

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term 2006

4 Docket No. 06-0976-cv

5 (Argued: May 15, 2007

Decided: October 17, 2007)

6
7 BETH MEDRASH EEYUN HATALMUD,

8 Plaintiff-Appellee,

9 v.

10 MARGARET SPELLINGS,* in her official
11 capacity as Secretary of the
12 Department of Education,

13 Defendant-Appellant.

14
15 Before: NEWMAN, MINER, and KATZMANN, Circuit Judges.

16 Appeal from a summary judgment in favor of plaintiff entered
17 in the United States District Court for the Southern District of
18 New York (Owen, J.) directing the payment with interest of the
19 portion of Pell Grant funds that was withheld by defendant
20 pursuant to a Settlement Agreement pending resolution of
21 plaintiff's ultimately unsuccessful challenge to the termination
22 of its eligibility to participate in the Pell Grant Program.

23
24 Reversed and remanded.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Secretary of the Department of Education Margaret Spellings is automatically substituted for former Secretary of the Department of Education Richard W. Riley as defendant-appellant in this case.

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NATHAN LEWIN (Alyza D. Lewin, on the brief), Lewin & Lewin, LLP, Washington, D.C., for Plaintiff-Appellee.

SHEILA M. GOWAN (Michael J. Garcia, United States Attorney for the Southern District of New York; Kathy S. Marks, Assistant United States Attorney, of counsel), New York, New York, for Defendant-Appellant.

1 MINER, Circuit Judge:

2 Richard W. Riley, originally named as defendant-appellant,
3 in his official capacity as the then-Secretary of the United
4 States Department of Education ("DOE"), appealed from a summary
5 judgment entered in the United States District Court for the
6 Southern District of New York (Owen, J.) in favor of plaintiff-
7 appellee Beth Medrash Eeyun Hatalmud ("BMEH"), an educational
8 institution devoted to Judaic and Rabbinical studies. The
9 judgment directed payment with interest of the portion of Pell
10 Grant funds that was withheld by the DOE, pursuant to a
11 Settlement Agreement, pending resolution of BMEH's ultimately
12 unsuccessful challenge to the termination of its eligibility to
13 participate in the Pell Grant Program. The District Court
14 determined that the funds withheld should be treated as a bond
15 posted by BMEH under the security provision of a temporary
16 restraining order previously issued but subsequently dissolved.
17 We disagree with that determination for the reasons that follow.

18 **BACKGROUND**

19 The Pell Grant Program (the "Program"), established under
20 Title IV of the Higher Education Act of 1965, provides grants to
21 assist students in need of financial aid for meeting the costs of
22 their post-secondary education. See 34 C.F.R. § 690.1. Under
23 the Program, the DOE has discretion to provide funds, through
24 several different methods, to institutions participating in the
25 Program. See id. § 668.162(a)(1). The method of funding for
26 BMEH was called the "reimbursement method," in which the school

1 paid student awards from institutional funds and later sought
2 reimbursement from the DOE. Id. § 668.162(d)(1).

3 In February, 1994, the DOE issued a notice for the
4 termination of BMEH's eligibility to participate in the Pell
5 Grant Program. The basis for the termination was the DOE's
6 finding that BMEH did not prepare its students for employment in
7 a recognized occupation, a requirement for Pell Grant
8 eligibility. Hatalmud v. Riley, No. 97-cv-2035 (RO), 1998 WL
9 1570, at *1 (S.D.N.Y. Apr. 3, 1998). On July 10, 1995, BMEH
10 brought an action in the United States District Court for the
11 Southern District of New York challenging the DOE's decision that
12 it would not pay BMEH's requests for reimbursement pending an
13 administrative decision on whether BMEH's eligibility was
14 properly terminated. When BMEH brought its action, it
15 simultaneously sought a temporary restraining order ("TRO")
16 requiring the DOE to pay two requests for reimbursement that
17 previously had been submitted and remained unpaid.

18 At the hearing on the TRO, the District Court, in granting
19 BMEH's reimbursement requests, stated: "[I]t seems to me that it
20 is in order to direct that payments be forthwith resumed, made or
21 otherwise." The DOE thereupon requested a bond, in accordance
22 with Fed. R. Civ. P. 65(c), to secure the DOE for any costs and
23 damages it might suffer if the TRO were found to be wrongfully
24 issued. BMEH's counsel suggested that the DOE "hold back ten
25 percent of the payments as a bond" because "[t]here are loans to
26 everyone." Adopting this suggestion, the District Court directed

1 the DOE to withhold ten percent of the ordered reimbursements as
2 a Rule 65(c) bond. On July 14, 1995, the court issued a written
3 Order granting the TRO, requiring the DOE to release "all monies
4 due to [BMEH]," and, "[i]n lieu of a bond," permitting the DOE to
5 withhold "ten percent (10%) of the monies currently held by it."
6 The Order also scheduled a hearing on the preliminary injunction
7 sought by BMEH to require future reimbursement payments pending
8 trial. On July 28, 1995, prior to any further proceedings, the
9 parties resolved their dispute in its entirety and entered into a
10 Settlement Agreement.

11 Under the terms of the Settlement Agreement, the DOE
12 admitted neither the factual allegations in BMEH's complaint nor
13 liability on account of any of the facts or circumstances alleged
14 in the complaint. The parties agreed to seek expedited
15 proceedings in the pending administrative proceedings relating to
16 the DOE's proposed termination of BMEH's participation in the
17 Pell Grant Program. The DOE also undertook to pay otherwise
18 eligible claims for reimbursement submitted by BMEH during the
19 pendency of the termination proceedings, except that the DOE
20 "[would] be entitled to retain ten percent (10%) of the amount
21 thereof pending final agency decision."

22 The parties agreed that the TRO would be dissolved and that
23 "no force and effect" would be given "to the findings made on the
24 record" by the District Court in connection with the TRO
25 application. Finally, the parties stipulated that the action be
26 dismissed with prejudice and without costs and that any dispute

1 relating to compliance with the terms of the Settlement be
2 resolved by the District Court without the need to file a new
3 action. The Stipulation of Settlement was "So Ordered" by the
4 District Court on August 3, 1995.

5 Thereafter, an Administrative Law Judge ("ALJ") held a
6 hearing on BMEH's eligibility to participate in the Pell Grant
7 Program. On April 23, 1996, the ALJ issued a ruling that BMEH
8 was not eligible to participate in the Program. Hatalmud v.
9 Riley, No. 97-cv-2035 (RO), 1997 WL 223075, at *2 (S.D.N.Y. May
10 2, 1997). Following a remand by the Secretary of Education for a
11 further elaboration of the ALJ's decision, the ALJ issued a more
12 detailed decision on September 25, 1996. In the decision on
13 remand, the ALJ reiterated his determination that BMEH was
14 properly terminated from the Pell Grant Program, finding that,
15 although "some students have found employment as teachers in the
16 field of Orthodox Jewish education . . . , these programs were
17 neither intended nor designed to prepare students for gainful
18 employment in a recognized occupation." In re Hatalmud, No. 97-
19 94-SP, 1998 EOHA Lexis 30, at *3 (Dep't of Educ. June 16, 1998).
20 The ALJ accordingly concluded that BMEH did not meet the
21 definition of an eligible institution. On January 27, 1997, the
22 ALJ's decision was affirmed by the Secretary of Education as the
23 final agency decision, and BMEH's participation in the Pell Grant
24 Program was terminated as of that date. The Secretary's
25 termination decision was upheld by the District Court in an Order
26 dated April 2, 1998. Hatalmud v. Riley, No. 97-cv-2035 (RO),

1 1998 WL 157059, at *4 (S.D.N.Y. Apr. 2, 1998). BMEH did not
2 appeal from that Order.

3 Meanwhile, on March 12, 1997, the DOE had issued a Final
4 Program Review Determination ("FPRD"), concluding that BMEH was
5 liable to the DOE for \$16,403,631, which the DOE had calculated
6 to be the amount of federal funds disbursed to BMEH under the
7 Pell Grant Program since BMEH began its participation. The DOE
8 ruled that, because BMEH's programs were ineligible for the Pell
9 Grant Program, BMEH was required to refund to the DOE all federal
10 funds it had received under the Program. On April 25, 1997, BMEH
11 advised the DOE that its calculation was incorrect and that the
12 liability should be reduced because the DOE had included the
13 \$452,008 that the DOE had retained pursuant to the Settlement
14 Agreement. BMEH did not assert any right to the \$452,008. The
15 DOE agreed with BMEH's calculation, and, on May 7, 1997, issued a
16 revised FPRD assessing a liability of \$15,949,148, reducing the
17 prior assessment by \$452,008 to account for the retained amount.
18 The DOE further agreed to reduce the liability to \$15,764,431
19 based on additional calculations submitted by BMEH.

20 On June 27, 1997, BMEH challenged the DOE's liability
21 assessment and requested an administrative hearing. In its
22 statement of "Issues and Facts in Dispute," BMEH renewed its
23 argument that its programs were eligible for federal funds and
24 further argued that it would be unfair to require it to repay the
25 funds because the money was received when it believed its
26 educational program was eligible. BMEH did not in its statement

1 assert any claim for, or otherwise contest, the DOE's right to
2 keep the \$452,008 retained pursuant to the Settlement Agreement.
3 For its part, the DOE continued to take the position that BMEH's
4 program had been ineligible from its inception, and, therefore,
5 that the federal funds had been improperly spent and must be
6 returned.

7 On June 16, 1998, the Chief Administrative Law Judge, in a
8 written opinion, addressed the issues raised in BMEH's appeal.
9 The Chief Judge reaffirmed, on the grounds of res judicata, the
10 previous determination that BMEH was ineligible to participate in
11 the Pell Grant Program. Hatalmud, 1998 EOHA Lexis 30, at *7 n.3.
12 However, the Chief Judge "conclude[d] that absent any evidence of
13 fraud or misleading information, and based on the fact that the
14 statutory provision and the regulations in question are subject
15 to varying interpretation, it would be unfair and impermissible,
16 and possibly a violation of substantive due process, to direct
17 repayment of the amount in issue." Id. at *14. Accordingly, the
18 Chief Administrative Judge ordered "that Beth Medrash Eeyun
19 Hatalmud is relieved of any obligation to repay the United States
20 Department of Education the sum of \$15,949,148." Id.

21 On review, in his decision dated April 1, 1999, the
22 Secretary of Education disagreed with the Chief Judge only to the
23 extent of finding that the "standard [for program eligibility] is
24 long-standing and was not newly interpreted when applied in this
25 case," and "that evidence of fraud or misleading information is
26 not necessary to establish that a given program is ineligible to

1 receive federal funds." Accordingly, the Secretary, rejecting
2 BMEH's attempt to relitigate the finding of ineligibility,
3 reiterated previous determinations by stating: "BMEH's programs
4 do not meet the standards of an eligible vocational program,
5 under the applicable statute." However, the Secretary found
6 that, "[n]otwithstanding BMEH's ineligibility, . . . the specific
7 facts of this case do not warrant the imposition of financial
8 liability." Accordingly, the Secretary concluded his review by
9 "affirm[ing] [the Chief Administrative Law Judge's] decision to
10 relieve BMEH of financial liability but impose[d] a fine in the
11 amount of \$50,000."

12 Over five years later, on March 17, 2005, in the action it
13 originally had brought to challenge the denial of reimbursement,
14 BMEH moved in the District Court for an Order requiring the DOE
15 to pay BMEH the \$452,008 that the DOE had retained pursuant to
16 the Settlement Agreement. Hatalmud v. Riley, No. 95-cv-5104
17 (RO), 2005 WL 3370500, at *1 (S.D.N.Y. Dec. 9, 2005). BMEH
18 argued in its motion that the amount sought was a "bond" that
19 BMEH had posted as "security" pursuant to Fed. R. Civ. P. 65(c).
20 Id. BMEH argued that, since all matters between the parties were
21 resolved, the DOE must return the "bond." BMEH also claimed that
22 it was entitled to interest on the theory that the DOE was merely
23 holding the funds as a bond. Hatalmud, 2005 WL 3370500, at *1.

24 In response, the DOE argued that, under the Settlement
25 Agreement the parties resolved all of the claims asserted in
26 BMEH's complaint, upon which the TRO was based, and that the

1 \$452,008 the DOE retained was in consideration of the DOE's
2 decision to forgo further litigation related to whether the DOE
3 was required to pay BMEH's reimbursement requests while BMEH's
4 eligibility to participate in the Pell Grant Program was being
5 determined in the administrative termination proceedings --
6 proceedings that BMEH ultimately lost.

7 The District Court ruled in BMEH's favor, concluding that
8 the Settlement Agreement imposed an obligation on the DOE to pay
9 BMEH \$452,008. Hatalmud, 2005 WL 3370500, at *1. In addition
10 the court ruled that, since the \$452,008 was BMEH's money held by
11 the DOE, BMEH was entitled to interest. Id. Under the judgment,
12 the interest would be calculated from the dates upon which the
13 DOE retained the ten percent from BMEH's reimbursement requests.
14 Id. at *1-2. The court also vacated the \$50,000 fine, ruling
15 that it had no support in the record and was imposed without a
16 hearing and without reasons given. That ruling is not in issue
17 here. Id. at *2.

18 In interpreting the Settlement Agreement, the District Court
19 rejected the DOE's argument "that the [\$452,008] is not, in fact,
20 a 'bond' or 'security' posted under Rule 65(c) of the Federal
21 Rules of Civil Procedure, but rather, is a benefit of the bargain
22 that the DOE received . . . in exchange for its promise to pay
23 BMEH's requests for reimbursement pending final agency decision
24 in the administrative proceedings." Id. at *1. The court
25 concluded that the "only reasonable understanding" of the
26 language in the Settlement Agreement "is as a carry-over of the

1 security provisions that governed the TRO.” Id. The court noted
2 that, at the TRO hearing, it had directed ten percent of the
3 reimbursement requests to be held as a Rule 65(c) bond, and had
4 issued a written order three days later that “unequivocally”
5 provides that the DOE could withhold that amount “[i]n lieu of a
6 bond.” Id.

7 The District Court further noted that the Settlement
8 Agreement, “signed only fourteen days later incorporated a
9 similar provision, prescribing that ten percent would be withheld
10 ‘pending final agency decision.’” Id. Finally, because the
11 District Court found that the \$452,008 retained constituted
12 “funds belonging to BMEH,” it concluded that an award of interest
13 would not be “an interest award against the United States” but an
14 award “of interest earned on BMEH’s money that BMEH was entitled
15 to receive years prior, and which has since been in the temporary
16 custody of the government.” Id. This timely appeal by the DOE
17 ensued.

18 **ANALYSIS**

19 On appeal, BMEH contends that its claim to the retained
20 funds should be governed by the general rule that a district
21 court’s interpretation of ambiguous language should be affirmed
22 unless clearly erroneous. It argues that this rule “applies with
23 even greater force” in this case, because the District Court so
24 ordered the Settlement Agreement only two weeks after granting
25 the TRO and therefore is in the best position to interpret the
26 settlement terms. BMEH notes that the percentage of payments

1 retained pursuant to the settlement was the same as the
2 percentage retained in lieu of bond pursuant to the TRO.

3 In further support of the judgment below, BMEH contends that
4 the "pending final agency decision" provision relative to the ten
5 percent retainage "do[es] not suggest that the DOE may keep the
6 withheld funds but only that they may be escrowed during the
7 administrative proceeding." Apparently, the DOE maintained a
8 separate escrow account for the withheld funds, and, according to
9 BMEH, this "demonstrates that the DOE viewed the withheld funds
10 as belonging to BMEH, not to the DOE, and as having been paid to
11 BMEH by the transfer to the escrow account." BMEH asserts that
12 the withheld funds were "only kept separately in case there would
13 be some liability by BMEH at the end of the process." Finally,
14 BMEH urges on appeal that, because it is the owner of the
15 retained funds, it is entitled to interest earned on the funds
16 despite the rule of sovereign immunity prohibiting the recovery
17 of interest against the United States.

18 We review de novo the District Court's conclusions of law
19 arising out of its interpretation of Settlement Agreement terms.
20 See Omega Eng'g, Inc. v. Omega, S.A., 432 F.3d 437, 443 (2d Cir.
21 2005). In doing so, we apply the same tests as are applied by
22 the District Court. See Compagnie Financiere de CIC et de
23 L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith,
24 Inc., 232 F.3d 153, 157 (2d Cir. 2000). It is only where the
25 District Court undertakes the interpretation of an ambiguity in
26 an agreement, in the presence of extrinsic evidence of meaning,

1 that we apply a clearly erroneous standard of review. See U.S.
2 Naval Inst. v. Charter Communications, Inc., 875 F.2d 1044, 1049
3 (2d Cir. 1989); Antilles S.S. Co. v. Members of American Hull
4 Ins. Syndicate, 733 F.2d 195, 204 (2d Cir. 1984) (Newman, J.,
5 concurring). But whether or not an ambiguity exists is a
6 question of law that we review de novo. See Tourangeau v.
7 Uniroyal, Inc., 101 F.3d 300, 306 (2d Cir. 1996).

8 In disagreement with BMEH, we see no ambiguity in the
9 Settlement Agreement in regard to the disposition of the withheld
10 funds and so accord no deference on review to the District
11 Court's interpretation. The fact that the Agreement was "so
12 ordered" by the District Court does not affect our de novo
13 examination here. The District Court's interpretation clearly
14 was informed by its erroneous conclusion that the provision for
15 10% withholding was "a carry-over of the security provisions that
16 governed the TRO." Hatalmud, 2005 WL 3370500, at *1.

17 While the District Court characterized its conclusion as the
18 "only reasonable understanding" of the withholding provision of
19 the Settlement Agreement, id., the parties specifically agreed to
20 the dissolution of the TRO and "that they will give no force and
21 effect to the findings made on the record by [the District
22 Court]." Accordingly, the Settlement Agreement, as "so ordered"
23 by the District Court, nullified the 10% "withholding as
24 security" provision that became effective when the TRO was
25 issued, and the District Court's observations that the Agreement
26 contained a "similar provision" and was "signed only fourteen

1 days later" therefore are without significance. Id. at *1-2.

2 Turning to the Settlement Agreement itself, there is no
3 language anywhere within its four corners evidencing, in the
4 words of the District Court, "a carry-over of the security
5 provisions that governed the TRO." Id. at *2. Moreover, a
6 security bond would have been pointless after the execution of
7 the Settlement Agreement because the purpose of such a bond is to
8 provide "for the payment of such costs and damages as may be
9 incurred or suffered by any party who is found to have been
10 wrongfully enjoined or restrained" by a TRO or a preliminary
11 injunction during pending litigation. See Fed. R. Civ. P. 65(c);
12 see also Commerce Tankers v. Nat'l Maritime Union of America, 553
13 F.2d 793, 800 (2d Cir. 1977). The following Stipulation included
14 in the Settlement Agreement put an end to the pending litigation:
15 "The action of the plaintiff against the defendant is hereby
16 dismissed with prejudice and without costs."

17 As in all such agreements, the Settlement Agreement here
18 represented a compromise between conflicting claims. BMEH agreed
19 to forego further District Court litigation and, in return, the
20 DOE agreed to pay ninety percent of BMEH's reimbursement requests
21 pending administrative determination of its entitlement to
22 participate in the Pell Grant Program. The parties agreed that
23 their dispute would go forward to an administrative
24 determination. (A later challenge by BMEH to the administrative
25 determination was made and rejected in the District Court.)
26 "[The] agreement reached . . . embodie[d] a compromise; in

1 exchange for the saving of cost[s] and elimination of risk, the
2 parties each gave up something they might have won had they
3 proceeded with the litigation.” United States v. O’Rourke, 943
4 F.2d 180, 186-87 (2d Cir. 1991) (quoting United States v. Armour
5 & Co., 402 U.S. 673, 681-82 (1971)).

6 Referring generally to Pell Grant Program future payments to
7 be made to BMEH, the ten percent withholding provision in the
8 Agreement simply provides “that [the DOE] will be entitled to
9 retain ten percent (10%) of the amount thereof pending final
10 agency decision.” In examining this provision, we recognize that
11 “[t]he cardinal principle for the construction and interpretation
12 of . . . contracts . . . is that the intention of the parties
13 should control.” SR Int’l Bus. Ins. Co. v. World Trade Ctr.
14 Props., LLC, 467 F.3d 107, 125 (2d Cir. 2006) (internal quotation
15 marks omitted). Moreover, “the best evidence of intent is the
16 contract itself; if an agreement is complete, clear and
17 unambiguous on its face, it must be enforced according to the
18 plain meaning of its terms.” Eternity Global Master Fund, Ltd.
19 v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 177 (2d Cir.
20 2004) (internal quotation marks and brackets omitted). The
21 language here is complete, clear and unambiguous and evidences
22 the clear intention of the parties: Disbursement of the withheld
23 funds is to abide the event of the final DOE determination; if
24 the DOE were to prevail in the administrative proceeding, it
25 would retain the funds; if BMEH were to prevail, the funds would
26 be paid over to it.

1 The final DOE determination, manifested in the decision of
2 the Secretary of Education dated April 1, 1999, and unchallenged
3 here by BMEH, conclusively determined that BMEH was ineligible
4 for participation in the Pell Grant Program ab initio. According
5 to this decision, BMEH received almost sixteen million dollars
6 over the years in Pell Grants, including \$4.5 million paid while
7 the termination proceedings were pending. Rather than requiring
8 the repayment of these funds, and apparently strictly as a matter
9 of grace, the Secretary forgave the debt: "Notwithstanding
10 BMEH's ineligibility, . . . the specific facts of this case do
11 not warrant the imposition of financial liability." This
12 forgiveness of debt followed the Secretary's rejection of the
13 reasons given by the Chief Administrative Judge for relieving
14 BMEH's repayment obligation -- the absence of fraud and
15 misleading information on the part of BMEH and the "varying
16 interpretation[s]" of the applicable statutory provisions and
17 regulations. Hatalmud, 1998 EOHA Lexis 30, at *10. The
18 Secretary's decision relieved BMEH of an enormous debt, ex aequo
19 et bono, and it does not lie in the mouth of BMEH to call for the
20 payment of money which it never was entitled to in the first
21 place.

22 BMEH's argument that the DOE maintained the withheld funds
23 in a special escrow account and therefore viewed the funds as
24 belonging to BMEH is unavailing. BMEH never was entitled to any
25 Pell Grant funds, whether withheld or paid over. In this regard,
26 it is noteworthy that the Secretary of Education did not relieve

1 BMEH from legal liability; he merely determined that "the
2 specific facts of this case do not warrant the imposition of
3 financial liability." (emphasis supplied).

4 As we have observed, both parties benefitted from the
5 Settlement Agreement, which includes the "winner take all"
6 element of the ten percent withholding provision. See EEOC v.
7 Local 40, Int'l Ass'n Bridge Workers, 76 F.3d 76, 79-81 (2d Cir.
8 1996). BMEH acknowledged the purpose and intent of that
9 provision by objecting to the DOE's calculation of the entire
10 Pell Grant liability for failure to reduce the amount of total
11 liability by the \$452,008 of withheld money in the DOE's
12 possession. It was not until five years later that BMEH reversed
13 course and concocted the theories that led to the judgment that
14 is the subject of this appeal.

15 In light of the foregoing, it is unnecessary for us to
16 address the issue raised by the District Court's award of
17 interest against the United States.

18 **CONCLUSION**

19 The judgment of the District Court is reversed, and the case
20 is remanded for the entry of judgment in favor of defendant-
21 appellant.