

Rogalsky v City of New York
2022 NY Slip Op 34079(U)
December 5, 2022
Supreme Court, New York County
Docket Number: Index No. 152818/2018
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05**

Justice

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ALENA ROGALSKY, AS ADMINISTRATOR OF THE
ESTATE OF DR. VITALY ROGALSKY, DECEASED,

Plaintiff,

INDEX NO. 152818/2018

MOTION DATE 11/15/2022

MOTION SEQ. NO. 004 & Other

- v -

CITY OF NEW YORK, POLICE OFFICER #1 (OFFICIAL &
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN), POLICE
OFFICER #2 (OFFICIAL & INDIVIDUAL CAPACITY,
IDENTITY UNKNOWN), POLICE OFFICER #3 (OFFICIAL &
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN), POLICE
OFFICER #4 (OFFICIAL & INDIVIDUAL CAPACITY,
IDENTITY UNKNOWN), POLICE OFFICER #5 (OFFICIAL &
INDIVIDUAL CAPACITY, IDENTITY UNKNOWN),

TRIAL DECISION

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 86-99, 120-122 and (Trial Memoranda) 100-128

were read on this motion for MISCELLANEOUS – IN LIMINE RULINGS.

Vitaly Rogalsky commenced this action on March 29, 2018, asserting claims against defendant the City of New York (the “City”) for as pertinent here, assault and battery, stemming from his arrest on March 4, 2017, during which New York City Police Department (“NYPD”) officers allegedly made harmful and offensive bodily contact with plaintiff without his consent, causing physical pain and mental anguish (NYSCEF Doc. No. 1 [Compl. at ¶¶28-31]),

In a Bill of Particulars dated June 5, 2018, Rogalsky asserted that his injuries stemming from this arrest included: “hematoma of left arm, lacerations of the right arm, bleeding, pain, chest pain, shock” as well as “psychological/emotional issues, including flashbacks” and “orthopedic (feet related) issues” (NYSCEF Doc. No. 6/101 [Bill of Particulars]).

Vitaly Rogalsky died on April 6, 2020 and his estate was substituted as plaintiff on August 5, 2020. Plaintiff filed a note of issue on December 23, 2020.

In a decision and order dated May 25, 2021, defendants' motion for summary judgment was granted to the extent that all causes of action alleged in the complaint except were dismissed except for plaintiff's assault and battery claims (NYSCEF Doc. No. 73) (Hon. Lyle E. Frank).

On February 25, 2022, nearly two years after Vitaly Rogalsky's death, plaintiff filed a Supplemental Bill of Particulars alleging the following injuries: (1) urinary-related ailments, including urinary incontinence and urinary catheterization; (2) nightmare disorder; and (3) insomnia (NYSCEF Doc. No. 76/103). This Supplemental Bill of Particulars was rejected by the City.

On April 19, 2022, trial was set to begin on May 3, 2022 before the Honorable Denise Dominguez (NYSCEF Doc. No. 77) but was subsequently adjourned from that date.

On August 30, 2022, over two years after Vitaly Rogalsky's death, plaintiff filed a second Supplemental Bill of Particulars setting forth the following injuries: (1) urinary-related ailments, including urinary incontinence and urinary catheterization; (2) nightmare disorder; (3) insomnia; (4) post-traumatic stress disorder ("PTSD"); and (5) depression (NYSCEF Doc. No. 85/105). This second Supplemental Bill of Particulars was also rejected by the City.

After a pre-trial conference on November 15, 2022, trial was rescheduled before this Court for December 12, 2022. In advance of the trial and the scheduled jury selection to begin on December 6, 2022, both parties have submitted motions in limine and opposition thereto. The Court addresses these motions, below.

THE CITY'S MOTIONS IN LIMINE

As a threshold matter, the City seeks rulings on several issues that are either not in dispute or appear, at present, to be hypothetical. Accordingly, the City's motion to preclude: (1) evidence that Vitaly Rogalsky's death was related to his arrest; (2) evidence related to a "blue wall of silence" within the NYPD; (3) evidence regarding unrelated instances of police misconduct; (4) unrelated disciplinary histories of the police officers involved in Vitaly Rogalsky arrest; (5) evidence related to theories of liability not set out in plaintiff's Notice of Claim (NYSCEF Doc No. 118); (6) evidence or arguments related to punitive damages; and (7) evidence-related new theories of liability beyond those set forth in the Notice of Claim are all denied without prejudice.

The City also seeks to preclude: (1) any evidence regarding all injuries set forth in the first and second Supplemental Bill of Particulars; (2) the testimony of Dr. Prudence L. Gourguechon; (3) all medical records pertaining to any examination and/or treatment of Vitaly Rogalsky which occurred after March 5, 2017, the day following plaintiff's arrest (See NYSCEF Doc. Nos. 109-113); (4) all evidence related to plaintiff's claims that blood was drawn against his wishes; (5) evidence regarding plaintiff's alleged foot injuries; (6) the weather report from March 4, 2017 (NYSCEF Doc. No. 116); (7) the Certificate of Disposition of the criminal case against Vitaly Rogalsky (NYSCEF Doc No. 117); and (8) the introduction of the NYPD Patrol Guide or evidence of any violation of its provisions. The Court addresses each in turn.

The City's motion to preclude plaintiff from presenting evidence related to all injuries set forth in the first and second Supplemental Bills of Particulars is granted to the limited extent that plaintiff is precluded from presenting evidence related to: (1) urinary-related ailments, including urinary incontinence and urinary catheterization; and (2) PTSD, and is otherwise denied.

CPLR §3043(b) provides that:

A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities.

(CPLR §3043[b] [emphasis added]). However, “[n]othing contained in the foregoing shall be deemed to limit the court in denying in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars” (CPLR §3043[c]).

The “urinary-related ailments” set out in the first and second Supplemental Bill of Particulars are novel injuries for which the City did not have timely notice (See Fuentes v City of New York, 3 AD3d 549 [2004]; Wolfer v 184 Fifth Ave. LLC, 27 AD3d 280 [1st Dept 2006]). Vitaly Rogalsky’s reference to urinary issues at his deposition in 2019 (NYSCEF Doc. No. 51 [June 20, 2019 EBT at pp. 17-18] and 52 [July 17, 2019 EBT AT pp. 156-157, 200]), did not alert the City that plaintiff would assert these injuries now, three years after those depositions. Under these circumstances, it would prejudice the City to allow plaintiff to do so now, two years after Vitaly Rogalsky’s death, when the City no longer has an opportunity to conduct an independent medical examination (“IME”) as to these issues that it is entitled to under CPLR §3043(c) (See Cruz v Sharkey's Trucking Corp., 192 AD3d 576, 576-77 [1st Dept 2021]).

Permitting plaintiff to submit evidence as to the PTSD claim included in the second Supplemental Bill of Particulars would be highly prejudicial for similar reasons. While the Court recognizes that “[u]nder some circumstances, allegations of post-traumatic stress disorder do not allege a ‘new injury’ but rather, merely supply a diagnostic label to injuries previously alleged” (Cheeks v The City of New York, 2015 NY Slip Op 31892[U] [Sup Ct, Bronx County 2015] citing

Allen v. Braxton, 21 AD3d 1272 [4th Dept 2005]), this is not the case here. Defendant could not reasonably have inferred from the broadly defined injuries set forth in the complaint and original Bill of Particulars that plaintiff would assert a PTSD diagnosis. Moreover, in the four years this action has been pending, plaintiff has never mentioned a PTSD diagnosis or provided medical records suggesting any treatment for PTSD (See Cheeks v The City of New York, 2015 NY Slip Op 31892[U] [Sup Ct, Bronx County 2015]). Accordingly, permitting plaintiff to submit proof of PTSD now, well after Vitaly Rogalsky's death, when the City no longer has an opportunity to conduct an IME as to this newly-claimed injury, would be highly prejudicial to the City.

The Court denies the City's motion as to plaintiff's claimed injuries of insomnia, nightmare disorder, and depression asserted in the first and second Supplemental Bill of Particulars. These claims are permissible under CPLR §3043, as they serve to provide greater detail as to the nature of the "psychological/emotional issues" set forth in the original bill of particulars (See Scherrer v Time Equities, Inc., 27 AD3d 208, 209 [1st Dept 2006] [internal citations omitted]). In addition, the City has been aware of these claimed injuries through Vitaly Rogalsky's testimony at his examination before trial (NYSCEF Doc. No. 126 [Rogalsky July 17, 2019 EBT at p. 194, 199]). While the City notes that it was not able to conduct an IME prior to Vitaly Rogalsky's death, though multiple so-ordered stipulations directed it (See NYSCEF Doc. Nos. 11-13), there is no indication this was result of bad faith on the part of plaintiff such that precluding evidence of these injuries would be appropriate (Cf. Aziz v City of New York, 130 AD3d 451, 453 [1st Dept 2015]).

The City's motion to preclude the testimony of Dr. Prudence L. Gourguechon is granted in part. Plaintiff asserts in its CPLR §3101(d)(1) Expert Witness Disclosure that "Dr. Gourguechon is expected to testify, to a reasonable degree of medical certainty, that as the direct result of the

actions by members of the New York City Police Department ... Dr. Rogalsky developed Post Traumatic Stress Disorder and Depression. Furthermore, Dr. Gourguechon is expected to testify that such diagnoses are not attributable to any pre-existing condition and were caused solely by members of the New York City Police Department” (NYSCEF Doc. No. 107).

The City argues that this testimony should be precluded because Dr. Gourguechon did not personally examine Vitaly Rogalsky. This is not grounds for preclusion. An expert opinion may be based on evidence in the record without a firsthand examination (See Salinas v World Houseware Producing Co., Ltd., 34 NY3d 925, 926 [2019]; Frye v Montefiore Med. Ctr., 70 AD3d 15, 25 [1st Dept 2009] [“plaintiff provided affirmations by experts in their field who based their opinions upon evidence in the record, including medical reports, charts and records, test results, sonogram images and reports, and EBT testimony”]; Henchy v VAS Exp. Corp., 115 AD3d 478, 478-79 [1st Dept 2014] [“[t]o the extent plaintiff argues that the radiologist's conclusions are speculative because he never met plaintiff, his observations of an increased body habitus are based on his review of the X ray and MRI films, and is supported by the record”]). Here, plaintiff submits that Dr. Gourguechon’s opinion will be based on her interview with Alena Rogalsky, and Vitaly Rogalsky’s EBT testimony, as well as her review of Dr. Bazil’s medical records; and New York Presbyterian medical records. In light of the foregoing, the Court grants defendants’ motion to preclude Dr. Gourguechon’s testimony only to the limited extent that, in accordance with the Court’s ruling precluding the introduction of any evidence of PTSD, Dr. Gourguechon may not testify to anything related to the decedent’s alleged PTSD at trial. This ruling is of course subject to plaintiff qualifying Dr. Gourguechon as an expert at trial. The City’s motion is otherwise denied.

The City’s motion to preclude plaintiff from presenting all medical records pertaining to plaintiff’s examination and/or treatment after March 5, 2017 is denied. The City contends that

preclusion is warranted because plaintiff will be unable to establish a causal connection between plaintiff's arrest and the injuries/treatment documented in these records. Based on the facts alleged here, the question of causation can be established remains an issue for trial (See Breen v Laric Entertainment Corp., 2 AD3d 298, 300 [1st Dept 2003] ["[e]ven if there had been some justification for precluding plaintiff's physician from testifying, dismissal of the complaint would have been improper, since causation in this case could be proved without expert testimony, in that the results of the alleged assault and battery are within the experience and observation of an ordinary layperson"]).

The City's motion to preclude all evidence related to plaintiff's alleged "orthopedic (feet) related" injuries (NYSCEF Doc No. 6 [Bill of Particulars at ¶4]) on the grounds that plaintiff will not be able to establish a causal connection is denied for these same reasons, except that plaintiff is precluded from submitting the proposed photograph of plaintiff's foot taken a year after the accident (NYSCEF Doc. No. 115), as lacking any probative value.

The City's motion to preclude evidence that plaintiff had blood drawn without his consent is denied. The City argues that plaintiff's EBT testimony fails to disprove that any blood drawn was performed by employees of New York City Health and Hospitals, a separate legal entity from the City of New York. However, whether blood was drawn and, if so, by whom it was drawn is an issue of fact to be determined by the jury at trial. In light of the foregoing, the Court also declines to preemptively refuse to take judicial notice of provisions of the Rules of the City of New York related to the right to refuse medical treatment.

The City's motion to preclude the weather report for March 4, 2017 (NYSCEF Do. No. 117) is held in abeyance.

The City's motion to preclude the Certificate of Disposition (NYSCEF Doc. No. 117) is granted, as it is irrelevant to plaintiff's sole remaining claim for assault and battery.

The City's motion to preclude the introduction of the New York City Police Department Patrol Guide, in whole or in part, is denied as premature. The City may renew this motion should plaintiff seek to introduce specific sections of this Patrol Guide into evidence at trial.

PLAINTIFF'S MOTIONS IN LIMINE

Plaintiff moves for an order: (1) deeming the proposed admissions in the Notice to Admit dated May 31, 2021 as admitted; (2) requesting the inclusion of a missing witness charge for arresting officer Druilio Rivera; (3) permitting plaintiff to use excerpts from Officer Rivera's deposition testimony at trial; (4) precluding the introduction of the transcript of a recording of decedent-plaintiff's statements to the Civil Complaint Review Board; (5) precluding a "mugshot of plaintiff" and photograph of Alena Rogalsky; and (6) precluding various NYPD records prepared in connection with plaintiff's arrest, as irrelevant. These motions are all denied with the exception of that branch of plaintiff's motion to preclude photographs of Alena Rogalsky.

Plaintiff's motion to deem the admissions in the Notice to Admit dated May 31, 2021 (NYSCEF Doc No. 88) as admitted is denied, as the notice to admit in question was improper. A "notice to admit may not be utilized, as sought by the plaintiff herein, to seek admissions of material issues or conclusory facts which go to the very heart of the matters at issue" (Zohar v Hair Club for Men Ltd., 200 AD2d 453, 454 [1st Dept 1994]).

Plaintiff's motion for a missing witness charge for Arresting Officer Duilio Rivera is denied as moot—counsel for the City has represented to the Court that Officer Rivera will testify at trial. That branch of plaintiff's motion seeking to use Officer Rivera's deposition testimony at trial is also denied, for the same reason.

Plaintiff's motion to preclude the introduction of the transcript of Vitaly Rogalsky's communications with the Civilian Complaint Review Board (NYSCEF Doc No. 93) is denied. Contrary to plaintiff's claim, this transcript has been certified as a business record. While plaintiff observes, correctly, that "a deceased witness whose prior testimony is admitted at trial may not be impeached by a posthumous showing of alleged contradictory or inconsistent statements" (Cioffi v. Lenox Hill Hospital, 287 AD2d 335 [1st Dept, 2001]), the City represents that it is not seeking to introduce the statements contained in the CCRB transcript to impeach Vitaly Rogalsky's EBT testimony but in support of its defense. Accordingly, the City may introduce excerpts of this transcript into evidence to the extent that Vitaly Rogalsky's statements therein do not expressly contradict any EBT testimony previously entered into evidence at trial. The City is directed to exchange a list of the page and line numbers of those portions of the EBT testimony that it intends to introduce at trial to counsel one day prior to moving the exhibit into evidence at trial.

Plaintiff's motion to preclude Vitaly Rogalsky's booking photograph (NYSCEF Doc. No. 94) is denied. As the City notes, plaintiff's attire in this photograph is relevant to his claim that he was dragged out of his apartment wearing nothing but his shirt, trousers and socks. Similarly, plaintiff's motion to preclude the Arrest Report, Domestic Incident Report, Sprint Report, and Aided Report (NYSCEF Doc No. 95) is also denied as these records contain information relevant to the factual disputes between the parties as to, inter alia, the clothing and footwear Vitaly Rogalsky was wearing at his arrest as well as the force used to effectuate this arrest. However, Plaintiff's motion to preclude the photograph of Alena Rogalsky (NYSCEF Doc. No. 96) is granted, as the Court determines that any probative value it may have is substantially outweighed by its prejudicial effect.

Accordingly, it is

ORDERED that plaintiff is precluded from introducing evidence related to the injuries of post-traumatic stress disorder and urinary-related ailments alleged in the first and second Supplemental Bills of Particulars; and it is further

ORDERED that plaintiff is precluded from introducing the photograph of plaintiff's foot (NYSCEF Doc. No. 115) into evidence; and it is further

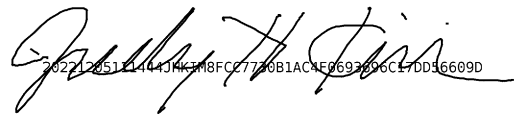
ORDERED that plaintiff is precluded from introducing the Certificate of Disposition of the criminal action against Vitaly Rogalsky (NYSCEF Doc. No. 117) into evidence; and it is further

ORDERED that defendant the City of New York is precluded from introducing the photograph of Alena Rogalsky (NYSCEF Doc. No. 96) into evidence; and it is further

ORDERED that all parties are directed to refrain from making any reference to any of the foregoing precluded materials/subjects to the jury panel during jury selection and at trial; and it is further

ORDERED that plaintiff and the City's motions in limine are otherwise denied.

This constitutes the decision and order of the Court.



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12/5/2022

DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE