographing the precinct should not be permitted because of the security risk it poses both to the City as well as to the individuals with privacy concerns who may be detained there.

CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." It is by now an immortal principle that "[t]he credibility of a witness is always in issue, and evidence which tends to impeach it, or to demonstrate the probability of the truth of his [or her] testimony, is relevant" (*Bloomingtondale v Adler*, 7 Misc 182, 185 [Ct. of Comm. Pleas of N.Y.C. and County, General Term 1894]; *see generally* 1515 *Summer St. Corp. v Parikh*, 13 AD3 305, 307 [1st Dept 2004] ["the credibility of a witness is always in issue"]; *People v Edkin*, 210 AD2d 808, 810 [3d Dept 1994] ["[t]he credibility of witnesses is always a relevant issue during a trial"]). The Court of Appeals has also recently held that "[f]or purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information" (*Forman v Henkin*, 30 NY3d 656, 666 [2018]). Thus, the plaintiff should be entitled to take photographs of the interior of the police precinct in an effort to demonstrate that the officers' descriptions of the events that took place there are inaccurate (*see Suchorzepka v Mukhtarzad*, 103 AD3d 878 [2d Dept 2013]).

The defendant's arguments to the contrary are unavailing. To the extent that the officers' statements with respect to the events that took place while Harris was in custody at the 28th precinct may be permitted into evidence by the justice of this court who will oversee the

imminent trial of this matter, the plaintiff should be permitted an opportunity to controvert those statements with photographic evidence of the interior of the precinct (*see generally Suk Ching Chan v Otis Elevator Co.*, 147 AD2d 395 [1st Dept 1989] [a “determination [as to] discoverability . . . does not constitute a holding with respect to the admissibility [of the evidence] at trial”]).

Further, “[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the notice of issue, so long as neither party will be prejudiced” (*Cabrera v Abaev*, 150 AD3d 588, 588-589 [1st Dept 2017]). Although the note of issue has been filed, the court finds that neither side would be prejudiced by permitting this extremely limited disclosure to take place. The court also notes that, although the defendant characterizes this request as a post-note of issue demand, in fact, this demand had been made many years ago, was the subject of proceedings in this court, and the defendant was aware that the plaintiffs had been explicitly granted permission to renew their motion following the depositions of the officers.

However, the defendant’s argument with respect to privacy concerns is well taken. The CPLR empowers this court to “make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts” (CPLR 3101[a]). Accordingly, where a site inspection and photographs of an area may implicate the privacy interests of other individuals, the court should “limit[the scope of such an inspection] to ascertaining the physical layout of the premises” (*Suchorzepka v Mukhtarzad*, 103 AD3d at 880). This court is concerned as to the privacy interests of the individuals who may be detained at the precinct, as well as the safety of the officers who work there. Accordingly, the

court's permission to conduct a site inspection will be limited in scope. A site inspection may be conducted by the plaintiffs' attorney, or a photographer hired by counsel, to take photographs (no video) of the sergeant's desk, the view from the desk to the holding cell where Harris was detained, and the holding cell itself. No photographs shall depict any individual within the holding cell. The photographs shall be maintained by counsel and shall not be disseminated to anyone, including to the plaintiffs, except to the extent necessary to conduct the trial of this matter. They shall be maintained at all times by the plaintiffs' attorneys and turned over to defense counsel immediately after they are taken.

Accordingly, it is hereby

ORDERED that the motion is granted as set forth herein; and it is further

ORDERED that the parties shall arrange, and the defendant shall make available, the areas of the 28th Precinct necessary to conduct the limited site inspection as delineated herein, on or before close of business on May 24, 2019.

5/23/2019
DATE


DEBORAH A. KAPLAN, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | REFERENCE | <input type="checkbox"/> | |