

Muller v City of New York

2023 NY Slip Op 31881(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 150467/2018

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 **05RCP**

Justice

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INDEX NO. 150467/2018

IAN MULLER, MELISSA MULLER,
Plaintiffs,

MOTION DATE 05/04/2021

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
HOMELESS SERVICES, THE NEW YORK CITY HUMAN
RESOURCES ADMINISTRATION, HARLEM UNITED
COMMUNITY AIDS CENTER INC., AGUILA INC, BAILEY
HOUSE INC., SECURITAS SERVICES INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 121, 122, 123, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 145

were read on this motion to

STRIKE/COMPEL

Plaintiffs’ complaint alleges that on May 29, 2017, plaintiff Ian Muller, a resident at the veteran’s shelter located at 330 West 95th Street, New York, New York, and his visiting sister, plaintiff Melissa Muller, were assaulted and stabbed by another resident of the veteran shelter, non-party Wali Abdul Rasheed (NYSCEF Doc. 63 [Compl.]). As relevant here, plaintiffs’ complaint asserts claims against defendants the City of New York, the New York City Department of Homeless Services, and the New York City Human Resources Development (collectively, the “City”), Securitas Services Inc. (“Securitas”) and Harlem United Community AIDS Center Inc. (“Harlem United”) based upon their allegedly negligent ownership, operation, management, maintenance, supervision, inspection and control of the shelter, specifically in permitting violent individuals, including Rasheed, to reside there while failing to provide adequate security (NYSCEF Doc. No. 1 [Compl. at ¶149]).

On December 29, 2020, plaintiffs served a Notice to Produce on the City (NYSCEF Doc. No. 110), to which the City has not responded. On March 5, 2021, plaintiffs served Securitas and Harlem United with a First Post-EBT Demand for Discovery and Inspection (the “Demand”). Although Securitas and Harlem United responded to the Demand (See NYSCEF Doc. Nos. 116, 121, and 122), plaintiffs contend that Securitas did not sufficiently respond to demands 4, 6, 7, 11 and 12¹, while Harlem United’s response to demands 1-13, 15-17, and 20 was inadequate. In addition, plaintiffs assert that the City has failed to respond to their First Post-EBT demand.

Plaintiffs now move for an order, pursuant to CPLR §3126: (i) striking the City’s answer based upon its failure to respond to plaintiffs’ demands; and (ii) striking Harlem United and Securitas’ answers based upon their failure to provide complete responses to the Demand. Alternatively, plaintiffs move for an order, pursuant to §3124: (i) compelling these defendants to respond to plaintiffs’ Demand; (ii) compelling Harlem United and Securitas to produce additional witnesses for examinations before trial (“EBT”); and (iii) compelling the City to produce a witness for an EBT.

Harlem United and Securitas oppose plaintiffs’ motion.

DISCUSSION

Plaintiffs’ Motion to Strike

That branch of plaintiffs’ motion to strike defendants’ answers is denied. While the Court excuses plaintiffs’ counsel’s lack of good faith efforts to procure the discovery demanded as “any effort to resolve the present dispute non-judicially would have been futile” under the circumstances (Baulieu v Ardsley Assoc. L.P., 84 AD3d 666, 666 [1st Dept 2011] [internal citations and

¹ Plaintiffs do not identify which of Securitas’s responses it believes are inadequate but instead seeks the production of incident reports and logbooks in Securitas’s possession. As this material is the subject of requests 4, 6, 7, and 11, the Court views that branch of plaintiffs’ motion as seeking to compel responses to those document requests.

quotations omitted]), the Court does not find, on the record before it, that any of these defendants engaged in willful or contumacious conduct such that the “imposition of punitive sanctions” is appropriate (See Masotto v City of New York, 38 Misc 3d 1226(A) [Sup Ct, Kings County 2013]) particularly in light of the fact that Securitas and Harlem United have responded to plaintiffs’ First Post-EBT Demand. Finally, while the City has yet to produce the discovery at issue, the Court declines to strike the City’s answer, as none of the prior court orders concerning discovery have put the City on notice that such a sanction was imminent in the event of its non-compliance (See Sidelev v Tsal-Tsalko, 52 AD3d 398, 398 [1st Dept 2008] [“[t]he court improvidently exercised its discretion under CPLR §3126 in denying defendants’ motion to vacate the striking of their answer, since they did not have prior notice . . . that such a sanction might be imminent”] [internal quotations omitted]). Accordingly, the Court now turns to that branch of plaintiffs’ motion to compel responses to their Demand from Securitas and Harlem United.

Plaintiffs’ Motion to Compel

“Disclosure in civil actions is generally governed by CPLR § 3101(a), which states that “all matter material and necessary in the prosecution or defense of an action” should be fully disclosed . . . Evidence is material if sought in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination. Notwithstanding this liberal construction, a party is not entitled to unlimited, uncontrolled and unfettered disclosure, and the trial courts have broad discretion to regulate discovery to prevent abuse” (Hunlock v New York City Tr. Auth., 2020 N.Y. Slip Op. 32111[U], 4 [Sup Ct, New York County 2020] [internal citations omitted], affd., 194 AD3d 522 [1st Dept 2021]).

Securitas

Plaintiffs' motion to compel a response to demand 4, seeking all incident reports documenting any incidents involving the tenants at the shelter from January 2016 through May 2017, including assaults, fights, drug use and possession, and weapon possession is granted in part, to the extent that Securitas is directed to produce all incident reports involving assaults, fights, and weapon possession at the shelter during this period (See Musano v City of New York, 182 AD3d 491, 491 [1st Dept 2020]; see also Stora v City of New York, 117 AD3d 557, 558 [1st Dept 2014] ["an issue of fact whether VOA was negligent in its duty to provide minimum security in the shelter is presented by ample evidence that residents had previously smuggled deadly weapons onto shelter premises, inter alia, by jumping over the perimeter fence, and that the weakness of the perimeter fence had been reported to VOA"]).

Plaintiffs' motion to compel a response to demand 6, which seeks documents, emails, incident reports, logbooks, and correspondence documenting requests for police intervention at the shelter between January 2016 and May 2017 is denied as overbroad.

Plaintiffs' motion to compel a response to demand 7, seeking emails, correspondence, incident reports, and logbooks entries documenting tenant complaints about other tenants at the shelter between January 2016 through May 2017 is granted in part. To wit, Harlem United is directed to produce all records relating to complaints of weapon possessions and violence at the shelter, as well as all complaints related to Rasheed (See Musano v City of New York, 182 AD3d 491, 492 [1st Dept 2020]).

Plaintiffs' motion to compel a response to demands 11 and 12, related to logbook entries for the shelter kept by Securitas, is denied as moot, as Securitas has produced its logbook in part

(See NYSCEF Doc. No. 122 [Supplemental Response at ¶12]), and represented it will produce the remainder.

Plaintiffs' motion to compel Securitas to produce an additional witness for a deposition is denied as Securitas maintains that the two employees present for the subject incident are no longer employed by Securitas (See NYSCEF Doc. No. 120 [Jamison Aff. In Opp. At ¶¶38, 47]).

Harlem United

Plaintiffs' motion to compel Harlem United to respond to demand 1, seeking "[a] copy of ... correspondence sent from the Human Resources Administration, the City of New York and/or the New York City Homeless Services to Harlem United Community AIDS Center, Inc., which lists Wali Abdul Rasheed as an eligible veteran for placement at the shelter" is granted (See Musano v City of New York, 182 AD3d 491, 491 [1st Dept 2020]).

Plaintiffs' motion to compel a response to demand 2, seeking all rules, regulations, and procedures regarding the screening process and backgrounds checks of potential candidates for placement at the veteran's shelter from January 2016 through May 2017 is denied. Harlem United's EBT witness testified that the City performed all screening and background checks for prospective residents at the veteran's shelter (NYSCEF Doc. No. 117 [Lawrence EBT at pp. 47-48]), and Harlem United asserted, in its response, that it is not aware of any materials responsive to this demand.

Plaintiffs' motion to compel a response to demand 3, seeking "[a] copy of the Intake Form and Program Expectation Form and complete file kept by Harlem United Community Aids Center for tenant Wali Abdul Rasheed" is held in abeyance for the reasons set forth in connection with Harlem United's cross motion for a protective order, addressed below.

Plaintiffs' motion to compel a response to demand 4, which seeks "[a] copy of all Incident Reports prepared by the defendants with respect to any incidents, including but not limited to, any assaults, fights, drug use and drug possession, gun, knife and weapon possession involving the tenants at the shelter ... from January 2016 through May 2017" is granted in part, and Harlem United is to produce any incident reports recording assaults, fights, and weapon possession at the shelter (See Stora v City of New York, 117 AD3d 557, 558 [1st Dept 2014]; see also Osorio v City of New York, 44 AD3d 553 [1st Dept 2007] ["[d]efendant made a prima facie case of entitlement to summary judgment by establishing that it had no notice of prior sexual assaults at the subject pool before the alleged sexual assaults were perpetrated upon infant plaintiffs, and that the assaults were not foreseeable"]).

Plaintiffs' motion to compel a response to demand 5, seeking "[c]opies of all emails and correspondence between all defendants which discuss any ... fights, assaults, drug use and drug possession, gun, knife and weapon possession which occurred at the shelter ... from January 2016 through May 2017" is granted in part and Harlem United is to produce all correspondence discussing assaults, fights, and weapon possession at the shelter during this period (Id.).

Plaintiffs' motion to compel a response to demand 6, seeking copies of all documents, emails, incident reports, logbooks, correspondence that document calls and requests by defendants to the New York City Police Department regarding the need for police intervention at the shelter between January 2016 and May 2017 is denied as overbroad.

Plaintiffs' motion to compel a response to demand 7, seeking documents, emails, correspondence, incident reports, and logbooks entries documenting tenant complaints about other tenants at the shelter from January 2016 through May 2017 is granted in part, to the extent that

Harlem United is directed to produce any complaints related to weapons and violence at the shelter as well as all complaints related to Rasheed.

Plaintiffs' motion to compel a response to demand 8, seeking a copy of the rules and regulations given to the shelter's residents detailing the procedure for reporting complaints about other tenants or staff members from January 2016 through May 2017 is granted.

Plaintiffs' motion to compel a response to demand 9, seeking the minutes of quarterly meetings held at the shelter between January 2016 through June 2017, which purportedly include discussions of, inter alia, security issues, criminal activity, tenant issues, and neighborhood complaints, is granted. However, plaintiffs' motion to compel a response to Demand 10, seeking the names and addresses of any individuals who attended these quarterly meetings, is denied as overbroad and unduly burdensome.

Plaintiffs' motion to compel a response to demands 11 and 12, seeking "[a] copy of all the logbook entries kept by the defendants which list all incidents, including but not limited to fights, assaults, drug use and drug possession, gun, knife and weapon possession and New York Police Department visits to the shelter ... from January 2016 through May 2017" and, additionally, the logbook entries for May 26, May 27, 2017, May 28, 2017 and May 29, 2017, is granted. However, to the extent Harlem United does not maintain any such logbook (beyond the logbook maintained by Securitas), its response shall so state.

Plaintiffs' motion to compel a response to demand 13, seeking the production of overnight passes for visiting guests of the veteran's shelter for May 26, 2017 through May 29, 2017 is denied as moot, as Harlem United has represented it is searching for such material and will produce same "insofar as they pertain to plaintiffs."

Plaintiffs' motion to compel a response to demand 14, seeking "documents, emails, correspondence, records in the possession of Community Board 7 with respect to fights, assaults, drug use and drug possession, gun, knife and weapon possession, violent incidents, police activity, security issues and tenant issues at the shelter ... from January 2016 through June 2017" is denied, as improperly directed to Harlem United.

Plaintiffs' motion to compel a response to demand 15, seeking "[a] copy of documents, emails, correspondence, records of all complaints received by the defendants from entities or individuals in the surrounding community of the shelter ... from January 2016 through June 2017" is denied as overbroad.

Plaintiffs' motion to compel a response to demand 16, seeking "[a] copy of documents, emails, correspondence, records in the possession of the defendants which detail any and all complaints received by the defendants from an entity known as 'Neighborhood in the Nineties' regarding the building and the tenants at the shelter ... from January 2016 through May 2017" is also denied as overbroad.

Plaintiffs' motion to compel a response to demand 17, seeking records of all complaints of fights, assaults, drug use and possession, weapon possession, violent incidents, police activity, and security and tenant issues at the shelter made by the local "Community Advisory Board" between January 2016 and May 2017 is granted to the limited extent that Harlem United shall produce all complaints related to fights, assaults, and weapon possession by shelter residents it received from this Community Advisory Board.

Plaintiffs' motion to compel a response to demand 20, seeking the complete name and address of "Omar," a maintenance worker at the veteran's shelter who purportedly witnessed the

subject incident, is denied as moot. Harlem United's response indicated that they are already searching for such information.

That branch of plaintiffs' motion to compel Harlem United to produce Laura Grund, a Harlem United administrator, is denied. Plaintiffs have not, at this juncture, made a "detailed showing of the necessity for taking additional depositions or the substantial likelihood that those sought to be deposed possess[] information necessary and material to the prosecution of the case" (Epperson v City of New York, 133 AD3d 522, 523 [1st Dept 2015]). Contrary to their argument, Jerome Lawrence's EBT testimony has not satisfied this standard.

The City

Plaintiffs' motion to compel the City to respond to their Demand is granted. In addition, plaintiffs' motion to compel the City to produce an additional witness for a deposition is granted in light of the Court's (Hon. Dakota D. Ramseur) previous orders directing this second deposition (See NYSCEF Doc. Nos. 113 [March 8, 2021 Order] and 124 [May 25, 2021 Order]).

Harlem United's Cross-Motion for a Protective Order

Harlem United's cross-motion for a protective order striking that portion of demand 3 in plaintiffs' First Post-EBT Demand, which seeks the production of Harlem United's "complete file" for Rasheed, is held in abeyance pending the parties' upcoming status conference. Harlem United argues that the disclosure of this file is barred by 42 USC §290dd-2. This statute mandates that records of substance abuse treatment for certain facilities that are "conducted, regulated, or directly or indirectly assisted by any department or agency of the United States, are not subject to disclosure unless the patient has given prior written consent or authorized by order of a court of competent jurisdiction for good cause shown" (L.T. v Teva Pharm. USA, Inc., 71 AD3d 1400, 1400-01 [4th Dept 2010] [internal citations omitted]). While it is undisputed that Harlem United is a not-for-

profit organization which receives federal assistance, the Court cannot, on the record before it, determine whether this statute applies. Specifically, the Court lacks information as to the services and treatment that Rasheed received at Harlem United to determine if his file, in whole or in part, qualifies as a record of substance abuse treatment under the statute (See e.g., Doe v James M. Inman Const. Corp., 281 AD2d 387, 387-88 [2d Dept 2001] [“even though the plaintiff’s post-accident medical records from the Medical Center and Gaylord Hospital refer to his history of intravenous drug use, the records of those facilities do not fall within the Federal confidentiality mandate of 42 USC §290dd–2(a)” because “the only treatment which the plaintiff received at the subject facilities related to the injuries he sustained in the accident”]). This determination must be made prior to any relief as to the motions to compel and preclude Rasheed’s “complete file”; if the statute does apply, no good cause determination can be made without notice to Rasheed (See 42 CFR §2.64[b]). Questions also remain as to whether the disclosure of this file would implicate the production of confidential HIV-related information and, if so, whether a compelling need for this disclosure exists (See PHL §2782[1][k]; PHL §2785) or whether appropriate redactions can obviate this issue.

Accordingly, it is

ORDERED that plaintiffs’ motion to strike is denied; and it is further

ORDERED that plaintiffs’ motion to compel is granted, in part; and it is further

ORDERED that Securitas Services, Inc. shall produce material responsive to Demands 4, 6, 7, and 11 to the extent set forth above within sixty days from the date of this decision and order or produce an affidavit pursuant to Jackson v New York, 185 AD2d 768 (1st Dept 1992) attesting to the good faith efforts undertaken to procure the demanded material and that the material demanded is not in their possession; and it is further

ORDERED that Harlem United Community AIDS Center, Inc. shall produce material responsive to Demands 1, 4, 5, 7, 8, 9, 12, and 17 to the extent set forth above within sixty days from the date of this decision and order or produce an affidavit pursuant to Jackson v New York, 185 AD2d 768 (1st Dept 1992) attesting to the good faith efforts undertaken to procure the demanded material and that the material demanded is not in their possession; and it is further

ORDERED that the City of New York, the New York City Department of Homeless Services, and the New York City Human Resources Development shall respond to plaintiffs' December 29, 2020 Notice to Produce (NYSCEF Doc. No. 110) and March 5, 2021 First Post-EBT Demand (NYSCEF Doc. No. 114) within sixty days from the date of this decision and order; and it is further

ORDERED that, within thirty days from the date of this decision and order, the City of New York, shall confer with plaintiffs to set a date certain for the examination trial of the City's additional witness; and it is further

ORDERED that, within the examination before trial of the City of New York's additional witness shall be held within ninety days from the date of this conference; and it is further

ORDERED that, should the City of New York fail to comply with the foregoing, plaintiff may file an affirmation, upon due notice, detailing the City's failure to appear and renewing this motion, at which time the City of New York's Answer shall be dismissed; and it is further

ORDERED that Harlem United Community AIDS Center, Inc. cross-motion for a protective order as to Harlem United's "complete file" for Wali Abdul Rasheed is held in abeyance pending the parties' status conference on June 6, 2023; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon all parties, with notice of entry, within fifteen days of the date of this decision and order; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “efiling” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of this Court.

6/5/2023
DATE


HON. JUDY H. KIM

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE