

Barahona v. City of New York

Supreme Court of New York, New York County

February 27, 2025, Decided

Index No. 151504/2025

Reporter

2025 N.Y. Misc. LEXIS 2511 *; 2025 NY Slip Op 50573(U) **

[**1] Diana Barahona ET AL., Petitioner, against The City of New York, NEW YORK CITY POLICE DEPARTMENT, EMERGENCY MEDICAL SERVICES, ADMINISTRATION FOR CHILDREN'S SERVICES, BROOKDALE HOSPITAL, Respondents.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Counsel: [*1] For Petitioner: By: Tracey L. Brown, Esq., Cochran Firm, New York, NY.

For Respondents (The City of New York, New York City Police Department, Emergency Medical Services, Administration for Children's Services): By: Karen L Kirchenbaum, Esq., New York City Law Department, New York, NY.

For Respondent (Brookdale Hospital): By: Robert Boccio, Esq., Gerasimia Stathatos, Esq., and Jesse Wang, Esq., Barker Patterson Nichols, LLP, Garden City, NY.

Judges: ARIEL D. CHESLER, J.S.C.

Opinion by: ARIEL D. CHESLER

Opinion

Ariel D. Chesler, J.

In this special proceeding, Petitioner seeks pre-action discovery pursuant to CPLR §3102[c]. Specifically, she seeks, *inter alia*, records, documents, video and audio recordings, and 911 tapes relating to "injuries and/or death of the infant J.D.B. on or about January 5, 2025 and January 6, 2025."

Regarding the issue of preservation of evidence, all Defendants have entered into stipulations agreeing to preserve the requested materials to the extent they exist

and have been or [**2] will be collected or created (see NYSCEF Docs 9, 11). These stipulations are incorporated into this Decision and Order and it is expected they are followed. Defendants are directed to preserve the requested materials to the extent [*2] they exist.

Regarding pre-action production or disclosure, a party is not generally entitled to discovery and inspection of documents and things until an action has been commenced (see CPLR §3120). Pre-action discovery "is not permissible as a fishing expedition to ascertain whether a cause of action exists" (*Liberty Imports v. Bourguet*, 146 AD2d 535, 536, 536 N.Y.S.2d 784 [1st Dept 1989]) and is available under CPLR 3102(c) only "where a petitioner demonstrates that [it] has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong" (see *Bishop v. Stevenson Commons Assocs., L.P.*, 74 A.D.3d 640, 641, 905 N.Y.S.2d 29 [1st Dept 2010], *lv. denied* 16 N.Y.3d 702, 942 N.E.2d 319, 917 N.Y.S.2d 108 [2011]).

In other words, "while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing" (*Uddin v. New York City Transit Authority*, 27 AD3d 265, 266, 810 N.Y.S.2d 198 [1st Dept 2006]). Stated differently, while such pre-action discovery may be permissible to frame a complaint, it may not be utilized to determine if a prospective plaintiff has a claim.

Here, the petition fails to demonstrate that Petitioner has a meritorious cause of action nor satisfies her significant burden to obtain pre-action disclosure. The petition merely provides a barebones description of the background and context of the potential action, claims Petitioner was informed [*3] of the decedent infant's death but given no cause or details, and focuses on the need to preserve potential evidence and ensure it is not erased or destroyed.

Significantly, Petitioner references that the infant decedent J.D.B was removed from her care by the Administration for Children's Services (ACS), and placed with a foster care agency, and that there have been ongoing proceedings in Family Court. However, Petitioner does not provide any details or information about the basis for the removal, the allegations against Petitioner by ACS, whether there have been any determinations or orders made by Family Court, what Petitioner's status or authority is in relation to the infant decedent, or what information or records she has requested or obtained in the Family Court proceeding regarding the death.

Further, the petition demonstrates that Petitioner knows the date of the death of the infant decedent J.D.B., the address of the foster parent, the agencies and entities involved, and potential causes of action. Thus, she was in possession of facts sufficient to file a notice of claim and complaint and any claim that petitioner needs pre-action discovery is belied by petitioner's own allegations. [*4] Petitioner provides no explanation for why she cannot commence an action and learn more information in the course of discovery. Otherwise, Petitioner relies on speculation. Thus, Petitioner conclusively demonstrates that they are not entitled to the discovery they seek because the petition contains sufficient information to frame a complaint.

In any event, as the City notes, certain materials maintained by ACS, the Fire Department EMS, and the New York Police Department are not disclosable at this time pursuant to statute and/or without HIPAA authorization from the estate's duly appointed representative. Here, Petitioner has not claimed she has been granted letters of administration or presented HIPAA authorizations. Thus, the request to inspect the requested materials is premature.

In sum, the preservation order now granted by the Court is limited to safeguarding the evidence without permitting immediate access or inspection (see C.D. v. City of New York, 225 N.Y.S.3d 887, 2025 WL 457842025, NY Slip Op. 25005 [Sup Ct, New York County 2025]).

Accordingly, it is hereby

ORDERED and ADJUDGED that Petitioner's motion to preserve materials related to Decedent infant's death as outlined in the stipulations regarding preservation is GRANTED to the extent that Respondents shall maintain and preserve such [*5] materials, subject to any applicable legal protections; and it is further

ORDERED and ADJUDGED that Petitioner's motion for pre-action discovery is DENIED. This constitutes the decision, order, and judgment of the court.

DATE 2/27/2025

ARIEL D. CHESLER, J.S.C.

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