Guerrieri v New York City Dept. of Educ.
2013 NY Slip Op 33026(U)
December 2, 2013
Supreme Court, Richmond County
Docket Number: 13652/03
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART C-2

THOMAS GUERRIERI and SHERRI GUERRIERI,

Plaintiff(s),

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

Index No. 13652/03

NEW YORK CITY DEPARTMENT OF EDUCATION, ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC., and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC.,

Motion No. 1963 - 011

Defendant(s).

The following papers numbered 1 to 4 were marked fully submitted on the 25th day of September, 2013.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendants ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC., and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC., with Supporting Papers, Exhibits (dated June 3, 2013)	1
Affirmation in Opposition by Plaintiffs, with Exhibits (dated July 30, 2013)	2
Affirmation in Partial Opposition by Defendant NEW YORK CITY DEPARTMENT OF EDUCATION to the Motion of Defendants ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC., and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC., (dated July 15, 2013)	3

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Reply Affirmation by Defendants ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC., and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC.,
(dated July 23, 2013) 4

Upon the foregoing papers, the cross motion for summary judgment of defendants ASSOCIATION FOR METROAREA AUTISTIC CHILDREN, INC. and ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC. is denied.

Plaintiffs commenced this action to recover damages for injuries sustained by THOMAS GUERRIERI (hereinafter plaintiff), while operating a bus owned by his employer, third-party defendant MINIBUS SERVICE CORP. It has been alleged that an autistic child who was being transported on the bus assaulted plaintiff. At the time of the alleged assault, the child was being transported to the cross movant's facility, the METROAREA AUTISTIC CHILDREN, INC., a/k/a ASSOCIATION IN MANHATTAN FOR AUTISTIC CHILDREN, INC. (hereinafter collectively referred to as "AMAC"), which provides educational services for children with disabilities pursuant to its contract with the defendant NEW YORK CITY DEPARTMENT OF EDUCATION (hereinafter DOE). DOE also contracted with plaintiff's employer, third-party defendant MINIBUS to provide transportation for the children to and from AMAC.

With specific regard to the allegations against AMAC, it is alleged that despite numerous complaints (misbehavior reports filed in accordance with DOE procedure) regarding the aggressive misbehavior of the disabled child on plaintiff's bus, AMAC failed to respond to any of the complaints, *i.e.*, suspend the child from the bus, arrange for alternative transportation, or provide for a paraprofessional on the bus.

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In a prior motion for summary judgment, AMAC argued that they had no control or authority over the operations of the bus, its driver, or the special needs of the child being transported, and thus, no duty was owed to the plaintiff. In opposition to that motion, plaintiffs contend, *inter alia*, that the DOE issued "Regulations of the Chancellor" which articulates the limits on the drivers and matrons to supervise and control severely misbehaving students. In addition, these regulations further provide the procedure to be followed regarding the misbehavior of children on school buses, and that the school's principal had a duty to supervise the misbehavior of students in connection with their bus transportation.

This Court denied AMAC's motion on the ground that it had failed to establish its entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate material issues of fact regarding the alleged breach of its duty to take appropriate action concerning the autistic child's dangerous conduct (*see* prior Decision and Order, dated February 15, 2008, p3). It further stated that the record was devoid of evidence that AMAC implemented any of the procedures set forth in the Chancellor's regulations regarding the misbehavior of students on its school buses.

AMAC now moves again, five years later, seeking dismissal of all claims against it on the ground that there are no issues of fact to be decided by a jury. AMAC claims that the motion was denied principally on the grounds that substantial discovery was outstanding. According to AMAC, the EBT of Ellice Geller, its former principal, held on June 23, 2011, establishes that AMAC had no duty with regard to the bus driver or the misbehavior of one of the students on the bus other than to write a report, and that it was the responsibility of the DOE to make

transportation safe. She did admit, however, that some of the instances of misbehavior by students on the bus were addressed by AMAC.

In opposition, plaintiffs contend that the cross motion should be denied as untimely because it was filed on June 3, 2013, which is more than 60 days after the filing of the Note of Issue on March 14, 2013 (*see* Richmond County Supreme Court Uniform Civil Term Rules 4a). Plaintiffs argue that AMAC neither moved for an extension of time to bring the motion nor did they obtain permission to bring the motion. Furthermore, the subject rules must be strictly followed, and that the courts must not consider the merits of an untimely summary judgment motion for any reason other than 'good cause' for the delay in making the motion (*see* Brill v. City of New York, 2 NY3d 648, 649). Here, plaintiff contends that 'good cause' for the delay has not been established.

Plaintiffs also contend that AMAC had previously moved for summary judgment and that the motion was denied, and they are not now permitted to move for summary judgment a second time. In fact, plaintiffs argue that in its prior Decision and Order, the Court did not grant AMAC leave to renew, nor did AMAC even request leave to renew in its current motion. Instead, this Court denied the first motion on the ground that AMAC failed to meet its burden of proving the absence of any material issue of fact. In addition, it was stated that the record was devoid of any evidence establishing that AMAC implemented any of the procedures set forth in the Chancellor's Regulations regarding the misbehavior of students on its school buses. According to plaintiffs, proof indicates that AMAC did have a duty to supervise the misbehavior of its students in

connection with their bus transportation as reflected in both the EBT testimony of Ms. Geller and in the procedures set forth in the Regulations of the Chancellor.

The cross motion is denied.

It is undisputed that a party moving for summary judgment in this Court is required to move for summary judgment no later than 60 days from the filing of the Note of Issue (see CPLR 3212[a]; Richmond County Uniform Civil Term Rules, "Motion Requirements" §1). Here, it is undisputed that the motion was made on June 3, 2013, which is more than 60 days after the filing of the Note of Issue on March 14, 2013.

Furthermore, it is well settled that the courts in this State may not entertain an untimely motion for summary judgment, nor can they extend the time to make such a motion absent a showing of good cause for the delay. As a result, the meritoriousness of the claim (or defense), and the lack of prejudice to the non-moving party have been rendered academic (*see* CPLR 3212[a]; Brill v. City of New York, 2 NY3d 648; Thompson v. New York City Bd. Of Educ., 10 AD3d 650). Here, the cross motion is clearly untimely, and cross movants have not requested an extension of time to make its motion, nor have they offered any satisfactory explanation for their dilatory conduct. Thus, this Court is without discretion to entertain its summary judgment motion, which must be denied as untimely.

In addition, contrary to the contentions of AMAC, the prior motion was not denied subject to the need for further discovery. Rather, it was denied based on the failure to meet its burden of establishing, prima facie, its entitlement to judgment as a matter of law by failing to prove the absence of any material issue of fact.

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In regard to plaintiffs' objection to AMAC moving for summary judgment for a second time, it is well settled that multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause (*see* 2009 85th Street Corp. v. WHCS Real Estate Limited Partnership, 292 AD2d 520). Even if this Court were to consider Ms. Geller's EBT testimony as "new" evidence, it is not sufficient to establish the absence of material issues of fact entitling AMAC to judgment as a matter of law. In fact, her testimony actually raises questions of fact insofar as AMAC's obligation and/or duty to take appropriate actions concerning the autistic child's conduct.

Accordingly, it is

ORDERED that the cross motion for summary judgment is denied.

E N T E R,

/s/
HON. THOMAS P. ALIOTTA,
J.S.C.

Dated: December 2, 2013