UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KADIAN MCBEAN, et al.,

Plaintiffs,

-v-

THE CITY OF NEW YORK, et al.,

Defendants.

02 Civ. 5426 (GEL)

ORDER

GERARD E. LYNCH, District Judge:

The Court has received a series of letters from the parties concerning defendants' recent production of voluminous documents, and related issues. In a letter dated August 17, 2007, plaintiffs seek (1) an order directing defendants to answer certain interrogatories and requests for admissions relating to the number of disposable hospital gowns ordered by the City for purposes of maintaining the privacy of persons being searched; (2) an order precluding defendants from making use of newly produced documents in their summary judgment motions or at the preliminary injunction hearing scheduled to begin on September 24, 2007; (3) an order directing the immediate production of all documents listed in defendants' privilege log dated July 19, 2007, or withheld or redacted after July 19, 2007. (Letter from Elizabeth S. Saylor, Esq., to the Court, dated Aug. 17, 2007, at 1 (the "8/17 Saylor Letter").)

Because the privilege issues implicate prior rulings by Judge Katz made in the course of his management of discovery in this case, and because the reference to Judge Katz remains open, the parties will be directed to take their dispute concerning privilege to Judge Katz. The applications for preclusion of new evidence and for discovery relating to that evidence, however, concern the issues addressed in this Court's Order of July 6, 2007, and accordingly will be dealt with in this Order.

1. Plaintiffs' Request to Preclude Newly Produced Evidence

On July 6, 2007, the Court issued an Order ("the July 6 Order") addressing an earlier request by plaintiffs to preclude evidence regarding disposable hospital gowns that was not disclosed prior to the end of the discovery period. Acknowledging that defendants were extremely late in producing the required information, the Court expressed strong distaste for the idea of preclusion as a discovery sanction, noting that "[w]hether or not plaintiffs are entitled to injunctive relief will be determined, so far as this Court can manage it, based on accurate fact-finding."

The July 6 Order went on to state:

> There is a point where preclusion may be appropriate — for example, where late production jeopardizes an adversary's ability to fairly prepare a response to new evidence, and thus undermines the reliability of that new evidence. An injunction precluding strip searches will not be imposed, however, as a sanction for belated discovery.

The July 6 Order went on to direct defendants in no uncertain terms to "produce any supplemental production on this issue on or before August 1, 2007," noting that "[i]t should not be beyond the collective wit of the Corporation Counsel and the Department of Corrections to manage to determine how many hospital gowns they purchase in a year, given twelve months to do it." Apparently it was. Defendants have continued to produce documents relating to their purchases of hospital gowns well past the August 1 deadline, and indeed have continued producing such documents even while opposing plaintiffs' current request for relief.

Plaintiffs, noting the July 6 Order's warning that "[i]f plaintiffs' preclusion request is premature now, the time is fast approaching when a similar request will meet with greater favor," seek preclusion of the recently produced documents. While the Court is willing to consider any application for relief that may directly address the prejudice suffered by plaintiffs, plaintiffs have not made the kind of showing that would require excluding the newly produced documents.

As the July 6 order made very clear, newly produced documents will not be excluded as a discovery sanction. Newly produced documents will, however, be excluded if they are unreliable due to plaintiffs' inability to fairly investigate and prepare their case with respect to those documents due to their belated disclosure. As the September 24 preliminary injunction hearing draws closer, defendants' failure to comply with discovery orders presents an increasingly serious threat to the Court's ability to discern the true facts at issue in this case. Plaintiffs' submissions note, rightly, that they have been prejudiced by defendants' late production, which came after plaintiffs' summary judgment motion had been filed, but plaintiffs do not contend that the true facts regarding the new documents cannot be established because of the late production. Instead, plaintiffs argue that defendants' belated and incomplete production strongly suggests that defendants have not been ordering hospital gowns in the numbers they claim. Perhaps so; plaintiffs may make this argument when the Court takes up the merits of the case. Meanwhile, absent an argument that defendants' discovery violations undermine the reliability of the evidence, plaintiffs' request for preclusion of the new documents is denied.

2. Discovery Sought In Response To Defendants' Late Production

Although at this time the newly produced documents will not be precluded, the late disclosures present serious challenges to the factfinding process. These challenges can be addressed only if the defendants fully respond to the plaintiffs' reasonable demands for supplementary discovery in connection with the belated production.

Plaintiffs seek an order directing defendants to answer certain interrogatories and requests for admissions relating to the number of disposable hospital gowns ordered by the City for purposes of maintaining the privacy of persons being searched. (See 8/17 Saylor Letter, Ex. 1.) In response, defendants argue that plaintiffs "have made no showing that the [documents produced] are in any way inadequate for the purpose of arriving at the truth" of whether the gowns were used in the manner defendants claim. (Letter from Karl J. Ashanti, Esq., and Genevieve Nelson, Esq., to the Court, dated Aug. 24, 2007 (the "8/24 Ashanti Letter"), at 2.) Plaintiffs, understandably, seek to compel defendants to answer simple factual questions that will be at the heart of the upcoming hearing: whether the gown information produced represents all the gowns ordered by defendants, how many gowns DOC ordered, and the number of detainees accused of misdemeanors admitted to DOC custody who should have been searched with a disposable gown. (See 8/17 Saylor Letter, Ex. 1.)

Defendants argue that plaintiffs "have been able to analyze the documents produced" themselves. (8/24 Ashanti Letter, at 3.) This argument is unconvincing enough on its face, but three days later, defendants — the same defendants who objected that it was unnecessary for them to answer plaintiffs' questions, including a question about whether the gown-related information already produced represented all the gown information there was — produced approximately 900 more pages of documents to plaintiffs. (Second Letter from Elizabeth S. Saylor, Esq., to the Court, dated Aug. 27, 2007 (the "Second 8/27 Saylor Letter"), at 1; Letter from Genevieve Nelson, Esq., to the Court, dated Aug. 28, 2007 ("8/28 Nelson Letter").) Apparently failing to see the irony in arguing first that plaintiffs can figure out for themselves whether all gown-related information has been produced and then producing more gown-related information, defendants have not withdrawn their objection to the interrogatories.

Defendants have little of relevance to say in regards to their refusal to answer the interrogatories. They complain that the plaintiffs' document requests were overly broad, but of course the time for objections to the scope of discovery requests is long past. At this point defendants' only choices are compliance or contempt, and it is becoming increasingly clear that defendants have chosen the latter.

Defendants also state that "[u]pon information and belief, most of these documents were only recently located by DOC." (8/28 Nelson Letter, at 1.) DOC was ordered to locate them much, much sooner. In the same letter, defendants contend that the documents were produced "two business days after receiving the documents" (id.), apparently meaning that defense counsel produced them shortly after DOC located them. The fact that defendants appear to regard DOC's lateness in locating the documents as some sort of an excuse for the late production suggests that defense counsel understand their role in this process as little more than passing documents along to plaintiffs whenever the client feels like producing them. It should not be necessary to explain why this is wrong. Discovery requirements are imposed on the parties themselves, not simply on defense counsel. In effect, defendants' counsel do not deny that defendants have failed to comply with this Court's order directing them to locate and produce all relevant documents by August 1; they simply argue it was their client's failure, not theirs. This does not help the City's case.

Finally, and somewhat astonishingly, defendants contend that "it is disingenuous" for plaintiffs to complain that this latest late production was a surprise, because plaintiffs "were well aware that the Defendants intended to produce additional documents to them on a rolling basis." (8/28 Nelson Letter, at 2.) Perhaps it is true that long ago, when discovery was still open, there was an understanding that production would be "on a rolling basis." But plaintiffs and the Court have long since had an understanding that discovery was closed, and defendants have done nothing to disabuse the rest of us of this understanding. Even if defendants had stated explicitly that discovery would continue "rolling" in at such a late date, it would amount to little more than an announcement that they intended to violate this Court's July 6 order. In short, defendants by their actions have demonstrated that plaintiffs' need for answers to their interrogatories is highly legitimate. Defendants will be given until Thursday, September 6, 2007, to answer the interrogatories in full.

Plaintiffs seek additional discovery on another issue. In a letter dated August 27, 2007, plaintiffs advise the Court that defendant on August 13, 2007, issued a revised policy document pertaining to searches conducted by the DOC. (First Letter from Elizabeth S. Saylor, Esq., to the Court, dated Aug. 27, 2007 (the "First 8/27 Saylor Letter"), at 1 n.1.) This policy appears to have been issued after the August 1, 2007, deadline, and so of course defendants have not violated this Court's July 6 order in producing it. Plaintiffs indicate, not surprisingly, that if defendants rely on this new policy in their motion papers, plaintiffs will seek a Rule 30(b)(6) deposition on matters relating to the policy, in particular why the policy was revised and how it is being implemented. See Fed. R. Civ. P. 30(b)(6).

Defendants contend, bizarrely, that plaintiffs' demand for new discovery regarding the new policy is "yet another attempt to divert defendants' attention from the preparation of the motions that are due this Wednesday." (Letter from Genevieve Nelson, Esq., to the Court, dated Aug. 27, 2007, at 1.) In other words, defendants, having produced significant new evidence on the eve of trial, see it as an attempt to sabotage their work when plaintiffs attempt to discover what that new evidence means.

Defendant also argue, irrelevantly, that their conduct in failing to disclose this new policy earlier was not "willful or in bad faith." (Id.) That matters not at all. Once again: the point is to find the truth about defendants' policies. The Court cannot find the truth if defendants continue to obstruct its factfinding process by making irrelevant objections to reasonable discovery requests. If defendants have claims of privilege to make relating to the new policy, they may present them to Judge Katz. Except for those matters as to which Judge Katz sustains a claim of privilege, a Rule 30(b)(6) witness must be made available and prepared to testify regarding the new policy.

Defendants seem not to understand what is at stake here. If they did, they would be rushing to offer plaintiffs answers to interrogatories, a 30(b)(6) witness, and any other form of discovery that may ensure that the reliability of the new documents is thoroughly tested by a fair adversarial process. If by the time of the hearing the Court cannot be sure that the plaintiffs have had ample opportunity to prepare their case with respect to the new documents, then it will have

no choice but to exclude those documents as unreliable evidence. In other words, when defendants produce documents beyond the close of discovery, the alternative to offering plaintiffs full supplementary discovery is for defendants not to be able to use the new evidence at all.

As was clearly stated in the Court's July 6, 2007 order, preclusion will not be imposed as a sanction for belated discovery. If the Court cannot be assured of new evidence's reliability, however, it cannot be admitted. Defendants will provide to plaintiffs all of the discovery they seek, and any other discovery that may reasonably aid in assessing the reliability and significance of the newly disclosed evidence.

Accordingly, it is hereby ORDERED that:

1. Plaintiffs' request for preclusion of newly produced evidence is denied.

2. Defendants are directed to respond by 5:00 p.m. on Thursday, September 6, 2007, to all interrogatories and requests for admissions contained in Exhibit 1 to the August 17, 2007, letter from Elizabeth S. Saylor, Esq., to the Court.

3. Defendants are directed to make available a witness pursuant to Rule 30(b)(6) to discuss the new policy, as discussed above.

4. Plaintiffs' applications with respect to defendants' claims of privilege should be directed to Judge Katz.

5. As chambers staff informed the parties by phone on August 28, 2007, the defendants' request for an extension of time to serve plaintiffs with defendants' motion for summary judgment and opposition to plaintiffs' motion (see 8/27 Nelson Letter, at 2-3) is granted. Defendants' time to serve those papers on plaintiffs is extended to 6:00 p.m. on Friday, August 31, 2007.

SO ORDERED.

Dated: New York, New York
August 31, 2007

GERARD E. LYNCH
United States District Judge