Thornton v New York City Dept. of Educ.
2017 NY Slip Op 30971(U)
May 9, 2017
Supreme Court, New York County
Docket Number: 156571/2016
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: **DEBRA A. JAMES** **PART 59**
Justice

EDWARD M. THORNTON and THORNTON'S CLASSIC STUDIO,

Petitioners/Plaintiffs,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID N. ROSS, and JAMILLA SIMMS,

Respondents/Defendants.

Index No.: 156571/2016
Motion Date: 05/09/2017
Motion Seq. No.: 001
Motion Cal. No.: _____

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

The following papers, numbered 1 to 4 were read on this petition pursuant to CPLR Article 78 and cross motion to dismiss.

	PAPERS NUMBERED
Notice of Petition/Verified Petition -Affidavits -Exhibits _____	1, 2
Notice of Cross Motion/Answering Affidavits - Exhibits _____	3
Replying Affidavits - Exhibits _____	4

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that the petition shall be denied and the cross motion shall be granted.

Petitioners attach to their supporting papers a copy of the opinion and order dated February 5, 2015 of the Appellate Division, First Department, 125 AD3d 444 (Opinion), in Thornton v Department of Education, Index No. 100743/2013 (New York Supreme Court, New York County) (prior proceeding).

In the Opinion, the First Department unanimously reversed the order of the trial court that denied the petition and

Check One: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

dismissed the hybrid proceeding brought pursuant to article 78 and 42 USC § 1983, and remanded the matter to respondent Department of Education (DOE) for "the issuance of a determination whether petitioner Thornton's Classic Studios, Inc. is a "responsible vendor" and reinstated and converted the 42 USC § 1983 claims into a plenary action without prejudice to a motion to dismiss (plenary action).

Finding that the "DOE acted arbitrarily and capriciously in failing to provide [petitioner] with notice of its apparent determination of non- responsibility and of [petitioner's] right to protest the determination, as required by its own Procurement Policy and Procedures (PPP) (Section 2-05[g][1] and 2-06)", by such remand and conversion, the Appellate Division, First Department, implicitly issued a judgment resolving that part of the prior hybrid action that sought a judgment pursuant to Article 78 of the Civil Practice Laws and Rules, and severed the such proceeding from the plenary action, the latter plenary action which the Appellate Division ordered would continue, without prejudice to a motion to dismiss. Upon further deliberation, this court notes that such plenary action has not been abandoned. See Chang v Batsacos, 92 AD3d 610 (1st Dept 2012).

Among the grounds upon which respondent now moves to dismiss this proceeding, which is also a hybrid, is that, pursuant to

CPLR 3211(4)(a), to the extent it seeks an award pursuant to 41 USC § 1983, the instant proceeding duplicates the plenary action that is still pending. A review of the pleadings in both cases shows that the 42 USC § 1983 proceeding at bar involves the same parties and actionable wrong and seeks essentially the same relief as the prior plenary action, which warrants dismissal of that part of the instant proceeding that seeks damages pursuant to 42 USC § 1983. See GSL Enterprises, Inc. v Citibank, NA, 155 AD2d 247 (1st Dept, 1989).

Moreover, the Opinion states, in pertinent part:

> "The DOE's determination placing TCS on de-active status in FAMIS was rationally based upon the 2012 admission of TCS's president, petitioner Edward Thornton, that he had continued to send a certain photographer to work in DOE schools after becoming aware that the photographer had been accused of touching a student's breast five years earlier and had pleaded guilty to the charge of endangering the welfare of a child (Penal Law § 260.10[1])".

As argued by respondents, "DOE in particular must be 'cognizant of its obligations to provide a safe place for New York City children to receive their education' when it evaluating the responsibility and integrity of potential vendors." See A. Grgas Contracting Co. V Mercklowitz, 168 AD2d 678 (2d Dept 1990). Thus, upon the principles of collateral estoppel, the petition herein fails to state a meritorious claim pursuant to 42 USC § 1983. See Bayreva v Department of Education, 57 AD3d 322 (1st Dept 2008). In addition, respondents are correct that to the extent that it seeks mandamus, petitioners' claim does not lie as

the determination of whether a vendor is responsible is a discretionary act of the administrative agency, which may not be usurped by the court.

Moreover, petitioners state no legal basis that supports their argument that the DOE's consideration and determination of their protest made after remand, which found petitioners to be a "non-responsible vendor" and maintained petitioners on "de-active status" as to open contracts was arbitrary and capricious or deprived them of due process because DOE never promulgated a rule prohibiting vendors from hiring persons with criminal records in accordance with the PPP. As correctly stated by respondents, the failure of a vendor's principals to take responsibility for past misconduct, here petitioners' failure to notify the DOE of the conviction of one of its photographers for the victimization of a student during a photography shoot at a school and its continuing to send that photographer into the schools, provides a rational basis for finding the vendor's business judgment and integrity inadequate. See Brooklyn Community Mgt LLC v New York City Dept. Of Educ., 67 AD3d 404 (1st Dept 2009).

Furthermore, petitioners set forth no legal precedent for the proposition that they were entitled to an evidentiary hearing, and in fact the decisions they cite stand for the contrary proposition. See, e.g., Matter of Schiavone Constr. Co. V Larocca, 117 AD2d 440, 443 (3rd Dept 1986) ("In cases such as

the one at bar, a formal trial-type hearing is not necessary".) Nor is there any precedent for their contentions that the Protest Officer was biased and lacked independence because she engaged in ex parte communications with respondent David N. Ross, DOE's Executive Director of Contracts and Purchasing in violation of petitioners' due process rights. Fundamental principles of administrative law squarely establish otherwise. See Mauro v Division of Housing & Community Renewal, 250 AD2d 392 (1st Dept 1998)("combination of investigatory, prosecutory and quasi-judicial functions in a single administrative agency is not in itself violative of due process".) Further, as stated by DOE, consultation among and between the Protest Officer and her appointing authority are explicitly authorized by the applicable rules. See PPP § 2-06(a)(5)("The Protest Officer may seek input as he or she deems appropriate, including a recommended disposition from individuals previously involved in the procurement, including but not limited to the Procurement Manager.")

Respondents are correct that petitioners have no property interest in any public contract. See Conduit & Found. Corp. V Metro. Transp. Auth., 66 NY2d 144, 148-149 (1985). Nor have petitioners set forth a "stigma-plus" claim, as petitioners "merely alleg[e] injuries caused by the 'deleterious effects which flow directly from a sullied reputation'". See Ruggiero v

Phillips, 292 AD2d 41, 45 (4th Dept 2002). Likewise, the Determination of non-responsibility does not constitute a de facto disbarment, as the Determination pertained to open and now completed contracts and does not bar petitioners from seeking a DOE contract in the future. See Mid-State Industries Ltd v City of Cohoes, 221 AD2d 705 (3d Dept 1995).

Finally, petitioner's First Amendment retaliation claim fails as petitioners state no basis for liability against the individual respondents or any official DOE custom and practice that implicates municipal liability arising from the dissemination of information concerning the Studio to superintendents and principals.

Accordingly, it is hereby

ORDERED that the petition in its entirety is denied; and the cross motion of respondents' to dismiss the petition is GRANTED and the Clerk is directed to enter judgment DISMISSING the proceeding.

This is the decision and order of the court.

Dated: May 9, 2017 ENTER:

DEBRA A. JAMES J.S.C.