

East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal
2015 NY Slip Op 32716(U)
February 26, 2015
Supreme Court, Nassau County
Docket Number: 600963/13
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 600963/13

-against-

MOTION DATE: Feb. 4, 2015
Motion Sequence # 009

NEW YORK SCHOOLS INSURANCE
RECIPROCAL,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... X
- Affirmation in Opposition..... X
- Memorandum of Law..... XX

Motion by defendant New York Schools Insurance Reciprocal to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, to stay the action pending administrative proceedings is **denied**.

This is an action to recoup legal expenses allegedly required to be reimbursed pursuant to a school board legal liability policy. Defendant New York Schools Insurance Reciprocal issued the policy to plaintiff East Ramapo Central School District for the period July 1, 2012 to July 1, 2013. The policy provides coverage for claims arising from “a wrongful acts(s) by the insured in the performance of duties for the school entity.”

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The policy has an exclusion for claims arising out of the failure to provide “an appropriate individualized education program.” The policy also has an exclusion for claims arising out of “any fraudulent, dishonest, malicious, criminal or intentional wrongful act or omission by an insured.” The policy contains an aggregate limit of liability of \$1 million.

On August 8, 2012, parents of students who attend school in the District commenced an action against the school board members in the United States District Court for the Southern District of New York, *Rebecca Montesa, et al v Daniel Schwartz, et al*, 12-cv-06057. In their amended complaint, the plaintiffs alleged that the District entered into contracts with private schools to provide remedial services for children in the district, resulting in the district’s funds being expended for religious education. The plaintiffs further alleged that the District engaged in collusive settlements with parents of special needs Hasidic children. More specifically, after the parents challenged the district’s placement of their children under the Individuals with Disabilities Education Act (“IDEA”), the Board allegedly agreed to place the children in private religious schools, paying both tuition and the parents’ attorneys’ fees. The plaintiffs alleged that District funds were used to purchase textbooks of a religious nature. Additionally, plaintiffs alleged that the school board members had approved a sale of the Hillcrest Elementary School to a religious congregation for \$3.1 million when the fair market value of the property was between \$11 million and \$13.9 million. The plaintiffs alleged that the Board leased the Colton Elementary School to a religious congregation under a five year lease and failed to collect \$85,000 rent which was in arrears. Finally, the plaintiffs allege that the Board had attempted to sell Colton Elementary to the tenant at a below market price, but the sale was challenged by a taxpayer. ✓

The plaintiffs in *Montesa* asserted claims under the Establishment Clause of the First Amendment, the Equal Protection clause, the New York State Constitution, and other state law claims. The plaintiffs in *Montesa* sought to bring the action as a civil rights class action on behalf of all parents of students attending school, and also all taxpayers, within the District.

On September 13, 2012, New York Schools Insurance Reciprocal disclaimed coverage with regard to the *Montesa* action. In disclaiming coverage, the insurer relied upon the exclusion for claims based upon failing to provide an appropriate individualized education program, as well as the exclusion for fraudulent, dishonest, malicious, criminal and intentional acts. On the same date that the insurer disclaimed coverage, the board members held a special meeting and adopted a resolution to retain counsel to defend the individual board members in the *Montesa* action.

The present action was commenced on April 17, 2013. In its first cause of action, the District seeks damages for breach of contract, that is the cost to the district of defending the Montesa action, up to the limit of the policy. The second cause of action is for breach of the implied covenant of good faith and fair dealing by disclaiming coverage. In the third cause of action, plaintiff seeks a declaratory judgment that New York Schools is under a duty to defend the school district in the Montesa action and indemnify the District up to the limit of the policy.

By order dated October 17, 2013, this court granted East Ramapo's motion for summary judgment to the extent of declaring that New York Schools Insurance Reciprocal was obligated to defend the District and its board members in the Montesa action. The court noted that an insurer's duty to defend is broader than the duty to indemnify (Barkan v New York Schools Insurance Reciprocal, 65 AD3d 1061, 1063 [2d Dept 2009]). The court reasoned that the amended complaint in Montesa alleged intentional, reckless, and negligent conduct, and neither recklessness nor negligence fell within the exclusion for fraudulent, dishonest, malicious, criminal, or intentional acts. The court made no determination with regard to the insurer's duty to indemnify.

Meanwhile, on September 30, 2013 Judge Seibel in the U.S. District Court issued an order dismissing certain of the Montesa plaintiffs' claims against certain of the defendants. Nevertheless, Judge Seibel allowed plaintiffs' Establishment Clause claims based upon IDEA settlements to continue against all defendants. Plaintiffs' Establishment Clause claims based upon textbook purchases were allowed to continue against all defendants, except defendant D'Agostino, an attorney for the District, and defendant Rothschild, a board member. Plaintiffs' Establishment Clause claims based upon fraudulent real estate transactions were allowed to continue against all defendants, except defendant D'Agostino. Plaintiffs' claims under the New York State Constitution based upon IDEA settlements were allowed to continue as to all defendants. Plaintiffs' claims under the anti-gift provision of the New York State Constitution based upon textbook purchases and lease transactions were allowed to continue as to all defendants, except D'Agostino and Rothschild. The plaintiffs in the Montesa action filed a second amended complaint on November 4, 2013, and a third amended complaint on December 11, 2013, in an effort to conform their pleading to Judge Seibel's order.

By order dated January 30, 2014, this court granted defendant New York Schools Insurance Reciprocal's motion for leave to renew its motion for summary judgment based upon Judge Seibel's order. Upon renewal, the court determined, as a matter of law, that the school board action alleged in support of the remaining Establishment Clause and state

constitutional claims; purchasing religious textbooks, paying religious school tuition, and transferring district facilities to religious schools at less than fair value; fell within the exclusion for intentional, wrongful conduct and could not potentially give rise to a covered claim (*Barkan v New York Schools Ins Reciprocal*, 65 AD3d 1061, 1063 [2d Dept 2009]).

Thus, defendant New York School's motion for summary judgment was granted to the extent of declaring that defendant had no duty to indemnify the District for the activity alleged in the *Montessa* action and no duty to defend the District after September 30, 2013, the date of Judge Seibel's order.

By order dated March 27, 2014, the court granted the District's motion for leave to renew defendant's motion for summary judgment based upon a subsequent decision of Judge Seibel issued on March 12, 2014. In the March 12 order, Judge Seibel dismissed the *Montessa* plaintiffs' state constitutional claims on the ground that taxpayers lacked standing to maintain such claims against a school district. Upon renewal, the court granted New York Schools Insurance Reciprocal's motion for summary judgment to the extent of declaring that the insurer had no duty to defend the District after March 12, 2014, the date of Judge Seibel's subsequent order.

Defendant New York Schools Insurance Reciprocal moves to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, to stay the action pending administrative proceedings before the Department of Education. On October 15, 2012, Betty Carmand and Steven White, who are parents of children who attend school in the District, filed a petition with the Department of Education, seeking to appeal the school board's decision to use District funds to defend individual board members in the *Montesa* action (See Education Law § 310). In their petition, Carmand and White argued that the board's decision to pay the members' legal expenses in defending the *Montesa* action violates Education Law § 3811(1). The statute provides that "Whenever the trustees or board of education of any school district,..., have been..instructed by a resolution adopted at a district meeting to defend any action brought against them,..., all their costs and reasonable expenses, as well as all costs and damages adjudged against them, shall be a district charge...." Carmand and White argued that this indemnity provision applies only if the board members were acting within the scope of their employment and were in good faith. The petitioners asserted that the board members had engaged in a pattern of willful and intentional misconduct, including "constitutional torts," fraud, and breach of fiduciary duty.

The Commissioner of Education issued his decision on November 28, 2014. The Commissioner dismissed the appeal as against certain of the board members for failure to effect proper service. However, service was sustained as against board members Schwartz,

Friedman, Weissmandl, and Stone. Upon reviewing the original complaint in *Montesa*, on which the board's decision to retain counsel was based, the Commissioner found that the alleged wrongful conduct "related to actions taken by the [board members] in their official capacities as board members" (Deft's ex A at 15). The Commissioner further noted that the complaint specifically alleged the board members "act[ed] under color of state law in the course and scope of their duties and functions as officers and agents of the [district]...although in a manner *ultra vires*." The Commissioner determined that he was not bound by the district's insurance carrier's disclaimer based upon the exclusion for intentional conduct (Id). Thus, the Commissioner determined that the "initial appointment" of counsel was appropriate. However, the Commissioner ruled that the "ultimate determination" of whether the claims against the board members arose out of the performance of their duties, entitling them to indemnification of their legal costs, must be made within the context of the "underlying proceedings" (Id). Similarly, the Commissioner ruled that the issue of whether the board members had acted in good faith had to be determined in "the underlying action or proceeding" (Id at 16). Thus, the Commissioner dismissed the appeal to the extent that petitioners were challenging the board's decision to appoint counsel for the individual board members. However, the appeal was sustained to the extent that the board had determined to provide the board members with "unconditional indemnification" (Id at 20).

New York Schools Insurance Reciprocal argues that the present action should be dismissed for lack of subject matter jurisdiction, or stayed pending unspecified "further administrative review" of the school board's decision (Deft's memo of law at 8).

At times, deference is accorded to an administrative agency because of its expertise in a given area (*Bd of Education v Mills*, 4 NY3d 51, 58 [2004]). However, with the interpretation of statutes and pure questions of law, no deference is accorded the agency's determination (Id at 59).

By ruling that the Board properly retained counsel in the first instance, the Commissioner in effect concurred with this court's determination that the insurer had an initial duty to defend. Upon the issue of the board's, and by implication the insurer's, duty to indemnify, the Commissioner deferred to this court. Thus, there is no occasion for the court to defer to the administrative expertise of the Department of Education in the present case. Defendant New York Schools Insurance Reciprocal's motion to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, to stay the action pending administrative proceedings is **denied**.

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Counsel are reminded of the pre-trial conference scheduled for April 21, 2015 and directed to be ready for trial/hearing on the issue of the reasonable value of plaintiffs legal fees in defending the Montesa action up to and including March 12, 2014, immediately following the pre-trial conference.

So ordered.

Dated FEB 26 2015


J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE