

**Morel v City of New York**

2010 NY Slip Op 32079(U)

August 3, 2010

Supreme Court, New York County

Docket Number: 116668/2009

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON *Justica*

PART 55

Index Number : 116668/2009  
**MOREL, RAMON**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*See Answered Decision,  
Order + Judgment.*

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/3/10

JANE S. SOLOMON *J.S.C.*

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

RAMON MOREL,  
  
Petitioner,

Index No. 116668/2009  
DECISION, ORDER  
and JUDGMENT

-against-

THE CITY OF NEW YORK, JOEL I.  
KLEIN as Chancellor of the City  
School District of the City of  
New York, and the BOARD OF  
EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK,

Respondents.

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SOLOMON, J. :

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Petitioner Ramon Morel (Morel), a public school teacher, brings this Article 78 proceeding to annul Respondents' determination not to provide him with counsel to defend him in a federal suit brought against him by a student, and for indemnification in that action under General Municipal Law (GML) 50-k(2) and GML 50-k(3).

FACTS

Morel is a tenured teacher at the Academy of Environmental Science, a junior high and high school in Manhattan. He also serves as the basketball coach for boys and as the athletic director. On March 6, 2008, Morel was closing the gymnasium at the conclusion of a basketball game. Four 14 year old female students remained in the gym. Morel instructed them to leave. While ushering them out of the gym, Morel pushed one of the students, Wanda Diaz (Diaz), and an altercation broke

out between them. The police were called and Diaz was arrested. The remaining three students were arrested on a later date.

The Department of Education (DOE) caused its Office of Special Investigations (OSI) to investigate whether Morel punched Diaz. OSI interviewed Morel, who denied punching Diaz and stated that while he was trying to get the students to leave the gym he may have inadvertently pushed her, that Diaz then cursed at him and when he went to shut the gym door behind her, she punched him in the face; Diaz, who reported that Morel told her to leave the gym, and that as she was doing so, Morel pushed and then punched her; the three other students, who each reported that Morel told them to leave the gym, threatened that he would "push them out," and then pushed and punched Diaz; the school's principal, who had no information to offer about the event; a substitute teacher, also involved in the altercation, who corroborated Morel's story; and a bystander teacher who stated that he witnessed Morel hit Diaz, and believed that Morel initiated the altercation (see, OSI Report, attached to Verified Answer, Ex. C).

On August 20, 2008, OSI concluded that "[t]he allegation that Mr. Morel punched [Diaz] has been substantiated. Moreover it has been established that Mr. Morel pushed [Diaz] at least once" (Id., p. 6). Notably, the Board of Education had not initiated a disciplinary proceeding regarding Morel's actions at the time he filed this petition.

On March 6, 2009, the parents of the four students sued Morel, the City of New York, and several police officers (*Wanda Aguila, et al, v. City of New York*, 09 CV 2072 (SDNY) (the Aguila Action), alleging, as relevant, that Morel's actions violated Diaz's civil rights.

Morel requested that respondents provide him with legal representation in his defense of the Aguila Action, pursuant to his rights as an employee of the City of New York (see, Education Law (EL) §§ 2560, 3028 and GML § 50-k, discussed *infra*). By letter dated July 27, 2009, the City's Corporation Counsel denied the request on the ground that Morel's actions were not within the ambit of GML § 50-k(2) (Denial Letter, attached to Petition, Ex. 2). No further reason was given. Subsequently, Morel hired private counsel to represent him in the Aguila Action, and also filed this petition.

## DISCUSSION

### 1. Statutory Framework

Section 50-k(2) of the General Municipal Law (GML) provides, as relevant:

[T]he city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court . . . arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.

EL § 2560 specifically extends this protection to DOE employees.

Section 3028 of the Education Law is a specific statute that governs legal representation of Board of Education employees. It states:

[E]ach board of education . . . in the state shall provide an attorney or attorneys for, and pay such attorney's fees and expenses necessarily incurred in the defense of a teacher . . . in any civil or criminal action or proceeding arising out of disciplinary action taken against any pupil of the district while in the discharge of duties within the scope of his employment . . . (EL § 3028).

As a threshold matter, it is determined that the statute at issue in this matter is EL § 3028, and not GML 50-k(2). In a conflict between a general statute and a specific statute, the specific statute controls (*Board of Managers of Park Place Condominium v. Town of Ramapo*, 247 AD2d 537 [2<sup>nd</sup> Dept. 1998]). Here, EL § 3028 is a specific statute, and it carves out an exception to GML 50-k(2) for claims arising from a teacher's disciplinary actions.

Accordingly, EL § 3028 is the controlling statute. Under it, the only ground upon which representation can be refused is scope of employment.

2. Scope of Employment:

Corporation Counsel's determination to deny representation cannot be nullified unless it "lacks a factual basis" (*Matter of Williams v. City of New York*, 64 NY2d 800, 802 [1985]).

The key issue in determining whether an employee was acting within the scope of employment is whether the specific conduct was a natural and foreseeable incident of the employee's work (*Blood v. Board of Educ. of City of New York*, 121 AD2d 128, 130 [1<sup>st</sup> Dept, 1986]).

In *Blood*, the petitioner, a teacher, was angered by a student in her class. "In a fit of rage," she snatched a book-bag from the student. The bag hit another student in the eye, injuring him. In the resulting civil action, Corporation Counsel refused to defend her. She petitioned, lost, then appealed. The First Department held that her actions were within the scope of her employment because:

"[I]t is not so unusual an occurrence that a teacher loses her temper with her class. Indeed, displays of anger in the classroom cannot be regarded as other than natural and sometimes necessary incidents of a teacher's work. Nor can it be reasonably expected that a teacher's anger will always be well gauged to the occasion and unaccompanied by impulsive behavior. Such behavior, although undesirable, is a generally foreseeable eventuality of teaching and, as such, must be deemed within the scope of a teacher's employment . . . Only classroom conduct maliciously motivated or so extreme as to remove itself from any natural connection with a teacher's occupational duties would constitute an adequate factual basis for a determination . . . that the scope of employment had been exceeded" (*Id.*, at 131 [citing *Riviello v. Waldron*, 47 NY2d 297 [1979]]).

Respondents rely on the OSI report as the basis for the denial of representation. They contend it substantiates that Morel's actions were outside the scope of his employment.

A review of that report reveals that all relevant interviewees in the OSI report claimed that Morel was attempting to remove students from the school's gymnasium after a school event had finished. It is uncontested that this is within the scope of his duties as the School's basketball coach and athletic director. Similarly, all the interviews relate that Morel initially pushed Diaz and that the fight escalated from there. Morel, himself, admits that he pushed Diaz, inadvertently, while trying to remove her from the gym.

The evidence presented in the OSI report shows that Morel was acting within the scope of employment. It relates that Morel appeared to lose his temper with a recalcitrant or disobeying student. Just as in *Blood*, this type of action, though not "well gauged", is foreseeable (see also, *Inglis v. Dundee Cent. School Dist. Bd. of Educ.*, 180 Misc2d 156 [Sup Ct, New York County, 1999] [teacher slapping a misbehaving student held reasonably foreseeable]). Moreover, OSI's report did not make a finding that Morel's actions were maliciously motivated or extreme. This position is bolstered by the fact that the DOE, in over a year since the incident, had not brought disciplinary charges against Morel.

Accordingly, there is no evidence that Corporation Counsel had a factual basis to determine that Morel was acting outside the scope of his employment when he pushed Diaz out of the gym.

### 3. Indemnification:

Morel also seeks to compel indemnification under GML 50-k(3). Notably, respondents have made no determination regarding indemnification, nor is there any evidence that it was contemplated in the Corporation Counsel's letter. Accordingly, Morel's indemnification request is outside the scope of this petition.

In accordance with the foregoing, it hereby is

ORDERED and ADJUDGED that respondents' determination to deny petitioner Ramon Morel's request for representation in the Aguila Action under section 50-k(2) of the General Municipal Law was arbitrary and capricious, and it further is

ORDERED, pursuant to Education Law § 3028, that Corporation Counsel is directed to file a notice of appearance for petitioner in the Aguila Action, or make other arrangements for his representation in that action, within 20 days of service of a copy hereof with notice of entry; and it further is

ORDERED that Respondents shall reimburse petitioner Ramon Morel for all reasonable legal fees incurred in his defense of the Aguila Action, and the issue of the amount due to petitioner from respondents is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it further is

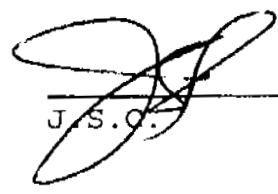
ORDERED that entry of a final judgment is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it further is

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Special Referee (Room 119) to arrange a date for the reference to a Special Referee; and it further is

ADJUDGED that the petition is otherwise denied.

Dated: *August 3, 2010*

ENTER:

  
\_\_\_\_\_  
J. S. O.

**JANE S. SOLOMON**

**UNFILED JUDGMENT**  
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