Strickland v State of New York
2013 NY Slip Op 34195(U)
March 27, 2013
Court of Claims
Docket Number: 120654
Judge: Frank P. Milano
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STATE OF NEW YORK COURT OF CLAIMS

SELENA STRICKLAND, as Administratrix of the Estate of LEONARD STRICKLAND,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 120654
Motion Nos. M-81905
CM-81929

Defendant.

BEFORE: HON. FRANK P. MILANO
Judge of the Court of Claims

APPEARANCES: For Claimant:
STEIN SCHWARTZ CHESIR & ROSH, LLP
By: Ronald B. Groman, Esq.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
By: Michael C. Rizzo, Esq.
Assistant Attorney General

Claimant moves for an order pursuant to CPLR §§ 3124 and 3126 striking defendant's answer, or, alternatively, compelling production of certain documents and items which were not disclosed pursuant to claimant's notices for discovery requests dated January 24, 2012, May 3, 2012 and May 22, 2012, respectively. Defendant opposes the motion and cross-moves for return of certain allegedly privileged documents inadvertently disclosed to claimant.

The amended claim states causes of action for wrongful death and for personal injuries and conscious pain and suffering of decedent Leonard Strickland, allegedly caused by defendant's negligence in failing "to take necessary and appropriate measures for the safety, security and control of the inmates including the Decedent" and in inflicting an "unnecessary and unreasonable beating" on decedent. The amended claim further alleges that defendant "failed to prescribe and cause to be prescribed and administered proper and appropriate treatment and medication [for decedent's "schizophrenia and paranoia"] rather than administer, unreasonable and unwarranted beating."

In support of the requested relief, the affirmation of claimant's attorney states that on October 3, 2010, claimant's decedent, Leonard Strickland, an inmate at Clinton Correctional Facility (Clinton), was "beaten to death by five or six correction officers" at Clinton.

The Court notes initially that defendant has already provided substantial disclosure of documents to claimant, including the Department of Correctional Services Unusual Incident Report, the New York State Police Investigation Report, decedent's medical records, decedent's mental health records, copies of all rules and regulations of the Department of Corrections and Community Supervision and/or of Clinton regarding the care and treatment of mentally ill prisoners, copies of all rules and regulations of the Department of Corrections and Community Supervision and/or of Clinton regarding the administration of emergency medical treatment to inmates, copies of all rules and regulations of the Department of Corrections and Community Supervision and/or of Clinton regarding the right to adequate medical care to inmates and copies of all rules and regulations of the Department of Corrections and Community Supervision and/or of Clinton regarding the use of force on inmates.

The defendant has provided to the Court, for *in camera* inspection, the disputed documents and items demanded by claimant.

The Court has "broad discretion in managing disclosure, and absent an abuse of discretion or unreasonable interference with the disclosure of relevant and necessary material" that discretion will not be disturbed (Czarnecki v Welch, 23 AD3d 914, 915 [3d Dept 2005]).

It is equally clear that "[w]hile disclosure provisions are to be liberally construed, the trial court is vested with broad discretion to supervise discovery and determine what is 'material and necessary' under CPLR 3101 (a)" (Mora v RGB, Inc., 17 AD3d 849, 851 [3d Dept 2005]).

The standard of materiality is "one of usefulness and reason," with the goal of "sharpening the issues and reducing delay and prolixity" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]).

The Court will first consider claimant's request for disclosure of the personnel and medical records of the involved correction officers.

Defendant argues that such disclosure would violate the protections afforded by Civil Rights Law § 50-a, which provides, at relevant part:

> "1. All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof . . . 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.
>
> 2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be

> sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Claimant has provided proof of service of the motion papers on the correction officers whose personnel records are sought, as required by Civil Rights Law § 50-a.

"The legislative purpose [behind the statute] was to prevent disclosure of officers' personnel records except when a legitimate need for them has been demonstrated sufficiently to obtain a court order, generally upon a showing that they are actually relevant to an issue in a pending proceeding" (Matter of Daily Gazette Co. v City of Schenectady, 93 NY2d 145, 155 [1999]). The party seeking the protected records has the initial burden of making a good faith showing of a "factual predicate" justifying the intrusion into the personnel records (Matter of Dunnigan v Waverly Police Dept., 279 AD2d 833, 834 [3d Dept 2001], quoting People v Gissendanner, 48 NY2d 543, 550 [1979]).

After careful review and consideration, the Court finds that there is no information contained in the correction officers' personnel files which is relevant and material to the allegations contained in the amended claim. The portion of claimant's motion demanding disclosure of the personnel files of the involved correction officers is denied.

With respect to claimant's demand for medical information on the correction officers involved in the subject incident, the burden is on the party seeking the records to show that the officers' medical condition is "in controversy" (Koump v Smith, 25 NY2d 287, 294 [1969]). "Once this preliminary burden is satisfied, however, discovery still may be precluded if the requested information is privileged and thus exempted from disclosure. . . . A litigant will be

deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" (Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). This requires the party to do more than deny the allegations, it requires affirmatively asserting the condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff" (Koump, 25 NY2d at 294).

Claimant has failed to show that the correction officers' medical conditions are in controversy, and, in any event, has failed to show waiver of the physician-patient privilege afforded the correction officers.

Claimant seeks production of the Special Investigation Final Report of the Office of Mental Health, dated October 28, 2010, and the Meeting Minutes of the Department of Corrections and Community Supervision, held at Clinton on October 6, 2010. Defendant has refused to disclose these items, arguing that they are exempt from disclosure as medical care quality assurance reports.

In Katherine F. v State of New York (94 NY2d 200, 204-205 [1999], the court explained that:

> "The language of the statute is unequivocal. Education Law § 6527 (3) exempts three categories of documents from disclosure: records relating to medical review and quality assurance functions; records reflecting 'participation in a medical and dental malpractice prevention program;' and reports required by the Department of Health pursuant to Public Health Law § 2805-l, including incident reports prepared pursuant to Mental Hygiene Law § 29.29. Incident reports are defined as 'reports of accidents and injuries affecting patient health and welfare' (Mental Hygiene Law § 29.29). Included in such reports are any allegations of 'violent behavior exhibited by either patients or employees' (Mental Hygiene Law § 29.29 [1] [ii]). . . .

> "Claimant, however, urges us to limit Education Law § 6527 (3) to reports that relate to a medical review or quality assurance function (see, e.g., Matter of Kristen K. v Children's Hosp., 204 AD2d 1009; Elmer v State of New York, 179 AD2d 1000), and bear directly on a patient's medical care and treatment. Because allegations of . . . abuse involve non-medical incidents that implicate a hospital's security function, claimant maintains the documents sought are not exempt from disclosure. We disagree.
>
> "Nothing in the plain language of Education Law § 6527 (3) or its legislative history indicates that the quality of care should be read to exclude reports of patient abuse."

The Court finds that the Special Investigation Final Report of the Office of Mental Health, dated October 28, 2010, and the Meeting Minutes of the Department of Corrections and Community Supervision, held at Clinton on October 6, 2010 relate to medical review and quality assurance functions and are accordingly exempt from disclosure by Education Law § 6527 (3).

Next, the defendant has produced for *in camera* inspection a DVD/videotape depicting what appears to be the conclusion of the alleged assault and the response of the correction officers and medical personnel. The Court has viewed the DVD/videotape and finds that it is relevant and should be disclosed. Defendant is ordered to provide a copy of the DVD/videotape to claimant's attorney within twenty days of the filing of this Decision and Order. Claimant's attorney is instructed and ordered that the DVD/videotape is to be used solely for the purpose of this claim to the extent necessary for the litigation of the claim, it is not to be copied and it shall be disclosed only to counsel, personnel employed to assist counsel, experts, court personnel, court reporters and/or monitors.

Claimant also seeks disclosure of the Inspector General Report and the preliminary and final reports of the New York State Commission of Correction and Medical Review Board. Defendant objects to disclosure on the basis of the public interest privilege. The public interest

privilege is described in Lowrance v State of New York (185 AD2d 268, 268-269 [2d Dept 1992]), which involved an inmate's demand for disclosure of an Investigator General file compiled during the investigation of the inmate's grievance against a correction officer:

> "It has long been recognized that the public interest is served by keeping certain government documents privileged from disclosure (see, Cirale v 80 Pine St. Corp., 35 NY2d 113; One Beekman Place v City of New York, 169 AD2d 492, 493). The Court of Appeals has observed that '[t]he hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality' (Cirale v 80 Pine St. Corp., supra, at 117-118). Under the circumstances presented, the State's interest in maintaining the integrity of its internal investigations and protecting the confidentiality of sources who provide sensitive information within a prison context, outweighs any interest of the claimant in seeking access to the file (Cirale v 80 Pine St. Corp., *supra*, at 117)."

As stated above in Lowrance, the public interest privilege asserted by defendant must be weighed against the claimant's right to disclosure of information relevant and material to the claim (see CPLR 3101; Marten v Eden Park Health Serv., 250 AD2d 44, 46 [3d Dept 1998]). Significantly, the "calibration [of the public interest privilege] can also take into account the extent to which pertinent information is available to plaintiffs from other public sources" (Matter of World Trade Ctr. Bombing Litig., 93 NY2d 1, 9 [1999]).

In this instance, the claimant's right to disclosure of information relevant and material to the amended claim has been adequately accommodated. The Court has considered the relevance of the information contained in the Inspector General Report and in the preliminary and final reports of the New York State Commission of Correction and Medical Review Board with respect to the allegations of the amended claim. The Court concludes, after careful comparison to the documents and items already disclosed, that the relevant information in the Inspector General

Report and in the preliminary and final reports of the New York State Commission of Correction and Medical Review Board are available to claimant through the voluminous and comprehensive records of the State Police Report, the Unusual Incident Report, the DVD/videotape, decedent's medical and mental health records and through taking the deposition testimony of already-identified witnesses.

Finally, claimant has requested disclosure of "similar incidents for 10 years prior to the subject action." Defendant objects that the demand is "vague, overbroad, unduly burdensome and irrelevant." Defendant correctly points out that in claims involving allegations by inmates of use of excessive force by correction officers, the specific circumstances of the incident and the credibility of the witnesses are generally the dispositive factors (see Davis v State of New York, 203 AD2d 234 [2nd Dept 1994]; Wester v State of New York, 247 AD2d 468 [2nd Dept 1998]; Lewis v State of New York, 223 AD2d 800 [3d Dept 1996]; Quillen v State of New York, 191 AD2d 31 [3d Dept 1993]; Arnold v State of New York, 108 AD2d 1021 [3d Dept 1985], *appeal dismissed* 65 NY2d 723 [1985]).

In view of the foregoing, defendant is directed to provide to claimant identifying information as to any grievances or claims arising at Clinton involving an alleged failure to provide prompt medical care after a use of force incident, during the two year period preceding October 3, 2010.

The materials reviewed *in camera* by the Court are returned to defendant's attorney, under separate cover, for disclosure as directed in this Decision and Order.

Addressing defendant's cross-motion, the preliminary report of the New York State Commission of Correction and Medical Review Board was inadvertently disclosed by defendant

and claimant is ordered to return the report to defendant (see Curry Road v K-Mart Corp., 191 AD2d 905 [3d Dept 1993]).

Albany, New York
March 27, 2013

Frank P. Milano

FRANK P. MILANO
Judge of the Court of Claims

Papers Considered:

1. Claimant's Notice of Motion;
2. Affirmation of Ronald B. Groman, dated June 28, 2012, with annexed exhibits;
3. Defendant's Notice of Cross-Motion;
4. Affidavit of Michael C. Rizzo, sworn to July 26, 2012;
5. Reply Affirmation of Ronald B. Groman, dated September 4, 2012, with annexed exhibits;
6. Letter of Court, dated November 15, 2012, directing service of the motion papers on correction officers and ordering submission of documents for *in camera* review;
7. Letter of Ronald B. Groman, dated December 10, 2012, enclosing proof of service of motion papers on correction officers;
8. Letter of Michael C. Rizzo, dated December 12, 2012, enclosing Meeting Minutes of DOCCS on October 6, 2010 for *in camera* review;
9. Letter of Michael C. Rizzo, dated December 12, 2012, enclosing list of documents and items for *in camera* review;
10. Letter of Michael C. Rizzo, dated December 20, 2012, enclosing Final Report of New York State Commission on Correction for *in camera* review.