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United States District Court, S.D. New York.

Marisol A., by her next friend, Rev. Dr. James Alexander Forbes, Jr., et al., Plaintiffs,
v.
Rudolph W. GIULIANI, Mayor of the City of New York, et al., Defendants.

No. 95 CIV. 10533(RJW) DFE. | June 24, 1997.

Opinion

MEMORANDUM AND ORDER

Douglas F. EATON, Magistrate Judge.

***1** Pursuant to my Standing Order on Discovery Disputes, the parties have proceeded by joint letter. I have before me a 6/4/97 joint letter from Marcia Lowry and Grace Goodman, and a 6/10/97 joint letter from Thomas Curnin and Judith Kramer. On 6/16/97 I heard oral argument from these attorneys, except that Craig Levine argued in place of Ms. Lowry. There are four disputes, and I shall discuss them in the order used at the oral argument.

1. ***Must the State produce documents from 1/1/90 or from 1/1/94?***

For the time being, the plaintiffs have permitted the City to produce documents going back only to 1/1/94. But Mr. Curnin argues that the plaintiffs need to go farther back in time for documents held by the State. He says he needs to prove that the State had knowledge of the City's violations. In that regard, he already has helpful evidence in the form of two State Reports—a 1989 report which criticized the City, and a 1996 report which he says was even more critical of the City. In addition, the State is providing documents for 1994 to the present. Nevertheless, Mr. Curnin argues that he needs documents for 1990 through 1993, so he can learn exactly what transpired between the State and the City, and who among the State officials may have knowingly failed to carry out the State's obligations to audit and monitor the City.

I find that evidence from 1990 through 1993 would be of only marginal relevance compared with the other evidence, especially since the plaintiffs are seeking only prospective relief. Accordingly, I sustain the State's objections.

At the oral argument, Mr. Curnin made an alternative request. He asked me to rule that the State should be precluded from making any argument based on the years 1990 through 1993. He hypothesized that the State may argue, "The circumstances in 1994 and 1995 were extraordinary and overwhelming, but we did a decent job during 1990–93." This hypothetical argument seems extremely weak and unlikely to deprive the plaintiffs of any appropriate prospective relief, which will surely turn on the trial judge's evaluation of the more recent evidence. On the other hand, I think we should learn now (before the 10/1/97 discovery cut-off) whether the State to intends to make any significant argument about the years 1990–93. Accordingly, I direct the State to send plaintiffs, by 7/1/97 by fax and by mail, an answer to the following:

> Assume that Judge Ward will ask you at trial (a) to characterize the State's performance during the years 1990 through 1993, and (b) to state the degree to which those years could potentially be relevant to the fashioning of prospective injunctive relief. At the present time, what is your answer to those two questions?

2. ***Must the State produce copies of all the documents it received from the City?***

In the 6/10/97 joint letter, the State offered the following compromise. The State asks that the plaintiffs provide the State with a set of relevant City documents that required some sort of action by the State Department of Social Services ("NYDSS"). With respect to each such document, the State will perform three tasks—(1) inquire of all NYDSS employees who have responsibilities relating to the subject matter contained in the document, in order to locate copies of the document, (2) provide any follow-up documents that may have been prepared in response to the City document, and (3) provide any copies of the City document itself upon which an NYDSS employee made a relevant notation. On the other hand, as to any copies that never got such a notation, the State doesn't want to identify the rooms where they were found, and doesn't want to produce copies of what the City has already produced.

***2** Mr. Curnin objects to this compromise. He says that it would not enable him to learn "if a State addressee merely placed the document in his files without making any notation on it, a critical fact in the context of this lawsuit."

But he will know the name of the State addressee, and there will be a strong inference that this addressee took no action if the State fails to produce any follow-up document or any notation. There is a possibility that the addressee might have photocopied the City document and dumped it on the desks of some other NYDSS officials—but this possible fact is very unlikely to lead to any relevant evidence. If the document bore no notation by the addressee, and if there was no follow-up document (not even a "buck slip"), then the addressee essentially took no action, and it seems pointless to criticize any inaction by the other officials who merely received extra photocopies in such circumstances.

Mr. Curnin says that, at the very least, he wants to list approximately 12 State officials and require the State to say whether the personal files of each of these 12 officials contained a duplicate copy of a given City document. I doubt that this exercise will lead to relevant evidence, but I will order it because the burden on the State is not too great if the exercise is limited to 12 officials.

Accordingly I direct the plaintiffs to provide the State with (a) a set of relevant City documents that required some sort of action by the NYDSS, (b) a list describing these documents and giving each a number, and (c) a list of specific State officials (no more than 12). Within 21 days of receipt, the State shall perform the three "tasks" which I described on page 3 and, in addition, shall provide a written statement (perhaps a chart) showing whether the personal files of each of the 12 listed officials contained a copy of any of the City documents provided in the plaintiffs' set and, if so, which documents.

3. ***Must the City answer the Second Request for Admissions?***

Both the first and second Requests for Admissions concern the State's April 1996 Report. The City responded to the First Request by admitting the Report's authenticity but declining to admit that the Report was a business record under Fed.R.Evid. 803(6). At the oral argument, I said that the plaintiffs would be better advised to seek to qualify the Report as a public report under Fed.R.Evid. 803(8).

Meanwhile, back on 12/11/96, the plaintiffs served their Second Request for Admissions, which consists of 268 paragraphs. The first 5 paragraphs cover the same ground as the First Request. The remaining paragraphs are in effect "couplets" (such as ¶¶ 6 and 7, ¶¶ 8 and 9, etc.) or "triplets" (such as ¶¶ 194–96, ¶¶ 197–99, etc.).

In each couplet, the first paragraph gives a quotation or a paraphrase of a specific statement in the Report; if it is a quotation (but not if it is a paraphrase) the City has admitted that the Report made the specific statement. The second paragraph of each couplet takes the same statement from the Report and asks the City to admit that the statement is true; the City says it cannot admit or deny unless it assigns a City employee or an outside expert to replicate the State's study, which would be unduly burdensome. At this time, I sustain the City's objections.

***3** Fed. R.Civ. P. 36(a) provides that the answering party must make "reasonable inquiry" to see if the information is "known or readily obtainable by the party." Here, more information will become obtainable in the near future. An updated case review is currently being conducted under the joint auspices of all parties, for use in the trial, on the same topics as the State's April 1996 Report. After the updated case review is completed, the importance of the April 1996 Report may fade away. If the plaintiffs still feel that it is important, they may serve a Third Request for Admissions. In that event, they must, to the maximum feasible extent, eliminate paraphrases that are more conclusory or more evaluative than the language used in the

Report. If that is done, then the City must admit or deny. "A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only part of the matter ..., the party shall specify so much of it as is true and qualify or deny the remainder." As to requests for admission that a statement in the Report is true, the City must respond to each request separately. It will be a satisfactory response if the City cites and adopts a pertinent portion of the updated case review. If the City chooses not to cite and adopt such a portion, or claims that it is unable to find a pertinent portion, then the City must admit or deny or make a particularized objection as to why the City should not be required to admit or deny.

4. The *plaintiffs' request for further in camera review of documents.*

In the 6/4/97 joint letter, the plaintiffs asked me to review 22 documents as to which the City has claimed the deliberative privilege, and Ms. Goodman stated the reasons she was claiming the privilege. I then studied Judge Ward's 5/8/97 Memorandum Decision on this precise topic, and I looked through the 12 documents he reviewed. On the basis of Ms. Goodman's explanations, I ruled at the oral argument that I would grant *in camera* review as to only 8 of the 22 additional documents.

The results of my *in camera* review are as follows. I sustain the City's invocation of privilege as to Documents # # 1, 13, 17, 18, 19 and 20. I direct the City to send me an *in camera* affidavit by 7/1/97 by fax and by mail, answering the following questions:

1. In Document # 5, on the second page, under the heading "Nurseries in Office Locations"—(a) does the City contend that the first two sentences are so intertwined with privileged opinions and recommendations that disclosure of the first two sentences would compromise the deliberative privilege? (b) does the City submit any other grounds for opposing the disclosure of the first two sentences?

2. In Document # 5, on the eleventh page, under the heading "Closed Case Files"—(a) does the City contend that the first two sentences are so intertwined with privileged opinions and recommendations that disclosure of the first two sentences would compromise the deliberative privilege? (b) does the City submit any other grounds for opposing the disclosure of the first two sentences?

***4** 3. Exactly how is Document # 11 related to the SupCon process? (To understand Document # 11, I think I need to know the name and title of the person to whom it was given, and the purpose of the columns, particularly the right-hand column.)