

Miller v City of Univ. of N.Y.

2016 NY Slip Op 30868(U)

May 9, 2016

Supreme Court, New York County

Docket Number: 158924/2014

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

MICHELLE MILLER, MARCIA JACKSON,
and DESMOND RICHARDS,

Plaintiffs,

-against-

INDEX NO. 158924/2014
MOTION DATE 03-16-2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

THE CITY UNIVERSITY OF NEW YORK,
and LOUIS MADER as an Aider and
Abettor, in his official and individual capacity,
Defendants.

The following papers, numbered 1 to 8 were read on this motion to compel discovery.

PAPERS NUMBERED

Table with 2 columns: Description of papers and PAPER NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, Replying Affidavits, and Cross-Motion.

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion and Plaintiff's cross-motion to compel discovery is granted to the extent stated herein.

Michelle Miller, Marcia Jackson and Desmond Richards (collectively "Plaintiffs"), currently employed as Campus Peace Officers at CUNY's Hunter College Department of Public Safety, commenced this action on September 11, 2014, against The City University of New York (herein "CUNY") and Louis Mader (herein "Mader"), asserting twelve causes of action for discrimination and retaliation under the New York State and New York City Human Rights Laws. (Mot. Exh. 1). Issue was joined and the parties proceeded with discovery.

Defendants now move pursuant to CPLR 3124 and 3126, seeking an Order directing Plaintiffs to provide

(a): (1) revised Responses to Defendants' Document Requests, specifying which documents are being produced, which (if any) are being withheld and the reason(s) therefore; and (2) all documents responsive to Defendants' Document Requests, or if Plaintiffs' maintain they have thoroughly searched for and have been unable to locate any additional documents, original notarized affidavits executed by each Plaintiff in the form attached as Mot. Exh. 19, confirming that Plaintiffs have not located documents after a diligent search and have not spoliated documents;

(b): (1) to provide revised Responses to Defendants' Interrogatories in a form that complies with CPLR 3133(b), with each answer preceded by

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

each question to which it responds, with each Response verified under oath by each Plaintiff that has personal knowledge of such Response; (2) revised Responses to Defendants' Interrogatories that fully and completely answer Defendants' Interrogatories numbered: 1, 2, 13-18, 19, 24-32, 36, 40, 42, 45, 54, 58, 59, 63, 73, 77-81, 89, 90 and 93; (3) revised Responses to Defendants' Interrogatories as necessary to correct any errors, including but not limited to Responses to Interrogatories 12, 36, and 55;

(c): (1) an original Stipulation of Confidentiality in the form attached to Mot. Exh. 8, or alternatively the Court to execute a Confidentiality Order in the form attached as Mot. Exh. 21; and (2) Plaintiffs shall maintain as confidential until that time all copies of the documents inadvertently produced by Defendants Bates stamped DEF 6136, 6329, 6338, 6671, and 6672;

(d): (1) original notarized affidavits in the form annexed as Mot. Exh. 20, executed by each Plaintiff confirming that each Plaintiff has been seen or treated by any health care provider (including but not limited to, any medical professional, therapist, psychologist or psychiatrist) from January 1, 2010 to date; (2) a list identifying each health care provider for each Plaintiff from January 1, 2010 to date, including therapists, psychologists or psychiatrists, by name, address and telephone number, and (3) notarized HIPAA releases executed by each Plaintiff for each health care provider (including releases for psychological notes) from January 1, 2010 to date; or in the alternative: (4) finding that Plaintiffs have waived any claim for damages related to their name and reputation, embarrassment, humiliation and anguish, or other emotional and/or physical injuries, and have waived economic damages resulting from the alleged failure to be promoted; and

(e): if Plaintiffs fail to comply with anything Ordered by the Court, an Order precluding Plaintiffs from seeking non-economic injuries and from raising any issues that involve their physical or psychological injury in this action; precluding Plaintiffs from introducing or referencing any document not produced, and, if found to have spoliated any relevant document, an instruction that such document can be presumed to have been damaging to plaintiff's claims; and/or directing the Complaint be stricken.

Plaintiffs oppose the motion arguing that they have already provided the documents requested, have fully and completely answered all of the Interrogatories, have provided the relevant HIPAA releases for each Plaintiff, as well as the sworn affidavits by each Plaintiff verifying their answers to the Document Requests and Interrogatories, and that they have completed their search and provided every document within their possession. (Aff. In Opp. & Cross-Mot. Exh. E).

Defendants served their First Request for Production of Documents (Mot. Exh. 2) and First Set of Interrogatories (Mot. Exh. 3) on February 12, 2015. Plaintiffs served Responses to Defendants' Document Request (Mot. Exh. 4) and Interrogatories (Mot. Exh. 5) on March 4, 2015. Defendants prepared a version combining Defendants' Requests with Plaintiffs' answers because Plaintiffs did not include the text of the requests in their answers. (Mot. Exhs. 6 & 7). A Preliminary Conference was held and

an Order issued by This Court on December 16, 2015. (Mot. Exh. 14).

CPLR § 3101(a) allows for the “full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court’s discovery order.

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court’s discretion to determine whether the materials sought are “material and necessary” as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see *Roman Catholic Church of the Good Shepherd v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]. “The words ‘material and necessary’ as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Kapon v. Koch*, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, *Allen v. Crowell–Collier Publishing Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968])).

Plaintiffs provided answers and/or stated that they had provided all they had in response to Defendants’ interrogatories. “[I]nterrogatories are appropriate and useful in enabling the seeking party to obtain lists and other detailed information to set the stage for meaningful depositions. Here, the responses to the original interrogatories furnished more than sufficient information for a fruitful deposition.” (*L.K. Comstock & Co., Inc. v. City of New York*, 80 A.D.2d 805 [1st Dept. 1981])).

When certain discovery is unavailable, the party ordered to produce the discovery may submit “[a]n affidavit regarding the unavailability of documents that are the subject of a discovery order,” and that affidavit “must document a thorough search conducted in good faith.” (*Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542[1st Dept. 2011])). A court may also preclude a party from testifying at the time of trial or otherwise submitting evidence in support of, or in opposition to, the discovery sought. (*Id.*; see also *Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 1 N.Y.S.3d 307 [2nd Dept., 2015])).

Plaintiffs contend that they have conducted searches and have determined that they have produced all relevant documentation that is within their possession. However, the Plaintiffs’ search affidavits do not set forth the time, place, or manner or who and when these searches were conducted. Plaintiffs did not answer the interrogatories in proper form; they failed to precede the answer with the question. Plaintiffs also failed to provide separate verifications swearing to the information contained in their response to Defendants’ interrogatories. CPLR 3133(b) mandates that “Interrogatories shall be

answered in writing under oath..." and "[e]ach answer shall be preceded by the question to which it responds."

During the production of documents, Defendants' inadvertently produced five pages of educational records by failing to redact the students' confidential information. "Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued." (New York Times Newspaper Div. of New York Times Co. V. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642 [1st Dept. 2002]). Here, Defendants took steps to prevent the disclosure with the numerous other documents produced by redacting sensitive information, they notified Plaintiffs' counsel immediately upon discovering the mistake of providing these documents without redacting the information, and by requesting the return of the documents to redact the non-relevant information. Plaintiffs will not be prejudiced as the information to be redacted is not necessary to the prosecution of the action.

In conjunction with the Court ordering the return of these documents, Defendants' request the Court to enter a Confidentiality Order. However, the Defendants have not stated a basis for which this relief should be granted. Demanding the Plaintiffs to maintain as confidential the information inadvertently disclosed on five documents, does not compare to This Court Ordering an extensive Confidentiality Order pertaining to all discovery in the action.

Defendants request that the Court Order various relief pertaining to the Plaintiffs failing to provide a list of healthcare providers and HIPAA releases regarding their claims for emotional and/or physical injuries. Plaintiffs having placed their mental, emotional, and/or physical condition in issue, they must provide a supplemental response to Defendants' Interrogatory No. 18 identifying each Plaintiffs' treating physicians for the relevant time period. Together with identifying these treating physicians, Plaintiffs must provide HIPAA Authorizations for each health care provider for the relevant time period.

Plaintiffs cross-move (1) to compel Defendants to provide all previously requested Electronically Stored Information (herein "ESI") specifying which documents correspond to which searches; (2) for a Court mandated deadline for Defendants to conduct Plaintiffs' depositions; and, (3) an Order barring Defendants from any further retaliatory acts against Plaintiffs during the pendency of this litigation.

Defendants provided around 6,800 pages of documents to Plaintiffs, and Plaintiffs contend that documents pertaining to Defendant Mader's emails are still missing. Plaintiffs argue that they have revised their ESI search terms three times at Defendants' request, to ease Defendants' burden of review and production, however, Defendants have not produced the responsive documents to date. A review of Plaintiffs' Supplemental Requests and subsequent limiting search terms for ESI (Aff. In Opp & Cross-Mot. Exhs. J, L, and O) are either overbroad or irrelevant in providing Defendants with effective search terms. Plaintiffs must revise the search terms for their ESI request, and limit the search to the time period of March 2010 through September 2014.

Accordingly, it is ORDERED, that Defendants' motion and Plaintiffs' cross-motion to compel discovery is granted to the extent stated herein, and it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry, Plaintiffs shall serve a Supplemental Response to Defendants' Interrogatories, including answering Interrogatory No. 18, by preceding each answer with the question to which it responds, and it is further,

ORDERED, that Plaintiffs provide defendants with HIPAA Authorizations for each health care provider who provided treatment for Plaintiffs' mental and/or physical injuries for the relevant time period, within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that each Plaintiff shall serve with the Supplemental Response to Defendants' Interrogatories an affidavit under oath swearing to the contents of the Interrogatories, and it is further,

ORDERED, that each Plaintiff provide a search affidavit detailing the time, places and manner that a search was conducted for the documents requested and that the documents cannot be located, within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that Plaintiffs return to Defendants the documents Bates stamped DEF 6136, 6329, 6338, 6671 and 6672, so that these documents may be properly redacted and returned to Plaintiffs, and it is further,

ORDERED, that Plaintiffs keep the contents of the unredacted portions of Defendants Documents Bates Stamped, DEF 6136, 6329, 6338, 6671, and 6672, confidential, and it is further,

ORDERED, that Plaintiffs revise the search terms of their ESI Request and limit the time period of said search to March 2010 through September 2014, and it is further,


ORDERED, that Plaintiffs serve Defendants with a Supplemental Demand containing the new ESI search terms, within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that Defendants provide a supplemental response to the Electronically Stored Information Request, specifying which documents correspond to which searches, within thirty (30) days of receipt of a Supplemental demand containing new ESI search terms, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on July 13, 2016, at 9:30 a.m.

ENTER:

Dated: May 9, 2016



MANUEL J. MENDEZ MANUEL J. MENDEZ
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE