

**Kastrati v City of New York**

2020 NY Slip Op 33284(U)

October 6, 2020

Supreme Court, New York County

Docket Number: 159503/2015

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART IAS MOTION 52EFM

*Justice*

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INDEX NO. 159503/2015  
MOTION DATE N/A  
MOTION SEQ. NO. 002

RRON KASTRATI, FATMIR KASTRATI,  
Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF EDUCATION, DIANE GALLAGHER,  
EACH OF THE FOREGOING INDIVIDUALLY AND/OR  
D/B/A MIND, BODY & SPORT, LLOYD POLANISH, EACH  
OF THE FOREGOING INDIVIDUALLY AND/OR D/B/A  
MIND, BODY & SPORT

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103

were read on this motion to/for JUDGMENT – SUMMARY

This action arises out of injuries allegedly sustained by plaintiffs as a result of infant plaintiff's participation in an afterschool program, Mind Body & Sport. Defendants, The City of New York and New York City Department of Education (City and DOE), move pursuant to CPLR § 3212 for summary judgment on the basis that the afterschool program is not a City or DOE program thus neither entity can be held liable for any negligence by the program. Plaintiff and co-defendants oppose the instant motion.<sup>1</sup>

A party moving for summary judgment must demonstrate an absence of any material issue of fact and an entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68

<sup>1</sup> There appears to be no opposition that the City of New York should be dismissed from the case as an improper party.

NY2d 320 [1986]. Because summary judgment is a drastic remedy that deprives a litigant of his or her day in court, the evidence in the record is viewed in a light most favorable to the party opposing the motion. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Once the movant has established its entitlement to judgment as a matter of law, the burden then shifts to the opponent to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [“mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient”]).

### **Facts**

Defendant Gallagher obtained a permit to operate the afterschool program Mind, Body and Sport. The program was to be held after school hours at Public School 183 located at 419 East 66th Street New York, NY. Defendant Gallagher was not an employee of the DOE, but defendant Polanish was employed by the DOE as a gym teacher. However, the time of the accident Polanish was not acting in his capacity as a New York City public school teacher, rather he was an employee of Mind, Body & Sport, as found by Justice Tisch previously in the course of this litigation. (*see Polanish v City of NY*, 2019 NY Slip Op 30317[U], [Sup Ct, NY County 2019]). Neither Gallagher nor Polanish were being paid by the City or DOE for creating or operating the afterschool program.

Plaintiffs learned of the afterschool program through a flier sent home in infant plaintiff's backpack. To participate in the program, payment was to be remitted to Diane Gallagher and a signed permission slip sent back to school. On February 25, 2015, infant plaintiff sustained an injury to his left eye during the Mind, Body & Sport afterschool program.

### Discussion

In support of its motion DOE relies primarily on *Jonathan A. v Bd. of Educ.*, 8 AD3d 80 [1st Dept 2004]. In that case, the infant plaintiff was a participant in an afterschool program that was held at a New York City public school building. The program, Police Athletic League (PAL), was not a DOE program, rather it was an independently run program that was issued a permit to use the facilities at the school building. While a participant at the program, the infant plaintiff was sexually abused by one of its employees. The First Department held that the PAL was an independent organization, that the plaintiff was entitled to pursue a claim directly against that organization and that the alleged abuser was not an employee of the BOE, thus there was no “sound policy to expand liability” to the BOE. *Id* at 83.

In opposition, plaintiffs contend that the DOE has not established entitlement to judgment as a matter of law because they “failed to provide meaningful oversight and financial vetting” of the afterschool program. Plaintiffs also contend that the DOE may be held liable through its issuance of the permit that allowed Mind, Body & Soul to operate at P.S. 183. In support of those arguments, plaintiffs and codefendants cite various cases that relate to parties who have entered into contracts. However, that is not the case here. The Court is unpersuaded by the arguments that Mind, Body & Sport is an agent of the DOE. There has been no evidence to support that contention.

Conversely, the Court finds this case directly on point with *Jonathan A.* Thus, this Court finds that the DOE has established its entitlement to judgement as a matter of law, by undisputed evidence that Mind Body & Sport is an independent organization, not created, operated or supervised by the DOE. Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants City of New York and the New York City Department of Education pursuant to CPLR 3211 and 3212 is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant as to all claims and cross claims; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties 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 are directed to mark the court's records to reflect the change in the caption herein; 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 "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED the case be transferred to a non-City part as the City of New York and New York City Department of Education are no longer parties in this action.

10/6/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

*LF*  
LYLE E. FRANK, J.S.C.

**HON. LYLE E. FRANK  
J.S.C.**

HOM LYLE E. FRANK  
J.S.C.