

Bellvue v City of New York

2023 NY Slip Op 30635(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 150805/2023

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NICHOLAS W. MOYNE PART 52

Justice

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MICHAEL BELLVUE

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 150805/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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

Upon the foregoing documents, and after oral argument:

Petitioner Michael Bellvue (“Bellvue”) brings this special proceeding and order to show cause seeking pre-action discovery and an order of preservation. The respondent City of New York (“City”) has no objection to the preservation of the items sought in the petitioner’s preservation demand but opposes the portion of the motion seeking pre-action discovery.

This proceeding arises out of the City’s alleged failure to protect the petitioner from violence when he was detained at Rikers Island, despite petitioner’s request for assistance prior to the incident. Petitioner alleges that on or about January 14, 2023, petitioner was assaulted and stabbed approximately seven times by a group of incarcerated men in and around the George R. Vierno Center (“GRVC”) 10A and 10B at Rikers Island, while NYC Department of Corrections Guards were posted close by. Petitioner was eventually transferred to Bellevue Hospital, where he reported having a cut on his left leg, received stitches on his face and head, and had his finger glued shut.

The petitioner now seeks an order requiring the respondent to produce to petitioner:

- a. All surveillance footage from January 14, 2023, capturing GRVC 10A, 10B, and the area in between the two where Petitioner was assaulted and stabbed by a group of incarcerated men;
- b. The name(s) and badge number(s) of any officer(s) on duty in GRVC 10A and 10B on January 14, 2023, when Petitioner asked to be removed before the stabbing occurred;
- c. The name(s) of any officer(s) stationed outside or near GRVC 10A, 10B, and the area in between the two on January 14, 2023, where Petitioner was assaulted and stabbed.

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

- a. All surveillance footage from GRVC 10A and 10B on January 14, 2023;
- b. Any and all complaints, grievances, or other correspondence received by the DOC from Mr. Bellvue since his entry on Rikers, with any appeals and responses;
- c. Any and all written requests for involuntary or voluntary protective custody made by or on behalf of Mr. Bellvue;
- d. Audio, video, or photographs taken in connection with any reported assault on and/or stabbing of Mr. Bellvue;
- e. Any and all staff logbook entries for GRVC 10A and 10B on January 14, 2023;
- f. Any and all custodial records maintained by NYCDOC for Mr. Bellvue, 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;

- g. Any and all investigation records regarding the January 14, 2023 assault and stabbing in or around GRVC 10A and 10B, including, but not limited to: written witness statements; audio/video recordings of witness statements; incident reports; injury reports; preliminary reports; Correspondence informing the NYCDOC Chain of Command and/or NYCDOC Investigation Division; 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; and the complete NYCDOC 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
- h. Any and all materials, media, documents, and/or electronically stored information connected with the January 14, 2023, assault and stabbing of Mr. Bellvue and any other prior incident of violence against Mr. Bellvue since he entered Rikers Island that were not captured in the above items a– l.

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 A.D.2d 346, 347, 707 N.Y.S.2d 159 (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 A.D.3d 640, 641, 905 N.Y.S.2d 29 (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 A.D.2d at 347, 707 N.Y.S.2d 159 (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 A.D.3d 557, 152 N.Y.S.3d 811 (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 A.D.2d 939, 940, 492 N.Y.S.2d 459 (2d Dept. 1985), *citing Matter of Houlihan–Parnes, Realtors v. Cantor, Fitzgerald & Co. Inc.*, 58 A.D.2d 629, 395 N.Y.S.2d 684 (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 A.D.2d 898, 457 N.Y.S.2d 518 [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 A.D.2d 346, 707 N.Y.S.2d 159).

In the instant matter the court finds that the use of “John Doe” and “Jane Doe” in substitution for the actual names of potential individual defendants will create an unnecessary burden for plaintiff as well as a delay in adjudicating the case, conflicting with the objectives of judicial economy and will eliminate the otherwise inevitable need for petitioner to amend his complaint with specific names post-discovery.

For the reasons set forth hereinabove, 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 120 days, the names and shield numbers of all Department of Corrections personnel who were on duty in, or adjacent to, GRVC 10A and GRVC 10B on the date of January 14, 2023, between the hours of 2:00AM and 7:00AM; and it is further

ORDERED that the City shall produce, within 120 days, the names and shield numbers of all Department of Corrections personnel who responded to the January 14, 2023, assault on petitioner or were involved in its aftermath, including transport of petitioner to medical care; and it is further

ORDERED that the respondent City shall preserve and shall not transfer, sell, destroy, throw away, or otherwise tamper with the items set forth in paragraph two of the petitioner's order to show cause, to wit: a.) All surveillance footage from GRVC 10A and 10B on January 14, 2023; b.) Any and all complaints, grievances, or other correspondence received by the DOC from Mr. Bellvue since his entry on Rikers, with any appeals and responses; c.) Any and all written requests for involuntary or voluntary protective custody made by or on behalf of Mr. Bellvue; d.) Audio, video, or photographs taken in connection with any reported assault on

and/or stabbing of Mr. Bellvue; e.) Any and all staff logbook entries for GRVC 10A and 10B on January 14, 2023; f.) Any and all custodial records maintained by NYCDOC for Mr. Bellvue, 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; g.) Any and all investigation records regarding the January 14, 2023 assault and stabbing in or around GRVC 10A and 10B, including, but not limited to: written witness statements; audio/video recordings of witness statements; incident reports; injury reports; preliminary reports; Correspondence informing the NYCDOC Chain of Command and/or NYCDOC Investigation Division; 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; and the complete NYCDOC 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 h.) Any and all materials, media, documents, and/or electronically stored information connected with the January 14, 2023, assault and stabbing of Mr. Bellvue and any other prior incident of violence against Mr. Bellvue since he entered Rikers Island that were not captured in the above items a- l.

3/2/2023
DATE


NICHOLAS W. MOYNE, J.S.C.

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		

NON-FINAL DISPOSITION

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

APPLICATION:

CHECK IF APPROPRIATE: