

Clarke v City of New York
2024 NY Slip Op 35310(U)
January 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 34525/2020E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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SHAWNTAE CLARKE and DOMINIQUE
FLOURNOY,

Index No. 34525/2020E

Plaintiffs,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

THE CITY OF NEW YORK, NEW YORK CITY
BOARD OF EDUCATION, NEW YORK CITY
DEPARTMENT OF EDUCATION, PIONEER
TRANSPORTATION CORP., ESTEBAN CHAVEZ,
ABIODUN M. OWOLABI and MOHAMMED L. A.
BALOGUN,

Defendants.

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The following papers were read on this motion (Seq. No. 2) for **summary judgment**, submitted on September 12, 2023.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 49 – 67
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 69 – 73
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 74 – 81
Affirmation in Reply and Exhibits	NYSCEF Doc. # 82

Upon the foregoing papers, it is ordered that this motion (Seq. No. 2) for an Order, pursuant to CPLR 3212: (1) awarding summary judgment to The City of New York (“City”), New York City Board of Education (“BOE”), and New York City Department of Education (“DOE”; and collectively, the “City Defendants”) and dismissing all claims and cross claims against them, and (2) awarding summary judgment on the first cross claim for indemnification in favor of Pioneer Transportation Corp. (“Pioneer Corp.”), Esteban Chavez (“Chavez”), and the City Defendants, if the claims against them are not dismissed, against Abiodun M. Owolabi (“Owolabi”) and Mohammed L.A. Balogun (“Balogun”; and collectively, “Owolabi Defendants”), is decided in accordance herewith.

Plaintiffs commenced this action on December 2, 2020, seeking damages for alleged serious personal injuries arising from a motor vehicle accident which occurred on February 27, 2020, at or near the intersection of Lafayette Avenue and Bruckner Boulevard in Bronx County, New York. Plaintiffs allege they were passengers in a cab owned by Balogun and operated by Owolabi. The other vehicle was a school bus owned by Pioneer Corp. and operated by Chavez. Plaintiffs also seek damages against the City Defendants in their capacity as owners and/or employers associated with the school bus.

In support of the motion, the City Defendants, Pioneer Corp., and Chavez submitted, *inter alia*, an attorney affirmation; a memorandum of law; a statement of material facts; an affidavit of Glenn Risbrook, Senior Executive Director of the Office of Pupil Transportation at the DOE; an affidavit of Neil Strahl, President of Pioneer Corp.; and copies of the pleadings, discovery orders, and stipulations.

Claims and Cross Claims Against the City Defendants

First, the movants seek summary judgment in favor of the City Defendants on the ground that they are not proper parties in this action and did not owe a duty to Plaintiffs. There is no opposition to this branch of the motion from Plaintiffs or the Owolabi Defendants.

In his affidavit, Glenn Risbrook avers that the City, DOE, and BOE “do not directly provide” school bus services for New York City schools. Instead, these services are “carried out by private bus companies serving as contractors for the BOE.” Risbrook avers that the school bus involved in the subject accident was operating “pursuant to a contract between Pioneer Transportation Corp. and the BOE,” and none of the City entities had a role in employing, hiring, training, supervising, or directing the bus driver Chavez, nor did they “supervise or direct the activities” of Pioneer Corp.

In his affidavit, Neil Strahl of Pioneer Corp. also avers that at the time of the accident, Pioneer Corp. owned the subject vehicle and employed Chavez. Strahl avers that Pioneer Corp. “hired, trained, supervised and directed all of the activities” of Chavez, the City Defendants did not own the vehicle, and the City Defendants did not hire, train, or direct Pioneer Corp. or Chavez.

The proponent of a summary judgment motion must make an initial *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon such a showing, the burden then shifts to the nonmovant to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

It is well established that the City of New York is a distinct legal entity from the DOE and BOE and is not liable for the torts of such department or municipal corporation (see Education Law §§ 2551; 2590-b; Gen Constr. Law § 66; *Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008] [“the City cannot be held liable” for “torts allegedly committed by the Board and its employees”]). As such, even if Plaintiffs had a viable cause of action against the DOE or BOE, the City would be an improper party (see also *Antonetti v City of New York*, 111 AD3d 558 [1st Dept 2013]; *Choudhury v City of New York*, 106 AD3d 523 [1st Dept 2013]).

Further, it is a general rule that a principal is not liable for the negligence of an independent contractor, “because principals ordinarily do not control the manner in which the independent contractors, as opposed to employees of the principal, perform their work” (*Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept 2007]). Whether a party is an independent contractor depends on such factors as “control of the method and means by which work is to be performed” (*id.*), and “[w]here the proof on the issue of control presents no conflict in evidence, the matter may properly be determined by the court as a matter of law” (*Lazo v Mak’s Trading Co.*, 199 AD2d 165 [1st Dept 1993]). Courts have consistently held that the BOE is not vicariously liable for the torts of private bus companies “hired by the Board of Education to furnish bus transportation to its school students” as independent contractors (*Chainani v Board of Educ. of City of N.Y.*, 201 AD2d 693 [2d Dept 1994], *aff’d* 87 NY2d 370 [1995]). The Courts of Appeals affirmed that school bus transportation does not trigger any exceptions to the rule, i.e., it is not an “inherently dangerous activity” or “nondelegable duty” (*Chainani*, 87 NY2d 370 [1995]). Thus, liability rests only with the independent contractors and their own employees.

Here, it is undisputed that the BOE engaged Pioneer Corp. as an independent contractor to provide school bus transportation at the time of the accident. Pioneer Corp. was independently responsible for the manner and means of performing their duties. Risbrook and Strahl’s affidavits set forth that the DOE and BOE had no control over hiring, training, or supervision of Pioneer Corp. or the drivers employed by Pioneer Corp., including Chavez. Under the independent contractor rule, the City Defendants owed no duty to the Plaintiffs and cannot be found liable for the happening of the accident. Accordingly, they have established *prima facie* entitlement to summary judgment on liability and dismissal of all claims and cross claims against them.

As the claims against the City Defendants are dismissed, their branch of the motion seeking indemnification is denied as moot.

Pioneer Corp. and Chavez’s Cross Claim Against the Owolabi Defendants

Pioneer Corp. and Chavez also move for summary judgment on their first cross claim against the Owolabi Defendants, seeking full indemnification in the event of any verdict or judgment in favor of Plaintiffs against Pioneer Corp. and Chavez, “by reason of [Owolabi’s] wrongful conduct being primary and/or active while any wrongdoing of [movants] was secondary and/or passive.”

In support of this branch of the motion, Pioneer Corp. and Chavez rely entirely on the so-ordered stipulation of the parties dated September 16, 2022¹. Pursuant to the stipulation and Owolabi’s undisputed failure

¹ The movants also misrepresent that a prior decision constituted a striking of Owolabi’s answer and an admission of the allegations in the complaint (see NYSCEF Doc No. 40). That motion was granted *only* to the extent of directing compliance with the parties’ discovery stipulation and was otherwise denied.

to appear for a deposition on December 7, 2022, Owolabi is precluded from “testifying at the time of trial and from offering an affidavit on a dispositive motion.”

In opposition², Plaintiffs submit an attorney affirmation, a counterstatement of material facts, a certified police accident report, and the deposition transcripts of Shawntae Clarke and Dominique Flournoy.

In further opposition to the cross claim branch of the motion, the Owolabi Defendants submit, *inter alia*, an attorney affirmation, a counterstatement of material facts, and the deposition transcripts of Shawntae Clarke, Dominique Flournoy, and Chavez. The Owolabi Defendants also submit an uncertified MV-104 report and unauthenticated photographs of the Owolabi vehicle, which have no evidentiary value (*see Morales by Perez v City of New York*, 278 AD2d 293 [2d Dept 2000]; *Rue v. Stokes*, 191 AD2d 245, 246-47 [1st Dept 1993]). Owolabi is precluded from offering an affidavit on a dispositive motion.

Even in the absence of opposition, summary judgment may only be granted when the movant has made a *prima facie* showing they are entitled to judgment as a matter of law. “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, at 853).

Generally, a claim for indemnification does not accrue until the party seeking indemnification has paid the injured party, i.e., after a verdict or judgment (*see McDermott v City of New York*, 50 NY2d 211 [1980]). While a defendant can, and typically does, assert a cross claim or third-party claim for indemnification from the outset of an action with multiple tortfeasors, this relief is usually premature until there has been an actual determination on liability in the main action (*see Slovik v Wang*, 110 AD2d 630 [2d Dept 1985]).

Contribution and indemnification allows “one who was compelled to pay for the wrong of another to recover from the wrongdoer the damages paid to the injured party” (*D’Ambrosio v City of New York*, 435 NY2d 454, 460 [1982]). In motor vehicle cases, where there may be more than one proximate cause of the accident, the more common claim is for *contribution* based on apportioned fault (*see also Rogers v Dorchester Associates*, 32 NY2d 553, 565-566 [1973]), and the relative fault of the parties is almost always a question for the jury. Full indemnification is more applicable when a “passive” or vicariously liable party is “held responsible solely by operation of law because of his relation to the actual wrongdoer” (*McCarthy v Turner Cost., Inc.* 17 NY3d 369 [2011]), such as an employer or vehicle owner (*see ELRAC, Inc. v Beckford*, 250 AD2d 725 [2d Dept 1998]).

In either situation, the party seeking contribution or indemnification must provide some showing as to the other tortfeasor’s negligence and their own proportionate or total lack of negligence. “To establish a claim for common-law indemnification, the one seeking indemnity must prove *not only that the proposed indemnitor was*

² Plaintiffs’ opposition papers treat this branch of the motion as one “dismissing plaintiff’s complaint” as to Pioneer Corp. and Chavez. However, the relief expressly sought by the movants is summary judgment on the *cross claim* for indemnification against the Owolabi Defendants only, on the theory that the Owolabi Defendants may be found 100% liable for the accident due to their preclusion order.

guilty of some negligence that contributed to the causation of the accident but also that [the moving party] was *not guilty of any negligence beyond the statutory liability*” (*Winkler v Halmar International, LLC*, 206 AD3d 458, 461 [1st Dept 2022] [emphasis added], citing *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1st Dept 2004]).

Here, Pioneer Corp. and Chavez have not met this initial burden. The moving papers are silent on the issue of liability entirely and present *no evidence* as to the happening of the accident, which is wholly insufficient to establish their entitlement to summary judgment. To the extent they rely on the Plaintiffs’ verified complaint, its allegations of negligence “upon information and belief” do not constitute admissible proof of the facts (*see Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227). The movants suggest that Owolabi’s preclusion order, standing alone, entitles the other defendants to an uncontested judgment of 100% liability against Owolabi. However, this limitation on testifying or offering an affidavit does not simply allow the Plaintiffs *or* the other defendants to bypass their own burden of proof on a dispositive motion. Pioneer Corp. and Chavez failed to establish by any evidence that the accident was caused by Owolabi’s negligence, nor have they established their own lack of negligence which would entitle them to full indemnification. Without meeting their *prima facie* burden, this Court need not reach the sufficiency of the opposing papers.

Accordingly, it is hereby

ORDERED that the branch of Defendants’ motion (Seq. No. 1) seeking an Order, pursuant to CPLR 3212, awarding summary judgment to the City Defendants (City, BOE, and DOE) and dismissing all claims and cross claims against them, is **granted**; and it is further

ORDERED that the branch of Defendants’ motion seeking an Order, pursuant to CPLR 3212, awarding summary judgment to the City Defendants on the first cross claim against Owolabi and Balogun is **denied as moot**; and it is further

ORDERED that the branch of Defendant’s motion seeking an Order, pursuant to CPLR 3212, awarding summary judgment to Pioneer Corp. and Chavez on the first cross claim against Owolabi and Balogun is **denied**.

This constitutes the Decision and Order of this Court.

Dated: January 11, 2024

Hon. 

BIANKA PEREZ, J.S.C.

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1. CHECK ONE.....

☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS.....

☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT