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| <b>Manna Lu-Wong v City of New York</b>                                                                                                                                                                                        |
| 2022 NY Slip Op 30611(U)                                                                                                                                                                                                       |
| February 28, 2022                                                                                                                                                                                                              |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 153614/2020                                                                                                                                                                                           |
| Judge: Judy H. Kim                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

|                                                                                   |                         |                    |                    |
|-----------------------------------------------------------------------------------|-------------------------|--------------------|--------------------|
| <b>PRESENT:</b>                                                                   | <u>HON. JUDY H. KIM</u> | <b>PART</b>        | <b>05RCP</b>       |
|                                                                                   | <i>Justice</i>          |                    |                    |
| -----X                                                                            |                         | <b>INDEX NO.</b>   | <u>153614/2020</u> |
| MANNA LU-WONG, individually and as administrator of the<br>Estate of Hon Wing Lu, |                         | <b>MOTION DATE</b> | <u>12/17/2021</u>  |
| Plaintiff,                                                                        |                         | <b>MOTION SEQ.</b> | <u>005</u>         |

- v -

THE CITY OF NEW YORK,  
NEW YORK CITY DEPARTMENT OF SANITATION, GLEN  
PUSEY,**DECISION + ORDER ON MOTION**

Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83,  
84, 85, 86, 87, 89, 90, 91, 92

were read on this motion to

QUASH DISCOVERY.

Upon the foregoing documents, plaintiff's motion to quash defendant the City of New York's (the "City") request for material plaintiff obtained from a City Agency pursuant to a Freedom of Information Law ("FOIL") request (the "FOIL Material") is granted to the limited extent that plaintiff's time to respond to the Court's discovery order dated November 10, 2021 is extended to March 4, 2022 and is otherwise denied.

Plaintiff Manna Lu-Wong commenced this action individually and as administrator of the Estate of Hon Wing Lu, seeking damages for the wrongful death of Hon Wing Lu resulting from a January 25, 2020 motor vehicle accident in which a vehicle driven by defendant Glen Pusey (the "Individual Defendant") but owned by his employer, co-defendants, the City of New York and the New York City Department of Sanitation (collectively, the "City"), collided with Hon Wing Lu.

Plaintiff sought and received some of the Individual Defendant's criminal file pursuant to a FOIL request, "including the complaint report and collision investigation squad case file"

stemming from the January 25, 2020 automobile collision (NYSCEF Doc. No. 23 [Exhibit 9 to Motion #001]). Thereafter, defendants sought to obtain this FOIL Material in discovery.

On July 26, 2021, plaintiff moved for Order:

(1) deeming all records related to the investigation, arrest and prosecution of Glen Pusey for offenses resulting from the motor vehicle accident that occurred on January 25, 2020, not sealed pursuant to CPE §160.55 because Mr. Pusey pleaded guilty to a misdemeanor; or in the alternative; (2) an Order pursuant to Criminal Procedure Law § 160.55, unsealing all records related to the investigation and conviction of Glen Pusey and permitting the plaintiff to serve subpoenas on the Manhattan District Attorney's Office, New York Police Department, Collision Investigation Squad and all other entities in possession of records relating to the investigation, arrest and prosecution of Mr. Pusey with regards to the subject accident; (3) an Order compelling the defendants to produce the complete employment file for Glen Pusey; (4) an Order permitting the plaintiff to question defendants' witnesses regarding investigation documents received by the plaintiff from the N.Y.P.D. via the Freedom of Information Law.

(NYSCEF Doc. No. 14).

The City objected on the grounds that it did not contest liability in this matter, making the discovery sought no longer material or necessary (NYSCEF Doc. No. 27). In reply, plaintiff noted that the Individual Defendant had made no such concession as to the issue of his liability (NYSCEF Doc. No. 38 [Lambrou Affirm. in Opp. at ¶8]).

In a decision and order dated September 28, 2021, Justice Dakota D. Ramseur granted plaintiff's motion to the extent that the City was directed to furnish the Individual Defendant's employment file within thirty days and to produce a witness to testify at a deposition concerning the FOIL Material (NYSCEF Doc. No. 41 [September 28, 2021 Decision and Order]). Justice Ramseur expressly denied the branch of plaintiff's motion which sought to unseal the Individual Defendant's criminal records relating to the events underlying this action (Id.).

Thereafter, both parties moved to reargue the September 28, 2021 Decision and Order. Plaintiff moved to reargue that portion of the decision which denied their motion to unseal records

and permit plaintiff to serve subpoenas on the District Attorney's office (NYSCEF Doc. No. 46) and simultaneously filed a notice of appeal (NYSCEF Doc No. 61). The City, in turn, moved to reargue that portion of the decision which directed the City to produce a witness to testify at a deposition concerning the FOIL Material. (NYSCEF Doc. No. 54). In support of the City's motion to reargue it submitted an affirmation from the managing attorney of the New York Police Department's Subpoena Litigation Unit, Robert F. Fodera, in which he stated that "absent an unsealing order obtained from the original court of jurisdiction or the submission of a written authorization from the criminal defendant whose records are concerned, the records cannot legally be produced to any party (NYSCEF Doc. No. 57 [Fodera Affirm. at ¶6]).

Prior to the submission of the reargument motions (Motion Seq. Nos. 3 and 4), Justice issued an order directing plaintiff to furnish a copy of the FOIL Material to the defendants by November 18, 2021 (NYSCEF Doc. No. 69 [November 10, 2021 Decision and Order]). In that order, Justice Ramseur also set a briefing schedule and scheduled oral argument on the reargument motions for December 7, 2021. (*Id.*)

Upon reargument, Justice Ramseur denied plaintiff's motion (Mot. Seq. 003) and granted the City's motion (Mot. Seq. 004) (NYSCEF Doc Nos. 95 and 96 [Decision and Order dated December 7, 2021]). The Court reasoned that "in light of the Court's determination that the subject records are sealed, it would be contradictory to direct the City to produce a witness to explain those very same records" (*Id.* [emphasis added]).

Plaintiff now moves to, ostensibly, quash the City's discovery demand for the FOIL Material, pursuant to CPLR §3103(a) or, alternatively, to extend plaintiff's time to respond to the Court's Order of November 10, 2021, pursuant to CPLR §2004. Plaintiff argues that FOIL Material is in the custody and control of the New York Police Department, an agency of the City, and

therefore the City can independently obtain the records. The City responds that it cannot obtain these records because they are sealed.

### DISCUSSION

Plaintiff asks the Court to, essentially, invalidate the prior orders of the Court (i.e. Justice Ramseur's November 10, 2021 order directing plaintiff to produce the FOIL Material to defendants and her December 7, 2021 decision and order acknowledging that the FOIL records are sealed). However, the statute under which plaintiff moves, CPLR §3103, does not contemplate such relief. Rather, it permits the Court to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR §3103[a]). The "disclosure devices" referenced in CPLR §3103 are limited to those set out in CPLR §3102 – e.g., depositions, interrogatories, discovery demands, and requests for admission, and do not include prior orders of the Court. Accordingly, plaintiff's motion pursuant to CPLR §3103 is granted to the extent to the limited extent that plaintiff is directed to comply with the November 10, 2021 Decision and Order on or before the end of business March 4, 2022 and otherwise denied. Should plaintiff fail to do so, defendants may immediately move to compel such compliance pursuant to CPLR §3124 and for appropriate sanctions pursuant to CPLR §3126, including preclusion.

This constitutes the decision and order of the Court.

2/28/2022

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

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DENIED

APPLICATION:

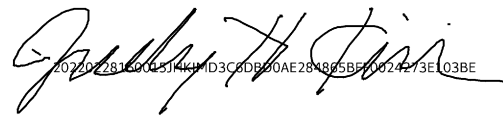
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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN



JUDY H. KIM, J.S.C.

☒

NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE