

**L.B. v City of New York**

2023 NY Slip Op 31668(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 160793/2019

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

*Justice*

-----X

L B, a Minor Child by his Mother and Natural Guardian,  
TAIJA MALDONADO,

Plaintiff,

INDEX NO. 160793/2019

MOTION DATE 02/01/2023

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF EDUCATION, and ESCUELA HISPANA  
MONTESSORI,

Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

ESCUELA HISPANA MONTESSORI,

Third-Party Plaintiff,

Third-Party  
Index No. 595941/2022

-against-

LAKESHORE LEARNING d/b/a LAKESHORE LEARNING  
STORE,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25,  
26, 27, 28, 29, 30, 31

were read on this motion for DISMISS/SEVER.

Upon the foregoing papers, the motion by third-party defendant Lakeshore Learning d/b/a Lakeshore Learning Store (“Lakeshore”) to sever the third-party action is granted on default and for the reasons set forth below.

On November 6, 2019, plaintiff commenced this action alleging that on May 2, 2019, plaintiff L.B., an infant, sustained injuries when he tripped and fell in the “cozy corner” of a day care facility operated by defendant Escuela Hispana Montessori (“EHM”) (NYSCEF Doc. No. 2

[Amended Compl. at ¶¶9-10]). Discovery revealed that L.B. fell and injured his head against a piece of furniture in the cozy corner (NYSCEF Doc. No. 27 [Alacron EBT at pp. 27-28]).

On November 28, 2022, Escuela commenced a third-party action against Lakeshore, which manufactures and sells the furniture in question, asserting claims sounding in products liability, breach of warranty, contribution, and indemnification (NYSCEF Doc. No. 29 [Third-Party Compl. at ¶¶11-24]). On January 11, 2023, Lakeshore interposed a third-party answer, asserting counterclaims against EHM for contribution, indemnification, and breach of contract (NYSCEF Doc. No. 15 [Answer at ¶¶40-45]). Lakeshore's answer also included a crossclaim for indemnification against first-party defendants the City of New York and the New York City Department of Education (collectively, the "City") (Id. at ¶46]).

Lakeshore now moves, pursuant to CPLR §§603 and 1010, to dismiss the third-party action without prejudice or, alternatively, to sever the third-party action. In support of its motion, Lakeshore argues that the denial of its motion would result in prejudice to either itself or plaintiff. Specifically, Lakeshore asserts that it would be prejudiced if this matter proceed to trial prior to the completion of discovery in the third party action, as the majority of discovery in the main action took place prior to the commencement of the third-party action, precluding Lakeshore's involvement in same. Lakeshore adds that if the Court required the trial of this action to be held after the completion of discovery in the third-party action, the infant plaintiff would be prejudiced by the unnecessary delay in adjudicating his claim in the main action. Finally, Lakeshore argues that severance of the third-party action would not prejudice any party because EHM's third-party claims against it involve different issues of fact and law than those asserted in the main action.

## DISCUSSION

CPLR §603 provides that, “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue...” (CPLR §603).

CPLR §1010, which applies specifically to third-party actions, provides that

The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

(CPLR §1010).

Considering the foregoing, the Court concludes that severance of the third-party action is warranted. While both actions arise from the same facts, they involve disparate legal theories. Specifically, the third-party action’s claims for breach of warranty, contribution, and indemnification do not “involve questions of fact similar to those in the main negligence action[.]” (Shipsey v Katz, 58 AD2d 827, 827-828 [2d Dept 1977]; see also Gardner v City of New York, 102 AD2d 800 [1st Dept 1984]). “The former require[s] detailed testimony by expert witnesses, as well as complicated exhibits, delving into the make, construction and repair of the [subject furniture]” while the latter involves a determination as to whether defendants’ negligence caused the infant plaintiff’s injuries (Id.). In addition, the Court agrees that Lakeshore would be prejudiced in participating in the trial without first completing discovery in the third-party action, while plaintiff would be “substantially prejudiced by a long delay if compelled to await completion of disclosure in the [ ] third-party action, which was commenced more than two years after commencement of the main action” (Blechman v I.J. Peiser’s & Sons, Inc., 186 AD2d 50, 51 [1st Dept 1992]). Finally, severance does not create a risk of inconsistent verdicts, as Lakeshore’s

liability for indemnification and contribution in the third-party action is contingent on a finding of liability against EHM in the main action (See *Admiral Indem. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419 [1st Dept 2015]). Accordingly, Lakeshore's motion is granted and the third-party action is severed. As a result, Lakeshore's crossclaim against the City is converted into a third-party action in the severed action (See e.g., *Jones v City of New York*, 161 AD2d 518 [1st Dept 1990]).

In light of the foregoing, it is

**ORDERED** that Lakeshore Learning's motion for an order, pursuant to CPLR §1010, to sever or dismiss the third-party action is granted to the limited extent that the third-party action is severed from this action; and it is further

**ORDERED** that the Clerk of the Court is directed to sever the third-party action from the main action, and the third-party action shall proceed as a separate action and the Clerk of the Court shall issue an index number to the severed third-party action upon the payment of the appropriate fees by Escuela Hispana Montessori; and it is further

**ORDERED** that the crossclaims asserted by Lakeshore Learning against the City of New York and New York City Department of Education in the third-party action are hereby converted into third-party claims in the severed action; and it is further

**ORDERED** that the caption of this severed action shall read

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
ESCUELA HISPANA MONTESSORI,

Plaintiff,

-against-

LAKESHORE LEARNING d/b/a LAKESHORE LEARNING STORE,

Defendants.

-----X  
LAKESHORE LEARNING d/b/a LAKESHORE LEARNING STORE,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK and  
THE NEW YORK CITY DEPARTMENT OF EDUCATION

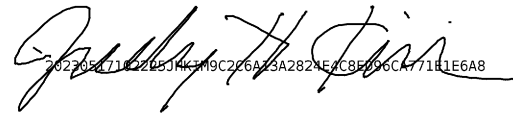
Third-Party Defendants.  
-----X

and it is further

**ORDERED** that Lakeshore Learning shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) who shall mark their records to reflect the severance; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this Court.



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5/17/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE