

**Angel v City of New York**

2015 NY Slip Op 32788(U)

October 9, 2015

Supreme Court, Bronx County

Docket Number: 8056/2004

Judge: Julia I. Rodriguez

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: Part IA 27**

**Index No. 8056/2004**

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JOSEPH LEE DE'LEONE ANGEL, an infant by his legal guardian and adoptive mother, DEBORAH ANGEL, YOLANDA JENKINS and DEBORAH ANGEL, Individually,  
Plaintiffs,

**DECISION and ORDER  
DECIDING DEFENDANTS'  
SUMMARY JUDGMENT  
MOTIONS**

-against-

THE CITY OF NEW YORK, JEWISH CHILD CARE ASSOCIATION OF NEW YORK, MILCIA PINEDA, and JOSEPH SEABOROUGH,  
Defendants.

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219 (a), of the papers considered in review of motions for summary judgment by the various Defendants pursuant to CPLR 3212 seeking dismissal of the Complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Milcia Pineda, Affirmation & Exhibits	1
Notice of Motion by City of NY, Affirmation, Affidavit & Exhibits	2
Notice of Motion by JCCA, Affirmation & Exhibits	3, 4, 5, 6
Plaintiff Joseph Angel's Affirmation in Opposition & Exhibits + Memorandum of Law	7, 8
Plaintiff Jenkins' Affirmation in Opposition & Exhibit	9
Pineda's Reply Affirmation	10
City's Reply Affirmation & Memoranda of Law in support of Summary Judgment	11, 12, 13
JCCA's Reply Affirmation	14

The within action concerns the infant Plaintiff **Joseph Lee De'Leon Angel** (hereinafter **Joseph**), who was born on February 20, 2002. In September 2002 his birth mother, Plaintiff **Yolanda Jenkins**, abandoned him, and Joseph was placed in the care and custody of the Commissioner of Social Services for the City of New York. In July 2004 Ms. Jenkins' parental rights were terminated by Family Court Order, after which Defendant **City of New York** (the City) appointed Defendant **Jewish Child Care Association** (JCCA) to place Joseph into a foster home. In September 2002 JCCA placed Joseph in the home of Defendant **Milcia Pineda** (Pineda), and while in Pineda's care Joseph suffered an assault resulting in personal injuries giving rise to this lawsuit. Specifically, on February 25, 2003, Defendant **Joseph Seaborough** (Seaborough), the boyfriend of Ms. Pineda's daughter, beat the infant Joseph resulting in severe injuries to the child.

In January 2004 Plaintiff Yolanda Jenkins commenced this lawsuit individually

and on behalf of the infant Joseph against the above-referenced Defendants alleging that they were: careless, grossly negligent and acted in bad faith in assigning, placing and maintaining the infant plaintiff in the dangerous, unsupervised, unguarded, unprotected and unsuitable foster home of Milcia Pineda, wherein Joseph Seaborough, a guest, family member and/or friend who was known or could and should have been known to the defendants to possess dangerous, violent, malicious ...and criminal nature, characteristics and propensities, and who was known, or could and should have been known to have been involved in prior and continuing criminal incidents of violence and dangerous behavior. . . [¶18 of BOP dated Nov. 10, 2004].

In July 2006 Joseph's adoptive mother, **Deborah Angel**, joined the action; the Amended Verified Complaint alleged negligent hiring, monitoring and retention of employees, violation of due process rights under 42 U.S.C. §1983, and derivative claims on behalf of Yolanda Jenkins and Deborah Angel.

The answering Defendants interposed their respective affirmative defenses and cross-claims, and all denied liability in their Answers.

During discovery the depositions of the following persons were conducted:

- (1) **Milcia Pineda**;
- (2) **Pilar Everth**, Ms. Pineda's 17-year old daughter who lived in the household and who had her own infant who had been fathered by Seaborough;
- (3) **Yolanda Jenkins** (50-H hearing on 6/3/2003 and deposition on 1/24/2014);
- (4) **Deborah Angel**, who adopted Joseph on November 29, 2005;
- (5) **Maria Mohiuddin**, ACS worker;
- (6) **Paul Torres**, JCCA worker;
- (7) **Janice Harbor**, ACS worker;

- (8) **Wanda Ellis**, JCCA worker;
- (9) **Lorraine Gonzalez**, JCCA worker;
- (10) **Sandra Rhodes**, JCCA worker.

After discovery Defendants **Pineda, the City** and **JCCA** all move for summary judgment pursuant to CPLR 3212 dismissing the complaint in their favor:

1. Ms. Pineda contends that as a foster parent she qualifies for the same immunity that protects biological parents from lawsuits by their children sounding in negligent supervision, and that in any event, Seaborough's conduct was an unforeseeable superseding act which severed any nexus between Ms. Pineda's alleged negligence and Joseph's injuries.

2. The City contends that there is no evidence that it knew or reasonably should have known of Seaborough's dangerous conduct which caused Joseph's injuries. The City also seeks a conditional order of contractual indemnification by JCCA and dismissal of all cross-claims.

3. JCCA presents that it followed all rules and procedures in placing Joseph in a proper foster home with Pineda. JCCA also contends that the assault occurred after Pineda made the decision, without contacting JCCA, to leave Joseph in Seaborough's care when she went to work on February 25, 2003; therefore, it was not reasonably foreseeable that JCCA knew or should have known that Pineda would leave Joseph with Seaborough and that Seaborough would assault Joseph.

Plaintiffs oppose Defendants' respective motions for summary judgment in each instance.

**1. Summary Judgment by Milcia Pineda**

Defendant Pineda submits that foster parent immunity is applicable and that *McCabe* is controlling in this instance: *McCabe v. Dutchess County*, 72 A.D.3d 145, 895 N.Y.S.2d 446 (2d Dep't 2010). In *McCabe* the infant plaintiff was placed in the care of a certified foster parent immediately after his birth in January 2004. When the infant was

sixteen months old, and while alone in the bedroom of his foster home, the infant climbed out of his “sleeping accommodation onto an adjacent dresser and fell to the floor” sustaining personal injuries.” *Id.* 72 A.D.3d at 147. Thereafter, the biological mother regained custody and brought suit against the foster parent, the county, the commissioner and department of social services alleging that their negligent care and supervision caused the infant’s injuries.

The *McCabe* court dismissed the suit against the foster parent citing *Holodook v. Spencer*, which held that a child does not have a legally cognizable claim for damages against his parent for negligent supervision. *Holodook*, 36 N.Y.2d 35, 40, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). Before holding that a parent’s failure to supervise his child is not a tort actionable by the child, the *Holodook* court explored, *inter alia*: “the danger of fraud and collusion between parent and child” in circumstances where the child sued the parent and insurance was present [36 NY2d at 46]; “the potential of abuse of a negligent supervision claim when brought in a retaliatory context between estranged parents, one suing the other on the child’s behalf, or by children estranged from their parents who could sue after reaching majority” [36 NY2d at 49]; that although the “reasonable man standard” is a workable analysis when comparing a “community’s understanding and expectation of proper conduct. . . we do not believe that application . . . to the family relation between parent and child . . . is the wisest course” [36 NY2d at 50]; and

an additional factor to be placed on the policy scale is the difficulty of judicial delimitation, either by court or by jury, of the bounds of the asserted right to supervise. The possibilities are virtually limitless, since, as we have stated, few injuries to children could not have been avoided by closer parental supervision [36 NY2d at 49].

The *McCabe* court revisited the cases and policies discussed in *Holodook* and concluded that “these same considerations apply to foster parents, who are responsible for the around-the-clock supervision of the day-to-day activities of children under their care for extended periods of time and are required to treat the children as members of their

households” [72 A.D.3d at 149]. *McCabe* further noted that “vulnerability to negligent supervision lawsuits might discourage foster parents from reporting injuries for fear of being sued by the biological parent on behalf of the child or impleaded as a third-party defendant in an action brought on behalf of the child against the third party” [72 A.D.3d at 149].

Defendant Pineda further submits that *assuming arguendo* she was not immune from suit for negligent supervision, the intervening, superseding criminal assault upon Joseph by Seaborough was the sole proximate cause of Joseph’s injuries.

After consideration of the submissions, the Court finds that Defendant Pineda met her burden of proof entitling her to summary judgment as a matter of law. The Court further finds that Plaintiffs failed in their burden of rebuttal by failing to raise an issue of fact to defeat summary judgment in Pineda’s favor.

Plaintiff argues that the parental immunity of *Holodook* and *Gelbman* should not apply to Pineda because even biological parents are not immune for the consequences of the infliction and/or allowance of physical abuse or neglect. *Holodook v. Spencer*, 36 N.Y.2d 35, 40, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); *Gelbman v. Gelbman*, 23 N.Y.2d 434 (1969). The flaw in this argument is that there is no evidence of abuse to Joseph prior to the date in question, and the injuries sustained by Joseph were not caused by Ms. Pineda. Ms. Pineda had known Seaborough for about five years and described him as a “normal boy;” she had never observed him lose his temper and or display a “bitter character.” Indeed, in the months prior to the incident Seaborough was in the household every day because he would take care of his own infant son, which Pineda described as “very well.” Similarly, Pilar Everth testified that she had never seen Seaborough behave in an abusive manner either to herself or their infant son, and that he was a “nice guy.” Plaintiffs’ contention(s) that a jury should be entitled to determine whether said testimony by Pineda and Everth is credible is not persuasive because the misdeeds attributable to Pineda, i.e, whether Pineda had entrusted Seaborough with Joseph’s care on prior occasion(s), whether Pineda should not have left Joseph in

Seaborough's care because Seaborough was seventeen- years-old, whether Pineda was working one week or months prior to the assault, and whether Pineda should have had an approved babysitter in place prior to the incident, *all fall within the category of negligent supervision.*

**2. Summary Judgment by the City of New York.**

The City presents that The New York City Administration for Children's Service ("ACS") is a City agency and that for purposes of this motion, the City and ACS are referenced interchangeably. The City also presents that it properly engaged JCCA to select and monitor Joseph's foster care placement because, pursuant to §371(10)(a) of the N.Y. Social Services Law ("SSL"), JCCA was an "Authorized Agency" authorized to "care for, to place out or to board out children..." Finally, the City presents that when custody of Joseph was surrendered to ACS in September 2002, ACS's Office of Placement properly assigned Joseph's placement to JCCA, who in turn placed Joseph with Milcia Pineda.

The City submits a contract between ACS and JCCA for the period March 1, 2000 through February 28, 2003 (the "Agreement"). The City contends that pursuant to this Agreement, JCCA was responsible for

(1) placement and supervision of children in foster boarding homes, comprehensive care and development of each child, implementation of a comprehensive services program and discharge planning;

(2) foster parent recruitment, training and ensuring that the foster parents were properly certified; and

(3) recruiting, hiring, training, supervising and retaining appropriate personnel meeting the General Requirements of the Agreement.

Indeed, Plaintiffs do not dispute that the City is not liable for its selection of JCCA as Plaintiff's foster care agency, or is vicariously liable for Pineda's conduct.

After consideration of the submissions, the Court finds that Defendant City of New York met its burden of proof entitling it to summary judgment as a matter of law. The Court further finds that Plaintiffs failed in their burden of rebuttal by failing to raise an issue of fact to defeat summary judgment in the City's favor. The court finds that the City was not negligent in selecting JCCA for the placement and care of Joseph because JCCA was a foster care agency authorized by the New York State Office of Children and Family Services [§371(10)(a) of N.Y. Social Services Law; 18 NYCRR §405.3]. Where JCCA selected the home for a child, ACS had no obligation to review the home prior to the child's placement in the home selected by JCCA [Rhodes transcript, pg. 158]. Thereafter, the City reasonably relied upon JCCA to ensure Joseph's care and safety, and it follows that the City did not have actual or constructive notice of the circumstances in the Pineda household. See Albino v. NYCHA, et al., 78 A.D.3d 485, 912 N.Y.S.2d (1<sup>st</sup> Dept. 2010 (re: judicial immunity)).

Plaintiffs argue that notice should be imputed upon ACS, that it should not be relieved of liability and should be held accountable, because there was evidence that Joseph had "old bruises" and that Pineda was working without an approved babysitter. The flaw in this argument is that this information was obtained *after* the tragedy of February 25, 2003. At the hearing on November 13, 2006 at the N.Y.S. Office of Children and Family Services the ACS worker, Janice Harper, testified that the oral transmission against Ms. Pineda was received on February 26, 2003 [See pg. 34 of NYSOCFS transcript]. Ms. Harper also testified that it was not the routine for ACS to go into the home of a foster parent to monitor conditions, as it was the JCCA workers who performed that task [Harper, Pg. 67]. Plaintiff failed to rebut the City's citation that these two items of information were obtained in the OCI report dated April 17, 2003 and ACS's records dated February 27 & 28, 2003, respectively. Under these circumstances, the City established that there is no evidence that it knew or reasonably should have known of Seaborough's dangerous conduct which caused Joseph's injuries, since there is no evidence of notice to the City by JCCA or any party *prior* to 2/25/2003 alerting the City of any issue in the Pineda household. See Jamal v. City of New York, 24 A.D.3d

301, 808 N.Y.S.2d (1<sup>st</sup> Dept. 2005) (defendant foster home did not have knowledge/notice of prior sexual incidents); *Pollock v. Luis Bones and Boys & Girls Harbor*, 52 A.D.3d 343, 860 N.Y.S.2d (1<sup>st</sup> Dept. 2008) (there were no records of previous physical altercations between plaintiff and fellow camper that would have placed defendant day camp on notice that the fellow camper's act that allegedly caused plaintiff's injuries could reasonably have been anticipated).

### **3. Summary Judgment by Jewish Child Care Association of New York ("JCCA").**

JCCA contends that it is entitled to summary judgment because, *inter alia*, (1) there is no issue of fact that it properly placed and monitored Joseph in the Pineda household, (2) it was not a reasonably foreseeable risk for JCCA to know or have reason to know that Pineda's babysitter would fail to appear on February 25, 2003 and that Pineda would leave Joseph in the care of 17-year-old Seaborough and (3) that Seaborough would assault Joseph. JCCA further contends that Plaintiffs cannot establish a USC 1983 claim because it is not a State Actor and its policies comported with State laws.

After consideration of the submissions, the Court finds that JCCA failed to establish entitlement to summary judgment as a matter of law. As an initial matter, there is the question of JCCA's caliber of care in the placement of Joseph in the Pineda household. In August 2002 Lorraine Gonzalez recommended that Ms. Pineda be assigned a child over the age of five years because Pineda was "employed full time as a hair dresser in a salon" [Pg. 39 of Gonzalez deposition], and it was the "common practice that children who were below school age be placed in homes where there was a nonworking foster parent" [pg. 41]. However, when Joseph was placed in Pineda's home Gonzalez did not recall "whether or not Pineda was actually working at the hair salon" [pg. 40], and apparently there was no documentation to assist her memory. Sandra Rhodes testified that "Pineda must have stopped working or I would not have made that placement," but if she had seen Pineda "in the lobby earlier in the afternoon" she could have placed Joseph with Pineda "even though the placement list would not have been updated" [Rhodes, pgs.

233 & 234]. Moreover, Joseph was placed with Ms. Pineda almost immediately after the assessment that her household needed to be “stabilized,” even though the household remained the same; to wit: the recent birth of another infant and one who had special needs.

JCCA insists that Ms. Pineda was dutifully trained and knew that she could not leave Joseph with a sitter under 18 years of age. However, at the hearing on Nov 13, 2006 at the N.Y.S. Office of Children and Family Services Ms. Pineda testified she did not know she was not allowed to leave Joseph alone with anyone under 18 years of age, or with Pilar (her daughter), and that JCCA was aware that Seaborough was an active participant in her household [Pineda, pgs. 117-118; 136]. Ms. Gonzalez testified she knew “Pilar had a boyfriend and I knew that he had a child with him and that he would visit his child frequently” [Gonzalez, pg. 70].

Janice Harper testified that foster parents “are required to have some sort of income other than foster parenting” [Harper, pg. 88]; at the same hearing Ms. Pineda testified that she was supposed to work outside the home [Pineda, pgs. 119 & 128]. JCCA Supervisor Sandra Rhodes testified that foster parents had an income requirement: “their income needed to exceed their expenses,” a determination which was made by the “home finding team” [Rhodes, pgs. 106 & 108]. Since the policy was that foster parents could work outside the home, and Pineda was under the impression she was supposed to work, then there is a question why JCCA did not diligently track Pineda’s work hours and home situation. Indeed, the record indicates that JCCA did not visit the Pineda home for approximately three months, i.e, from Nov. 27, 2002 to Feb. 21, 2003, even though the rules required monthly home visits [Torres, pg. 40].

For the foregoing reasons, there exists questions of fact and credibility, *including but not limited to*: (1) whether the Pineda home was the proper placement for Joseph in the first instance; (2) whether JCCA followed its own rules in monitoring Pineda’s search for employment and securing that Pineda knew and followed the rules regarding who could babysit Joseph and when; (3) whether JCCA properly monitored the Pineda household after Joseph’s placement; and (4) whether the assault by Seaborough was a

superseding act that was not foreseeable.

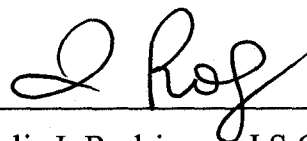
For the foregoing reasons and after oral argument on May 20, 2015, the motion for summary judgment by JCCA is **denied** *except* that the branch of JCCA's motion seeking dismissal of Plaintiff's U.S.C. §1983 claim is **granted** as there is no issue of fact that the JCCA staff were front line workers and not "state actors" and their actions were not done with "deliberate indifference" to the foster child. *Cf. Delgado v. City of New York*, 86 A.D.3d 502, 928 N.Y.S.2d 487 (1<sup>st</sup> Dept. 2011). However, the motions for summary judgment by Defendants Pineda and the City are **granted** in their entirety, and therefore it is

ORDERED that the complaint and all cross-claims are dismissed as against Defendants **Milcia Pineda** and **The City of New York**; and it is further

ORDERED that the City of New York is awarded judgment for contractual indemnity against Defendant Jewish Child Care Association of NY;<sup>1</sup> and it is further

ORDERED that Plaintiff's claim pursuant to U.S.C. §1983 is dismissed.

Dated: ~~October~~ 9, 2015



Hon. Julia I. Rodriguez, J.S.C.

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<sup>1</sup> The City's request for contractual indemnification was never requested in the alternative; consequently, the court awarded contractual indemnification for clarification purposes, whether or not it may be deemed moot in light that the City was granted summary judgment.