

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
WINFIELD, et al., : Docket #15cv5236
 : 1:15-cv-05236-LTS-KHP
 Plaintiffs, :
 - against - :
 THE CITY OF NEW YORK, : New York, New York
 : September 14, 2017
 Defendants. :
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PROCEEDINGS BEFORE
THE HONORABLE KATHARINE PARKER,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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somewhat less perpetuation of segregation. So this really is -- let me put it a different way. It could not be, in our judgment, more different from a damages case where essentially there is some middle ground that people can get to.

THE COURT: Well we don't need to talk about it now. We're going to have the conference --

MR. GURIAN: Great.

THE COURT: -- and we'll explore a resolution. Because there's been discovery and that may have impacted both sides' positions. But we're going to set aside that day, and I want to see if we can work to resolve the case. So I'll issue an order of scheduling that.

Next, there are some motions that are pending. And with respect to the motion to quash the depositions of counsel members Torres and Espinal and for a protective order, so the City has moved to quash the subpoenas of Messrs. Torres and Espinal pursuant Federal Rules of Civil Procedure 45, as well as for a protective over pursuant to Rule 26C to prevent document discovery from various city council members, including Rafael Espinal, Ritchie Torres, Melissa Mark-Viverito, Laurie Cumbo, Robert Cornegy, and Antonio Reynoso. So this is currently pending as Docket Number 113.

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The City has moved to quash the subpoenas, arguing that plaintiffs have failed to demonstrate exceptional circumstances to warrant the depositions of counsel members because the City claims plaintiffs have not demonstrated what unique firsthand knowledge the depositions have or that the information cannot be obtained through a less burdensome means. And under Rule 26C, a party may move for a protective order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, forbidding the disclosure of discovery.

And Rule 30(d)3 further permits the Court to terminate or limit a deposition as provided in Rule 26C. In order to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition. For example, that the official has unique firsthand knowledge related to the litigative claims or that the necessary information cannot be obtained through other less burdensome or intrusive means. And I'm citing the Lederman case, Lederman v. New York City Department of Parks and Recreation, 731 F.3d 199, 202.

And like in Lederman, this Court finds that plaintiffs have not met their burden to warrant deposing counsel members Torres and Espinal, specifically, plaintiffs have not explained what unique firsthand

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2 knowledge these counsel members possess that is relevant to
3 the claims in the case. The outsider restriction policy
4 was not and is not a legislative enactment. It was and is
5 a policy established and maintained by mayors
6 administratively. And this argument proves the lack of
7 relevance of the city council members to this dispute. It
8 is HPD, not a city council or its members that's
9 responsible for implementing and maintaining the community
10 preference policy.

11 So as a result, it is not clear to this Court
12 what relevant unique facts these counsel members would
13 possess that could not be gathered from other sources,
14 including depositions of other individuals who are
15 responsible for the community preference policy.

16 And moreover, plaintiffs have not explained to
17 this Court's satisfaction, why and what any individual city
18 council member says or thinks about the community
19 preference policy that is relevant to this litigation.
20 Even if city council were responsible for the policy, which
21 it is not, it would be the actions of the counsel as a
22 whole that are relevant and not the subjective beliefs or
23 motivations of any single counsel member. And there I
24 reference Brown v. Gilmore, 200 U.S.D. LEXIS 21623 at 20
25 (E.D. Va., Oct. 26, 2000), aff'd, 258 F.3d 265 (4th Cir.

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2 2001).

3 To the extent that plaintiffs argue that they
4 need to depose counsel members Torres and Espinal in order
5 to test the City's asserted justification for the community
6 preference policy, which is to overcome resistance to build
7 more affordable housing, plaintiffs already have access to
8 publicly available materials that illustrate whether
9 opposition to affordable housing development has been
10 articulated in the past. And if so, where that
11 opposition's coming from, and how the City reacts to it.

12 For example, plaintiffs have their records from
13 planning commission meetings. They also have access to
14 city council meeting transcripts and can see what if
15 anything counsel members said about the community -- about
16 the community preference policy. And plaintiffs suggested
17 they want to inquire whether counsel members would oppose
18 the development of low-income housing if the community
19 preference policy were eliminated.

20 But with this line of questioning, plaintiffs are
21 seeking answers to hypotheticals, not factual information.
22 And since plaintiffs have access to information that speaks
23 to whether there is or not community opposition to low-
24 income housing, counsel members' speculation about what
25 might happen if the community preference policy were

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eliminated is not probative the issues in this case. So for that reason, I'm going to grant the motion to quash with respect to those City members, City council members.

The City's also cite a protective order regarding ESI discovery that plaintiff seek from six counsel members, city council members. And under Rule 26B, a party may obtain discovery on matters that are relevant to a party's claim or defense, and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Here plaintiffs have not explained to this Court's satisfaction what documents they are seeking from city council and why the ESI is likely to be relevant. And as previously addressed, city council is not a branch of government that is responsible for the community preference policy, and plaintiffs have already received ESI from custodians that are responsible for the policy, including HPD and the Mayor's office.

Therefore, to the extent there are any communications between city council members and HPD or the

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2 Mayor's office about the community preference policy,
3 plaintiffs are already getting those communications. And
4 it is not clear what additional relevant documents city
5 council would possess that are not duplicative of documents
6 obtained from another source. So this Court also concludes
7 that the burden and expense of the ESI sought is not
8 proportional of the needs of the case considering the
9 minimal relevance of the discovery sought.

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And the City represents that the six council
11 members have over a million e-mails. Given the scope of
12 ESI that the City is already reviewing, it's not
13 proportional to drastically increase the ESI review
14 population to include documents that don't appear to be
15 particularly relevant or that can be obtained through other
16 sources. So accordingly, this Court grants the City's
17 motion to quash the deposition subpoenas and the motion for
18 protective order precluding ESI regarding the six city
19 council members.

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Now with the motion to quash the deposition of
21 Mayor Glen, the City has also sought a protective order
22 under Rule 26C and 20(d)3(b) to preclude the deposition of
23 Deputy Mayor Alicia Glen, arguing that the law does not
24 permit depositions of high-ranking officials absent a
25 showing of exceptional circumstances. And they argue, the