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| <b>Mascolo v Triborough Bridge &amp; Tunnel Auth.</b>                                                                                                                                                                          |
| 2023 NY Slip Op 32308(U)                                                                                                                                                                                                       |
| July 10, 2023                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 155143/2023                                                                                                                                                                                           |
| 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

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| <b>PRESENT: <u>HON. SABRINA KRAUS</u></b><br><div style="text-align: right; margin-right: 50px;"><i>Justice</i></div> <p>-----X</p> <p>JOSEPH MASCOLO</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p> | <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;"><b>PART</b></td> <td style="width: 50%; text-align: right;"><b>57TR</b></td> </tr> <tr> <td><b>INDEX NO.</b></td> <td style="text-align: right;"><u>155143/2023</u></td> </tr> <tr> <td><b>MOTION DATE</b></td> <td style="text-align: right;"><u>7/10/2023</u></td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td style="text-align: right;"><u>001</u></td> </tr> </table><br><p style="text-align: center;"><b>DECISION + ORDER ON<br/>MOTION</b></p> | <b>PART</b> | <b>57TR</b> | <b>INDEX NO.</b> | <u>155143/2023</u> | <b>MOTION DATE</b> | <u>7/10/2023</u> | <b>MOTION SEQ. NO.</b> | <u>001</u> |
| <b>PART</b>                                                                                                                                                                                                                                                                                                                                                 | <b>57TR</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |             |             |                  |                    |                    |                  |                        |            |
| <b>INDEX NO.</b>                                                                                                                                                                                                                                                                                                                                            | <u>155143/2023</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |             |             |                  |                    |                    |                  |                        |            |
| <b>MOTION DATE</b>                                                                                                                                                                                                                                                                                                                                          | <u>7/10/2023</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |             |             |                  |                    |                    |                  |                        |            |
| <b>MOTION SEQ. NO.</b>                                                                                                                                                                                                                                                                                                                                      | <u>001</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |             |             |                  |                    |                    |                  |                        |            |

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 9, 10, 11, 12, 13, 14  
 were read on this motion to/for DISCOVERY - PRE-ACTION.

## **BACKGROUND**

On September 16, 2020, Petitioner was working at the Triborough Bridge and Tunnel Authority's shop at the Throgs Neck Bridge in Bronx County, placing a tire on a Hunter Revolution Tire Changer, when his right hand was crushed in an unguarded pinch point.

In this action Petitioner moves for an order pursuant to CPLR §3102(c):

(1) enabling Petitioner to review, inspect, and photograph the subject Hunter Revolution Tire Changer that injured Petitioner on or about September 16, 2020, located on the premises of Respondent, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY at its Throgs Neck Bridge shop, located at 4260 Throgs Neck Expressway, Bronx, NY 10465; and

(2) enabling Petitioner to copy records relating to the maintenance, repair, inspection, purchase, bidding, auction, and modification of the subject Hunter Revolution Tire Changer that injured Petitioner on or about September 16, 2020; and

(3) enabling Petitioner to copy any accident report and photographs created in relation to the incident that occurred on or about September 16, 2020; and

(4) directing Respondent to cease from any use, alteration, destruction, removal, or sale of subject machine.

Petitioner asserts it needs to know who sold, repaired, manufactured, and designed the subject machine to know who must be named as parties to his action. Petitioner also seeks to obtain the proper serial number to the subject machine so that the manufacturer and designer of the machine can be identified. Petitioner did not retain counsel until June 2, 2023. The expiration of the statute of limitations is September 16, 2023, as against defendants other than Respondent.

Respondent opposes the relief sought. Respondent has provided Petitioner with the name of the manufacturer of the Machine, Hunter Engineering Company, and the machine's serial number. Respondent has also advised that was purchased from Mohawk Resources, Ltd. and installed by Hunter Engineering Company. Respondent asserts that the Hunter Revolution Tire Changer was inspected, maintained and repaired exclusively by JCAPS Mechanical LLC, and that it is unaware of any alterations or modifications to the machine.

Respondent argues that the information it has provided is sufficient for Petitioner to identify the proper defendants to sue and therefore Petitioner's application has been rendered moot.

Petitioner argues that the lack of a site inspection of the subject machine will cause detrimental prejudice to the Petitioner in not being permitted to thoroughly examine the machine prior to framing the complaint.

Respondent asserted at argument that the machine has been previously repaired, and that counsel has identified documents related to the repair which are not voluminous. Counsel also

asserted at argument that the machine is not currently being used by Respondent and has not been used for several months.

On July 7, 2023, Petitioner filed a summons and complaint in Bronx County, Supreme Court under Index Number 810358/2023.

### **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 Dept. 2022); *Bishop v. Stevenson Commons Assoc., L.P.*, 74 A.D.3d 640, 641 (1st Dept. 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 Dept. 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 Dept. 2006).

The court agrees that much of what Petitioner has requested goes beyond the need to frame a complaint and therefore is not properly sought within the context of this proceeding. *See, Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 271 A.D.2d 346 (1st Dept. 2000). *F*; *Matter of Walker v. Sandberg & Sikorski Corp.*, 125 A.D.3d 480 (1st Dept. 2015); *Ryan v. Marsh and McLennan International, Inc.*, 70 A.D.2d 567 (1st Dept. 1979).

However, the court grants the petition to the extent of directing Respondent to turn over the documents it has identified pertaining to repairs which were discussed at oral argument within 10 days of the date of this order, and further orders that Respondent is enjoined from any use, alteration, destruction, removal, or sale of subject machine through and including December 31, 2023, to afford Petitioner an opportunity to seek appropriate discovery in the context of the pending Bronx action and to preserve the status quo pending Petitioner's obtaining said relief.

Similarly, Respondent is directed to preserve any photographs or accident reports related to the incident.

WHEREFORE it is hereby:

ORDERED that Respondent preserve all photographs and accident reports related to the accident; and it is further

ORDERED that Respondent is enjoined from any use, alteration, destruction, removal, or sale of subject machine through and including December 31, 2023; and it is further

ORDERED that Respondent turn over documents related to the repair of the machine to Petitioner within ten days of the date of this order; and it is further

ORDERED that the balance of the relief sought by Petitioner is denied; and it is further

ORDERED that, within 20 days from entry of this order, Petitioner 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 this constitutes the decision and order of this court.

|                       |                                                                             |                                                                                     |                                    |
|-----------------------|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------|------------------------------------|
| <u>7/10/2023</u>      |                                                                             |  |                                    |
| <b>DATE</b>           |                                                                             | <b>SABRINA KRAUS, J.S.C.</b>                                                        |                                    |
| CHECK ONE:            | <input checked="" type="checkbox"/> CASE DISPOSED                           | <input type="checkbox"/> NON-FINAL DISPOSITION                                      |                                    |
|                       | <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART                                            | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input type="checkbox"/> SETTLE ORDER                                       | <input type="checkbox"/> SUBMIT ORDER                                               |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN                         | <input type="checkbox"/> FIDUCIARY APPOINTMENT                                      | <input type="checkbox"/> REFERENCE |