SHORT FORM ORDER

INDEX No. 08-25617
CAL. No. 10-02003MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-13-11
ADJ. DATE 8-17-11
Mot. Seq. # 003 - Mot D; CASEDISP

MARIA C. CASTILLO, as parent and natural guardian of infant CARLOS CASTILLO, and MARIA C. CASTILLO, individually, Plaintiffs, - against - BRENTWOOD UNION FREE SCHOOL DISTRICT, SUFFOLK TRANSPORTATION CORP. and PLINO BUSTILLO, Defendants.	CASSISI & CASSISI, P.C. Attorney for Plaintiffs 114 Old Country Road Mineola, New York 11501 CAMPOLO, MIDDLETON & McCORMICK, LLP Attorney for Defendants 3340 Veterans Memorial Highway Suite 400 Bohemia, New York 11716

Upon the following papers numbered 1 to 30 read on this motion for RRRR; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 20; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21-28; Replying Affidavits and supporting papers 29-30; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendants, Brentwood Union Free School District, Suffolk Transportation Corp. and Plino Bustillo, pursuant to CPLR §2221 (d) and (e) for an order granting renewal or reargument of motion (002), which motion was brought pursuant to CPLR §3212 for summary judgment dismissing the complaint, and which motion was denied, is granted as to reargument, and upon reargument, summary judgment is granted and the complaint is dismissed in its entirety.

CPLR §2221 (d) (2) provides a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. It is a basic principle that a movant on reargument must show that the Court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (***Bolos v Staten Island Hosp.,*** 217 AD2d 643, 629 NYS2d 809 [2d Dept 1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (***Pahl Equipment Corp. v Kassis,*** 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (***Giovanniello v Carolona Wholesale Office Machine Co., Inc.***, 29 AD3d 737, 815 NYS2d 248 [2d Dept 2006]). Motion (002) was not decided on the merits as the defendants failed to submit a complete copy of the pleadings, including their answer. It is noted that this Court could have considered the defendant Plino Bustillo's deposition

transcript, the defendants having adopted it as accurate by submitting it on the motion (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2dDept 2008]). In view of the foregoing and the fact that movants have now submitted a copy of their answer, the defendants' application for reargument is granted.

Pursuant to CPLR §2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR §2221 (e) (3), a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," (***Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor,*** 132 AD2d 190 [1st Dept 1987]). Here, no basis for renewal has been demonstrated, and accordingly, the defendants' application for renewal of motion (002) is denied.

In this action, the plaintiffs seek damages personally and derivatively for injuries claimed to have been sustained by the infant plaintiff, Carlos Castillo, on September 20, 2007, when he suffered an injury to his left eye, while he was a passenger on a bus owned and maintained by Suffolk Transportation Corp. (hereinafter Suffolk Transportation), and operated and controlled by Plino Bustillo (hereinafter Bustillo) The plaintiffs claim that Brentwood Union Free School District (hereinafter School District) and Suffolk Transportation entered into an agreement for the operation of the bus, and that the defendants' negligently supervised the infant plaintiff and other students on the bus, proximately causing the infant plaintiff's injury.

The defendants seek summary judgment dismissing the complaint on the basis that they did not negligently supervise the infant plaintiff or other students, that they had no prior knowledge of the dangerous conduct leading to the infant plaintiff's injury, that there was no prior conduct on the part of the students involved that would have put them on notice of any dangerous activity, and that there is nothing they did or did not do that proximately caused the infant plaintiff to suffer injury.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon***

Prods., 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the Notice of Claim; summons and complaint; the defendants' answer and the plaintiffs' verified bill of particulars and supplemental bill of particulars; the transcripts of the General Municipal Law (hereinafter GML) §50-h hearing of the plaintiff Maria C. Castillo, dated March 10, 2008 and the infant plaintiff Carlos Castillo, dated March 13, 2008; and the examinations before trial (hereinafter EBT) of Maria C. Castillo, Carlos Castillo, and Bustillo, all dated March 8, 2010, with proof of service of the same; a copy of the prior order of this Court, dated May 25, 2011, with notice of entry; and a copy of the plaintiffs' opposition and defendants' reply. The Notice of Claim apprises the defendants that while the infant plaintiff was riding on bus #62 on September 20, 2007, he was struck in his left eye by a sharp instrument or pencil.

At her GML §50-h hearing, Maria C. Castillo testified that on September 20, 2007 her son, Carlos Castillo, was attending Northeast Elementary School in the School District. He took a school bus to and from school each day with other children in first through fifth grade. She learned from her son's friend, Tommy, that a pencil which came from the front of the bus, "fell in Carlos' left eye." She stated that Judy Campos met the infant plaintiff at the bus stop after school on the date of the accident and told her that he was crying when he got off the bus. She continued that Judy Campos asked the bus driver what happened, and he did not know. When the infant plaintiff arrived home, he was crying. She stated that he told her that his eye hurt and that someone on the bus had thrown something and it hit his eye. Prior to this incident, her son only told her that the kids made a lot of noise on the bus. Her only complaint was that the bus was coming too late, but she had no other reason to complain to the bus company. At her EBT, she stated that there was no problem on the bus for the first three weeks until the incident occurred.

Carlos Castillo testified at his GML §50-h hearing that he was seven years old and was attending second grade at Northeast Elementary School. He took the school bus each day. He did not know his bus driver's name, and stated that the driver was a woman. On his ride home on the date of the accident, the bus was coming to the last stop and he was seated on the right side of the bus. He testified that his friend Justin, who was seated next to him on the bus, saw a pencil "flying so fast." He did not know who threw the pencil, and stated that the eraser on the pencil hit him in the left eye. When he got off the bus, Justin told the bus driver that he was hurt. He continued that no one met him at the bus stop and that he walked home, crying because his eye hurt. Upon arrival home, he told his mother what happened. Prior to this incident, he did not have any problems on the bus, although he stated that the kids were loud and shouting. No one was running around, but some kids went to a different seat. He testified that no one was permitted to play rough on the bus. He never told anyone about the bus being noisy or that the kids sometimes changed seats. At his EBT, the infant plaintiff Carlos Castillo testified that he did

not see the pencil before it struck him in the eye, and he did not know who threw it.

Bustillo testified at his/her EBT that he/she had been working for Suffolk Transportation for about six and a half years prior to the incident. In September 2007, Bustillo was driving the long bus #812 on bus route #62 transporting about 36 to 38 children to and from the Northeast Elementary School. The children were seated on the bus by ages. There were no adults on the bus besides Bustillo. Bustillo did not keep a log and was instructed only to report mileage or mechanical problems each day. Prior to this incident, Bustillo did not file a report concerning any problems with any of the children from the beginning of the school year, and did not learn of the incident involving the infant plaintiff until about two or three days after it occurred when Bustillo was advised by the supervisor that a child had been poked in the eye on the bus. When shown a document with the date of September 21, 2007, Bustillo recalled that the day before Carlos Castillo looked sad and was blinking his eyes while getting off the bus. When asked if something had happened, Carlos Castillo told Bustillo, "Nothing, I am ok." Bustillo did not see anyone throwing anything on the bus that day or changing seats. Bustillo did not experience problems with the children staying in their seats in September 2007, and never witnessed anyone on the bus throwing anything, such as pencils or papers.

Based upon the adduced testimonies, the defendants have established prima facie entitlement to summary judgment dismissing the complaint. The School District's responsibility commences upon the student's entry on the school bus and includes proper supervision while the student is in school or on the school bus (***Hurlburt v Noxon***, 149 Misc2d 374, 565 NYS2d 683 [Sup Ct, Chenango County 1990]). School Districts are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the defendant School District is warranted (***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010];***Link v Quogue Union Free School District***, 38 AD3d 719, 832 NYS2d 623 [2d Dept 2007];***Eberwein v Newburgh Enlarged City School Dist.***, 31 AD3d 492, 818 NYS2d 255 [2d Dept 2006];***Convey v Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

In the instant action, the defendants had no knowledge or notice of any dangerous conduct which caused the injury wherein the acts of a third-party could have reasonably been anticipated (*see,* ***Janukajtis v Fallon,*** 284 AD2d 428, 726 NYS2d 451 [2d Dept 2001]). The defendants have shown the lack of actual or constructive notice of any prior similar conduct by another student who may have thrown the subject pencil which struck the infant plaintiff in the eye. (*see* ***Velez v Freeport Union free School District***, 292 AD2d 595, 740 NYS2d 364 [2d Dept 2002]). In this action, Bustillo had not experienced any disciplinary problems with any of the children on the bus from the beginning of the school term and was not aware the incident occurred. Thus, the defendants did not have the opportunity to intervene on the infant plaintiff's behalf to prevent injury or to stop dangerous conduct (*see,* ***DeMunda v Niagara Wheatfield Board of Education***, 213 AD2d 975, 625 NYS2d 764 [4th Dept 1995];*compare,* ***Blair v Board of Education of Sherburne Earlville Central School***, 86 AD2d 933, 449 NYS2d 566 [3d Dept 1982]). The defendants have established entitlement to judgment as a matter of law by

submitting evidence that they did not have actual or constructive notice of any dangerous conduct by any of the students on the bus, and that the incident occurred in so short a period of time that any alleged lack of supervision was not the proximate cause of the infant plaintiff's injuries.

In opposition, the plaintiffs have failed to raise a triable issue of fact. Although the plaintiffs assert that the students were noisy and some students may have changed seats, this does not establish proximate cause between any alleged negligence by the defendants and the manner in which the infant plaintiff was injured. There was no testimony to establish that students were throwing things around the bus, thereby causing injury to the infant plaintiff, and giving rise to actual or constructive notice to the defendants of a potentially dangerous activity by any student on the bus. The plaintiffs have raised no factual issues concerning whether Bastillo, the defendant bus driver, could have prevented the incident or could have intervened in order to prevent injury to the infant plaintiff.

Accordingly, upon reargument, summary judgment is granted and the complaint is dismissed in its entirety.

Dated: SEP 28 2011

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION