Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

----------X

Everett Parker,

Plaintiff,

- against -

New York City Department of Education, The City of New York, GEICO Insurance Company, Barry Davis, John B. Uruburo and Rabia Ashfaq,

Defendants.

----------X

Index Number: 717691/18

Motion Date: 3/8/21

Motion Seq. No.: 4

The following papers numbered E56-E66, E68-E69 and E76 read on this motion by defendants, New York City Department of Education (DOE) and The City of New York, for leave to amend their answer and to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	E56-66
Affirmation in Opposition	E68-69
Reply	E76

Upon the foregoing papers it is ordered that the motion is decided as follows:

The DOE and the City move for leave, pursuant to CPLR 3025, to amend their answer to include the affirmative defense of statute of limitations and to dismiss the complaint pursuant to CPLR 3211(a)(5) upon the ground that the action must be converted to an Article 78 proceeding and then dismissed upon the ground that it is barred by the 4-month statute of limitations applicable to Article 78 petitions, and, alternatively, to dismiss the complaint against them, pursuant to CPLR 3211(a)(7), upon the ground that it fails to state a cause of action against them.

Plaintiff was involved in a four-car chain-reaction motor vehicle accident on the westbound Grand Central Parkway at 187th Street in Queens County on December 6, 2016. The unrebutted evidence is that he was the rear-most vehicle and that he rear-ended the vehicle operated by defendant Ashfaq. Plaintiff alleges in his complaint that he saw the vehicle operated by Urbano strike the rear of the Davis vehicle and then the Ashfaq vehicle strike the Urbano vehicle and further alleges that he was unable to avoid striking the Ashfaq vehicle due to the slick condition of the

roadway resulting from rain. He alleges that all vehicles were moving at a very slow speed. Plaintiff was an employee of defendant DOE and the vehicle he was operating was owned by the DOE.

Plaintiff alleges that he had the use of the DOE vehicle to drive to and from work, that at approximately 2:30 pm on the date of the accident his mother asked him for a ride to the medical facility where she was to undergo radiation treatment and that he picked up his mother on his way home from work and drove her to her appointment, where he waited for her, and that the accident occurred as he was driving his mother home after her appointment.

Ashfaq and Davis subsequently commenced actions against plaintiff as well as the DOE and the City, and plaintiff, in turn, requested that the DOE's Office of Legal Services represent him, pursuant to §50-k(2) of the General Municipal Law. By letters dated January 23, 2018, the City's Law Department declined representation of plaintiff upon the ground that the actions against him did not arise out of any act or omission "while the employee was acting within the scope of his employment and in the discharge of his duties...at the time the alleged act or omission occurred", as required under §50-k(2), to qualify him for representation by the Office of the Corporation Counsel that represents the DOE.

Based upon the DOE's and the City's declination of his request to defend him, plaintiff filed a claim with his personal motor vehicle insurance carrier, GEICO, on February 4, 2018. By letters dated February 20, 2018, GEICO disclaimed coverage upon the ground that the vehicle that he was operating was not an "owned auto", "non-owned auto" or "temporary substitute auto" under the terms of his policy.

Plaintiff thereafter filed a notice of claim against the DOE and the City and then commenced the present action on November 19, 2018, ostensibly for a declaratory judgment seeking a determination that the City and the DOE, or alternatively, GEICO, are required to defend and indemnify him.

That branch of the motion for dismissal of the action against the City and DOE for failure to state a cause of action against them, pursuant to CPLR 3211(a)(7), is granted.

Since the complaint may be construed as being a challenge to an agency's determination not to represent and indemnify plaintiff upon the ground that the accident did not occur in the course and scope of his employment, and seeks the determination of the Court as to whether the City/DOE, through the Office of the Corporation Counsel, is required to defend and indemnify plaintiff, it may only be brought as a special proceeding under CPLR Article 78 for review of an agency determination, not as an action for declaratory judgment (see Ricketts v New York City Health and Hosp. Corp., 88 AD 3d 593 [1st Dept 2011]).

Whether or not an employee of a municipal entity is entitled to representation and indemnification under General Municipal Law §50-k in suits brought against the employee is a determination to be made by the Corporation Counsel, judicial review of which may only be sought by way of a special proceeding under CPLR Article 78, pursuant to which the determination may only be set aside if it is found that it had no factual basis and thus was arbitrary and capricious (see Williams v New York, 64 NY 2d 800 [1985]; Blood v Board of Education, 121 AD 2d 128 [1st Dept 1986]).

No allegations, or causes of action, are set forth in the complaint alleging that the Office of the Corporation Counsel acted arbitrarily, capriciously or irrationally in its determination that plaintiff did not qualify for representation by the Corporation Counsel as a DOE employee under General Municipal Law §50-k(2) or that the determination to decline representation was not based on fact, that fact being whether he was acting in the course and scope of his employment at the time of the accident. Moreover, no facts are alleged and no causes of action are set forth articulating declaratory judgment relief against the municipal defendants. Aside from a recital of the aforementioned facts of this matter, the complaint merely states, with respect to any cause of action or prayer for relief, in its entirety, the following:

> 32. That since he did not steal the vehicle, and under the law of the State of New York, he must be represented and indemnified by the Dept. of Ed., and the City.
>
> 33. Should the Court decide that the City and the Dept. of Ed., not be responsible then Geico should be responsible for representation and any indemnification since he was not driving the vehicle without insurance.
>
> WHEREFORE, since the Plaintiff cannot be driving the vehicle uninsured it is requested that the Court determine who should represent and indemnify the plaintiff together with any other relief this Court deems just and proper.

Therefore, the complaint fails to state a cause of action for declaratory relief against the City or DOE.

The remaining branches of the motion for an order converting this declaratory judgment action to an Article 78 proceeding, and, upon such conversion, to grant the City and DOE leave to amend their answer to assert the affirmative defense of statute of limitations and to dismiss the Article 78 petition as untimely are denied. Although an action that is improperly brought as a declaratory judgment action that actually seeks Article 78 relief may, in the discretion of the Court, be converted to a special proceeding under CPLR Article 78 (see EMP of Cadillac LLC v Assessor of Spring Valley, 15 AD 3d 336 [2nd Dept 2005]), as noted,

the complaint does not set forth any allegations in the nature of Article 78 relief. Moreover, even had the complaint set forth causes of action and prayers for relief in the nature of review and mandamus to compel under CPLR Article 78, the summons and complaint still could not be converted to a notice of petition and petition under CPLR Article 78 because such a proceeding would not lie against GEICO.

Finally, this Court, parenthetically, must express its bewilderment at plaintiff's counsel's commencement of this declaratory judgment action against the other drivers, Davis, Uruburo and Ashfaq. The complaint does not seek any relief against them but only seeks a determination of whether the City/DOE or GEICO are required to defend and indemnify him against the actions commenced by Ashfaq and Davis against him. There is also no indication that Urbano has commenced an action against plaintiff and so there is absolutely no rational basis for inclusion of him as a defendant in an action that only seeks a determination as to whether the municipal defendants or plaintiff's insurance carrier is obligated to defend and indemnify plaintiff against the actions commenced against him by the other two defendants. Although the complaint states no causes of action and does not seek any relief against Davis, Urbano and Ashfaq, and plaintiff's counsel sets forth no reason for serving them as defendants in this action, they have not moved for dismissal under CPLR 3211(a)(7) and, therefore, this Court may not dismiss the action against them for failure to state a cause of action sua sponte.

Accordingly, the caption of the action is amended to read as follows:

----------X

Everett Parker,

Plaintiff,

- against -

GEICO Insurance Company, Barry Davis, John B. Uruburo and Rabia Ashfaq,

Defendants.

----------X

Index Number: 717691/18

Dated: March 12, 2021

KEVIN J. KERRIGAN, J.S.C.

FILED

3/17/2021

10:38 AM

COUNTY CLERK

QUEENS COUNTY