

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY-LAW DIVISION

RECEIVED

JUN 04 2015

J. Christopher Gibson, J.S.C.

Civil Action

DOCKET NO.: CPM L 85-13
ORDER

Steven Pascal,

Plaintiff,

v.

City of Cape May,

Defendants

This matter being opened to the Court on Defendant's motion to quash subpoena or for a protective order; and the court having heard argument and reviewed the submissions submitted; and for good cause shown

IT IS ON THIS 4th day of June, 2015 ORDERED that:

1. Plaintiff is to issue a more specified subpoena duces tecum on the Cape May County Prosecutor consistent with the within memorandum of decision.
2. Defendant's motion to quash is granted.
3. A copy of this order shall be served on all attorneys of record within seven (7) days of receipt.



J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION IS ATTACHED.

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE
COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY**

TO: Robert A. Baxter, Esquire
CRAIG ANNIN BAXTER
41 Grove Street
Haddonfield, NJ 08033

CASE: Steven Pascal v City of Cape May et al
DOCKET NO. CPM L 444-13

NATURE OF APPLICATION: DEFENDANT'S MOTION TO QUASH
SUBPOENA OR FOR A PROTECTIVE ORDER

RECEIVED

JUN 04 2015

J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint was filed on September 3, 2013. The discovery end date was April 7, 2015. Defendant Robert Sheehan, Jr. now moves to quash the subpoena duces tecum issued to the Cape May Prosecutor, or in the alternative, for a protective order.

The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:10-2 provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. The relevance standard refers not only to matters which would necessarily be admissible in evidence but includes information

reasonably calculated to lead to admissible evidence respecting the cause of action or its defense. See Comment 1 to R. 4:10-2. In short, a matter is relevant for discovery purposes if it has “a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” Id.

A subpoena is simply “a command to appear at a certain time and place to give testimony upon a certain matter.” Black's Law Dictionary 1279 (5th ed. 1979). R. 1:9-1 provides, in pertinent part, that a subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk. A subpoena may require the production of books, papers, documents, electronically stored information, or other objects designated therein. R. 1:9-2.

The court, on motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the objects subpoenaed. R. 1:9-2. The court may direct that the objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys. Id.

Our Supreme Court requires that the subject of the subpoena “must be specified with reasonable certainty, and there must be a substantial showing that [the party, through the use of the subpoena, seeks] . . . evidence relevant

and material to the issue[s] [in the case]. If the specification is so broad and indefinite as to be oppressive and in excess of the demanding's necessities, the subpoena is not sustainable." State v. Cooper, 2 N.J. 540, 556 (1949).

R. 4:10-3 states, in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- (a) That the discovery not be had;
- (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery...

MOVANT'S POSITION

Defendant Robert Sheehan, Jr. provides that the City of Cape May has taken action to rescind the provisional appointment of Defendant Sheehan as Chief of the Cape May City Police Department and return him to the rank of Captain. Consequently, the actions of the City Counsel in rescinding the appointment is now subject of the litigation in the matter of Robert Sheehan Jr., v. Cape May City, Superior Court of New Jersey, Law Division, Docket No. L-__-15. Defendant Sheehan asserts that Plaintiff in this matter, which is unrelated, served a subpoena upon the Cape May County Prosecutor's Office for the disclosure of:

1. Any and all investigations regarding Mr. Sheehan in the past five years.
2. Please provide the name of the monitor appointed to oversee the Cape May City Police department, the purpose for having the monitor in place and any and all documentation regarding the appointment of the monitor and/or any documentation prepared for the monitor.

See Subpoena attached as Defendant's Exhibit "A."

Defendant now moves to quash the subpoena on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that Plaintiff has failed to comply with the requirements of State v. Doliner, 96 N.J. 236 (1985). In the alternative, Defendant request a protective order limiting the scope of the inquiry permitted to the facts of the within litigation. Specifically, narrowing the scope of the inquiry to whether there any investigations by the Cape May Prosecutor's Office of Robert Sheehan, Jr. related to bias or discrimination on the basis of sexual preference and whether the Cape May Prosecutor's appointment of a monitor for the Cape May City Police Department related to the allegations of sexual preference discrimination or bias by the Cape May City Police Department or its officers.

Defendant Sheehan contends that the within matter is a result of allegations made by Plaintiff that the City of Cape May and its Police Department was not protective enough of Plaintiff concerning his relationship with the public as a gay police officer.

Defendant Sheehan provides that a subpoena that is oppressive and unreasonable should be quashed under R. 1:9-2 and R. 4:10-3 where its

subject matter is overbroad and in excess of the demanding party's needs. Wasserstein v. Swern and Co., 84 N.J. Super. 1, 6-8 (App. Div.), certif. denied, 43 N.J. 125 (1964). Defendant Sheehan contends that a proponent must show how discovery will be "useful," and relevance is to be established on a case by case basis. Myers v. St. Francis Hosp., 91 N.J. Super. 377, 386 (App. Div. 1966). Defendant Sheehan maintains that discovery requests must be reasonably calculated to lead to the discovery of admissible evidence. R. 4:10-2(a).

Defendant Sheehan asserts that Plaintiff, despite his acknowledgement under oath that he has no factual support for any allegation as to Defendant Sheehan, seeks to engage in a fishing expedition into whether Defendant Sheehan was investigated by the Cape May County Prosecutor's Office in the past five years for any reason. Defendant maintains that such an inquiry is overly broad and is not limited in scope. Defendant contends that the subpoena should be quashed in its entirety as it is not reasonably calculated to lead to discovery of relevant evidence. In the alternative, Defendant Sheehan requests that the scope must be limited to investigations bearing upon the allegations against Defendant Sheehan in Plaintiff's complaint under R. 4:10-3(d).

Next, Defendant Sheehan argues that to the extent any investigation conducted by the Cape May County Prosecutor's Office involved grand jury proceedings or the use of grand jury proceedings, Plaintiff must satisfy the Doliner criteria. Defendant maintains that defendants in criminal

proceedings may access transcripts to testimony presented to the Grand Jury, to support their indictment and those not indicted after a Grand Jury investigation "may request the grand jury . . . issue a statement indicating that a charge against the person was investigated and that the grand jury did not return an indictment from the evidence presented." N.J.S.A. § 2B:21-9(a). Additionally, a person called before a grand jury "may request the grand jury to issue a statement indicating that the person was called only as a witness in an investigation, and that the investigation did not involve a charge against the person." N.J.S.A. § 2B:21-9(b).

Defendant Sheehan asserts that in Doe v. Klein, 143 N.J. Super. 134, 141 (App. Div. 1976), the court indicated that the applicant must "demonstrate compelling circumstances or need warranting disclosure of grand jury testimony." Defendant contends that our Supreme Court provided that "the principles that underlie federal and state grand jury secrecy are identical[.]" State v. Doliner, 96 N.J. 236, 246 (1984). The applicant seeking disclosure must make "a strong showing of particularized need that outweighs the interest in grand jury secrecy." Ibid.

Defendant Sheehan requests that the subpoena for investigatory records maintained by the Cape May County Prosecutor's office regarding Defendant Sheehan be quashed or limited by a protective order to only those records not acquired by the Cape May County Prosecutor through the use of the Grand Jury's subpoena power.

Finally, Defendant Sheehan contends that the request for documentation regarding the appointment of a police monitor is not reasonably calculated to lead to the discovery of relevant evidence. Defendant Sheehan notes that Cape May County Prosecutor Robert Taylor appointed Detective Mark Weeks from the staff of the Cape May County Prosecutor's Office to serve as a buffer between Captain Robert Sheehan and city officials after the City Council rescinded Captain Sheehan's appointment as Chief of Police. Defendant Sheehan maintains that the details as to Prosecutor Taylor's action have no bearing upon the allegations by Plaintiff in this matter.

Accordingly, Defendant Sheehan requests that an order pursuant to R. 1:9-2 and R. 4:10-3 be entered quashing the subpoena directed to the Cape May County Prosecutor.

OPPOSITION

Plaintiff contends that our Supreme Court stated that the subject of a subpoena "must be specified with reasonable certainty and there must be a substantial showing that they contain evidence relevant and material to the issue. If the specification is so broad and indefinite as to be oppressive and in excess of the defendant's necessities, the subpoena is not sustainable." State v. Cooper, 2 N.J. 540, 566 (1999). Plaintiff asserts that the discovery rules are designed to eliminate concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill

and maneuvering of counsel. See Abtrax Pharmaceuticals, Inc., v. Elkins-Sinn, Inc., 139 N.J. 499, 513 (1995).

Plaintiff maintains that the relevance standard under R. 4:10-2(a) does not refer only to matters which would necessarily be admissible but also includes information reasonably calculated to lead to admissible evidence respecting the cause of action or its defense. See, e.g., Pfenniger v. Hunterdon Central, 167 N.J. 230, 237 (2001). Plaintiff asserts that in order for evidence to be relevant, it must touch directly on the issues in the pleadings. Simon v. Graham Bakery, 17 N.J. 525, 530 (1995).

Plaintiff maintains that it he is seeking a copy of any and all investigations the Prosecutor's Office has conducted into Defendant Sheehan's conduct over the past five years for three reasons. First, Plaintiff purports that the Prosecutor's office investigated allegations of sexual harassment and/or inappropriate sexual conduct by Defendant Sheehan towards a female employee. Plaintiff contends that the documentation at issue would be relevant as to conduct on Defendant Sheehan's part that violated Cape May City's anti-discrimination policy, as to whether or not the training or policies instituted by Cape May City were effective, whether Cape May adequately remediated and repudiated the discriminatory conduct at issue, and whether Defendant Sheehan had propensity to ignore and violate the anti-discrimination policy.

Second, Plaintiff asserts that the Prosecutor's office conducted an investigation into Defendant Sheehan's alleged violation of City policy on

payment of overtime/compensation time to employees of certain ranks, whether that violation was knowing, and whether Defendant Sheehan intentionally submitted false information to the Prosecutor's office during the course of that investigation. Plaintiff submits that if Defendant Sheehan violated City policy and procedure is relevant to Plaintiff's claims as the alleged conduct involves potential dishonesty on the part of Defendant Sheehan in providing false information to the Prosecutor's office which bears on Plaintiff's credibility.

With regard to the motion to quash the portion of the subpoena which seeks information regarding the appointment of a monitor, Plaintiff asserts that the demotion from Chief to Captain is directly related to the information obtained by the City and/or the Prosecutor's office as part of the investigation into the foregoing matters. Plaintiff contends that to the extent documentation exists that corroborates the allegations made against Defendant Sheehan, those documents would support the fact that the provided false information to the Prosecutor's office.

Finally, Plaintiff asserts that part of the allegations against Defendant Sheehan with regard to the excessive compensation time for certain officers, the PBA representative John Campbell filed a complaint after he objected to same that he suffered retaliation by Defendant Sheehan. Plaintiff maintains that that the foregoing is related to this matter as one of Plaintiff's claims is that he objected to discriminatory conduct and subsequently suffered retaliation.

Plaintiff requests that the within motion to quash be denied in its entirety.

DISCUSSION

The Court finds that Defendant Sheehan is partially entitled to the requested relief to quash the subpoena duces tecum issued to the Cape May County Prosecutor.

By way of brief factual background, the Court notes the following allegations contained in the complaint. Plaintiff provides that he is an openly gay Police Officer who was hired by Defendant City in 2002. Plaintiff has been purportedly subject to anti-gay slurs and other comments and conduct relevant to his sexual orientation from members of the public in the City of Cape May. Plaintiff asserts that these comments continued until 2012 when he was suspended without pay. Plaintiff alleges that once the City was aware of the harassment, the City had an obligation to investigate and determine whether Plaintiff was a victim of a crime and to remediate and repudiate the discriminatory conduct.

Plaintiff contends that as a result of the harassment, Defendants City and Sheehan opened an Internal Affairs investigation into Plaintiff's response to specific conduct by Cape May citizens which occurred in 2009. The complaint avers that Defendant Sheehan used Internal Affairs investigations of Plaintiff on multiple occasions. Additionally, Plaintiff alleges that Defendant Sheehan discriminated against plaintiff based on his

sex and retaliated against plaintiff when Plaintiff objected and reported being harassed.

Plaintiff recently issued a subpoena duces tecum upon the Cape May County Prosecutor's Office with a return date of April 16, 2015 for disclosure of the following materials:

1. Any and all investigations regarding Mr. Sheehan in the past five years.
2. Please provide the name of the monitor appointed to oversee the Cape May City Police department, the purpose for having the monitor in place and any and all documentation regarding the appointment of the monitor and/or any documentation prepared for the monitor.

See Subpoena attached as Defendant's Exhibit "A."

As a general rule, "unless otherwise limited by an order of court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." McClain v. College Hospital, 99 N.J. 346, 353 (1985). R. 1:9-2 provides that a court

on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed.

The information being sought by the subpoena duces tecum "must be specified with reasonable certainty, and there must be a substantial showing that they contain evidence relevant and material to the issue. If the specification is so broad and indefinite as to be oppressive and in excess of the

demandant's necessities, the subpoena is not sustainable." State v. Cooper, 2 N.J. 540, 556 (1949).

The Court determines that the subject subpoena seeks evidence which is relevant to the subject matter involved in the pending action. However, the subpoena is overly broad and not sufficiently limited in scope. Violations of the New Jersey Law Against Discrimination or involve allegations of discrimination or harassment as to Defendant Sheehan are discoverable and relevant to the within litigation. Specifically, Plaintiff contends that the documentation sought from the Cape May Prosecutor's Office includes an allegation by a female employee against Defendant Sheehan. The Court determines that those allegations would be pertinent as to whether Defendant Sheehan habitually violated Cape May City's anti-discrimination policy, whether or not the training or policies instituted by Cape May City were effective, and whether Cape May adequately remediated and repudiated the discriminatory conduct at issue. However, the privacy of the individuals named in the investigation is to be protected.

Additionally, the Court hereby limits the request seeking documentation concerning the Cape May Prosecutor's Office appointment of a monitor and any allegations as to Defendant Sheehan which is not related to claims of discrimination or harassment. The Court determines that the subpoena is overly broad as it seeks to request documentation requesting any and all investigations concerning Defendant Sheehan. Plaintiff's complaint alleges, generally, violations of the New Jersey Law Against Discrimination

and that Defendant Sheehan retaliated against Plaintiff. Although Plaintiff contends that any and all investigations would be pertinent to Defendant Sheehan's credibility, the Court determines without a more specified request, the subject subpoena is overly broad and not specifically limited in scope. As written, the subpoena duces tecum issued to the Cape May County Prosecutor's Office is not sustainable.

Accordingly, Defendant's motion to quash the subpoena is granted. Plaintiff if he wishes to pursue the balance of the requested information, is to issue a more specific subpoena duces tecum on the Cape May County Prosecutor consistent with the within memorandum of decision and the privacy of individuals named in the investigation is to be protected.

CONCLUSION

The motion to quash the subpoenas duces tecum is opposed. The Court finds that the subpoena duces tecum seeks discoverable and relevant evidence, however, the subpoena is overly broad and not limited in scope. Plaintiff is to issue a more specified subpoena duces tecum on the Cape May County Prosecutor consistent with the within memorandum of decision. Defendant's motion to quash is granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

June 4, 2015


J. Christopher Gibson, J.S.C.