

**Afflick v Turner Constr. Co.**

2011 NY Slip Op 32068(U)

July 22, 2011

Supreme Court, New York County

Docket Number: 107391/11

Judge: Barbara Jaffe

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

PRESENT: Jaffe BARBARA JAFFE  
Justice J.S.C.

PART 3

Afflick, Migdaliq

INDEX NO. 107391611

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

Turner Construction

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Preaction discovery

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/22/11

[Signature]  
BARBARA JAFFE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

JUL 22 2011

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
MIGDALIA AFFLICK,

Index No. 107391/11

Petitioner,

Motion Date: 6/28/11  
Motion Sequence No.: 001

Permitting Discovery and Inspection  
for the Purposes of Framing a Complaint  
and Preserving Evidence and Furnishing  
for Purposes of Inspection, Examination  
and Duplication,

**DECISION AND JUDGMENT**

**UNFILED JUDGMENT**

-against-

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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

TURNER CONSTRUCTION COMPANY, and  
MADISON SQUARE GARDEN, LP,

Respondents.

-----X  
BARBARA JAFFE, J.S.C.:

**For petitioner:**  
Thomas J. Moverman, Esq.  
Lipsig, Shapey, Manus & Moverman, P.C.  
40 Fulton Street  
New York, NY 10038-1850  
212-285-3300

**For respondents:**  
John E. Sparling, Esq.  
London Fischer, LLP  
59 Maiden Lane  
New York, NY 10038  
212-972-1000

By notice of petition dated June 23, 2011, petitioner moves pursuant to CPLR 3102(c) for  
an order compelling respondents to provide pre-action discovery. Respondents oppose.

**I. FACTUAL BACKGROUND**

On June 16, 2011, petitioner, an employee of Five Star Electrical Construction Corp.,  
working under the direction and control of respondent Turner Construction Company (Turner)  
sustained electrical burns to her arms and face from an explosion at a 480-volt electrical panel  
box while working as an electrician at a construction site on the sixth floor of Madison Square  
Garden, located in Manhattan at 2 Penn Plaza. (Emergency Affirmation of Thomas J.  
Moverman, Esq., dated June 23, 2011 [Moverman Emerg. Aff.]; Affirmation of Thomas J.

Moverman, Esq., dated June 23, 2011 [Moverman Aff.]).

By letter dated June 20, 2011, petitioner informed Turner of her intention to conduct an engineering inspection of the accident site, and gave it notice not to alter, modify, or remove the electrical panel there. (*Id.*, Exh. B). By letter dated June 22, 2011, petitioner asked that respondent Madison Square Garden, LP (MSG) afford it access to the site in order to conduct a non-destructive examination and take photographs. (*Id.*).

By letter dated June 21, 2011, respondents denied petitioner access to 2 Penn Plaza, and advised her to cease all direct communication with them. (*Id.*, Exh. C). Petitioner reiterated her request, in a letter dated June 22, 2011, to conduct a non-destructive inspection, noting that the need to inspect was urgent because the accident site is an active construction zone, subject to frequent alteration and change (*id.*, Exh D), and the following day, informed respondents by letter that an order to show cause for a preliminary injunction seeking a temporary restraining order would be sought (*id.*, Exh. E).

By order dated June 28, 2011, I temporarily enjoined respondents, pending the determination of petitioner's application, from altering, modifying, destroying or disposing of any portion of the subject electrical panel box on the sixth floor at Madison Square Garden, any of its component parts, or any records relating to its manufacture, purchase, servicing, maintenance or repair.

## II. CONTENTIONS

Petitioner asserts that an emergency application for pre-action inspection of the electrical panel is appropriate as the accident occurred at an active construction site, subject to change and/or modification at any time, and that denial of access to the panel would severely prejudice her case, resulting in irreparable harm by preventing her from determining, recording, and

photographing the conditions as they existed at or about the time of her injury. (Moverman Emerg. Aff.). She also seeks respondents' records relating to the repair, maintenance, and inspection of the panel box prior to the incident, all contracts between respondents and any third-parties for the repair, service, inspection and maintenance of the electrical panel both before and after June 16, 2011, all studies and evaluations, examinations and reports relating to and reflecting all accidents and incidents occurring on and with the electrical box around June 16, 2011, and all records, reports, memoranda, correspondence, and other documentation reflecting complaints about the physical condition of the electrical box. (Moverman Aff.).

Petitioner contends that the inspection and depositions of respondents and other persons with knowledge of the facts and circumstances of the accident constitute vital and tangible physical evidence which must be preserved in order to identify and confirm the identities of all parties which provided services and repairs for the panel and to "determine[] if a valid cause of action exists." (*Id.*).

Respondents argue that since the time of the accident, the panel box has been used and that its condition is not the same as it was on the date of the accident, and that consequently, a preservation order would be ineffectual. They also maintain that petitioner has failed to demonstrate the existence of a meritorious cause of action or that the information demanded is necessary and material to the alleged wrongful conduct, that her request constitutes a fishing expedition to determine whether the facts support alternative theories of liability, and observe that she relies solely on the affirmation of counsel, offering no evidence based on first-hand knowledge. Even if petitioner has met its burden of establishing a meritorious cause of action, respondents note that petitioner may secure the information and documents sought via FOIL requests and the normal course of post-action discovery. (Affirmation of John E. Sparling, Esq.,

dated Jun. 27, 2011 [SparlingAff.]).

### III. ANALYSIS

CPLR 3102(c) authorizes a court to order disclosure prior to the commencement of an action to aid in bringing an action or to preserve information. (*Matter of Uddin v NYCTA*, 27 AD3d 265, 266 [1<sup>st</sup> Dept 2006]). A plaintiff may petition the court under this section in order to identify potential defendants (*Holzman v Man. and Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [2000]; *Stump v 209 E. 56<sup>th</sup> Street Corp.*, 212 AD2d 410, 410 [1<sup>st</sup> Dept 1995]), or determine the way in which the complaint should be framed (*Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1<sup>st</sup> Dept 1989]). However, pre-action discovery may not be utilized to discern the existence of a cause of action. (*Holzman*, 271 AD2d at 347). Accordingly, a petitioner must show that she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. (*Id.*).

Here, although petitioner alleges injuries and names party defendants, she does not suggest a theory of liability or proffer facts evidencing a connection between the injuries and a party, and advances no allegations based on first-hand knowledge relating to negligence or any other theory of liability.

In *Holzman*, pre-action discovery was denied because the petitioner failed to allege any facts supporting his bare claim that respondents were negligent and that respondent's negligence caused his injury. (*Holzman*, 271 AD2d at 347). Here, petitioner has not only failed to allege sufficient facts to support a claim of negligence, but has not even identified a cause of action. While it is reasonably inferred from the alleged explosion that it was the product of negligence (*Ero v Graystone Materials, Inc.*, 252 AD2d 812 [3d Dept 1998]), absent an affidavit setting forth first-hand knowledge of the facts underlying her claim, petitioner has not established

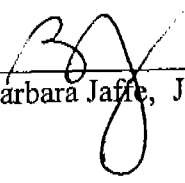
entitlement to pre-action discovery or inspection of the electrical panel. (*See Matter of Nicol v Town of Rotterdam*, 134 AD2d 754 [3d Dept 1987] [attorney's affidavit insufficient]).

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED AND ORDERED, that the petition for pre-action disclosure is denied and the proceeding is dismissed.

ENTER:

  
Barbara Jaffe, JSC

DATED: July 22, 2011  
New York, New York  
JUL 22 2011

**BARBARA JAFFE**  
J.S.C.  
JUL 22 2011

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