

Calhoun v County of Suffolk

2013 NY Slip Op 33917(U)

March 22, 2013

Supreme Court, Suffolk County

Docket Number: 8577/2009

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX NO. 8577/2009

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.

**Decision and Order After *In Camera*
 Review of Discovery Materials**

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The Court, pursuant to Civil Rights Law § 50-a, has conducted an *in camera* review of the investigation file of the Suffolk County Police Department pertaining to the high-speed police chase that occurred on December 28, 2006, the subject matter of this action, in accordance with this Court's Order of December 28, 2012.

This action arises from a high-speed police chase that occurred on December 28, 2006, when members of the Suffolk County Police Department pursued defendant, RICHARD MAIR ("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 causing the death of plaintiff's decedent, WILLIAM S. CALHOUN, while he was on his living room couch.

Plaintiff served defendant COUNTY OF SUFFOLK ("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.

As stated in the prior Order, 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 in its prior Order found that plaintiff had 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]).

This Court is mindful of the holding in *Evans v Murphy, supra*, wherein the defendant City of New York was directed to produce a three page Internal Affairs Report, redacting the names of witnesses therein.

This Court has undertaken a review of the reports sought herein including all documentation annexed thereto and concludes that there is relevant and material information contained therein.


The disclosure of this material will not frustrate the goal of the statute to curtail fishing expeditions into police personnel files and thereby prevent the release of irrelevant and potentially damaging information (see generally *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562 [1986]; *Flores v City of New York*, 207 AD2d 302 [1994]; *Zarn v City of New York*, 198 AD2d 220 [1993]).

Where, as here, there are investigative reports as well as statements and recordings of members of the department as well as civilian witnesses to the events herein, the Court is required to direct the production of reports, statements and recordings, as these statements are relevant and material to the action before it (see Civil Rights Law § 50-a [2], [3]; *People v Gissendanner*, 48 NY2d 543 [1979]; *Becker v City of New York*, 162 AD2d 488 [1990]; *Lawrence v City of New York*, 118 AD2d 758 [1986]).

Wherefore, the County is directed to disclose the three page narrative report of Suffolk County Police Captain Robert Ryan dated February 9, 2007, as well as the twenty-three page narrative report of Suffolk County IAB Police Sergeant Elizabeth Yeungling dated August 4, 2008. Should the County seek to redact any portion of either report the appropriate application may be made to the Court on notice to all parties.

The foregoing constitutes the decision and Order of the Court.

Dated: March 22, 2013



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION