

Mosquera v Rodriguez
2013 NY Slip Op 33453(U)
November 22, 2013
Supreme Court, New York County
Docket Number: 108443/11
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 108443/2011
MOSQUERA, KAYLA
vs.
RODRIGUEZ, HERBERT
SEQUENCE NUMBER : 001
VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for vacate note of issue/ Strike from mal calendar

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
DEC 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
NOV 27 2013
JAS MOTION SUPPORT OFFICE
JAS SUPREME COURT-CLERK

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

Dated: 11.22.13

Arlene P. Bluth, J.S.C.

- 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

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Kayla Mosquera, by her mother and natural guardian, Joy Mosquera, and Joy Mosquera, individually,

Plaintiffs,

-against-

Herbert Rodriguez and Tirsa Berru,

Defendants.

-----X

Herbert Rodriguez,

Third-party plaintiff,

-against-

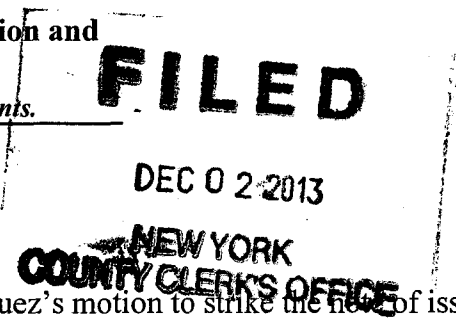
The New York City Department of Education and
The City of New York,

Third-party defendants.

Index No.: 108443/11
Mot. Seq. 001

DECISION/ORDER
HON. ARLENE P. BLUTH, JSC

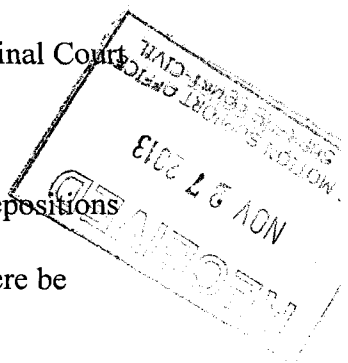
T.P. Index No. 590738/13



Defendant/third-party plaintiff Rodriguez's motion to strike the name of issue in the main action is denied and the main action shall remain on the trial calendar; the third-party action is hereby severed.

In July 2011, plaintiffs commenced the main action, alleging that the 11 year old infant-plaintiff was injured when she was struck by a car driven by defendant Berru and owned by defendant Rodriguez as she crossed the street outside of the playground at PS 142 on her way to her after-school program. On February 9, 2012, defendant Berru pled guilty to reckless driving (VTL 1212) in connection with the subject motor vehicle accident in Manhattan Criminal Court (opp., exh 5).

The case scheduling order dated August 30, 2011 (opp., exh 5) directed that depositions of all parties were to be completed by January 10, 2012, and that impleader actions were be



completed by February 21, 2012 (para. 10).

In the course of discovery, the court (Silver, J.) ordered defendants to appear for their depositions on four occasions: 11/4/11, 2/24/12, 5/25/12 and 7/27/12 (opp., exhs 7, 8, 10, 11). Defendants did not appear for their depositions until September 21, 2012. At the October 26, 2012 compliance conference, defendant Rodriguez sought the infant-plaintiff's after-school program's files and an authorization from PS 142 for a parental release involving the after-school program; this indicates that he was contemplating making a claim against the City of New York in October 2012.

Plaintiffs filed their note of issue on or about January 14, 2013.

Eight months later, on September 20, 2013, Rodriguez filed a third-party action seeking contribution from The City of New York even though defendant Berru pled guilty to reckless driving approximately 17 months earlier. The third-party complaint alleges that the infant-plaintiff's injuries "were caused *solely* (emphasis supplied) by the active and primary carelessness, negligence, and culpable conduct of third party defendants in failing to properly supervise their students under their care and custody, and failing to properly train and supervise their employees, agents and/or servants" (Verified Third-Party Complaint, moving papers, exh D, para. 9).

Significantly, Rodriguez commenced this third-party action in September 2013, more than 19 months after the end date for impleader specified in the Case Scheduling Order. Rodriguez's attorney does not offer any excuse for this delay but conclusorily asserts that because the issues in both actions are "virtually the same", the main action should be "removed" from the Court's trial calendar until the third-party defendants complete discovery and the case

can be heard before one jury” (aff., para. 10). This Court disagrees.

First, this motion to strike the main action from the trial calendar is denied as untimely; it was made on October 21, 2013, more than 9 months after the Note of Issue, which violated Uniform Rule 202.21(e) which requires that such motion be made 20 days after service of the Certificate of Readiness, here January 10, 2013. Additionally, Rodriguez does not dispute that discovery is complete in the main action.

Furthermore, there is no question that had plaintiffs’ attorney crossed-moved to sever the third-party action, such severance would have been proper. *See Garcia v Gesher Realty Corp.*, 280 AD2d 440, 721 NYS2d 343 (1st Dept 2001). Even without a cross-motion, this Court has the discretion to order severance, sua sponte, under the circumstances presented here. The Appellate Division, First Department recognized the authority to sever sua sponte in *Karama Supermarket, Inc. v Frawley Plaza Associates*, 200 AD2d 355, 606 NYS2d 177 (1st Dept 1994): “A trial court has the discretionary authority to sever a claim against any party and order a separate trial, in the interest of justice (CPLR 1003), especially with respect to a third-party claim, where that controversy ‘will unduly delay the determination of the main action or prejudice the substantial rights of any party (CPLR 1010)’”. Indeed, Professor Alexander referred to CPLR 1010 as a “safety valve” available to prevent such delays and injustice as this Court finds here.¹ Alexander, Practice Commentaries (McKinney’s Cons Laws of NY, Book 7B).

¹Could there be a more obvious dilatory tactic than starting a third-party action against the City of New York at this late date and after the defendant driver was convicted of reckless driving in a school zone? No.

While in *Karama*, the Court determined that the trial court's severance of the third-party action (commenced a mere 6 weeks after defendant in the main action interposed an answer) was an abuse of discretion, the Court recognized that under the appropriate circumstances, such sua sponte severance is within a trial court's discretion. *See also Jambrone v A.J.C. Food Market Corp.*, 159 AD2d 298, 552 NYS2d 576 (1st Dept 1990). Although the Court also found that the trial court's sua sponte severance in *Jambrone* was an abuse of discretion because discovery was not complete in the main action and defendant had not delayed in bringing the third-party action, that is not the case here.

Clearly, under the right fact pattern, it is within a trial court's discretion to sever a third-party action, sua sponte, in the interest of justice. This case presents that fact pattern.

As Corporation Counsel has appeared for the third-party defendant, the third-party action is transferred to a City Part. The merits of that contribution claim, in light of the defendant driver's conviction of reckless driving, will be determined in due course.

Accordingly, it is hereby

ORDERED that Rodriguez's motion to vacate the note of issue in the main action is denied; and it is further

ORDERED that the third-party action, *Herbert Rodriguez v The New York City Department of Education and The City of New York*, TP Index No. 590738/13, is severed from the main action, and the Clerk is directed to transfer that case to a City Part as Corporation Counsel has appeared for the City.

The parties in the main action are reminded of the mediation scheduled on Wednesday

December 4, 2013 at 9:30AM at 80 Centre Street.

This is the Decision and Order of the Court.
copies mailed to all parties.

Dated: November 22, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED
DEC 02 2013
NEW YORK
COUNTY CLERKS OFFICE