[1]

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

PRESENT: YORK Justice — PART 2

3rd Avenue Transit

-v-

NYC Dept. of Education

INDEX NO. 101383/06

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/12/07

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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Application of

Allied Transit Corp.,

Petitioner,

Index No. 101382/2006

For a judgment, pursuant to Article 78 of the CPLR

-against-

New York City Department of Education,

Respondent.

----------x

3rd Avenue Transit, Inc.,

Petitioner,

Index No. 101383/2006

For a judgment, pursuant to Article 78 of the CPLR

-against-

New York City Department of Education,

Respondent.

----------x

York, J.S.C.:

Index Numbers 101382/2006 and 101383/2006 are consolidated for disposition and resolved as follows:

Because the Court is dismissing these proceedings on the threshold issue of failure to join a necessary party, a detailed analysis of the contract and pick order system is not necessary. In short, in the current proceedings, petitioners, who operate transportation services for New York City's special education students, challenge respondent Department of Education's interpretation of language in the most recent extension ("the third extension") of their contracts. The third extension was entered into on June 5, 2005 on a global basis, after negotiations between respondent and representatives of petitioners' union.

Prior to the third extension, based on their most recent weighted bids, petitioner 3rd Avenue Transit, Incorporated had the right to pick additional transportation routes first for its item; and petitioner Allied Transit Corporation had the right to pick second for its item. Items refer to the type of vehicle used in a particular transportation zone. For example, here, the pick orders for items BBC-MW (between Bergen County, mini-wagon) and WM-MW (within Manhattan, mini-wagon), are at issue.

The third extension states at paragraph 50 that respondent "shall offer any 'additional' vehicle(s) to contractors in the relevant contractual item as determined by the [pick order] established as of August 24, 2004." For reasons the Court does not discuss here, petitioners argue that under this provision, the pick orders which were in place going into the contract were in effect "as of August 24, 2004." Thus, they contend, under paragraph 50 the earlier pick order, which was favorable to them, should still apply.

Initially, respondent issued a pick order list for 2005 which comported with this interpretation. However, respondent states that prior to the 2005 pick it realized that

this was not a valid interpretation of paragraph 50. Instead, respondent concluded that under the provision petitioners were not vendors in their items "as defined by the 2004 Schedule of Picks or 'as of' August 24, 2004" and "had to return routes [they] had previously accepted in 2004 and during the 2004/2005 school year and be relegated to [lower positions in their pick orders] on August 23, 2005." Answers at ¶¶ 62 (Answer in 3rd Ave. Transit), 56 (Answer in Allied). As a result, petitioners were forced to return the additional routes from 2004 and these routes were given to other contractors. In addition, they lost the high pick orders to which they believed they were entitled.

After petitioners returned the routes, they commenced these Article 78 proceedings, demanding that the routes they relinquished be returned to them, and that the original pick order be reinstated. Petitioners named New York City Department of Education as the sole respondent and did not serve or in any formal way notify any other vendors of the Article 78 proceedings.

In its answers to the two petitions, respondent asserted, among other affirmative defenses, that petitioners did not join necessary parties to the proceeding. In particular, in this defense respondent referred to the vendors who have higher pick orders under respondent's interpretation of the third extension and who would lose their priority – and possibly some of the additional routes they have acquired – if petitioners prevailed. Respondent also discussed the issue in its briefs in opposition to the two petitions. Petitioners did not address the issue in their reply papers, did not move to add the other vendors, and did not otherwise formally inform these non-parties of the proceedings.

In May of 2006, the Court held oral argument on these two petitions for the first time. Subsequently, to clarify the issues relating to the pick order system, the Court

conferenced the matters on several additional occasions. At the first of these post-argument conferences, the issue of failure to join necessary parties was addressed. Noting that petitioners had not briefed the matter, the Court adjourned the conference and directed all parties to submit supplemental briefs. The Court held additional conferences in early and mid 2007. Despite the Court's articulated concerns, at no time did petitioners move to add the other vendors or otherwise formally notify them of the proceeding.

At the last of the post-argument conferences, a miscommunication occurred regarding (1) whether the Court had ruled on an aspect of the Article 78 proceedings from the bench at the original oral argument; (2) whether there had been a court reporter at the original oral argument; and (3) whether petitioners were to order the transcript and provide the Court with a copy. The Court held the petitions in abeyance while awaiting the transcript. Finally, in August of 2007, the Court discovered that the parties believed a court reporter had not been present at the initial oral argument, and therefore they had taken no action to obtain a copy of a transcript. Accordingly, the Court then put the proceedings back under consideration. Now, for the reasons below, the Court dismisses the proceedings.

Under CPLR 1001(a),

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

McKinney's CPLR § 1001. "The joinder provisions of CPLR 1001(a) apply to Article 78 proceedings." 27th Street Block Ass'n v. Dormitory Auth. of State of New York, 302

A.D.2d 155, 160, 752 N.Y.S.2d 277, 281 (1st Dept. 2002). The Court on its own motion or any party may raise the issue of the absence of a necessary party at any stage of the proceedings. Estate of Prospect v. New York State Teachers' Retirement Syst., 13 A.D.3d 699, 700, 785 N.Y.S.2d 774, 775 (3rd Dept. 2004). If, upon consideration, the Court determines that parties whose interests may be inequitably or adversely affected by a potential judgment have not been made parties, to the proceeding, dismissal of the petition is appropriate. Id.

Here, respondent did not affirmatively cross-move for dismissal based on failure to join a necessary party. However, as indicated above, it briefed the issue and requested dismissal in its pleadings, in its papers and at argument. Moreover, as also discussed, the Court put the parties on notice that would consider CPLR 1001(a) as a threshold issue, and allowed all parties to submit supplemental briefs.

Now, the Court reviews the original and supplemental papers on this issue. As respondent points out, petitioners failed to name the other vendors selecting in their items. These vendors would be affected by any determination relating to respondent's interpretation of paragraph 50 of the Thirteenth Amendment to the contract. In particular, under respondent's interpretation of paragraph 50, there are five vendors who pick before Third Avenue in item BBC-MW and ten vendors who pick before Allied in item WM-MW. If the Court were to rule in favor of petitioners, this would accord Third Avenue and Allied first and second picks in their respective items – and thus would adversely affect all those vendors which currently believe they have the right to pick before petitioners. For analogous reasons, courts have held that "a successful bidder is a necessary party in an action or proceeding commenced by an unsuccessful bidder

challenging the award of a contract." Subolo Contracting Corp. v. County of Westchester, 282 A.D.2d 737, 737, 724 N.Y.S.2d 754, 755 (2nd Dept. 2001). Similarly, the other vendors here should have been included as necessary parties. See id.; Boston Culinary Group, Inc. v. New York State Olympic Regional Development Auth., 18 A.D.3d 1103, 1104, 796 N.Y.S.2d 188, 189 (3rd Dept. 2005), lv denied, 5 N.Y.3d 844, 814 N.Y.S.2d 77 (2006). Petitioners' attempts to distinguish this situation from those involving successful bidders to contracts are unpersuasive.

Petitioners assert that the parties who have not been made part of this proceeding will not be harmed by the loss of additional routes and of their pick orders. This is true, petitioners explain, because respondent misinterpreted the third extension. Because the non-parties had no right to the additional routes and the higher pick orders in the first place, the argument is, they will not be harmed by the restoration of the proper pick order. Petitioners' reasoning is circular, requiring the Court to assume that the petitions have substantive merit before it determines whether it is proper to consider them. As the Court of Appeals has indicated, when a court is faced with a threshold challenge under CPLR 1001, "it is not for [the] Court in the first instance" to consider the "factual strength" of the petitions. Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals, 5 N.Y.3d 452, 461, 805 N.Y.S.2d 525, 530 (2005)("Red Hook"). In addition, this argument of petitioners is not logical. The non-parties are enjoying the benefits of the alternate pick order and they would be impacted negatively by any decision altering that pick order. Accordingly, these non-parties should have been made part of the litigations.

In the instant proceedings, the four-month statute of limitations expired by the time respondent filed and served its Answer. Thus, it was too late then, and it is far too late now, to add the non-parties. In this circumstance,"when justice requires," a court may allow the action to proceed without the joinder of the parties. CPLR 1001(b). In making its determination, the court considers (1) whether petitioners have other effective remedies; (2) the prejudice which may accrue to respondent or to the non-parties as a result of nonjoinder; (3) whether the prejudice might have been avoided, who might have averted the prejudice, and whether prejudice may be avoided in the future; (4) the feasibility of including "a protective provision" in the court order or judgment; and (5) whether there can be an effective judgment if the non-parties are not included in the proceeding. Id. No one factor is determinative and the Court need not explicitly address them all, as long it gives due consideration to all of the factors. Red Hook, 5 N.Y.3d at 461, 805 N.Y.S.2d at 530.

In accordance with these principles, the Court has considered the five statutory factors. First, it is clear that if the Court dismisses the proceedings, petitioners will suffer harm, as there is no alternate venue in which they can attempt to right their perceived wrongs. However, as discussed at length earlier, prejudice also will accrue to the non-parties if the petitions proceed without them; petitioners' arguments to the contrary are unpersuasive. The Court also cannot envision an adequate protective provision. Therefore, unfortunately, there is no easy solution which will protect the rights of everyone concerned.

The Court finds the third statutory consideration – "whether and by whom prejudice might have been avoided" – to be especially pertinent, and ultimately

dispositive. See Red Hook, 5 N.Y.3d at 459, 805 N.Y.S.2d at 529. Petitioners were aware of the interest and identity of the other vendors; and, they could have included them as parties to the proceedings in a timely fashion. Moreover, once they read the answers to the petitions or heard the Court's concerns over the failure to include the other vendors, they could have taken actions to notify or join them. Even if the other vendors challenged the joinder and petitioners were unable to add them to the proceeding, petitioners' efforts would have shown their diligence and desire to provide due notice, and the equities might have weighed more heavily in their favor now. In light of the inexplicable inaction of the petitioners, this is not "one of the 'rare case' factors enumerated in § 1001(b) militating in favor of allowing this proceeding to continue." Solid Waste Services, Inc. v. New York City Dept. of Environmental Protection, 29 A.D.3d 318, 319, 814 N.Y.S.2d 151, 152 (1st Dept.), lv denied, 7 N.Y.3d 710, 822 N.Y.S.2d 758 (2006)(Table). This is especially true here, where petitioners knew the identity of the other vendors, see Fiume v. Chadwick, 16 Misc. 3d 906, 912, 840 N.Y.S.2d 278, 283 (Sup. Ct. Broome County 2007), and have not proffered a justifiable, or any, excuse for their failure. See Best Payphones, Inc. v. Public Serv. Commission, 34 A.D.3d 1068, 1070, 825 N.Y.S.2d 306, 307 (3rd Dept. 2006), lv denied, 8 N.Y.3d 806, 833 N.Y.S.2d 426 (2007). Petitioners cannot rely solely on the fact that the Court has the discretion to excuse petitioners' own failure to act, but instead must bear the responsibility for their mistake. See Fiume, 16 Misc. 3d at 911, 840 N.Y.S.2d at 283. Moreover, as the statute of limitations has expired, petitioners are incorrect that the Court can compel them to appear at this time.

Petitioners further stated, at court conference, that respondent could have added the non-parties if respondent had concluded they were necessary parties. Petitioners suggested that therefore their own conduct was excusable or was not problematic. However, it is not the responsibility of respondent to name and serve the parties that petitioners should have included in their own proceedings. Therefore, this statement is not persuasive.

Accordingly, it is

ORDERED that the petitions, Index Numbers 101382/06 and 101383/06, are dismissed.

ENTER:

Dated: 10/12/07

LOUIS B. YORK
Hon. Louis B. York, J.S.C.
J.S.C.

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE