

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JOSHUA HOLDSWORTH,  
Plaintiff,  
v.

**DECISION  
and  
ORDER**

UNITED STATES OF AMERICA,  
L&D JOHNSON PLUMBING & HEATING, INC.,  
a/k/a U.S. Veterans Constructions & Management Corp.,

**11-CV-889A(F)**

Defendants.

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APPEARANCES:

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In this Federal Tort Claims Act action, Defendant, United States of America, (“Defendant”) moved to dismiss based on a lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1) (“Defendant’s motion”) (Doc. No. 14). By papers filed April 10, 2012, Defendant asserts that it is immune from liability based on the discretion any function exception to the FTCP and that Plaintiff’s action against it is also barred under

the Independent Contractor Doctrine (Doc. No. 22 ¶¶ 36-37). In opposition, Plaintiff contends he is unable to oppose Defendant's motion without adequate discovery. Co-Defendant, L&D Johnson Plumbing & Heating, Inc. ("Co-Defendant L&D") also opposes Defendant's motion on the merits and alternatively requests discovery directed to the two grounds asserted in support of Defendant's motion (Doc. No. 23 at 18). Upon review of the Defendant's motion papers, the opposition of Plaintiff and Co-Defendant L&D, the court finds that discovery limited to Defendant's assertion of the discretionary function exception and independent contractor doctrine as grounds for Defendant's motion is warranted. See *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004) (citing *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) ("party asserting jurisdiction [ ] permitted discovery of facts demonstrating jurisdiction")). Such limited discovery may proceed for a **90-day period** commencing upon service of this Decision and Order. Defendant's motion (Doc. No. 14) is therefore DISMISSED without prejudice to refile within 30 days following the end of the 90-day discovery period. An order scheduling Plaintiff's and Co-Defendant L&D's further responses and Defendant's reply will be entered by the court following the expected re-filing of Defendant's motion which shall include consideration of the results of the limited discovery permitted hereunder.

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

Dated: September 27, 2012  
Buffalo, New York