

**Red Apple Child Development Center v Community
School Districts Two, Twenty-Four, Twenty-Five &
Twenty-Eight**

2002 NY Slip Op 30064(U)

February 8, 2002

Supreme Court, New York County

Docket Number: 0117470/2001

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: Hon. _____

PART 55

Justice

Ret Apple Chick Development Center

INDEX NO.

117470/01

MOTION DATE

10/15/01

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
Community School District 2, etc.

The following papers, numbered 1 to 6 were read on this ^{petition} ~~motion~~ to/for Article 18 relief

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

SCANNED

Answering Affidavits — Exhibits _____

FEB 25 2002

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{and as judge} ~~motion~~ ^{petition} is decided in accordance with the entered decision, order and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED: _____

J.S.C.

Dated: 2/8/02

Check one: FINAL DISPOSITION

J.S. Solomon
JANE S. SOLOMON
J.S.C.
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

-----X
RED APPLE CHILD DEVELOPMENT CENTER,

Petitioner,

DECISION, ORDER and
JUDGMENT

Index No: 117470/01

-against-

COMMUNITY SCHOOL DISTRICTS TWO,
TWENTY-FOUR, TWENTY-FIVE AND TWENTY-EIGHT,
and the BOARD OF EDUCATION,

Respondents,

-----X

SOLOMON, JANE J.:

This special proceeding was initiated by Red Apple Child Development Center ("Red Apple"), as petitioner, with Community School Districts ("CSD") Two, Twenty-four, Twenty-five and Twenty-eight, and the Board of Education ("Board"), named as respondents. Without first seeking relief from the administrative action which led to this proceeding, Red Apple seeks an order 1) directing respondents to enroll students in Red Apple's Universal Pre-Kindergarten programs on an equal basis with other providers until October 31, 2001; 2) directing respondents to provide funding for eligible students currently attending Red Apple's programs; and 3) a direction that respondents pay arrears due to it. Based on the submissions, this court finds that the administrative conduct was in error, but that the other relief sought is not properly awarded here.

BACKGROUND

Red Apple is an educational corporation chartered in December 1997 by the New York State Board of Regents as a private educational institution. Until July 17, 2001, Red Apple operated

eight day care facilities--of which there are two in Manhattan, four in Queens, and one in Brooklyn--primarily catering to children in the immigrant Chinese communities. The schools provided daycare and "pre-kindergarten" services for young children.

Red Apple was paid a certain amount for each eligible 4-year old who received pre-kindergarten schooling under the Universal Pre-kindergarten ("UPK") Program set forth in section 3602-e of the New York Education Law. More than 300 eligible children attended Red Apple centers (payment for each school year is calculated based on the actual number of eligible children enrolled on October 31). Red Apple claims that it provided excellent UPK services, which claim is bolstered by a June 2000 letter of recommendation from a UPK specialist employed in CSD 1, and more significantly, by the many petitions signed by parents who send their children to Red Apple facilities which are submitted as Exhibit M to the petition. Red Apple also submitted photographs of what appear to be happy children, parents and staff members in bright, pleasant classrooms. Respondents do not contest the quality of Red Apple educational services.

Red Apple began providing UPK services in 1998 pursuant to contracts between it and the Board, which made the contracts on behalf of the CSDs. There is a separate contract for each CSD. The contracts were extended through June 2004. Petitioner annexed continuation contracts with respondent CSD 2 for Red Apple's Manhattan facilities, and those with respondent CSDs 24,

25 and 28 for the Queens facilities.

In effect, each renewal contract¹ requires that, for its duration, Red Apple maintain a valid Certificate of Occupancy ("C of O"), Department of Health license, and certificate of insurance, for each location; that it provide the CSDs with proof of newly issued certificates or licenses within thirty days from the expiration of an old one; and that failure to do so would result in suspensions of all payments under the contract. The contracts provide for a procedure to resolve payment disputes. The procedure is not mandatory, rather it permits Red Apple to appeal a CSD's decision to withhold payment to a board of review, and reserves both parties' rights under the law.

Respondents claim that the initial contracts required, as a condition precedent, that Red Apple represent that it possesses valid health permits to operate a pre-school program. There is no indication that it did not. Respondents also claim that buildings and classrooms must meet all applicable fire and building codes. Again, there is no indication that they did not; however, an issue arose regarding Red Apple's C of Os and health permits.

In June 2001, Red Apple's chief executive officer was arrested and charged with offering a bribe to a building inspector in connection with an application for a C of O for a

¹ No copy of the initial contract is provided by either side, so it is assumed that it provides for no additional rights beyond those in the renewals.

Red Apple facility in Brooklyn. The charges were dismissed in July before trial. The City of New York Department of Health ("DOH") responded to news of the arrest by demanding that Red Apple produce certified copies of C of Os for all its facilities, to compare with the copies presented to the DOH in applying for health permits. Upon finding discrepancies, DOH suspended all of Red Apple's health permits pending an administrative hearing, and directed Red Apple to cease operating any of its eight daycare centers. By a letter dated July 17, 2001, the Board notified Red Apple that all PKU contracts were terminated effective August 27, 2001. The letter states that the Board received a BOH order "terminating" all of Red Apple's health permits, and accordingly, Red Apple was "no longer in compliance with the requirement of maintaining a valid Department of Health license. Based on the foregoing, you are hereby notified that all contracts between the [Board] and Red Apple, Inc. [sic] are terminated."

In July 2001, a Red Apple officer, Fan Xiaoping, commenced two actions pro se seeking injunctive relief against DOH (index number 113657/01) and the Department of Buildings (114230/01) relative to these events. Those actions were addressed by this Court, despite the infirmity presented by an individual attempting to represent a corporation pro se, and ultimately dismissed. Partly in an effort to resolve the underlying issues, also in July 2001, Red Apple negotiated with DOH officials regarding the terms under which DOH would consider reinstating the health permits. DOH agreed to an expedited

review, including re-inspections of Red Apple facilities, and Red Apple agreed to be subjected to monitoring of its finances and to exclude the arrested CEO from further involvement with Red Apple. In August and early September 2001, health permits were reinstated for all Red Apple facilities except for the one in Brooklyn. By early September, however, the Board claims that the CSDs had made alternative arrangements with other UPK providers, so it did not enter into any "new" UPK contracts with Red Apple, even though the renewal contracts were to end on June 30, 2004. As a result, this proceeding was begun.

DISCUSSION

A threshold question is whether the relief sought by petitioner is properly before this court under Article 78. "Rights based on a contract with a governmental body generally cannot be enforced by means of an Article 78 proceeding." Alexander, Practice Commentaries, 7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, § c7801:6, p. 39 (West 1994 & Supp.). The Appellate Division, First Department, has stated that:

"It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion." Accordingly, a party seeking mandamus must show a " 'clear legal right' " to such relief, such as where a duty to act is "'premiered upon specific statutory authority' ". "The right to performance 'must be so clear as not to admit of reasonable doubt or controversy.' "

Morrison v New York State Div. Of Housing and Community Renewal,

241 AD2d 34 (1st Dept 1998), reversed, 93 NY2d 834 (1999)
(remanded to the trial court with directions to dismiss on
grounds that issues presented were moot) (citations omitted).

This petition is framed as one to direct respondents to enroll students in Red Apple's UPK program and make payments under the contracts. The Board's argument that the CSDs are not using Red Apple's services simply because they "made other arrangements" following the Board's July 17 determination is disingenuous; clearly they did so in connection with the Board's action. However, Red Apple does not demonstrate that its right to recover under the contracts is so clear as not to admit of reasonable doubt or controversy (these are the sorts of matters frequently litigated in plenary actions), or that the CSDs have no discretion as to with which UPK providers they may enroll children. Accordingly, the petition is considered only as to the implied claim that the Board improperly "terminated" the contracts, and not as to affirmative relief for any such breach. (It is noted that the renewal contracts include an administrative remedy for a failure to pay, which has not been exhausted. The claims for damages are dismissed without prejudice because they do not belong here.)

Under paragraph 7(a) of the renewal contracts Red Apple submitted, it was required to maintain valid health permits. Paragraph 7(b) provides that the CSD's remedy in the event Red Apple does not maintain its permits is to suspend payment. It is not clear that termination is an appropriate remedy, especially

here, where the Board acted upon BOH's provisional suspension of the permits in anticipation of a hearing. See, Order of the Commissioner, annexed to the Verified Answer at Exhibit B, 3. The July 17 letter incorrectly states that all of Red Apple's health permits were terminated. In fact, the permits were merely suspended pending further administrative action, and were reinstated but for the one for the Brooklyn facility, which is not a subject of this petition.

The July 17 letter is a final determination by the Board with respect Red Apple's qualifications as a UPK provider. Although Red Apple and Board employees engaged in a negotiation regarding the contracts, the Board gave no notice of its decision to terminate the contracts and did not provide a hearing. Such notice and hearing as was provided, by BOH, ended favorably for Red Apple with respect to all the facilities at issue here. Moreover, the Board's determination is arbitrary and irrational on its face because it is premised on the incorrect factual assertion that BOH issued an order terminating all of Red Apple's health permits. BOH's order merely suspended the permits pending administrative review, and it is patently unfair that Red Apple be penalized summarily as if that review had been held and resolved against it.

Finally, the renewal contracts do not provide for summary termination by the Board, and the Board does not reference any rule or statute authorizing it to summarily terminate the contracts under these circumstances.

Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted to the extent that the determination by the Board terminating Red Apple's contracts, dated July 17, 2001, hereby is vacated and annulled, and the petition otherwise is denied.

Dated: February 8, 2002

ENTER:



J.S.C.
JANE S. SOLOMON