Fitzmaurice v City of New York
2006 NY Slip Op 30190(U)
June 12, 2006
Supreme Court, New York County
Docket Number: 0115721/2003
Judge: Paul G. Feinman
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SCANNED ON 6/20/2006

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

PRESENT: PAUL G. FEINMAN, *Justice* PART 52

Daniel Fitzmaurice

INDEX NO. 115721/03

MOTION DATE 4/12/06

- v -

MOTION SEQ. NO. 002

City of New York

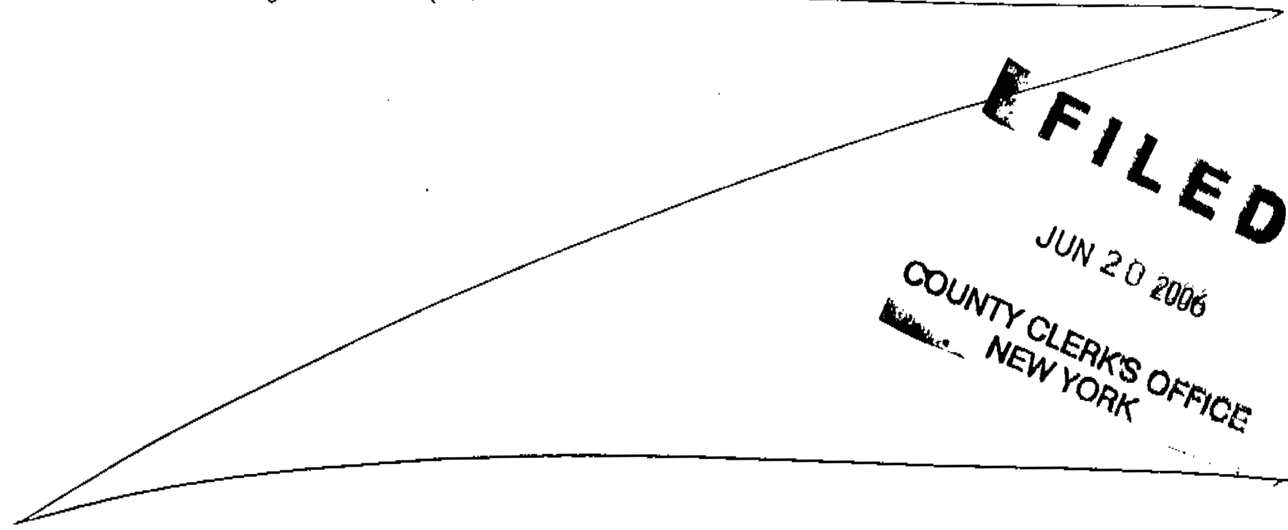
MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for CD

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross Motion — Exhibits	2
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision & order.



FILED
JUN 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: June 12, 2006

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
---X
DANIEL FITZMAURICE,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.
---X

Index Number 115721/2003
Mot. Submit Date April 12, 2006
Mot. Seq. No. 002

DECISION AND ORDER

For the Plaintiff:
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For the Defendant:
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Corporation Counsel of the City of New York
By: Robert W. Gordon, Esq.
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Papers considered in review of this motion to compel and cross-motion for a protective order:

Papers	Numbered
Notice of Motion and Affidavits Annexed..........	1
Notice of Cross-Motion......................................	2

FILED
JUN 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

PAUL GEORGE FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

Plaintiff Daniel Fitzmaurice moves pursuant to CPLR 3124 to compel defendant to produce the outstanding items of discovery set forth in its Demand for Discovery and Inspection dated October 30, 2003. Defendant City of New York cross-moves pursuant to CPLR 3122(a) for a protective order as to all the discovery still demanded. For the reasons which follow, the motion is granted and the cross-motion is denied to the extent set forth below.

Factual and Procedural Background

Plaintiff seeks to recover for damages sustained as the result of an accident on September 27, 2002 at the Julia Richmond High School Complex located in New York County (Cross. Mot. Ex. A, Complaint [hereinafter "Compl."] ¶ 7). At the time of the accident, plaintiff was an

employee of the Board of Education of the City of New York and was injured in the course of his duties (Compl. ¶ 13). He had been hired to plaster the school's stairwells and on the day in question, he slipped and fell down the stairs due to the fact that rain had seeped in through a rooftop doorway and wet the paper covering the stairs to protect them from plaster dust and dirt (Not. of Cross-Mot. Ex. B, Fitzmaurice EBT 16, 18, 19).[1]

After serving a Notice of Claim upon the City, plaintiff commenced an action in early September 2003. Issue was joined by service of the Answer on September 23, 2003 (Cross-Mot. Ex. A, Answer, Aff. of Service). On about October 30, 2003, plaintiff served a Demand for Discovery and Inspection (Not. of Mot., Nye Aff. ¶ 6). Five compliance conferences were held over the the course of the next year at which the City repeatedly entered into so-ordered stipulations with plaintiff which included agreements to respond to the Demand. Only in November 2005 did the City serve plaintiff with a Response. Out of the 20 items demanded, the City's response to 16 of them was that the City is not a proper party, that the Board of Education has control over the documents demanded by plaintiff, and that the Board of Education should be sued in its own right pursuant to the New York City Charter, chapter 20, section 521(a) and (b) (Not. of Mot. Ex. C). Plaintiff now makes a motion to compel the outstanding items of discovery, and the City cross-moves for a protective order.

Discussion

Underlying this discovery dispute are the 2002 amendments to the Education Law which transferred many of the powers formerly granted to the Board of Education to a newly created

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[1]According to defendant, plaintiff has received Workers' Compensation through the Board of Education (Cross-Mot. Gordon Aff. ¶ 7).

chancellor hired by the mayor of the City of New York (see Educ. L. § 2554, §2590-h[17]). Prior to that amendment, the New York City Board of Education was a separate entity empowered to operate and control the public schools pursuant to then-Education Law § 2554. Thus, under the prior law, it was improper to bring a cause of action against the City of New York for personal injury suffered in a public school, because although the City retained title to the schools, it did not have responsibility for their care, custody, control, or safekeeping, and the proper party was the Board of Education (*see, e.g., Goldman v City of New York,* 287 AD2d 689, 689, 690 [2d Dept. 2001], citing Educ. L. § 2554 [4]).

Under the current law, the chancellor has the powers and duties given to other cities' boards of education (Educ. L. §2590-h[17]). These powers and duties include "the care, custody, control and safekeeping of all school property" (Educ. L. §2554[4]). In addition, the chancellor has jurisdiction over all employees with respect to "the design, construction, operation and maintenance of all school building in the city school district" (Educ. L. § 2590-h[5]). The chancellor is responsible for establishing the qualifications and requirements for all custodial positions, and the standards for evaluating their performance (Educ. L. §2590-h[26]). The performance standards include cleanliness of facilities, adequacy and timeliness of making minor repairs, maintenance of good working order of facilities (Educ. L. §2590-h[26]).

The 2002 amendment to the law did not abolish the Board of Education, but the powers of this "city board" now concern policy issues (see Educ. L. §§ 2590-a[3]; 2590-b). Indeed, the city board "shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils" (Educ. L. § 2590-g). Moreover, "[t]he board shall exercise no executive power and perform no executive or administrative functions," and "nothing" in the

statute requires or authorized "the day-to-day supervision or the administration of the operations of any school within the city school district of the city of New York" (Educ. L. §2590-g). According to the bylaws of the Board of Education of the City School District of the City of New York, the thirteen-member body designated as the Board of Education "shall be known as the Panel for Educational Policy" (Cross-Mot. Gordon Aff. ¶ 7 n.1 [quoting from preamble to Board of Education bylaws]). Together with the Chancellor, superintendents, community school boards, principals, and school leadership teams, the Panel for Educational Policy makes up the Department of Education of the City of New York (Cross-Mot. Gordon Aff. ¶ 7 n.1).

The City argues that notwithstanding these amendments to the Education Law, the Department of Education is a separate and legally distinct entity from the City of New York, citing in particular Education Law ¶ 2551[2] and *Gonzalez v Esparza*, 2003 U.S. Dist. LEXIS 13711 (SDNY 2003) (Cross-Mot. Gordon Aff. ¶ 8). *Gonzalez*, a federal case applying New York law, dismissed claims against the City of New York brought by a student, finding that while the changes in the structure of the Board of Education and the control by the mayor's office over the position of Chancellor have "blurred the division between the two entities," pursuant to Education Law § 2590-g(2), the Board continues to be the government or public employer of all persons appointed or assigned by the city board or the community districts (*Gonzalez*, 2003 U.S. Dist. LEXIS 13711 at * 4). *Gonzalez* relies on another federal district court decision, *Linder v City of New York*, 263 F. Supp. 2d 585 (EDNY 2003), which relied on pre-2002 case law and

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[2]Education Law § 2551 states: "The board of education of each city school district of a city with one hundred twenty-five thousand inhabitants or more according to the latest federal census is hereby continued as a body corporate." This statute was not amended in 2002.

which was not challenged by the plaintiff.

In New York, there appear to be only two officially published decisions addressing this issue, and neither follows the reasoning of the federal decisions in reaching their own. In *Perez v The City of New York*, 9 Misc.3d 934 (Sup. Ct., Bronx County 2005), the court denied the City's motion for dismissal or summary judgment dismissal holding that the changes in the status of the Board were a "wholesale transfer of power and responsibility from the Board of Education to the Mayor," and that the City should not be allowed to shield itself from liability by claiming the Board of Education is responsible (9 Misc. 3d at 936-937). In reaching its conclusions that the City had become the proper party for suit, *Perez* noted, among other things, that "the only power granted to the Board with respect to litigation, contained in Education Law §2590-g(6) is to 'approve litigation settlements *only* when such settlements would significantly impact the provision of educational services or programming within the district'" (9 Misc. 3d at 936, emphasis in original). In addition, *Perez* noted that it was unclear what the liability would be "of an entity which as no executive power, performs no administrative functions and is not authorized to supervise or administer the operations of any school within the city school district of the City of New York" (9 Misc. 3d at 936). Similarly, in *Matter of P.I. v New York City Board of Education*, 2006 NY Slip Op. 50051U, 10 Misc.3d 1073A (Sup. Ct., New York County 2006), the court noted the "ambiguity engendered by the recent amendments to the Education Law transferring control over the City schools to the Chancellor controlled by the Mayor," and held that the claim brought by the plaintiff was not "patently meritless" for purposes of allowing time to file a late notice of claim (*Matter of P.I.* at * 2).

Although the City argues that the 2002 amendments concerned the political

accountability for the quality of education and not the legal responsibility for incidents occurring within the schools, and "did *not* explicitly or implicitly alter the allocation of responsibility for tort claims" (Cross-Mot. Gordon Aff. ¶ 10, emphasis in original), this is belied by the sections of the statute quoted or referred to above, which clearly strip the Board of its day-to-day administrative functions. The City also argues that there are other public benefit corporations where the Mayor appoints the governing members, including the New York City Health and Hospitals Corporation and the New York City Housing Authority, which are separate entities and must be sued separately from the City (Cross-Mot. Gordon Aff. ¶ 13). However, among the enumerated powers of both the New York City Health and Hospitals Corporation and the New York City Housing Authority is the power to sue and be sued (McKinney's Unconsol. L. §7385[1]; Public Housing Law §37[s]), a power conspicuously absent among the powers currently conferred upon the Department of Education.

Ordinarily where a defendant fails to seek timely a protective order pursuant to CPLR 3122, the court does not inquire into the propriety of the discovery requests (*Zurich Ins. Co. v State Farm Mutual Automobile Ins. Co.*, 137 AD2d 401 [1st Dept.1988]). Failure to timely move for a protective order after service of notice is deemed a waiver of the right to object to discovery. However, a court in its discretion may relieve a party from its default under CPLR 3122 in failing to timely move for a protective order on a notice for discovery and inspection (*Handel v Handel*, 26 NY2d 853 [1970]). Thus, where the disclosure requests are palpably improper, this rule is not strictly observed (*Haenel v November & November*, 172 AD2d 182, 182 [1st Dept. 1991]). Accordingly, although the City's cross-motion for a protective order is denied as concerns the 16 items objected to in its Response to Plaintiff's Demands, the scope of the

requests is narrowed as follows:

As to Item 8, the scope of the demand is narrowed to a three-year period prior to the date of accident. As to Item 9, the scope of the demand shall initially encompass five years prior to the date of the accident, but only as relevant to the roof, roof door, and the fifth and sixth floors of the stairwell where the accident occurred. As to Item 10, the scope is restricted to statements which are not subject to privilege and which were not previously turned over regarding the accident and the worksite.

Conclusion

Accordingly, it is

ORDERED that the motion to compel is granted to the extent set forth above, and the cross-motion for a protective order is denied to the extent set forth above; and it is further

ORDERED that the City is directed to produce the outstanding discovery with 45 days of service of a copy of this order with notice of its entry; and it is further

ORDERED that the parties are to appear for their previously scheduled compliance conference on June 21, 2006 at 2:00 at Supreme Court, 80 Centre Street, Room 103.

This constitutes the decision and order of the court.

Dated: June 12, 2006
New York, New York

J.S.C.

FILED
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