

Matter of Board of Educ. of the Garrison Union Free School Dist. v Greek Archdiocese Inst. of St. Basil
2007 NY Slip Op 33049(U)
September 27, 2007
Supreme Court, Albany County
Docket Number: 0407805/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of

BOARD OF EDUCATION OF THE GARRISON
UNION FREE SCHOOL DISTRICT,

Plaintiff,

-against-

GREEK ARCHDIOCESE INSTITUTE OF ST.
BASIL a/k/a ST. BASIL ACADEMY; THE
NEW YORK STATE OFFICE OF CHILDREN AND
FAMILY SERVICES; and RICHARD P. MILLS,
COMMISSIONER OF THE NEW YORK STATE
EDUCATION DEPARTMENT,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

RJI: 01-05-ST5809 Index No. 4078-05¹

Appearances: Girvin & Ferlazzo, P.C.
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¹By decision-order dated April 17, 2007 Supreme Court Justice Joseph C. Teresi consolidated the instant action, commenced under Albany County Index Number 418-07 with a prior action commenced under Albany County Index No. 4078-05, RJI No. 01-05-ST5809. He directed that the instant action be consolidated under the earlier index number.

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff Board of Education of the Garrison Union Free School District (the District) moves pursuant to CPLR 3211 for an order dismissing the first, second, third, and fourth counterclaims interposed against the District in an answer served by defendant Greek Archdiocese Institute of St. Basil a/k/a St. Basil Academy (St. Basil) in the above-captioned action. St. Basil opposes the motion.

St. Basil operates a residential care program for children pursuant to Social Services Law Article 7 within the District. Since at least 1997, the District has had an ongoing dispute with St. Basil regarding the District's obligations in connection with the education of St. Basil's students². The primary issue is with regard to who or what entity should be financially responsible for the education of St. Basil's students.

The District commenced the above-captioned action for a declaratory judgment with respect to its obligations to provide an education to St. Basil's students, particularly those students who are privately placed or placed by an agency of a sister state – that is, not placed by order of a New York State Family Court, a New York State Social Services District or the New York State Division For Youth (see Education Law Article 81). The complaint challenges the District's obligation to educate non-resident children who are privately

²The District indicates that it is one of the smallest school districts in the State, with one school building in which it educates approximately 300 pupils attending kindergarten to eighth grade. Thereafter, its resident high school age children attend either Highland Falls-Montgomery Central School or Haldane Central School District, on a tuition paying basis.

placed at St. Basil. Commissioner Mills, in two prior administrative determinations (St. Basil I, dated April 6, 2004, and St. Basil II, dated March 11, 2005), ruled that the District is obligated to educate St. Basil students. The issue concerning the responsibility for the education of privately placed students under Education Law Article 81 was not specifically addressed in these decisions.³ In addition, the District also challenges the scope of the license granted by the Office of Children and Family Services, specifically with regard to whether the license authorizes St. Basil to accept privately placed children.

As relevant to the instant motion practice, on April 5, 2007, St. Basil answered the complaint, interposing five counterclaims. St. Basil notes it was founded in 1944 and operated as a boarding school until 1997 when the school component was discontinued but the residential care aspect continued (see Answer at ¶¶ 53-57, Ferlazzo Affidavit, Exhibit B). St. Basil then began using local schools, both private and public, to educate the children under its care (see id. at ¶ 55). In its counterclaims, St. Basil asserts that, in 2002, it attempted to enroll its children in the District but that the “District responded by launching a relentless campaign to deprive the St. Basil children of their state and federal rights” to a free and appropriate public education (id. at ¶ 37). St. Basil alleges that it has attempted to resolve the dispute with the District but the District rejected such proposals, including the

³The reason why the issue was not addressed, as Commissioner Mills observed in his decision dated April 6, 2004, is that St. Basil did not, at that time, possess a license to operate a child care institution, and as such, did not fall within the purview of Education Law Article 81. Subsequently, on November 10, 2006, St. Basil was issued an operating certificate by the Office of Children and Family Services.

most recent one of April 21, 2006 (see id. at ¶ 38). St. Basil contends, that, as a result, it “has been reluctantly compelled to conclude that [the District’s] refusal to educate the St. Basil children has been motivated by improper and discriminatory motives” (id. at ¶ 39). St. Basil seeks, inter alia, injunctive relief and counsel fees “in its capacity as legal guardian” for fourteen named children in its care and “in the interest of numerous other children in need who will be accepted into St. Basil’s care in the future” (id. at ¶¶ 48-50). The first three counterclaims, premised, in part, on 42 USC § 1983, allege violations of the children’s equal protection rights, the Individuals with Disabilities Education Act (20 USC § 1400, et seq.), and the Rehabilitation Act (29 USC § 794). The fourth counterclaim alleges unjust enrichment on the part of the District.⁴

The District now seeks dismissal of the first four counterclaims. As to the first three counterclaims, the District contends that dismissal is warranted since St. Basil’s failed to allege that “it possesses the requisite ‘legal custody,’ supported by judicial decree, as to each of the infants on which it purports to act in this action, sufficient to confer standing to sue on their behalf pursuant to CPLR . . . 1201” (Ferlazzo Affidavit at ¶ 7). In addition, the District maintains that the first three counterclaims fail to allege that the any of the named children ever actually applied to be enrolled in the District after November 10, 2006.

CPLR 3211 (a) (7) provides: “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state

⁴ St. Basil interposed a fifth counterclaim seeking a declaratory judgment as to the parties’ rights and responsibilities but that counterclaim is not at issue in this motion practice.

a cause of action.” Further, “[i]n the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference” (EBCI, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; see Martin v Columbia-Greene Humane Soc., Inc., 17 AD3d 839, 841 [3d Dept 2005]; see also Ford v Snashall, 285 AD2d 881, 881 [3d Dept 2001]).

As to the District’s argument that the first three counterclaims should be dismissed for failing to allege that the name-children actually applied to the District for admission, this argument lacks merit. Although the complaint does not expressly state that the named children applied for admission in the District after November 10, 2006, that fact may be inferred from the counterclaim, as well as the pleadings on the whole. St. Basil’s gave a detailed history of its dealings with the District in trying to have the children enrolled in the District. Accordingly, one can reasonably infer that the named-children continue to seek admission to the District.

Otherwise, CPLR 3211 (a) (3) provides: “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the party asserting the cause of action has not legal capacity to sue.” The “capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing” (HANYS Servs., Inc. v Empire Blue Cross & Blue Shield, 292 AD2d 61, 64 [3d Dept 2002], lv denied 98 NY2d 612). Legal capacity to sue

“concerns a litigant’s power to appear and bring its grievance before the court. The concept of lack of capacity, which has also been occasionally intermingled with the analytically distinct concept of a failure to state a cause of action, does not admit of precise or comprehensive definition. Capacity, or lack thereof, sometimes depends purely on a litigant’s status. A natural person’s status as an infant . . . could disqualify that individual from seeking relief in court” (Community Bd. 7 v Schaffer, 84 NY2d 148, 155 [1994]; see Sliver v Pataki, 96 NY2d 532, 537 [2001]; HANYS Servs., Inc. v Empire Blue Cross & Blue Shield, *supra*).

Here, the issue is the status of the infants on whose behalf St. Basil contends it is suing and, specifically, whether St. Basil has the capacity to commence a suit of their behalf.

CPLR 1201 provides, in pertinent part:

“Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody . . . A person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent or other person or agency having legal custody . . .”

As the District notes, allegations within the first three counterclaims only state that St. Basil is commencing an action on behalf of the named children as their guardian but do not specify anything further about that relationship. In response, St. Basil argues that it is authorized to act on behalf of the children in its care. In support of this contention, St. Basil submits signed “Consent for Boarding Care and Releases of Waiver of Liability” forms for nine of the children on whose behalf St. Basil interposed the first three counter claims. In pertinent part, that form stated that the form’s executor is “the legal parent or guardian of said child with legal custody or legal authority to make decisions about the care and custody of said child. I do hereby give consent for Saint Basil Academy to take said child under

boarding care and assume physical custody of said child” (Horowitz Affidavit, Exhibit 11).

The form further provides:

“I hereby authorize Saint Basil academy to provide care for said child, including the authority to make decisions regarding the educational, medical, psychiatric, psychotherapeutic care of said child, as well as the spiritual and religious counseling and care. It is my desire that this consent have the same legal effect as if Saint Basil Academy were awarded sole legal custody of said child in a court of law. It is my desire that Saint Basil Academy act in my place in making decisions regarding said child” (id.).

The forms are signed purportedly by a parent and, in some cases, witnessed by another individual (see id.).

Although these forms purport to have the same legal effect as if St. Basil’s was awarded sole legal custody of the child in the court of law, the form clearly states that the individual who executed the form is the child’s legal parent or custodian. Further, the express language of CPLR 1201 provides that a child shall appear by his guardian of property or by his or her parent having legal custody. Thus, under CPLR 1201, the parent of these nine children have legal capacity to sue the District but, St. Basil’s does not fit any of the descriptions of individuals or entities entitled to commence an action on behalf of an infant insofar as these nine infants are concerned (see CPLR 1201). Accordingly, as interposed on behalf of these nine infants, the first three counterclaims must be dismissed.

As to the remaining five infants, St. Basil submits “Consent for Guardianship and Transfer of Custody to Saint Basil Academy Release & Waiver of Liability” forms. These forms provide that the current legal parent or guardian is “transferring full and unqualified

care, custody and guardianship of said child to Saint Basil Academy freely, voluntarily, and without duress or coercion” (Horowitz Affidavit, Exhibit 11). The form further provides that the parent or guardian understands that “said child shall be in the sole care, custody and guardianship of Saint Basil Academy in Garrison, New York” (id.). The form also notes:

“It is my desire that this Consent have the same force and effect as a court order of sole legal custody and guardianship of said child to Saint Basil Academy. In the event of any court or administrative action regarding the custody and/or guardianship of said child, I respectfully request that this Consent be accepted into evidence to establish my wishes and intent in support of exclusive residence, custody and guardianship regarding said child” (id.).

Each of these forms were executed by a purported parent or guardian before a notary public.

As to these five children, nothing submitted by St. Basil indicates that the a judicial order has been issued granting St. Basil custody of these five children (see Villafane v Banner, 87 Misc 2d 1037, 1038 [Sup Ct, New York County, 1976]). Per the form executed by the purported parent or guardian, the parent or guardian expressed his or her desire that the subject form be “evidence” to establish his or her wishes and intent in the event of a court action, evidencing that no court determination has been made regarding the custody of the children. Accordingly, without evidence of such, St. Basil lacks capacity to sue on behalf of these children as well (see id.). Further, the affidavits of the children over 16 submitted by St. Basil are of no effect. To the extent that the children are under 18 years of old, they are considered infants and fall under the purview of CPLR 1201 (see CPLR 105 [j]; CPLR 1201). In the two cases where the affidavit cited the individual was 18 or over,

those individuals would be able to bring an action on their own behalf unless otherwise incapacitated. Moreover, to the extent that any of the children are at St. Basil pursuant to Court order, St. Basil has not proffered such orders for this Court to determine whether the orders confer guardianship upon St. Basil so as to give it authority pursuant to CPLR 1201 to sue on behalf of such children.

As to the fourth counterclaim, the District contends that it should be dismissed since St. Basil failed to give it written notice of the claim for unjust enrichment pursuant to Education Law § 3813. In response, St. Basil argues that section 3813 is inapplicable to this situation since it seeks disgorgement of funds that never belonged to the District and, thus, does not affect the District's property.

Education Law § 3813 provides, as relevant here:

“No action or special proceeding for any cause whatever, except as hereinafter provided, relating to district property or property of schools provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy four or claim against the district or any such school, or involving the rights or interests of any district . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment thereof for thirty days after such presentment. In the case of an action or special proceedings for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.”

Satisfaction of Education Law § 3813 “is a condition precedent to bringing an action against a school district or a board of education and, moreover, failure to present a claim within the

statutory time limitation or to notify the correct party is a fatal defect” (Parochial Bus Sys., Inc. v Board of Educ. of the City of New York, 60 NY2d 539, 547 [1983]). Moreover, section 3813 is to be strictly construed; “[t]his is true when where the [District has] actual knowledge of the claim or fail[s] to demonstrate actual prejudice” (Varsity Transit, Inc. v Board of Education of the City of New York, 5 NY3d 532, 536 [2005], quoting Parochial Bus Sys., Inc. v Board of Educ. of the City of New York, *supra*).

Here, the fourth counterclaim seeks monetary damages from the district under the theory of unjust enrichment. St. Basil alleges that the District

“has been unjustly enriched by failing to provide appropriate education and transportation services under Article 81 of New York’s Education laws to St. Basil. St. Basil has expended, and continues to expend, funds for the tuition and transportation costs of its K-8 children and 9-12 children, expenses that should otherwise be covered by [the District]. It would be against equity and good conscience for [the District] to continue to retain these funds that at all relevant times should have been used to provide education and transportation services to the children at St. Basil Academy, at [the District’s] expense” (Answer at ¶¶ 102-104, Ferlazzo Affidavit, Exhibit B).

Contrary to St. Basil’s argument, this claim does affect the District’s property and, thus, is subject to the notice of claim provision of Education Law § 3813 (see Prudential Farms of Nassau County v Educational Food Mgt. Servs., 213 AD2d 388, 388 [2d Dept 1995]; see also Bias Limud Torah, Inc. v County of Sullivan, 290 AD2d 856, 858 [3d Dept 2002], *lv denied* 98 NY2d 610). Since St. Basil did not comply with that notice provision, the fourth counterclaim must be dismissed (see Prudential Farms of Nassau County v Educational Food Mgt. Servs., *supra*; see also Matter of Harder v Board of Educ., Binghamton City

School Dist., 188 AD2d 783, 784 [3d Dept 1992]).

Otherwise, the parties' remaining arguments lack merit.

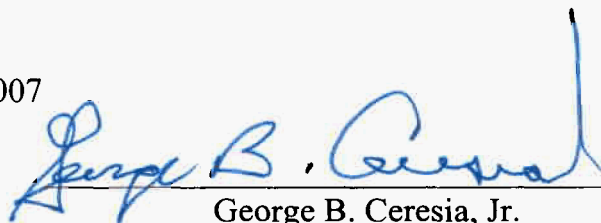
Accordingly, it is

ORDERED that plaintiff Board of Education of the Garrison Union Free School District's motion to dismiss the first four counterclaims in the Answer interposed by defendant Greek Archdiocese Institute of St. Basil a/k/a St. Basil Academy is granted; and it is further

ORDERED the first four counterclaims in the Answer interposed by defendant Greek Archdiocese Institute of St. Basil a/k/a St. Basil Academy are dismissed.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for plaintiff Board of Education of the Garrison Union Free School District, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: September 27, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion to Dismiss dated May 30, 2007
2. Affidavit of Salvatore D. Ferlazzo, Esq., sworn to May 25, 2007, with accompanying Exhibits A-C;
3. Affidavit of Gregory A. Horowitz, Esq., sworn to July 11, 2007, with accompanying Exhibits 1-12;
4. Reply Affidavit of Christopher P. Langlois, Esq., sworn to July 20, 2007, with accompanying Exhibit A.