

**Boys Choir of Harlem, Inc. v New York City
Dept of Educ.**

2007 NY Slip Op 30003(U)

February 4, 2007

Supreme Court, New York County

Docket Number: 0101310

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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BOYS CHOIR OF HARLEM, INC.

Plaintiff,

Index No. 101310/2006

v.

DECISION

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

-----X
KARLA MOSKOWITZ, J.:

Plaintiff Boys Choir of Harlem (“Boys Choir”) seeks a temporary injunction and defendant New York City Department of Education (“DOE”) cross moves to dismiss the action on the ground that the law is clear that the Boys Choir has no legal right to remain at the Choir Academy of Harlem (“Choir Academy”). The court is constrained to deny injunctive relief and grant defendant’s motion to dismiss. I have already issued an order embodying that relief. This decision follows:

Background in Brief

In 1983, the Boys Choir and the New York City Board of Education (the Board”) (now defendant DOE) entered into an agreement (the “Agreement”) in which the Board granted Boys Choir the use of space at a public school, the Choir Academy at 2005 Madison Avenue in Harlem. The Board renewed that Agreement annually until January 2004 at which time the Boys Choir and DOE entered into a letter Agreement.

On February 1, 2006, DOE and the Choir Academy barred Boys Choir employees from their offices at the Choir Academy. The Boys Choir commenced this action, first seeking a temporary restraining order and then a temporary and permanent injunction requiring DOE to restore Boys Choir’s use of the space and a declaratory judgment that there is a valid lease, that

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defendant did not validly terminate the lease and that DOE illegally and forcibly evicted the Boys Choir. DOE breached the lease and the Boys Choir is entitled to remain on the premises and, finally for monetary damages under RPAPL 853 for breach of lease (Complaint, *passim*).

This court declined to issue a TRO and, because of factual issues the parties raised about the nature of the Agreement and relationship of the parties, the court held a hearing on those issues before issuing a temporary injunction.

The hearing lasted over several days. The parties also submitted various documents and affidavits.

Decision

Preliminary Injunction

For plaintiff to obtain a preliminary injunction it must show that (i) there is a likelihood of success on the merits, (ii) irreparable injury in the absence of the preliminary injunction, and (iii) the balancing of the equities is in the movant's favor. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862, 552 NYS2d 918, 919 [1990]; see *Coinmach Corp. v Alley Pond Owners Corp.*, 25 A.D.3d 642, 808 N.Y.S.2d 418 [2d Dept 2006]).

The first and dispositive issue for the court to determine is whether the plaintiff can prevail on its contention that the 1993 Agreement as renewed and as the parties treated it was a lease and thus there is a likelihood of a success on the merits.

Because the Boys Choir cannot succeed on the merits, as discussed below, it cannot meet the first element to obtain a preliminary injunction. As to the two other elements, the testimony over many days addressed the harm to Boys Choir and the balancing of the equities. True, Boys Choir's loss of its administrative staff offices affected its ability to obtain funding and manage its programs. On the other hand, there was ample credible evidence that the way Boys Choir

operated and failed to operate its programs at the Choir Academy interfered with the school's own curriculum and supervision of its students.

It is unnecessary for the court to rule on these elements. If the court were to, the credible evidence showed that the Boys Choir, although showing that it sustained injury to its ability to continue to exist, did not carry its burden of proof that its injury outweighed the harm and disruption to the Choir Academy, the school in which the Boys Choir had its offices and for whom it was supposed to provide programming.

The court thus concludes that Boys Choir of Harlem is not entitled to an injunction.

Motion to Dismiss

Defendant, to prevail on its motion to dismiss, must show that the documentary evidence precludes the relief plaintiff seeks as a matter of law and that DOE is entitled to a declaration in its favor on the first cause of action and dismissal of the remaining claims. (*Silvester v Time Warner, Inc.*, 1 Misc.3d 250, 255 [Sup Ct NY Co 2003], *aff'd*, 14 AD3d 430 [1st Dept 2005]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143 [1st Dept 2001]; *Wallach v Hinckley*, 12 AD3d 893, 894-95 [3d Dept 2004]).

The 1993 Agreement (part of Exhibit 1 of Affidavit of Dr. Walter Turnbull and Exhibit C to Affidavit of Smith Norman dated February 15, 2006 and Exhibit 1 at hearing) is entitled Agreement for Use of Space. It is not signed or specifically dated but is contemporaneously accompanied by the Board memoranda referring to the March 13, 1993 Board Resolution and to multi-use fees and containing other details. (*See Ex. 1 to Dr. Turnbull Affidavit*).

The relevant terms of the Agreement all reflect an authorization for use of space. For instance:

"1. Tenant shall have use of Room 118, ... (hereinafter referred to as the "Space"), a total of approximately 6,723 square feet in the School (also referred to as the "School Premises"), from 9:00 A.M. to 3:00 P.M. on all days that the school is in regular session ... for administrative and support-service office purposes.

...

"15. Tenant has administrative control of the Space under the general supervision of the Principal of the School. However, no one will be allowed to enter or remain on the School Premises unless the Custodian or Principal, or an authorized representative of the Custodian or Principal, is on the School Premises.

...

"17. Prior to and/or after school hours, Saturdays, Sundays and holidays, and during the summer vacation, Tenant may utilize the Space pursuant to a Permit.

...

"19. The Chancellor may, by written notice, said notice to be effective upon mailing or delivery to Tenant, terminate this agreement if the Chancellor determines that Tenant's use of the space is disruptive to normal school operations or endangers the health or safety of the public school students. The Chancellor also may, by giving thirty (30) days written notice, terminate this agreement if the Chancellor determines that the Space used by Tenant, or any portion thereof, is needed for classroom space. If as a result of such termination, Tenant uses the space for a period less than a full calendar month, the monthly fee shall be prorated to reflect such use for that month.

...

"21. h. The term 'license' or 'permit' as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right."

It is true that Boys Choir is referred to as Tenant in the Agreement. However, this label of Tenant does not create a landlord tenant relationship or a lease where the description of the relationship in the Agreement is not a lease. Thus, every written communication from the Board of Education from 1993 to 2004 has its "Re:" or "Subject" "Multi-Use: Choir Academy of

Harlem, 2005 Madison Avenue” or “Use of Space at 2005 Madison Avenue” or “Multi-Use Arrangement Renewal for School Year 1997-1998: Choir Academy of Harlem. (Exhibits 1-6, 8-9, 11-13). Even Dr. Turnbull’s requests to renew the Multi-Use Agreement refer not to a lease but a Multi-Use Arrangement or Renewal. (Exhibits 14, 15).

The case law the parties rely on supports DOE’s position that the agreement between the parties is for nothing more than use of space that the Board and then DOE can take back at any time. Further, as DOE argues, sections 403a and 414 of the Education Law permit DOE and, previously, the Board to regulate the use of school buildings but not to lease them, except in particular instances of abandonment.

The remainder of Boys Choir’s causes of action also fail because they all rest on its incorrect position that it had a lease for the space.

Thus, the New York City Department of Education is entitled to dismissal of this action with prejudice.

Dated: February 21, 2007



J.S.C.

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