

Liston v Volunteers of Am.

2014 NY Slip Op 33630(U)

November 24, 2014

Supreme Court, New York County

Docket Number: 101351/12

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ANGELINA LISTON, Individually, ANGELINA LISTON as Mother and Natural Guardian of GAVAN LISTON, ARLENE MATOS, Individually, ARLENE MATOS, as Mother and Natural Guardian of EDDIE NEGRON, FATIMA MILLER, Individually, FATIMA MILLER, as Mother and Natural Guardian of SEAN WESLEY MILLER, and JONATHAN McALLISTER, TELEIA JARVIS an Infant by Her Guardian Ad Litem, JASMINE JARVIS, and JASMINE JARVIS, Individually,

INDEX NO. 101351/12
MOTION DATE 11-05-2014
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Plaintiffs,

-against-

VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC., NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, and THE CITY OF NEW YORK,

Defendants.

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IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to 7 were read on this motion to/for: vacate an Order and pursuant to CPLR §3124 Compel Discovery:

Notice of Motion/ Order to Show Cause — Affidavit — Exhibits **FILED**
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____ **DEC 02 2014**

PAPERS NUMBERED	
1 - 3	_____
4, 5 - 6	_____
7	_____

Cross-Motion: Yes No **NEW YORK COUNTY CLERKS OFFICE**

Upon a reading of the foregoing cited papers, it is Ordered that VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC.'s motion pursuant to CPLR §2221 to vacate the February 20, 2014 Order of this Court and pursuant to CPLR §3124 to compel plaintiffs to provide discovery, is granted only to the extent that plaintiffs shall produce their cellular telephone records for April 15, 2011; a copy of the Sprint records relative to cellular telephone number (787) 469-9319 on April 15, 2011; or to the extent they do not possess said records duly executed authorizations for same within thirty days of the date of this Order. The remainder of the relief sought in this motion is denied.

The plaintiffs brought this negligence action to recover for personal injuries resulting from a fire that occurred on April 15, 2011, within Unit 916 of 2720 Broadway, New York, New York, a homeless shelter owned and operated by the defendants. Plaintiffs Teleia Jarvis, and her guardian ad litem, Jasmin Jarvis were the residents of Unit 916. Teleia Jarvis has cerebral palsy and was unable to stand or get out of bed, she was alone in Unit 916 at the time of the fire, and was severely burned.

On May 5, 2014, all the plaintiffs except Teleia Jarvis, an infant by her guardian ad litem, Jasmine Jarvis, Jasmine Jarvis, individually and Arlene Matos, individually (hereinafter collectively referred to as "plaintiffs"), settled their claims.

Pursuant to the Status Conference Order dated September 25, 2013, plaintiffs submitted to this Court for in camera inspection the Administration for Children's Services

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

(ACS) Investigation File, containing the records of the Child Protective Services (CPS) investigation of the events of April 15, 2011. By Order dated February 20, 2014, after in camera inspection and review of the complete ACS file, this Court denied Volunteers of America - Greater New York, Inc. (hereinafter referred to as "Volunteers") access to the records.

Volunteers pursuant to CPLR §2221 seeks to vacate the February 20, 2014 Order of this Court denying disclosure of the ACS Investigation that contained the records of the CPS Investigation for the same events. Upon vacating the February 20, 2014 Order, defendants pursuant to CPLR §3214 seek to compel plaintiffs, to produce an authorization for the ACS investigation file, containing the records of the CPS Investigation. Defendants also seek to compel the remaining plaintiffs to (1) produce their cellular telephone records for April 15, 2011; (2) produce a copy of the Sprint records relative to cellular telephone number (787) 469-9319 on April 15, 2011; and (3) produce duly executed authorizations for same.

Volunteers asserts that in complying with the Status Conference Order of September 25, 2013, plaintiffs included a cover letter dated December 17, 2013, which ex parte argued the discoverability of the records in the ACS Investigation File after having taken an unfair opportunity to review them. It contends that the arguments asserted in the cover letter were relied upon by this Court in determining the lack of entitlement to the ACS Investigation File and their letter dated January 2, 2014 seeking to have this Court disregard plaintiff's cover letter was ignored.

Plaintiffs contend that this Court's February 20, 2014 Order clearly states it was rendered following an in camera inspection of the documents and that it was not in reliance on correspondence.

The February 20, 2014 Order of this Court, was made solely on review of the documents submitted for in camera inspection. It specifically states, "Upon in camera inspection and review of complete ACS Investigation File, this Court finds that it is not relevant to the action. The ACS Investigation File does not support defendants' affirmative defenses of contributory negligence and/or culpable conduct." (Mot. Exh. F). Any references to the parties in the Order did not rely on contentions made in correspondence.

Volunteers argues that the February 20, 2014 Order prevents access to records that are material and necessary to the Article 16 apportionment defenses and counterclaims based on Arlene Matos' conduct as a tortfeasor. Volunteers contends that the ACS Investigation File is critical to ascertaining whether there was negligent entrustment of Teleia Jarvis to Arlene Matos and incompetent supervision prior to and at the time of the occurrence.

Plaintiffs object to the use of the ACS Investigation File because of the alleged irrelevant nature of the records to the defendants negligence claims, their potential detrimental effect on the plaintiffs' relationship and that the records cannot be produced without notice to ACS.

A parent's negligence for failure to supervise a child is generally not an actionable tort by the child. (*Holodook v. Spencer*, 36 N.Y. 2d 35, 324 N.E. 2d 338, 364 N.Y.S. 2d 859 [1974]). A claim of negligent supervision is not actionable because of the "potential strain on the family relationship." The potential burden on guardians, "...especially those charged with special responsibilities for children who happen to suffer developmental disabilities, by exposing them to rebound liability, flowing from a child's or adult's natural deficits or personal qualities merely on the basis of general allegations," is unreasonable (*LaTorre v. Genesee Mgt.*, 90 N.Y. 2d 576, 687 N.E. 2d 1284, 665 N.Y.S. 2d 1 [1997]).

A narrow and specific addendum to parental tort liability applies to a parent or guardian that might owe a duty to third parties by either improvidently entrusting a dangerous instrument with a child, or leaving the child with a dangerous instrument, with the parent or guardian's knowledge and the ability to control its use (*Nolechek v. Gesuale*, 46 N.Y. 2d 332, 385 N.E. 2d 1268, 413 N.Y.S. 2d 340 [1978]). A party asserting a claim of parental or a guardian's liability for negligent entrustment must establish the conduct created a foreseeable and particularized danger to third persons (*Rios v. Smith*, 95 N.Y. 2d 647, 744 N.E. 2d 1156, 722 N.Y.S. 2d 220 [2001]). A parent is not liable for negligence resulting from a babysitter's injuring a child, when the babysitter had no reason to know a dangerous condition existed (*Deshler v. East W. Renovators*, 275 A.D. 2d 252, 712 N.Y.S. 2d 518 [1st Dept., 2000]).

Volunteers are aware of the outcome of the ACS Investigation since it has a copy of the hospital record which states, on Tuesday, April 19, 2011, the hospital social worker, "...spoke with CPS Keith Danzy who consulted with his Supervisor Jan Ludwig and stated that events that occurred could not have been predicted." On April 27, 2011, ACS worker Daniel DiDio updated the hospital social worker on the investigation, reporting that, "...the agency did not have any plans of removing the patient (Teleia Jarvis) from the grandmother's (Jasmine Jarvis) care... The patient's discharge plan is "Shelter Placement with Family," pending medical evaluation, procedures and recommendation..." (Mot. Exh. J). Volunteers have not stated a foreseeable and particularized basis for a finding of negligence that can be established by the ACS Investigation file. It has also not stated a basis to vacate the February 20, 2014 Order.

Volunteers contends that it is entitled to plaintiffs cellular telephone records for April 15, 2011 and duly executed authorizations for same as a means of establishing a timeline of events, specifically when Teleia Jarvis was aware of the fire and any culpability of Arlene Matos.

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1st Dept. 1994]). The test concerning discovery is one of "usefulness and reason" and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (*Allen v. Crowell-Collier Publ.Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991]).

Plaintiffs have not established that the cellular telephone records sought by Volunteers have no bearing on the liability or damages issues asserted in this case. Although there has been no claim that the infant plaintiff caused the fire, Volunteers relies on deposition testimony and other evidence that both Jasmine Jarvis and Arlene Matos first became aware of the fire and the need to return to the apartment because of calls made by Teleia Jarvis on her cellphone (Mot. Exhs. I, M, and N). Volunteers has stated a basis to obtain the records to establish the timeline of events.

Accordingly, it is ORDERED, VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC.'s motion pursuant to CPLR §2221 to vacate the February 20, 2014 Order of this Court and pursuant to CPLR §3124 to compel plaintiffs to provide discovery, is granted only to the extent that plaintiffs shall produce their cellular telephone records for April 15, 2011; a copy of the Sprint records relative to cellular telephone number (787) 469-9319 on April 15, 2011; and duly executed authorizations for same, and it is further,

ORDERED that plaintiffs shall produce their cellular telephone records for April 15, 2011; a copy of the Sprint records relative to cellular telephone number (787) 469-9319

on April 15, 2011; and duly executed authorizations for same within thirty (30) days from the date of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED, that the parties are directed to appear for a Status Conference in IAS Part 13, Room 210 at 71 Thomas Street, on January 28, 2015 at 9:30am.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: November 24, 2014

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
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NEW YORK
COUNTY CLERKS OFFICE

FILED

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION