

<b>Matter of Dailey v New York City Tr. Auth.</b>
2020 NY Slip Op 30200(U)
January 21, 2020
Supreme Court, New York County
Docket Number: 161873/2018
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

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In the Matter of the Application of  
SAMIR DAILEY,

Petitioner,

**DECISION AND ORDER**

-against-

Index No.: 161873/2018

THE NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY,  
CITY OF NEW YORK, THE FIRE DEPARTMENT  
OF THE CITY OF NEW YORK, and THE NEW YORK  
CITY POLICE,

Mot Seq: 3

Respondents.

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*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Paper	Numbered	NYCEF #
Petitioner's Motion/ Affirmation/Memo of Law	<u>1</u>	40-51
Respondent's Affirmation in Opposition/Memo of Law	<u>2</u>	54

LISA A. SOKOLOFF, J.

Petitioner Samir Dailey moves by order to show cause pursuant to CPLR §3102(c) for an order directing Respondents The New York City Transit Authority, Metropolitan Transportation Authority, City of New York, The Fire Department of the City of New York, and The New York City Police to produce and preserve all video/digital images and audio recordings made concerning an accident involving Petitioner, which took place between 11:30 pm on September 14, 2018 and 2:00 am on September 15, 2018 at the 157th street and Broadway subway station. For the following reasons followed, this petition is denied.

Petitioner contends that pre-action discovery is needed to prepare a proper notice of claim and to frame the complaint because Petitioner Dailey has no memory of the accident.

Additionally, Petitioner would be prejudiced by the destruction of the materials that would occur in the ordinary course of business.

In opposition, Respondents contend that none of the items sought by Petitioner are necessary in order to frame a pleading, so production of the material at this point is premature and unwarranted. Respondents also claim that Petitioner's demand for production of video in advance of his statutory hearing is outside the scope of CPLR § 31, which does not apply to statutory hearings or other discovery contemplated by the Public Authorities Law.

Under CPLR § 3102(c), a potential plaintiff may petition the court to obtain discovery before service of a complaint. The statute permits pre-action discovery to "aid in bringing an action, to preserve information or to aid in arbitration" (CPLR §3102[c]). Pre-action discovery is available only where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong (*Holzman v Manhattan and Bronx Surface Transit Operating Authority*, 271 AD2d 346 [1st Dept 2000]). While pre-action discovery is appropriate if it is required to frame a complaint or to identify potential defendants (*Id.* at 347), it may not be used as a fishing expedition to ascertain whether a cause of action exists (*Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1989]) or to explore alternative theories of liability (*Uddin v New York City Transit Authority*, 27 AD3d 265, 266 [1st Dept 2006]).

Here, Petitioner alleges that as a result of Respondents' negligence, he was injured at the 157th Street subway station of the 7th Avenue line when he fell to the tracks as the #1 train entered the station. Although Petitioner is unable to recall the accident, the police report provides sufficient information to frame a complaint, including the time, location and the account of a witness who stated that Petitioner appeared impaired, walked with a wobble as he approached the edge of the platform, and that no one stood behind Petitioner

when he fell to the tracks. According to the police report, Petitioner's cousin stated that they had been drinking before taking the subway and exiting at the 157th street station. The train operator reported that upon seeing a person on the tracks, he immediately applied the brakes.

To plead a negligence claim, Petitioner need only allege that Respondents owed a duty to Petitioner, the duty was breached, and the breach proximately caused his injury (*Petrucci v City of New York*, 167 AD2d 29 [1st Dept 1991]). Here, the police report provides ample facts to frame a negligence complaint against Respondents. Since no one was near Petitioner when he fell to the tracks, there would appear to be no potential defendants, other than Respondents, who could be identified from pre-action discovery.

Relying on *Matter of Barillaro v City of New York*, 53 Misc3d 307 (Sup Ct. Bronx Co. 2016), Petitioner further seeks discovery of videotapes and recordings of calls related to the accident prior to submitting to any Public Authorities Law hearings. In *Barillaro*, the court allowed pre-action disclosure of video surveillance footage for a worker injured during installation of natural gas lines to laboratory classroom. However, *Barillaro* is distinguishable from the instant case in that various people were walking in and out of the classroom at the time of the accident whereas Petitioner was alone by the subway tracks.

In reaching its decision, the *Barillaro* court relied on *Tai Tran v New Rochelle Hosp. Medical Center*, 99 NY2d 383 [2003] where the Court of Appeals held that CPLR § 3101(i) "requires full disclosure [of surveillance tapes] with no limitation as to timing ... " (*Id.* at 389-90). Respondents argue, however, and the court agrees, that CPLR Article 31 discovery rules do not apply to General Municipal Law (GML) §50-h (the companion legislation to the Public Authorities Law governing claims against municipalities). "Section 50-h has been strictly construed to not incorporate the discovery provisions of the Civil Practice Law and Rules" (*Alouette Fashions v Consolidated Edison Co. of NY*, 119

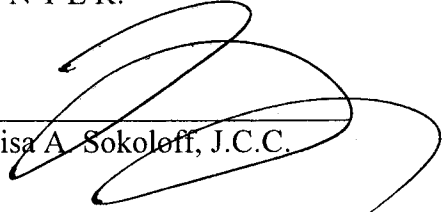
AD2d 481 [1st Dept 1986], *aff'd for reasons stated below* 69 NY2d 787 [1987] [Court found that the language of 50-h precluded City from compelling production of documents in advance of statutory hearing]. The Court in *Alouette Fashions* noted that the purpose of the statutory hearing is to afford the municipality an early opportunity to investigate and explore the merits of a claim with a view toward settlement while "the broad panoply of pretrial disclosure proceedings pursuant to CPLR article 31 is available to advance the function of a trial" (*Id.* at 487).

This principle was recently affirmed by the Second Department, holding that "CPLR provisions, including CPLR article 31 discovery rules, do not apply to the pre-commencement 50-h hearings" (*Colon v Martin*, 170 AD3d 1109 [2nd Dept 2019] [City had authority under GML §50-h to exclude motorist and passenger from each other's oral examinations, and thus motorist and passenger failed to comply with hearing requirement when they refused to proceed with oral examination unless each was permitted to be present while the other testified, and were precluded from commencing action]).

In view of the foregoing, Petitioner's application for pre-action discovery pursuant to CPLR § 3102(c) is denied.

Dated: January 21, 2020  
New York, New York

ENTER:

  
Lisa A. Sokoloff, J.C.C.

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	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
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