

Monroe v City of New York

2023 NY Slip Op 31005(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 159494/2022

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X

INDEX NO. 159494/2022

DAUNTE MONROE,

MOTION SEQ. NO. 001

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISCOVERY - PRE-ACTION

After reading the above listed documents and hearing oral arguments, for the reasons that follow, Petitioner’s leave for production and preservation of early disclosure pursuant to CPLR 3102 [c] is denied in part and granted in part.

Petitioner, DAUNTE MONROE, before commencing an action, moves by his attorneys, by order to show cause, for an order directing Respondents THE CITY OF NEW YORK (the “CITY Respondents”), THE NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY (the “TRANSIT Respondents”) to preserve and make available for inspection “all evidence currently in their possession and/or control related to the accident that occurred on October 9, 2022 at 4:00 a.m. on the Far Rockaway bound platform of the A train at the 50th Street Station” including “video, photographs, statements, investigation and testing”.

Under CPLR §3102[c] before commencing an action, a party, only by court order, may seek discovery to aid in bringing the action, to preserve information, or to aid in arbitration.

The party seeking the discovery has the burden of establishing facts that “fairly indicate” a meritorious cause of action and that the discovery sought is material and necessary to prepare accurate pleadings (*Emmrich v Technology for Information Management, Inc.*, 91 AD2d 777 [3rd Dept 1982]; *see Liberty Imports v Bourguet*, 146 AD2d 535 [1st Dept 1989]; *Bliss v. Jaffin*, 176

AD2d 106 [1st Dept. 1991]; *Holzman v. Manhattan and the Bronx Surface Transit Operating Authority*, 271 AD2d 346 [1st Dept 2000]; *Uddin v New York City Transit Authority*, 27 AD3d 265 [1st Dept 2006]; *White v New York City Transit Authority*, 198 AD3d 557 [1st Dept 2021]).

Importantly, however, a petitioner is not entitled to pre-action discovery for the purpose of exploring whether she or he has a cause of action or has alternative theories of liability (*Liberty Imports*, 146 AD2d 535; *Bliss*, 176 AD2d 106; *Holzman*, 271 AD2d 346; *Uddin*, 27 AD3d 265; *White*, 198 AD3d 557).

The Petitioner's verified petition asserts that he has a meritorious cause of action because he on October 9, 2022 at approximately 4:00 a.m., he was on the Far Rockaway-bound platform of the A train at the 50th Street subway station in Manhattan when he "was unable to remove [himself] from the train tracks as the train began entering the station" and could not get onto the platform. Petitioner further asserts that he suffered a loss of consciousness at some point and therefore does not recall of the events of the accident. Despite losing consciousness, Petitioner claims that the train negligently entered the station without determining that it was safe to do so, causing the Petitioner to sustain serious injuries. Again, despite losing consciousness, Petitioner asserts that the Respondents conducted an immediate investigation, retrieved a "black box" from the train, took video tape and photographs of the scene, prepared investigative reports and took witness statements. (NYSCEF Doc no. 4). In the affirmation in support of the motion by order to show cause, counsel alleges that the Petitioner was on the subway tracks when no train was in the station, and that the Petitioner was struck by a train that had negligently entered the station and "failed to observe Petitioner attempting to ascend onto the platform". (NYSCEF Doc no. 3). At oral argument, Petitioner's counsel advised the Court and the Respondents that the Petitioner went on to the subway tracks to retrieve a cell phone that had fallen on to the tracks.

Respondent THE CITY OF NEW YORK opposes the within motion by order to show cause, asserting that the Petitioner does not have a meritorious claim against THE CITY OF NEW YORK because it did not owe the Petitioner a legal duty of care as it is an out of possession landlord of the subway system. Specifically, pursuant to Section 2.1 of the 1953 lease agreement between THE CITY OF NEW YORK and the NEW YORK CITY TRANSIT AUTHORITY: "The City hereby leases to the Authority... all of the transit facilities now owned or hereafter acquired or constructed by the City and any other materials, supplies and property incidental to or necessary for the operation of such transit facilities. The city hereby authorizes the Authority to take

jurisdiction, control, possession and supervision of such transit facilities, materials, supplies and property on the effective date.” (NYSCEF Doc. # 7, 10).

Upon review, the Defendant THE CITY OF NEW YORK has shown that it is an out of possession landlord that had no control over and no responsibility to maintain the subject subway station and platform as per the 1953 lease agreement between THE CITY OF NEW YORK and the NEW YORK CITY TRANSIT AUTHORITY (NYSCEF Doc. #10). The 1953 lease agreement has regularly been held to establish that the subway stations were leased by THE CITY OF NEW YORK to the NEW YORK CITY TRANSIT AUTHORITY and that Respondent THE CITY OF NEW YORK, as an out-of-possession landlord, is not responsible for any negligence on the part of the NEW YORK CITY TRANSIT AUTHORITY concerning accidents that occur in locations, such as subway platforms, which are incidental to the operation of the subway system. (*McGuire v. City of New York*, 211 A.D.2d 428, 429, 621 N.Y.S.2d 314, 315 [1st Dept 1995], *Arteaga v. City of New York*, 101 A.D.3d 454, 454, 956 N.Y.S.2d 9, 10 [1st Dept 2012]). Accordingly, the Petitioner’s motion by order to show cause seeking pre-action from Respondent THE CITY OF NEW YORK is denied as the Petitioner has failed to allege any facts supporting the claim that Respondent THE CITY OF NEW YORK was negligent and that such negligence caused the alleged injuries. (*See Holzman*, 271 AD2d at 347).

Although the Petitioner is not able to provide much detail regarding the accident, based on the allegations set for the in the verified petition, the Petitioner has set forth a meritorious claim against the TRANSIT Respondents.

In his petition, it is alleged that the Petitioner needs the video footage of the accident to identify the train operator and conductors and to identify the particular train car that made contact with him in order to prepare a proper Notice of Claim and to bring an action against the Respondents. Petitioner further asserts that he needs the accident reports, witness statements, photographs, videos, the “black box” and any records from any disciplinary hearings or investigations in order to frame the notice of claim so that the exact location of the accident can be identified and so the conductor or operator can be identified. (NYSCEF Doc no. 4).

At the time of the petition was filed, a notice of claim had not yet been filed against the Respondents, or presumably any other potential defendant. However, subsequent to the filing of the petition and motion by order to show cause, a notice of claim, dated January 4, 2023, was filed on behalf of the Petitioner against Respondents THE CITY OF NEW YORK, THE NEW YORK

CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY. Therein, the date, time and location of the subject accident are identified. So too is the manner in which the accident occurred. Specifically, it is alleged that “the accident occurred when the [Petitioner] was caused to be on the tracks at the aforementioned location and was struck by an arriving train that was pulling in to the station... causing [Petitioner] to sustain serious injuries.” (NYSCEF Doc no. 12).

Where a petition clearly shows that the petitioner knows the date and location of the accident and the individuals involved in the accident and the alleged cause of the accident, the petitioner has sufficient facts and information to frame the complaint. (*see White*, 198 AD3d 557; *Uddin*, 27 AD3d 265). Upon review, the petition and supporting documents show that the Petitioner has sufficient information to identify the date, time and location of the incident as well as the potential entities to name in a complaint as well as the cause of the alleged accident, a subway entering the 50th Street subway station. This is further shown by the fact that the Petitioner prepared and served the notice of claim on the Respondents while his application was pending. Further the petition does not allege sufficient facts explaining why the video recordings and other materials would be necessary and material in preparing accurate pleadings in this matter.

Thus, Petitioner does not establish his burden for production of pre-action discovery against either the CITY Respondents or the TRANSIT Respondents. While this Court recognizes that Petitioner alleges serious injuries, directing Respondents to produce and make available pre-action discovery is not appropriate at this time. As, pre-action disclosure, pursuant to CPLR §3102[c] it is not meant as a tool to explore whether there is a cause of action.

The petition also seeks an order directing the Respondents to preserve evidence within its possession and/or control relating to the incident, including any accident report, witness statements, photographs, surveillance or scene videos, the “black box” and any records from any disciplinary hearings or investigations in order to frame the notice of claim.

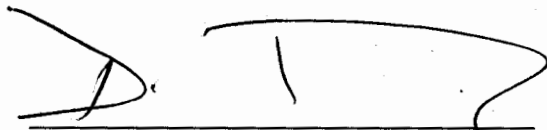
Upon review, the petition alleges sufficient claims pursuant to CPLR 3102[c] to direct the TRANSIT Respondents, who manage and control the NYC subway system, to preserve video surveillance footage depicting the Petitioner’s October 9, 2022 4:00 a.m. accident on the Far Rockaway bound platform of the A train at the 50th Street Station as well as any investigation materials and documents including any “black box” data concerning the subject accident to the extent such videos, materials and documents exist and are in their control.

It is therefore ORDERED that the part of the petition seeking production of pre-action discovery is denied; and it is further

ORDERED that the part of the petition seeking preservation of evidence is granted to the extent that the TRANSIT Respondents are directed to preserve video surveillance footage depicting the Petitioner's October 9, 2022 4:00 a.m. accident on the Far Rockaway bound platform of the A train at the 50th Street Station as well as any investigation materials and documents including any "black box" data concerning the subject accident to the extent such videos and investigative materials and documents exist and are in their control.

3/30/2023

DATE



DENISE M DOMINGUEZ, 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