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Other Cases

Lewis M. Steel '63 Papers

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12-1-1995

## Complaint and Notice of Entry of Decision

Lewis M. Steel '63

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

PRESENT: Hon. EMILY JANE GOODMAN

Justice

PART 17

Renee Solomon

INDEX NO. 18449/92

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

American Society for the Prevention of Cruelty to Animals

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

*to amend complaint is not unreasonably or unduly prejudicial for a defendant duly produced.*

ION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE  
DATED:

J.S.C.

Dated: 1/16/91

EX-100  
1/16/91  
J.S.C.

FILED  
JAN 24 1991  
COUNTY OF NEW YORK

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

## SUPREME COURT, NEW YORK COUNTY

Renee Solomon

Plaintiff(s),

Index No. 18449/92

-against-

American Society for the Prevention  
of Cruelty to Animals,  
et al.

Defendant(s)

IAS Part 17Compliance Conference  
OrderOn April 3, 1997, a conference was held in this case. The parties appeared as follows:Plaintiff(s) Renee Solomon by Lewis M. SteelDefendant(s) American Society for the Prev. of Cruelty to Animals - Michael CanfieldJose HernandezLynne KroneLeonard/Elly EpsteinMelba Shiver for Stanley Waxman P.C.ESCO Eterminatingby Oshman + Helfenstein, John CusimanThe Court has determined that the Court's Case Management Order of           , 1996 has not been complied

with ~~in that~~ AND that thereafter the court granted ~~ITS~~ permission  
to amend her complaint, & thereafter the amended complaint  
was served on all parties, and all parties having answered, except  
for Hernandez, who will answer in 10 days, the plaintiff will, by MAY 5,  
1997 file an answer and/or supplementation, B.P. and will ~~by~~ file  
~~the answer~~ a note of issue by MAY 20, 1997

Accordingly, it is ORDERED that the above be complied  
with as indicated.

NOTE OF ISSUE TO BE FILED BY MAY 20, 1997

Enter:

J.S.C.

EMILY JANE GOODMAN

Dated: 4-3-97

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

RENEE SOLOMON,

Plaintiff,

-against-

AMERICAN SOCIETY FOR THE PREVENTION OF  
CRUELTY TO ANIMALS, JOSE HERNANDEZ,  
LEONARD EPSTEIN and ELLY EPSTEIN,

Defendants.

LEONARD EPSTEIN and ELLY EPSTEIN,

Third-Party Plaintiffs,

-against-

ESCO EXTERMINATING SERVICES CO., a/k/a,  
NATIONAL CLEANING CONTRACTORS, INC.

Third-Party Defendants,

EMILY JANE GOODMAN, J:

Defendant, Jose Hernandez ("Hernandez"), former peace officer employed by defendant, the American Society for the Prevention of Cruelty to Animals ("ASPCA"), seeks to limit disclosure of his ASPCA personnel file, including post- and pre-incident disciplinary material.

Plaintiff, Renee Solomon ("Solomon") seeks to inspect and copy documents in Hernandez' personnel file which is currently in possession of the Court for an in camera review. Solomon also seeks any other disciplinary information regarding Hernandez, his unredacted attendance record and an order that Hernandez respond to unanswered questions posed at his deposition regarding other civil suits against Hernandez, the reasons for his eventual discharge and

other disciplinary matters.

### FACTS

Solomon resides in an apartment building located at 315 East 86th Street, in New York. Solomon's next-door neighbors, the Epsteins, fed birds on their terrace which adjoins Solomon's terrace. As a result of this feeding, pigeons and other birds frequently alighted and defecated on Solomon's terrace. In addition, the birds and Solomon's apartment became the target of children firing pellet guns from a nearby roof. Solomon claims that her window was shattered by the pellets and that pellets lodged in her bedroom closet.

Solomon informed her landlord of the problem. The landlord employed an outside contractor who placed a gel-like substance on Solomon's window-sill. As a result, some birds became stuck in the gel-like substance and died.

The Epsteins complained to various animal protection groups, including the ASPCA, about the death of the birds. In or about October, 1991, Officer Hernandez was assigned to investigate the matter. Solomon contends that Hernandez thereafter hounded and harassed her. Hernandez asserts that he obtained a search warrant for Solomon's apartment. Upon searching her apartment, Hernandez discovered two more dead birds.

On February 11, 1992, Hernandez and his partner showed up at the Columbia University School of Social Work, where Solomon, who is on the faculty, was about to give a lecture. Solomon asserts that, in front of her colleagues and students, Hernandez forcibly

assaulted her, handcuffed her and removed her from the premises.

Hernandez then escorted Solomon to the 19th Precinct of the Police Department of the City of New York and swore out a complaint accusing her of violating section 353 of the Agriculture and Markets Law and resisting arrest, a class A misdemeanor. After an appearance at the Criminal Court of the City of New York, where Solomon was charged with two misdemeanors each carrying a maximum penalty of one year in jail, the charges against plaintiff were dropped.

Plaintiff then commenced this action against the ASPCA, Hernandez and the Epsteins. The claims against the ASPCA and Hernandez sound in false arrest, false imprisonment, malicious prosecution, assault and a violation of 42 USC §1983 based upon these acts. The claims against the Epsteins are for slander and nuisance.

### ARGUMENTS

Hernandez contends that his personnel file is not discoverable under either state or Federal law. Although he concedes that he is not a police officer as defined by Criminal Procedure Law §2.10, he argues that the Court should extend the privilege contained in New York Civil Rights Law §50-a to him because he is a peace officer under C.P.L.210.7, performing many of the same functions as a police officer, such as undercover work. In addition, Hernandez claims that it would be difficult for the ASPCA to supervise its peace officers if confidential personnel files and discipline

records were available for public review.

Hernandez also contends that his personnel file contains "unverified" disciplinary records which are irrelevant and unrelated to the issues of this case. Finally, Hernandez contends that Solomon's request for his employment file is a "blunderbuss".

Hernandez seeks protection under Federal law by applying the balancing test articulated by the United States District Court for the Eastern District of New York in King v Conde (121 FRD 180 [EDNY 1988]). Hernandez asserts that the factors favoring non-disclosure, such as the threat of violent retaliation, invasion of his privacy and the inadmissibility of disciplinary information outweigh the factors favoring disclosure, because the personnel file and disciplinary records are not relevant to Solomon's case, the public interest in giving force to Federal civil rights laws is not served by disclosure of his personnel file and disciplinary information; and non-disclosure is not prejudicial to Solomon's case.

Solomon argues that Hernandez' personnel file and disciplinary records will help her determine whether Hernandez' conduct was part of a pattern and whether the ASPCA had notice of Hernandez' conduct. Solomon argues that Federal law alone applies to this discovery dispute because all of Solomon's state law claims are encompassed by her 42 USC §1983 claim. Like Hernandez, Solomon applies the King v Conde balancing test and asserts that factors favoring disclosure, such as the relevancy of Hernandez' personnel file and disciplinary records to proving Solomon's civil rights

claim, the public interest in giving vitality to the civil rights laws and the prejudice to her case of non-disclosure outweigh the factors offered by Hernandez to support his argument for non-disclosure.

Solomon also asserts that CRL §50-a does not apply to Hernandez, and even if it did, the privilege is not absolute. According to Solomon, even under a CRL §50-a analysis, Hernandez' personnel file and disciplinary records are relevant to Solomon's case and are, therefore, discoverable.

### ANALYSIS

When a state court entertains a Federally created cause of action "it is appropriate that the court follow Federal law when assessing the discoverability of documents" (Svaigsen v City of New York, 203 A.D.2d 32, 33 [1st Dept 1994]) (citations omitted) (applying Federal discovery rules to 42 USC §1983 claim where plaintiff brought state claims for wrongful arrest, assault, false imprisonment and wrongful death and deprivation of Federal civil rights under 42 USC §1983). This is particularly true in civil rights actions brought under 42 USC §1983, as the statute was enacted to vindicate federal rights against deprivation by state action (id.). However, because the 42 USC §1983 claim may encompass all of the acts alleged in her state law claims does not necessarily mean that these claims should also be governed by Federal discovery rules. A state court hearing state law claims should apply state discovery rules; only Solomon's 42 USC §1983



claim concerns the vindication of federal civil rights.

Neither state nor federal law contemplates denial to a litigant of information from personnel files or other documents if information is necessary to the party's preparation of her case, even if the material may reveal matters that could cause embarrassment or other possible harm to another party (Burke v New York City Police Department, 115 FRD 220, 225 [SDNY 1987]). Accordingly, Solomon is entitled to discover Hernandez' personnel file and disciplinary records under an application of either state or Federal law.

a. STATE LAW CLAIMS

Solomon is correct in asserting that CRL §50-a does not apply to Hernandez. Hernandez is a peace officer, not a police officer as defined by CPL §1.20, nor a correction officer, firefighter or firefighter/paramedic. Thus, he is not entitled to the protection of CRL §50-a (McKinney v New York, 111 Misc.2d 382, 385 [Ct Claims 1981]). Even if the Court were to find that Hernandez was covered by CRL §50-a, the privilege provided by the statute is not absolute. Rather, the statute provides that the court, after in camera inspection, "shall make those parts of the record found to be relevant and material available to the persons so requesting (CRL §50-a(3)). CRL §50-a protects irrelevant materials from disclosure, and does not safeguard privacy itself (King v Conde, 121 FRD 180, 192 [EDNY 1988]).

As no privilege applies, Solomon's discovery request is

analyzed according to general principles of discovery. CPLR §3101 states that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action ...".

The words material and necessary should 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 (Allen v Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 [1968]). The test is one of usefulness and reason (id.). Although Solomon has not alleged a violation of her state civil rights, this Court is of the opinion that in civil rights actions, plaintiffs should not be denied information necessary to establish their claims (In the Matter of O'Grady v City of New York, 164 Misc.2d 171, 624 N.Y.S.2d 337, 340 [Sup Ct New York County 1995]). As discussed below, Hernandez' personnel file and disciplinary material appear relevant to the prosecution of Solomon's case, and are, therefore discoverable.

**b. FEDERAL LAW CLAIM**

Both parties cite the Eastern District's balancing test set forth in King v Conde (121 FRD 180 [EDNY 1988]). Once the parties have met their threshold burdens by setting forth specific reasons for disclosure or non-disclosure, the Court may review the materials at issue in camera (King v Conde, supra, 121 FRD at 190). In conducting its in camera review, the Court should weigh the interests on both sides by considering the factors favoring non-

disclosure and disclosure as set forth by the Eastern District. In this case, the factors favoring non-disclosure are the threat to the officer's safety, invasion of the officer's privacy, weakening of law enforcement programs, chilling of internal investigative and citizen complainant candor, state privacy law and CRL §50-a (id. at 191-194).

The most important factors favoring disclosure are the relevance to the plaintiff's case, the "truly dominant interest" of the public policy underlying Federal civil rights laws and the public interest in giving force to these laws (id. at 194-195). Other factors to consider are: plaintiff's need for the information, its availability from other sources and the strength of the plaintiff's case (id. at 194-195).

#### **1. FACTORS FAVORING NON-DISCLOSURE**

Hernandez' arguments in support of non-disclosure are not persuasive. Concerning the threat of violent retaliation, Hernandez asserts that disclosure of information such as his home address, whether he has a family and other personal information could threaten his family's safety. "Pedigree" details of Hernandez' private life are not relevant to Solomon's case and may be redacted from his records (id. at 198). Hernandez' privacy interest in non-disclosure should be especially limited because his position mandates accountability to the public. (id. at 191). Next, Hernandez argues that "disciplinary information is inadmissible as it is more prejudicial than probative." At this

stage of the proceedings, discoverability is the inquiry, not admissibility. This information is clearly appropriate for pretrial disclosure.

## 2. FACTORS FAVORING DISCLOSURE

Upon review, the files provided by Hernandez appear relevant to Solomon's claim under 42 USC §1983 based upon the acts of malicious prosecution, false arrest, false imprisonment and assault. The records contain numerous documents reflecting disciplinary action taken by the ASPCA against Hernandez both before and after the incident with Solomon.

The records reflect that Hernandez engaged in a wide range of misconduct including: his failure to follow departmental procedures, unexplained absences and unavailability for emergency calls, failure to follow orders, falsification of records, a request to break-in without exigent circumstances, allowing unauthorized persons on an investigation site, misuse of a firearm, neglect of duty and participating in an altercation with a fellow agent. Significantly, a discipline action form dated December 12, 1993 cites Hernandez for false arrest, cruelty, recklessness and negligence. As a result of his misconduct, Hernandez received many written warnings, was suspended several times and was ultimately fired. The public interest in disclosure is particularly strong in this type of case where citizens, like Solomon, seek protection from unconstitutional state action. In addition, it appears that Solomon may not obtain the information contained in Hernandez'

files from another source.

Solomon seeks both pre- and post-incident information. In Malsh v New York City Police Department, after in camera review, the United States District Court for the Southern District found both pre- and post-incident reports to be discoverable (1995 WL 217507 at \*2-3). In particular, the Court found that post-incident reports may provide information relevant to show intent and institutional or individual patterns of behavior (id. at \*3). These reports may also provide information concerning the ASPCA's supervision of Hernandez and the degree of their knowledge of, and acquiescence in, a pattern of misconduct (Hurley v Keenan, 1984 WL 358, \*3 [SDNY 1984]).

Upon balancing the parties' interests in disclosure or non-disclosure, the balance tips in favor of disclosure. As stated above, Hernandez may redact only the names, home addresses and telephone numbers of his family before providing his personnel file and attendance sheet to Solomon's counsel.

In addition, Hernandez is directed to appear for a continued deposition. He should be directed to answer questions regarding his employment history, prior complaints and civil actions, the reasons for his discharge and disciplinary actions (King v Conde, supra, 121 FRD at 198 (stating that "plaintiffs in federal civil rights actions are presumptively entitled to recollections as well as documents on prior complaints and police history")). He also is directed to answer questions concerning witnesses or persons with knowledge of his disciplinary history. If the names or addresses

of family members is relevant to that, he shall divulge the information, if requested.

Hernandez' counsel is directed to pick up the documents reviewed by the Court and to provide counsel for the other parties with the redacted documents within 20 days of the date of this order.

This constitutes the decision and order of the Court.

DATE: 10/31 /95

ENTER:



J.S.C.

**FILED**  
NOV 16 1995  
COUNTY CLERK'S OFFICE  
NEW YORK

EMM. J. JAMES (1000000000)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

DELIA J. VITALE, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 351 Broadway, New York, New York. On December 1, 1995, I served the foregoing Notice of Entry of Decision and Order by depositing true copies thereof in post-paid wrappers, in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York, addressed to counsel for the defendants herein at their last known addresses:

CAULFIELD HELLER & HARRIS  
250 West Street  
New York, New York 10013

BALL LIVINGSTON & TYKULSKER  
108 Washington Street  
Newark, New Jersey 07102

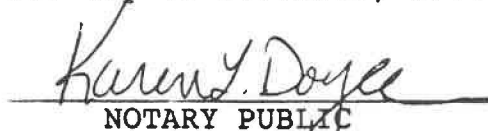
STANLEY R. WAXMAN, P.C.  
330 Old Country Road  
Mineola, New York 11501-4149

OSHMANN HELFENSTEIN & MATZA  
116 John Street  
New York, New York 10038

  
DELIA J. VITALE

Sworn to before me this

1st day of December, 1995.

  
NOTARY PUBLIC

KAREN L. DOYLE  
Notary Public, State of New York  
No. 02D05028104  
Qualified in Queens County  
Commission Expires May 23, 1996