

**Grant v Washington Hgts. & Inwood Dev. Corp.**

2009 NY Slip Op 31665(U)

July 21, 2009

Supreme Court, New York County

Docket Number: 405847/07

Judge: Saliann Scarpulla

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

PRESENT: Hon. Sallann Scarpulla

PART 52

*Justice*

Matthew Grant, an infant, by his mother and natural guardian, Suzanne N. Taylor, individually,

INDEX NO. 405 847-2007

Plaintiffs,

MOTION DATE June, 24, 2009

- v -

Washington Heights and Inwood Development Corp.,  
The City of New York, City of New York Parks and Recreation, and the Wayfinder Experience, Inc.,

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

Defendants.

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

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

PAPERS NUMBERED

1

Answering Affidavits \_ Exhibits \_\_\_\_\_

2, 3

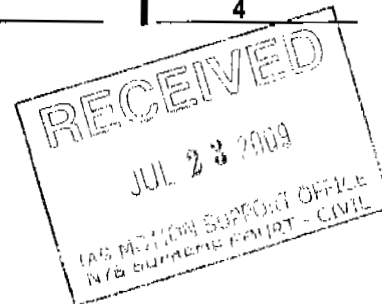
Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.



**FILED**

JUL 27 2009

COUNTY CLERK'S OFFICE  
NEW YORK

This Constitutes Decision and Order of the Court.

Dated: 7/21/09

Sallann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

*Handwritten signature*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X  
MATTHEW GRANT, an infant, BY HIS MOTHER  
AND NATURAL GUARDIAN SUZANNE N.  
TAYLOR, individually,

Index Number 405847/07  
Submission Date 6/24/09  
Mot. Seq. No. 001

Plaintiffs,

-against-

**DECISION & ORDER**

WASHINGTON HEIGHTS AND INWOOD  
DEVELOPMENT CORPORATION, THE CITY OF  
NEW YORK, CITY OF NEW YORK PARKS AND  
RECREATION, AND THE WAYFINDER  
EXPERIENCE, INC.,

Defendants.

----- X  
**Appearances:**

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**For Defendant the City of New York:**

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**For Defendant the Wayfinder Experience:**

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By Lawrence N. Rogak  
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Mot. and Motion with Annexed. Ex.....	<u>1</u>
Affirm in Opp. with Annexed Ex. by Plaintiff.....	<u>2</u>
Affirm. in Opp. with Annexed Ex. by Wash. Inw.....	<u>3</u>
Reply Affirm.....	<u>4</u>

**HON SALIANN SCARPULLA, J.:**

Defendants the City of New York and the City of New York Parks and Recreation  
(hereinafter collectively "the City") move for summary judgment pursuant to CPLR 3212  
for dismissal of all claims and cross-claims against them, or, in the alternative, for

summary judgment against defendant Washington Heights and Inwood Development Corporation (“WHID”) on the City’s claim for contractual indemnification.

This case arises out of an accident that befell plaintiff Matthew Grant (“Grant”) on October 8, 2006. On that day, Grant, then ten years of age, attended with his mother, Suzanne N. Taylor (“Taylor”), the Medieval Festival at the Fort Tryon Park. The festival drew throngs of people and featured numerous entertainment events for both children and adults. As part of one of these events, about one hundred children were divided into two groups, the light and the dark. The children were all given foam swords and were told to hit with swords the children from the opposing team. A stricken child was to act “dead” by lying motionless on the ground. Grant participated in the play and was injured when he tripped on one of the “dead” children lying on the ground.

Taylor brought this action on behalf of herself and Grant in July, 2007. In the complaint, Taylor asserts a cause of action on behalf of Grant for negligent supervision and oversight and a cause of action in her own right for loss of services and consortium and the financial losses resulting from Grant’s injury. The City now moves for summary judgment on the grounds that neither the City’s action nor inaction was the proximate cause of Grant’s injuries, and that the City owed Grant no special duty to protect him from the alleged negligence of co-defendants WHID and the Wayfinder Experience, Inc. (“Wayfinder”). Plaintiffs and WHID oppose the City’s motion.

## Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The motion must be supported by (1) an affidavit, (2) by a copy of the pleadings and (3) by other available proof, such as depositions and written admissions. CPLR 3212 (b). To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1<sup>st</sup> Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1<sup>st</sup> Dep’t 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

The City maintains that it did not breach a duty of care and did not cause Grant’s injuries. The City submits its contract with WHID, which shows that WHID, as an independent contractor, assumed the responsibility for organizing and overseeing the Medieval Festival, including making arrangements for the services of instructors who supervised the “jousting” play during which Grant was injured. WHID then contracted with Wayfinder, which provided its employee Rufus Griffin Johnston and an apparent independent contractor Jacques Covell as the instructors for the subject “jousting” event.

As a general rule, a principal is not vicariously liable for the independent contractor's negligent acts or omissions, absent appreciable amount of supervision, oversight, and control exercised by the principal over the contractor's performance. *See Rosenberg v Equitable Life Assurance Society of the United States*, 79 N.Y.2d 663, 668 (1992)(internal citations omitted); *see also Goodwin v Comcast Corp.*, 42 A.D.3d 322 (1<sup>st</sup> Dep't 2007). The mere retention of general supervisory powers over an independent contractor is insufficient to impose vicarious liability on the principal. *See Brown v Transcare, et al.*, 27 A.D.3d 350 (1<sup>st</sup> Dep't 2006) (finding the City had no vicarious liability where the ambulance personnel provided by an independent contractor were not hired, compensated, or trained by the City).

Here, the City has shown that its involvement with, and participation at, the Medieval Festival was limited. The City granted WHID a facility permit and had several on-sight meetings and walkthroughs with WHID contacts in preparation for the festival. The City also provided pole taps, put up the banners on the light poles and arranged for the recycling services before and during the event. Additionally, the City set up the stage and the bleachers for the musical entertainment. The New York Police Department and the Parks and Recreation enforcement patrol provided security.

The City, however, did not take upon itself any tasks involving the provision of entertainment and vending services. None of the City's employees undertook participating in or supervising the plays, games and other recreational activities. Nor did the City direct the actions of Rufus Johnston or Jacques Covell of Wayfinder before or

during the “jousting” game, at which Grant was unfortunately injured. Accordingly, the City did not exercise sufficient control over the recreational activities at the Medieval Festival to raise a triable issue of fact as to whether it was vicariously liable for the acts of the instructors provided by WHID and Wayfinder. *See Duhe v Midence*, 48 A.D.3d 244, 245 (1<sup>st</sup> Dep’t 2008).

Grant argues that this case is an exception to a general rule that a principal is not liable for the acts of its independent contractor. The exceptions generally recognized involve situations where the principal has a statutory duty to perform or control the work, has assumed a specific duty by contract, is under a duty to keep premises safe, or has assigned work to an independent contractor that one knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated. *Rosenberg*, 79 N.Y.2d at 668. Grant relies on the last two exceptions.

Grant maintains that City is liable for his injuries because the City owns the Fort Tryon Park and is under a non-delegable duty to maintain its property in a reasonably safe condition under the existing circumstances. *See Perez v Bronx Park South Assoc.*, 285 A.D.2d 402, 403 (1<sup>st</sup> Dep’t 2001). Grant’s reliance on the City’s status as a landowner is misplaced. Generally, as a landowner, the municipality must act “as a reasonable person maintaining the property in a reasonable safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.” *Preston v State of New York*, 59 N.Y.2d 997, 998 (1983). To be liable for a defect on land, the defect has to be visible and apparent,

and it must have existed for a sufficient length of time before the accident for the owner to have discovered the defect and remedied it. *See Pappalardo v Health & Racquet Club*, 279 A.D.2d 134, 143 (1<sup>st</sup> Dep't 2000).

Grant has presented no evidence of either a defect situated on the land where he fell, or that the defect proximately caused his injury. It is undisputed that Grant's fall resulted from his tripping on a live person in the course of playing with other children. Grant offered no authority that a live child lying on the ground could be considered a "defect on land," which could then trigger the City's liability as a landowner. Therefore, the City cannot be held liable for Grant's accident simply on account of its status as the landowner of the Fort Tryon Park.

Grant also contends that the City owed him a non-delegable duty of care because the "jousting" game was an inherently dangerous activity. This exception has been applied by courts mostly in the cases of construction, demolition, and highway repair accidents. *See e.g., Tytell v Battery Beer Distributing Inc.*, 202 A.D.226, 227 (1<sup>st</sup> Dep't 1994) (finding the construction of a sidewalk bridge for pedestrians to be inherently dangerous); *see also Christie v Ranieri & Sons*, 194 A.D.2d 453, 454 (1<sup>st</sup> Dep't 1993) (finding garage demolition to be inherently dangerous). Again, Grant cites to no authority for the proposition that a children's game could qualify for this exception. Moreover, the "jousting" game in which Grant partook was not, by its very nature, inherently dangerous. *C.f., Dolan v City of New York*, 5 A.D.2d 300, 301 (1<sup>st</sup> Dep't 1958) (finding monkey bars not to be inherently dangerous).

As an alternative theory of liability, Grant argues that the City breached a special duty it owed to Grant, which arose when the City took custody of Grant at the “jousting” game, “co-sponsored” the Medieval festival, and participated in the general oversight of the Fort Tryon Park. The City counters that the City acted in furtherance of the performance of the City’s governmental functions and that the City owed Grant no special duty.

Under the governmental immunity doctrine, a municipality and its agents cannot be held liable for negligence in the exercise of a governmental function absent a special duty owed by the municipality to use due care for the benefit of a particular plaintiff. *See Lauer v City of New York*, 95 N.Y.2d 95, 101 (2000). Here, none of the functions the City performed at the Medieval Festival established a special relationship with Grant. Furthermore, Grant’s contention that the City “took custody” of him is unsupported. Accordingly, the City neither owed nor breached any special duty.

Therefore, as Grant has failed to raise an issue of fact as to the City’s liability for the alleged actions and omissions attributable solely to WHID and Wayfinder, the City is entitled to summary judgment dismissing Grant’s first cause of action. The second cause of action, personal to Taylor, must also fail against the City, as it is predicated on the success of Grant’s cause of action.

In accordance with the foregoing, it is therefore

ORDERED that the motion by defendants the City of New York and City of New York Parks and Recreation for summary judgment dismissing plaintiff's complaint and all cross-claims is granted, and the Clerk of the Court is directed to sever and dismiss the action and any cross-claims pled against defendants the City of New York and City of New York Parks and Recreation; and it is further

ORDERED that the action shall continue under this index number against defendants Washington Heights and Inwood Development Corporation and the Wayfinder Experience, Inc.; and it is further

ORDERED that defendants the City of New York and City of New York Parks and Recreation shall serve a copy of this order within twenty (20) days upon the Trial Support Office (60 Centre Street, Room 158) and, upon such service, the Trial Support Office shall reassign this action to a non-City General IAS Part inasmuch as the City is no longer a defendant.

This constitutes the decision and order of the Court.

Dated: July 21, 2009

New York, New York

ENTER:

*Saliann Scarpulla*

Hon. Saliann Scarpulla, J.S.C.

**FILED**  
JUL 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK