

Matter of Alexandre v Metropolitan Hosp. Ctr.
2007 NY Slip Op 31448(U)
May 29, 2007
Supreme Court, New York County
Docket Number: 0102954/2007
Judge: Marcy L. Kahn
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: NOEL MCCOYL, J.S.C.
Justice

PART 50K

Margaret Alexandre

INDEX NO. 102954/07

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -
Metropolitan Hospital Center

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for pre-action discovery

~~Notice of Motion/ Order to Show Cause — Affidavits — Exhibits —~~
~~Answering Affidavits — Exhibits —~~
Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 23.05 MAY 29 2007

NOEL MCCOYL, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50K

-----X

In the Matter of the Application of :

MARGARETT ALEXANDRE, :

Petitioner, :

To Obtain Pre-Action Discovery :
Pursuant to CPLR 3102(c) To Aid :
in Bringing an Action :

DECISION AND ORDER
Index No. 102954/07

-against- :

METROPOLITAN HOSPITAL CENTER, :

Respondent. :
-----X

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MARCY L. KAHN, J.

Petitioner Margarett Alexandre has moved for an order pursuant to New York Civil Practice Law and Rules (CPLR) §3102(c) directing pre-action disclosure to aid in bringing an action against respondent Metropolitan Hospital Center ("respondent" or "MHC"). She seeks production of her complete employee personnel file maintained by MHC. Respondent opposes the application, arguing that petitioner has failed to establish that she has a meritorious cause of action or that the information sought is material and necessary to frame a complaint. For the reasons stated, the motion is denied, without prejudice.

I. BACKGROUND

Petitioner alleges that she was employed by respondent as an assistant director of nursing for approximately eight and

one-half years. On February 21, 2006, MHC terminated petitioner's employment. Petitioner claims that she was "wrongfully terminated stemming from unlawful reasons." (Affirm. of Denise L. Quarles, Esq., dated March 30, 2007, in Reply to Opp. To Order to Show Cause to Compel Pre-action Discovery ["Reply"], at ¶6). Specifically, petitioner alleges that respondent incorrectly determined that a second employment held by petitioner interfered with her ability to perform her job at Metropolitan Hospital Center adequately, and that her termination was therefore without good cause. (Id., at ¶¶7,8; Affirm. of Denise L. Quarles, Esq., dated March 1, 2007, in Support of Order to Show Cause ["Pet. Affirm."], at ¶4). Petitioner maintains that the production by MHC of her personnel file is necessary "to assist her in evaluating whether she has a viable cause of action against" respondent, to enable her to frame a complaint and to determine the relief to which she may be entitled. (Pet. Affirm., at ¶5). She also claims a need for such documentation in order to determine the identity of the prospective defendants in any such action for wrongful termination. (Reply, at ¶9). Petitioner avers that she has made several unsuccessful attempts to obtain a copy of her employee/personnel file from respondent's human resources department by letter and telephone. (Reply, at ¶1).

II. DISCUSSION

Section §3102(c) of the Civil Practice Law and Rules provides, in relevant part:

Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration may be obtained, but only by court order.

In order to obtain pre-action disclosure, the petitioner must demonstrate both "a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." (Matter of Uddin v. New York City Transit Auth., 27 A.D.3d 265 [1st Dept. 2006]; Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 A.D.2d 346, 347 [1st Dept. 2000]; Bliss v. Jaffin, 176 A.D.2d 108 [1st Dept. 1991]). In Matter of Gleich v. Kissinger, 111 AD2d 130 (1st Dept. 1985), the Appellate Division, First Department adopted the criteria for granting pre-action discovery which had been earlier announced by the Appellate Division, Third Department:

The factors to be considered in determining an application for preaction disclosure were well summarized by the Appellate division, Third Department in Emmrich v. Technology for Information Mgt. (91 AD2d 777) as follows: "Disclosure to aid in bringing an action, under CPLR 3102 (subd [c]), is granted only where the party seeking the disclosure has shown in his affidavits facts which 'fairly indicate he has some cause of action against the adverse party' and, further, that the information he seeks is 'material and necessary' to that actionable wrong (Stewart v. Socony Vacuum Oil Co., 3 AD2d 582, 583). Preaction disclosure is not allowed to determine whether facts supporting a cause of action exist (Matter of Manufacturers & Traders Trust Co. v. Bonner, 84 AD2d 678; L-Tron Corp. v. Davco Systems, 60 AD2d 25, 29), and mere conclusory statements of suspicion and conjecture are insufficient to

allow one 'a judicial franchise to penetrate into another party's affairs, either by examination or inspection, to find out whether he ought to sue or ought not to sue' (*Stewart v. Socony Vacuum Oil Co.*, *supra.*, p 583; see, also, 3A Weinstein-Korn-Miller, NY Civ Prac, par 3102.14)."

(*Matter of Gleich v. Kissinger*, *supra*, 111 AD2d at 131-132).

A court has "wide discretion in determining what is material and necessary" in terms of the disclosure to be made under §3102(c). (*Stanco v. Steinberg*, 254 A.D.2d 363 [2nd Dept. 1998]). Furthermore, the court must consider the evidence presented in the light "most favorable to the petitioner," who is entitled to "every favorable inference which can reasonably be drawn." (*Ero v. Graystone Materials, Inc.*, 252 A.D.2d 812 at 814 [3rd Dept. 1998]).

In order to prevail on a Section 3102(c) claim for pre-action discovery, however, as a threshold requirement, the petitioner must show that she has a prima facie cause of action. (*Toal v. Staten Island Univ. Hosp.*, 300 A.D.2d 592 [2nd Dept. 2002]; *Stewart v. New York City Transit Auth.*, 112 A.D.2d 939 at 940 [2nd Dept. 1985]). Therefore, pre-action disclosure is unavailable to ascertain whether facts supporting a cause of action exist. (*Matter of Uddin v. New York Transit Authority*, *supra*, 27 A.D.3d at 265; *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536 [1st Dept. 1989] [pre-action disclosure "is not permissible as a fishing expedition to ascertain whether a cause of action exists"])).

Here, petitioner seeks disclosure of her personnel file to aid her "in evaluating whether she has a viable cause of action against the Respondents" (Pet. Affirm., at ¶5). That is, petitioner has not alleged the existence a cause of action, but rather merely seeks to investigate whether or not such cause of action exists against the respondent. She has not alleged any potential legal basis for a wrongful termination claim, such as breach of an employment contract or violation of any statute or regulations, however. It is well-settled, however, that if a petitioner "does not have a describable sense of the wrong that [she] thinks hurts [her], [she] ought not be allowed a judicial franchise to penetrate into another party's affairs, either by examination or inspection, to find out whether [she] ought to sue or ought not to sue." (Stewart v. Socony Vacuum Oil Co., 3 A.D.2d 582 [3rd Dept. 1957]; see Matter of Stump v. 209 East 56th St. Corp., 212 AD2d 410 [1st Dept. 1995]; Matter of Gleich v. Kissinger, *supra*).

Furthermore, appellate case law establishes that the petitioner must have a *meritorious* cause of action before pre-action discovery will be granted. (Matter of Belmont v. Bristol-Myers Squibb Co., 18 AD3d 292 [1st Dept. 2005]; Holzman v. Manhattan & Bronx Surface Transit Operating Auth., *supra*, 271 A.D.2d at 347; Matter of Gleich v. Kissinger, *supra*). In this regard, petitioner's showing is similarly deficient. She claims

drawn, the facts provided by the petitioner fail to suggest that she has any cause of action at all, much less a meritorious one. (See Ero v. Graystone Materials, Inc., supra, 252 A.D.2d at 814).

Petitioner avers that pre-action disclosure is necessary in order to enable her to frame a complaint. Such disclosure for the purpose of examining "the feasibility of framing a complaint" has not been permitted. (Cotler v. Retail Credit Co., 18 A.D.2d 898 [1st Dept. 1963]).

Petitioner also seeks pre-action disclosure "to determine and state the relief to which petitioner may be entitled." (Pet. Affirm., at ¶5). Disclosure has been denied, however, where "its object is to enable plaintiff to state the amount of damages, since damages can be estimated." (Zakarias v. Radio Patents Corp., 20 A.D.2d 795, 796 [2nd Dept. 1964]). In this case, petitioner is capable of estimating her damages, making pre-action disclosure for such purpose unnecessary.

Finally, petitioner claims that pre-action disclosure is material and necessary because "it is unknown to Petitioner which employees of Respondents are responsible for administering her unlawful termination." (Reply, at ¶9). However, pre-action discovery for the purpose of identifying potential defendants is only permissible if the petitioner sufficiently alleges facts that state a cause of action (Matter of Stump v. 209 East 56th

St. Corp., supra), which petitioner has failed to do here. In any case, petitioner has not demonstrated that she could not name the Metropolitan Hospital Center as the defendant, in the event she had a viable cause of action.

In sum, petitioner's application fails to demonstrate prima facie the existence of any cause of action against MHC, that such cause of action is meritorious or that the information in her personnel file is material and necessary to the prosecution of such action. Under these circumstances, she is not entitled to such discovery to frame a complaint, determine her damages (if any) or identify defendants. Petitioner's deficient showing on this motion, however, is no bar to her seeking relief upon an adequate showing.

Accordingly, for all the foregoing reasons, petitioner's application for pre-action discovery pursuant to CPLR §3102(c) is denied in all respects, without prejudice to her making a new application based upon a proper showing of entitlement to relief.

The foregoing constitutes the decision and order of this court.

ENTER:

FILED

JUN 05 2007

[Signature]
Marcy L. Kahn, J.S.C.

~~NEW YORK COUNTY CLERK~~

DATED: New York,
May 29, 2007

NEW YORK
COUNTY CLERK'S OFFICE