

Rochester v County of Nassau
2022 NY Slip Op 34443(U)
March 30, 2022
Supreme Court, Nassau County
Docket Number: Index No. 611519/2019
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 14

Present: Hon. Helen Voutsinas

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KAREN ROCHESTER, as Administratrix of the Estate of
COLLIN T. ROCHESTER, Deceased,

Plaintiff,

Index No.: 611519/2019

-against-

Motion Seq. Nos.: 010 & 011

COUNTY OF NASSAU, MARIO MASTROPIERRO,
CHRISTOPHER M. McCARTHY, individually and in their
official capacities, and JOHN DOE Nos. 1-10 being police
officers and other employees of the County of Nassau
responsible for the torts committed against Decedent and
Violation of the Rights of Decedent and Plaintiff,

Short Form Order

Defendants.
-----X

The following papers were read on these motions:

Notice of Motion, Affirmation in Support, Exhibits, and Memorandum of Law in Support.....	1
Notice of Cross-Motion, Affirmation in Support, Exhibits and Memorandum of Law in Opposition to Motion and in Support of Cross-Motion.....	2
Affirmation in Opposition to Motion.....	3
Affirmation in Opposition to Motion.....	4
Reply Memorandum of Law in Further Support of Motion.....	5
Reply Memorandum of Law in Further Support of Cross Motion.....	6

Upon the foregoing papers, plaintiff Karen Rochester, as Administratrix of the Estate of Collin T. Rochester, deceased, moves for an Order pursuant to CPLR §3124: (1) compelling defendant County of Nassau (the "County") to produce all Internal Affairs Unit files and complaints ("IAU's") regarding defendants Mario Mastropierro and Christopher McCarthy (the "Officers"); and (2) any documents in the Officers' personnel files that goes to honesty, credibility, and adherence to or violation of Nassau County Police Department ("NCPD") policies and regulations; the County cross moves for an Order pursuant to CPLR §3103: (1) granting County a protective order as against plaintiff's Third Request for the Production of Documents in the Federal Action, Fourth Request for the Production of Documents in the Federal Action, and Supplemental Request for the Production of Documents in this action; and (2) denying plaintiff's motion to compel in its entirety. The motion and cross motion are determined as hereinafter provided.

This action arises out of an accident which occurred just after midnight on October 9, 2009,

involving a motorcycle and a car, and which resulted in the death of the motocyclist, Collin T. Rochester ("Rochester"), plaintiff's decedent and son. The factual and procedural background was summarized in this Court's Prior Order dated August 19, 2021 ("Prior Order"), which is incorporated by reference as though set forth in full herein.

By way of background, plaintiff filed a complaint in the United States District Court, Eastern District of New York, Case No. 10 cv 06117, on December 29, 2010 (the "Federal Action"), asserting claims under §1983. The Federal Action also alleged the same state law claims as those alleged herein. Discovery in the Federal Action spanned nine years. The County states that concise officer histories, IAU's with finding of founded and IAU's pertaining to similar acts as those alleged in herein and/or dishonesty, as defined by the Federal Court in the Federal Action, were already produced during the Federal Action and those documents are in plaintiff's possession.

By Order dated February 27, 2019, United States District Court Judge Pamela K. Chen granted defendants' summary judgment motions, with prejudice, with regard to all Federal Claims against and declined to exercise supplemental jurisdiction over the state law claims. Thereafter, plaintiff filed this action and defendants moved for summary judgment in this action. By Order dated August 19, 2021, this Court granted in part and denied in part defendants' respective motions for summary judgment, dismissing the claim for negligent hiring, training and supervision against the County. The only remaining claim against the County is for vicarious liability.

This discovery dispute involves plaintiff's attempt to obtain supplemental discovery responses following the repeal of Civil Rights Law §50-a ("§50-a") from the County. Plaintiff seeks to obtain all IAU's regarding the Officers and all documents in the Officers' personnel records that go to honesty, credibility and adherence to or violation of NCPD policies and regulations.

Plaintiff alleges that while the County has provided responses and an updated privilege log, the County withheld several IAU's and documents from the Officers' personnel records, on the grounds that the repeal of §50-a does not permit the disclosure of past disciplinary records, unsubstantiated complaints, or documents from personnel files, among other objections and assertions of privilege. Plaintiff asserts that the requested items are relevant regardless of whether the allegation is dissimilar to the conduct alleged in the lawsuit.

Plaintiff also seeks any documents in the personnel files that go to honesty, credibility, and adherence to NCPD policies. Plaintiff argues that the repeal of §50-a applies retroactively and the County is required to supplement its discovery responses accordingly. Plaintiff further argues that the repeal of §50-a requires disclosure even of unsubstantiated complaints and allegations against the Officers and all officer personnel records, not only "law enforcement disciplinary records".

The information that is the subject of Plaintiff's motion which was withheld by the County are listed below in identified IAU's as follows:

- IAU 24-2000 - McCarthy - Unfounded - Privilege Log dated November 9, 2021.

- IAU 25-2004 - Mastropierro - Undetermined - Privilege Log dated November 9, 2021.
- IAU 67-99 - Mastropierro - Unfounded- Privilege Log dated November 9, 2021.
- IAU-37-00 - McCarthy - Unfounded/Undetermined - Privilege Log dated November 9, 2021.
- IAU 111-2001- Mastropierro - Unfounded, Privilege Log dated November 9, 2021.
- IAU 12-2015 - Mastropierro - Exonerated/Unfounded - Privilege Log dated November 2, 2021.
- Personnel File Mastropierro, Privilege Log dated November 9, 2021; Privilege Log dated August 1, 2013.
- Personnel File McCarthy, Privilege Log dated November 9, 2021; Privilege Log dated August 1, 2013.

The personnel records at issue are Bates stamped 1020, 1035-1038, 1039-1041, 1042-1043, 1044, 1242-1267, 1268-1301, 1302-1303, 1304-1322, 1323, 1324-1325, 1326-1327, 1328-1381, 1382, 1393-1395, 1400, 1401, 1405, 1407, 1415, 1420, 1424-1425, 1426, 1427, 1430, 1431, 1433, 1434-1435, 1436, 1437-1438, 1439, 1441, 1459-1463, 1483, 1487, 1494-1496, 1497, 1498-1514, 1515-1519, 1520, 1521-1522, 1523-1543, 1545-1572, 1576-1627, 1698-1718, and 1720-1726. Privilege Log dated August 1, 2013.

The County states that the demanded information can be categorized as follows: 1) IAU's with a determination of unfounded or exonerated; 2) IAU's with a determination of undetermined; 3) Personnel files containing employment applications, medical records, and highly personal and confidential information; and 4) Information regarding prior lawsuits or notices of claim.

The County argues that the requested documents are entirely irrelevant to the remaining claims in this action - negligence/wrongful death and respondeat superior. The County argues further that since the claim against the County for negligent hiring, supervision, and training was dismissed, the personnel records are not relevant to the present action, citing *Parkinson v. FedEx Corp.*, 184 AD3d 433 [1st Dept 2020]. The County argues that, in the event this Court deems that that the documents requested are relevant, they are nevertheless non-discoverable despite the repeal of §50-a.

It is further argued by the County that the discovery demands are overbroad and burdensome, and that it is incumbent on the party seeking the discovery to demonstrate that they are relevant. The County also argues that the plaintiff's demands are untimely as discovery is complete and the plaintiff offers no explanation for the delay in their demand. The County asserts that the legislation repealing §50-a passed in the summer of 2020 and the plaintiff waited until August of 2021 to serve supplemental discovery demands and offers no explanation for the delay. The County states that in the Federal Action, discovery spanned nine years and included nineteen depositions and 1,985 pages of documents that were produced by the defendants. They further assert that the privilege log was served in the Federal Action in August of 2013.

The County further argues that the IAU's withheld are irrelevant and thus non-discoverable. The basis for their arguments is that §50-a had ensured that any personnel records used to evaluate the performance of police officers could not be released by the law enforcement agency unless such release was authorized by the relevant officer or required by court order. The County contends that the Legislature in repealing the law did not intend to make the repeal retroactive.

The County argues that an IAU with findings of unfounded, exonerated or undetermined should not be disclosed due to privacy reasons, citing, *New York C.I. Union v. City of Syracuse*, 72 Misc 3d 458 [Sup Ct, Onondoga County 2021].

As to information regarding prior lawsuits and notice of claims, the County states that such information does not exist for the Officers, which are both retired, and that the County does not and did not maintain a list of lawsuits and notices of claim for them.

The County states that, as it does not want to waive privilege or confidentiality by revealing too much information contained within the withheld IAU's in its motion papers, it would consent to the Court's in camera inspection of the documents to determine whether they are relevant to the subject action. Lastly, the County asserts that in the event the Court orders disclosure, the documents must be redacted prior to disclosure pursuant to Public Officers Law §§86-89.

Defendant Mastropiero argues that plaintiff's motion seeks disclosure of IAU's pertaining to allegations against him that were "undetermined" and "unsubstantiated" as well as his personnel files, which are not relevant whatsoever to this matter and would affect his right of privacy. Defendant McCarthy states that the records sought relating to him are for the most part related to personal injuries he suffered for which he received Workers' Compensation benefits and relate to his disability retirement. He further states that the other records sought include part of an irrelevant IAU file, personnel data, mortgage documents, payroll status, Departmental Recognition, attendance records and medical records and therefore they are irrelevant and affect his right to privacy.

As to defendants' claim that the additional request for discovery is untimely and should not be considered, the Court disagrees. The Supplemental Request for Production of Documents in this action was served on August 31, 2021. This case was certified for trial on November 2, 2021, over objection of the defendants Mastropiero and the County due to the discovery dispute at issue herein. The parties entered into a briefing schedule regarding this application. As the discovery request was made before the case was certified for trial, the Court deems it timely.

The Court next turns to the merits of the parties' motions. The longstanding practice of federal courts has been to "limit discovery of a defendant's disciplinary history to complaints, whether substantiated or not, about conduct similar to the conduct alleged in the complaint." (*Gibbs v. City of New York*, 2008 WL 314358 [EDNY 2008]). §50-a did not apply in federal cases, however, they serve as a guide in this uncharted analysis.

§50-a was repealed by the New York State Legislature (the "Legislature") in an effort to promote transparency in the police department and address issues which had come to light through

a series of cases that were in the press. Repealing §50-a would provide access to the public of all records. It is evident to the Court that the intent of the Legislature with regard to the repeal of §50-a together with changes made to the Public Officers Law, while promoting transparency the Legislature also ensured that private information would still be protected.

This is a civil action for personal injuries wherein CPLR § 3101 applies. The standard for disclosure in civil actions is different than that applicable in criminal cases cited by plaintiff. Criminal cases require the disclosure of all discovery including records once protected under §50-a. CPLR §3101[a] requires “full disclosure of all matter material and necessary the prosecution or defense of an action.” It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in disclosure of relevant evidence. The Court must analyze the evidence sought and whether the records that are being requested are relevant in this personal injury case. In order to determine the remaining issues, the Court must determine whether the documents are relevant.

The issues involved in this case include whether the actions of the Officers were the proximate cause of the accident, whether the Officers’ actions were in violation of NCPD’s pursuit policy, whether the Officers were reckless in pursuing a motorcycle in an unmarked SUV and whether the vehicle was being operated as an emergency vehicle in the course of an emergency operation within the meaning of Vehicle and Traffic Law §§114-b and 1104. Therefore, any records pertaining to those issues would be deemed relevant. Officer McCarthy was not the driver of the vehicle. However, his summary judgment motion was denied as issues of fact were found as to whether he could be liable for failing to activate the emergency lights. The Court found issues of fact requiring a trial on these matters in this case.

As to the Officers’ personnel records, this Court follows the holding of *Zhang v. City of New York*, 198 AD3d 504 [1st Dept 2021], which involved a civil case, and found that the personnel files are not discoverable, as the cause of action for negligent hiring had been dismissed.

With regard to the IAU files, the Court must examine whatever limited information is provided in determining their relevance. Courts have taken different approaches on whether records that are unsubstantiated, unfounded, exonerated or dismissed should be disclosed. In *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093, 2020 NY Slip Op 34346[U] [Sup Ct, Schenectady County 2020], the Supreme Court found that all documents should be disclosed regardless of the category. In contrast, *New York Civ. Liberties Union v City of Syracuse*, 72 Misc 3d 458, 2021 NY Slip Op 21128 [Sup Ct., Onondoga County, 2021], held that Courts are prohibited from releasing unsubstantiated complaints pursuant to Public Officer Law §87[2] as an unwarranted invasion of privacy.

The right to privacy is juxtaposed with the intent of the repeal of §50-a. However, it is evident that the amendment to Public Officer Law §89 was intended to protect the right to privacy and sensitive information. Although on its face this case is a civil personal injury matter, the allegations involved include a wrongful police chase that resulted in death. This Court holds that most misconduct descriptions are potentially relevant either because of the similarity of the accusations to the plaintiff’s allegations or because they may influence the assessment of the

credibility of the officers. Plaintiff is entitled to complaints that are similar in nature to the allegations in the complaint, including any cases involving accidents, a police chase, unnecessary force or failure to follow NCPD procedure or protocol.

This Court finds that the defendants' arguments that the application of §50-a's repeal is not retroactive is misplaced. "Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated [.] However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *In re Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122 [2001]. Here, the repeal of §50-a is explicitly remedial because the legislature wanted to increase transparency of police misconduct. Furthermore, this Court notes that the Legislature did not enact a new law, it repealed an existing one wherein the intent was to provide access to the public of records, including records in existence as of the time of the repeal.

Furthermore, this Court is not inclined to revisit or change the requests or findings for the discovery made in the Federal Action.

The parties each refer to the Magistrate Judge's Order (in the Federal Action) dated January 28, 2013, which pertained to the discovery at issue. However, a copy of the Magistrate Judge's Order has not been provided. The parties each state that the Order directed that "the Defendants shall produce only those records relating to complaints of similar acts to those alleged in the complaint and of dishonesty." Defendant argues that the sustained IAU's and the IAU's pertaining similar issues and/or dishonesty, as defined by the Federal Court in the Federal Action, have been produced. It is not clear to this Court whether an in-camera review was made by the Federal Court in the Federal Action of the IAU files sought in this motion.

In light of the foregoing, this Court deems that that most appropriate course of action is for the Court to conduct an in-camera review of the IAU's which have been withheld in order to determine their relevancy. The Court will thereafter order production of any records deemed relevant, subject to any appropriate redactions.

Accordingly, plaintiff's motion is **GRANTED** in part and **DENIED** in part. The motion is granted to the extent that the County is directed to, within ten (10) days of the date of entry of this Order, submit to the Court for in camera inspection all Internal Affairs Unit files and complaints regarding the Officers, with a separate list of requested redactions in the event the Court orders production of any of the records. The plaintiff's request for personnel records is **DENIED**.

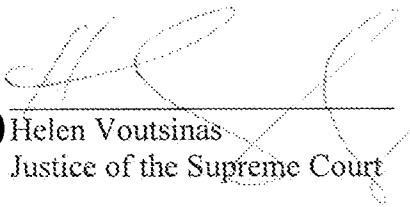
Defendant County of Nassau's cross motion for a protective order is **GRANTED** in part and **DENIED** in part. The motion is **GRANTED** as to the Officer's personnel records. As to the remaining documents requested, the Court shall conduct an in-camera review as set forth above.

After the in-camera review, the Court shall issue a further Order.

Any other relief sought herein but not specifically ruled upon is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: March 23, 2022
Mineola, New York



Helen Voutsinas
Justice of the Supreme Court

ENTERED
Apr 18 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- GIP
- Denied
- Other

Check if appropriate:

- Schedule Appearance
- Settle Order
- Fiduciary Appointment
- Submit Order