

Kendall v City of New York

2024 NY Slip Op 30467(U)

January 24, 2024

Supreme Court, New York County

Docket Number: Index No. 160113/2022

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. 160113/2022

MARLENE KENDALL,

MOTION SEQ. NO. 002

Plaintiff,

- v -

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

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 23, 24

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.

Petitioner, MARLENE KENDALL, before commencing an action, moves by order to show cause, for an order directing Respondents THE CITY OF NEW YORK (the “CITY”), THE NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY (“TRANSIT”) to produce for inspection and copy various records, reports, recordings, surveillance video, photos and audio recordings related to the Petitioner’s May 27, 2022 incident at the Chambers Street/Brooklyn Bridge Station on the J/Z subway lines in Manhattan.

TRANSIT opposes the Petition and motion by order to show cause (NYSCEF Doc. 18) and the CITY presents its position by letter to this Court dated March 27, 2023 (NYSCEF Doc. 22). Without leave of Court, the Petitioner filed a reply affirmation and TRANSIT a sur-reply (NYSCEF Doc. 23, 25). As the Court did not permit such filings, neither will be considered.

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).

Here, the Petitioner’s affidavit avers that on May 27, 2022, between 6:45 a.m. and 7:15 a.m., while the Petitioner was on a downtown J train at the Canal Street station, she was punched in the back by an individual who had just boarded the train. This individual is only described as being male. When the train arrived at the Chambers Street Station, this individual pulled/dragged the Petitioner from the train and onto the platform where he continued to “batter” the Petitioner until two passengers were able to pull the assailant off of the Petitioner. Following this incident, the Petitioner was able to reach the mezzanine area and reported the incident to an individual that the Petitioner believed to be a TRANSIT station agent. Emergency responders arrived at the scene and an FDNY ambulance transported the Petitioner to Bellevue Hospital. No TRANSIT personnel were present at the time of this incident occurred. (NYSCEF Doc. 9).

In opposition, TRANSIT asserts that the Petitioner does not have a meritorious action against it as TRANSIT is not responsible for the assault committed by a third-party, that pre-action discovery is impermissible where it is being used to determine if a valid cause of action exists and that as the Petitioner has already prepared and served the notice of claim, the Petitioner has sufficient information to prepare the complaint. (NYSCEF Doc. 18, 19).

Upon review, at this time the Petitioner’s claims against the Respondents do not appear to be meritorious. There is nothing in the Petitioner’s affidavit which shows how or why the CITY may be responsible for this incident. (See *McGuire v. City of New York*, 211 A.D.2d 428, 621 N.Y.S.2d 314 [1st Dept 1995]; *Arteaga v. City of New York*, 101 A.D.3d 454, 956 N.Y.S.2d 9 [1st Dept 2012]). Nor is it clear that the Petitioner has a meritorious claim against TRANSIT. As per

the notice of claim, the Petitioner appears to assert that the incident was due to TRANSIT's negligence in failing to take reasonable measures to ensure the safety of its passengers by preventing criminal acts. Although the notice of claim served on TRANSIT asserts that the Petitioner was assaulted in the presence of and with the knowledge of TRANSIT employees, this claim is contradicted by the Petitioner's affidavit which avers that there were no TRANSIT personnel present at the time of this incident (NYSCEF Doc. 19). Additionally, as per the Petitioner's November 14, 2022 statutory hearing testimony, she did not speak to the train conductor or operator at any time and does not recall seeing any TRANSIT personnel on the train or platform at the time the incident occurred. (NYSCEF Doc. 20). Generally, when a common carrier, such as TRANSIT, is acting in the performance of its governmental functions, it may not be liable for the intentional acts of third parties absent a showing of a special relationship between the carrier and the injured party. (*See Weiner v. Metro. Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124 [1982]; *Rawlins v. Manhattan & Bronx Surface Transit Operating Auth.*, 232 A.D.2d 340, 648 N.Y.S.2d 610 [1st Dept 1996]).

However, even giving the Petitioner the benefit of every possible inference at this early stage, and even presuming that the Petitioner shows a meritorious claim against the Respondents, pre-action discovery is still not warranted here.

The Petitioner seeks to inspect and copy numerous records related to the emergency responders' response to the subject incident including all "reports, tape-recordings or other documentation, pertaining to police or emergency response calls and/or calls for police or emergency services...." The Petition also seeks to inspect and copy any surveillance videos from platforms of the downtown and uptown J/Z lines and all entrances and exits at Chambers Street Station/Brooklyn Bridge Station on May 27, 2022. Additionally, the Petition seeks to inspect and copy all "documents, incident reports, photographs, diagrams, logbooks, patrol books, and log sheets" from TRANSIT as well as "all daily logs, reports, statements and records maintained by any [TRANSIT] employees" related to the accident. The Petitioner asserts that the requested items are being sought to identify all possible culpable parties, to preserve important evidence, to permit an investigation and because the Petitioner essentially wants the records at this time.

Upon review, the Petitioner does not show what potential culpable party is to be identified through the requested items or why the Petitioner is entitled to such items prior to commencing litigation.

Moreover, it is clear that the items sought are not material and necessary to prepare the complaint. Where a petition for pre-action discovery 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 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 or about July 14, 2022, prior to pursuing the within Petition. Thus, Petitioner does not establish his burden for production of pre-action discovery against either the CITY or TRANSIT. 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.

Although not clearly borne out in the Petition, the Petitioner also seeks an order directing the Respondents to preserve all of the aforementioned records. Upon review, pursuant to CPLR §3102[c], those Respondents who manage and control the subway system are directed to preserve video footage, if any, depicting the platform of the downtown and uptown J/Z lines at the Chambers Street Station/Brooklyn Bridge station on May 27, 2022, which shows the subject incident, to the extent such videos exist and are in their control. Those Respondents who conducted an investigation into the subject incident are directed to preserve any investigative documents and materials including any accident/incident reports, photographs, witness statements, or audio recordings, to the extent such materials exist and are in their control. The application is otherwise denied.

Accordingly, it is hereby

ORDERED that the branch of the Petition which seeks an Order directing the Respondents to produce for inspection and copy various reports, records, photographs, videos and audio recordings, as outlined herein, is denied; and it is further

ORDERED that the branch of the Petition seeking preservation of evidence is granted to the extent that those Respondents who are in control of the video footage from the Chambers Street Station/Brooklyn Bridge station, are directed to preserve video footage of the platforms on the

downtown and uptown J/Z lines on May 27, 2022 which depict the subject incident, to the extent such videos exist and are in its 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 including any accident/incident reports, photographs, witness statements, or audio recordings, to the extent such materials exist and are in their control; and it is further

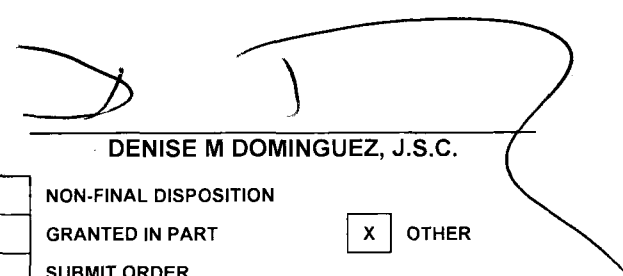
ORDERED that as the within Petition has been denied in part and granted in part, the Petition is now dismissed; and it is further

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.

1/24/2024
DATE


DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<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"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE