Varsity Bus Co. v New York City Dept. of Educ.

2011 NY Slip Op 32437(U)

September 9, 2011

Sup Ct, NY County

Docket Number: 100604/10

Judge: Barbara Jaffe

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SCANNED ON 9/15/2011

[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. *Justice* PART 5

Varsity Bus Co.

-v-

N.Y.C. Dept. of Education

INDEX NO. 100604/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 111

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

SEP 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9-9-11

SEP 09 2011

BARBARA JAFFE J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

VARSITY BUS CO., *et al.*,

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

Defendants.

---x

Index No. 100604/10

Argued: 6/14/11
Motion Seq. Nos.: 001,

DECISION & ORDER

FILED

SEP 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated October 10, 2010, plaintiffs move pursuant to CPLR 1002 and 3025(b) for an order granting them leave to amend their complaint to add and/or substitute plaintiffs. Defendants oppose the addition of any new plaintiffs.

By notice of motion dated December 22, 2010, plaintiffs move for an order granting them summary judgment. Defendants oppose and, by notice of cross motion dated March 14, 2011, move for summary dismissal of the complaint.

I. BACKGROUND

Plaintiffs are bus companies that have contracted with defendant New York City Department of Education (DOE) to transport New York City school children to and from City schools pursuant to two contracts, the Contract for Transportation of General Education Pupils to Public and Nonpublic Schools and the Contract for Special Education Pupil Transportation

Services of New York. (Affidavit of Andrew Brettschneider, dated Dec. 17, 2010 [Brettschneider Affid.]). In or around September 2000, the parties executed two amendments to the contracts. (*Id.*). The first amendment, entitled "Extension and Ninth Amendment of Contract for Transportation of General Education Pupils to Public and Nonpublic Schools in the City of New York," and the second amendment, entitled "Extension and Eleventh Amendment of Contract for Special Education Public Transportation Services" (Eleventh Amendment), both provide, as pertinent here, that:

> [t]he Contractor shall be entitled to receive eighty-five percent (85%) of its daily rate(s) per vehicle for "regularly scheduled school days" on which the Chancellor or his designee(s) shall order schools to be closed and/or pupils not to be in attendance for any reason, which percentage shall be deemed to represent costs that the Contractor shall be unable to avoid when service is not furnished.

(*Id.*, Exhs. A, B). "Regularly scheduled school days" are defined as "days on which schools are scheduled to be open in accordance with the official [DOE] calendar as originally adopted and published annually and prior to the amendment thereof." (*Id.*).

On or about March 10, 2009, DOE published the official calendar for the 2009-2010 school year listing September 8, 2009 as the first day of school (original calendar). (*Id.*, Exh. C). Then, on or about July 11, 2009, DOE changed the calendar by rescheduling the first day of school to September 9, 2009. (*Id.*, Exh. D).

After plaintiffs demanded compensation for September 8, 2009, DOE, by letter dated December 17, 2009, refused to pay on the ground that the pertinent contractual provisions were inapplicable as the change of the school opening date "was made by calendar amendment two months before schools opened, not by order directing schools to be closed or that pupils not be in attendance . . ." (*Id.*, Exh. E).

In December 2009, plaintiffs served defendants with their notices of claim. (*Id.*, Exh. F). On or about January 15, 2009, plaintiffs served their summons and complaint, and on or about January 27, 2009 a supplemental summons and amended complaint. (Affirmation of Christopher M. Bletsch, ACC, dated Mar. 14, 2011 [Bletsch Aff.], Exhs. 1, 2). On March 5, 2010, defendants served their answer to the amended complaint. (*Id.*, Exh. 3).

II. CONTENTIONS

Plaintiffs maintain that the clear and unambiguous contractual provisions require that defendants compensate them for September 8, 2009, arguing that DOE's decision to order students not to attend school on that date triggered the provisions. (Mem. of Law, dated Dec. 22, 2010).

Defendants deny that the provisions apply as the change of the opening school date from September 8, 2009 to September 9, 2009 did not result from a Chancellor's order closing the schools but from a calendar revision made months earlier. They assert that the intent of these provisions is to compensate plaintiffs for school closings that are unforeseen or unavoidable, such as weather conditions or emergency situations, not a change in a school day made in advance, and that plaintiffs would receive a windfall if compensated here. Defendants also contend that as the contracts are between plaintiffs and DOE only, City is not a proper party in this matter. (Mem. of Law, dated Mar. 14, 2011).

In response, plaintiffs argue that September 8, 2009 was a regularly scheduled school day in the original calendar, and that therefore DOE's decision to amend the calendar to change the date is covered by the pertinent provisions, entitling them to compensation. They observe that nothing in the provisions limits their applicability to unforeseen or unavoidable situations, and as

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they provide for liquidated damages, plaintiffs need not prove actual damages. Plaintiffs also deny that City is an improper party. (Mem. of Law, dated Apr. 18, 2011).

In reply, defendants reiterate their prior arguments. (Reply Affirmation, dated Apr. 29, 2011).

III. ANALYSIS

As the contracts at issue are solely between plaintiffs and DOE, and as City and DOE are separate and distinct legal entities (*Miner v City of New York*, 78 AD3d 669 [2d Dept 2010]; *Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]), City is not a proper party here. The cases cited by plaintiffs are not on point.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562 [2002]), and extrinsic evidence cannot be considered (*R/S Assocs. v New York Dev. Auth.*, 98 NY2d 29 [2002]; *1701 Rest. on Second, Inc. v Armato Props., Inc.*, 83 AD3d 526 [1st Dept 2011]). The court may be required to interpret a contract only if it is ambiguous. (*South Rd. Assocs., LLC v Intern. Bus. Machines Corp.*, 4 NY3d 272 [2005]; *239 E. 79th Owners Corp. v Lamb 79 & 2 Corp.*, 30 AD3d 167 [1st Dept 2006]). A contract is ambiguous if it is "reasonably susceptible of more than one interpretation," in which case extrinsic evidence may be considered and summary judgment may be inappropriate. (*Foot Locker, Inc. v Omni Funding Corp. of Am.*, 78 AD3d 513 [1st Dept 2010], *quoting Chimart Assocs. v Paul*, 66 NY2d 570 [1986]).

Here, there are two terms at issue. The first is "regularly scheduled school days," which are defined as "days on which schools are scheduled to be open in accordance with the official [DOE] calendar as originally adopted and published annually and prior to the amendment

thereof." Using the plain and unambiguous language of that term, it is clear that September 8, 2009 was a regularly scheduled school day as it was the day on which schools were first scheduled to open.

The agreement also provides that DOE must compensate plaintiffs "for 'regularly scheduled school days' on which the Chancellor or his designee(s) shall order schools to be closed and/or pupils not to be in attendance for any reason . . ." Plaintiffs submit no evidence showing that the Chancellor ordered schools to be closed and/or pupils not to be in attendance on September 8, 2009. Rather, DOE and/or the Chancellor changed the date on which schools would open, and even if the Chancellor "ordered" the date change, he or she did not thereby order schools to be closed and/or pupils not to be in attendance. An order to attend on September 9, 2009 is not the equivalent of an order not to attend on September 8, 2009 as the schools were not yet open on that day.

I thus find that plaintiffs have failed to demonstrate that they are contractually entitled to compensation for September 8, 2009, and that defendants have established that plaintiffs are not entitled to compensation.

In light of this result, I need not determine whether plaintiffs should be permitted to amend their summons and complaint to add additional plaintiffs.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is denied; it is further

ORDERED, that defendants' cross motion to dismiss is granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

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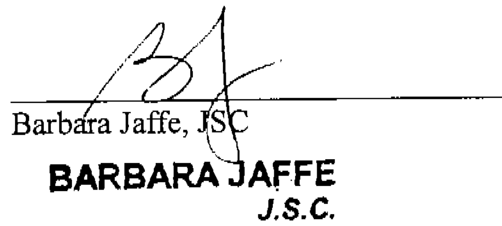
ORDERED, that plaintiffs' motion for leave to amend is denied as moot.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 9, 2011
New York, New York

SEP 09 2011

FILED

SEP 13 2011

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