

**Matter of Antigua v New York & Presbyt. Hosp.**

2023 NY Slip Op 31904(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154332/2023

Judge: Sabrina Kraus

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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. SABRINA KRAUS **PART** **57TR**

*Justice*

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In the matter of YUBELKY ANTIGUA, proposed  
administrator of the Estate of Cesar Brito, deceased,

Petitioner,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Respondent.

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**INDEX NO.** 154332/2023

**MOTION DATE** 6/6/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 7, 8, 9, 10, 11, 12, 13, 14

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

**BACKGROUND**

Cesar Brito was killed on September 12, 2022, when he was electrocuted by a live wire at The New York And Presbyterian Hospital where he was employed. Petitioner asserts in the underlying papers that she has no information on the incident and requires discovery to determine who to sue. Respondent opposes, arguing petitioner lacks standing to seek any relief pre action discovery and that the discovery sought is overly broad.

For the reasons set forth below the petition and motion are granted only to the extent of directing respondent to preserve all color, black and white or other photographs or videos, progress, surveillance or otherwise, from the date of incident from one hour before up to an including one hour after the subject incident and is otherwise denied.

## DISCUSSION

“Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.” CPLR § 3102(c).

13. Pre-action discovery is not permissible to ascertain whether a cause of action exists. *See Matter of GTV Media Group, Inc. v. Confidential Global Investigations*, 205 A.D.3d 539, 539 (1st Dep’t 2022); *Bishop v. Stevenson Commons Assoc., L.P.*, 74 A.D.3d 640, 641 (1st Dep’t 2010). Rather, pre-action discovery is available only “where a petitioner demonstrates that it has a meritorious cause of action and the information sought is material and necessary to the actionable wrong.” *Id.*; *see Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32, 38 (1st Dep’t 2011). A “petitioner cannot use pre-action discovery to determine whether he might have additional causes of action or alternative theories of liability arising out of” an incident. *Bishop*, 74 A.D.3d at 641; *see Matter of Uddin v. New York City Tr. Auth.*, 27 A.D.3d 265, 266 (1st Dep’t 2006).

The petitioner in this action has not been appointed administrator of the estate of the deceased. Indeed, petitioner acknowledged at argument, as of the date this motion was heard, no proceeding had been filed in Surrogates Court relative to the estate. Respondent correctly argues that petitioner has thus failed to establish a meritorious claim as EPTL §5-4.1(1) provides only:

(t)he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.

Moreover, while the papers in this proceeding claim lack of any knowledge, at oral argument petitioner’s counsel acknowledged that in addition to knowing the date time and place of the incident, counsel has identified nine possible electrical contractors who may have worked

on the installation and or maintenance of the electrical equipment and wiring at issue. Thus, while the precise culpable party may not have been identified, a pool of such possible parties has been identified.

Finally, the scope of discovery sought is indeed vastly overly broad, and clearly is not requested solely for the purpose of identifying the proper defendants herein. For example, petitioner seeks an inspection of the room where the incident occurs. Petitioner seeks OSHA reports even though said report is already in petitioner's possession.

WHEREFORE it is hereby:

ORDERED that respondent preserve all color, black and white or other photographs or videos, progress, surveillance or otherwise, from the date of incident from one hour before up to an including one hour after the subject incident; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that, within 20 days from entry of this order, respondent shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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6/6/2023  
DATE

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SABRINA KRAUS, 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