STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

M.A., an infant by his mother and
natural guardian SUE H.R. ADLER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1795-11
RJI NO. 01-11-103195

RAMI STROSBERG, individually and as Head of School; BET SHRAGA HEBREW ACADEMY OF THE CAPITAL DISTRICT; PATRICIA BULMER; individually and as Elementary School Principal; RUTH MALKA; individually and as a 5th Grade Teacher; UNIDENTIFIED PARENT 1; and UNIDENTIFIED PARENT 2;

Defendants.

Supreme Court Albany County All Purpose Term, June 27, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Sue H.R. Adler, Esq.
Attorney for Plaintiff and Pro Se
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Albany, New York 12203

Burke, Scolamiero, Mortati & Hurd, LLP
Peter Balouskas, Esq.
Attorneys for Defendants Rami Strosberg, individually and as Head of School; Bet Shraga Hebrew Academy of the Capital District; Patricia Bulmer; individually and as Elementary School Principal; Ruth Malka; individually and as a 5th Grade Teacher
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TERESI, J.:

Plaintiff commenced this action, in part, to compel Bet Shraga Hebrew Academy of the Capital District (hereinafter "BSHA") to accept M.A. as a 6th grade student for the upcoming 2011-2012 school year. Upon commencing this action, Plaintiff obtained a Temporary

Restraining Order (hereinafter "TRO") followed by a Preliminary Injunction. Plaintiff now moves for an Order finding Rami Strosberg, BSHA and the President of BSHA's Board of Directors, Ira Zackon, (hereinafter collectively "Defendants") in criminal and civil contempt. Defendants oppose the motion and seek sanctions pursuant to 22 NYCRR 130-1.1(c)(2). Because neither party established their entitlement to the relief they seek, all relief is denied.

"In order [t]o sustain a finding of either civil or criminal contempt based on an alleged violation of a court order[,] it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect[,] ... that the order has been disobeyed and that the charged party had knowledge of the court's order." (Town of Copake v. 13 Lackawanna Properties, LLC, 73 AD3d 1308 [3d Dept. 2010], quoting Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 NY2d 233 [1987][internal quotation marks omitted]).

Here, while Plaintiff established that the lawfully issued TRO was "in effect" when the alleged contemptuous acts occurred, he failed to demonstrate that the Preliminary Injunction was "in effect" at any time relevant herein. It is uncontested that the TRO was issued and became effective on May 27, 2011, prior to Defendants alleged disobedience. The Preliminary Injunction, by its terms, did not become effective and thereby replace the TRO until "Plaintiff provid[ed] Defendants with an undertaking in the amount of $12,500." Plaintiff, however, proffered no proof that he obtained and provided the requisite undertaking prior to the allegedly contemptuous acts. While, on this record, Defendants have admitted that Plaintiff posted the undertaking on June 13, 2011 (one day before Plaintiff "made" [CPLR §2211] this motion), the contemptuous acts alleged by Plaintiff all occurred before such effective date. As such, Plaintiff

failed to establish that the Preliminary Injunction was "in effect" when Defendants allegedly disobeyed it and his motion must be considered solely in light of the TRO's mandates.

Considering the TRO's "unequivocal mandate" it specifically "enjoined [Defendants] from further targeting plaintiff, retaliating against plaintiff or any of his teachers, and breaching the legally valid contract that plaintiff's parents have with the school, for the benefit of plaintiff."

On this record, Plaintiff failed to establish that Defendants disobeyed such mandate. Plaintiff has not alleged that Defendants targeted or retaliated against M.A. Rather, this motion is premised upon Defendants' "breaching the legally valid contract that plaintiff's parents have with the school." Assuming the "legally valid contract" referred to is M.A.'s enrollment contract for the 2011-2012 school year, Plaintiff established no breach. Plaintiff's admissible non-hearsay proof demonstrates only that the Defendants have neither cashed Plaintiff's deposit check nor "confirm[ed] that M.A. is enrolled for school next year at BSHA." Such non-action / non-communication does not constitute a breach of contract because the time for Defendants' performance has not yet past. Nor has Plaintiff proffered any admissible proof to establish that Defendants will not perform. Non-communication, in the absence of an obligation to communicate, simply does not constitute a breach. Similarly, Defendants' holding Plaintiff's check is not the same as Defendants' rejecting it.

Additionally, Defendants' opposition confirmed that they have not rejected M.A.'s enrollment. Rather, due to an alleged decline in their 6th grade enrollment, Defendants are considering the viability of having any 6th grade class next year. While Defendants' business determination not to have a 6th grade class could potentially constitute a breach of contract, such issue is not before this Court. Moreover, as the Preliminary Injunction has now superceded the

TRO its "breach of contract" language is no longer controlling. Rather, the Preliminary Injunction's explicit mandate requires Defendants "not to refuse M.A.'s enrollment as a student at BSHA for the 2011-2012 school year" without regard to grade. Because Defendants previously indicated their willingness to advance M.A. a grade ahead, the Preliminary Injunction's mandate requires BSHA to enroll M.A. whether there is a 6th grade or not.

Turning to Defendants' request for sanctions, it is unavailing. Despite this Court's denial of Plaintiff's contempt motion, it was not wholly without basis in law or fact. Moreover, contrary to Defendants' sanctions allegations, it was Defendants' unjustified non-communication that necessitated this motion.

Accordingly, both Plaintiff's motion and Defendants' request are denied.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
July 6, 2011

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated June 14, 2011, Affirmation of Sue Adler, dated June 13, 2011, with attached Exhibits A-D; Affirmation of Alan Adler, dated June 7, 2011; Affidavit of Daniel Smith, dated June 8, 2011; Affidavit of Micah Waldman, dated June 13, 2011; Affidavit of Amir Evan, dated June 9, 2011.
2. Affirmation of Peter Balouskas, dated June 20, 2011; Affidavit of Nancy Daigle, dated June __, 2011, with attached Exhibit A; Affidavit of Ira Zackon, dated June 20, 2011; Affidavit of Rami Strosberg, dated June 20, 2011; Affidavit of Mark Koblenz, dated June 20, 2011, with attached unnumbered exhibit.
3. Affirmation of Sue Adler, dated June 27, 2011, with attached Exhibit A; Affirmation of Alan Adler, dated June 24, 2011;Affidavit of Micah Waldman, dated June 26, 2011.