

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D24174  
C/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - June 9, 2009

A. GAIL PRUDENTI, P.J.  
HOWARD MILLER  
JOSEPH COVELLO  
LEONARD B. AUSTIN, JJ.

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2008-09500

DECISION & ORDER

Naquan McClain, etc., et al., appellants, v City  
of New York, respondent.

(Index No. 15415/04)

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Kurzman Karelsen & Frank, LLP, New York, N.Y. (Charles Palella of counsel) for  
appellants.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo and  
Elizabeth I. Freedman of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as  
limited by their brief, from so much of an order of the Supreme Court, Kings County (Rothenberg,  
J.), dated August 4, 2008, as granted that branch of the defendant's motion which was pursuant to  
CPLR 3211(a)(7) to dismiss the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, the facts alleged  
in the complaint must be accepted as true, the plaintiff is accorded the benefit of every favorable  
inference, and the court's function is to determine only whether the facts as alleged fit within any  
cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88). Applying these principles, the  
Supreme Court properly granted that branch of the motion of the defendant, City of New York,  
which was pursuant to CPLR 3211(a)(7) to dismiss the complaint. Although the plaintiffs sought to  
hold the City vicariously liable for certain allegedly negligent and intentional acts and omissions of  
certain employees of the New York City Board of Education (hereinafter the Board of Education),

September 8, 2009

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there is no basis for holding the City vicariously liable for the actions of employees of the Board of Education, “an entity separate and distinct from the City” (*Bleiberg v City of New York*, 43 AD3d 967, 971; *see Leacock v City of New York*, 61 AD3d 827, 827; *Perez v City of New York*, 41 AD3d 378, 378-379).

PRUDENTI, P.J., MILLER, COVELLO and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court