

<b>Curtis v City of New York</b>
2022 NY Slip Op 34015(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 158544/2022
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

WILLIE CURTIS Petitioner,
INDEX NO. 158544/2022
MOTION DATE 10/05/2022
MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, Respondent.
DECISION + ORDER ON MOTION

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

This special proceeding arises out of injuries sustained by petitioner Willie Curtis (petitioner) when he allegedly slipped and fell at the North Infirmiry Command (NIC) of Rikers Island on September 16, 2022. Petitioner alleges that his civil and common law rights were violated because the New York City Department of Corrections (DOC) failed to maintain a safe premises.

Petitioner seeks an order for pre-action discovery and preservation of evidence. Specifically, petitioner requests pre-action discovery relief pursuant to CPLR 3102 (c) requiring respondent the City of New York (the City) to immediately produce:

- a) All surveillance footage from any camera capturing the area between the day room and kitchen in the NIC on September 16, 2022; and
b) All surveillance footage depicting petitioner's movements between 6:00 p.m. on September 16, 2022 in the NIC, until his transfer off Rikers Island for outside medical care that evening or the next morning.

Petitioner also seeks an order compelling the preservation of the following records in anticipation of civil rights litigation:

- a) All surveillance footage described above;
b) Any and all medical evaluations for petitioner;
c) Any and all maintenance or cleaning schedules or reports for the area in which petitioner was injured, for the week of September 12 - 18, 2022;

- d) Any and all historical maintenance records concerning the lighting in the area in which petitioner was injured, including, but not limited to: records showing the last date on which the lights were changed or otherwise serviced prior to this incident, and the extent of the completed work;
- e) Any and all historical maintenance records concerning cleaning of the floors in the area in which petitioner was injured, including, but not limited to records showing the last time the floors were mopped prior to this incident;
- f) Any and all complaints or reports of maintenance issues in NIC for the 6 months preceding the incident, including, but not limited to: complaints or reports of spills/leaks or poor lighting;
- g) Any and all injury reports or documents reflecting prior slip and falls in NIC for the 6 months preceding the incident;
- h) Any and all DOC policies or procedures concerning the scheduled or unscheduled maintenance and service of the lighting in DOC facilities;
- i) Any and all DOC policies or procedures concerning the scheduled or unscheduled cleaning of floors in DOC facilities;
- j) Any and all staff logbook entries related to the areas in which petitioner was injured on September 16, 2022;
- k) Any and all custodial records maintained by DOC for petitioner, including but not limited to: custodial files; incident report forms; disciplinary records; grievance records; intake records; classification records; movement/placement records; program records; visit records; escort/transport records; discharge planning records; security records; incident photos; rehabilitation records; and medical records, including mental health records;
- l) Any and all investigation records regarding the September 16, 2022 incident in which petitioner suffered significant injuries from his slip and fall, including, but not limited to: Witness Statements; audio/video recordings of witness statements; incident reports; injury reports; preliminary reports; Correspondence informing the DOC Chain of Command; Correspondence informing the DOC Investigation Division; The complete DOC 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; and the complete DOC Health Affairs 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; and
- m) Any and all materials, media, documents, and/or electronically stored information connected with the September 16, 2022 incident that were not captured by the above-listed items.

The City does not oppose the portion of petitioner's requested order seeking preservation of the evidence listed above. However, the City opposes petitioner's request for pre-action discovery, arguing that the items requested are not material or necessary to frame a summons and complaint. The City also argues that the demands are vague, overbroad, and encompass discovery not enumerated with the Case Scheduling Order.

CPLR 3102 (c) permits court-ordered pre-action discovery "...to aid in bringing an action, to preserve information or to aid in arbitration." To establish a *prima facie* case for pre-action discovery, petitioner must demonstrate that "he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." *Holzman v. Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 (1st Dept 2000). The Appellate Division, First Department has held that,

Pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists[,] and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong. Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court. *Bishop v Stevenson Commons Assocs., L.P.*, 74 AD3d 640, 641 (1st Dept 2010) (internal quotations and citations omitted).

Moreover, pre-action discovery is not appropriate where the "petitioner has sufficient information to frame [his] complaint," which would include potential defendants. *Holzman*, 271 AD2d at 347 (denying pre-action discovery because the petitioner could identify the defendants as well as the time and place of the accident). Specifically, where the petition demonstrates that petitioner knows the date of the accident, the place of the accident, the individuals or entities involved in the accident, and the alleged cause of the accident, pre-action discovery is not permitted. *See In Matter of White v New York City Tr. Auth.*, 198 AD3d (1st Dept 2021).

The limitations of CPLR 3102 (c) are designed to:

... prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party. Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate. *Stewart v New York City Transit Authority*, 112 AD 2d 939, 940 (2d Dept 1985), citing *Matter of Houlihan-Parnes, Realtors v Cantor, Fitzgerald & Co. Inc.*, 58 AD 2d 629 (2d Dept 1977).

Additionally, the First Department has held that the Court has broad discretion in assessing the propriety of pre-litigation discovery (*see Thomas v New York City Transit Police Dept*, 91 AD2d 898 [1st Dept 1983]) and has interpreted CPLR 3102 (c) as allowing pre-action discovery not only to frame a complaint

or preserve evidence but also to ascertain the identities of prospective defendants (*see Holzman*, 271 AD2d 346).

Here, petitioner asserts that he needs video footage of his slip and fall because he does not know what he slipped on, what time he slipped, whether it was caused by inadequate lighting in the facility or a floor maintenance issue, and that no one witnessed his fall. Therefore, to obtain information necessary to frame his complaint, as well as identify additional defendants, petitioner requests the surveillance footage of the incident from 6:00 p.m. to when petitioner was brought out of the building by Emergency Medical Services at approximately 9:30 p.m., as well as any footage capturing the area of the incident on the day of September 16, 2022.

Given that petitioner does not know what caused his slip and fall or the time it occurred, and that he asserts that there were no witnesses, the Court finds that these specific circumstances necessitate pre-action discovery of all surveillance footage depicting petitioner's movements between 6:00 p.m. and 10:00 p.m. on September 16, 2022 in the NIC. Petitioner's request for an order requiring the City to produce surveillance footage from any camera capturing the area between the day room and kitchen in the NIC on the full day of September 16, 2022 is denied. The Court finds that video footage of the entire day on which the incident occurred is unnecessary for the framing of petitioner's complaint and will serve to aid in prosecuting the action, not commencing it. Upon commencing the intended action, petitioner will be able to obtain further disclosure through the normal course of litigation and may move this Court to amend its pleadings as necessary. With respect to petitioner's request to order the City to produce an affidavit indicating the steps it took to preserve the evidence sought, petitioner offers no legal basis to grant such relief at this time. However, should the ordered items not be provided, petitioner may renew this request.

As noted above, the City has no objection to petitioner's request for preservation of relevant evidence for potential litigation. The Court deems all items listed by petitioner for preservation above as

relevant and material to this matter. Therefore, without opposition by the City, items "a" through "m" listed above shall be preserved by the City.

Accordingly, it is hereby

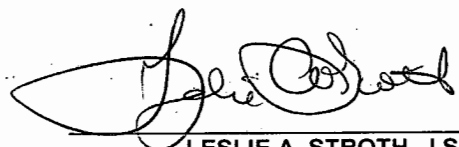
ADJUDGED that the petition and order to show cause seeking pre-action discovery is granted to the following extent:

It is ORDERED that the City shall produce, within 30 days of the date of this order, all surveillance footage depicting petitioner Willie Curtis' movements between 6:00 p.m. and 10:00 p.m. on September 16, 2022 in the Northern Infirmary Command of Rikers Island; and it is further

ORDERED that, without opposition, the City shall preserve and shall not transfer, sell, destroy, throw away, or otherwise tamper with the following all items requested by petitioner and listed above for preservation. The City shall take all necessary measures to preserve and prevent the deletion and/or overwriting of all video, audio, still images, and electronically stored information listed in same; and it is further

ORDERED that, without opposition, the City shall preserve and shall not transfer, erase, delete, allow to be automatically erased, transferred or deleted, tamper or otherwise alter or interfere with any information or data, electronically stored or otherwise, concerning the items of evidence listed in petitioner's order to show cause.

This constitutes the decision and order of the Court.



LESLIE A. STROTH, J.S.C.

11/16/2022  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: