New York Official Reports

Unreported Disposition
23 Misc.3d 1134(A), 889 N.Y.S.2d 506 (Table), 2009 WL 1564689 (N.Y.Ct.Cl.), 2009 N.Y. Slip Op. 51100(U)

***1** David Ohnmacht, Claimant,

v.

The State of New York, Defendant.

112158
Ct Cl
Decided on May 4, 2009

CITE TITLE AS: Ohnmacht v State of New York

ABSTRACT

Disclosure
Material Exempt from Disclosure

Ohnmacht v State of New York, 2009 NY Slip Op 51100(U). Disclosure—Material Exempt from Disclosure. Civil Rights Law—§ 50-a (Personnel records of police officers, firefighters and correction officers). (Ct Cl, May 4, 2009, DeBow, J.)

APPEARANCES OF COUNSEL

ES: For Claimant:
DAVID OHNMACHT, Pro se
For Defendant:
ANDREW M. CUOMO, Attorney General of the State of New York
By: Thomas R. Monjeau, Assistant Attorney General

OPINION OF THE COURT

W. Brooks DeBow, J.

This claim by an individual incarcerated in a State correctional facility alleges that claimant was assaulted by Correction Officer (CO) Mark Lewis at Coxsackie Correctional Facility on November 3, 2005. This Court previously granted parts of claimant's motion to compel production of documents, but provided defendant the opportunity to seek a protective order with respect to certain documents (*see Ohnmacht v State of New York*, UID No. 2008-038-612, Claim No. 112158, Motion No. M-74753, DeBow, J. [Sept. 24, 2008]). Defendant now moves for a protective order, and claimant opposes the motion.[1]

The first item at issue is the investigative file of the Inspector General regarding the November 3, 2005 incident. Defendant argues that this file and the documents therein should not be disclosed, and it relies on the public interest privilege that applies to files created in the course of an internal investigation in the prison context (*see Lowrance v State of New York*, 185 AD2d 268 [2d Dept 1992]). This privilege furthers the State's interest in protecting its investigatory processes into misconduct of public employees by maintaining the integrity of its internal investigations and protecting the confidentiality of sources of information, and requires claimant to demonstrate that his need for information contained in the file outweighs the State's interests (*see Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 118 [1974]; *Saldana v State of New York*, UID # 2003-030-541, Claim No. 103172, Motion No. M-65471, Scuccimarra, J. [May 19, 2003]). Defendant asserts that -- with one exception -- any documents in the Inspector General's file that were not generated by claimant himself and which contain facts relevant to this claim have already been produced to claimant or are available to claimant through other avenues of discovery (*see* Monjeau Affirmation, ¶¶ 14, 15). Claimant's substantive response to this assertion ***2** is that not all documents have been produced, and that some are incomplete (*see* Ohnmacht "Affirmation", ¶ 10).[2]

The Court perceives no harm to the integrity of the Investigator General's investigation or file if defendant were to produce copies of those documents that defendant asserts have already been provided to claimant. The qualified public interest privilege attendant to the Inspector General's file does not apply when "the information is already known to the parties" (*see Tyree v State of New York*, UID # 2002-019-530, Claim No. 101474, Motion No. M-63202, Lebous, J. [May 6, 2002]). Thus, defendant's motion for a protective order is denied with respect to the following items, which defendant asserts are already in claimant's possession (*see* Monjeau Affirmation, ¶ 14):

-- the complaint from claimant, as well as correspondence from claimant;

-- the use of force report, the unusual incident (U.I.) forms, and the inmate grievancepacket, including the statements of DOCS employees who were witnesses to the alleged incident;

-- the tier hearing packet;

-- a transcript of the tier hearing tape;

-- claimant's ambulatory health records; and

-- color copies of the digital photographs taken at the time of the incident.

Defendant shall inform claimant of the duplication fee applicable to each of these items, and claimant shall then advise defendant of the documents of which he desires a copy. Upon claimant's payment of the copying fee for desired items, defendant shall reproduce and deliver them to claimant.[3]

With respect to certain other items in the Inspector General's file, to wit, the statement of ***3** one witness, the letter of an inmate that claimant identifies as "Sukrah" (*see* Ohnmacht "Affirmation", ¶ 19), and the investigator's summaries of interviews and his Investigative Report, these items fall within the qualified privilege that applies to the Inspector General's files to protect the confidentiality of witnesses who provide information in the course of an investigation in the prison context (*see Lowrance v State of New York*, *supra*).[4] Claimant proffers no specific argument that the State's interest in the confidentiality of those documents is outweighed by his interest in having them disclosed. Thus, defendant's motion for a protective order will be granted with respect to those documents.

Defendant seeks a protective order with respect to the version of DOCS Directive #4944 that was applicable at the time of the incident at issue, and which addresses the Use of Physical Force by DOCS employees. Defendant argues that due to security concerns, this document is classified for distribution to staff only (*see* Monjeau Affirmation, ¶ 21), and cites Court of Claims precedent suggesting that this directive is not discoverable by virtue of the Commissioner of DOCS' exercise of his authority to restrict inmates' access to it (*see Brown v State of New York*, UID # 2001-015-200, Claim No. 103284, Motion No. M-63858, Collins, J. [Nov. 5, 2001]). However, defendant has nevertheless provided claimant with a redacted version of this directive along with copies of its supporting forms (*see* Monjeau Affirmation, Exhibit A). Upon *in camera* review of the unredacted version of the directive, the Court finds that the limited redactions proposed by defendant appropriately protect sensitive information that is not, in any event, relevant to this claim. Accordingly, defendant's motion for a protective order will be granted to the extent that defendant will not be required to produce an unredacted copy of Directive #4944.

Defendant next seeks a protective order addressed to claimant's demand for the medical records of CO Lewis, who was the alleged perpetrator of the assault on claimant. Defendant contends that the medical records of the correction officer are not discoverable, and it relies on the physician-patient privilege set forth in CPLR 4504 and discussed in *Dillenbeck v Hess* (73 NY2d 278 [1989] [validly asserted physician-patient privilege is not waived unless defendant affirmatively places his or her medical condition in issue]; *but see Matter of Moore v Goord*, 255 AD2d 640, 641 [3d Dept 1998]; *cf.* CPLR 4504 [a] [statute protects information held by a treating physician "acquired in *attending* a patient in a professional capacity" (emphasis added)]). Claimant makes it clear that his demand for CO Lewis' medical records is limited to a physical examination that followed the incident of November 3, 2005 (*see* Ohnmacht "Affirmation" ¶ 15). Assuming without deciding that defendant has standing or authority to assert the physician-patient privilege on behalf of CO Lewis (*cf. Dillenbeck v Hess*, *supra* at 289 [the statutory privilege "belongs to the patient"]), the Court will reserve decision on defendant's motion with respect to disclosure of these records. Considering that the record sought by claimant is in the nature of medical records, disclosure of which implicates privacy rights, CO Lewis will be given the opportunity to assert the physician-patient privilege and demonstrate why the record should ***4** be subject to the privilege.[5]

Defendant also seeks a protective order with respect to claimant's demand for information on the number of complaints of excessive force against CO Lewis as well as information on any disciplinary actions taken against CO Lewis throughout his employment with DOCS. Defendant argues that these demands seek irrelevant material, and further, that the information claimant seeks is protected from disclosure by Civil Rights Law § 50-a. Claimant responds that he is not seeking disclosure of the contents of the file, but only information about the number of complaints against CO Lewis and whether disciplinary sanctions have ever been

imposed upon him, and that the information he seeks about CO Lewis will be relevant to the issue of notice.

It is well-established that records regarding complaints and disciplinary sanctions of correction officers are confidential pursuant to Civil Rights Law § 50-a (*see Matter of Prisoners' Legal Servs. of NY v New York State Dept. of Correctional Servs.*, 73 NY2d 26 [1988]). Claimant attempts to avoid the application of Civil Rights Law § 50-a to his request for information about CO Lewis' employment history by asserting that he is not seeking the actual documents themselves, but only data about CO Lewis' employment history. However, given the purpose of the statutory protection -- to protect enumerated public employees from exploitation, harassment or embarrassment that might flow from others' potential use of the information in their personnel files (*see id.* at 33; *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 157-158 [1999]) -- it would defeat the purpose of Civil Rights Law § 50-a to conclude that the statute protects the personnel documents themselves but not the information contained therein. Thus, the Court concludes that the information claimant seeks falls within the scope of Civil Rights Law § 50-a.

The statute allows for production of confidential personnel records pursuant to court order (Civil Rights Law § 50-a[1]), and it sets forth the procedures to be followed before such an order may issue (*see id.*, subd. [2]; [3]). Procedurally, the statute:

contemplates four distinct steps: 1) the Court determines whether there is a sufficient showing of facts to warrant giving notice to all interested parties and holding (or offering to hold) a hearing; 2) if so, a hearing is conducted . . . ; 3) if convinced that there is sufficient basis for ordering release of the records, the Court then directs that they be sealed and sent for *in camera* inspection; and 4) the Court reviews the records and releases only those parts that are deemed relevant and material to the matter at hand.

(*Parker v State of New York*, UID # 2003-032-081, Claim No. 105753, Motion Nos. M-66789, ***5** CM-66854, Hard, J. [Aug. 20, 2003]). If it is patently clear that the records sought would not be material and relevant to the prosecution of the claim, the Court may preclude the production of documents without a hearing (*see People v Diaz*, 223 AD2d 469 [1st Dept 1996], *lv denied* 87 NY2d 1019 [1996]; *Parker v State of New York*, *supra*). Here, defendant contends that the information claimant seeks about the number of complaints lodged against CO Lewis and whether he has ever been subject to disciplinary sanctions is not material or relevant to the claim.

Claimant counters that the information sought is necessary and relevant to prove that the State had prior notice of CO Lewis' "behavior" (*see* Ohnmacht "Affirmation", ¶ 16). This argument fails, however, because notice of prior events is not an element of this claim, which alleges that CO Lewis assaulted and battered claimant. This is not a claim in which the State may be held liable because it was reasonably foreseeable that an inmate confined in a State correctional facility would assault another inmate, in which notice of past violent behavior is material and relevant (*see e.g. Sanchez v State of New York*, 99 NY2d 247 [2002]). Nor does the claim assert a cause of action for negligent training and supervision, to which defendant's knowledge of prior conduct of CO Lewis might be material and relevant. Rather, the State's alleged liability is in the nature of respondeat superior flowing from CO Lewis' conduct on November 3, 2005. Since "it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion" (*Matter of Brandon*, 55 NY2d 206, 210-211 [1982] *see also* Prince, Richardson on Evidence §4-517 [Farrell 11th ed]) information from CO Lewis's personnel records about prior complaints or disciplinary sanctions is not material or relevant to the instant claim. Accordingly, defendant's motion for a protective order with respect to information about CO Lewis's employment history will be granted. In sum, it is

ORDERED, that defendant's motion for a protective order is GRANTED IN PART, and defendant may withhold production of the file of the Inspector General except those documents specifically recited in the third paragraph of this Decision and Order, and may withhold production of information related to CO Lewis' employment history, and it is further

ORDERED, that the Attorney General shall serve a copy of this Decision and Order on CO Mark Lewis no later than five days after receipt of this Decision and Order, and it is further

ORDERED, that the Court's Decision and Order on the disclosure of CO Lewis' medical records is held in abeyance pending the filing and service of papers by CO Lewis asserting the physician-patient privilege and the filing and service of claimant's reply, if any, provided that the privilege shall be deemed waived if CO Lewis does not file and serve

such papers within 45 days of the date of filing of this Decision and Order, and it is further

ORDERED, that defendant shall, within 15 days of the date of the filing of this Decision and Order, inform claimant of the fee for copying each document to be produced and shall produce such documents to claimant upon his payment of such fee, and it is further

ORDERED, that defendant's motion is in all other respects DENIED.

***6** Albany, New York

May 4, 2009

W. BROOKS DeBOW

Judge of the Court of Claims

FOOTNOTES

Footnotes

1 Defendant has submitted unredacted copies of all of the documents addressed in this motion for *in camera* review.

2 The Court notes defendant's objection to claimant's submission of an unsworn “affirmation” (*cf.* CPLR 2106 [allowing an affirmation by an admitted attorney to substitute for an affidavit]). However, requiring claimant to recast his submission as an affidavit is not warranted on this motion, which does not generally turn upon factual assertions by claimant. The Court further notes claimant's objection to the untimeliness of defendant's motion, which was filed several days after the time directed in the Court's prior decision. However, and despite defendant's failure to offer an excuse for this tardy submission, as no prejudice to claimant from the late motion is apparent, the Court will decide the motion on the merits.

3 As indicated in defense counsel's cover letter to his *in camera* submission, the grievance packet, which was previously provided to claimant, is not included in the Investigator General's file. Counsel states that a search has been conducted for that packet, but that a search by the Investigator General's office failed to locate that packet. Inasmuch as claimant will be required to pay for a copy of this document that defendant asserts has already been provided, claimant should advise defendant of his continued desire for a copy of the inmate grievance packet and authorize payment therefor. Thereafter, if claimant still desires to obtain a copy of the grievance packet, defendant should conduct a further search of DOCS' records outside of the Inspector General's office and shall produce the inmate grievance packet or submit an affidavit detailing the search for that packet and stating that it cannot be found.

4 The Investigator General's file of the incident giving rise to this claim includes documents from another inmate's unrelated grievance that were mistakenly placed in the file for this incident (*see* Monjeau Correspondence, Nov. 3, 2008). Claimant concedes that this document need not be disclosed (*see* Ohnmacht “Affirmation”, ¶ 11).

5 The Attorney General is directed to serve on CO Lewis a copy of this decision and order no later than five days after receipt thereof, and the Attorney General shall file with the Clerk an affidavit of such service. CO Lewis will have 45 days from the date of filing of this Decision and Order within which to file and serve papers asserting the physician-patient privilege and the legal basis for the assertion of the privilege. Claimant's reply, if any, to CO Lewis' papers shall be filed with the Clerk of the Court and served on CO Lewis no later than 15 days after a copy of said papers has been served on claimant. Service of claimant's reply may be accomplished by service on the Attorney General who shall then forward such reply to CO Lewis forthwith.