

**Nazareth Nursery Parent Assn. v Nazareth Nursery,
Inc.**

2015 NY Slip Op 30941(U)

June 4, 2015

Supreme Court, New York County

Docket Number: 152890/15

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

INDEX NO. 152890/15
MOTION DATE 05-15-15
MOTION SEQ. NO. 001
MOTION CAL. NO.

NAZARETH NURSERY PARENT ASSOCIATION, by its Chair, SUSIE MOGAVERO, TIFFANY WEBBER, as parent of a minor student at Nazareth Nursery Montessori School; EBONY BERRY, as parent of a minor student at Nazareth Nursery Montessori School; CLEMENTINE BORGUETA, as parent of a minor student at Nazareth Nursery Montessori School; OLEG BUJOR, as parent of a minor student at Nazareth Nursery Montessori School; SHERWIN BUTARAN and GERALDINE BUTARAN, as parents of a minor student at Nazareth Nursery Montessori School; JOYCE CARACCIOLI and RONNIE H. CARRACCIOLI, as parents of a minor student at Nazareth Nursery Montessori School; JOVANA SKORO, as parent of minor students at Nazareth Nursery Montessori School; SEPHORA BERTHON, as parent of a minor student at Nazareth Nursery Montessori School; LAWRENCE DOWD, as parent of a minor student at Nazareth Nursery Montessori School; MICHAEL FLOREZ and REBECCA GOMEZ, as parents of a minor student at Nazareth Nursery Montessori School; KRISTINA ROGERS, as parent of a minor student at Nazareth Nursery Montessori School; MARTA BERGAMASCHI, as parent of a minor student at Nazareth Nursery Montessori School; ADWINA GIL and STEVEN GIL, as parents of a minor student at Nazareth Nursery Montessori School; CHERYL A. CHAPMAN and JOSHUA S. GILBERT, as parents of a minor student at Nazareth Nursery Montessori School; DZELIKA DANIEL and ANDRE GORDON, as parents of a minor student at Nazareth Nursery Montessori School; SUSANA GOUGH and JONATHAN D. GOUGH, as parents of a minor student at Nazareth Nursery Montessori School; ASHLEY HAMMARTH and MORGAN JOHNSON, as parents of a minor student at Nazareth Nursery Montessori School; CHRISTOPHER W. HARRIS and KAREN VAITES, as parents of a minor student at Nazareth Nursery Montessori School; SARAH FARSAAD and CHRISTOPHER HIGHTOWER, as parents of a minor student at Nazareth Nursery Montessori School; ANNELIE AXELSSON and PONTOS HOOK, as parents of a minor student at Nazareth Nursery Montessori School; PRIYA JACOBSON and JULIAN JACOBSON, as parents of a minor student at Nazareth Nursery Montessori School; JAE KIM, as parent of a minor student at Nazareth Nursery Montessori School; DAVID LACROSS and DIEDRE McGARRIGLE, as parents of a minor student at Nazareth Nursery Montessori School; DANIEL LAMBLIN and JUNG HEE SOHN, as parents of a minor student at Nazareth Nursery Montessori School; TOMASION LETHBRIDGE and ELIZABETH WILLIAMS, as parents of a minor student at Nazareth Nursery Montessori School; DUANE LITTLES and CASSIDY MOSHER, as parents of a minor student at Nazareth Nursery Montessori School; CAROLINE MILLER, as parent of a minor student at Nazareth Nursery Montessori School; DAMIAN MOGAVERO and SUSIE MOGAVERO, as parents of a minor student at Nazareth Nursery Montessori School; LETICIA PINSON, as parent of a minor student at Nazareth Nursery Montessori School; MARY CHANDRAHASAN and ANANTH SAMPATHKUMAR, as parents of a minor student at Nazareth Nursery Montessori School; SEONGSHIN KIM and LUKE STRICKLIN, as parents of a minor student at Nazareth Nursery Montessori School; and LOUISA GUI, as parent of a minor student at Nazareth Nursery Montessori School,

Plaintiffs,

-against-

NAZARETH NURSERY, INC.; FRANCES ACOSTA, Individually and as Chairman, Board of Trustees, Nazareth Nursery, Inc.; and ANNETTE REINO SINDONA, ROSEMARIE HENDRY, KEVIN L. SULLIVAN, ELAINE A. FARRELL, JANET PALAZZOLO, MAUREEN TOMKIEL, ROSE JEROME KENLON, HELEN PAUL PODESLA, and JUANA ECHEVARRIA, as Trustees of the Nazareth Nursery, Inc.,

Defendants.

The following papers, numbered 1 to 7 were read on this Order to Show Cause for a Preliminary Injunction and cross-motion to dismiss:

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows for 1-4, 4-6, 7.

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

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs motion seeking an injunction, is denied. Defendants cross-motion to dismiss this action pursuant to CPLR §3211[a],[1],[5],[7] and CPLR §3016, is granted and the case is dismissed.

Defendant Nazareth Nursery, Inc. is a Catholic Montessori nursery school located on 15th Street in the Chelsea neighborhood of Manhattan. It was founded in 1902, by the Franciscan Ministries, an entity created by the Sisters of St. Francis of the Neumann Communities, to serve the poor and needy including self-supporting mothers in New York's meat packing district. Nazareth Nursery, Inc. is currently subject to the New York Not-for-Profit Corporation Law.

At a parent meeting held on December 8, 2014, the plaintiffs were notified that the nursery school servicing approximately fifty-five (55) students would close as of the end of the 2014-2015 school year. By letter dated January 20, 2015, the Sisters of St. Francis of the Neumann Communities sent a letter to the plaintiffs stating that the decision to cease operations at the end of the 2014- 2015 school year would be final (Mot. Exh. N). The January 20, 2015 letter informs the parents of four possible alternative Catholic school programs costing less tuition and that the Daycare Council of New York, Inc. was engaged to assist parents in relocating their children to other programs.

Plaintiffs commenced this case on March 24, 2015, asserting causes of action for fraudulent inducement and for breach of an equitable contract. The complaint also seeks money damages in a sum equal to the amount needed to provide an education equivalent to Nazareth Nursery Montessori School (hereinafter referred to as "Nazareth Nursery"), attorneys fees and costs (Mot. Exh. A).

Plaintiffs' motion seeks injunctive relief enjoining the defendants from closing or failing to maintain Nazareth Nursery at all grade levels other than the entering level for the 2015-2016 school year. Plaintiffs also seek to prevent the defendants from disposing of or transferring any assets of Nazareth Nursery, Inc. unless they are contributed to another nursery school which services student from low and middle-income families.

Plaintiffs argue that they satisfy the prerequisites of a preliminary injunction. They contend that they were fraudulently led to believe that the school would remain open for an extended period of time, and the materials provided by the school including, the website (Mot. Exh. E), a registration letter dated March 12, 2014 (Mot. Exh. G), the Handbook (Reply Aff. of Susie Mogavero, Exh. Q) and "A Parents Guide to the Montessori Classroom" (Reply Aff. of Susie Mogavero, Exh. U), establish that the program is required to revolve around three year cycles with registration being automatically renewed. Plaintiffs argue that closing Nazareth Nursery will be permanent and cause irreparable injury to their children's education because it is impossible to find alternate Montessori placement before the 2015-2016 school year. Plaintiffs claim they will sustain irreparable injury because the programs recommended by the defendants are not Montessori, appropriate Montessori programs are much more expensive than Nazareth Nursery, and enrollment for Independent Schools Admissions Association of Greater New York (ISAAGNY) Montessori schools with alternate programs closed on October 15, 2014.

The issuance of a injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (Doe v. Axelrod, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]).

Clearly disputed facts and the evidence presented by the defendants refute plaintiffs' claims. A preliminary injunction should not be granted unless its necessity and justification is clear based on undisputed facts and the presentation of clear and convincing evidence (*Residential Board of Managers of the Columbia Condominium v. Alden*, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991] and *LDC USA Holdings, Inc. v. Taly Diamonds, LLC*, 121 A.D. 3d 529, 995 N.Y.S. 2d 6 [1st Dept., 2014]). Defendants provide a copy of the re-registration form and letter for the 2014-2015 school year (Cross-Mot. Exh. B), as proof that there was annual re-registration and not an automatic renewal in three year cycles.

This Court has reviewed the materials relied on by the plaintiffs and finds their arguments subjective, speculative and unpersuasive. There is no language in the Handbook, website or the registration materials that specifically states the program at Nazareth Nursery, or its registration, is organized and automatically renewable over the course of mandatory three year cycles. The Montessori materials cited by the plaintiffs refer to an ideal application of the method in order to obtain an "Absorbent Mind," no proof was provided that Nazareth Nursery's Montessori certification requires the provision of a mandatory three year program.

Plaintiffs have also not established irreparable injury on the asserted claim of disruption of education. Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (*Zodkevitch v. Feibush*, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [1st Dept., 2008]). Defendants provided plaintiffs with the names of other Catholic pre-school options and engaged the Daycare Council of New York, Inc. to further assist with relocation of the children to other programs. Although the children would no longer participate in the certified program at Nazareth Nursery, other cheaper programs amenable to applying the Montessori methods have been made available. Defendants have identified approximately 11 other Montessori schools having available seats as late as April 15, 2015 (See Aff. of Jennifer Olivera at paragraph 16), plaintiffs have not provided proof that their late applications to ISAAGNY schools have actually been rejected. Plaintiffs' complaint seeks money damages for any difference in the payment of tuition resulting from changing to another more expensive program, there are other educational equivalents of Nazareth Nursery that exist and are available to the children, which further establishes economic remedies to avoid the claim of irreparable injury.

The balancing of the equities requires a showing that any burden imposed on the party seeking the injunction will be greater than the harm caused by the imposition of injunctive relief (*Credit Index, L.L.C. v. Riskwise Intern. L.L.C.*, 282 A.D. 2d 246, 722 N.Y.S. 2d 862 [1st Dept., 2001]). Injunctive relief may be granted to maintain the "status quo" of the parties where the relief would result in little or no harm to the party being enjoined (*Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D. 3d 255, 884 N.Y.S. 2d 353 [1st Dept., 2009]). Plaintiffs have not demonstrated that the balance of the equities tip in their favor. As a private institution and a corporation there is no obligation on the part of the defendants to remain open and incur additional operational expense on behalf of the plaintiffs. The injunctive relief sought to maintain the "status quo" would create a greater harm to defendants' fundamental rights in corporate decision-making and the presumption favored by the business judgment rule.

There is no basis for the injunctive relief sought by plaintiff's preventing the defendants from disposing of, or transferring any assets of Nazareth Nursery, Inc. unless they are contributed to another nursery school which services student from low and middle-income families. Denial is warranted for injunctive relief that seeks to alter the "status quo" and is equivalent to granting the ultimate relief sought (*Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 93 A.D. 3d 570, 940 N.Y.S. 2d 617 [1st Dept., 2012]). This injunctive relief is premature and would alter the status quo solely for the purpose of keeping the school open. Defendants are closing the school but have not sought to transfer any of the corporate assets and would require Vatican approval before making an application to do so.

Defendants cross-motion seeks to dismiss this action pursuant to CPLR §3211[a][1],[5],[7] and CPLR §3016[b].

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, supra). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept., 2013]). CPLR §3016[b] requires that the circumstances of a claim of fraudulent inducement be plead in detail, including the specific dates and items (Orchid Const. Corp. v. Gottbetter, 89 A.D. 3d 708, 932 N.Y.S. 2d 100 [2nd Dept., 2011] and Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y. 3d 553, 910 N.E. 2d 976, 883 N.Y.S. 2d 147 [2009]).

A cause of action asserting fraudulent inducement of a contract requires, "a material representation, known to be false, made with the intention of inducing reliance, upon which [it] actually relie[d], consequentially sustaining a detriment" (Frank Crystal & Co., Inc. v. Dillman, 84 A.D. 3d 704, 925 N.Y.S. 2d 430 [1st Dept., 2011]). Fraud in the inducement requires a "preconceived and undisclosed intention of not performing" a promise, and is distinguishable from a "mere promissory statement as to what will be done in the future" or a prediction (Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y. 2d 954, 502 N.E. 2d 1003, 510 N.Y.S. 2d 88 [1986] and Dragon Inv. Co. II LLC v. Shanahan, 49 A.D. 3d 403, 854 N.Y.S. 2d 115 [1st Dept., 2008]). Plaintiffs are required to allege facts to establish they justifiably relied on the defendants misrepresentations. The party alleging fraud in the inducement is required to demonstrate that it exercised ordinary intelligence to determine the truth of the alleged representation. A party's mistake of fact does not constitute fraudulent inducement (ACA Financial Guaranty Corp. v. Goldman Sachs & Co., 2015 N.Y. Slip Op. 03876 [2015] and Li-Shan Wang v. Landmark Capital Investments, Inc., 94 A.D. 3d 418, 941 N.Y.S. 2d 144 [1st Dept., 2012]).

Plaintiffs have not stated a cause of action for fraud in the inducement that could be sustained. The language related to the longevity of Nazareth Nursery prior to closure in the materials and website, was not a promise that the school would continue in perpetuity. The Montessori materials referring to the three year period to develop an "Absorbent Mind" represent the ideal situation for children and was not a specific promise or commitment to any kind of mandatory three year program. Plaintiffs subjective misunderstanding of the statements on the website and in the Montessori materials provided by the defendants does not establish fraud in the inducement. Plaintiffs have not established that they were fraudulently induced to register or re-register the children at Nazareth Nursery, there was no proof that defendants intentionally misrepresented or were aware, prior to the 2014-2015 registration, that the school would be closed as of the 2015-2016 school year. Plaintiffs speculative statement that the defendants "had to have known in September 2014 that they were considering closing" is insufficient to establish a fraud in the inducement claim.

Defendants argue that there is no enforceable written contract that the school would remain open and seek to dismiss pursuant to CPLR §3211[a][5], because any alleged equitable contract for a three year period is invalid under the Statute of Frauds. Any oral contract that is for an indefinite period and cannot by its terms be performed within one year from when it is made is void and unenforceable under the Statute of Frauds. Oral contracts that provide for contingencies which can be performed within one year are enforceable (D & N Boening, Inc. v. Kirsch Beverages, Inc., 99 A.D. 2d 522, 471 N.Y.S. 2d 299 [2nd Dept. 1984] and North Shore Bottling Co. v. Schmidt & Sons, 22 N.Y. 2d 171, 239 N.E. 2d 189, 292 N.Y.S. 2d 86 [1968]). Plaintiffs contention that the registration agreement was for a period of three years

automatically renewed every year, requires performance beyond the one year period on an unwritten agreement violated the Statute of Frauds. There were no contingency provisions that would sustain the plaintiffs' claims under the Statute of Frauds.

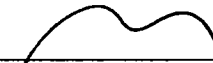
Breach of an equitable contract involving a school requires a showing that certain specified services were not provided after the acceptance of tuition, resulting in the failure to meet an obligation (Paladino v. Adelphi Univ., 89 A.D. 2d 85, 454 N.Y.S. 2d 868 [2nd Dept., 1982]). There is no basis to sustain the plaintiffs claims of breach of equitable contract. Plaintiffs' contentions that registration was automatically renewed over a three year period is refuted by the documentation produced by the defendants which establish re-registration was required every year.

Plaintiffs have argued that the cause of action for breach of equitable contract is actually for equitable estoppel. A claim of equitable estoppel is imposed to prevent the enforcement of rights due to an intentional concealment of facts that would result in a fraud or injustice upon a party (Holm v. C.M.P. Sheet Metal, Inc., 89 A.D. 2d 229, 455 N.Y.S. 2d 429 [4th Dept., 1982]). A claim of equitable estoppel requires proof of a clear and unambiguous promise, that was reasonably relied upon and acted upon, resulting in a prejudicial change in position (Roufaiel v. Ithaca College, 241 A.D. 2d 865, 660 N.Y.S. 2d 595 [3rd Dept., 1997] and Tierney v. Capricorn Invs., 189 A.D. 2d 629, 592 N.Y.S. 2d 700 [1st Dept., 1993]). In the absence of evidence that a party was misled by the other party's conduct, or of significant and justifiable reliance on conduct to a party's disadvantage, there is no basis to sustain a claim of equitable estoppel (Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P., 7 N.Y. 3d 96, 850 N.E. 2d 653, 817 N.Y.S. 2d 606 [2006]). Plaintiffs' claim of equitable estoppel cannot be sustained. There was no clear and unambiguous promise to automatically renew registration in three year periods or that the school would remain open in perpetuity.

Accordingly, it is ORDERED that plaintiffs' motion seeking a preliminary injunction enjoining the defendants from failing to make appropriate arrangements to maintain classes at Nazareth Nursery Montessori School at all grade levels other than the entering level for the Fall of 2015-Spring of 2016 school year, and from disposing of or transferring any of the assets of Nazareth Nursery, Inc. unless those assets are contributed to another nursery school which services student from low and middle-income families, is denied, and it is further,

ORDERED, that the defendants' cross-motion to dismiss this action pursuant to CPLR §3211[a],[1],[5],[7] and CPLR §3016, is granted, and it is further,

ORDERED, that the case is dismissed.

ENTER: **MANUEL J. MENDEZ**
J.S.C.


MANUEL J. MENDEZ,
J.S.C.

Dated: June 4, 2015

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