SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

THOMAS GUERRIERI and SHERRY GUERRIERI,

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT/BOARD OF EDUCATION, ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC. and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC.

Defendants.

NEW YORK CITY DEPARTMENT/BOARD OF EDUCATION,

Third-Party Plaintiff,

-against-

MINIBUS SERVICE CORP.,

Third-Party Defendant.

Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 13652/03

Motion No. 892-010

The following papers numbered 1 and 2 were fully submitted the 19th day of June, 2013.

	Papers Numbered
Notice of Motion by Defendant New York City Department/Board of Education to Dismiss the Complaint and for Summary Judgment, with Supporting Papers (dated March 11, 2013).....	1
Plaintiffs' Affirmation in Opposition (dated June 12, 2013).....	2

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GUERRIERI v NEW YORK DEPARTMENT/BOARD OF EDUCATION

Upon the foregoing papers, the motion of defendant New York City Department /Board of Education (hereinafter, "DOE") to dismiss the complaint pursuant to CPLR 3211(a)(7), or in the alternative, for summary judgment pursuant to CPLR 3212 is granted in accordance herewith.

This personal injury action arises out of an incident that occurred on October 9, 2002 wherein plaintiff Thomas Guerrieri (hereinafter, "plaintiff"), while operating a school bus owned by his employer, third-party defendant Minibus Service Corp., was allegedly injured by an autistic student whom plaintiff was transporting to an educational facility for developmentally disabled persons, co-defendant Association in Manhattan for Autistic Children, Inc. (hereinafter, "AMAC").

In his notice of claim, Mr. Guerrieri alleges that DOE failed to provide adequate supervision and control over the special education student, Allan C., who was in need of same to ensure the safety of the minibus employees and the other passengers. It is further asserted (in both the notice of claim and the complaint) that, although DOE had prior notice of this student's dangerous, violent and uncontrollable nature, it failed to provide the necessary paraprofessional to properly control and supervise the student during his transportation to and from co-defendant's facility.

In moving to dismiss the complaint pursuant to CPLR 3211(a)(7), or in the alternative, for summary judgment, DOE maintains that plaintiffs have failed to plead and/or demonstrate the existence of a special duty, the absence of which precludes the imposition of liability upon the municipal defendant as a matter of law. In support, movant points out that the notice of claim and the complaint are devoid of the requisite factual allegations of a special relationship between the

municipal entity and the injured plaintiff arising from, *e.g.*, direct contact with DOE personnel during which promises or assurances were made to plaintiff upon which he justifiably relied.

In opposition, plaintiff maintains that prior to October 9, 2002, he and the matron assigned to his bus had filed 12 "Student Misbehavior Reports" with their employer which were allegedly forwarded to DOE's Office of Pupil Transportation by co-defendant AMAC . These reports purportedly described separate incidents wherein Allan C. behaved in a violent and uncontrollable manner on the bus. According to plaintiff, "absolutely nothing was done" to address this safety issue, *i.e.*, DOE neither provided a special transportation paraprofessional nor suspended the student from bus transportation.

In addition, plaintiff points to certain "Individualized Education Programs" ("IEPs") prepared for Allan C. prior to the incident wherein DOE's Committee on Special Education made specific "recommendation[s]" that Allan C. be assigned a special transportation paraprofessional. According to plaintiff's expert, a retired District 75 special education school teacher, DOE was required to implement the "recommendations" of this Committee.

Finally, plaintiff claims that upon informing his employer on "multiple" occasions that a special transportation paraprofessional was "desperately needed" for Allan C., he was "assured" by his employer that one would be "supplied soon".

It is well settled that in order "[t]o invoke the special duty exception to the rule that a public entity is not liable for the negligent performance of its governmental functions, a plaintiff must establish that, through affirmative acts, the municipality has lulled him or her into foregoing other available avenues of protection or that it has voluntarily assumed a duty separate from that which

is owed to the public generally" (Goga v Binghamton City School Dist., 302 AD2d 650, 651, citing Perry v Board of Educ., Gouverneur Cent. School Dist., 189 AD2d 939, 940 [internal quotation marks omitted]). Pertinently, it is well settled that a school's duty to supervise and police its students is a governmental function (*id.*).

In the instant matter, plaintiff maintains that he was injured as a result of DOE's alleged negligence in failing to supply a transportation paraprofessional to supervise and control the special needs student in question. Inasmuch as DOE is a governmental entity whose purported negligence arose in the exercise of a governmental function, it was incumbent upon plaintiff to demonstrate "a special relationship with [defendant], which create[d] a specific duty to protect [him], and [that plaintiff] justifiably relied upon the performance of that duty" to his detriment (Perry v Board of Educ., Gouverneur Cent. School Distr., 189 AD2d at 940; *see* Valdez v City of New York, 18 NY3d 69, 75; Goga v Binghamton City School Dist., 302 AD2d at 651; Reynolds v Central Islip Union Free School Dist., 300 AD2d 292, 293).

In the opinion of this Court, plaintiff has failed to sustain his burden.

Here, DOE established, prima facie, that it did not assume a special duty toward plaintiff, who failed to rebut that showing and raise a triable issue of fact as to the existence of a special relationship between himself and the municipal defendant. In this regard, there is no evidence in the record before the Court that DOE's agents made *any* direct assurances to plaintiff, much less an assurance "definite enough to generate justifiable reliance" (Dinardo v City of New York, 13 NY3d 872,874; *see* Cuffy v City of New York, 69 NY2d 255, 260; Goga v Binghamton City

School Dist., 302 AD2d at 651; Reynolds v Central Islip Union Free School Dist., 300 AD2d at 293).

In any event, plaintiff's failure to allege or provide facts sufficient to establish the necessary elements of a special relationship theory in his notice of claim or complaint is fatal to the maintenance of this action (*see* Blackstock v Board of Educ. of City of NY, 84 AD3d 524; Rollins v New York City Bd. of Educ., 68 AD3d 540, 541).

Accordingly, it is

ORDERED, that the motion for summary judgment by defendant, The New York City Department/Board of Education is granted; and it is further

ORDERED that the complaint and any cross-claims as against this defendant are severed and dismissed; and it is further

ORDERED that the Clerk enter Judgment and mark his records accordingly.

This constitutes the Decision and Order of the Court.

E N T E R,

Dated: August 16, 2013

/s/
Hon. Thomas P. Aliotta
J.S.C.