

Matter of Johnson v County of Suffolk
2019 NY Slip Op 33123(U)
October 8, 2019
Supreme Court, Suffolk County
Docket Number: 611422/2017
Judge: Linda Kevins
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INDEX No. 611422/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

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IN THE MATTER OF THE APPLICATION OF GREGORY
JOHNSON,

Petitioner,

-against-

DECISION AND ORDER
MOTION Seq. # 1 – MOTD

THE COUNY OF SUFFOLK, THE SUFFOLK COUNTY
POLICE DEPARTMENT and COSTCO WHOLESALE
CORPORATION,

Respondent.

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The following papers have been read on this pre-action Motion by Petitioner Gregory Johnson (hereinafter Petitioner Johnson):

Order to Show Cause, Verified Petition, Affirmation & Exhibits	1
Affirmation in Reply [Response] by Respondents The County of Suffolk & The Suffolk County Police Department	2
Affirmation in Opposition by Respondent Costco Wholesale Corporation	3
Reply Affirmation & Exhibit	4

Upon the foregoing papers, it is Ordered that this Motion is decided as follows:

Petitioner Johnson seeks an Order pursuant to CPLR 3102 (c) for pre-action disclosure of the following:

A. As to Respondents Suffolk County and the Suffolk County Police Department:

Compelling Respondent Suffolk County by way of the Suffolk County Police Department, to produce and exchange an unredacted true and exact copy of all “911” emergency police and medical dispatch

recordings and transmissions prepared in connection with the “aided” case involving Gregory Johnson at the Costco Wholesale Corporation store at 3000 Middle Country Road, Lake Grove, New York on April 14, 2017, at about 11:42 a.m., under Central Complaint No. 2017-0217789, from the time of the first 911 call(s), through the EMS transport to St. Catherine of Siena Medical Center, showing the content of those voice communications, the content of the reports of incident by the 911 call(s), and the identity and call numbers of said 911 caller(s), including an un-redacted printed transcript thereof; and

B. As to Respondent Costco Wholesale Corporation:

1) Compelling Respondent Costco Wholesale Corporation, to produce and exchange the unredacted photographic still images and surveillance video showing the happening of the incident involving Plaintiff Gregory Johnson on April 14, 2017, at about 11 :42 a.m., the location of the incident, the condition which caused his fall [wood freight skid platform on which the paper towels were displayed], the insignia or mark on the subject wood skid/pallet(s) which would identify [sic] the owner, showing when and how subject display was configured, and showing Plaintiff Gregory Johnson’s post incident position on the floor until he was removed by ambulance;

2) Compelling Respondent Costco Wholesale Corporation, to produce and exchange documents/information/images which identify [sic] each person/contractor who configured the wooden pallet platform where Plaintiff Gregory Johnson was injured, whether they were Costco employees or independent contractors, and which show when and how the display was configured.

See Order to Show Cause.

This application for pre-action disclosure relates to an incident wherein Petitioner Johnson alleges he was grievously injured on April 14, 2017, at or about 11:42 a.m., at a Costco Warehouse Retail Store located at 3000 Middle Country Road, Nesconset, Suffolk County, New York. Petitioner Johnson states he sustained injuries as the result of a trip and fall which occurred when he caught his foot on/in a display platform made up of wooden freight skids that were positioned in the retail space and upon which several tiers of large bundled paper towels were displayed for sale. Respondents, The County of Suffolk (hereinafter Respondent Suffolk) represents non-parties The Suffolk County Police Department (hereinafter Respondent SCPD) and The Suffolk County Department of Fire Rescue (hereinafter FRES) and have filed an Affirmation in Reply [Response], and Respondent Costco Wholesale Corporation (hereinafter Respondent Costco) has filed an Affirmation in Opposition.

Petitioner Johnson seeks, among other things, to obtain pre-action discovery of the identity of prospective Defendants, surveillance video and still photographic images of the incident and location on or about the time of Petitioner’s injury, and the 911 emergency call

recordings related to the incident and injury. Petitioner states the pre-action exchange of such materials is necessary to assist in the identification of potential Respondents to the claim, and to identify and preserve material information. Petitioner alleges such materials are within the control of Costco Warehouse Corporation and Suffolk County, but that access to those materials has been expressly denied.

CPLR 3102(c) provides in relevant part, that “[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information . . . , may be obtained, but only by court order.” Prior to the commencement of an action, discovery may be allowed in order to frame a complaint, to preserve evidence, or to ascertain the identities of prospective Defendants. *Barillaro v City of New York*, 53 Misc 3d 307 [Sup Ct 2016]. “A petition for pre-action discovery limited to obtaining the identity of prospective defendants should be granted where the petitioner has alleged facts fairly indicating that he or she has some cause of action (*see Matter of Toal v. Staten Island Univ. Hosp.*, 300 A.D.2d 592, 752 N.Y.S.2d 372; *Matter of Scattoreggio v. Cablevision Sys. Corp.*, 203 A.D.2d 468, 610 N.Y.S.2d 319; *Matter of Houlihan–Parnes, Realtors [Cantor, Fitzgerald & Co.]*, 58 A.D.2d 629, 630, 395 N.Y.S.2d 684).” *Konig v WordPress.com*, 112 AD3d 936, 936 [2d Dept 2013]. The provision allowing pre-action discovery under CPLR 3102(c) provides a method for a party, prior to the filing of a cause of action, to seek “information relevant to determining who should be named as a defendant (*see CPLR 3102[c]*; *Matter of Toal v. Staten Is. Univ. Hosp.*, 300 A.D.2d 592, 593, 752 N.Y.S.2d 372; *Bonanni v. Straight Arrow Pubs.*, 133 A.D.2d 585, 586–587, 520 N.Y.S.2d 7; *Matter of Delgado v. Lader*, 23 Misc.3d 1114 (A), 2009 N.Y. Slip Op. 50749(U), 2009 WL 1067394 [Sup. Ct., Nassau County, Feb. 19, 2009] [Austin, J.]; Siegel, N.Y. Prac. § 352 at 573; Weinstein–Korn–Miller, N.Y. Civ. Prac. P. 3102.12 [2d ed.]).” *E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2d Dept 2009], *affd*, 16 NY3d 775 [2011]. The right to pre-action disclosure must be weighed by the petitioner's need for the disclosure and the burden of obtaining it. *Aiding bringing of action*, 1 *Modern New York Discovery* § 4:3 (2d ed.).

With respect to records sought from Respondents Suffolk (SCPD and FRES). Respondent Suffolk does not object to producing the records maintained by the SCPD or FRES. Respondent Suffolk acknowledges that they are the custodian of 911 calls and radio transmissions between the responding police officer and the communications dispatcher. However, they state that they do not maintain printed transcripts of 911 calls or radio transmissions. Therefore, neither the SCPD or FRES has a duty to create printed transcripts of 911 calls or radio transmissions, or any other documentary evidence, which is not created during the regular course of business. *Newman v Dinallo*, 22 Misc 3d 1134(A) [Sup Ct 2009], *affd*, 69 AD3d 636 [2d Dept 2010]. *See Brown v New York City Police Dept.*, 264 AD2d 558 [1st Dept 1999]. Respondent Suffolk also states, that they do not have possession of the recordings and/or transmissions regarding EMS medical transport and this information must be obtained from either the ambulance provider, or FRES. Respondent Suffolk states that FRES is conducting a search of its records to ascertain if it has any such records and if such records are located, consents to their production upon an Order by this Court directing production. In consideration of the foregoing, “an agency has no duty to create documents that are not in existence.” *Id.* Based upon the consent of Respondent Suffolk (SCPD and FRES), Petitioner’s application for an Order pursuant to CPLR 3102 (c) for pre-action disclosure is Granted to the extent that, Suffolk County, The Suffolk County Police Department and the Suffolk County Department of Fire Rescue and Emergency Services are directed to preserve and send a copy of any “911” emergency police and medical

dispatch calls, recordings, transmissions, reports, command bands and all sector to sector car transmissions prepared in the regular course of business in connection with the “aided” case involving Petitioner Gregory Johnson at the Costco Wholesale Corporation store at 3000 Middle Country Road, Lake Grove, New York on April 14, 2017, at or about 11:42 a.m., under Central Complaint No. 2017-0217789, from the time of the first 911 call(s), through the EMS transport to St. Catherine of Siena Medical Center.

With respect to records sought from Respondent Costco, Petitioner Johnson makes this pre-action application for discovery to compel Costco to provide the video surveillance and still photographic images of the incident and the makeshift display platform which allegedly caused his injury. Petitioner Johnson alleges the location of the incident was covered by Respondent Costco’s surveillance video system which likely recorded the incident, and further, that still photographic images were taken by store personnel of the scene in the immediate aftermath of the incident. Petitioner Johnson further states that these images are necessary since they will provide identifying information allowing him to ascertain the identity of prospective Defendants, namely the pallet owner and manufacturer.

Here, Petitioner Johnson has provided sufficient allegations of fact to frame a complaint and support a request for pre-action discovery pursuant to CPLR 3102(c), to the limited extent, that he may engage in pre-action discovery to ascertain the identities of prospective defendants. Petitioner Johnson has provided sufficient allegations of fact to support a request for pre-action discovery to determine the identity of the manufacturer or owner of the specific pallets involved at the time of the injury and the identities and employer of those individuals responsible for the design, creation and maintenance of the pallet display at the time of the accident.

Here, Respondent Costco alleges, by attorney affirmation, that Petitioner Johnson currently possesses sufficient information to form a complaint against Respondent Costco and there are no other potential Defendants. Regarding the surveillance video and photographs, Respondent Costco alleges, by attorney affirmation, that Costco:

[D]id not possess surveillance cameras capable of capturing the accident location. Accordingly, there is no video showing the accident. There is no video showing the condition which purportedly caused petitioner's fall. There is no video showing how or when the display at issue was configured. There is no video showing petitioner's position on the floor. There is no video showing the insignia or other identifying marks on the pallet at issue. There is no video surveillance that shows the pallet being delivered. There is no video surveillance that shows the pallet being stocked.

There were no photographs taken by Costco in the ordinary course of business following the alleged accident. The only relevant photographs in Costco's possession are protected by privilege, including attorney client privilege, the attorney work product doctrine and anticipation of litigation doctrine.

Respondent Costco, Affirmation in Opposition, para 9-10.

Based upon the foregoing, Petitioner Johnson's application is Granted to the extent that, for the purpose of obtaining the identity of prospective Defendants as permissible, and warranted herein, pursuant to CPLR 3102(c), Respondent Costco is directed to provide:

1) to the extent such records exist, any and all identifying information related to the original source, owner(s) and/or manufacturer(s) of the wood freight skid platform(s), including but not limited to any insignias or marks on the subject wood skid/pallet(s), included as part of the display in connection with the incident involving Gregory Johnson on April 14, 2017, on or about 11 :42 a.m., at the Costco Warehouse Retail Store located at 3000 Middle Country Road, Nesconset, Suffolk County, New York;

2) to the extent such records exist, the names, addresses, and other contact information related to all employee(s), contractor(s) or other individual(s) that configured and/or were assigned to the maintenance of the wooden pallet platform(s) utilized in the display in connection with the incident involving Petitioner Gregory Johnson on April 14, 2017, on or about 11 :42 a.m., at the Costco Warehouse Retail Store located at 3000 Middle Country Road, Nesconset, Suffolk County, New York.

All other requests by Petitioner Johnson are beyond the scope of CPLR 3102(c) in that they are either duplicative, go beyond determining the identity of prospective Defendants, and/or have no bearing upon the identification of prospective Defendants. In particular, Petitioner Johnson requests pre-action discovery of video and photographic evidence, these and other similar demands are beyond the scope of what is countenanced by CPLR 3102(c) and would be considered discovery in a pending action, rather than appropriate for pre-action discovery.

Accordingly, it is hereby

ORDERED, that based upon the consent of Respondent Suffolk, Petitioner Johnson's application for an Order pursuant to CPLR 3102 (c) for pre-action disclosure is GRANTED, to the extent that, Suffolk County, The Suffolk County Police Department and the Suffolk County Department of Fire Rescue and Emergency Services are directed to preserve and, within 45 days of receipt of a copy of this Order, send a copy of any "911" emergency police and medical dispatch calls, recordings, transmissions, reports, command bands and all sector to sector car transmissions prepared in connection with the "aided" case involving Petitioner Gregory Johnson at the Costco Wholesale Corporation store at 3000 Middle Country Road, Lake Grove, New York on April 14, 2017, at or about 11:42 a.m., under Central Complaint No. 2017-0217789, from the time of the first 911 call(s), through the EMS transport to St. Catherine of Siena Medical Center; and it is further

ORDERED, that Petitioner Johnson's application for an Order pursuant to CPLR 3102 (c) for pre-action disclosure from Respondent Suffolk is DENIED, to the extent that, Suffolk County, The Suffolk County Police Department and the Suffolk County Department of Fire Rescue and Emergency Services are not required to create an un-redacted printed transcript or

any other business record not created or prepared in the regular course of business in connection with the "aided" case involving Petitioner Gregory Johnson at the Costco Wholesale Corporation store at 3000 Middle Country Road, Lake Grove, New York on April 14, 2017, at or about 11:42 a.m., under Central Complaint No. 2017-0217789, from the time of the first 911 call(s), through the EMS transport to St. Catherine of Siena Medical Center; and it is further

ORDERED, that Petitioner Johnson's application for an Order pursuant to CPLR 3102 (c) for pre-action disclosure from Respondent Costco is GRANTED, to the extent that, for the purpose of obtaining the identity of prospective Defendants as permissible and warranted herein pursuant to CPLR 3102(c), Respondent Costco is directed to provide, within 45 days of receipt of a copy of this Order, the following:

1) to the extent such records exist, any and all identifying information related to the owner(s) and/or manufacturer(s) of the wood freight skid platform(s), including but not limited to any insignias or marks on the subject wood skid/pallet(s), included as part of the display in connection with the incident involving Gregory Johnson on April 14, 2017, at or about 11:42 a.m., at the Costco Warehouse Retail Store located at 3000 Middle Country Road, Nesconset, Suffolk County, New York;

2) to the extent such records exist, the names, addresses, and other contact information related to all employee(s), contractor(s) or other individual(s) that configured and/or were assigned to the maintenance of the wooden pallet platform(s) utilized in the display in connection with the incident involving Petitioner Gregory Johnson on April 14, 2017, at or about 11:42 a.m., at the Costco Warehouse Retail Store located at 3000 Middle Country Road, Nesconset, Suffolk County, New York;

and it is further

ORDERED, that Movant(s) is/are directed to immediately serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk; and it is further

ORDERED, that upon Entry of this Order by the Suffolk County Clerk, Movant(s) is/are directed to serve, forthwith, a copy of this Order with Notice of Entry upon all parties and to promptly file the Affidavit(s) of Service with the Clerk of the Court.

The Court has considered the remaining issues and finds them unavailing.

This constitutes the Decision and Order of this Court.

Dated: October 8, 2019
Riverhead, New York



HON. LINDA KEVINS
J.S.C.