

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES ROSENCRANZ,	)	
Plaintiff,	)	
	)	
v.	)	1:14-cv-13050-JGD
	)	
JAMES A. FREEMAN,	)	
Defendant.	)	

**MEMORANDUM OF LAW OF NON-PARTY, MIIA PROPERTY AND CASUALTY
GROUP, INC., IN SUPPORT OF ITS EMERGENCY MOTION TO QUASH SUBPOENA
AND FOR A PROTECTIVE ORDER**

Pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure, MIIA Property and Casualty Group, Inc. (“MIIA”) submits this memorandum of law in support of its emergency motion to quash the Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action served upon it by the Plaintiff, James Rosencranz, (“Plaintiff”) and for a protective order.

Background

On or about July 18, 2014, the Plaintiff filed the complaint in the present action. The complaint alleges various claims, including but not limited to alleged civil rights violations, against defendant, James Freeman, a police officer in the Town of Winthrop, Massachusetts (“Town”), in relation to the Plaintiff’s arrest on or about July 23, 2011. MIIA administers the Law Enforcement Liability Coverage Form for the Town. MIIA is not a party to the present litigation.

On or about May 18, 2015, Attorney Jeremy Silverfine, counsel for Officer Freeman, received a Notice of Issuance of Subpoena Pursuant to Fed.R.Civ.P. 45 upon the Keeper of the

Records of the MIIA Property and Casualty Group, Inc. On or about that same date, MIIA was served with a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action. Said Subpoena specified June 5, 2015 at 11 a.m. as the time for compliance with the request for production. Said Subpoena was served together with an Exhibit A which set forth six (6) broad and vague categories of documents requested by the Plaintiff. See the documents attached hereto as Exhibit 1. Briefly, Request Nos. 1 and 2 sought documents regarding claims made to MIIA regarding Officer Freeman or the Winthrop Police Department. Request Nos. 3 and 4 sought documents related to the application to MIIA for insurance coverage for Freeman and a complete copy of the policy covering Officer Freeman as of July 23, 2011. Request Nos. 5 and 6 sought documents related to “any risk control and/or training services” provided to Freeman or the Winthrop Police Department including “results of any tests taken by Freeman in connection with such services.”

Pursuant to Fed. R. Civ. P. 45(d)(2)(B), counsel for MIIA sent a written objection by certified mail to the Plaintiff dated May 28, 2015. See the documents attached hereto as Exhibit 2. Counsel requested that Plaintiff contact counsel to discuss the subpoena and MIIA’s objections. Counsel further notified the Plaintiff that if the Plaintiff failed to withdraw the subpoena, MIIA would be filed the present motion to quash.

On June 3, 2015, the parties agreed to extend the deadline for MIIA to respond to the subpoena and/or file a motion to quash and/or protective order from June 5, 2015 until June 12, 2015. This agreement was reached because the undersigned counsel was attempting to gather and confirm information from MIIA regarding what documents, if any, it had in response to Plaintiff’s subpoena. The parties agreed to extend the deadline so that MIIA’s counsel could determine what documents may exist and discuss with Plaintiff whether there were any

responsive, discoverable documents and to give the parties an opportunity to reach an agreement or for the Plaintiff to withdraw the subpoena. Despite MIIA's counsel's representations to the Plaintiff that there are no discoverable documents available, Plaintiff has refused to withdraw the subpoena.

Argument

The subpoena issued to MIIA should be quashed because it (1) seeks documents that are neither admissible nor reasonably calculated to lead to the discovery of admissible evidence, (2) seeks documents available either from the defendant or from public sources, and (3) subjects MIIA, a non-party, to undue and unnecessary burden. In addition, a protective order should issue barring any further discovery regarding the claims and training information sought by the Plaintiff in the subject subpoena, including any testimony regarding said claims and training information.

I. The Subpoena Must be Quashed because It Seeks Documents that are Neither Admissible nor Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Subpoenaed records must be admissible or reasonably calculated to lead to the discovery of admissible evidence. "A Rule 45 subpoena must fall within the scope of proper discovery under Fed. R. Civ. P. 26(b)(1)." Shea v. McGovern et al., 2011 U.S. Dist. LEXIS 8992, *9 (D. Mass. 2011). Under Fed. R. Civ. P. 26(b)(1), the production sought must therefore be "(1) not privileged; (2) relevant to the claim or defense of any party; and (3) either admissible in itself or reasonably calculated to lead to the discovery of admissible evidence." Id. at *9-10; *see also* Enargy Power Co. Ltd. et al. v. Xiaolong Wang et al., 2014 U.S. Dist. LEXIS 67708, *6-7 (D. Mass. 2014). If the subpoenaed documents fail to meet the requirements of Rule 26, most notably for present purposes the third prong requiring admissibility, the subpoena is improper.

Discovery into prior claims activity, as with prior lawsuits against a party, fails under Rule 26(b)(1) because it would be inadmissible and therefore is not “reasonably calculated to lead to the discovery of admissible evidence.” Rhone-Poulenc Rorer Inc. v. AETNA Cas. & Surety Co. et al., 1991 U.S. Dist. LEXIS 12959, *11 (E.D. Pa. 1991) (holding that “the policyholders did not need to discover the information contained in the files of other insureds in order to develop and prepare its [sic] case”); *see also* Moses v. State Farm Mut. Automobile Ins. Co., 104 F.R.D. 55, (N.D. Ga. 1984); Lawyers Title Ins. Corp. v. U.S. Fid. & Guar. Co., 122 F.R.D. 567 (N.D. Cal. 1988); Heidelberg Americas, Inc. et al. v. Tokyo Kikai Seisakusho, Ltd. et al., 333 F.3d 38 (1st Cir. 2003) (affirming the district court’s decision to quash the subpoena on a non-party finding that the materials sought were not probative to the threshold issue in the litigation). As prior claims filed with MIIA regarding Officer Freeman or the Winthrop Police Department are not probative to the Plaintiff’s claims against Officer Freeman and are neither admissible nor likely to lead to admissible evidence, they are not discoverable.

More specifically, to the extent the Plaintiff seeks to uncover claims files which include information on prior, similar allegations against Officer Freeman or other officers of the Winthrop Police Department, any such prior allegations, if they existed, would be inadmissible pursuant to Fed. R. of Evidence 404. “[I]n accordance with Rule 404(b), ‘the evidence must have special relevance to an issue in the case such as intent, knowledge, or absence of mistake or accident, and must not include bad character or propensity as a necessary link in the inferential chain.’” DiRico v. City of Quincy, 404 F.3d 464, 467-68 (1st Cir. 2005) (upholding district court’s exclusion of evidence pertaining to a prior arrest by the defendant police officer). “Evidence of other, unrelated episodes [is] material only in the impermissible sense of showing a bad character from which to infer a propensity to commit the alleged wrong.” Tigges v. Cataldo,

611 F.2d 936, 938 (1st Cir. 1979) (excluding evidence of police officer's prior discipline and finding that putting the issue before the jury would have been highly prejudicial to the officer); *see also* Ruffin v. City of Boston et al., 146 Fed. Appx. 501, 508 (1st Cir. 2005) (stating, "the inference that Ruffin wished to raise – that because Williams had been terminated for an unrelated incident, he was probably at fault in this incident too – is precisely the type of inference that the Federal Rules of Evidence seek to prevent a party from raising."). Thus, specifically as to the Plaintiff's first and second requests seeking claims made to MIIA regarding Officer Freeman and the Winthrop Police Department, respectively, said requests do not seek admissible evidence and are not likely to lead to the discovery of admissible evidence, and MIIA therefore should be exempted from producing the requested documents.

Moreover, as MIIA's counsel tried to explain to the Plaintiff, after conducting a diligent search of its claims files, MIIA was only able to locate three (3) claims against the Town under the law enforcement form administered by MIIA for the Town, other than the pending claims of the Plaintiff against Officer Freeman. Of those three claims, none involved Officer Freeman. Thus, there are no discoverable documents in response to Request No. 1 of the subpoena. As discussed, other claims against the Winthrop Police Department did not involve Officer Freeman and would be neither relevant nor admissible and therefore there are no discoverable documents in response to Request No. 2 of the subpoena.

II. The Subpoena Must be Quashed because It Subjects MIIA, a Non-Party, to Undue and Unnecessary Burden

Rule 45 also mandates quashing a subpoena that "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). "The district court has the discretion to limit discovery...if it determines that 'the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive' Fed. R.

Civ. P. 26(b)(2)(i).” Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 193 (1st Cir. 2001). Rule 26(c) has been held to “confer broad discretion on the trial court to decide when a protection order is appropriate and what degree of protection is required.” Seattle Times Co. v. Rhinehart, 467 U.S. 20, 46 (1984).

In determining whether a subpoena presents an undue burden on a non-party, the Court considers (1) the relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party described the requested documents; (6) the burden imposed; and (7) the expense and inconvenience to the non-party.

LSI Corp. v. Vizio, Inc., 2012 U.S. Dist. LEXIS 83657, *7 (D. Mass. 2012) (citations omitted).

When balancing the relevance of a particular discovery request against the burden of production, “concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.” Continental Datalabel, Inc. v. Avery Dennison Corp., 2010 U.S. Dist. LEXIS 68703, *2 (D. Mass. 2010); *see also* Cascade Yarns, Inc. v. Knitting Fever, Inc. et al., 755 F.3d 55 (1st Cir. 2014) (finding the district court gave appropriate special consideration to the subpoenaed party’s non-party status and awarding the non-party its costs in opposing the subpoena). “[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.” In re Cusumano, 162 F.3d 708, (1st Cir. 1998). In order to respond to the Plaintiff’s subpoena, MIIA would first have to pull all claim files specified in Request Nos. 1 and 2. MIIA and/or its counsel would then have to review each page of each claim file for privileged attorney client or work product information. MIIA and/or its counsel would also have to review each page of each claim file for confidential information of claimants and/or officers such as information which would be protected by the Health Insurance Portability and Accountability Act of 1996. Any privileged or confidential information would then have to be redacted. Documents related to

applications for coverage and training and testing would have to be subjected to a similar, onerous review. The Plaintiff should not be permitted to force MIIA to expend resources to respond to a subpoena that is nothing more than a “fishing expedition.” Milazzo v. Sentry Ins., 856 F.2d 321, 322 (1st Cir. 1988) (denying plaintiff’s attempt to discover insurer’s claims file.). As the documents sought are not admissible nor reasonably likely to lead to admissible evidence, *see supra*, this burden should not be imposed upon MIIA, an entity otherwise unrelated to the Plaintiff’s present action.

III. The Subpoena Must be Quashed because It Seeks Documents Available Either from the Defendant or from Public Sources

Information regarding prior claims against Officer Freeman or the police department, insurance policies maintained by the police department providing coverage to Officer Freeman and testing and training administered to Officer Freeman by the police department, if discoverable at all, is clearly available to the Plaintiff through discovery served upon the Defendant.¹ “If the material sought by subpoena is readily available, either from a party to the action or from a public source, obtaining it through subpoena on a nonparty often will create an undue burden.” Gray v. Town of Easton, 2013 U.S. Dist. LEXIS 75062, *8-9 (D. Conn. 2013). In Visto Corp. v. Smartner Info. Sys., Ltd., 2007 U.S. Dist. LEXIS 8481, *4 (N.D. Cal. 2007), the court refused to grant a motion to compel compliance with a non-party subpoena where there was “nothing in the record to suggest that [the non-party] had data or documents not available from [the plaintiff].” *Id.* as cited in Arista Records LLC, 2011 U.S. Dist. LEXIS at *17; *see also* Tucker v. American International Group, Inc. et al., 281 F.R.D. 85, 96 n21 (D. Conn. 2012)

¹ MIIA notes recent filings with the Court that establish that the Plaintiff served the Winthrop Police Department with a lengthy subpoena on or about May 1, 2015. Defendant’s counsel, also representing the Police Department, responded to said subpoena on or about May 27, 2015 by producing over 400 documents to the Plaintiff. This production was in addition to nearly 200 pages produced by the Defendant as part of his initial disclosures. See Documents 24 and 26.

(“when the burden of discovery is at issue, courts generally approve direct discovery from a party over discovery from a non-party.”); In re Cusumano, 162 F.3d 708, (1st Cir. 1998) (finding that that same information was available through direct discovery). The documents the Plaintiff has requested are available from the parties or from public sources.

The Plaintiff served a subpoena upon the Winthrop Massachusetts Police Department on May 1, 2015. The documents were to be produced on or before May 19, 2015. Request Nos. 2 and 4 sought complaints against Officer Freeman by anyone outside of or within the police department, respectively. Request No. 11 sought documents regarding amounts paid by the police department, the Town or anyone else as a result of actions taken or allegedly taken by Officer Freeman. Request No. 22 sought all lawsuits filed against the police department to which Officer Freeman is a defendant or in which his conduct is at issue. Request No. 23 sought documents regarding allegations of wrongdoing by Officer Freeman. Request Nos. 28, 29 and 30 sought documents relating to training received by Officer Freeman. Documents responsive to these requests, if any discoverable documents exist, are duplicative of the documents the Plaintiff is attempting to subpoena from MIIA. To the extent the Plaintiff seeks additional documents from MIIA not included in the subpoena to the Town, the Plaintiff had ample opportunity to request such documents from the Town in the subpoena served nearly three weeks prior to the subpoena served on MIIA.

The Plaintiff will be unable to prove he has a substantial need to obtain the documents from MIIA. Thus, as the subpoena seeks documents available from the parties or publicly available and production would cause an undue burden on the non-party, MIIA, the Court should quash the subpoena and excuse MIIA from the burden of complying with same.

Additionally, MIIA's counsel tried to explain to the Plaintiff that, following a diligent search of its records, MIIA has determined that the Town of Winthrop has attended four (4) of the voluntary training courses offered by MIIA between the years of 2006 and the present. Of those courses, none were law enforcement related. Furthermore, Officer Freeman did not attend any of the MIIA courses in which the Town participated. Therefore, MIIA has no documents in response to Request Nos. 5 and 6 for "any risk control and/or training services" provided to Officer Freeman or the Winthrop Police Department while insured with MIIA.

IV. The Court Should Enter a Protective Order Barring Any Further Discovery Regarding MIIA's Administration of the Town's Insurance Coverage

In addition to quashing the Plaintiff's subpoena issued to MIA, the Court should enter a protective order barring any further discovery regarding the claims and training information sought by the Plaintiff in the subject subpoena, including any testimony regarding said claims and training information.

Rules 26 and 45 of the Federal Rules of Civil Procedure govern discovery and the use of subpoenas in federal courts. Although Rule 26(b)(1) generally authorizes a party to obtain "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party," the Rules also establish limits upon a party's ability to engage in discovery. In particular, Rule 26(b)(2) obligates a court to limit the "frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ... if:

- (i) the discovery sought is unreasonably cumulative or duplicative, ... (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2). On its own initiative or pursuant to a motion under Rule 26(c), 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 ... that the disclosure or discovery not be had; ... that certain matters not be inquired into, ... [and] that ... confidential ... commercial information not be revealed...” Fed. R. Civ. P. 26(c)(1), (4), (7).

As discussed in greater detail above, further discovery in this litigation regarding the claims and training information sought by the Plaintiff is unnecessary, irrelevant, inadmissible and would require the disclosure of privileged and confidential information. In order to protect MIIA from oppression and undue burden or expense, the Court should enter a protective order barring any further discovery regarding the claims and training information sought by the Plaintiff, including any testimony related thereto.

V. MIIA is Entitled to an Award of Its Costs in Opposing the Plaintiff’s Subpoena

The Plaintiff has subpoenaed records from a non-party. The Plaintiff has sought said records despite seeking similar if not identical records from the Town and having ample opportunity to seek the same records either from the Town or from the defendant. Having received MIIA written objection to said subpoena and representations from the undersigned on behalf of MIIA that there are no discoverable records available in response to said subpoena, the Plaintiff has failed to withdraw the subpoena. As a result of Plaintiff’s failure to seek discovery from the proper party or parties and his further failure to withdraw the subpoena served on MIIA, MIIA had no choice but to file the present motion. As such, MIIA should be awarded its costs in objecting to the Plaintiff’s subpoena and in filing and pursuing the present motion. *See e.g., Cascade Yarns, Inc. v. Knitting Fever, Inc. et al.*, 755 F.3d 55 (1st Cir. 2014) (awarding the non-party with its costs).

Conclusion

For the foregoing reasons, the subpoena issued to MIIA should be quashed and a protective order should issue barring any further discovery regarding the claims and training information sought by the Plaintiff including any testimony related thereto. Additionally, for the reasons set forth herein, MIIA should be awarded its costs in opposing the Plaintiff's subpoena.

Date: June 12, 2015

Respectfully submitted,
MIIA Property and Casualty Group, Inc.,
A non-party
By its attorneys,

/s/ Deawn C. Takahashi

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Certificate of Service

I hereby certify that a true copy of the above document was served upon Plaintiff by forwarding same via ECF on June 12, 2015.

/s/ Deawn C. Takahashi

Deawn C. Takahashi

MIIA953 Memo in Support.doc