

Tucci v New York City Dept. of Sanitation
2021 NY Slip Op 31917(U)
February 3, 2021
Supreme Court, Richmond County
Docket Number: 150264/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

-----X
GINO TUCCI and LT LAND DEVELOPMENT CORP.,

HON. THOMAS P. ALIOTTA

Plaintiffs,

DECISION & ORDER

- against -

Index No.: 150264/2019
Motion Seq.: 005

NEW YORK CITY DEPARTMENT OF SANITATION,
THE CITY OF NEW YORK, and ELTON A. SMITH,

Defendants.
-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1"
through "4" marked fully submitted on the 6th day of November 2020:

	Papers Numbered
Plaintiff's Notice of Motion, Affirmation and Exhibits (NYSCEF 65)	1,2
Affirmation in Opposition on behalf of defendants, NYCDS and NYC, (NYSCEF 69).....	3
Reply Affirmation (NYSCEF 70).....	4

Upon the foregoing papers, plaintiff's motion to seal records is decided as follows:

This is an action for personal injuries sustained by plaintiff when his vehicle was struck in the rear by a sanitation vehicle operated by defendant, Elton A. Smith (hereinafter "Smith"), and owned by defendants, NEW YORK CITY SANITATION DEPARTMENT and THE CITY OF NEW YORK (hereinafter collectively referred to as "the City"). The following factual and

procedural history is taken from this Court's Order dated September 10, 2020 (NYSCEF #65, Exhibit "A").¹

This action was commenced by service of a summons and complaint upon the defendants. The City served an answer on behalf of the municipal defendants only. Although the City denied permissive use in their answer (NYSCEF #4), the City later admitted that Smith was operating the vehicle with their permission in response to plaintiff's Notice to Admit (City Ex. A). However, the City steadfastly maintained that Smith was not operating the vehicle within the course of his employment with the City.

Thereafter on March 6, 2019, plaintiff served a Notice to Produce seeking the contents of Smith's personnel file and disciplinary history. The basis of this demand was that Smith was operating the sanitation vehicle under the influence of drugs and/or alcohol. Plaintiff then served a motion seeking a default judgment against Smith, together with an award of summary judgment on the issue of liability against all defendants. This Court granted the motion on July 24, 2019 (Motion Sequence 001).

It was conceded by the parties that the basis of the March 6, 2019 Notice to Produce was to determine whether plaintiff was entitled to punitive damages. By a letter dated October 10, 2019, the City advised plaintiff that punitive damages were not alleged in the complaint and, moreover, are not recoverable against a municipality. Upon receipt of this letter, plaintiff served a motion to amend the complaint and compel a response to the Notice to Produce (Motion Sequence 002). On the return date, the Court permitted plaintiff to withdraw the motion without prejudice with leave to re-file due to plaintiff's failure to serve defendant, Smith, with the motion

¹ Plaintiff did not separately electronically file the Exhibits. This Exhibit A starts at digital page 8 of 16 in document #65 on NYSCEF.

so as to put him on notice that additional damages were being sought against him. (See NYSCEF DOC. #35, p.1).

On November 6, 2019, plaintiff served Motion Sequence 003 which was decided on January 29, 2020 seeking the same relief. Annexed to that motion was a proposed unverified amended pleading seeking to add punitive damages as against Smith. The only basis offered by plaintiff for the amendment was hearsay in the form of a purported conversation with defendants' counsel that Smith was operating the sanitation vehicle under the influence of alcohol at the time of the accident [NYSCEF #41, ¶5]. The motion also sought to obtain the personnel file and disciplinary history of Smith to determine if an award of punitive damages can be supported against him for operating a vehicle under the influence of drugs and/or alcohol.

In opposition to Motion Sequence 003, the City argued there was no indication that Smith's conduct was either wantonly negligent or reckless so as to constitute the equivalent of a conscious disregard for the rights of others [NYSCEF #42, ¶10]. The City further argued that punitive damages were not recoverable against a municipality. Finally, the City argued that if the Court was inclined to order the production of the personnel file and disciplinary history that the Court conduct an *in camera* inspection and only permit the disclosure of the relevant portions. The motion was returnable before the Court on December 4, 2019. After oral argument, the Court issued an interim order directing the City of New York to submit the personnel file of Smith for an *in camera* inspection. The file was submitted to the Court January 3, 2020.

By an order dated January 29, 2020, this Court denied plaintiff's motion on two grounds. First, the proposed unverified pleading failed to separately state that punitive damages were being sought only as against the pro se defendant, Smith. Second, the proposed amended

pleading had neither an affidavit by a person with knowledge of the underlying facts (*Mohan v. Hollander*, 303 AD2d 473, 474 [2d Dept. 2003]), nor a verification by plaintiff in support of the proposed amended pleading (*Frost v. Monter*, 202 AD2d 632, 633 [2d Dept. 1994]). As a result, the release of the disciplinary file was also denied.

Plaintiff then moved to reargue the decision of January 29, 2020 (Motion Sequence 004), annexing thereto plaintiff's personal verification. By Order dated September 10, 2020, the Court granted plaintiff's motion for leave to reargue, permitted the amendment and provided for the production of only the portions of Smith's personnel file, subject to redaction, relating to the accident which forms the basis of this litigation. The Court did not permit the release of the entire personnel file. The Court forwarded a copy of the decision to defendants with only that portion of the *in camera* records as redacted by the Court for disclosure to plaintiff. The Court did not redact the entire personnel file as the Court ruled same was not subject to disclosure. The Court further ordered that parties, non-parties, interested parties, all attorneys and/or their agents, servants, or employees, including anyone acting on behalf of the aforesaid persons or entities, were enjoined from disseminating or publishing the information contained in the exchanged documents to any person or entity not a party to this litigation, subject to the penalty of criminal contempt. The City exchanged the excerpted redacted records with plaintiff.

Plaintiff now brings this motion to permit the filing of the entire personnel file unredacted and under seal as well as to vacate the restrictions set forth in the foregoing order. In support, plaintiff argues that the unredacted records and removal of the "gag order" are necessary so as to permit appellate review. The plaintiff also relies upon the Uniform Rules of Trial Courts Section 216.1[a] which provides that good cause must be shown to seal records, and Judiciary Law Section 4 which requires that judicial proceedings shall be public.

In opposition, the City states that the redacted portions of the personnel file were provided to plaintiff on October 14, 2020 in accordance with the September 10, 2020 order. It is argued that the entire personnel file is irrelevant and should not be produced since summary judgment on liability has been granted and, therefore, Smith's employment has no bearing on the issue of damages since punitive damages cannot be awarded against a municipality. Any disclosure beyond those records relating to the accident serve no purpose other than to inflame and bias the jury against the City when considering damages.

In reply, plaintiff argues that plaintiff was never served with the order directing a limited exchange (NYSCEF 70, par. 3). Moreover, it is argued that the "law in New York regarding punitive damages in a 'DWI' setting is that driving while intoxicated, standing alone, is generally not sufficient to impose punitive damages upon a defendant. However, a DWI may support an award for punitive damages where there is additional evidence that the defendant engaged in wanton and reckless conduct or there is evidence of a history of prior acts of DWI. This is the reason that the plaintiffs sought to obtain the personnel and disciplinary records of defendant Smith" (NYSCEF 70, par. 5). To support this argument, reference is made to the page stamped "081" which it is alleged identifies prior "incidents" of 6/20/16, 8/4/16, 9/20/16, 11/23/16 and 7/26/17" (NYSCEF 70, par. 7).

"CPLR § 3101 (a) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*Kayantas v. Restaurant Depot, LLC*, 173 AD3d 718, 720 [2d Dept. 2019]). The phrase "material and necessary" requires "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" (*Id.*). This is true regardless of a party's burden of proof, since "[T]he liberal

construction of the statute [CPLR 3101] is self-evident from its language, using nomenclature such as ‘shall,’ ‘all,’ and ‘material.’ The language is not limited to evidence that may be admissible at trial, as discovery is broader than admissibility” (*Peterson v. Rozansky*, 171 NY3d 805, 810 [2d Dept. 2019]). The party objecting to disclosure bears the burden of demonstrating that such material is immune from discovery (*Id.*). Further, any matter which may lead to the discovery of admissible proof which bears upon the prosecution or defense is discoverable even if the underlying facts themselves are not admissible (*see Cajamarca v. Osatuk*, 163 AD3d 619, 620 [2d Dept. 2018]). However, the liberal interpretation of the statute is not without limitations (*Trotman v. New York City Transit Authority*, 168 AD3d 1116 [2d Dept. 2019] and *Neiger v. City of New York*, 72 AD3d 663 [2d Dept. 2010]).

With respect to personnel records, it is appropriate for the Court to conduct an *in camera* review to determine which parts of the records produced by the defendants contain unprivileged information that is material and relevant to the issues placed in controversy (*Diaz v. Minhas Construction Corp., LLC*, 188 AD3d 812 [2d Dept. 2020]). This rule recognizes that employees records may contain “privileged and/or sensitive information of a highly personal nature” (*Id.*).

The discovery of a pattern of driving while intoxicated is necessary because evidence that a person was driving while intoxicated at the time of an accident is insufficient by itself to justify the imposition of punitive damages in a personal injury action (*Gershman v. Ahmad*, 156 AD3d 868, 869 [2d Dept. 2017]). “An evaluation of whether punitive damages are warranted must be made on a case-by-case basis taking into account the nature of the actor's conduct and the level of his intoxication” (*Chiara v. Dernago*, 128 AD3d 999, 1003 [2d Dept. 2105] [defendant was incoherent with a blood alcohol content over twice the legal limit). Therefore, to sustain such an award, there must be evidence that that the defendant engaged in wanton and reckless conduct

establishing a heedlessness and an utter disregard for the safety of others, such as driving while excessively drunk or was previously convicted of driving while intoxicated and speeding at the time of the accident (*Gershman v. Ahmad*, 156 AD3d 869 and *Parkhill v. Cleary*, 305 AD2d 1088, 1089 [2d Dept. 2003]).

Here, although the City has denied that Smith was operating the vehicle in the course of his employment, the City has conceded permissive use [Vehicle & Traffic Law §388]. Based upon this concession and the award of summary judgment on July 24, 2019, the City is liable to pay any judgment for compensatory damages. Therefore, those portions of Smith's personnel file unrelated to driving while intoxicated are irrelevant, not reasonably calculated to lead to admissible evidence on the issue of punitive damages and inadmissible at trial against either defendant (see *Trotman v. New York City Transit Authority*, 168 AD3d 1117 and *Neiger v. City of New York*, 72 AD3d 665).² Accordingly, that branch of plaintiff's motion seeking production of Smith's entire personnel file is denied.

The Court now turns to the balance of plaintiff's motion. However, it is first noted that this Court's Order dated September 10, 2020 only permitted the release of the redacted pages, not the entire personnel file. The City was in full compliance with the September 10, 2020 order upon exchanging only the selected (redacted) pages.

The Court grants that branch of plaintiff's motion to file under seal with the Clerk of the Court those portions of the file that have been exchanged with the redactions of Smith's social security number, date of birth and employee identification numbers to comply with the privacy requirements of the New York State Case Electronic Filing System (22 NYCRR §202.5[e]).

² The records relating to driving while under influence are also inadmissible at the time of trial against the City as same are irrelevant and palpably improper on the issue of compensatory damages.

Next, page 081 referred to in plaintiff's reply is titled "Plea to Docket" with subsections labeled "INDEX NO(S)" and "RULES VIOLATED." The listed Rules Violated are "1.2, 1.4, 1.5, 2.1, and 3.27." Neither party has introduced a copy of the Rules referenced therein to determine whether same are relevant to the issue of a pattern of Smith driving while intoxicated. Therefore, the Court takes judicial notice of the Rules (CPLR 4511).³ The index numbers relating to 1.2 (Signing in and out of work location); 1.4 (Absent without authority); 1.5 (Emergency Leave); and 3.27 (Conduct prejudicial to good order or discipline) are not discoverable (see *Trotman v. New York City Transit Authority, supra* and *Neiger v. City of New York, supra*). The records relating to violation 2.1 (Employee's use of alcohol or drugs) on the day of plaintiff's accident were previously disclosed and are filed unsealed herewith. The Court is also permitting the release of pages 153⁴ and 156 bearing the title "Unusual Occurrence Report" dated 1/22/06, which indicate that while off duty, Smith was arrested for driving his personal vehicle under the influence. These pages were inadvertently not included with the Order dated September 10, 2020. The Court notes that the post-accident personnel records are also not subject to disclosure (see *Rivera v. New York City Transit Authority, 71 AD3d 438 [1st Dept. 2010]*).

Finally, the non-disclosure of the entire record does not prevent plaintiff perfecting the appeal. Plaintiff must seek to have the City forward the personnel file to the Appellate Division for an *in camera* review of the records, together with this Court's decision, and create a complete

³ The Court has annexed to the decision a copy of the Code of Conduct, General Order 2015-03 by the Commissioner of the Department of Sanitation (General Order 2015-03).

⁴ This page appears to be a print-out of a driving abstract from the Department of Motor Vehicles' website.

record (see *Andolina-Stovcsik v. Conesus Lake Nursing Home, LLC*, 105 AD3d 1377, 1378 (4th Dept. 2013)).

ORDERED, that plaintiff's motion seeking defendant ELTON A SMITH's complete personnel file is denied; and it is further

ORDERED, that plaintiff's motion seeking to electronically file in NYSCEF the documents exchanged pursuant to this Court's Order dated September 10, 2019, is granted to the extent that the documents will be electronically filed under seal with the Clerk of the Court; and it is further

ORDERED, that the documents exchanged pursuant to this Court's Order dated September 10, 2019 shall be electronically filed as redacted under seal with the Clerk of the Court; and it is further

ORDERED, that pages 153 and 156 shall be electronically filed in NYSCEF with the Clerk of the Court under seal; and it is further

ORDERED, that defendants, NEW YORK CITY DEPARTMENT OF SANITATION and THE CITY OF NEW YORK, shall exchange pages 153 and 156 within 30 days of entry of this Order in NYSCEF; and it is further

ORDERED, that the balance of plaintiff's motion is denied.

This constitutes the decision and order of the Court.

Dated: February 3, 2021

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.