

<b>Fernandez v City of New York</b>
2016 NY Slip Op 31347(U)
June 29, 2016
Supreme Court, Bronx County
Docket Number: 20060/2006
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 10(e)

-----X  
Gladys Fernandez and Mauricio R. Fernandez,

Plaintiffs,

DECISION and ORDER  
Index No 20060/2006

-against-

The City of New York, New York City Department  
of Education, New York City Board of Education  
and St. Joseph's School for the Deaf,

Defendants.

-----X  
St. Joseph's School for the Deaf,

Third-Party Plaintiff,

Third-Party  
Index No 84161/2009

-against-

Hoyt Transportation, Inc.,

Third-Party Defendant.

-----X  
Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion  
for summary judgment:

Notice of Motion and annexed Exhibits and Affidavits.....	1
Notice of Cross-Motion and annexed Exhibits and Affidavits.....	2
Affirmation in Opposition and annexed Exhibits.....	3
Reply Affirmations.....	4

Plaintiff Gladys Fernandez (“Fernandez”), a school bus matron, accompanied students who are transported from their school(s) to their respective homes on a school bus owned and operated by plaintiff’s employer, third-party defendant Hoyt Transportation, Inc. (“Hoyt Transportation”). Defendant St. Joseph’s School for the Deaf (“St. Joseph’s”) utilizes Hoyt Transportation’s bus service. Although defendant St. Joseph’s is a non-public school, defendants NYC and D/BOE explain that they are required to provide transportation to and from the school pursuant to the New

York State Education Law § 4402(4)<sup>1</sup>. Accordingly, D/BOE entered into a contract with defendant Hoyt Transportation to transport St. Joseph's special education students. Ms. Fernandez claims that a St. Joseph's student caused her to sustain serious injuries.

Alleged Events

Five-year old Amato, one of St. Joseph's students, allegedly has a known history of violent behavior. Ms. Fernandez provided written reports to St. Joseph's on 4/5/06 and 4/10/06 regarding Amato's "very violent" and aggressive behavior toward her and other students. On 4/26/06, at the end of the school day, students were being transported and the bus was in motion when Amato removed his seat belt, got out of his seat and attacked another student. When plaintiff Fernandez intervened, Amato turned and violently attacked plaintiff; an ambulance transported her to the hospital to treat her sustained neck, back, shoulder and knee injuries. Ms. Fernandez claims that as a result of the incident, she has undergone at least five knee and shoulder surgeries; she has been repeatedly institutionalized for severe depression and suicidal tendencies; and is rendered wheelchair bound and totally disabled, requiring round-the-clock care.

Parties' Sought Relief

Defendant St. Joseph's moves for summary judgment pursuant to CPLR 3211[a][7] dismissing all causes of action and cross-claims against it on the ground that the plaintiff fails to state a cause of action and was owed no duty of care by the defendants.

Defendants The City of New York ("City"), New York City Department of Education and New York City Board of Education ("D/BOE") cross-move for the same relief and/or summary judgment pursuant to CPLR 2312 and for an Order dismissing the action against defendant City

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<sup>1</sup> Education Law § 4402(4) provides: The board of education or the board of trustees of each school district shall provide suitable transportation to and from special classes or programs...( c) Such board shall be empowered to contract for transportation services provided pursuant to this subdivision with any...private contractor meeting the school bus provisions outlined in section thirty-six hundred twenty-three of this

chapter...(d) Notwithstanding any other provision of law, such board shall provide suitable transportation up to a distance of fifty miles to and from a nonpublic school which a child with a handicapping conditions attends if such child has been so identified by the local committee on special education and such child attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special education.

because it is an improper party.

#### DISCUSSION

A party may move for judgment dismissing one or more causes of action asserted against it on the ground that the pleading fails to state a cause of action. (CPLR 3211[a][7].) It is well settled that “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Siegmund Strauss Inc. v East 149<sup>th</sup> Realty Corp.*, 104 AD3d 401 [1<sup>st</sup> Dept 2013]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1<sup>st</sup> Dept 2012].) “If a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated.” (Siegel, NY Prac § 208 [5<sup>th</sup> ed].)

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit. (CPLR 3212[b].)

#### Defendants St. Joseph’s, City and D/BOE Claim No Duty of Care

Defendants St. Joseph’s and City and D/BOE respectively maintain that they were not negligent because they owed no duty of care to the plaintiff.

“Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party.” (*Medinas v Milt Holdings, LLC*, 131 AD3d 121 [1<sup>st</sup> Dept 2015] citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002].)

Schools “are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.” (*MacCormack v Hudson City School District Board of Education*, 51 AD3d 1121 [3d Dept 2008].) In determining whether there has been a breach of duty... “it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury” and the acts could “reasonably have been anticipated.” (*MacCormack v Hudson City School District Board of Education*, 51 AD3d 1121, *supra*.)

In support of its position, defendant St. Joseph’s submits the affidavit of Debra Arles and the deposition transcripts of Joseph Termini and Richard Scarpa. Defendants City and D/BOE (“municipal defendants”) adopt and incorporate St. Joseph’s arguments and exhibits and, in support

of their cross-motion, submit the deposition transcripts of Steve Sarran, Noreen Collins, William Nolan and plaintiff Fernandez.

By affidavit, Ms. Arles, St. Joseph's Executive Director, states that St. Joseph's had no part in selecting Hoyt Transportation as the bus company to transport students; is under no obligation or contractual or financial agreement with Hoyt Transportation; neither owns, maintains nor controls the bus; and bears no responsibility in hiring or training employees for Hoyt Transportation. Ms. Arles asserts that Amato was not in St. Joseph's physical custody or control at the time of the alleged occurrence and thus it owed no duty of care to Ms. Fernandez.

Mr. Scarpa, senior advisor to NYC DOE's Office of Pupil Administration's ("OPA") Executive Director, testified on behalf of defendant City. During his deposition, he stated that while employed as Acting Director from 2006 until 2008, he was involved in contract negotiations and amendments with private bus companies to provide bus service to schools; a contract existed between OPA and Hoyt Transportation but none with St. Joseph's.

During his deposition, Mr. Termini, Vice-President of Hoyt Transportation, corroborates Mr. Scarpa's testimony in that he testified that Hoyt Transportation and the Board of Education entered into a contract in 1987 whereas no contract exists between Hoyt Transportation and St. Joseph's. Mr. Termini stated that Hoyt possesses no authority to hire additional persons to provide escort service on a school bus. When two escorts are assigned to a bus, the City of New York pays Hoyt for the second escort. As it relates to transporting a child with violent tendencies or behavioral issues, Mr. Termini stated that Hoyt has no right to refuse to transport that child unless it is so authorized by D/BOE or is informed that the school suspended the child. When a driver or escort encounters a behavior problem, he or she completes a provided Behavior Report and submits it to the school for signature, thus placing the school on written notice of the student's problematic behavior.

Mr. Sarran, St. Joseph's former principal, describes the school as a "private state supported school" owned by nuns; it is not a DOE school and is not obligated to follow its rules.

Ms. Collins, Coordinator of Pupil Personnel Services, conceded during deposition that the school was aware of, discussed and evaluated Amato's behavioral problems, violent tendencies and misbehavior on the bus, including fights with his brother.

Mr. Nolan, OPA's Chief Investigator, testified that OPA informed St. Joseph's of these incidents, its only obligation and closed the case.

Defendants City and D/BOE reference plaintiff Fernandez's deposition transcript to establish that she was a bus matron and employee of Hoyt Transportation who was hit and punched by Amato while on the bus. The defendants posit that none of their agents were on the bus during the 4/26/06 subject incident and they neither employed, paid nor supervised Ms. Fernandez.

Plaintiff Opposes Defendants' Respective Motions

Plaintiff Fernandez opposes defendant St. Joseph's motion and defendants City and D/BOE's cross-motion. Plaintiff submits that Amato exhibited uncontrollable behavior and violent tendencies against her on two prior occasions and against other students.

The plaintiff relies heavily on Education Law § 4402 in asserting that the statute requires the D/BOE's Committee on Special Education ("CSE") to develop an Individual Education Plan ("IEP") for each disabled student: CSE must appoint a Special Committee ("SC") comprised of the child's parent(s), a special education teacher, school psychiatrist, administrator/supervisor and physician to identify and address the child's needs and protect those within his or her circle. The plaintiff posits that to the extent that an IEP student has violent behavioral issues, the SC must develop a Behavior Intervention Plan ("BIP") with a copy provided to the school. Amato had both an IEP and BIP, both of which should have been provided to St. Joseph's. Amato's violent behavior exacerbated when he rode the bus with his brother. The defendants received written reports of Amato's behavior and were acutely aware that he was a danger to himself and others. Defendants developed a Behavioral Intervention Plan ("BIP"). Although they determined that Amato would be removed from a group environment, they failed to follow their own protective policies and protocols. The defendants also knew that at the time of the incident, Amato was taken off his behavioral medication.

The Court notes that according to the BIP dated 9/29/05, "Amato acts out physically towards others, seemingly for no reason, on a daily basis - poking, kicking, spitting, twisting arms."

The plaintiff describes as irrelevant, the defendants' contention that the incident occurred off the school grounds and they lacked physical control over Amato and control over the bus, operated by an independent contractor. The plaintiff posits that defendants St. Joseph's and D/BOE were empowered to suspend Amato immediately after the 4/5/06 and 4/10/06 incident and thus keep him

off the bus. Hoyt Transportation, on the other hand, possessed no authority to prevent a child from boarding a bus since its sole job is to transport students to and from school.

In support of her position, plaintiff Fernandez, like the defendants, reference the deposition testimony of former principal Sarran, Mr. Scarpa, senior advisor to OPA's Executive Director, and Ms. Collins, Coordinator of Pupil Personnel Services. The plaintiff proffers her deposition transcript, medical records and her written "Behavior Reports" concerning Amato; Amato's school records; a copy of NYC DOE's "Standard Operating Procedures Manual: The Referral, Evaluation, and Placement of School-Age Students with Disabilities (February 2009);" and a copy of St. Joseph's "Behavior Code" Manual. Plaintiff also submits an out-of-state expert affidavit from Donald Weber but it is inadmissible since it lacks the requisite CPLR 2309[c] certification.

To establish B/DOE's role in Amato's transportation, plaintiff Fernandez references DOE's Standard Operating Manual and the 2000 Regulation of the Chancellor No. A-801 ("Reg. A-801"). The Manual states in pertinent part:

The following factors must be taken into consideration when determining whether Specialized Transportation is warranted:  
Whether the student has a severe emotional disability and documented aggressive and/or acting out behavior that requires support on the bus to and from school.

Regulation A-801 provides that the Director of the Office of Pupil Transportation, a unit of D/BOE, determines the mode of transportation provided for each student, the available options and how safety issues will be addressed in this regard:

[Where a] child's behavior threatens the physical safety of...others, the principal or special education supervisor shall arrange for a conference with the parent and discuss the methods for resolution, such as the parent independently taking the child to school. (Reg. A-801 § 3[III][D].)

If an emergency threatens the safety of the child or others on the ride home and the principal or special education supervisor cannot be reached, the Director of Office of Pupil Transportation can decide that the bus company is not to pick up the child the following day. (Reg. A-801 § 3[III][E].)

Only the principal or the special education supervisor may temporarily bar a child from transportation. (Reg. A-801 § 3[III][F].) The principal or special education supervisor shall arrange a conference with the parent, teacher, and other appropriate personnel to help resolve the problem and to arrange other means, if necessary, of getting the child to school. (Reg. A-801 § 3[III][G].)

Defendant St. Joseph's Behavior Code at page 3 addresses bus behavior, levels of misconduct and the consequences:

Engage in misconduct while on a school bus.  
It is crucial for students to behave appropriately while riding on school buses to ensure their safety and that of the other passengers and to avoid distracting the bus driver. Students are required to conduct themselves on the bus in a manner consistent with established standards for classroom behavior. Excessive noise, pushing, shoving and fighting will not be tolerated.

St. Joseph's Behavior Code sets forth three levels of misconduct. Level 3 includes "committing violent acts on students or staff" and warrants suspension and a police referral.

Mr. Sarran, the former principal, testified that St. Joseph's and D/BOE, in accordance with Education Law § 4402, generate an IEP annually for each child and if he or she exhibits behavioral issues, a BIP is also generated and updated as needed. Accordingly, St. Joseph's creates a BIP documenting Amato's behavioral issues and submits same to D/BOE as part of his yearly IEP. Mr. Sarran states that while he never personally observed Amato's violent behavior, he was aware of his consistent verbal and physical abuse of both the students and Hoyt Transportation staff. Mr. Sarran described Amato as a "boiling pot." Mr. Sarran called OPT and constantly discussed Amato with coordinator Jeff Burger and requested a new and separate bus route for Amato and his brother since sharing a bus incited Amato's violent tendencies.

Mr. Scarpa, the senior advisor to OPA's Executive Director, testified that although an IEP is generated yearly and substantively reviewed every three years, D/BOE's Committee of Special Education reviews these reports as deemed necessary. Every third year, a psychologist is present at the meeting and the child's school and medical records are reviewed. Significantly, an IEP discusses a child's transportation requirements and whether a paraprofessional is necessary for the child's medical, emotional or behavioral needs. If the child is violent on a bus, the issue should be



addressed immediately and a one-on-one paraprofessional can be provided. He states that if a child has an incident on a bus, it would be OPT's responsibility to "speak with the school, identify the problem, and make recommendations on whatever action is needed or required."

The plaintiff submits documents dating back to 2004 including e-mails between school staff describing Amato as "dangerous to others," an "extremely dangerous child" and "explosive." In 2004, Maggie Contreras, a St. Joseph's coordinator, wrote to Amato's mother and informed her about the "serious situation on the bus with Amato." In 2005, he gave a little girl a black eye and had done so before; he bit a boy in his face and on his chest resulting in a one-day suspension from the bus. In early 2006, Amato was taken "off" the medication that helped control his violence. A 2006 e-mail exchange discussed Amato swinging his seatbelt and striking students. The plaintiff herself wrote and warned that Amato is "very violent" toward her and communicated via hand signals that he wanted to kill her and his brother(s).

#### CONCLUSION

Defendant St. Joseph's moves and defendants City and D/BOE cross-move for summary judgment dismissing all causes of action and cross-claims against them on the ground that the plaintiffs fail to state a cause of action and were not owed a duty of care. After a careful review of the evidence, the Court finds the contrary. The overwhelming evidence makes clear that St. Joseph's and D/BOE owed a duty to plaintiff Fernandez because they possessed specific knowledge of Amato's dangerous conduct; the probability that his acts could cause injury was reasonably anticipated. (*MacCormack v Hudson City School District Board of Education*, 51 AD3d 1121, *supra.*; *Braun v Longwood Junior High School*, 123 AD3d 753 [2<sup>nd</sup> Dept 2014].)

St. Joseph's and D/BOE were acutely aware of Amato's violent proclivities and repeated attacks of biting, kicking, punching, spitting, twisting arms and fighting. Although many discussions were held and e-mails exchanged, the defendants took no action. While Amato's removal from the bus and recommendations that he not be involved in group settings were a consistent topic, the defendants took no action. It was not until after the commencement of this action that Amato was immediately and indefinitely suspended and then hospitalized by his parents. Upon his return, he and his brothers were transported home on separate buses and Amato's parents subsequently transferred him to another school.

Since the defendants move and cross-move to dismiss pursuant to CPLR 32111[a][7], the Court, in making its finding, must determine whether the plaintiff has a cause of action against the defendants. Here, defendants St. Joseph's and D/BOE released Amato "into a foreseeable hazardous setting it had a hand in creating" (*Chalen v Glen Cove School Dist.*, 29 AD3d 508 [2<sup>nd</sup> Dept 2006].) The defendants neither took action nor made adjustments to address these issues or minimize the risks since he was never barred from traveling on the bus.

Based on the foregoing, the Court finds that the plaintiff has a cause of action against the defendants and a triable issue of fact exists as to liability. The defendants' respective motion and cross-motion are decided as follows:

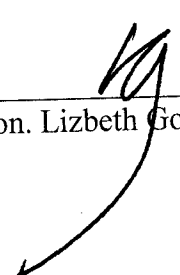
- 1) Defendant St. Joseph's motion to dismiss is denied.
- 2) Defendants City and D/BOE's cross-motion to dismiss and/or for summary judgment is granted solely to the following extent:
  - [a] The prong seeking dismissal of all causes of action and cross-claims against defendant The City of New York is granted; and
  - [b] The prong of defendants' cross-motion seeking dismissal of plaintiff's claim that the defendants violated Labor Law § 200(1) is granted.

The remaining relief sought in defendants City and D/BOE's cross-motion is denied.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: June 29, 2016

So ordered,

  
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Hon. Lizbeth González, JSC