

Calhoun v County of Suffolk

2012 NY Slip Op 33137(U)

December 28, 2012

Sup Ct, Suffolk County

Docket Number: 8577/2009

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

BRIAN CALHOUN as administrator of the
Estate of WILLIAM S. CALHOUN, deceased,

Plaintiff,

-against-

COUNTY OF SUFFOLK, COUNTY OF
NASSAU, RICHARD MAIR, ELRAC INC.
and CAROLYN JIMENEZ,

Defendants.

ORIG. RETURN DATE: MARCH 21, 2012
FINAL SUBMISSION DATE: APRIL 19, 2012
MTN. SEQ. #: 003 (002)
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR AN IN CAMERA INSPECTION

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Support 6; Reply Affirmation 7; it is,

ORDERED that this motion by plaintiff, BRIAN CALHOUN as administrator of the Estate of WILLIAM S. CALHOUN, deceased ("plaintiff"), for an Order:

(1) pursuant to Civil Rights Law § 50-a, granting plaintiff an in camera review by the Court of the Internal Affairs' file of defendant, COUNTY OF SUFFOLK ("County"), including, but not limited to, the Internal Affairs' report, all documents utilized for the preparation and drafting of said report, including, but not limited to, notes, letters, reports, interviews, pictures, videotapes, audiotapes, records, opinions, and conclusions of the County pertaining to the high-speed police chase that occurred on December 28, 2006, and that is the subject matter of this action, and thereafter, granting plaintiff disclosure of same;

(2) pursuant to Civil Rights Law § 50-a, granting plaintiff an in camera review by the Court of the investigation file of Suffolk County Police Captain Paul Ryan, including, but not limited to, his report, all documents utilized for the preparation and drafting of said report, including, but not limited to, notes, letters, reports, interviews, pictures, videotapes, audiotapes, records, opinions and conclusions of Suffolk County Police Captain Paul Ryan, pertaining to the high-speed police chase that occurred on December 28, 2006, and that is the subject matter of this action, and thereafter, granting plaintiff disclosure of same; and

(3) pursuant to CPLR 3106 (c), granting plaintiff leave to depose defendant, RICHARD MAIR ("Mair"), at Collins Correctional Facility, Coxsackie, New York, on a date and time negotiated with Collins Correctional Facility and the parties herein,

is hereby **GRANTED** as set forth hereinafter. The Court has received an affirmation in opposition to this application from the County, and an affirmation in support from Mair.

This action arises from high-speed police chase that occurred on December 28, 2006, when members of the Suffolk County Police Department pursued Mair after he fled the scene while being questioned by Police Officer Richard Tofano. Mair apparently lost control of his vehicle during the chase and crashed into plaintiff's home, thereby allegedly causing the death of plaintiff's decedent, WILLIAM S. CALHOUN, while he was on his living room couch.

Plaintiff has now filed the instant application for the relief described hereinabove, alleging that he served the County with a Notice for Discovery and Inspection dated July 25, 2011, seeking, among other things, the Internal Affairs investigation file of the subject incident, as well as the investigation file of Suffolk County Police Captain Paul Ryan. By letter response dated October 24, 2011, the County denied the aforementioned demands, arguing that the materials sought are confidential pursuant to Civil Rights Law § 50-a, and may only be disclosed by Court Order after an in camera review.

Initially, this Court is mindful that CPLR 3101 (a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). Moreover, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]), and "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]).

Further, Civil Rights Law § 50-a provides that the personnel records of police officers used to evaluate performance toward continued employment or promotion shall be considered confidential and not subject to inspection or review

without the express written consent of such police officer except as may be mandated by lawful court order (see Civil Rights Law § 50-a; *McBride v City of Rochester*, 17 AD3d 1065 [2005]). Civil Rights Law § 50-a was enacted to limit access to personnel records by criminal defense counsel, who used the contents of the records to embarrass officers during cross-examination (see e.g. *35 N.Y. City Police Officers v City of New York*, 34 AD3d 392 [2006]). The party seeking disclosure of such records must offer “in good faith . . . some factual predicate” for providing access to the personnel files so as to warrant an in camera review (*Zarn v City of New York*, 198 AD2d 220 [1993]; see also *Matter of Dunnigan v Waverly Police Dept.*, 279 AD2d 833 [2001]; *Taran v State of New York*, 140 AD2d 429 [1988]). “This threshold requirement is designed to eliminate fishing expeditions into police officers’ personnel files for collateral materials to be used for impeachment purposes” (*Zarn v City of New York*, 198 AD2d at 220-221).

With respect to disclosure of the records sought by plaintiff, the Court finds that plaintiff has provided a good faith factual predicate for the disclosure of such records, to wit: the deposition testimony of three Suffolk County Police Officers indicating that Internal Affairs and Captain Paul Ryan conducted investigations into the accident, which may contain information that is relevant and material to plaintiff’s allegation of negligence against the County (see *Blanco v County of Suffolk*, 51 AD3d 700 [2008]; *Evans v Murphy*, 34 AD3d 417 [2006]; *Pickering v State of New York*, 30 AD3d 393 [2006]; *Flores v City of New York*, 207 AD2d 302 [1994]; *Spadaro v Balesteri*, 237 AD2d 507 [1997]).

Finally, CPLR 3106 (c) governs the depositions of prisoners. That section provides that “[t]he deposition of a person confined under legal process may be taken only by leave of the court” (CPLR 3106 [c]). Here, counsel for Mair indicates that he has no opposition to producing his client for a deposition at the correctional facility where he is incarcerated.

In view of the foregoing, this motion is **GRANTED** as follows: (1) the County shall produce to the Court, for an in camera inspection, the Internal Affairs’ file, as well as the investigation file of Suffolk County Police Captain Paul Ryan, pertaining to the high-speed police chase that occurred on December 28, 2006, within thirty (30) days of the date of service upon the County of the instant Order with notice of entry (see *Blanco v County of Suffolk*, 51 AD3d 700, *supra*); and (2) the deposition of Mair shall be conducted at the Collins Correctional Facility, pursuant to CPLR 3106 (c), on a date to be agreed upon by the parties and with the consent and permission of the regulating authorities at the aforesaid

Facility, but in no event shall the deposition be conducted beyond March 31, 2013. A copy of this Order shall be presented to the proper authorities at the Facility, along with full identifying names of all individuals expected to attend the deposition, including all attorneys and court reporters, at least two weeks prior to the agreed-upon deposition date, for the purpose of allowing said deposition to be properly held pursuant to the rules and regulations of the Facility.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2012



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION