SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

NELSON GONZALEZ,

Plaintiff,

- v -

CITY OF NEW YORK, POLICE OFFICER GREGORY SANTANA, POLICE OFFICER JEFFREY SAN JUAN and SGT. JOSE RAMOS,

Defendants.

MOTION INDEX NO. 158776/2014

MOTION DATE

MOTION SEQ. NO. 002

Cross-Motion: ☐ Yes ■ No

Plaintiff NELSON GONZALEZ ("plaintiff") moves, by order to show cause, and pursuant to 22 N.Y.C.R.R. § 202.21(d), to vacate the note of issue and compel additional discovery.

Defendants CITY OF NEW YORK, POLICE OFFICERS GREGORY SANTANA ("officer Santana"), POLICE OFFICER JEFFREY SAN JUAN ("officer San Juan"), and SARGENT. JOSE RAMOS ("Sgt. Ramos") (collectively "defendants") oppose the application. For the reasons discussed below, the motion is denied in part.

BACKGROUND AND ARGUMENTS

On February 26, 2014, plaintiff was arrested by two police officers as he was walking home from work. Plaintiff alleges that he was eating chocolate raisinets when officer Santana jumped and beat him. Officer San Juan claims that he observed a "hand to hand" transaction from a "few feet" to a "block and a half away" between plaintiff and a dealer, and contacted officer Santana with his cell phone. When officer Santana arrived at the scene, he allegedly saw plaintiff place a clear plastic bag of marijuana into his mouth, and despite telling plaintiff to spit it out, plaintiff swallowed the bag. However, plaintiff alleges that he ate

a chocolate raisinet. According to Sgt. Ramos, plaintiff tried to flee the area, and when he and officer Santana tried to subdue plaintiff, all three of them fell to the sidewalk. Sgt. Ramos also testified that officer San Juan came to the scene and helped arrest and transport plaintiff to the precinct.

This action was commenced with the filing of plaintiffs' Summons and Complaint on or about September 8, 2014. Thereafter, defendants filed an answer on September 26, 2014. Over the following years, the parties conducted discovery, including depositions of plaintiff and all three individually named police officers. At a compliance conference on March 30, 2017, the parties stipulated that "all discovery is complete." On May 4, 2017, plaintiff filed a note of issue.

Plaintiff argues that due to "unusual or unanticipated circumstances," namely, a New York Law Journal article ("NYLJ article") that was recently brought to plaintiff's counsel's attention, additional pretrial discovery is needed. The article, "Trial Opens in Case Alleging NY Cops Made False Arrests to Secure OT Pay" details a problem in which the NYPD failed to stop a practice known as "collars for dollars," whereby police officers made questionable arrests near the end of their shifts to "pocket" overtime pay. Plaintiff contends that the NYPD condoned this practice by ignoring it, and although it was not written or formally adopted, it is a pervasive and longstanding practice that could impose liability on a municipal for 42 U.S. Code § 1983 ("§ 1983") violations.

Plaintiff asserts that defendants' conduct in this case points to the practice of "collars for dollars," and in light of the newly discovered NYLJ article, additional discovery is required to explore evidence that would support his § 1983 claim, including Sgt. Ramos' memo book, a deposition of NYPD Chief of Internal Affairs Joseph Reznick concerning his April 2018 memo, and further depositions of Sgt. Ramos and officers Santana and San Juan. Specifically, plaintiff proffers that these officers arrested him at or near the end of their normal work tour, and that information related to the start and end of their tours, overtime, and time of arrests is crucial to his case. Plaintiff explains that because this practice was not previously known to his counsel, further questions regarding the time and the "detailed specifics of what was done to process plaintiff's arrest and how long it took" are necessary.

In opposition, defendants point out that plaintiff filed a note of issue, certifying that all discovery was complete, but now seeks to compel further pretrial discovery one year later on the eve of trial. Defendants argue that plaintiff's application should be denied because plaintiff has not demonstrated unusual or unanticipated circumstances to warrant production of additional discovery. Rather, defendants contend that plaintiff's "[discovery of] additional legal theories" fails to meet this standard. Defendants further assert that plaintiff has not offered evidence demonstrating that he would suffer actual prejudice if his application is not granted.

In reply, plaintiff reiterates that his counsel did not have any information about the "collars for dollars" practice, and that there was no way for him to have discovered the practice even with due diligence. Plaintiff clarifies that before the article's publication, he had no reason to seek additional discovery. Plaintiff further refutes defendants' argument that plaintiff is attempting to alter the theory of his case, asserting that he has pled the same § 1983 cause of action in his complaint, and is only now seeking additional discovery to prove this theory. Ultimately, plaintiff avers that evidence from additional discovery should support a motion to amend his complaint and/or "conform the pleadings to the proof" since this "collars for dollars" practice is an implicit, official NYPD policy that police and municipal officials acquiesced to such that § 1983 liability can be found against defendants.

DISCUSSION

N.Y.C.R.R. § 202.01(d) provides, in pertinent part, that a court, "in its discretion, may grant permission to conduct additional discovery after the filing of a note of issue and certificate of readiness, where the moving party demonstrates that 'unusual or unanticipated circumstances' developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice" (*Karakostas v. Avis Rent A Car Sys.*, 306 A.D.2d 381, 382 [2d Dept. 2003]). "The common thread in the cases allowing further discovery is some occurrence after the filing of a note of issue that is not in the control of the party seeking

further discovery and which causes actual rather than potential prejudice" (*Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 139 [2d Dept. 2000]). "Incompleteness of discovery is not an 'unusual and unanticipated' circumstance arising after the filing of the certificate of readiness" (*Di Maria v. Coordinated Ranches, Inc.*, 114 A.D.2d 397, 398 [2d Dept. 1985]; *see also Karr v. Brant Lake Camp, Inc.*, 265 A.D.2d 184, 185 [1st Dept. 1999] [the inadvertence of counsel alone is not sufficient to depart from the provisions of these rules]). Similarly, "the lack of complete discovery due to the passage of time cannot be considered such a circumstance" (*Philpott v. Bernales*, 196 Misc. 2d 117, 118 [2d Dept. 2003]).

Here, plaintiff's argument that the newly discovered NYLJ article demonstrates unusual and unanticipated circumstances warranting additional discovery is insufficient. As a preliminary issue, plaintiff fails to cite or attach the NYLJ article as an exhibit for the court's reference or disclose when the article was first brought to his counsel's attention. Through the court's own search, the article was published on February 20, 2018, nearly a year after the filing of the note of issue and four years after the alleged incident (Andrew Denney, *Trial Opens in Case Alleging NY Cops Made False Arrest to Secure OT Pay*, New York Law Journal [2018]). Plaintiff, however, fails to demonstrate how or why the "collars for dollars" practice documented in this article has any bearing on or relation to his claims against the individual police officers or the NYPD besides mere speculation that the subject incident may relate to the practice detailed in the article. Through this backwards attempt, plaintiff relies on this article published nearly one year after discovery was certified as complete to draw unsupported conclusions that defendants may have participated in this practice at the time of the alleged incident. However, without a sufficient basis as to whether this practice occurred in this particular case, plaintiff cannot use this recently discovered article to get a second attempt at discovery.

Specifically, plaintiff fails to demonstrate unusual or unanticipated circumstances that would justify a deposition of NYPD Chief of Internal Affairs Joseph Reznick concerning his April 2018 memo. Plaintiff does not explain what the testimony of Mr. Reznick would reveal, if and how it relates to the subject incident, or how it would aid in the discovery of additional information not previously known to plaintiff.

Since plaintiff alleges a § 1983 claim in his initial pleadings, he knew or should have known that there may have been other relevant NYPD witnesses involved in this incident, especially higher ranked employees (*Madison v. Sama*, 92 A.D.3d 607, 607 [1st Dept. 2012] [denying plaintiff's request for a further deposition after the note of issue was filed where plaintiff's only reason for this request was because his new counsel's expert discovered areas of inquiry that his former counsel had failed to pursue was "insufficient to establish "'unusual or unanticipated circumstances'"]; *Di Maria,* 114 A.D.2d at 398, *supra* [request for further examinations should be denied where defendant knew the identity of the individuals sought to be deposed and the significance of their testimony prior to placing the case on the trial calendar]; *Ehrhart v. Nassau Cty.*, 106 A.D.2d 488, 488 [2d Dept. 1984] [where movant clearly has long known, or should have known, prior to the filing of the statement of readiness, the identity of the individuals sought to be deposed and the significance of their testimony, a motion for their pretrial examination, made subsequent to the filing of the statement of readiness, should be denied]; *Holbin v. Port Auth. of New York & New Jersey*, 88 A.D.2d 990, 990 [2d Dept. 1982] [Plaintiffs failed to show that unusual or unanticipated circumstances had developed subsequent to the filing of a note of issue where the identity, and possible testimonial significance, of the defendant's employee whom plaintiffs sought to depose subsequent to the placement of this case on the trial calendar was known, or should have been known, to plaintiffs well in advance of their filing a note of issue. "The record does not support plaintiffs' contention that not until after this case was placed on the trial calendar did they realize their need to depose this employee."]). Accordingly, plaintiff's request for a deposition of Joseph Reznick must be denied.

Moreover, plaintiff's argument that the NYLJ article will shed light on defendants' contradictory testimony with respect to the timing of their shifts and tours is unavailing. Plaintiff fails to explain how a further deposition of Sgt. Ramos and officers Santana and San Juan will reveal new facts, if any, pertaining to the "collars for dollars" practice. The mere allegation that these officers may have arrested plaintiff near the end of their shift does not indicate or prove that they had knowledge of or participated in this practice. Assuming *arguendo* that the NYLJ article amounts to an unusual or unanticipated circumstance that

developed subsequent to the filing of the note of issue, plaintiff proffers no evidence that further depositions of defendants will elicit new or different testimony as to the timing of their shifts and tours. Indeed, defendants already produced officer Santana's memo book outlining the timing of his work shift and tours, and the record reveals, and plaintiff admits, that questions were already asked and answered at defendants' depositions concerning such timing. Furthermore, defendants may well uphold their prior testimony or continue to maintain that they cannot recall the specifics of the timing of their shifts and tours. Accordingly, it is unlikely that further depositions will produce testimony substantively different from that of prior depositions even in light of the article—rather, plaintiff ineffectively relies on the article as grounds to reexamine witnesses and reopen discovery to support a claim made nearly four years ago.

In that regard, plaintiff's assertion that he did not inquire about Sgt. Ramos' actual end of tour and time of plaintiff's arrest on the date of the incident because his counsel did not know about the "collars for dollars" practice is insufficient to warrant additional depositions. Similarly, the obstruction of the tour time in officer Santana's memo book cannot justify additional depositions since plaintiff knew or should have known about such obstruction at the time of the deposition, but failed to further inquire into the matter or serve post-deposition demands in light of officer Santana's testimony that he cannot recall the "the tour duty he was on that night" or "what tour he was on when plaintiff was arrested." Plaintiff cannot now argue that this obstruction later became relevant in light of the NYLJ article when plaintiff had knowledge of these glaring discrepancies, but failed to conduct thorough discovery (*Med Part v. Kingsbridge Heights Care Ctr., Inc.*, 22 A.D.3d 260, 261 [1st Dept. 2005] [defendant failed to demonstrate unusual or unanticipated circumstances to justify post-note of issue discovery since the documents requested could have been sought before the note of issue was filed]; *Bojkovic v. JLT Assocs., Inc.*, 278 A.D.2d 46, 46–47 [1st Dept. 2000] [defendant's motion for a third deposition of plaintiff made eight months after the filing of the note of issue was properly denied]). Accordingly, because plaintiff failed to establish that discovery of the NYLJ article amounts to an unusual or unanticipated circumstance, plaintiff's request for further depositions of Sgt. Ramos and officers Santana and San Juan must be denied. Similarly, plaintiff's request

for discovery and inspection of certain documents pertaining to the timing of the officers' shifts, tours, and overtime dated May 7, 2018 must also be denied.

Indeed, additional depositions of these witnesses would be duplicative and burdensome considering the breadth of discovery previously conducted and that currently requested. Plaintiff fails to allege any prejudice, and was in fact accorded a full and fair opportunity to conduct ample discovery, including reviewing the officers' memo books and deposing the officers involved in the alleged incident (*McBrien v. Murphy*, 177 A.D.2d 292, 292 [1st Dept. 1991]; *see also Lacqua v. Staten Island Univ. Hosp.*, 56 A.D.3d 529, 530 [2d Dept. 2008] [barring further deposition of defendant where defendant had been completely and fully deposed, and plaintiff failed to demonstrate that a further deposition was necessary]). In that regard, plaintiff cannot wait until the eve of trial to request further discovery as this delay may prejudice defendants (*Campaign for Fiscal Equity, Inc. v. State*, 265 A.D.2d 277, 277 [1st Dept. 1999] [trial court properly exercised its broad discretion by denying discovery requests made on eve of trial]). Ultimately, public policy dictates that additional discovery requested four years after the alleged incident and nearly one year after the case has been certified and ready for trial contradicts and undermines longstanding principles that at some point, the "discovery process must end" (*Philpott ex rel. Philpott*, 196 Misc. 2d at 118, *supra* [defendants submitted no evidence of "unusual or unanticipated" circumstances to permit additional discovery after the filing of the note of issue]).

However, because defendants agreed to produce Officer Ramos' memo book in their response to a compliance conference order dated October 15, 2015, defendants are directed to produce the same within 30 days of this order. As such, it is hereby

ORDERED that plaintiff's application to vacate the note of issue is denied; and it is further

ORDERED that plaintiff's request for a deposition of Joseph Reznick is denied as previously indicated; and it is further

ORDERED that plaintiff's request for further depositions of Sgt. Ramos and officers Santana and San Juan is denied as previously indicated; and it is further

ORDERED that plaintiff's request for discovery and inspection dated May 7, 2018 is denied as previously indicated, and it is further

ORDERED that defendants are directed to produce Officer Ramos' memo book within 30 days of this order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 7, 2018 at 9:30 A.M. at 111 Centre Street, Room 1227 (Part 10) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: July 13, 2018

George J. Silver

HON. GEORGE J. SILVER

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION