

Rosenbaum v City of New York

2007 NY Slip Op 34203(U)

December 19, 2007

Supreme Court, New York County

Docket Number: 0117650/1999

Judge: Karen Smith

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KAREN SMITH

PART 62

Justice

Index Number : 117650/1999

ROSENBAUM, SIMEON

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 017

DISMISS

10

INDEX NO. 117650-99

MOTION DATE 11/29/07

MOTION SEQ. NO. # 017

MOTION CAL. NO. _____

read on this motion to ~~for~~ dismiss cross-claims,
cross-motion to dismiss cross-claims and cross-motion
to sever claims

PAPERS NUMBERED	
_____	1
_____	2
_____	3
_____	4-6
_____	7
_____	8-9
_____	10

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits
Notice of Cross-Motion to dismiss Cross-Claims, Affidavit and Memorandum
Notice of Cross-Motion to sever

Cross-Motion: Yes No (2)

Upon the foregoing papers, it is ordered that this motion and two cross-motions are
decided in accordance with the annexed decision
and order

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

FILED
DEC 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/19/07

KSS
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
SIMEON ROSENBAUM, an infant by his mother and Natural
Guardian, REBECCA ROSENBAUM and REBECCA,
ROSENBAUM, individually,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, ADMINISTRATION FOR CHILDREN'S
SERVICES, NEW YORK CITY BOARD OF EDUCATION,
RABBI & MRS. YISROEL GORNISH, O'HEL CHILDRENS
HOME AND FAMILY SERVICES and ADAM KATZ

Defendants.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Index No.: 117650/1999
Motion Seq.: 017
Motion Date: 11/29/2007

DECISION AND ORDER

FILED
DEC 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants', The City of New York's ("CNY"), New York Police Department's ("NYPD") Administration for Children's Services's ("ACS") and New York City Board of Education's ("BOE") (collectively referred to as the "Municipal Defendants"), motion for leave to amend their answer herein and for summary judgment dismissing all cross-claims asserted against them herein by Adam Katz ("Katz"), O'Hel Family Home and Children's Services ("O'Hel"), and Rabbi and Mrs. Yisroel Gornish (the "Gornishes") is granted in part and denied in part, Katz's cross-motion for summary judgment dismissing the cross-claims asserted against him herein by the Municipal Defendants is granted and plaintiff, Rebecca Rosenbaum's ("Rosenbaum") cross-motion to sever her claims of false arrest and false imprisonment from the remaining portions of this action is denied.

Plaintiff brought this action alleging, inter alia; 1) Rosenbaum was falsely arrested and imprisoned by the NYPD, 2) Simeon Rosenbaum ("Simeon"), Rosenbaum's son, was

improperly removed from Rosenbaum's custody by the Administration for Children's Services ("ACS"), 3) Simeon suffered physical abuse while in ACS custody in foster care with the Gornishes and O'Hel due to their negligent supervision of Simeon and others within their care, 4) BOE failed to properly report and act upon Simeon's reports to BOE concerning the physical abuse he was receiving while in foster care and, 5) Katz, an officer and shareholder in Rosenbaum's corporate landlord, precipitated all of these events by making and filing a false report of Rosenbaum's neglect of Simeon.

The Municipal Defendants now move for leave to amend their answer herein to assert a defense based upon common law and statutory immunity. The Municipal Defendants also move for summary judgment dismissing all cross-claims asserted against them by the other defendants in this action to the extent that said cross-claims are based upon the actions of ACS and/or the alleged failure of BOE to properly respond to Simeon's report that he was being physically abused while in foster care. The Municipal Defendants contend statutory and common law immunity applies with respect to the actions of ACS and the documentary evidence in this matter conclusively refutes the contention that BOE failed to respond to Simeon's report of his abuse. The Gornishes submitted opposition to the Municipal Defendants' motion arguing, if the Gornishes' then pending summary judgment motion was denied, such a determination necessitates the finding that a question of fact exists with respect to the Municipal Defendant's summary judgment motion.

Katz submitted a cross-motion seeking dismissal, *inter alia*, of the Municipal Defendants' cross-claims against Katz and opposing the dismissal of Katz's cross-claims against the Municipal Defendants.

All the cross-claims asserted by the various defendants in this action are premised upon the concept that the cross-claiming party was not responsible for the plaintiffs' injuries but, to the extent the plaintiffs' injuries were not caused by their own negligence, the defendants against whom the various cross-claims are asserted, were the negligent parties. Therefore, the cross-claiming defendants each seek to be held harmless and indemnified by the party or parties who are determined to be responsible for the plaintiffs' injuries. Alternatively the cross-claiming defendants argue that, to the extent they become liable for any of the plaintiffs' damages, that liability must be apportioned among the parties who are actually determined to be responsible for the plaintiffs' injuries.

Additionally, Rosenbaum has submitted a cross-motion seeking to sever her claims for false arrest and false imprisonment against the NYPD from the remaining claims in this action¹. In her cross-motion, Rosenbaum argues that her claims for false arrest and false imprisonment are "... separate and distinct from the remaining claims ..." and "... should be severed in order to avoid confusion and simplify the trial..." (Affirmation in Support of Cross-Motion, page 2).

The court will first address Rosenbaum's cross-motion as the relief she is currently requesting has twice been denied by the court in this action. Rosenbaum had a full and fair opportunity to litigate the issue of severance in the context of the prior motions and Rosenbaum has not presented any new information which would justify changing the prior determinations. In spite of Rosenbaum's assertions to the contrary, it has already been determined that Rosenbaum's claims against the NYPD involve common issues of law and fact with the other claims asserted

¹ In addition to Rosenbaum's claims against the NYPD, Rosenbaum still has a claim pending against Katz and Simeon still has a claim pending against O'Hel.

in this action and that Rosenbaum would not be prejudiced by a single trial of all the claims asserted herein. The prior determinations are the law of this case. Accordingly, Rosenbaum's cross-motion is denied.

The Municipal Defendants' motion to amend their answer is also denied. With the exception of the claims against the NYPD for false arrest and false imprisonment, the complaint in this action has been dismissed as it relates the Municipal defendants. As none of the proposed amendments effect the two remaining claims, there is no basis for the court to grant the Municipal Defendants' request in this regard.

The remaining branches of the Municipal Defendants' motion and Katz's cross-motion each seek summary judgment dismissing cross-claims which have been asserted against the moving defendants. Initially; "...the proponent of a summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital, et al.*, 68 NY2d 320,324 [1987], internal quotations and citations omitted). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

With respect to the cross-claims asserted by the Gornishes, the Municipal Defendants' motion has been rendered moot by reason of the granting of the Gornishes' motion for summary judgment dismissing the complaint as against them. Since the Gornishes have suffered no damages for which they may seek indemnity, and their cross-claims all sound in indemnity and apportionment, their cross-claims against the Municipal Defendants must fail. Thus, the motion

to dismiss the Gornishes cross-claims is granted.

The branch of the Municipal Defendants' motion seeking dismissal of all cross-claims as against ACS is denied. ACS has failed to make a *prima facie* showing of its entitlement to judgment as a matter of law concerning the cross-claims of O'Hel and Katz. The Municipal Defendants assert that ACS has statutory and common law immunity from civil liability for its determinations concerning the rendition of foster care services. However, the complaint in the instant action alleges negligent supervision of Simeon and other individuals in the foster care system after a determination to render foster care had been made and the individuals involved were already within the foster care system. "The weight of appellate authority in this state does not recognize governmental immunity where recovery is predicated on negligence in the supervision of care provided by foster parents to a child placed in their custody ... This court agrees that liability may be imposed upon a state or its subdivisions for injuries sustained by children due to negligent oversight of the foster homes that care for them" (*Sean M v City of New York, et al.*, 20 AD3d 146, 160 [1st Dept, 2005], internal citations omitted). As the Municipal Defendants have not tendered any evidence in admissible form to show that there are no material issues of fact with respect to their potential liability for the negligent supervision of Simeon and the other individuals involved in this matter, the Municipal Defendants' are not entitled to summary judgment dismissing the cross-claims against ACS.

The branch of the Municipal Defendant's motion seeking summary judgment dismissing the cross-claims against BOE is granted. The Municipal Defendants have submitted evidence in admissible form to demonstrate BOE properly responded to Simeon's reports of his abuse. None of the parties asserting cross-claims against BOE have opposed this motion by presenting any

evidence in admissible form to raise any triable issue of fact with respect to the cross-claims. Therefore, BOE is entitled to summary judgment dismissing the cross-claims asserted against it.

Similarly, Katz has made a *prima facie* showing of his entitlement to judgment as a matter of law dismissing the Municipal Defendants' cross-claims against him. The complaint herein asserts Katz's liability in this matter is premised upon his alleged negligence, carelessness and recklessness in allowing or causing a false report of Rosenbaum's neglect of Simeon to be filed with ACS. In his cross-motion, Katz has submitted evidence in admissible form to make a *prima facie* showing he was not the individual who filed the allegedly false report and the accuracy of the allegations in the report was determined in a Family Court proceeding. None of the Municipal Defendants has responded with evidence in admissible form to raise a triable issue of fact with respect to the Municipal Defendants' cross-claims against Katz. Therefore, Katz is entitled to summary judgment dismissing the cross-claims asserted by the Municipal Defendants against Katz herein. Accordingly, it is;

ORDERED that Rosenbaum's motion for severance of her claims against NYPD, the Municipal Defendants' motion to amend their answer in this action to assert defenses of statutory and common law immunity and the Municipal Defendants' motion for summary judgment dismissing O'Hel's and Katz's cross-claims against ACS are all denied, and it is further;

ORDERED that the Municipal Defendants' motion for summary judgment dismissing all cross-claims asserted herein against BOE and Katz's cross-motion dismissing the cross-claims asserted by the Municipal Defendants against Katz are both granted, and it is further;

ORDERED: that, upon the service of a copy of this decision and order, with notice of entry hereof and such other forms and fees as the clerk may reasonable require, on the


appropriate division of the clerk's office at 60 Centre Street, New York, New York, the clerk shall forthwith enter judgment dismissing all cross-claims asserted against BOE only, and dismissing the cross-claims asserted by the Municipal Defendants against Katz only and, it is further;

ORDERED that all other claims herein are severed and this action shall continue.

The foregoing constitutes the decision and order of this court.

Dated: December 19, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
DEC 28 2007
NEW YORK
COUNTY CLERKS OFFICE