

Minsky v Allstate Idem. Co.

2012 NY Slip Op 30416(U)

February 6, 2012

Supreme Court, Nassau County

Docket Number: 007302-07

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

ANDREA MINSKY,

Decision and Order

Plaintiff,

**MOTION SUBMITTED:
December 1, 2011**

-against-

**MOTION SEQUENCE:04
INDEX NO. 007302-07**

ALLSTATE INDEMNITY COMPANY,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Affirmation in Opposition	3
Affirmation in Reply	4

Introduction

In this action for breach of contract (and, apparently, for bad faith denial of an insurance claim), the plaintiff moves, pursuant to CPLR 2307, for issuance of a subpoena directing the New York City Police Department to produce: "Complaint # 2005-109-04664 and investigation by Internal Affairs or other such duly constituted investigatory body as investigated upon the complaint of Andrea Minsky regarding such complaint" (Exhibit "D" to Motion: Subpoena).

Background

In her complaint, the plaintiff alleges that on May 7, 2005, she was the owner of a homeowner/renter's insurance policy issued by defendant Allstate Insurance Company ("Allstate"); on that date, plaintiff claims that jewelry was stolen from her residence. Upon presenting her claim to Allstate for reimbursement, however, it was denied because of alleged "inconsistencies and misrepresentations".

According to the plaintiff's attorney, Allstate's denial was based on a police report issued in connection with the alleged burglary of her residence, which she asserts contained false information. Plaintiff's counsel notes that his client "indicated that she dated the [responding?] police officer, briefly, and then broke off the relationship before receiving the police report of her claim, and that the report was false."¹ The report indicates that the plaintiff reported the alleged burglary on May 7, 2005, two days after it occurred, that she made the report at the precinct, and that she reported drinking alcohol until 4:30 a.m. before the alleged burglary. The narrative of the report states the following:

At T/P/O C/V states items were in her home before she went to bed. After waking up, listed items were missing. Det. Matthews interviewed. C/V's statements were inconsistent when answering repeated questions. C/V stated she needed report for insurance claim. Compl's demeanor and responses to questions suggests she may be emotionally unstable. Compl't did however state that she had been drinking as late as 4:30 hrs the night before and that she is not sure where she placed her jewelry. C/V also stated that she waited several days to report this incident because she was searching her residence. Compl't does not want an investigation to be conducted.

Plaintiff's counsel states that after viewing the above report, plaintiff requested an investigation of the report itself (Affirmation in Support of Motion at p.1). Counsel states, somewhat confusingly, that "I was advised that the Detective involved has retired, has his pension, and there is nothing in the report which would cause any issue [of a confidential nature]. The police officer involved, who dated Plaintiff, has been promoted to Detective at Internal Affairs * * * If the conclusion is that no one knows how the report was written or who wrote the report, that would suffice for this case." Finally, plaintiff's counsel asserts that the information sought "is material and necessary for the prosecution of this case and to seek to overcome the defense of fraud" (Affirmation in Support of Motion at pp.2-3).

Allstate does not oppose the motion but mentions that Donald Hoehl, a detective with the

¹Plaintiff's counsel does not specifically identify the officer/detective plaintiff allegedly dated.

New York City Police Department, was deposed by the plaintiff. He testified that he responded to plaintiff's residence as a result of a theft report, that he did not prepare the police report complained of by the plaintiff, that he never engaged in a social relationship with the plaintiff and that Detective Matthews prepared the report. He also stated that he was unaware of an Internal Affairs investigation regarding his conduct.

Counsel for the New York City Police Department opposes the motion arguing that the Internal Affairs investigatory report requested is part of the officer's personnel file, and, is thus, confidential. Counsel asserts that the plaintiff failed to meet the burden necessary to obtain disclosure of the report, which, in any event, exonerated the officer—meaning that Internal Affairs determined the officer's conduct to be lawful and proper. Counsel adds that the plaintiff had initially made a complaint to the New York City Civilian Complaint Review Board, which then forwarded the information to the NYPD's Internal Affairs Unit. "It would follow that Plaintiff should obtain a copy of her initial complaint through CCRB" (Affirmation in Opposition at p.2).

The Court's Determination

Civil Rights Law §50-a requires that:

1. All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency * * * shall be considered confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer or peace officer within the department of corrections and community supervision except as may be mandated by lawful court order.
2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the

personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting.

In *Dunnigan v Waverly Police Dept.* (279 AD2d 833 [3d Dept 2001]), the court stated that:

“The legislative purpose [behind the statute] was to prevent disclosure of officers' personnel records except when a legitimate need for them has been demonstrated sufficiently to obtain a court order * * *”. Thus, the initial burden is on the party seeking the subject records to demonstrate “in good faith, ‘some factual predicate’ warranting the intrusion into the personnel records” *** “This threshold requirement is designed to eliminate fishing expeditions into police officers' personnel files for collateral materials to be used for impeachment purposes * * *”.

We agree with Supreme Court that [Officer] Derrig is a necessary party to this proceeding inasmuch as Civil Rights Law § 50-a(2) specifically provides that, in reviewing requests for disclosure of police personnel records, the court shall “give interested parties the opportunity to be heard” and Derrig stands to be inequitably affected by any judgment rendered in the proceeding (see, CPLR 1001[a]).

In any event, even if Derrig had been joined in this proceeding, petitioner has not satisfied his burden of establishing entitlement to disclosure of the requested records (internal citations omitted).

At bar, a review of the submitted papers indicates that Officer Hoehl was not served with the instant motion. The failure to serve the officer is fatal to the plaintiff's application (*Dunnigan v Waverly Police Department, supra*; *Crowe v Kelly*, 9 Misc3d 1111(A) [Supreme Court New

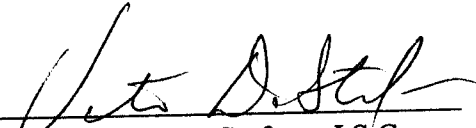
York County 2005]; *cf. Wong v State*, 19 Misc3d 1122(A) [Ct Claims 2008]).

In any event, even assuming that the officer had been served, the submissions by the plaintiff that can properly be considered by the court,² and which attempt to overcome the Civil Rights Law restrictions on disclosure of the Internal Affairs report, are conclusory and insufficient. Other than the vague allegation by counsel that the police report concerning the alleged burglary was false and that it resulted in Allstate's denial of plaintiff's claim, the initial papers contain no explanation as to why the Internal Affairs report—apparently resulting in an exoneration of the officer—is necessary for the prosecution of the plaintiff's claim.

Accordingly, it is hereby ordered that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 6, 2012


Hon. Vito M. DeStefano, J.S.C.

ENTERED
FEB 09 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

²The Reply Affirmation of Plaintiff's counsel contains allegations that are improperly raised for the first time therein, and which, therefore, cannot be considered by the court (*see Yiecheli v Glissen Chemical Co., Inc.*, 40 AD3d 988 [2d Dept 2007]). For example, the Reply Affirmation asserts that in the report concerning the alleged burglary "Detective Miller changed what Detective Hoehl had started to write" (Reply Affirmation at p.4). Moreover, the Reply Affirmation references a telephone call to the Internal Affairs Bureau by the plaintiff concerning her accusation of a neighbor for the burglary, her deposition testimony in regard to her accusation and contains additional complaint reports against the neighbor, none of which was discussed or contained in the initial moving papers.