UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JENNIFER JORGENSEN,

Plaintiff,

-against-

COUNTY OF SUFFOLK, et al.

Defendants.
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MEMORANDUM AND OPINION
CV 11-2588 (ADS)(AYS)

ANNE Y. SHIELDS, United States Magistrate Judge:

This is a civil rights action in which the Plaintiff, Jennifer Jorgensen ("Plaintiff" or "Jorgensen"), alleges that Defendants, inter alia, falsely arrested and maliciously prosecuted her, in violation of her Fourth and Fourteenth Amendment rights. Presently before the Court is Plaintiff's motion to unseal the grand jury minutes of state court Indictments 1425-2009 and 1099-2010. Defendants oppose the motion in its entirety, arguing that Plaintiff has not demonstrated a compelling and particularized need for disclosure of the grand jury minutes. For the following reasons, Plaintiff's motion to unseal is granted.

BACKGROUND

On or about May 30, 2008, Plaintiff, who was eight months pregnant at the time, was involved in an automobile accident with another vehicle on Whiskey Road in Ridge, New York, which resulted in the death of the two occupants of the other vehicle, retired police officer Robert Kelly and his wife, Mary Kelly, as well as Plaintiff's unborn child. (2d Am. Compl. ¶¶ 29-30, 33-34; Decl. of Tricia S. Lindsay ("Lindsay Decl.") in Supp. of Pl. Mot. to Compel, ¶ 3.) Plaintiff was severely injured during the accident and was airlifted to Stony Brook University Hospital. (Lindsay Decl. ¶ 4.)

Prior to the accident, Plaintiff visited Michael's Craft Store ("Michael's") in Rocky Point, New York, where she purchased several items and returned others. (2d Am. Compl. ¶ 41; Lindsay Decl. ¶ 12.) While in Michael's, Plaintiff interacted with several employees, including Debbie DeRocher, Virginia Gordon, and Destiny Martin. (2d Am. Compl. ¶ 42; Lindsay Decl. ¶ 12.) After leaving Michael's, Plaintiff placed her purchases in the trunk of her vehicle, then walked to Sonny's Card Store, where she purchased lottery tickets, and then to Pompeii Pizzeria, both of which are located in the same shopping center as Michael's. (2d Am. Compl. ¶ 43; Lindsay Decl. ¶ 12.)

Plaintiff exited the shopping center in her vehicle at approximately 2:30 p.m. and proceeded to drive towards Ridge, New York. (2d Am. Compl. ¶ 47; Lindsay Decl. ¶ 13.) She made a telephone call to her future father-in-law using the Bluetooth function in her vehicle and advised him that she was on her way, and would be arriving at his house in a few minutes. (2d Am. Compl. ¶ 47; Lindsay Decl. ¶ 13.)

Shortly after the telephone call, Plaintiff felt a sharp pain in her stomach and immediately fell unconscious. (2d Am. Compl. ¶ 48; Lindsay Decl. ¶ 14.) The next thing Plaintiff recalled was waking up in the recovery room at Stony Brook University Hospital. (2d Am. Compl. ¶ 49; Lindsay Decl. ¶ 14.) According to expert medical opinion, the sharp pain Plaintiff experienced was the result of a spontaneous placental abruption. (2d Am. Compl. ¶ 48; Lindsay Decl. ¶ 14.) After arriving at Stony Brook University Hospital, Plaintiff underwent several hours of surgery for extensive and life-threatening injuries, including emergency caesarean section delivery of her daughter, who died several days later. (2d Am. Compl. ¶ 54.)

Two toxicology tests performed at the hospital – a urine test, performed by the hospital, and a blood test, performed by the police using a Driving While Intoxicated ("DWI") kit – found

no evidence of drugs or alcohol in Plaintiff's system. (Id. ¶¶ 55, 61.) However, Defendants obtained a warrant to test blood drawn from Plaintiff shortly after her arrival at the emergency room on May 30, 2008. (2d Am. Compl. 63.) The only blood that could be supplied was from a red cap blood tube, containing less than two milliliters of blood volume, which was not obtained for toxicological purposes. (Id. ¶ 64.) Defendants did not test Plaintiff's blood obtained pursuant to the warrant until twenty-six days after the accident. That blood again tested negative for both drugs and alcohol. (Id. ¶ 71.) A test of Plaintiff's infant daughter's transfused blood, however, tested positive for traces of alcohol. (Id.)

Thirteen months after the accident, Plaintiff was indicted and charged with Aggravated Vehicular Homicide, Manslaughter in the Second Degree, Operating a Motor Vehicle While Under the Combined Influence of Drugs and Alcohol, and traffic infractions. (2d Am. Compl. ¶ 95; Am. Decl. of Elizabeth Miller ("Miller Decl.") in Opp'n to Pl. Mot. to Compel ¶ 3.) A superseding indictment was then filed, charging Plaintiff with three counts of Manslaughter in the Second Degree. (Id.)

Prior to her criminal trial, Plaintiff moved to have the grand jury minutes unsealed, which the prosecution opposed. (Miller Decl. ¶ 4.) On March 3, 2010, the Supreme Court of Suffolk County unsealed limited portions of the minutes that included the expert testimony of Lori Arendt ("Arendt"), the forensic scientist in Plaintiff's criminal action, and Robert Genna ("Genna"), the collision reconstructionist in Plaintiff's criminal action, both of whom are Defendants herein. (Miller Decl. ¶ 5.) The minutes were provided to Plaintiff's criminal attorney. (Id.)

In 2011, just prior to her trial, Plaintiff again moved to unseal the rest of the grand jury minutes, which, again, the prosecution opposed. (Miller Decl. ¶ 6.) Plaintiff's motion was

denied. (Id.) Plaintiff's first jury trial ended with a hung jury. (2d Am. Compl. ¶ 136.) After a second jury trial, Plaintiff was found guilty of one count of Manslaughter in the Second Degree, for the death of her infant daughter, and acquitted on the remaining counts. (Miller Decl. ¶ 59.) Plaintiff was sentenced to three to nine years in prison. (Id.)

Plaintiff appealed her conviction, which was affirmed by the New York Appellate Division, Second Department, on January 22, 2014. (Id. ¶ 60 and Ex. E, annexed thereto.) Plaintiff's conviction was ultimately reversed by the New York Court of Appeals on October 22, 2015. (Miller Decl. ¶ 60 and Ex. F, annexed thereto.)

Plaintiff commenced this civil rights action on May 27, 2011, which was stayed for a number of years due to Plaintiff's ongoing criminal action. Once the underlying criminal action was resolved, the stay was lifted in November 2015 and discovery proceeded. In September 2018, Plaintiff filed an Order to Show Cause in New York Supreme Court, requesting that the grand jury minutes of the above-referenced indictments be unsealed for purposes of prosecuting this action. (Miller Decl. ¶ 62.) Defendants opposed the motion. (Id.) Plaintiff's application was denied by the New York Supreme Court on October 25, 2018. (Id. ¶ 64 and Ex. H, annexed thereto.) Plaintiff now moves this Court to unseal the grand jury minutes.

DISCUSSION

I. Legal Standard

While "there is a 'long-established policy [of] maintain[ing] the secrecy of . . . grand jury proceedings,'" Anilao v. Spota, 918 F. Supp. 2d 157, 172 (E.D.N.Y. 2013) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958)) (alteration in original), "Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure provides that a court 'may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a

grand-jury matter . . . preliminarily to or in connection with a judicial proceeding.'" Frederick v. New York City, No. 11 Civ. 469, 2012 WL 4947806, at *7 (S.D.N.Y. Oct. 11, 2012) (quoting Fed. R. Crim. P. 6(e)(3)(E)(i)). Recognizing that disclosure may be warranted in certain situations, the Supreme Court has fashioned a "tripartite analysis" to guide lower courts in determining whether disclosure of grand jury materials is appropriate. Anilao, 918 F. Supp. 2d at 173; see also Frederick, 2012 WL 4947806, at *7. According to the Supreme Court, "[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." Douglas Oil Co. of California v. Petrol Stops Nw., 441 U.S. 211, 222 (1979). Put another way, the party seeking disclosure must prove a "particularized need" for the materials. Anilao, 918 F. Supp. 2d at 173; Frederick, 2012 WL 4947806, at *7.

The burden of demonstrating that the need for disclosure outweighs the need for secrecy "is a heavy one, and it rests with the party seeking disclosure." Anilao, 918 F. Supp. 2d at 173. "Courts have repeatedly recognized that the showing required is substantial." Frederick, 2012 WL 4947806, at *7 (citation and internal quotation marks omitted). A showing of "mere relevance, economy and efficiency will not suffice." Pizzuti v. United States, 809 F. Supp. 2d 164, 194 (S.D.N.Y. 2011) (citation omitted). Nor are unspecific allegations of need or mere speculation adequate. See Anilao, 918 F. Supp. 2d at 174 (citing cases).

Finally, district courts are afforded substantial discretion in determining whether the disclosure of grand jury materials is warranted. See id. at 174 (citing Douglas Oil, 441 U.S. at 223). In making its determination, the court "must carefully weigh the need for disclosure of the

grand jury transcript, whether in full or in part, and the public interest in secrecy" by considering "the particular, relevant circumstances of the case." Anilao, 918 F. Supp. 2d at 174.

II. Analysis

A. Avoiding Injustice

Plaintiff commenced this action alleging, inter alia, Section 1983 claims for false arrest and malicious prosecution. She alleges that that grand jury who indicted her was never informed by the Assistant District Attorney – Defendant Laura Newcombe ("Newcombe") – of Plaintiff's request to have Destiny Martin ("Martin") and Virginia Gordon ("Gordon") – the two individuals she interacted with in Michaels on the day of her accident – testify before the grand jury. (Lindsay Decl. ¶¶ 7, 9.) Plaintiff further alleges that the grand jury was "presented with misrepresentations about [Plaintiff's] blood that was taken and analyzed," as well as "a flawed, and incomplete investigation, which was filled with numerous untruths by Defendant Detective Roy Baillard ("Baillard"). (Id. ¶ 10.) Accordingly, Plaintiff asserts that she needs access to the grand jury minutes to substantiate her false arrest and malicious prosecution claims. The Court agrees with Plaintiff.

Courts in this circuit have recognized that the Douglas Oil test can be satisfied where civil rights claims for false arrest and malicious prosecution "would be hindered by denial of access to grand jury materials." Anilao, 918 F. Supp. 2d at 175-76 (citing Frederick, 2012 WL 4948706, at *7 and Palmer v. Estate of Stuart, No. 02 Civ. 4076, 2004 WL 2429806, at *3 (S.D.N.Y. Nov. 1, 2004)). However, "[a] review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." Anilao, 918 F. Supp. 2d at 176 (quotation omitted). Rather, "the party requesting disclosure of grand jury materials, either in whole or in part, must make a 'showing of likely success in defeating the presumption of

probable cause.'" Id. (quoting Frederick, 2012 WL 4948706, at *9). A party's own version of the events is insufficient; something more is required to potentially rebut the presumption of probable cause created by a grand jury indictment. See Anilao, 918 F. Supp. 2d at 176 (citation omitted); see also Brandon v. City of New York, 705 F. Supp. 2d 261, 273 (S.D.N.Y. 2010) ("[W]here a plaintiff's only evidence to rebut the presumption of the indictment is his version of events, courts will find such evidence to be nothing more than mere conjecture and surmise that [the plaintiff's] indictment was procured as a result of conduct undertaken by the defendants in bad faith, which is insufficient to rebut the presumption of probable cause.") (second alteration in original).

Here, to prevail on both her false arrest and malicious prosecution claims, Plaintiff must rebut the presumption of probable cause that automatically attaches to a grand jury indictment. See Rothstein v. Carriere, 373 F.3d 275, 282-83 (2d Cir. 2004) ("Once a suspect has been indicted . . . the law holds that the Grand Jury action creates a presumption of probable cause."). To rebut this presumption, Plaintiff must "establish that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." Id. at 283 (quoting Colon v. City of New York, 60 N.Y.2d 78, 83 (1983)). Accordingly, "[t]he burden of rebutting the presumption of probable cause requires the Plaintiff to establish what occurred in the grand jury, and to further establish that those circumstances warrant a finding of misconduct sufficient to erode the 'premise that the Grand Jury acts judicially.'" Rothstein, 373 F.3d at 284 (quoting Colon, 60 N.Y.2d at 82). Where a plaintiff "adduces facts that strongly suggest misconduct at the grand jury sufficient to rebut the presumption of probable cause if ultimately proven true," courts have recognized an interest in avoiding "possible injustice" under Douglas Oil. Frederick, 2012 WL 4947806, at *10. Such is the case here.

Denying Plaintiff's motion to unseal the grand jury minutes here would create "a hazard of 'possible injustice.'" Id. at *10. As set forth in Plaintiff's motion, Plaintiff alleges that during her criminal trial in February 2011, Newcombe represented to the jury that a blood test was conducted on June 3, 2008. (Lindsay Decl. ¶ 16.) During a pre-trial hearing to determine the admissibility of the blood evidence, it was learned from excerpts of the grand jury transcripts that the forensic scientist, Defendant Arendt, had untruthfully testified to the grand jury when she stated that Plaintiff's hospital blood, tested by Defendants, contained a preservative, when, in fact, there were no preservatives or anticoagulants in the blood tested. (Id.) Plaintiff alleges that, despite knowing the representation made by Arendt to be untrue, Defendants facilitated and encouraged the testimony during Plaintiff's criminal trial. (Id.)

In addition, Plaintiff alleges that Defendant Baillard testified untruthfully to the grand jury when he stated that Plaintiff's vehicle did not contain a Bluetooth device, suggesting that Plaintiff was using a hand-held cellular telephone while driving at the time of the accident. (Id. ¶¶ 17-18.) An investigation into the features of Plaintiff's vehicle subsequently determined that the vehicle was factory equipped with a Bluetooth system. (Id. ¶ 18.) Plaintiff alleges that even though Defendants knew Baillard's testimony to be false, they still permitted it to be heard by the grand jury, which resulted in Plaintiff's indictment. (Id.) Finally, Plaintiff alleges that, despite requests from her criminal defense counsel to have Martin and Gordon testify before the grand jury as to Plaintiff's lack of any impairment on the day of the accident, Newcombe never presented that body with Plaintiff's request. (Id. ¶¶ 8-9.)

Based on the foregoing, the Court finds that Plaintiff has "adduced and corroborated facts that strongly suggest misconduct at the grand jury sufficient to defeat the presumption of probable cause for purposes of her false arrest and malicious prosecution claims." Frederick,

2012 WL 4947806, at *10. While Defendants argue that they are entitled to immunity for their actions taken before the grand jury, that argument is not relevant to the determination before the Court. It is possible that Defendants may prevail under an immunity theory on summary judgment. At this juncture, however, the Court is concerned only with whether Plaintiff has demonstrated a compelling need for the discovery she seeks. Determining that Plaintiff has demonstrated such a need, the Court holds that Plaintiff has satisfied the first prong of the Douglas Oil test.

However, before a Court can unseal grand jury minutes, it must first determine that "no alternative means of illuminating the grand jury proceeding exist." Anilao, 918 F. Supp. 2d at 176 (citation omitted). "While depositions of witnesses may ordinarily suffice to illuminate grand jury proceedings and thereby obviate motions to unseal," that is not the case here. Frederick, 2012 WL 4947806, at *10 (citing Barnett v. Dillon, 890 F. Supp. 83, 88 (N.D.N.Y. 1995)). Plaintiff asserts that counsel for the County Defendants refuses to produce the County Defendants for depositions until Plaintiff either obtains the grand jury minutes or survives a motion for summary judgment. (Pl. Mem. of Law 21.) Accordingly, Plaintiff is apparently being thwarted from obtaining the information she seeks by Defendants' very own actions. Finally, "due to the significant passage of time [since] the Grand Jury proceedings . . ., there is a significant risk that witnesses will not recall all the details of the relevant events of their Grand Jury testimony." Anilao, 918 F. Supp. 2d at 178 (citations omitted); see also Palmer, 2004 WL 2429806, at *3 ("It is highly unlikely that the surviving officers in 2004 could recall precisely what they said before the grand jury in 1999, at the time the matter was freshest in their minds."). For these reasons, the Court finds that Plaintiff has no other means of obtaining the information she seeks.

B. The Need for Continued Secrecy

The second prong of the Douglas Oil test requires the Court to balance the Plaintiff's need for disclosure with the need for continued secrecy. Plaintiff's need for the testimony has already been set forth above. "The Supreme Court has enumerated five reasons for grand jury secrecy to guide courts in their evaluation of requests to unseal," which the Court must consider "in light of the specific context of the case." Anilao, 918 F. Supp. 2d at 179 (citations omitted). The five objectives served by grand jury secrecy are as follow:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble, 356 U.S. at 681 n.6. The Court finds that none of the foregoing factors apply here.

First, Plaintiff's grand jury proceeding has concluded. Accordingly, there is no need for the Court to worry about her escape. Second, disclosure of the grand jury minutes will not reveal the identities of the grand jurors, so there is no concern over "importuning" grand jurors. Third, Plaintiff's criminal trial has also concluded, so there is no need for concern over suborning perjury or witness tampering. Finally, since Plaintiff has chosen to identify herself publicly by filing this lawsuit, the purpose of protecting an "innocent accused" bears no weight. "The single secrecy-related consideration that bears on the Court's analysis is a desire 'to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes.'" Frederick, 2012 WL 4947806, at *13 (quoting Procter & Gamble, 356 U.S. at 681

n.6). Here, many, if not all, of the persons who testified before the grand jury testified against Plaintiff at her criminal trial, and are named Defendants in this action. Accordingly, "concerns about [their] safety and anonymity are virtually nonexistent" at this point. Frederick, 2012 WL 4947806, at *13. Moreover, "[o]nly in the most abstract and minimal sense might a prospective grand juror who learns of a decision to unseal [the] grand jury minutes [herein] be moved to hide or shade testimony in a future criminal case." Id. This Court finds it difficult to discern any possible interest that may be impaired by the release of the grand jury minutes herein, especially in light of the number of years that has elapsed since the grand jury was convened in Plaintiff's criminal action. See In re Craig, 131 F.3d 99, 107 (2d Cir. 1997) (noting that "the passage of time erodes many of the justifications for continued secrecy").

Accordingly, the Court finds that the second factor of the Douglas Oil test also weighs in Plaintiff's favor.

C. The Structure of the Request

"The substantial discretion afforded to district courts in deciding motions to unseal grand jury minutes extends to control over the extent of any disclosure ultimately authorized." Anilao, 918 F. Supp. 2d at 181 (quoting Frederick, 2012 WL 4947806, at *14). Plaintiff requests the entire grand jury transcript be disclosed. Defendants assert that Plaintiff is already in possession of the only portions she needs – Arendt's and Baillard's testimony – which were provided to her criminal defense counsel at the time of her trial.

First, Plaintiff's counsel avers that neither Plaintiff nor his office are in possession of any of the grand jury testimony. The Court credits this statement, given the length of time that has passed since Plaintiff's criminal trial. Second, "this is not a case in which misconduct is alleged as to a particular person's testimony or as to a particular issue." Anilao, 918 F. Supp. 2d at 182.

The misconduct that Plaintiff alleges pertains to the entire grand jury proceeding, including the presentation of false testimony and the failure to present possibly exculpatory testimony. Thus, "it is impossible to parse out portions of the Grand Jury materials for disclosure purposes." Id. As such, disclosure of the grand jury minutes in their entirety is warranted.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to unseal the grand jury minutes requested is granted. Defendants are directed to provide Plaintiff with a copy of the entire grand jury transcript within ten (10) days. The minutes are to be used only for purposes of this litigation.

SO ORDERED:

Dated: Central Islip, New York
October 2, 2019

/s/ Anne. Y. Shields
ANNE Y. SHIELDS
United States Magistrate Judge