

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

CORY CAPUTO,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 3:09CV00002 (DJS)
	:	
TIMOTHY KLUNTZ, ET AL.,	:	
	:	
Defendants	:	

RULING ON PLAINTIFF'S MOTION TO COMPEL

This is an action pursuant to 42 U.S.C. §1983 seeking money damages against five detectives employed by the Waterbury Police Department and the City of Waterbury for alleged violations of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, as well as alleged violations of the Connecticut Constitution and common law. In his Second Amended Complaint, the plaintiff contends that the individual defendants seized him without an arrest warrant, transported him to police headquarters against his will, and unlawfully imprisoned him there for over twelve hours. The plaintiff further alleges that during this period the individual defendants physically assaulted him and threatened to perpetrate other assaults on him.

Pending before the Court is the plaintiff's Motion to Compel and to Award Costs in which the plaintiff requests that the Court: (1) compel the defendant Milford Hayes to answer questions that were propounded to him at a deposition held on August 23, 2010, which he refused to answer; (2) compel the defendant to pay

for all costs of continuing the deposition as it pertains to this issue; and (3) award attorney's fees relating to both the motion to compel and the continued deposition. For the reasons set forth below, the plaintiff's Motion to Compel and to Award Costs (dkt. # 63) is **GRANTED in part** and **DENIED in part**.

DISCUSSION

I. Request that the Defendant Hayes be Compelled to Answer Questions

At his August 23, 2010 deposition, Hayes was asked by plaintiff's counsel about the source of information provided to the Waterbury Police on January 19, 2010, that a particular individual ("person of interest") might be found at a specific address in Waterbury, which was the residence of that individual's sister. The police wished to talk to the person of interest in connection with a recent homicide. Hayes responded that the information was provided by a person "who wishes to remain anonymous at this time." (Dkt. # 63-1, at 10.) When pressed on this point by plaintiff's counsel, Hayes continued to respond by saying that the source of information (the "informant") wished to remain anonymous.

Counsel for Hayes objected to questions about the identity of the informant, stating that Hayes "could tell you the circumstances surrounding him obtaining the information from this individual and how this individual was involved in this case, but if you wish to pursue the identity. . . we're going to have to

get a court order on that.” (Id. at 11.) When asked whether he was claiming that the informant was fearful of retaliation if his or her identity were disclosed, Hayes testified that “I would have to assume yes” since the person of interest “is a known gang member.” (Id. at 12.) Hayes also testified that while he couldn’t recall the name of the informant at that time, he has the name on file and that he “would definitely be able to get you the person’s name.” (Id. at 16.)

The address that Hayes testified was provided to the Waterbury police by the informant was the residence of a woman who is the sister of the person of interest. This same woman was disclosed by the plaintiff as a witness in this case in August 2009. While it is undisputed that the defendant Hayes and other Waterbury police officers entered and searched that woman’s apartment on January 19, 2010, the circumstances surrounding those events are disputed and were the subject of a motion filed by the plaintiff on February 19, 2010. (Dkt. # 38.) According to the plaintiff, the police “stormed into” the apartment and held the woman in her bedroom “while they searched the rest of her apartment against her will.” (Id. at 1.) According to the defendants, the woman “voluntarily allowed [the police] entry,” consented to a search of the apartment, and “at no time” was held hostage in her bedroom. (Dkt. # 41, at 2, 3.)

The plaintiff claims that the actions of Hayes and the other

police officers on January 19, 2010 at the apartment of the plaintiff's witness "constituted deliberate harassment and intimidation of a witness in an attempt to discourage her testimony." (Dkt. # 63-1, at 3.) The plaintiff further contends that "either the 'concerned citizen' referenced by Hayes [i.e., the informant] is non-existent, or that appropriate inquiry under oath will determine that no reliable information was provided that would justify the warrantless entry into the witness's home." (Id. at 2.) For their part, the defendants argue that disclosing the identity of the informant "will place this individual in harm's way resulting perhaps in dire consequences because of the 'gang' component of this homicide investigation," will jeopardize and compromise an ongoing homicide investigation, and is "immaterial and irrelevant to the claims made by Cory Caputo in this lawsuit." (Dkt. # 64, at 3, 4.)

Evidence of a defendant's effort to intimidate a witness can be offered to "prove his consciousness of guilt," and is relevant since an effort to intimidate a witness is probative of the defendant's state of mind. United States v. Mickens, 926 F.2d 1323, 1329 (2d Cir. 1991); United States v. Bein, 728 F.2d 107, 114-15 (2d Cir. 1984) ("Evidence of threats by a defendant against a potential witness against him can, if [a] balancing test is met, be used to show guilty knowledge."). The Court has no difficulty in concluding that the information sought by the

plaintiff is relevant. This is particularly true at the discovery stage, where “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26 (b) (1).

On August 20, 2010, the Court issued an Order stating that “[i]f Defendants intend to assert a claim of privilege to withhold information otherwise discoverable, they are directed to do so in strict compliance with the requirements of Fed. R. Civ. P. 26(b) (5). . . .” (Dkt. # 61.) Pursuant to Fed. R. Civ. P. 26(b) (5) (A), “[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged . . . the party must: (i) expressly make the claim. . . .” When asked by plaintiff’s counsel at Hayes’ deposition what the legal basis was for not disclosing the informant’s identity, Hayes’ counsel stated that “I would go along the privileged [sic] lines and the individual wishes to remain anonymous.” (Dkt. # 63-1, at 18.) Beyond that vague reference to privilege, there is nothing before the Court indicating that the defendants made an express claim of privilege either at the Hayes deposition or in their objection to the plaintiff’s pending Motion to Compel and to Award Costs. Nor did the defendants at any time seek a protective order as to the identity of the informant.

Fed. R. Civ. P. 30(c) (2) provides that “[a] person may

instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3) [motion to terminate or limit a deposition]." As noted above, the defendants did not make an express claim of privilege at the deposition.

Additionally, no limitation had been ordered by the court and no motion was presented under Fed. R. Civ. P. 30(d)(3). Since the defendants did not properly make a claim of privilege as to the identity of the informant, the Court concludes that there was no proper basis under the federal rules for an instruction to Hayes not to answer the question that asked for that identity.

The only unanswered questions at the Hayes deposition that have been brought to the attention of the Court were questions seeking the identity of the informant. Since Hayes testified that he has the name on file and that he "would definitely be able to get [plaintiff's counsel] the person's name," (dkt. # 63-1, at 16), the Court directs the defendant Hayes to provide the name of this person, i.e., the informant, along with any other identifying information, address, or telephone number(s) associated with that person in the possession, custody, or control of the defendant Hayes or the Waterbury Police Department, to his attorney, who shall then provide all such information to plaintiff's counsel. All such information shall be provided to plaintiff's counsel no later than March 7, 2011.

Although the defendants have not properly asserted a privilege as to the identity of the informant, the Court does have a concern about the well-being of this individual in light of representations made about gang membership and possible retaliation. The informant is not a party to this action and the interests of the informant are not represented by counsel. For that reason, the Court will exercise its discretion under Fed. R. Civ. P. 26(c) and order that all disclosure made pursuant to this ruling shall be limited to counsel for the plaintiff, who shall, as an officer of the court, maintain the confidentiality of all such information absent further order of this Court. See *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 164 (“[C]ounsel may in appropriate cases learn the identity of an informer under an obligation as an officer of the court not to disclose that identity to the client or others.”). This limitation is not intended to prevent plaintiff’s counsel from attempting to contact the informant or from deposing the informant if counsel wishes to do so. Any such deposition of the informant shall remain under seal until further order of the Court.

II. Request that the Defendant Hayes be Compelled to Pay All Costs of Continuing His Deposition

As previously noted, the only unanswered questions at the Hayes deposition that have been brought to the attention of the Court were questions seeking the identity of the informant.

Since the Court has ordered the defendant Hayes to provide this information to the plaintiff through counsel, the Court concludes that the plaintiff's motion does not warrant a continuation of the Hayes deposition. Accordingly, this request to pay all costs of continuing Hayes' deposition is denied.

### III. Request for an Award of Attorney's Fees

The plaintiff's motion also seeks an award of attorney's fees as to both the motion to compel and the continued deposition of Hayes. The Court has already concluded that the plaintiff's motion does not warrant a continuation of the Hayes deposition. With regard to the motion to compel, the plaintiff contends that "the information sought by the plaintiffs [sic] is essentially the same for which the defendants filed a protective order on August 10, 2010 [Doc. 58] to preclude information pertaining to this same inquiry, *and which this court denied on August 20, 2010* [Doc 61]." (Dkt. # 63-1, at 1.) The plaintiff further argues that the defendant Hayes has failed to follow federal and local rules for asserting a privilege, and that, despite an agreement that the deposition would be subject to the normal stipulations, including reserving objections to the time of trial, counsel for Hayes stated that the witness would not answer the question about the informant's identity without court intervention.

Having once again reviewed the defendants' August 10, 2010

motion for protective order, the Court does not find the denial of that motion to be a suitable basis for an award of attorney's fees pursuant to the plaintiff's motion to compel. It is true that the items as to which the defendants sought a protective order included any "statements from witnesses or informants" either created in connection with any investigation of the person of interest or "concerning any Waterbury police officers' activity at or near" the address of the person of interest's sister. (Dkt. # 58-1, at 3.) It is also true, however, that neither the defendants' motion for protective order nor the Court's order denying that motion specifically referred to the identity of the informant. For that reason, the Court declines to award attorney's fees on the basis of the previous denial of the defendants' motion for protective order.

The Court believes the plaintiff's assertion that the defendants failed to follow federal and local rules for asserting a privilege presents a closer question. As has been noted, the defendants were directed by the Court on August 20, 2010 to assert any claim of privilege "in strict compliance" with the federal rules. (Dkt. # 61.) The Court concludes that the assertion of a claim of privilege at the deposition of the defendant Hayes was not "in strict compliance" with the federal rules. Because of the concerns expressed about possible retaliation against the informant by gang members, however, the

Court does not conclude that the defendant acted in bad faith by refusing to identify the informant at the deposition. For that reason, the Court declines to exercise its discretion to award attorney's fees.

CONCLUSION

For the foregoing reasons, the plaintiff's Motion to Compel and to Award Costs (dkt. # 63) is **GRANTED in part** and **DENIED in part**. The defendant Hayes shall provide the name of the informant, along with any other identifying information, address, or telephone number(s) associated with that person in the possession, custody, or control of the defendant Hayes or the Waterbury Police Department, to his attorney, who shall then provide all such information to plaintiff's counsel. All such information shall be provided to plaintiff's counsel no later than March 7, 2011. Plaintiff's counsel shall maintain the confidentiality of all such information absent further order of this Court.

The plaintiff's requests that the defendant Hayes be compelled to pay all costs of continuing his deposition and for an award of attorney's fees are denied.

SO ORDERED this 15th day of February, 2011

\_\_\_\_\_/s/ DJS

Dominic J. Squatrito  
United States District Judge.