

**Matter of Town of North Hempstead v County of  
Nassau**

2011 NY Slip Op 32266(U)

August 11, 2011

Supreme Court, Nassau County

Docket Number: 6734/11

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
In the Matter of the Application of the

TOWN OF NORTH HEMPSTEAD,

Plaintiff-Petitioner,

INDEX NO.: 6734/11

For a Judgment Pursuant to Sections 2001 and Article 78  
of the Civil Practice Law and Rules,

MOTION DATE: 07/01/11  
SEQUENCE NO. 001

-against-

COUNTY OF NASSAU,

Defendant-Respondent.

-----X

<b>Notice of Petition, Petition, Affs &amp; Exs.....</b>	<b><u>1</u></b>
<b>Verified Answer and Objection, Affs &amp; Exs.....</b>	<b><u>2</u></b>
<b>Reply Affirmation.....</b>	<b><u>3</u></b>

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Upon the foregoing papers, the application by Petitioner Town of North Hempstead (hereinafter "Town), pursuant to CPLR §3001 and Article 78 of the CPLR, for a judgment (i) directing and compelling the County of Nassau (hereinafter "County") to pay the Town \$2,448,625.00, said sum representing the Town's share of the County-collected sales tax for the fourth quarter of the fiscal year 2010; (ii) for an order declaring the County's withholding of mandated sales tax revenue from the Town illegal, arbitrary, and capricious, and without legal authority; (iii) declaring the County's attempted offset of claimed community college and Fashion Institute of Technology (hereinafter "FIT") charge backs against statutorily mandated sales tax revenue, illegal, arbitrary, and capricious, and without legal authority; (iv) declaring that the County is without authority to charge back the Town for FIT expenses it incurs, and further

declaring such charge back illegal, arbitrary, and capricious, and without legal authority; and (v) declaring that the County is without authority to charge back the Town for FIT expenses it incurs for out of County students pursuant to the New York State Education Law, and declaring such charge back illegal, arbitrary, and capricious, and without legal authority; is determined as follows.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

In this application, the Town is alleging that the County is withholding \$2,448,625.00 due to the Town for the Town's share of the County-collected sales tax for the fourth quarter of the fiscal year 2010. It is undisputed by the parties that the Town's share of the County-collected sales tax for the fourth quarter of 2010 is \$2,448,625.00. The Town alleges that the County is improperly withholding said funds due to an offset of Fashion Institute of Technology ("FIT") charge backs, in the amount of \$1,174,462.60, and an offset of other community college charge backs, in the amount of \$601,482.27, which the County claims is due and owing from the Town.

Education Law §6305(5) provides that the County has the statutory authority to charge back its cities and towns for the costs incurred by the County from paying charge-backs assessed against the County under §6305(2) for its residents attending out-of-County community colleges. Pursuant to Education Law §6305(2), a community college may charge to and collect from each home county the allocable cost of the home county's students attending such out-of-county community college. Pursuant to 6305(5), the County may then charge back such amounts, in whole or in part, to the cities and towns within the County for the number of students attending each such community college who were residents of each city or town. The purpose of the charge backs is to "insure that counties of non-resident students share in the cost incurred in operating a community college, for any nonresident students who are 'attending such community college.'" (*Fulton-Montgomery Community College v. County of Saratoga*, 80 A.D.3d 217, 912 N.Y.S.2d 702 (2d Dept. 2010), *quoting* Education Law §6305(2)).

In 2003, the Nassau County Legislature (by Resolution 368-2003, approved on December 18, 2003) authorized the County Treasurer to charge back to the towns and cities in the county, the amounts paid by the County to out-of-county community colleges. Subsequent to the

adoption of said resolution, the County began charging back to the cities and towns for community colleges in general. It was not until 2011, however, that the County began to charge its cities and towns for County residents attending FIT, beginning with FIT charge-backs for the fiscal year 2010.

The Town contends that FIT is not a community college as defined by Education Law §6303, and, accordingly, the County cannot charge back the Town for the amounts paid to FIT by the County for Town resident-students. The Town argues that when the Education Law was adopted in 1948, FIT offered only two year programs consistent with the statutory definition of a community college. In 1975, however, FIT began offering four-year degrees in multiple disciplines and, in 1979, began offering Masters Degree programs. As such, the Town argues that FIT ceased being a “community college” as defined by the Education Law. The Town also argues that the County Legislature’s Resolution Number 368-2003 did not authorize the County Treasurer to charge back to the cities and towns the amounts paid by the County to FIT.

Further, in 1994, Education Law §6305 was amended to add subsection 10. Section 6305(10) of the Education Law provided that the State shall reimburse each county which has issued a certificate of residence for any non-resident student in attendance at FIT. In 2001, however, the appropriation bill proposed by the governor and passed by the legislature effectively eliminated such funding from the state budget. (*See, Matter of County of Suffolk v. King*, 18 A.D.3d 1010, 794 N.Y.S.2d 695 (2d Dept. 2005)). The Town contends that §6305(10) expressly separated FIT from the conventional community colleges for the purposes of County charge back authority.

In its objections to the Town’s petition, the County contends that FIT is a “community college” within the meaning of the Education Law, including §6305’s charge-back scheme, and as such, the County is entitled to charge back payments for the costs incurred on behalf of the Town’s residents attending FIT. In addition, the County contends that the County Legislature’s December 18, 2003 Resolution number 368-2003 authorized the County Treasurer, pursuant to §6305, to charge back to the cities and towns of Nassau County the amounts payable by the County to out-of-County community colleges for County residents attending those out-of-County community colleges. The County argues that the Resolution covers all community colleges,

including FIT, which, by statutory definition is a community college.

The County also argues that if FIT was not a community college under the Education Law, it would not be able to charge the County for non-resident students attending FIT. FIT is only afforded the statutory authority to charge the County for its students attending FIT pursuant to Education Law §6305. The County also contends that Education Law §6305 does not require implementation by the local legislative body in order for the County to charge its cities and towns for their residents attending FIT.

The Town's argument that FIT is not a community college, as contemplated by the Education Law, is without merit. Education Law §6301(2) defines a community college as a college "providing two-year post secondary programs pursuant to regulations prescribed by the state university trustees and receiving financial assistance from the state therefor." Education Law §6303(1) states that "community colleges shall provide two-year programs of post high school nature combining general education with technical education relating to the occupational needs of the community, area, or community college region in which the college is located and those of the state and the nation generally." Education Law §6302(3) states, however, that community colleges in New York City, where FIT is located, may offer baccalaureate and masters degrees, and "shall be financed and administered in the manner provided for community colleges."

In addition, Education Law §2587, entitled, "Tenure in fashion institute of technology," provides that "'Community College' shall mean fashion institute of technology, a community college sponsored by the board of education of the City of New York." Further, the courts have repeatedly held that FIT is a community college. "FIT is anomalous among community colleges in that it offers baccalaureate and Master's degree programs in addition to two-year programs, but in all other relevant statutory respects is like all other community colleges." (*Mostaghim v. Fashion Institute of Technology*, 2001 WL 1537544 (S.D.N.Y. 2001)(holding that "FIT is a community college, albeit an unusual one"); *See also, Amato v. State of New York*, 131 Misc.2d 1049, 502 N.Y.S.2d 928 (Ct. of Claims 1986); *Jackson v. Bd. of Education*, 30 A.D.3d 57, 812 N.Y.S.2d 91 (1<sup>st</sup> Dept. 2006)).

As Education Law §§6301(2) and 6303(1) specifically state that community colleges shall

provide “two-year programs,” the Court finds that the charge backs authorized by Education Law §6305(5) shall be limited to the amounts paid by the County to FIT for Town-resident students enrolled in the two year education programs and those seeking two-year Associate Degrees.

Lastly, as a municipality may utilize the remedy of setoff against its debtor, the County may offset the amount owed to it by the Town from the sales tax due to the Town. (*See, U.S. v. Munesy Trust Co.*, 332 U.S. 234, 67 S. Ct. 1599 (1947)(“the government has the same right, which belongs to every creditor, to apply the unappropriated moneys of his debotr, in his hands, in extinguishment of the debts due to him.”); *Morash v. State of New York*, 268 A.D.2d 510, 703 N.Y.S.2d 55 (2d Dept. 2000)(“the State Comptroller has the common-law right of setoff in order to collect a debt owed to the State even where the State’s claim has not been reduced to judgment or whent the setoff is unrelated to the State’s debt to the claimant”); *Canale v. New York State Dept. of Tax and Finance*, 84 Misc.2d 786, 378 N.Y.S.2d 566(Ct. of Claims 1975); *See also*, 1988 N.Y. St. Compt. Opinion 88-42).

Accordingly, pursuant to Education Law §§ 6301, 6302, 6303, and 6305, as well as the case law cited *supra*, this Court declares and orders the following:

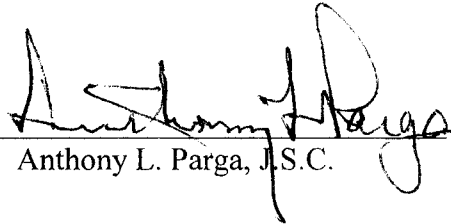
- (1) That FIT is a “community college” as contemplated by Education Law §§6301, 6302, 6303, and 6305;
- (2) That, pursuant to Education Law §§6301(2), 6302(3), 6303(1) and 6305(5), the County is entitled to charge back to the Town the amount paid by the County to FIT for Town residents enrolled in two year education programs and those seeking two-year Associate Degrees;
- (3) That the undisputed amount of \$672,680.13, representing the balance due from the County to the Town for the sales tax distribution for the fourth quarter of the fiscal year 2010, shall be paid by the County to the Town within thirty (30) days following the date of this order;
- (4) That the County may retain the remainder of the sales tax due and owing to the Town for the fourth quarter of the fiscal year 2010, in the amount of \$1,775,944.87, pending a determination of the total amount due and owing from the Town for community college charge backs and FIT Associate Degrees and two year education charge backs;
- (5) That the County shall determine the amount due and owing to it from the Town for community college charge backs for Town residents for the fiscal year 2010 and part of the fiscal year 2009, and for FIT Associate

Degrees and two year education charge backs for Town residents for the fiscal year 2010, within sixty (60) days of this order; and

- (6) That the County may offset the amount due and owing to it for the above-noted charge-backs from the remainder of the \$1,775,944.87 due to the Town for the Town's share of the collected sales tax for the fourth quarter of the fiscal year 2010.

This constitutes the decision and order of this Court.

Dated: August 11, 2011




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Anthony L. Parga, J.S.C.

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**ENTERED**  
**AUG 15 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**