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Y.A. Mullings Corp. v. Hall

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Y.A. Mullings Corp. v Hall
2021 NY Slip Op 21241
Decided on September 13, 2021
Civil Court Of The City Of New York, Kings County
Stoller, J.
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Decided on September 13, 2021

Civil Court of the City of New York, Kings County

<p>Y.A. Mullings Corp., Petitioner,</p> <p>against</p> <p>Veronica Hall, et al., Respondents.</p>
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Index No. 53902/2020

For Petitioner: Pamela Smith

For Respondent: Sarah Zaboli

Jack Stoller, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages/numbered

Notice of Motion and Supplemental Affirmation Annexed 1, 2, 3

Affirmation In Opposition 4

Affirmation and Affidavit In Reply 5, 6

Upon the foregoing papers, the Decision and Order on this motion are as follows:

Y.A. Mullings Inc., the petitioner in this proceeding ("Petitioner") commenced this holdover proceeding against Veronica Hall, Oriceida Yearwood, Marcus Yearwood, and Malcolm Yearwood ("Respondents") seeking possession of 394 Montgomery Street, Apt. 4B, Brooklyn, New York ("the subject premises") on the allegation that Respondents have committed a nuisance. The matter had been calendared for trial. Petitioner now moves to permit its witnesses to testify at a closed hearing at which Respondents will not be able to observe the faces or ascertain the identities of the witnesses.

The predicate notice, incorporated into the petition by reference, alleges that Respondents and their invitees have congregated in the common areas of the building in which the subject premises is located ("the Building") and have made noise, left garbage, harassed tenants in the Building, assaulted Petitioner's principal, sold marijuana, broken the lock to the common entrance of the Building, and trespassed onto the roof of the Building at the same time that gunshots were fired.

Petitioner's attorney affirms in support of the motion on information and belief that one of Respondents and his friends are members of a violent street gang that is "notorious" for being armed, "prone to engaging in violent behavior including murder," and "quick to wreak [*2]retribution upon anyone that they feel has wronged them " Petitioner's attorney affirms that ten witnesses had committed to testify against Respondents, but that "many" of them "indicate that they are terrified of revealing their identifies to" Respondents Petitioner's

attorney also affirms that several tenants in the Building have been threatened for calling police about Respondents and an employee of Petitioner has been threatened for providing information to Petitioner. Petitioner's attorney affirms that "[v]irtually every" nonparty witness would prefer to testify without revealing their names or addresses and without exposing their faces.

In support of its motion, Petitioner annexes press reports and press releases concerning various crimes committed in Brooklyn. One of the articles, dated June 21, 2019, references a shooting at the Building. Another one, dated July 14, 2021, references someone being murdered elsewhere in Brooklyn. Petitioner's attorney affirms that her witnesses told her that they had seen the victim in the Building. Petitioner does not connect the remaining articles to anything having to do with Respondents or the Building.

In a criminal trial, the Court may limit cross-examination about a witness' identity, address, and occupation upon a showing that a cognizably valid interest of the witness is involved, i.e., a showing that the question will harass, annoy, humiliate or endanger the witness. [*People v. Waver*, 3 NY3d 748](#), 750 (2004), *People v. Stanard*, 42 NY2d 74, 84, *cert. denied sub nom. Stanard v. New York*, 434 U.S. 986 (1977). Upon making such a showing, the burden then shifts to the examining party to demonstrate the materiality of the requested information. *Id.* The Court must then, in the exercise of discretion, weigh the various interests involved and determine whether the testimony is sufficiently material to overcome the interest of the opposing party. *Id.* Although not exhaustive, the following factors show materiality: (1) the extent to which the right to cross-examine is infringed, (2) the relevance of the testimony, (3) the nature of the crime charged and the quantum of proof established aside from the testimony of the witness, (4) the nature and significance of the interest or the right asserted by the witness, and (5) the nature of and extent to which the proposed cross-examination would produce evidence favorable to that party and, of course, whether such evidence would be merely cumulative. *Id.*

Factors supporting anonymous testimony include the risk of a premature termination of an especially significant ongoing police investigation, *People v. Frost*, 100 NY2d 129, 134 (2003), [*People v. Ortiz*, 74 AD3d 672](#), 673 *leave to appeal denied*, 15 NY3d 894 (2010), *People v. Tai*, 145 Misc 2d 599, 607 (S. Ct. NY Co. 1989); a witness who is a confidential informant working with police, *Id.*; where a criminal defendant already knew the original names of the witnesses before the witnesses received new identities and relocation for their

protection; where the District Attorney provided the defense with the arrest record of the witnesses up to the month before trial, *Stanard, supra*, 42 NY2d at 84; where the People showed convictions of members of the defendant's family, *Frost, supra*, 100 NY2d at 132-33; where another eyewitness had been murdered; where a defendant had recently been indicted for slashing five inmates with whom he had been jailed, as well as a criminal history which included other violent crimes, *Id.*; and when knowledge of a police officer's shield number already opens an avenue of investigation to a defendant. [People v. Washington, 40 AD3d 228, 229 \(1st Dept.\)](#), *leave to appeal denied*, 9 NY3d 927 (2007). Petitioner has not identified any of these factors on this motion practice.

A witness may also remain anonymous upon proof of the danger to the life of the witness, *Frost, supra*, 100 NY2d at 134, *Tai, supra*, 145 Misc 2d at 607, and a defendant's family's attempts to discourage potential witnesses from testifying. *Frost, supra*, 100 NY2d at 132-33, [People v. Smith, 11 Misc 3d 1087\(A\)](#)(S. Ct. NY Co.). Petitioner alleges that the [*3]witnesses fear repercussions from testifying and that witnesses have been threatened for calling police, albeit only by the affirmation of an attorney, which has no probative value. [Thelen LLP v. Omni Contr. Co., Inc., 79 AD3d 605, 606 \(1st Dept. 2010\)](#), *leave to appeal denied*, 17 NY3d 718 (2011). [\[FN1\]](#)

The Court must balance Petitioner's arguments against Respondents' rights to cross-examine witnesses. In "any trial in any Court whatever" the party accused shall be, *inter alia*, confronted with the witnesses against them, NY Constitution, Art. I, § 6, such that cross-examination of an adverse witness is a matter of right in every trial of a disputed issue of fact. *Friedel v. Bd. of Regents*, 296 NY 347, 352 (1947), *Hill v. Arnold*, 226 AD2d 232, 233 (1st Dept. 1996). [See Also M.S. v. Cty. of Orange, 64 AD3d 560, 562 \(2nd Dept. 2009\)](#), *Barnes v. City of NY*, 44 AD3d 39, 46 (1st Dept. 2007), [Mujica v. Jerome-Human, 65 Misc 3d 158\(A\)](#) (App. Term 2nd Dept. 2019)(referring to cross-examination as a right). Cross-examination confers upon litigants, including civil litigants, an opportunity to challenge their adversary's evidence where the evidence consists of the testimony of witnesses whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959), *Schneider v. Mulvey*, 2007 NY Misc. LEXIS 8574, at *5-6 (S. Ct. Nassau Co. 2007).

The very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask for the witness' name and address. *Stanard, supra*, 42

NY2d at 84, [People v. Waite, 52 AD3d 237](#), 238 (1st Dept. 2008), citing *Smith v Illinois*, 390 U.S. 129, 131 (1968). The witness' name and address open "countless" avenues of in-Court examination and out-of-Court investigation. *Waite, supra*, 52 AD3d at 238. [FN2] A litigant can then ascertain, for example, if the witness is the same person who may have cause to be biased against the litigant, a witness' criminal record, or any social media postings of a witness. A restriction of a witness' identity therefore necessarily impairs a litigant's right to cross-examine. *Studefin v. N.Y.C. Taxi & Limousine Com.*, 135 Misc 2d 923, 926-27 (S. Ct. NY Co. 1987)(Parness, J.). Accordingly, the Court normally must permit a party to cross-examine witnesses about their identity, address and occupation. *Waver, supra*, 3 NY3d at 750, *Stanard, [*4]supra*, 42 NY2d at 84.

The Court does reserve discretion to limit the scope and manner of cross-examination, [Salm v. Moses, 13 NY3d 816](#), 817 (2009), but the extent to which Petitioner wishes to restrict Respondents' ability to cross-examine factors into this determination as well. For example, a witness should not testify anonymously when that witness is "central" to the People's case against a criminal defendant. *Waver, supra*, 3 NY3d at 750. Conversely, witnesses may testify anonymously where only 3 of 17 witnesses against a defendant concealed their identities, *Frost, supra*, 100 NY2d at 133, or in the face of similarly predominant evidence against a defendant aside from the concealed witness' testimony. [People v. Nunez, 155 AD3d 444](#) (1st Dept. 2017), *Tai, supra*, 145 Misc 2d at 607. Petitioner does not provide information about the extent of their case aside from the witness testimony. Instead, Petitioner's counsel affirms in support of the motion that "virtually every" witness wishes to conceal their identity.

The lack of a record about the extent of Petitioner's case other than anonymous witness testimony underscores the limited utility of authority from criminal matters to this special proceeding. Criminal defendants get discovery, including discovery about witnesses, as a matter of law. [FN3] Respondents in special proceedings only get discovery by leave of Court. CPLR §408. The discovery criminal defendants receive places them in a far more favorable place to weather infringements of their right to cross-examine than civil respondents in summary proceedings who do not obtain discovery. *Cf. Frost, supra*, 100 NY2d at 135 (even when witnesses in a criminal trial were allowed to remain anonymous, the defendant was provided with, *inter alia*, criminal histories of all witnesses).

Petitioner suggests that it could apprise Respondents' counsel of the names of the witnesses as long as Respondents' counsel would not disclose the names to Respondents. This

proposed course of action, while creative, deprives Respondents' counsel of the ability to check with Respondents to see if any witness had a personal bias against Respondents and interferes with the attorney-client relationship, *Frost, supra*, 100 NY2d at 134, *Washington, supra*, 40 AD3d at 229, in ways that would unfairly put Respondents' counsel in an ethically problematic posture.

While not absolute, the right to meaningful cross-examination matters enough to require a greater showing of a need to conceal witness' identities than a statement by an affiant with no personal knowledge that "virtually every" non-party witness fears Respondents and should testify anonymously, particularly with no discovery or other showing of the quantum of evidence in Petitioner's case so that the Court can evaluate the extent of the restriction of Respondents' ability to cross-examine the witnesses against them. The Court therefore denies Petitioner's motion. The Court will hold a conference with counsel for the parties to calendar a trial date.

This constitutes the decision and order of the Court

Dated: Brooklyn, New York

September 13, 2021

HON JACK STOLLER

J.H.C.

Footnotes

Footnote 1: Petitioner also supplies a reply affidavit to similar effect, although the affiant

does not have personal knowledge of potential witness' fears. Petitioner also includes as an exhibit an email to Respondents' counsel alleging that one of the Respondents has been intimidating witnesses although, again, the email is not a sworn statement by a deponent with personal knowledge. Moreover, the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new grounds for the motion. *Stang LLC v. Hudson Square Hotel, LLC*, 158 AD3d 446, 447 (1st Dept. 2018), *All State Flooring Distribs., L.P. v. MD Floors, LLC*, 131 AD3d 834, 836 (1st Dept. 2015).

Footnote 2: *See Also* *Awai v. Benchmark Constr. Serv., Inc.*, 172 AD3d 978, 979 (2nd Dept. 2019), *Hoffman v. Ro-San Manor*, 73 AD2d 207, 211-12 (1st Dept. 1980), *Zayas v. Morales*, 45 AD2d 610, 612 (2nd Dept. 1974)(civil litigants in plenary actions are entitled to learn in discovery the identities of witnesses against them); *Nysandy3 Nbp11 LLC v. Thompson*, 2021 N.Y.L.J. LEXIS 716, *6 (Civ. Ct. Bronx Co.), *86 West Corp. v. Singh*, 2007 NY Misc. LEXIS 8544 (Civ. Ct. NY Co. 2007)(respondents in nuisance holdover proceedings can potentially obtain leave to learn the identities of complaining witnesses against them).

Footnote 3: The prosecution shall disclose to the defendant, *inter alia*, all items and information that relate to the subject matter of the case, CPL §245.20(1), all statements made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including includes statements by persons to be called as witnesses at pre-trial hearings, CPL §245.20(1)(e), any exculpatory evidence, CPL §245.20(1)(k), and a complete record of judgments of conviction for all potential prosecution witnesses. CPL §245.20(1)(p).

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