

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

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Submitted - December 1, 2009

REINALDO E. RIVERA, J.P.
HOWARD MILLER
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2008-02244

DECISION & ORDER

Lowayne Williams, appellant-respondent, v D & J
School Bus, Inc., et al., defendants, City of New York,
et al., respondents-appellants, BFI Waste Systems of
North America, Inc., respondent
(and a third-party action).

(Index No. 48165/00)

Law Office of Robert Kaminski, PLLC, New York, N.Y., for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers,
Diana Raynes, and Janet L. Zaleon of counsel), for respondents-appellants.

Camacho Mauro & Mulholland, New York, N.Y. (Kathleen M. Mulholland and
Reena Shah of counsel), for respondent.

In a consolidated action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Battaglia, J.), dated February 1, 2008, as granted that branch of the motion of the defendant BFI Waste Systems of North America, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, and granted that branch of the cross motion of the defendants City of New York and Board of Education of the City of New York which was for summary judgment dismissing the claim alleging that they were negligent in the ownership and/or control of a certain dumpster, and the defendants City of New York and Board of Education of the City of New York cross-appeal, as limited by their brief, from so much of the same order as denied that branch of their cross motion which was for summary judgment dismissing the remainder of the complaint insofar as asserted against them.

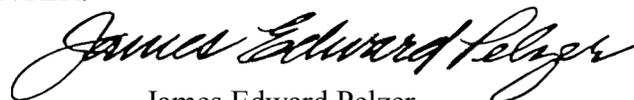
ORDERED that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The Supreme Court properly awarded summary judgment dismissing so much of the complaint as alleged that the defendant BFI Waste Systems of North America, Inc. (hereinafter BFI), and the defendants City of New York and Board of Education of the City of New York (hereinafter together the City defendants) were negligent in the ownership and/or control of a certain dumpster involved in the plaintiff's accident. BFI and the City defendants established their prima facie entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony, which demonstrated that the placement of the dumpster merely furnished the condition or occasion for the occurrence of the accident (*see Wechter v Kelner*, 40 AD3d 747, 748). In opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

Furthermore, the court properly denied that branch of the City defendants' cross motion which was for summary judgment dismissing the balance of the complaint insofar as asserted against them, i.e., the claims premised upon alleged negligence arising from their ownership and/or operation of a school bus also involved in the accident. In support of the cross motion, the City defendants submitted the affidavit of an employee who conducted a search of certain records, but was unable to locate a contract between the City and the alleged operator of the school bus. As the Supreme Court properly concluded, however, the affidavit was insufficient to establish, as a matter of law, that such a contract did not exist, since the employee did not describe the relevant records regularly created and maintained by the City, nor did she describe the practices and procedures for the creation, maintenance, retrieval, or use of such records. Furthermore, insofar as the City defendants failed to produce a contract governing the operation of the subject bus, they failed to establish, in the alternative, that the operator of the bus was an independent contractor whose actions could not be imputed to either of the City defendants (*see generally Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370; *Goodwin v Comcast Corp.*, 42 AD3d 322).

RIVERA, J.P., MILLER, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court