Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Carlos Cabrera, an infant under the age of 10 years by his mother and natural guardian, Blanca Cabrera, and Blanca Cabrera, individually

Plaintiffs,

- against -

The City of New York, The New York City Department of Education and The Salvation Army,

Defendants.

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Index Number: 13601/10

Motion Date: 10/8/13

Motion Cal. Number: 23

Motion Seq. No.: 2

The following papers numbered 1 to 29 read on this motion by defendants, The City of New York and The New York City Department of Education (DOE), for summary judgment; cross-motion by defendant, The Salvation Army, for an extension of time to commence a third-party action and striking the answer of defendants, City of New York and DOE; and cross-motion by defendants, The City of New York and DOE for the imposition of sanctions against defendant, The Salvation Army for frivolous motion practice.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion(Salvation)-Affirmation-Exhibits	5-8
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Affirmation in Opposition to City's Motion-Exhibits	16-18
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Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

Motion by the City and the DOE for summary judgment dismissing the complaint and all cross-claims against them is granted.

Infant plaintiff allegedly sustained injuries as a result of being forced to perform push-ups on his knuckles by a martial arts instructor at the Springfield Family Inn Shelter Recreational Center in Queens County (hereinafter, "Springfield") on February 27, 2009. The shelter is operated by the Salvation Army from funds provided by the City's Department of Homeless Services pursuant to a contract between the Department and the Salvation Army. Winnie Tjioe, employed by the DOE as Student Temporary Housing Content Expert, testified that the DOE, from grants provided by the State of New York, offers to fund programs for families in shelters through community-based organizations. One of the programs it offered to fund at Springfield was a martial arts program. Tjioe testified that, with the approval of Springfield's recreation director, Monica Lang, the DOE, through her, entered into a contract work order with Innovation Multi-Service Inc., a martial arts academy, to teach martial arts to children housed at Springfield. The academy was run by one "Sensei Jackie".

It is undisputed that Sensei Jackie was the regular instructor of the martial arts classes but that on the date of plaintiff's injury, she assigned one of her older students, one Dana Smith, to teach the subject martial arts class. This student teacher disciplined infant plaintiff by compelling him to perform knuckle push-ups, resulting in his injuries.

Plaintiffs seek damages from the City and the DOE based upon their alleged failure to supervise the martial arts instructor.

The City is entitled to summary judgment since it was the DOE, and not the City, that funded the martial arts program at Springfield and entered into a work order with Innovation. The Department of Education of the City of New York (formerly known as the Board of Education) is a separate and distinct entity from the City of New York (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]). Therefore, the City is entitled to summary judgment as a matter of law. Indeed, plaintiffs' counsel does not oppose the City's motion but concedes that the City is not liable.

With respect to the DOE, the evidence presented, on this record, is that Innovation was an independent contractor whose martial arts instruction was not controlled by the DOE. A party who hires an independent contractor is not liable for the negligence of the independent contractor unless it is shown that the one who employed the independent contractor controlled the manner in which the work was done (see McSorley v. Tripoli, 284 AD 2d 900 [4th Dept 2001]). The opposition papers fail to raise an issue of fact as to whether the DOE exercised any control over the way Innovation taught martial arts and, thus, fail to raise a triable issue of fact as to whether the DOE supervised Innovation so as to render it

vicariously liable for the acts of Innovation's martial arts instructor (see Posa v Copiague Public School Dist., 84 AD 3d 770 [2nd Dept 2011]). The DOE's funding of the martial arts program with Innovation and the Tjioe's regular visits to Springfield, and her subsequent investigation of the incident, did not establish supervisory control over the methods or manner in which the martial arts instruction was performed by Innovation so as to render the DOE liable for the negligent acts of Innovation's instructors (see Gross v City of New York, 207 AD 2d 525 [2nd Dept 1994]). Therefore, the DOE is entitled to summary judgment as a matter of law (see Bennett v Commercial Flooring Specialists, Ltd., 77 AD 3d 696 [2nd Dept 2010]).

Cross-motion by the Salvation Army for an extension of time to commence a third-party action against Innovation and to strike the answer of the DOE is granted, in the interest of justice, solely to the extent that the Salvation Army is granted leave to commence a third-party action against Innovation Multi-Service Inc. within 30 days after service of a copy of this order with notice of entry. In all other respects, the cross-motion is denied.

Counsel for the Salvation Army contends that because the City and the DOE failed to comply with the preliminary conference order and compliance conference order resulting in deposition of the DOE not taking place until May 7, 2013, it was not until May 7, 2013 that, in the course of the DOE's deposition, the Salvation Army was apprised of the existence of a work order between the DOE and Innovative. Post-deposition discovery yielded from the DOE a copy of the work order with Innovation on June 7, 2013. Since the Salvation Army did not become aware of the contractual relationship between the DOE and Innovation until June 7, 2013, argues counsel, it would be unfairly deprived of the right to commence a third-party action against Innovation if it were not granted an extension of time to do so. Counsel states that the preliminary conference order provided that all third-party actions must be commenced by the compliance conference date and that after that date, a third-party action could not be commenced without leave of court. The compliance conference was held on September 10, 2012 and, therefore, the time to commence third-party actions has long since expired. Counsel for the City and DOE contends that the DOE complied with the preliminary conference order and the compliance conference order and that any delay in providing the work order was not willful and contumacious so as to merit the striking of their answers.

In the first instance, the Court notes that it is undisputed that Salvation Army's own employee, Springfield's recreation director, Monica Lang, was introduced to Innovation and with her

approval Tjioe entered into a work order with Innovation to provide martial arts classes at the Salvation Army's facility, Springfield. Therefore, the Salvation Army, through its own employee had knowledge, from the inception, of the contractual relationship between the DOE and Innovation and that Innovation was the provider of the martial arts classes at Springfield. It is thus disingenuous of counsel for the Salvation Army to argue that he was precluded from commencing a timely third-party action against Innovation until after he "discovered" the existence of a contract with Innovation at the DOE's deposition on May 7, 2013. Counsel has presented no good reason why the Salvation Army could not have commenced a third-party action for indemnification and contribution promptly after it was made a party defendant in this action.

Moreover, the Court notes that the compliance conference order issued by Justice Martin E. Ritholtz on September 10, 2012 required the Salvation Army or the City to provide a copy of contracts between the provider of the karate class and the Salvation Army. It further provided that "any further third-party actions shall be commenced promptly upon discovery of the third-party defendants, but not more than thirty days after the completion of depositions, unless for good cause shown". Thus, even if the Salvation Army did not discover the existence of Innovation until the DOE's deposition was held on May 7, 2013, it had 30 days thereafter to commence a third-party action. No reason is proffered by its counsel for his failure to do so.

However, in the interest of justice, the Salvation Army is granted leave to commence a third-party action against Innovation. That branch of the Salvation Army's cross-motion for an order striking the answers of the City and DOE is denied as moot.

Cross-motion by the City and the DOE for the imposition of sanctions against the Salvation Army pursuant to 22 NYCRR 130-1.1 for frivolous motion practice is denied as moot.

Accordingly, the complaint and all cross-claims are dismissed against the City and the DOE, the Salvation Army's cross-motion is granted to the extent heretofore provided and the City's and the DOE's cross-motion for sanctions is denied.

The caption of this action is hereby amended to read as follows:

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Carlos Cabrera, an infant under the age of 10 years by his mother and natural guardian, Index Number: 13601/10

Blanca Cabrera, and Blanca Cabrera,
individually,
Plaintiffs,
- against -

The Salvation Army,
Defendant.
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Serve a copy of this order with notice of entry upon counsel for all parties and the Clerk of the Court without undue delay.

Dated: October 25, 2013

KEVIN J. KERRIGAN, J.S.C.