

**Martinez v City of New York**

2013 NY Slip Op 32577(U)

October 18, 2013

Sup Ct, New York County

Docket Number: 111536/2009

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/22/2013  
[\* 1]

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

**PRESENT:** HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT  
*Justice*

**PART** 5

Index Number : 111536/2009  
MARTINEZ, JOSEPH  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS CAL: #39

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
OCT 22 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10-18-13  
OCT 18 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  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: Part 5

-----X  
JOSEPH MARTINEZ, INDIVIDUALLY AND AS THE  
FATHER AND NATURAL GUARDIAN OF THE  
INFANT, ASHLEY MARTINEZ,

Plaintiffs,

-against-

DECISION/ORDER  
Index No. 111536/2009  
Seq. No. 001

CITY OF NEW YORK AND NEW YORK CITY  
DEPARTMENT OF EDUCATION,

Defendants.

-----X  
KATHRYN E. FREED, JSC:

**FILED**

OCT 22 2013

COUNTY CLERK'S OFFICE  
NEW YORK

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 ( Exhs. A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR §3211(a)(7), dismissing plaintiffs' Verified  
Complaint and/or pursuant to CPLR§ 3212, granting summary judgment to defendants dismissing  
all claims and cross-claims. Plaintiffs oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **grants**  
the motion as to the City only.

Factual and procedural background:

This is an action to recover monetary damages for personal injury allegedly sustained by 14  
year old infant plaintiff, Ashley Martinez, ("plaintiff"), on May 27, 2008. Plaintiff, a seventh grader

at that time, alleges that she was assaulted by approximately eight females at the Lieutenant William Tighe Triangle, which is also known as Riverside Inwood Neighborhood Gardens, located where Riverside Drive, Dyckman Street and Broadway intersect in New York County. Plaintiff's father, Joseph Martinez, sues for loss of services and expenses.

According to infant plaintiff, on May 27, 2008, she was a student at Public School I.S. 218. On that particular day, she apprised school Dean Robert Guzman, that she was "attacked off of school property" a few days earlier by another student named Yadel Taveras. Nevertheless, Mr. Guzman sent plaintiff to class. Later that day, during 5<sup>th</sup> period lunch, plaintiff was warned by another student named Michele, that Tavares's friends planned to attack plaintiff after school. Michele showed plaintiff an e-mail on her phone which confirmed this warning. Plaintiff and Michele then showed said e-mail to Teacher James Figueroa, who asked Michele to forward the e-mail to his e-mail address. He also stated that he would inform the principal and call plaintiff's mother.

Plaintiff also attempted to show the e-mail to Principal June Barnett, but was not permitted access to her. Later that day, plaintiff went to see both Mr. Figueroa and Dean Guzman, who were unable to speak with her. Having received no direction from school officials, plaintiff decided to leave school early in an effort to avoid any confrontation with the prospective attackers. She left with a friend, Alba Hernandez. Approximately one block from school, eight young women confronted plaintiff and Alba, identifying themselves as friends and relatives of Tavares. After one of the young women struck plaintiff, a fight ensued wherein Alba was stabbed and plaintiff was cut multiple times with what she perceived at that time to be a box cutter. Consequently, she was transported to Columbia Presbyterian Hospital Emergency Room. She sustained severe lacerations resulting in disfiguring scars to her head and back.

Thereafter, on August 22, 2004, plaintiff's father Joseph Martinez, individually and as the father and natural guardian of plaintiff, served a Notice of Claim on defendants. He also commenced

the instant action via service of a Summons and Verified Complaint on or about September 23, 2009. Defendants joined issued via service of an Answer on or about October 1, 2009. Mr. Martinez served a Bill of Particulars on or about April 27, 2011. On January 23, 2009, plaintiff testified at a hearing pursuant to General Municipal Law§ 50-h.

Positions of the parties:

The City argues that it since it and the Department of Education are separate entities, it is not a proper party to the instant suit and as such, the complaint must be dismissed as against it. Plaintiffs argue that defendants have failed to make a prima facie showing of entitlement to summary judgment in that it is well settled that school districts have a duty to provide supervision to ensure the safety of those students in their charge. This duty continues when the student in released into a potentially hazardous situation which poses a foreseeable risk of harm.

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” ( *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985] ). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact ( see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.2d 535 [1<sup>st</sup> Dept. 2008] ). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” ( *Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985] ). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied ( *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1<sup>st</sup> Dept. 2002] ).

It is well settled that the Board of Education continues to exist as a separate and distinct entity from the City of New York ( see Education Law§ 3590-g[2]; *Perez ex rel Torres v. City of New York*, 41 A.D.3d 378 [1<sup>st</sup> Dept.], *lv dismissed* 16 N.Y.3d 733 [2011]; *Gold v. City of New York*, 80 A.D.2d 138, 140 [1<sup>st</sup> Dept. 1981]; *Montgomery-Costa v. City of New York*, 26 Misc.3d 755, N.Y. Slip Op. 29461 ( Sup Ct NY County 2009) ).

In the case at bar, it is clear that the City is not a proper party to the suit. Indeed, in plaintiffs' opposition papers, they proffer arguments that are directed specifically to the Department of Education.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue, and it is further

ORDERED that defendant City shall serve a copy of this order with notice of entry on the Trial Support Office at 60 Centre Street, Room 158; and it is further

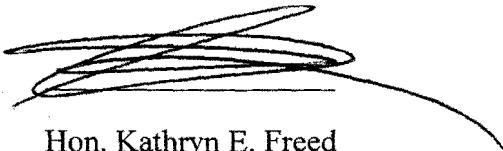
ORDERED that this constitutes the decision and order of the Court.

DATED: October 18, 2013

ENTER:

OCT 18 2013

**FILED**



OCT 22 2013

Hon. Kathryn E. Freed

COUNTY CLERK'S OFFICE  
NEW YORK

**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**