

Manna Lu-Wong v City of New York

2021 NY Slip Op 32942(U)

December 7, 2021

Supreme Court, New York County

Docket Number: Index No. 153614/2020

Judge: Dakota D. Ramseur

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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: HON. DAKOTA RAMSEUR PART **05**

Justice

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INDEX NO. 153614/2020

MANNA LU-WONG, MANNA LU-WONG,

10/28/2021,

Plaintiff,

MOTION DATE 10/28/2021

- v -

MOTION SEQ. NO. 003 004

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF SANITATION, GLEN PUSEY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 62, 63, 70, 71, 72, 73, 74, 75

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 68, 76, 77, 78

were read on this motion to/for REARGUMENT/RECONSIDERATION

This is an action seeking damages for wrongful death. In motion sequence 003, plaintiffs, Manna Lu-Wong as Administrator of the Estate of Hon Wing Lu, and Manna Lu-Wong, individually (plaintiffs), now move pursuant to CPLR 2221 to reargue this Court’s decision and order filed on September 29, 2021, denying the branches of plaintiffs’ motion seeking: 1) to unseal records and documents sealed pursuant to CPL 160.55 related to the individual defendant, Glen Pusey’s (individual defendant), arrest and prosecution stemming from the January 25, 2020 motor vehicle accident; and 2) permitting “the plaintiff to serve subpoenas on the Manhattan District Attorney’s Office, New York Police Department, Collision Investigation Squad and all other entities in possession of records relating to the investigation, arrest and prosecution [of the individual defendant].” In motion sequence 004, co-defendant, the City of New York and New York City Department of Sanitation (collectively, the City), also moves to reargue the portion of the previous decision granting the branch of plaintiff’s motion to compel the City to produce a witness to testify at a deposition concerning certain investigation documents. Both motions are opposed. For the following reasons, and after oral argument on December 7, 2021, plaintiffs’ motion is denied, and the City’s motion is granted, and upon reargument, the Court denies the branch of plaintiff’s underlying motion to compel the City to produce a witness to testify concerning the investigation documents.

According to plaintiffs, the decedent was killed when the vehicle operated by the individual defendant collided into the decedent while decedent was crossing the street at the intersection of Canal Street and Elizabeth Street, in the County, City and State of New York. At the time of the accident, the individual defendant was an employee of the City and operating a City-owned vehicle.

As a result of the accident, the individual defendant was arrested. According to the certificate of disposition, the individual defendant was charged with, first, a violation of Administrative Code § 19-190(b). That provision states, in relevant part, that any driver who fails to yield to a pedestrian when said pedestrian has the right of way and “[w]hose motor vehicle causes contact with a pedestrian . . . and thereby causes physical injury shall be guilty of a misdemeanor.” And second, Vehicle and Traffic Law (VTL) § 1146 (c), which states that where a driver of a motor vehicle’s failure to exercise due care results in serious physical injury, the driver shall be guilty of a traffic infraction. The individual defendant plead guilty to both charges. The certificate of disposition indicates that only the charge under the VTL was sealed pursuant to CPL 160.55.

Plaintiffs sought and received at least some of the individual defendant’s criminal file. On April 26, 2021, the Records Access Appeals Officer assigned to process plaintiffs’ request under the Freedom of Information Law disclosed parts of the investigative file related to this accident, including the complaint report and collision investigation squad case file. According to the affirmation of Robert F. Fodera (Fodera), the Managing Attorney of the Subpoena Litigation Unit of the New York City Police Department, the release of those records was the product of an oversight.

Fodera affirms that all of the documents related to the investigation, arrest, and prosecution of the individual defendant concerning the accident are sealed (NYSCEF doc. no. 57 at ¶ 4). Fodera further affirms that the subject records remained sealed under New York State Office of Court Administration’s records (*id.*). As a result, Fodera affirms, “I have been unable to produce the records to the New York City Law Department absent submission of a written authorization from the former employee, a document which, to date, has not be provided to the undersigned” (*id.*).

Notably, Fodera states that the Freedom of Information Law Unit, the unit that released the individual defendants’ records to plaintiffs, indicated that the NYPD files were “not properly marked as sealed,” and that the Unit “[d]id not take the subsequent step that the Subpoena Litigation Unit takes in confirming the status of the records in official OCA records before producing records to any party upon their request or pursuant to a subpoena or order of a court” (*id.* at ¶ 5).

CPLR 2221(d) permits a party to move for leave to reargue a decision upon a showing that the court overlooked or misapprehended the law, but shall not include any matters of fact not offered on the prior motion (*William P. Pahl Equip. Corp. v Kassiss*, 182 AD2d 22, 27 [1st Dept 1992]; *Pezhman v Chanel Inc.*, 126 AD3d 497 [1st Dept 2015]). “A motion for reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*Matter of Setters v AI Props. And Devs. (USA) Corp.*, 139 AD3d 492 [1st Dept 2016]).

In support of their motion, plaintiffs argue that the sealing provision of CPL 160.55 does not apply to individual defendant’s criminal conviction because he was convicted of a misdemeanor, as opposed to a noncriminal offence such as a violation or plea to a traffic

infraction. Plaintiffs also argue at length that the Court incorrectly analyzed plaintiffs' application under 160.50.

"Under CPL 160.55, when a criminal action or proceeding against an individual is terminated by conviction of, or guilty plea to, a traffic infraction or a violation, 'all official records and papers relating to the arrest or prosecution ... on file with the division of criminal justice services, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency.'" (*People v F.B.*, 155 AD3d 1, 4 [1st Dept 2017], quoting CPL 160.55[1][c]).

Here, the criminal charges against the individual defendant arise from the same event and are intertwined to the extent that it would be impossible to parse the records related to each charge. Plaintiffs do not cite to any statute or caselaw permitting access to records and documents concerning a criminal investigation, where there are two criminal charges, and one charge is sealed, but the other is not, and both charges occurred as a result of the identical incident and were presumably investigated simultaneously. Further, a review of the previous decision reveals that CPL 160.50 was neither mentioned, nor used as the statutory means to deny plaintiffs' motion. Accordingly, the Court finds that it did not misapply, overlook, or misapprehend the law in the previous decision as it relates to plaintiffs' motion.

As for the City's motion, the Court finds that it erred in granting the branch of plaintiffs' motion to compel the City to produce witness to testify at a deposition concerning the investigation documents plaintiffs received pursuant to the FOIL request. In light of the Court's determination that the subject records are sealed, it would be contradictory to direct the City to produce a witness to explain those very same records.

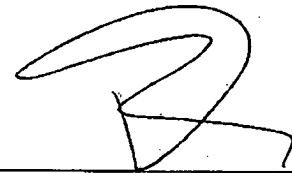
Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to reargue is granted, and that on reargument, the Court adheres to its previous decision denying the branch of plaintiffs' motion seeking certain records and documents concerning the individual defendant's arrest and prosecution; and it is further

ORDERED that the City's motion for leave to reargue is granted, and on that argument, the Court denies the branch of plaintiffs' motion seeking to depose a witness from the City concerning certain investigation documents; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties, with notice of entry, within fourteen (14) days of entry.

This constitutes the decision and order of the Court.



DAKOTA D. RAMSEUR, J.S.C.

12/7/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE