

<b>Keller v City of New York</b>
2022 NY Slip Op 33717(U)
October 31, 2022
Supreme Court, New York County
Docket Number: Index No. 157550/2022
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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MALIEK KELLER,

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 157550/2022

MOTION DATE 10/11/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7 were read on this motion to/for PRE-ACTION DISCOVERY.

Upon the foregoing documents, Petitioner’s petition seeking pre-action discovery pursuant to CPLR §3102(c) is granted in part, to the extent set forth below:

On September 6, 2022, Petitioner Maliek Keller filed the instant petition alleging that on the morning of August 27, 2022, while at Anna M. Kross Center (“AMKC”) on Rikers Island, petitioner was attacked by approximately seven incarcerated individuals (NYSCEF Doc. No. 1 [Petition at ¶¶4, 7). The petition alleges that no New York City Department of Correction (“NYCDOC”) staff prevented, intervened, or otherwise interrupted the assault, allowing it to go on for several minutes (Id. at ¶8). The petition further alleges, upon information and belief, that no NYCDOC officers were present when the attack began, as only one officer was assigned to Petitioner’s dorm that day, in violation of NYCDOC policies (Id. at ¶10).

Petitioner now seeks an order directing respondent the City of New York to preserve and produce the following:

- a. The full names of any NYCDOC employees who were on duty in EMTC, 5 main between the hours of 5:00 a.m. and 12:00 p.m. on August 27, 2022;

- b. The full names of any NYCDOC employees who were physically present in EMTC, 5 main between the hours of 5:00 a.m. and 12:00 p.m. on August 27, 2022, including any persons who responded to the assault on Petitioner;
- c. The full names and Book and Case Numbers of Petitioner's attackers;
- d. Mr. Keller's entire NYCDOC medical file from August 1, 2022 to the present;
- e. Any and all video recordings that capture Mr. Keller between the hours of 5:00 a.m. and 10:00 p.m. on August 27, 2022, including but not limited to:
  - 1. Any and all video recordings capturing the attack on Mr. Keller;
  - 2. Any and all video recordings capturing the aftermath of the altercation, including any medical response;
  - 3. Any and all video recordings that capture NYCDOC employees responding or not responding to the attack on Mr. Keller; and
  - 4. Any and all video recordings capturing Mr. Keller's transfer to and receipt of medical care for injuries he sustained during the assault.

Petitioner further seeks a Court order enjoining the City from destroying all relevant evidence related to these claims and directing the City to preserve the foregoing material as well as:

- f. Any and all intake and placement documents for Mr. Keller;
- g. Any and all logbook entries related to Mr. Keller, including, but not limited to:
  - 1. Intake post logs;
  - 2. Intake new admission tracking log;
  - 3. Clinic new admission logs;
  - 4. Clinic post logs;
  - 5. Emergency health care referral logbooks;
  - 6. Housing logbooks;
  - 7. Crime scene logbooks;
  - 8. Transfer logbooks;
  - 9. Daily/shift logbooks; and
  - 10. Supervising officers' logbooks;
- h. Any and all records maintained by NYCDOC concerning Mr. Keller, including, but not limited to:
  - 1. Correctional records, including but not limited to custodial and legal files;
  - 2. Incident report forms;

3. Records on transfers;
  4. Security risk group/ gang intelligence unit records;
  5. Search records;
  6. Disciplinary records;
  7. Grievance records;
  8. Requests for medical or mental health attention/appointments;
  9. Intake records;
  10. Classification records;
  11. Movement records;
  12. Placement records;
  13. Housing records;
  14. Program records;
  15. Visit records;
  16. Escort records;
  17. Transport records;
  18. Discharge planning records;
  19. Security records;
  20. Law enforcement records;
  21. Probation and parole records;
  22. Chaplain's report;
  23. Incident photos;
  24. Rehabilitation records; and
  25. Medical records – including mental health records;
- i. Any and all investigation records regarding the August 27, 2022 incident in which Mr. Keller was attacked by other incarcerated people, including, but not limited to:
1. Witness Statements;
  2. Unusual Incident Reports;
  3. Incident Reports;
  4. Injury to Incarcerated people;
  5. Audio recordings of witness interviews;
  6. Video recordings of witness interviews;
  7. Use of force reports and attachments;
  8. Investigation reports;
  9. Any preliminary reports;
  10. Any preliminary investigative reports;
  11. any video or audio records of location of incident;
  12. Correspondence informing the NYCDOC Chain of Command of the incident;
  13. Correspondence informing the NYCDOC Investigation Division of the incident;
  14. Correspondence informing the New York City Police Department, the District Attorney's Office, the State Commission of Corrections and/or any other Outside agencies of the incident;

15. The complete NYCDOC Investigation Division file inclusive of all reports, case logs, attachments, interview recordings, internal department correspondences regarding the investigation, and external correspondences with other agencies regarding the investigation into the incident; and
  16. Mr. Keller's entire NYCDOC Health Affairs file including all reports, case logs, attachments, interview recordings, internal department correspondences, and external correspondences with other agencies regarding the investigation into the incident;
- j. Any and all disciplinary files and records of NYCDOC personnel in connection with the August 27, 2022 incident in which Mr. Keller was attacked by other incarcerated people, including, but not limited to:
1. Personnel disciplinary files;
  2. Employee performance services report;
  3. Memorandum of complaints against employees;
  4. Employee performance service reports;
  5. Notices of Pleading and Hearings;
  6. Overtime Reports;
  7. Notices of Suspension;
  8. Charges and Specifications;
  9. Notices to Appear before the NYCDOC Investigation Division;
  10. Negotiated Plea Agreements;
  11. Probation Agreement Forms; and
  12. All records regarding Office of Administrative Trials and Hearing (OATH) trials.
- k. Any and all materials, media, documents, and/or electronically stored information connected with the August 27, 2022 incident in which Mr. Keller was attacked by other incarcerated people that was not captured by the abovelisted items; and
- l. The full names of any NYCDOC employees who were suspended in connection with this incident, including the length of that suspension.

### DISCUSSION

Respondent does not oppose that portion of the petition seeking the preservation of the foregoing material and, in fact, has already requested that NYCDOC preserve all material set forth in the Petition to the extent that these items exist and are in its possession (NYSCEF Doc. No. 6 [Santosuosso Affirm. at ¶5]). Accordingly, the Court turns to that branch of the petition seeking an order that the respondent produce the requested material as part of pre-action discovery.

“A petition for pre-action discovery should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong” (Uddin v New York City Tr. Auth., 27 AD3d 265, 266 [1<sup>st</sup> Dept 2006] [internal citations omitted]). In this case, “[p]etitioner is demanding, as pre-suit discovery, functionally all the ... discovery that he would demand from the City of New York in a potential future action, a purpose which CPLR §3102 is not designed to allow. [The] petition clearly shows that Petitioner is already in possession of the sufficient facts necessary to frame his complaint, except for the identities of the additional possible defendants in the form of the corrections officers and supervisors” involved in NYCDOC’s alleged failure to protect Petitioner (Feliciano v The City of New York, 2020 NY Slip Op 32303[U], 3 [Sup Ct, New York County 2020]). In light of the foregoing, the Court concludes that “petitioner is entitled to pre-action discovery of ‘[t]he full names of any NYCDOC employees who were suspended in connection with this incident’” (Id.; see also Riccio v City of New York, 2016 WL 4218626 [Sup Ct, New York County 2016]) and otherwise denies that branch of the petition seeking pre-action disclosure.

Accordingly, it is

**ADJUDGED** that the petition is granted to the limited extent set forth below; and it is further

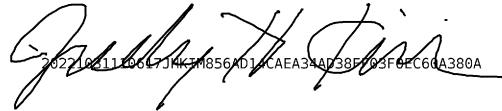
**ORDERED** that Respondents shall direct that all of the documentary evidence set forth in the Petition is preserved, to the extent that it exists; and it is further

**ORDERED** that the petition is otherwise denied in all other respects.

**ORDERED** that Petitioner shall serve a copy of this decision and order, with notice of entry, upon Respondent within ten days of the date of this decision and order; and it is further

**ORDERED** that Respondent shall, within thirty days of the date of this decision and order, disclose the identities of any New York City Department of Correction employees suspended in connection with this incident.

This constitutes the decision and order of the Court.



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10/31/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE