

**Sukhov v New York City Tr. Auth.**

2024 NY Slip Op 30464(U)

January 25, 2024

Supreme Court, New York County

Docket Number: Index No. 154149/2023

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

INDEX NO. 154149/2023
MOTION SEQ. NO. 001

KAMILA SUKHOV,

Petitioner,

- v -

NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK

Respondents.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

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

Upon the foregoing documents, and following oral arguments, the Petitioner's leave for production and preservation of early disclosure pursuant to CPLR §3102 [c] is denied in part and granted in part.

The underlying incident concerns an April 17, 2023 incident wherein the Petitioner, KAMILA SUKHOV, was somehow caused to be on the tracks at the 23rd Street and 6th Avenue station in Manhattan, and was subsequently struck by a train. (NYSCEF Doc. 3)

The Petitioner, before commencing an action, moves by order to show cause, for an order directing Respondents THE CITY OF NEW YORK (the "CITY") and THE NEW YORK CITY TRANSIT AUTHORITY ("TRANSIT") to preserve and produce TRANSIT's accident report, photos and footage, the NYPD's accident report with witness statements and DD5 forms, the Respondents' surveillance footage of the accident as well as from cameras in the subject train as it traveled through various tunnels and as it pulled into the station, unspecified audio and electronic messages received by any TRANSIT employee regarding the Petitioner being on the tracks, witness contact information and the subject train's "black box" data.

Both the CITY and TRANSIT oppose the Petition and motion by order to show cause (NYSCEF Doc. 9, 12).

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 A.D.2d 777 [3<sup>rd</sup> Dept 1982]; see *Liberty Imports v Bourguet*, 146 A.D.2d 535 [1st Dept 1989]; *Bliss v. Jaffin*, 176 A.D.2d 106 [1<sup>st</sup> Dept. 1991]; *Holzman v. Manhattan and the Bronx Surface Transit Operating Authority*, 271 A.D.2d 346 [1<sup>st</sup> Dept 2000]; *Uddin v New York City Transit Authority*, 27 A.D.3d 265 [1<sup>st</sup> Dept 2006]; *White v New York City Transit Authority*, 198 A.D.3d 557 [1<sup>st</sup> 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 A.D.2d 535; *Bliss*, 176 A.D.2d 106; *Holzman*, 271 A.D.2d 346; *Uddin*, 27 A.D.3d 265; *White*, 198 A.D.3d 557).

Here, the Petitioner’s affidavit avers that on April 17, 2023 she was somehow caused to end up on the subway tracks at the 23<sup>rd</sup> Street and 6<sup>th</sup> Avenue subway station and that she was then struck by an oncoming subway. The affidavit does not identify which subway line, whether the incident occurred on the uptown or downtown tracks, or what train came into contact with the Petitioner. The Petitioner avers that due to her injuries and treatment/medication, she does not recall how she ended up on the subway tracks prior to be struck by the train. However, the Petitioner avers that staff at Bellevue Hospital indicated that she had reported to them that she was pushed on to the tracks. It is also averred that NYPD investigating officers told the Petitioner’s father that NYPD has “surveillance” from the accident and was investigating the incident. (NYSCEF Doc. 3). The Petitioner’s notice of claim provides additional details. Therein it is claimed that the subject incident occurred between 10:30 a.m. and 10:50 a.m. on April 17, 2023 and that the Petitioner was struck by a southbound F train at the station. It is also alleged that the Petitioner has no memory of the accident. It is unclear from the notice of claim whether the Petitioner maintains that she was pushed on to the tracks prior to being struck by the subway. (NYSCEF Doc. 15).

The Petitioner seeks the requested documents and materials in order to determine what how the incident occurred and why the Petitioner was caused to be on the tracks. (NYSCEF Doc. 1).

The CITY opposes the within motion by order to show cause, asserting that the Petitioner does not have a meritorious claim against the CITY. The CITY asserts that the Petitioner cannot maintain a meritorious claim against it 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 and TRANSIT: “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. 11).

Upon review, the CITY 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 and TRANSIT (NYSCEF Doc. 11). The 1953 lease agreement has regularly been held to establish that the subway stations were leased by the CITY to TRANSIT and that the CITY, as an out-of-possession landlord, is not responsible for any negligence on the part of TRANSIT 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, 621 N.Y.S.2d 314 [1<sup>st</sup> Dept 1995], *Arteaga v. City of New York*, 101 A.D.3d 454, 956 N.Y.S.2d 9 [1<sup>st</sup> Dept 2012]). Accordingly, the Petitioner’s motion by order to show cause seeking pre-action discovery from the CITY is denied as the Petitioner has failed to allege any facts supporting the claim that the CITY was negligent and that such negligence caused the alleged injuries. (*See Holzman*, 271 A.D.2d at 347).

TRANSIT opposes the within motion by order to show cause, asserting that the Petitioner has sufficient information to prepare the complaint.

Here, the Petitioner seeks the production of numerous records which essentially relate to any subsequent investigation of this incident by the Respondents in order to determine how this incident occurred and why the Petitioner ended up on the tracks in the first instance.

However, pre-action disclosure pursuant to CPLR §3102[c] it is not meant as a tool to explore whether there is a cause of action, which is explicitly what the Petitioner seeks to do in this application. (*See White*, 198 A.D.3d 557).

Moreover, where a petition for pre-action discovery clearly shows that the petitioner knows the date and location of the accident, 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 A.D.3d 557; *Uddin*, 27 A.D.3d 265). Here, the Petition and supporting documents show that the Petitioner has sufficient information to identify the date, time and location of the incident, the potential entities to name in a complaint as well as the nature and cause of the alleged claims. This is further shown by the fact that the Petitioner prepared and served the notice of claim on the Respondents while this application was pending (NYSCEF Doc. 16).

Upon review, directing the 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, which is what the Petitioner seeks in the within application. Accordingly, that aspect of the Petition which seeks pre-action disclosure of the aforementioned documents and materials from the Respondents is denied.

Neither the CITY nor TRANSIT oppose that branch of the motion which seeks the preservation of documents and materials, to the extent that they are in their respective control/possession. As the Petitioner has shown that the documents, video and materials related to this accident may be material and necessary should an action be commenced, that branch of the motion by order to show cause which seeks their preservation is granted as follows. Those Respondents who manage and control the subway system are directed to preserve video footage, whether from the perspective of the southbound F train platform at the 23<sup>rd</sup> Street/6<sup>th</sup> Avenue station, or from the train itself, depicting the subject incident, to the extent such footage exists and is in their control. Those Respondents who conducted an investigation following this incident are directed preserve any accident/incident reports, DD5 forms, photographs and/or video footage and any witness statements and contact information to the extent such items exist and are in their control. TRANSIT is directed to preserve any audio or electronic messages it/its employees received reporting that the Petitioner was on the tracks at the subject subway station immediately prior to this incident, to the extent such items exist and are in its control. TRANSIT is also directed to preserve the subject train's "black box" data; to the extent such items exist and is in its control.

Accordingly, it is hereby

ORDERED that the branch of the Petition which seeks an Order directing the Respondents to produce various documents and materials, is denied; and it is further

ORDERED that the branch of the Petition seeking preservation of evidence is granted to the extent those Respondents who manage and control the subway system are directed to preserve video footage depicting the subject incident, whether from the perspective of the southbound F train platform at the 23<sup>rd</sup> Street/6<sup>th</sup> Avenue station, or from the train itself, to the extent such footage exists and is in their control; and it is further

ORDERED that the branch of the Petition seeking preservation of evidence is further granted to the extent that those Respondents who conducted an investigation into the subject incident are directed to preserve any investigative documents and materials any accident/incident reports, DD5 forms, photographs and/or video footage and any witness statements and contact information to the extent such items exist and are in their control; and it is further

ORDERED that TRANSIT is directed to preserve the subject train’s “black box” data and any audio or electronic messages it/its employees received reporting that the Petitioner was on the subject tracks at the 23<sup>rd</sup> Street/6<sup>th</sup> Avenue subway station immediately prior to this incident, to the extent such items exist and are in its control; and it is further

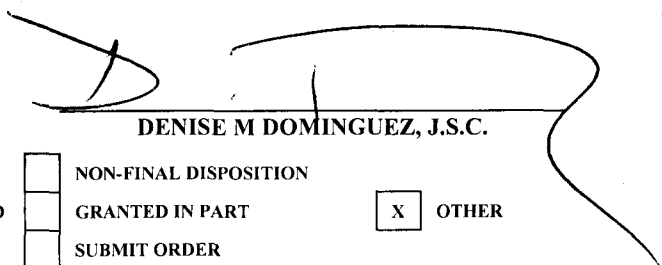
ORDERED that as the within Petition has been denied in part and granted in part, the Petition is now dismissed; and it is further

ORDERED that within 20 days from the entry of this order, Petitioner shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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).

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

1/25/2024  
DATE

  
DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	