

Matter of Carr v De Blasio
2021 NY Slip Op 31987(U)
July 23, 2021
Supreme Court, New York County
Docket Number: 101332/2019
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 11

Justice

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In the Matter of GWEN CARR, ELLISHA FLAGG GARNER,
CONSTANCE MALCOLM, LOYDA COLON, JOO-HYUN
KANG, MONIFA BANDELE, KESI FOSTER and MARK
WINSTON GRIFFITH,

Petitioners,

INDEX NO. 101332/2019
MOTION DATE N/A
MOTION SEQ. NO. N/A

BILL DE BLASIO, Mayor of the City of New York, JAMES P.
O'NEILL, New York City Police Commissioner, DANIEL A.
NIGRO, New York City Fire Commissioner, KEVIN
RICHARDSON, New York City Police Department Deputy
Commissioner, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

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As set forth herein, after considering the written submissions of the parties and oral arguments held before this court on April 20, 2021, June 30, 2021 and July 19, 2021, the court grants in part Petitioners Gwen Carr's, Elisha Flagg Garner's, Constance Malcolm's, Loyda Colon's, Joo-Hyun Kang's, Monifa Bandele's, Kesi Foster's and Mark Winston Griffith's (collectively "Petitioners") requests for a court order directing the testimony of certain witnesses during the summary inquiry to be conducted before this court and for discovery, to the extent that the court grants the testimony of certain witnesses listed on Petitioners' proposed witness list, permits testimony by affidavit to respond to certain inquiries and orders limited discovery as set forth herein. However, the court denies Petitioners' request to order the testimony of several high-ranking New York City officials, including New York City Mayor Bill de Blasio, Chief Medical Examiner Barbara Samson and current and former New York City Police Department Commissioners.

Petitioners brought this proceeding against Respondents Bill de Blasio, Mayor of the City of New York, James P. O'Neill, New York City Police Commissioner, Daniel A. Nigro, New York City Fire Commissioner, Kevin Richardson, New York City Police Department ("NYPD") Deputy Commissioner and the City of New York (collectively "Respondents") seeking a summary judicial inquiry, pursuant to New York City Charter § 1109, into alleged violations of neglect of duty regarding the arrest and death of Eric Garner on July 17, 2014.

In a decision and order dated September 24, 2020, this court denied Respondents' motion to dismiss the petition and granted in part the petition to the extent that the court ordered a summary judicial inquiry, but limited the scope of such inquiry to alleged violations and neglect of duties regarding the following:

- 1) The stop and arrest of Mr. Garner and the force used by the police officers, other than former police officer Daniel Pantaleo, who were involved in Mr. Garner's arrest;
- 2) The filing of official documents regarding Mr. Garner's arrest;
- 3) The leaking of Mr. Garner's alleged arrest history and medical conditions in the autopsy report; and
- 4) The alleged lack of medical care provided to Mr. Garner by police officers.

The court's decision was unanimously upheld by the Appellate Division, First Department on July 15, 2021 (*Carr v. De Blasio*, -AD3d-, 2021 NY Slip Op 04412 [1st Dept 2021]).

Petitioners now seek a court order: 1) compelling certain witnesses to testify at the summary inquiry, including several high-ranking and senior New York City public officials, including Mayor Bill de Blasio, current and former First Deputy Mayors and Police Commissioners, Chief Medical Examiner Barbara Samson and others; 2) compelling

Respondents to provide responses to Petitioners' discovery requests, dated March 16, 2021; 3) compelling Respondents to detail which documents contained in their previous responses to Petitioners' Freedom of Information Law ("FOIL") requests were responsive to each FOIL request and discovery request; and 4) compelling Respondents to identify which material, if any, was withheld or redacted from their FOIL responses.

Petitioners argue in substance that the testimony of the high-ranking public officials are needed for the City and NYPD to adequately respond to the allegations of neglect of duty for failing to investigate and discipline the other police officers who assisted Mr. Pantaleo in arresting Mr. Garner, the allegations of false statements being included in official NYPD documents, the source of the alleged leaks of Mr. Garner's sealed criminal history and medical condition and the failure of the police officers to provide medical assistance to Mr. Garner. Petitioners allege in substance that only Mayor de Blasio, the Police Commissioners and other high-ranking officials have the authority to decide whether to investigate such misconduct and to determine the scope and targets of such investigation. Additionally, Petitioners argue that discovery is permitted in this proceeding as governed by the CPLR.

Respondents oppose Petitioners' requests for the testimony of such high-ranking City officials and for written discovery. Respondents argue in substance that Petitioners failed to establish why the testimony of Mayor de Blasio, the current and former Police Commissioners and Chief Medical Examiner Barbara Samson are needed to address the limited scope of the summary inquiry. They further argue that other officials with personal knowledge of the subject matter are in a better position to adequately respond to the subject of the inquiry. Additionally, Respondents argue in substance that written discovery is unavailable in a § 1109 proceeding, Respondents previously provided over 40,000 pages of documents in response to Petitioners'

FOIL requests and Petitioners have repeatedly failed to identify which outstanding material they believe is needed for the inquiry.

A. Testimonial Witnesses

The court determines that Petitioners failed to establish their need to call most of the high-ranking public officials included on their list of potential witnesses in lieu of calling other public officials who may have more direct knowledge of the subject matter of this inquiry. The court finds that several other individuals appear to have personal knowledge of the subject matter and they appear to be as competent, if not more competent, to testify as to the material facts to be addressed during the summary inquiry. Therefore, the court denies Petitioners' request for a court order compelling the testimony of most of the high-ranking City officials, including, New York City Mayor Bill de Blasio, current and former First Deputy Mayors, current and former Police Commissioners, Chief Medical Examiner Barbara A. Sampson, the EMS workers and others.

However, the court grants Petitioners' request for a court order compelling the testimony of certain witnesses and the court orders the following individuals to testify at the summary inquiry in this matter:

- 1) Deputy Commissioner for Public Information Phillip Walzac;
- 2) Deputy Commissioner of Internal Affairs Joseph Reznick;
- 3) Deputy Inspector Charles Barton;
- 4) Lt. Christopher Bannon;
- 5) Sgt. Luke Gasquez;
- 6) Sgt. Dhanan Saminath;
- 7) Sgt. Beki Kalicovic;
- 8) Sgt. Kizzy Adonis;
- 9) P.O. Justin D'Amico;
- 10) P.O. Mark Ramos;
- 11) P.O. Craig Furlani;
- 12) P.O. William Meems; and
- 13) Patrolmen's Benevolent Association President Patrick J. Lynch.

B. Testimony By Affidavit

The court recognizes that one of the purposes of this § 1109 summary inquiry is to bring transparency to issues regarding whether and to what extent the City of New York and NYPD investigated the actions of police officers, other than Mr. Pantaleo, who were involved in the arrest, use of force and lack of medical treatment provided to Mr. Garner by the officers and whether any disciplinary actions were taken against these officers. Therefore, in addition to the required testimony of the thirteen (13) witnesses set forth above, the court directs Respondents to provide testimony by affidavit from individuals with knowledge to address these investigatory and disciplinary issues. Although Respondents are tasked with selecting the appropriate individuals to provide such testimony by affidavit, the court requires the selected individuals to have had the authority to decide or to provide substantial participation in the decision-making process regarding whether to conduct investigations into these matters and if so, to determine the nature, scope, targets and extent of such investigations or proceedings.

Furthermore, the court directs that all testimony by affidavit shall become a part of the official record of this summary inquiry.

To the extent that it is determined that the City of New York or NYPD conducted such investigations or proceedings regarding the other officers, then Respondents must provide all documents, transcripts, recordings and other material related to such investigations or proceedings to Petitioners within thirty (30) days of the date of this decision and order.

C. Discovery

The court determines that it has the discretion to order discovery in this § 1109 summary inquiry. Therefore, the court finds that limited discovery is appropriate to further the goals of transparency and judicial economy regarding allegations of serious neglect of duty and the City's

apparent failure to disclose the nature and extent of any investigations into alleged violations and neglect of duty committed by the police officers involved in Mr. Garner's arrest, death and lack of medical treatment, other than Mr. Pantaleo, and the other areas of inquiry to be conducted at this proceeding. Thus, the court orders the limited discovery set forth below. However, the court denies Petitioner's request to compel Respondents to identify which documents contained in their previous responses to Petitioners' FOIL requests were responsive to each FOIL request and discovery request.

All additional requests for relief not discussed herein have been considered by this court and are denied, unless expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Petitioner's request for a court order compelling the testimony of the witnesses included on Petitioner's Proposed Witness List, filed on July 15, 2021 (NYSCEF Doc. No. 59), to the extent that the court compels the following witnesses to testify at the summary inquiry in this matter:

- 1) Deputy Commissioner for Public Information Phillip Walzac;
- 2) Deputy Commissioner of Internal Affairs Joseph Reznick;
- 3) Deputy Inspector Charles Barton;
- 4) Lt. Christopher Bannon;
- 5) Sgt. Luke Gasquez;
- 6) Sgt. Dhanan Saminath;
- 7) Sgt. Beki Kalicovic;
- 8) Sgt. Kizzy Adonis;
- 9) P.O. Justin D'Amico;
- 10) P.O. Mark Ramos;
- 11) P.O. Craig Furlani;
- 12) P.O. William Meems; and
- 13) Patrolmen's Benevolent Association President Patrick J. Lynch; and it is further

ORDERED that the court denies Petitioners' request for a court order compelling the testimony of the following individuals included on Petitioner's Proposed Witness List, filed on July 15, 2021 (NYSCEF Doc. No. 59):

- 1) New York City Mayor Bill de Blasio;
- 2) Former First Deputy Mayor Anthony Shorris;
- 3) First Deputy Mayor Dean Fuleihan;
- 4) Chief Medical Examiner Barbara A. Sampson;
- 5) Former Police Commissioner William Bratton;
- 6) Former Police Commissioner James O'Neill;
- 7) Police Commissioner Dermot Shea;
- 8) First Deputy Police Commissioner Benjamin Tucker;
- 9) Deputy Police Commissioner Kevin Richardson;
- 10) Lt. Luis F. Gutierrez;
- 11) Lt. Steven Dreyer;
- 12) Richmond University Medical Center ("RUMC") EMT/Paramedic Nicole Palmeri;
- 13) RUMC EMT/Paramedic Stefanie Greenberg;
- 14) RUMC EMT/Paramedic Daniel Machuca;
- 15) RUMC EMT/Paramedic Roseann Vitale; and
- 16) RUMC EMT/Paramedic Daniela Garcia; and it is further

ORDERED that the court requires Respondents to file testimony by affidavits from individuals who have personal knowledge of the following subject matter and who had the authority to decide or to provide substantial participation into the decision-making process regarding whether to conduct an investigation or disciplinary charge, proceeding or action, and if such investigation or disciplinary charge, proceeding or action was taken, then to determine the nature, scope, targets and extent of such investigation or proceeding into the following matters:

- 1) whether there was probable cause for the arrest of Mr. Garner;
- 2) whether the extent of force used by the officers who arrested Mr. Garner, other than former police officer Daniel Pantaleo, was justified given the nature of the alleged offense;
- 3) whether Police Officer Justin D'Amico filed documents containing false statements, including, but not necessarily limited to, that no force was used during the arrest of

Mr. Garner or whether there was probable cause to arrest him for a felony regarding his possession of untaxed cigarettes;

- 4) whether information was improperly leaked regarding Mr. Garner's sealed criminal history or private medical information contained in the autopsy report;
- 5) whether any NYPD or New York City personnel accessed Mr. Garner's sealed criminal history information between July 17, 2014 and August 5, 2014, and improperly conveyed such information to others; and
- 6) whether there was neglect of duty for the alleged lack of medical care provided to Mr. Garner by police officers at the scene of his arrest; and it is further

ORDERED that Respondents must file such testimony by affidavits within thirty (30) days of the date of this decision and order and the court directs that all testimony by affidavit shall become a part of the official record of this summary inquiry; and it is further

ORDERED that, to the extent it is determined that the City of New York or NYPD conducted such investigations or proceedings regarding police officers, other than former police officer Daniel Pantaleo, then Respondents must provide Petitioners with all documents, transcripts, recordings and other material related to such investigations or proceedings within thirty (30) days of the date of this decision and order, to the extent not already provided; and it is further

ORDERED that the court grants in part Petitioners' demand for discovery in this proceeding to the extent that the court directs Respondents to provide the following discovery responses to Petitioners within thirty (30) days of the date of this decision and order:

- 1) NYPD documents, including "scratch" or handwritten versions of typed documents, regarding Mr. Garner's stop, arrest, use of force, search and medical attention

provided on July 17, 2014, including, but not necessarily limited to, the stop report, arrest report, complaint report, property clerk vouchers, memo book entries, unusual occurrence, unusual incident, UF-49, DD-5 and aided report completed by Police Officer Justin D'Amico and others;

- 2) NYPD documents, recordings, transcripts or other material regarding Lt. Christopher Bannon's, Police Officer Justin D'Amico's or any other police officer's observations of Mr. Garner engaging in the possession or sale of untaxed cigarettes on July 17, 2014, and observations of Mr. Garner immediately prior to the time Police Officer Justin D'Amico and former police officer Daniel Pantaleo approached Mr. Garner on July 17, 2014;
- 3) Recordings, transcripts and printouts of internal NYPD radio and telephonic communications related to the stop, arrest and use of force against Mr. Garner and Mr. Garner's physical and medical condition on July 17, 2014;
- 4) Transcripts, recordings or notes of the GO-15 and other NYPD Internal Affairs Bureau ("IAB") interviews of witnesses regarding the subject of this summary inquiry; and
- 5) NYPD paperwork regarding any medical care provided to or sought for Mr. Garner by police officers on July 17, 2014; and it is further

ORDERED that if Respondents withhold or redact any documents or information responsive to these demands, then they must do so based solely upon legitimate objections permissible in the CPLR and Respondents must include a detailed explanation for the basis of such objections; and it is further

ORDERED that the court denies Petitioner’s request to compel Respondents to identify which documents contained in their previous responses to Petitioners’ FOIL requests were responsive to each FOIL request and discovery request; and it is further

ORDERED that the summary inquiry in this matter shall begin on October 25, 2021, and continue on consecutive business days, excluding holidays, until completion; and it is further

ORDERED that the parties must confer with each other and submit a joint proposed schedule of witnesses for the summary inquiry by emailing the undersigned judge and the Clerk of Part 11, Ms. Bing Zhao, at SFC-Part11-Clerk@nycourts.gov by September 8, 2021; and it is further

ORDERED that the parties must appear for a status conference before this court on September 13, 2021, at 10:00 a.m., via Microsoft Teams (link will be provided via email).

This constitutes the decision and order of the court.

7/23/2021

DATE



ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: