

Smith v Gosine

2016 NY Slip Op 33109(U)

January 26, 2016

Supreme Court, Queens County

Docket Number: 700859/14

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

Present: Hon. Kevin J. Kerrigan
Justice

IAS PART 10

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KEVIN SMITH,

Index No. 700859/14

Plaintiff,

Motion Date: 9/29/15

-against-

Motion Cal. No. 147

RACHEL GOSINE, THE CITY OF NEW YORK;
PABLO DeJESUS (individually); ANDREW
FITZGERALD (individually); and MORGAN
SPRAGUE (individually),

Seq. #: 5

Defendants.

-----X

FILED
JAN 27 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 10 read on this motion by plaintiffs for an order precluding defendants from offering any evidence at trial based upon their failure to comply with prior discovery orders of this court; and extending the time in which to file the note of issue and certificate of readiness.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 5
Affirm. In Partial Opposition	6 - 8
Reply Affirmation	9 - 10

Upon the papers filed in support of the motion and the papers filed in opposition thereto, the motion is decided as follows:

This is an action arising from three separate arrests of plaintiff, (February 28, 2013, May 9, 2013 and May 20, 2013), for allegedly violating an order of protection. Plaintiff herein is seeking monetary damages based on allegations of false arrest and malicious prosecution in connection with these arrests.

Plaintiff brings the within motion seeking sanctions against defendants for failure to

provide discovery in compliance with this court's Preliminary Conference Order dated December 17, 2014 and So-Ordered Stipulation dated March 17, 2015. In opposition to this motion, defendants assert that they have complied with the discovery orders of this court by way of service of their 1) Response to Preliminary Conference Order and To So-Ordered Stipulation dated March 17, 2015; and 2) Supplemental Response to Preliminary Conference Order and To So-Ordered Stipulation dated March 17, 2015. Therein defendants raised objections to providing requested portions of the Patrol Guide as overly broad, irrelevant or palpably improper. Notwithstanding, defendants indicated that Patrol Guide records relating to the alleged incident had been requested. Defendants also objected to providing the complete personnel files of defendant Police Officers Pablo DeJesus, Andrew Fitzgerald, and Morgan Sprague, on the basis that these requests were overly broad, irrelevant or palpably improper, citing N.Y. Civ. Rights §50-A. Additionally, although defendants responded to various other demands by stating that the requested records had been requested, to date many of the documents and records remain outstanding. It is these issues that form the basis of this motion.

CPLR § 3101(a) sets forth the criterion for disclosure under the CPLR, requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action." Requests for disclosure, however, may not be overbroad, burdensome, or lacking in specificity and they may not seek irrelevant information. *Osowski v. AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 (1st Dept. 2009). The words material and necessary are to be liberally interpreted 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. *Allen v. Crowell Collier Publishing Co.*, 21 N.Y.2d 403, 406407 (1969) The test to determine if the information sought is material and necessary is one of usefulness and reason. *Id.*

The principle of full disclosure does not, however, give a party the right to uncontrolled and unfettered disclosure. Matters relating to disclosure lie within the broad discretion of the trial court which is in the best position to determine what is material and necessary. *Buxbaum v. Castro*, 82 AD3d 925 (2d Dept. 2011).

As noted above, in the case at bar, defendants have objected to providing plaintiff with copies of the requested sections of the Patrol Book on the basis that this demand is overly broad, irrelevant or palpably improper. This court does not agree. The sections requested by plaintiff are specific and sufficiently relevant to the issues raised in this action to warrant their disclosure.

In contrast, plaintiff herein fails to set forth any basis to support disclosure of the personnel files of the defendant officers. Although plaintiff is correct in his contention that discovery of police personnel files in this matter is governed by federal, rather than state law, the party seeking the records must still make a showing that the records contain information reasonably calculated to lead to the discovery of relevant and admissible evidence. *See Mann v. Alvarez*, 242 AD2d318, 661 NYS2d 250 (2nd Dept. 1997). Plaintiff 's unsupported,

general assertion that the personnel files are properly discoverable in an action brought, in part, under 42 U.S.C. §1983 falls far short from satisfying this burden. The court has not been provided with any information which would establish that these privileged records sought are relevant to any claims asserted in plaintiff's complaint.

With respect to plaintiff's request for a Supplemental Bill of Particulars on the defendants' affirmative defense of probable cause, this court notes that the prior orders upon which plaintiff premises the within motion directed defendants to serve a Bill of Particulars as to affirmative defenses, a directive that defendants have complied with. To the extent that plaintiff desires to inquire further into defendant's defense of probable cause, same would be better suited to be explored at the depositions of the defendant officers, which have not yet occurred.

Accordingly, based on the foregoing, it is

ORDERED that within forty-five (45) days of service of this order with Notice of Entry, defendants shall provide all documents indicated to have been requested by defendants' Response to Preliminary Conference Order and to So-Ordered Stipulation, dated March 17, 2015. If unable to obtain the requested discovery and/or as to any items, to which defendants have previously responded that there were "none", defendants shall provide an affidavit from the person conducting the search for same, outlining the efforts made to obtain such information/documents, with an indication of whether said documents ever existed, and if so, the reason for their unavailability; and it is further

ORDERED that within forty-five (45) days of service of a copy of this order with notice of entry, defendants shall provide copies of all sections and indexes of the Patrol Guide, as requested by way of Plaintiff's Demand for Documents dated July 8, 2014; and it is further

ORDERED that within forty-five days of service of a copy of this order with notice of entry, defendants shall provide a response to plaintiff's demand for witness statements and for witness disclosure; and it is further

ORDERED that failure of defendants to comply with the directives of this order shall result in defendants being precluded from offering any evidence at the trial of this matter on the issue of liability, and it is further

ORDERED that plaintiff's application for an extension of time to file the Note of Issue in this matter is denied as moot, the note of issue having been filed on November 5, 2015; and it is further

ORDERED that all other applications not specifically addressed herein are denied;

and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendants without undue delay.

Dated: January 26, 2016



Kevin J. Kerrigan, J.S.C.

FILED
JAN 27 2016
COUNTY CLERK
QUEENS COUNTY