SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

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

Plaintiff,

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

-against-

RAMI STROSBERG, individually and as Head of School; BET SHRAGA HEBREW ACADEMY OF THE CAPITAL DISTRICT; PATRICIA BALMER; 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, October 5, 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, Mortari & Hurd, LLP
Sarah B. Brancatella, Esq.
Attorneys for Defendants Rami Strosberg, individually and as Head of School; Bet Shraga Hebrew Academy of the Capital District; Patricia Balmer; individually and as Elementary School Principal; Ruth Malka; individually and as a 5th Grade Teacher
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TERESI, J.:

Initially, the defendants moved to reargue a Decision and Order of this Court dated May 25, 2001 pursuant to CPLR 2221(d). The motion to reargue was denied by this Court in a Decision and Order dated August 18, 2011. The defendants now move pursuant to CPLR 2221(e) for leave to renew a Decision and Order of this Court dated May 25, 2011 which granted plaintiff's application for a preliminary injunction. The plaintiff opposes the motion.

At the time of the commencement of this action, the plaintiff was a fifth grade student at Bet Shraga Hebrew Academy of the Capital District ("BSHA"). On January 17, 2011, the infant's parents executed a 2011-2012 Enrollment Contract with BSHA for the enrollment of their son in the sixth grade. The parents delivered the signed contract and a deposit check to BSHA. Shortly thereafter, BSHA informed the parents that their son would not be allowed to enroll in the sixth grade in September, 2011. BSHA maintains its decision not to enroll the student was a result of his disciplinary history at the school.

Plaintiff commenced this action for a declaratory judgment and specific performance of the contract. Plaintiff moved for preliminary injunctive relief and this Court granted the motion finding the plaintiff had satisfied her burden by demonstrating a sufficient probability of success on the merits, irreparable injury and a balance of equities in her favor. This Court determined the defendants did not offer an explanation why they denied the plaintiff enrollment in the sixth grade. This Court held the absence of such proof "established BSHA's lack of reason or rationality in denying M.A.'s enrollment, a prima facie arbitrary and capricious showing."

Plaintiff's grades were quite good and his teacher comments were very favorable. Defendants' offer to immediately place the infant in the sixth grade contradicts the defendants' assertions that the student's behavior was the reason for the denial of enrollment at BSHA for the 2011-2012 school year. This Court determined the plaintiff demonstrated the probability of success on the merits and granted the preliminary injunction. The infant plaintiff is currently enrolled in the sixth grade at BSHA.

The defendants, in support of the motion to renew, claim that at the time of the original motion, they were unsure if the granting of the preliminary injunction would have a detrimental affect on BSHA. Defendants claim that granting the preliminary injunction has affected student enrollment as parents have failed to enroll their children in the sixth grade. The defendants contend there are only four students in the sixth grade for the 2011-2012 school year. Two parents maintain they have withdrawn their children from BSHA because of class size and MA's behavioral issues. In support of the motion to renew, the defendants now offer four affidavits from teachers who claim MA had consistent and disciplinary problems throughout his attendance at BSHA. The defendants allege the motion to renew should be granted and the preliminary injunction should be denied.

The plaintiff contends the defendants have 1) failed to offer proof that the new evidence now offered existed at the time of the preliminary injunction motion, 2) failed to demonstrate they exercised due diligence to discover the new evidence and 3) offered no justifiable excuse why the new evidence was not previously submitted to the Court. The plaintiff maintains the new evidence submitted by the defendants on this renewal motion does not support vacating the preliminary injunction. The plaintiff contends the new evidence was available to the defendants

in April 2011 when they opposed the preliminary injunction application. The plaintiff contends two children did not return to BSHA primarily due to the size of the class and in one instance the lack of female students.

A motion to renew must be based upon facts not offered on the prior motion that would change the prior determination. (see, CPLR 2221(e)(2); Lafferty v. Eklecco, 34 AD3d 754 [2nd Dept. 2006]; Spa Realty Associates v. Spring Associates, 213 AD2d 781 [3rd Dept. 1995] or upon a demonstration that there has been a change in the law that would change the prior determination. (see, CPLR 2221(e)(2)). A motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but was unknown to the party seeking renewal. (First Union Bank v. Williams, 45 AD3d 1029 [3rd Dept. 2007])."Renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." (Hart v. City of New York, 5 AD3d 438 [2nd Dept.2004]). While a motion for leave generally should be based on newly discovered facts, the rule is flexible, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided the movant offers a reasonable excuse for the failure to submit additional facts on the original motion.(Allstate Ins. Co. v. Liberty Mut. Ins., 58 AD3d 727 [2nd Dept. 2009]).

Defendants' motion to renew is denied. The relevant evidence the defendants now claim is new evidence was readily available to them at the time of the preliminary injunction motion in April, 2011. The defendants could have readily obtained the affidavits from the four teachers at BSHA detailing MA's behavioral issues in their opposition to the preliminary injunction motion. The defendants have not offered any compelling reason for their failure to present the newly

discovered facts on the prior motion. (see, CPLR 2221(e)(3)). Moreover, the behavior issues the teachers now raise are offset by praiseworthy comments made by the teachers who taught MA in the fifth grade. The affidavits of the two parents who did not re-enroll their children in BSHA for the sixth grade clearly stated that the primary reason was due to class size and the small number of girls in the class. The parents stated MA's conduct was a secondary issue.

The defendants have not offered any new facts that would change the prior determination. As discussed in the prior motion to reargue, this Court determined the defendants failed to demonstrate that the denial of re-enrollment for the 2011-2012 school year had a rational basis. The purpose of a preliminary injunction is to maintain the status quo pending a hearing on the merits. (360 West 11th LLC v. ACG Credit Co. II, LLC, 46 AD3d 367 [1st Dept. 2007]). This Court determined the plaintiff had established the likelihood of success on the merits and utilizing its discretion, granted the application for a preliminary injunction. (Melvin v. Union College, 195 AD2d 447 [2nd Dept. 1993]).

Accordingly, the defendants' motion to renew the Decision and Order of this Court dated May 25, 2011 is denied.

This Decision and Order is returned to the attorney for the plaintiff. 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 relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
October 17, 2011

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated September 7, 2011;
2. Affirmation of Sarah B. Brancatella, Esq. dated September 7, 2011 with Exhibits A-J;
3. Affirmation of Sue H.R. Adler, Esq. dated September 28, 2011 with Exhibits A-I;
4. Affirmation of Alan M. Adler, Esq. dated September 27, 2011;
5, Plaintiff's Memorandum of Law dated September 28, 2011.