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SHORT FORM ORDER INDEX NO. 28154/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

THERESA HAUGHLAND,

Plaintiff,

-against-

ROBERT C. BILL, COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, and DETECTIVE KEVIN KEYES in his official and personal capacities,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 16, 2013
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 008
MOTION: MD

ORIG. RETURN DATE: OCTOBER 24, 2013
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 009
CROSS-MOTION: XMG

ORIG. RETURN DATE: APRIL 10, 2014
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 010
MOTION: MG

ORIG. RETURN DATE: APRIL 10, 2014
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 011
CROSS-MOTION: XMG

ORIG. RETURN DATE: MAY 29, 2014
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 012
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 18 read on these motions and cross-motions FOR A PROTECTIVE ORDER, TO COMPEL, AND FOR AN ADVERSE INFERENCE JURY INSTRUCTION. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Notice of Motion and supporting papers 7-9; Notice of Cross-motion and supporting papers 10-12; Notice of Cross-motion and supporting papers 13-15; Reply Affirmation and supporting papers 16, 17; Affirmation in Reply and in Opposition to Plaintiff's Cross-motion 18; it is,

ORDERED that this motion (seq. #008) by defendants COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT and DETECTIVE KEVIN KEYES (collectively "County defendants") for an Order, pursuant to CPLR 3103, granting the County defendants a protective Order precluding plaintiff from conducting the deposition of A.D.A. Ming Liu Parson, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #009) by plaintiff, THERESA HAUGHLAND, for an Order: (a) granting plaintiff's cross-motion to compel the deposition of Ming Liu Parson; and (b) dismissing the County defendants' motion for a protective Order in its entirety, is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this motion (seq. #010) by defendant ROBERT C. BILL ("Bill") for an Order, pursuant to CPLR 3124, compelling plaintiff to make available for inspection and copying the computer in her possession provided to her by her employer, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #011) by the County defendants for an Order, pursuant to CPLR 3124, compelling plaintiff to make available for inspection and copying the computer in her possession provided to her by her employer, is similarly **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #012) by plaintiff for an Order, pursuant to CPLR 3126, awarding plaintiff sanctions in the form of an adverse inference jury instruction at trial, and on motions for summary judgment, against the County defendants that there was no probable cause for plaintiff's arrest, is hereby **GRANTED** solely to the extent set forth hereinafter.

Plaintiff, a former employee of Robert C. Bill Associates, Inc. ("RBA"), alleges that Bill, among other things, filed a false criminal complaint against her, resulting in her arrest and prosecution. Plaintiff originally pleaded seven causes of action, to wit: (1) malicious prosecution; (2) false arrest/imprisonment; (3) abuse of process; (4) intentional infliction of emotional distress; (5) *prima facie* tort; (6) interference with prospective advantage; and (7) interference with employee benefits (ERISA) against Bill only. By this Court's Order dated March 7, 2011, plaintiff's Second, Fourth, Fifth, and Seventh causes of action were dismissed as against Bill upon Bill's pre-answer motion.

Plaintiff contends that Bill lodged a criminal complaint against her with defendant SUFFOLK COUNTY POLICE DEPARTMENT on October 10, 2007, in connection with the downloading of "certain historical information" by plaintiff in or about April of 2007 from the computer system of RBA, prior to plaintiff leaving RBA to work for a competitor of RBA. Plaintiff claims that she did not believe Bill would honor his financial obligations to her, so she proceeded to download this historical information onto a compact disc during business hours. Plaintiff alleges that she believed she was authorized to download such information, and therefore was violating no laws, rules or regulations. However, plaintiff was arrested on February 15, 2008, on a felony charge of Computer Trespass (Penal Law § 156.10), and was arraigned on April 10, 2008 based upon Bill's criminal complaint. On February 24, 2009, the District Attorney's Office asked the Court to dismiss the charge because "they determined there was not enough evidence to indict the plaintiff." The Court thereafter dismissed the charge in the "interest of justice." Plaintiff alleges that Bill was actively involved with her arrest and with the County defendants to cause her injury.

The parties have now filed the instant applications seeking the relief described hereinabove.

The first issue the Court must address is whether non-party Assistant District Attorney Ming Liu Parson should appear for an examination before trial in this matter pursuant to plaintiff's Notice of Examination Before Trial dated July 11, 2013. The County defendants seek a protective Order precluding plaintiff from conducting the examination before trial of A.D.A. Parson, arguing that neither the District Attorney's Office nor A.D.A. Parson is a defendant in this action and that the complaint contains no allegations of wrongdoing against these parties. In addition, the County defendants argue that a district attorney has absolute immunity regarding the manner in which a criminal prosecution is handled.

In opposition, plaintiff has filed a cross-motion to compel A.D.A. Parson's examination before trial. Plaintiff argues that the County defendants' instant application is untimely, as they failed to object to plaintiff's Notice of Examination Before Trial, or move for a protective Order, within twenty days of receipt thereof pursuant to CPLR 3122. Moreover, plaintiff alleges that she is entitled to examine A.D.A. Parson on such issues as A.D.A. Parson's role in advising Bill and Detective Keyes about the "grounds and legitimacy for arresting" plaintiff, her investigation of the case, the circumstances of the "outlandish" plea offer made by A.D.A. Parson of six months in jail and five years probation in exchange for a guilty plea to the felony charge, and the circumstances of the ultimate dismissal of the charge. Further, plaintiff indicates that the County defendants have not articulated any prejudice if A.D.A. Parson were to appear for an examination before trial.

CPLR 3101 (a) (4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a] [4]). What is material and necessary is in the "sound discretion" of the trial court and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon ex rel. Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]).

Recently, the Court of Appeals has held that the "material and necessary" standard is the appropriate one for determining what "circumstances

or reasons" are required before disclosure from a non-party may be obtained pursuant to CPLR 3101 (a) (4), and is in keeping with New York State's policy of liberal discovery (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]). The Court held:

> The words "material and necessary" as used in CPLR 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. Section 3101 (a) (4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty

(*id.* at 38).

In contrast, CPLR 3103 (a) provides in pertinent part, "[t]he court may at any time . . . on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]).

Notwithstanding the foregoing, the failure of the County defendants to move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of plaintiff's Notice of Examination Before Trial forecloses all inquiry concerning the propriety of the demand and the information sought to be discovered thereunder. Exceptions to this rule have been carved out where the demand seeks privileged matter under CPLR 3101, or where the demand is palpably improper (*see* CPLR 3122, 3101; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]; *Handy v Geften Realty, Inc.*, 129 AD2d 556 [1987]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues on the case (*see Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]).

Here, the Court finds that plaintiff's Notice of Examination Before Trial does not wholly fall within an exception to the general rule of CPLR 3122 (*see* CPLR 3122; *Handy v Geften Realty, Inc.*, 129 AD2d 556, *supra*), although at least some of the information sought thereunder may be privileged. The attorney work-product privilege (*see* CPLR 3101 [c]) would protect the assistant district attorney from disclosing her "mental impressions, conclusions, opinions or legal theories" (CPLR 3101 [d] [2]) in the underlying criminal action (*see Smith v City of New York*, 49 AD3d 400 [2008]). Moreover, while there have been instances in which an assistant district attorney has been deposed in the context of a malicious prosecution action (*see Warner v City of New York*, 57 AD3d 767 [2008]), this Court is mindful that an action based on the allegedly malicious or improper acts of an assistant district attorney cannot stand where the actions complained of are associated with "the prosecutorial phase of the criminal process," and are thus subject to absolute immunity (*Johnson v Town of Colonie*, 102 AD2d 925, 926 [1984]; *see Smith v City of New York*, 49 AD3d 400, *supra*; *Drakeford v City of New York*, 6 AD3d 302 [2004]).

Consequently, given the procedural posture of the matter, this motion by the County defendants for a protective Order precluding plaintiff from conducting the examination before trial of A.D.A. Ming Liu Parson is **DENIED** under CPLR 3122, and this cross-motion by plaintiff for an Order compelling the examination before trial of A.D.A. Ming Liu Parson is **GRANTED** to the extent that the examination before trial of A.D.A. Ming Liu Parson shall be conducted within thirty (30) days of the date this Order is served upon the County defendants with notice of entry (*see Matter of Kapon v Koch*, 23 NY3d 32, *supra*; *Warner v City of New York*, 57 AD3d 767, *supra*).

Next, with respect to plaintiff's computer provided to her by RBA, Bill and the County defendants seek an Order compelling plaintiff to make the computer available for inspection and copying. These defendants allege that while employed with RBA, plaintiff was given a computer so that she could work from home, which plaintiff refused to return after she left the employ of RBA. Defendants indicate that plaintiff testified at her examination before trial that she did not copy the information from the compact disc onto the computer, and did not use the information on the disc in any way. However, defendants seek to inspect the computer, which apparently is in the possession of her attorney, in order to verify or disprove plaintiff's claims. Furthermore, Bill alleges that the computer may contain certain business documents of RBA that may be necessary in the defense of this matter.

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]). "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]).

In this matter, the Court finds that the subject computer is relevant and material and necessary to the claims and defenses asserted herein. As such, Bill's motion and the County defendants' cross-motion are both **GRANTED** to the extent that plaintiff shall make the subject computer available to defendants for inspection and copying within thirty (30) days of the date of service of the instant Order upon plaintiff with notice of entry.

Finally, plaintiff has filed a cross-motion (seq. #012) seeking an Order, pursuant to CPLR 3126, awarding plaintiff sanctions in the form of an adverse inference jury instruction at trial, and on motions for summary judgment, against the County defendants that there was no probable cause for plaintiff's arrest. Plaintiff bases her application upon the County defendants' failure to produce the complete "investigative file" on plaintiff. Plaintiff alleges that she served a Notice for Discovery and Inspection upon the County defendants on October 13, 2009, requesting every document in the County defendants' possession regarding the criminal investigation of plaintiff. Plaintiff indicates that in response thereto, the County defendants provided approximately twenty documents and did not provide a privilege log of any documents withheld. Plaintiff contends that according to the deposition testimony of Detective Keyes, the investigative file contains many other documents, including Detective Keyes' case notes. In opposition to this application, the County defendants allege that they have requested that the entire District Attorney's Office file regarding plaintiff be transferred to the County Attorney's Office, but that they have yet to receive it. The County defendants indicate that as soon as the file is received and reviewed, "any non-privileged documents not previously exchanged will be exchanged."

Accordingly, this cross-motion by plaintiff is **GRANTED** solely to the extent that the County defendants shall provide the entire District Attorney's Office file regarding plaintiff to plaintiff and co-defendant Bill within thirty (30) days of the date of service of the instant Order upon the County defendants with notice of entry. If the County defendants intend to withhold any documents on the basis of privilege, then they shall include a privilege log with the production.

The foregoing constitutes the decision and Order of the Court.

Dated: December 19, 2014

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**