

**Tesoro v Metropolitan Swimming, Inc.**

2018 NY Slip Op 32769(U)

October 25, 2018

Supreme Court, New York County

Docket Number: 155308/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 155308/2017
MOTION SEQ. NO. 001

ROBERT TESORO,

Plaintiff,

- v -

METROPOLITAN SWIMMING, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19
were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action, third-party defendant Lehman College of the City
University of New York ("Lehman College") moves, pursuant to CPLR 3211, to dismiss the
complaint of third-party plaintiff Metropolitan Swimming, Inc. ("Metro Swimming"). After a
review of the relevant statutes and case law, the motion, which is unopposed, is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

On May 22, 2017, plaintiff Robert Tesoro ("Tesoro") commenced the instant action by
filing a summons and verified complaint on Metro Swimming. (Doc. 17 at 13-18.) The
complaint alleged that, on February 11, 2017, plaintiff was an invitee of a swim meet at the Apex
Center at Lehman College. (Id. at 15.) Metro Swimming hosted the swim meet and was the
licensee of the Apex Center for use in connection with the swim meet. (Id.) Tesoro alleged that
he sustained personal injuries when he slipped and fell because of an "accumulation of liquid" on

the floor of the Apex Center. (*Id.* at 15–16.) The complaint alleged negligence against Metro Swimming. (*Id.* at 14–18.)

On March 22, 2018, after filing its answer (*id.* at 21–24), Metro Swimming filed a summons and complaint against third-party defendant Lehman College (*id.* at 2–7). Metro Swimming alleged that Tesoro’s injuries resulted from the negligence of Lehman College and that, should Tesoro recover any damages from Metro Swimming, Lehman College should be liable for indemnification. (*Id.* at 4–6.)

On July 12, 2018, Lehman College moved, pursuant to CPLR 3211, to dismiss Metro Swimming’s third-party complaint. (Docs. 15–16.) Lehman College argues that this Court lacks subject matter jurisdiction over Metro Swimming’s action. (Doc. 16.) In support of its motion, Lehman College cites New York Education Law § 6224(4) which, Lehman College asserts, confers exclusive jurisdiction upon the New York State Court of Claims to hear and determine the claims of any person against the City University of New York sounding in tort. (*Id.*) The motion is unopposed.

#### LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].) Specifically, CPLR 3211(a)(2) divests a court of jurisdiction over a matter when the court does not have “jurisdiction of the subject matter of the cause of action . . . .”

Subject matter jurisdiction gives a court “the power to act . . . and to determine and adjudge . . . the particular facts presented . . . .” (*Hunt v Hunt*, 72 NY 217, 230 [1878].) Although the New York State “Supreme Court is a court of general jurisdiction” (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]), its jurisdiction may nevertheless be statutorily proscribed (*id.*). “[L]ack of subject matter jurisdiction [is] a nonwaivable defense that may be raised at any stage of the action.” (*Gelin v Lehman Coll.*, 254 AD2d 119, 119 [1st Dept 1998].)

In enacting § 6224(4) of New York’s Education Law, the state legislature specifically conferred jurisdiction over matters involving the City University of New York not on the Supreme Court, but on the Court of Claims. That provision reads:

Exclusive jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claims of any person against the city university of New York . . . (b) in connection with causes of action sounding in tort alleged to have been committed by a senior college of such university or any officer, agent, servant or employee of a senior college of such university in the course of his employment on behalf of such university . . . .

(Education Law § 6224[4].)

Here, Metro Swimming’s complaint alleges that plaintiff Tesoro’s injuries were a result of Lehman College’s negligence. (Doc. 17 at 4–6.) Lehman College is a senior college of the City University of New York. (*2641 Concourse Co. v City Univ. of New York*, 137 Misc2d 802, 803 [Ct Cl 1987] (stating that Lehman College is a senior college).) Where, as here, the claim being asserted against the senior college sounds in tort, the action lies properly not within the jurisdiction of this Court, but within the jurisdiction of the Court of Claims. (*See Feher v John Jay Coll. of Criminal Justice*, 37 AD3d 307, 308 [1st Dept 2007] (dismissing tort suit against City University for lack of subject matter jurisdiction under Education Law § 6224[4]); *Ibekweh*

v *Wiredu*, 197 AD2d 478, 478 [1st Dept 1993] (same.) The third-party action against Lehman College should therefore be heard by the Court of Claims.

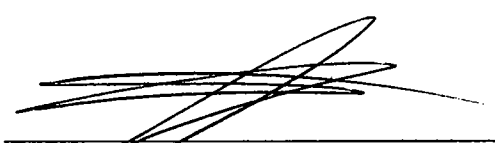
In accordance with the foregoing, it is hereby:

**ORDERED** that third-party defendant Lehman College of the City University of New York's motion to dismiss the complaint of third-party plaintiff Metropolitan Swimming, Inc. is granted, with leave to replead in the Court of Claims; and it is further

**ORDERED** that, within 30 days after this order is filed with NYSCEF, counsel for the third-party defendant is to serve a copy of this order with notice of entry on all parties and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

**ORDERED** that this constitutes the order and decision of this Court.

10/25/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	