Matter of Drunker

2012 NY Slip Op 31298(U)

May 8, 2012

Supreme Court, Suffolk County

Docket Number: 11-12243

Judge: Jerry Garguilo

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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

In the Matter of the Application of

JAMES O. DRUKER, ESQ. and OSCAR MICHELEN, ESQ., on behalf of FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON,

Petitioner-Plaintiffs,

for an order pursuant to CPL § 190.25 and Judiciary Law § 325 permitting them to inspect and Copy the Minutes of Certain Grand Jury Proceedings and Evidence presented to the Grand Jury.

By: Jerry Garguilo, J.S.C.
Dated: May 8, 2012

Index No. 11-12243
Mot. Seq. # 005 - MG; CDISPSUBJ

Return Date: 5-9-11
Adjourned: 2-29-12

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This special proceeding seeks judgment unsealing the minutes of the proceedings of, and release of the exhibits presented to, the grand jury under indictments 00769A-07 through 00769K-07 relative to ten nurses and their attorney (petitioners). The indictments charged the petitioners with endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same, and solicitation. On January 13, 2009, the petitioners obtained a writ of prohibition based upon the fact that they were being "threatened with prosecution for crimes for which they cannot constitutionally be tried" ***Matter of Vinluan v Doyle***, 60 AD3d 237, 251, 873 NYS2d 72 [2d Dept 2009]). Thereafter, the petitioners commenced an action in the United States District Court, Eastern District of New York[1] (Eastern District action) alleging violation of their First, Thirteenth, and Fourteenth Amendment rights, conspiracy, malicious prosecution, and false arrest.

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[1] *Anilao v Spota*, Docket Number 10-CV-00032 (JFB)(WDW), United States District Court, Eastern District of New York.

The petitioner Felix Q. Vinluan ("Vinluan") and the ten remaining petitioners on whose behalf this special proceeding has been brought (nurses) (collectively petitioners) commenced the Eastern District action against Thomas J. Spota, III, individually (Spota) and as District Attorney of Suffolk County (District Attorney); the Office of the District Attorney of Suffolk County (DA's Office); Leonard Lato, individually and as an Assistant District Attorney of Suffolk County (Lato); the County of Suffolk (collectively the County defendants), and against Sentosa Care, LLC (Sentosa); Avalon Gardens Rehabilitation and Health Care Center (Avalon Gardens); Prompt Nursing Employment Agency, LLC (Prompt); Francris Luyun (Luyun); Bent Philipson (Philipson); Berish Rubinstein (Rubinstein) ; Susan O'Connor (O'Connor); and Nancy Fitzgerald (Fitzgerald) (collectively the Sentosa defendants).

According to the complaint in the Eastern District action[2], the nurses, residents of the Philippines, had been recruited to work in the United States by the Sentosa defendants, and upon arriving here they believed that the Sentosa defendants had breached the promises made to them. The nurses sought the advice of Vinluan, an attorney, who advised the nurses that the Sentosa defendants had breached their respective employment contracts and that the nurses could terminate their employment. Shortly thereafter, the nurses resigned from their positions caring for children and disabled adults at Avalon Gardens. After the nurses resigned, the Sentosa defendants reported the nurses to the New York State Education Department (which is in charge of licensing for nurses), sought a preliminary injunction against the nurses, and reported the nurses to the Suffolk County Police Department. In each case, these actions taken by the Sentosa defendants were unsuccessful. The Education Department's investigation found that the nurses had acted within their rights, the preliminary injunction was denied for failure to prove a likelihood of success on the merits, and the Police Department refused to take action because the police did not believe that any crimes had been committed.

The complaint in the Eastern District action further alleges that the Sentosa defendants then approached the DA's Office and met with the District Attorney to convince him to prosecute the nurses. Because the Sentosa defendants were politically influential, Spota allegedly agreed to prosecute the nurses for the benefit of the Sentosa defendants. The District Attorney assigned Lato to investigate the nurses in the absence of any police involvement. After his investigation, Lato presented the case to the grand jury, including a presentation of allegedly false testimony by defendant Philipson, and obtained the subject indictments.

The complaint in the Eastern District action alleges that the actions of the County defendants and the Sentosa defendants violated the petitioners' First and Thirteenth Amendment rights, that the indictment was procured in violation of the petitioners' Fourteenth Amendment due process rights "in that the Grand Jury was not properly charged on the law, was given false evidence, and was not presented with exculpatory evidence," and that the County defendants also engaged in unconstitutional conduct during the investigative stage prior to the presentation of evidence to the grand jury.

After the defendants in the Eastern District action moved to dismiss the complaint, that Court found that "(1) the individual County defendants are entitled to absolute immunity for conduct taken in

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[2] The allegations in the subject complaint are not disputed by the affidavit in opposition to the petition. The recitation of the allegations is not intended to indicate that the Court considers them to be facts.

their role as advocates in connection with the presentation of the case to the Grand Jury; (2) the individual County defendants are not entitled to absolute immunity for alleged misconduct during the investigation of [petitioners], and the Court cannot determine at the motion to dismiss stage, given the allegations in the Amended Complaint, whether the individual County defendants are entitled to qualified immunity for their actions in the investigation phase; (3) [petitioners] have sufficiently pled § 1983 claims against the individual County defendants for alleged Due Process violations in the investigative stage; and (4) [petitioners] have sufficient pled a claim for municipal liability against the County of Suffolk. As to the defendants Philipson, Luyun, Rubinstein, Sentosa Care, Prompt, and Avalon Gardens, the Court concludes: (1) [petitioners] have sufficiently alleged that they were acting under color of state law, and (2) [petitioners] have sufficiently pled claims for malicious prosecution and false arrest under both § 1983 and state law, as well as a § 1983 conspiracy claim. As to defendants O'Connor and Fitzgerald, the Court dismisses the claims against them without prejudice for: (1) failure to plead that they were acting under color of state law, and (2) failing to set forth allegations to properly plead the state-law malicious prosecution and false arrest claims as to these two individual defendants. Finally, as to the § 1983 conspiracy claim against all defendants, the Court finds that [petitioners] have sufficiently pled a claim against all defendants except O'Connor and Fitzgerald, who, as noted *supra,* were not alleged to have been acting under color of state law for purposes of the § 1983 claims."

Thus, the petitioners have been adjudicated to have viable causes of action in the Eastern District action against public officials in both their individual and official capacities, as well as most of the Sentosa defendants. The petitioners now seek disclosure of the grand jury minutes, testimony and exhibits to assist them in prosecuting their claims against the defendants in that action. Generally, grand jury proceedings are secret, and a party is not entitled to disclosure of grand jury materials for use as a private litigant in a civil proceeding (CPL 190.25 [4], ***Albert v Zahner's Sales Co., Inc.***, 81 Misc 2d 103, 364 NYS2d 410 [Sup Ct, New York County 1975], *affd* 51 AD2d 541, 378 NYS2d 414 [2d Dept 1976], including actions for false arrest, false imprisonment and malicious prosecution (***Albert v Zahner's Sales Co., Inc.***, *id.*; ***Dworetzky v Monticello Smoked Fish Co.***, 256 AD 772, 12 NYS2d 270 [3d Dept 1939]). The Court of Appeals has listed the most frequently mentioned policy reasons for grand jury secrecy as : "(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely." (***People v Di Napoli***, 27 NY2d 229, 235, 316 NYS2d 622 [1970]; *see also* ***Ruggiero v Fahey***, 103 AD2d 65, 478 NYS2d 337 [2d Dept 1984]). However, it is clear that grand jury secrecy is not absolute.

CPL 190.25 (4) (a) provides: "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence or ... other matter attending a grand jury proceeding." CPL 215.70 provides "A person is guilty of unlawful grand jury disclosure when, being a grand juror, a public prosecutor, ...or a public officer or public employee, he intentionally discloses to another the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury

proceeding which is required by law to be kept secret, except in the proper discharge of his official duties or upon written order of the court. Nothing contained herein shall prohibit a witness from disclosing his own testimony."

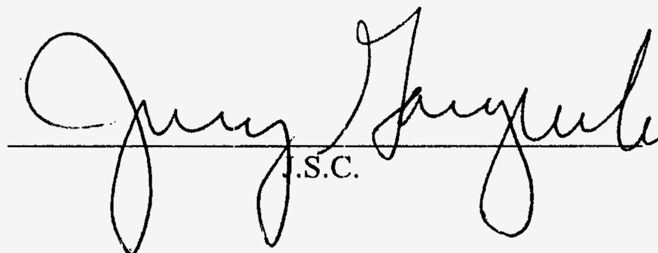
Thus, disclosure of grand jury proceedings is a matter within discretion of the court, which is required to "balance the competing interests involved, the public interest in disclosure against that in secrecy" (***People v Di Napoli***, *supra* at 234]; *see also* ***Matter of District Attorney of Suffolk County***, 58 NY2d 436, 461 NYS2d 773 [1983]). In addition, it has been held that an applicant must show a compelling and particularized need in order to justify a need for said disclosure (***People v Robinson***, 98 NY2d 755, 751 NYS2d 843 [2002]; ***People v Fetcho***, 91 NY2d 765, 676 NYS2d 106 [1998]). The petitioners contend, among other things, that disclosure is required under these facts to establish their claims that the County defendants conspired with the Sentosa defendants to procure false evidence and present it to the grand jury as well as to hide exculpatory evidence from the grand jury, that both sides in the federal court litigation have a particularized need for the information, and that the Eastern District action is a matter of public interest, involving alleged wrongdoing on the part of public officials.

In examining the policy considerations as they relate to the case at bar, this Court finds that there are ample reasons to release the grand jury minutes, testimony and exhibits. There is no risk that a defendant who is about to be indicted will take flight, and the grand jury has long finished its work in this matter, meaning there is no risk of interference from those under investigation, or of subornation of perjury and tampering with prospective witnesses. In addition, as the petitioners were the accused under the subject indictments, they require no protection from unfounded accusations and, if it is established that they testified falsely before the grand jury, the Sentosa defendants cannot claim that they relied on secrecy in exchange for their willingness to testify freely (***People v Di Napoli***, *supra*). It is also interesting to note that the Sentosa defendants have not opposed the instant application for relief.

In light of the findings herein, and the slight need for keeping the grand jury proceedings secret, the information should be released (***Ostroy v Six Sq., LLC***, 29 Misc 3d 470, 906 NYS2d 882 [Sup Ct, New York County 2010]; ***People v Driscoll***, 165 Misc 2d 245, 629 NYS2d 664 [New York County Court, 1995]; ***Matter of New York State Temporary Commn. of Investigation***, 155 Misc 2d 822, 590 NYS2d 169 [Westchester County Court, 1992]; ***Matter of FOJP Serv. Corp.***,119 Misc 2d 287, 463 NYS2d 681 [Sup Ct, New York County 1983]; *but see* ***Matter of District Attorney of Suffolk County***, *supra* (no showing of particularized need for the minutes, nor description of the conduct which would be revealed by the minutes); ***Ruggiero v Fahey***, *supra* (where evidence was alleged to be necessary to cross-examine witnesses, or to refresh their recollection, court denied disclosure with explanation that continued witness co-operation is necessary to an effective grand jury system); ***Matter of City of Buffalo (Cosgrove)***, 57 AD2d 47, 394 NYS2d 919 [4th Dept 1977] (where witnesses had testified to a scheme of fraud, disclosure would have a "chilling effect on the ability of future grand juries to obtain witnesses" in investigations). Here, this Court cannot say that disclosure would have a chilling effect on the ability of future grand juries to obtain witnesses (***People v Di Napoli***, *supra*). This is especially true when the public's interest in accurate information about its public officials outweighs the assurance of secrecy for witnesses in future grand jury proceedings (***Jones v State of New York***, 79 AD2d 273, 436 NYS2d 489 [4th Dept 1981]).

However, the Court is mindful of the limited record submitted in this special proceeding. The current status of the Eastern District action is not clear, nor is the Court aware of the progress of discovery in that action. It is clear that the trial court has discretion to control the method and manner of disclosure of grand jury proceedings (***Ruggiero v Fahey***, *supra*; ***Matter of Aswad v Hynes***, 80 AD2d 382, 439 NYS2d 737 [3d Dept 1981]; ***Matter of City of Buffalo (Cosgrove)***, *supra*. In that light, the Court directs that the subject grand jury proceedings be released *in camera* to the Judge and/or Magistrate assigned to the Eastern District action for his or her determination regarding what information contained therein should be released to the parties in that action, and when and how it should be released.

Submit judgment.



J.S.C.

HON. JERRY GARGUILO