SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. HASA A. KINGO **PART** 05M

Justice

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AMY WEISSBROD,

Plaintiff,

- v -

CITY OF NEW YORK, NELLIE MALAVE, P.O. ROSS, SERGEANT SHIMSCRY

Defendants.

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INDEX NO. 161111/2014

MOTION DATE 09/18/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, Plaintiff Amy Weissbrod ("Plaintiff") moves *pro se* to amend the complaint, compel discovery, and for sanctions. Defendants the City of New York (the "City"), New York City Police Department ("NYPD") Detective Nellie Malave (Shield No. 6977), Sgt. David Shimshi s/h/a Sergeant Shimshi, Police Officer Ross, and NYC Bellevue Medical Center (together, "Defendants") oppose and cross-move for a protective order. Upon review the above-referenced documents, the motion is denied and the cross-motion is granted.

BACKGROUND

In this action arising from an encounter between Plaintiff and the NYPD on August 9, 2013 through August 10, 2013, Plaintiff asserts state and federal causes of action for false arrest, deprivation of constitutional rights, excessive force and malicious prosecution. On November 7, 2014, Plaintiff commenced this action by filing a summons with notice. A complaint was thereafter filed on December 15, 2014. On June 29, 2018, Plaintiff filed a motion, by order to show cause, to amend her complaint which was denied with leave to renew (NYSCEF Doc Nos. 5-6, 20). Plaintiff moved to amend a second time by motion filed April 19, 2019, which was later withdrawn (NYSCEF Doc No. 25-26, 47). Plaintiff filed a third motion to amend on September 30, 2019 (NYSCEF Doc Nos. 53-61). The motion was granted by order and decision dated January 28, 2020, and Plaintiff was permitted to file an amended complaint with eleven new causes of action. The amended complaint interposes causes of action for (1) False Arrest and False Imprisonment under New York State law; (2) False Arrest and False Imprisonment under 42 USC § 1983; (3) Assault and Battery under New York State Law; (4) Excessive Force Under 42 USC § 1983; (5) Malicious Prosecution under New York State Law; (6) Malicious Prosecution Under 42 USC § 1983; (7) Malicious Abuse of Process under New York State Law; (8) Malicious Abuse of Process under 42 USC § 1983; (9) Failure to Intervene under New York State Law; (10) Failure to

Intervene under 42 USC § 1983; and (11) Negligent Hiring and Supervision under New York State Law.

Plaintiff now moves for leave to file a second amended complaint "based on additional permanent injuries confirmed by doctors," and for sanctions for Defendants' alleged failure to respond to Plaintiff's discovery demands, answer interrogatories, produce documents, and prevent spoliation and destruction of police records. Defendants oppose and cross-move pursuant to CPLR §3130 (2) for a protective order with respect to the interrogatories served by Plaintiff. The motion was scheduled for oral argument on February 27, 2027. Notice of the appearance was sent via the court's eTrack system. Plaintiff did not appear, and the motion was marked fully submitted without oral argument. Plaintiff contacted the court by email later the same day and requested an adjournment of the oral argument, which was not granted. Plaintiff then filed additional documents ostensibly intended as a motion to compel Defendants to withdraw their opposition and cross-motion (NYSCEF Doc 141, "Notice of Safe Haven Motion That Defendants and Their Attorneys Withdraw Their Cross-Motion and Exhibits Seeking to Dismiss Plaintiff's Action and Amended Complaint or Risk Frivolous Litigation Sanctions [NYCRR 130-1.1] and Judiciary Law § 487 Sanctions").

DISCUSSION

A. Amendment

Pursuant to CPLR Rule 3025, a party may amend their pleading "at any time by leave of court or by stipulation of all parties" (CPLR § 3025 [b]). "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (*id.*). The proposed amended complaint must satisfy the requirements set forth in CPLR Rule 2014, which provide that the "pleading shall consist of plain and concise statements in consecutively numbered paragraphs," which contain, "as far as practicable, a single allegation." "It is well settled that a request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*see LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019]). The proposed amended complaint offered here fails to satisfy requirements set forth in CPLR Rule 3025 and 2014 because it does not clearly show the changes or additions to be made to the pleading and does not consist of plain and concise statements. Moreover, the proposed amended complaint seeks to add *Monell* claims, which were previously disallowed and stricken by the court in the January 28, 2020 decision and order because the proposed amended complaint contained "no factual allegations, only a series of conclusions based upon information and belief" (NYSCEF Doc. No. 76, 127 at 4). The proposed amended complaint similarly fails to assert factual allegations regarding this cause of action. If Plaintiff seeks to assert additional injuries, she may do so by way of a Supplemental Bill of Particulars. Therefore, the proposed amendment is palpably improper or insufficient and the motion to file a second amended complaint is denied.

B. Discovery

Pursuant to CPLR § 3101(a), "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial" (*Roman Catholic Church of Good Shepherd v Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). The test is one of usefulness and reason (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). The trial court is invested with broad discretion to supervise discovery and to determine what is material and necessary (*id.*; *Madia v CBS Corp.*, 146 AD3d 424, 425 [1st Dept 2017]). Ultimately, it is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of admissible information bearing on the claims (*Gomez vState of New York*, 106 AD3d 870, 872 [2d Dept 2013]).

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response" (CPLR § 3124). On a motion brought pursuant to CPLR § 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412 [U], *5 [Sup Ct, NY County 2015]). "[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure" (*Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD2d 451, 452 [1st Dept 2012]). Courts have found that a party is not required to respond to a discovery demand that is "palpably improper . . . [in that it is seeking] irrelevant information, or [is] overbroad and burdensome" (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 843 [2d Dept 2013]).

If a party refuses to obey an order for disclosure or willfully fail to disclose information which the court finds ought to have been disclosed, the court is authorized to issue appropriate sanctions upon motion of a party or the court's own motion (CPLR § 3126; *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A party's failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). A party may "tender a reasonable excuse to overcome [a] showing of willfulness" (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), but "failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the answer" (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011]). "The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assoc, LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

Plaintiff moves to compel responses to her outstanding interrogatories, document demands, and requests for depositions. Defendants cross-move for a protective order pursuant to CPLR § 3103 from Plaintiff's interrogatories and demands served on or about August 2023. The August 2023 demand consists of forty (40) interrogatories and twenty-four (24) document demands. Turning first to Defendants' motion for a protective order pertaining to the interrogatories served by Plaintiff, the court may at any time, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . designed to prevent unreasonable annoyance,

expense, embarrassment, disadvantage, or other prejudice to any person or the courts (CPLR § 3103 [a]). With respect to Plaintiff's interrogatories, CPLR § 3130 (1) directs that "a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court . . . in an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence." Plaintiff has opted to conduct depositions in this action. Therefore, she is not permitted to also serve interrogatories. As such, the interrogatories are stricken and Defendants' cross-motion for a protective order is granted and the interrogatories and to the first document demand, which seeks disclosure of "[c]opies of any and all documents referred to in Plaintiff's responses to interrogatories," are stricken (NYSCEF Doc No. 134).

Although she does not point to any particular document demands, Plaintiff also seeks broadly to compel production of the following from Defendants, to which they object: (1) Recordings, Body Camera and Audio Recordings, (2) Personnel Files, Disciplinary Records, Complaints of officers connected to the case, (3) the identity of all Police Officers and individuals arrested at the 20th & 7th Precincts and Central Booking, and (4) Bellevue Hospital Center's Records in connection with her treatment there on August 9, 2013 and August 10, 2013. Section 3101 of the comp requires that generally, there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" by all parties or the officer, director, member, agent or employee of a party" (CPLR § 3101 [a][1]). With respect to video or audio recordings, CPLR § 3101 (i) provides the following:

> In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision [a] of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

Defendants object to the demands for body camera footage, and audio recordings on the grounds that the demand is "speculative, conclusory, and unduly burdensome," and because "Plaintiff has not made a detailed showing of the existence of such discovery." In the absence of disclosure, knowledge and information regarding the existence of relevant items is entirely within possession of Defendants. Moreover, Defendants cites to no authority that supports the imposition of such a duty upon Plaintiff, in contravention of disclosure directed by CPLR § 3101 (i), nor do Defendants invoke the exception pursuant to Public Officers Law § 87. Moreover, the Court of Appeals has specifically held that a plaintiff need not submit to a deposition before disclosure of relevant video recordings (*Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 389-90 [2003]). As such, any relevant recordings, body camera footage, or audio recordings in the possession of Defendants are discoverable. Relevant materials, in this instance, include those which depict Plaintiff during her interaction with members of the NYPD on August 9, 2013 and August 10, 2013.

Plaintiff also seeks broad disclosure of police personnel files and disciplinary records of the named Defendants and several other police officers, including, *inter alia*, the "full name and alias, present address, telephone number, prior addresses, date of birth, Social Security Number, pension number and pension officer." As an initial matter, Plaintiff's demand for unredacted personnel files including the names, addresses, social security numbers, and other private information of the individually named officers, the motion is denied because this information is not discoverable and would constitute an unwarranted invasion of personal privacy under Public Officers Law § 89.

Defendants also contend that redacted personnel records are undiscoverable because the City does not dispute that the officers were acting within the scope of their employment. "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention" (*Karoon v New York City Transit Auth.*, 241 AD2d 323, 324 [1st Dept 1997]). The sole exception where the plaintiff seeks punitive damages is not relevant here because punitive damages are not recoverable against municipalities, unless specifically provided for by statute (*see Krohn v New York City Police Dept.*, 2 NY3d 329, 335 [2004], *citing Sharapata v. Town of Islip*, 56 NY2d 332, 336 [1981]). Employee personnel files are not typically discoverable in the absence of a cause of action for negligent hiring because they are unlikely to contain relevant and material information (*Parkinson v FedEx Corp.*, 184 AD3d 433, 434[1st Dept 2020]). Where, as here, the City concedes that the officers were acting within the scope of their employment, the personnel files are not discoverable in connection with the cause of action for negligent hiring and retention.

Nevertheless, Internal Affairs Bureau ("IAB") records, records of the Civilian Complaint Review Board, and disciplinary records and complaints that contain information relevant to Plaintiff's claims are discoverable (*Chavez v City of New York*, 33 Misc 3d 1214(A), *4 [Sup Ct, NY County 2011], *affd*, 99 AD3d 614, 615 [1st Dept 2012]; (*Rodriguez v The City of New York*, 2016 NY Slip Op 30484 [U] [Sup Ct, NY County 2016]). To the extent that these documents reference prior complaints or disciplinary actions taken against the officers, they are discoverable as well (*id.* at 5). These records are discoverable even if the officers were acting within the scope of their employment (*Chavez v City of New York*, 99 AD3d 614, 615 [1st Dept 2012]). Therefore, the records shall be disclosed, *in camera*, within 30 days of entry of this order.

Plaintiff's request for the identity of all police officers and individuals arrested at the 20th and 7th Precincts and central booking on the dates of the incident is denied as improper, overbroad and is not reasonably calculated to lead to admissible evidence. On the contrary, such disclosure would likely reveal personal and confidential information regarding officers and private citizens who have no connection to this proceeding. Therefore, the request is denied. Plaintiff's demand for the City to produce Plaintiff's medical records from Bellevue Hospital Center is also denied. Plaintiff may obtain the records by submitting the appropriate authorization form and making a request directly to Bellevue Hospital Center.

Plaintiff's motion for sanctions is also denied. The City demonstrated that it provided discovery responses, produced NYPD records, deposed Plaintiff, and is prepared to produce witnesses for deposition by Plaintiff. Plaintiff has made no showing that Defendants engaged in

willful and contumacious behavior or acted in bed faith (*Parkinson v FedEx Corp.*, 184 AD3d 433, 433 [1st Dept 2020]), and makes no factual allegations to suggest that any defendant engaged in spoliation or destruction of police or other records. Therefore, the request for sanctions is denied.

Accordingly, it is

ORDERED that Plaintiff's motion to compel discovery is granted in part and to the extent set forth herein; and it is further

ORDERED that Defendants shall forthwith produce to Plaintiff copies of any video or audio recordings in possession of Defendants which depict Plaintiff during her interaction with members of the NYPD on August 9, 2013 and August 10, 2013; and it is further

ORDERED that Defendants shall provide to the court for *in camera* review, within 30 days of this order, copies of all Internal Affairs Bureau ("IAB") records, records of the Civilian Complaint Review Board, and disciplinary records and complaints made against the named defendants Detective Malave, Sergeant Shimshi, and Police Officer Ross; and it is further

ORDERED that Defendants' time to provide such records may be extended upon good cause shown; and it is further

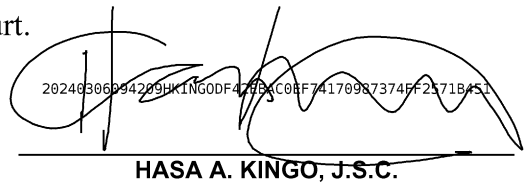
ORDERED that the balance of Plaintiff's motion to compel discovery is denied; and it is further

ORDERED that Defendants' cross-motion for a protective order is granted and Plaintiff's undated interrogatories and to the first document demand served on or about August 2023 are hereby stricken, except as otherwise set forth herein; and it is further

ORDERED that a compliance conference of this matter shall be held on April 16, 2023 at 2:00 p.m. in the Differentiated Case Management Part located in Room 103 of the courthouse located at 80 Centre Street, New York, New York; and it is further

ORDERED that Plaintiff's February 29, 2024, filing styled as a motion to compel Defendants to withdraw their opposition and cross-motion is denied as moot.

This constitutes the order and decision of the court.



3/5/2024
DATE

HASA A. KINGO, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER