SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: DCM PART 6

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MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

- against -

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN AND JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant,

- and -

AFFIRMATION OF ASSISTANT ATTORNEY GENERAL STEVEN L. BANKS IN SUPPORT OF STATE DEFENDANTS' MOTION FOR A STAY

Index No. 101105/14

(Marin, J.S.C.)

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR.., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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JOHN KEONI WRIGHT; GINET BORRERO; TAUANA GOINS; NINA DOSTER; CARLA WILLIAMS; MONA PRADIA; ANGELES BARRAGAN LAURIE; TOWNSEND; DELAINE WILSON,

Plaintiffs,

- against -

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York;

Defendants,

- and -

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

- and -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

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STEVEN L. BANKS, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. I am an Assistant Attorney General in the office of BARBARA D. UNDERWOOD, the Attorney General of the State of New York, attorney for defendants THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (also sued here as "The New York State Board of Regents"); and THE NEW YORK STATE EDUCATION DEPARTMENT (collectively the "State Defendants"). I submit this affirmation in support of State Defendants' motion for an order staying all proceedings pending a decision on the motions for leave to appeal from the Decision and Order of the Appellate Division, Second Department, dated March 28, 2018, and, if leave to appeal is granted, staying all proceedings pending a decision of the New York Court of Appeals.

Prior Proceedings

2. This consolidated action was commenced by two groups of plaintiffs after they filed separate but similar complaints in 2014 challenging New York's statutory due process protections for public school teachers. The first, Davids v. State of New York, et al. (Index No. 101105/14), was filed in Supreme Court, Richmond County, by eleven students who allegedly reside in the New York City public school district. The second action, Wright v. State of New York, et al. (Index No. A00641/2014), was filed in Supreme Court, Albany County, by nine students and their parents who allegedly reside in the New York City and Rochester City public school districts. By order dated September 18, 2014, Supreme Court, Richmond County (Minardo, J.), consolidated the actions before it.

3. The State Defendants and other defendants promptly moved to dismiss the complaints in their entirety. By decision and order entered March 20, 2015, the Court dismissed claims against individual state officials but otherwise denied defendants' respective motions to dismiss. Defendants timely appealed.

3. In April 2015, a sweeping set of changes in the various tenure laws specifically challenged by plaintiffs were enacted as part of New York State's Budget Bill. Consequently, defendants moved to dismiss and/or moved to renew their motions to dismiss, arguing that the statutory changes rendered plaintiffs' challenge to the superseded teacher tenure system moot.

4. By Decision and Order entered October 23, 2015, the Court denied the defendants' respective motions for leave to renew and for dismissal, but granted a stay of proceedings pending the resolution of defendants' appeals. "[G]iven the extensive nature of discovery likely to be required in this case, it is only proper that all further proceedings in this

matter should be stayed pending the determination of the Appellate Division." See Exhibit A.

5. Defendants' appeal was argued before the Second Department on November 30, 2017.

6. On March 28, 2018, the Second Department affirmed the denial of Defendants' motion to dismiss.

7. On April 23, 2018, after service of notice of entry of the Second Department's decision on appeal, the parties appeared for a conference before this Court. After substantial discussions regarding plaintiffs' proposal to proceed with discovery, and defendants' stated intentions to seek further appeal to the Court of Appeals and to seek a stay, the Court granted defendants additional time to answer the complaint to June 20, 2018, and advised the parties to notify the Court of any action by the Second Department on the motions for leave to appeal. The Court indicated that it would revisit defendants' request for a stay once the leave applications were decided.

8. State Defendants' timely moved for leave to appeal with a return date of May 11, 2018. The other defendants filed their own respective motions for leave to appeal. At plaintiffs' request, the parties subsequently entered into a stipulation extending plaintiffs' time to file opposition to the collective motions for leave to appeal to May 25, 2018, and adjourning the return date of all motions to June 1, 2018.

9. The motions are now fully briefed and awaiting a decision by the Appellate Division, Second Department. It appears unlikely that the motions for leave to appeal will be decided by the June 20, 2018 date set for defendants' answers to the separate complaints filed in this action.

Grounds for a Stay of Proceeding

10. CPLR § 2201 permits "the court in which an action is pending" to "grant a stay of proceedings in a proper case, upon such terms as may be just." It is well established that "a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." Zonghetti v. Jeromack, 150 A.D.2d 561, 563 (2d Dep't 1989). Given the unique nature of the present action, and the Court's prior recognition of "the extensive nature of discovery likely to be required in this case," a further stay of the proceedings pending a resolution of the motions for leave to dismiss is warranted. If the motions for leave to appeal are granted and the legal issues herein are reviewed by the Court of Appeals, a stay should be entered and remain in effect until final action by the Court of Appeals.

11. Significantly, this is a case of first impression in New York and presents significant threshold questions of law that should be reviewed by the Court of Appeals before this action proceeds into discovery. Notably, contrary to the standards laid down by the Court of Appeals for Education Article claims, see, e.g., Aristy-Farer v. State, 29 N.Y.3d 501 (2017), plaintiffs' Education Article claims seek relief on a state-wide basis without identifying particular school districts where students are allegedly being denied a minimally adequate sound basic education as a result of the laws they challenge. Moreover, given the scope of plaintiffs' challenge to tenure protections for any public school teacher, their claims present important political questions and involve questions as to the extent of permissible judicial interference in the public policy of tenure. A decision by the Court of Appeals could clarify the nature of the rights secured by the Education Article, and possibly dispose of this action in its entirely, or at

least limit its focus.

12. Further, discovery in this lawsuit will be both costly and time consuming, and indeed "the extensive nature of discovery" in this action was previously cited by Justice Minardo in granting a stay of proceedings during the pendency of defendants' appeals to the Second Department. Discovery will necessarily involve an investigation into the educational circumstances in districts throughout the State, discovery of teacher tenure statues, their history and effects, the identification of allegedly "ineffective" teachers and whether they ultimately cause the denial for the opportunity of a sound basic education in a district overall, and extensive expert discovery. Before the parties spend time and money engaging in burdensome discovery, the Court of Appeals should be given the opportunity to review the legal issues in this case and the opportunity to dismiss the claims or narrow the issues.

Dated: New York, New York
June 5, 2018

STEVEN L. BANKS
Assistant Attorney General

Printed on Recycled Paper

EXHIBIT

RICHMOND COUNTY CLERK
2015 OCT 28 P 2:14
DIVISION OF LAW & PROPERTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et al.*, and JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

Motion Nos.[1] 1996 - 013
2012 - 014
2110 - 015
2111 - 016
2186 - 017

[1]These motions have been consolidated for purposes of disposition.

MYMOENA DAVIDS, *et al.* v. THE STATE OF NEW YORK , *et al.*

The following papers numbered 1 to 12 were fully submitted on the 25th day of August, 2015.

Papers Numbered

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated May 27, 2015) 1

Notice of Motion to Dismiss and/or Renew by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated May 27, 2015) 2

Notice of Motion to Dismiss and/or Renew by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L.Banks, with Exhibits and Memorandum of Law, (dated May 27, 2015) 3

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants SETH COHEN,*et al.*, with Exhibits and Memorandum of Law, (dated May 26, 2014) 4

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI with Exhibits and Memorandum of Law, (dated MAY 26, 2015) 5

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss and/or Renew, with Exhibits and Memorandum of Law (dated June 26, 2015) 6

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.*, to Defendants and Intervenors-Defendants' Motion to Dismiss and/or Renew, with Exhibits and Memorandum of Law, (dated December 5, 2014) 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Reply Memorandum of Law by Intervenors-Defendants MICHAEL MULGREW, as President Of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, (dated July 7, 2015) 8

Reply Affirmation by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, (dated July 7, 2015) 9

Reply Affirmation by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI, (dated July 1, 2015) 10

Reply Memorandum of Law by Intervenors-Defendants SETH COHEN, *et al.*, (dated July 7, 2015) 11

Reply Memorandum of Law by Defendants STATE OF NEW YORK, , *et al* , (dated July 7, 2015) 12

Upon the foregoing papers, the motions by defendants and intervenor-defendants for, *inter alia*, dismissal of the complaints and/or leave to renew their prior motions for like relief are decided as follows.

The parties' familiarity with the facts is presumed from their participation in this litigation and the exhaustive Decision and Order of this Court entered on March 20, 2015.

In this action for a judgment declaring, singly and in combination, various sections of the Education Law as violative of Art. XI, §1 of the New York State Constitution[2] (hereinafter the Education Article), this Court previously denied defendants' and intervenor-defendants' several motions to dismiss the complaints on various grounds which the Court found to be without merit.

[2] To the extent relevant, this article guarantees to all of the students within the State of New York a "sound basic education".

Defendants and intervenor-defendants subsequently appealed that determination to the Appellate Division, Second Department, where it has yet be to calendared for oral argument. At or about the same time, the State Legislature undertook to amend certain sections of the Education Law challenged by plaintiffs, which prompted defendants and intervenor-defendants to file a second round of motions to dismiss on the ground that this action of the Legislature rendered the complaints moot and/or nonjusticiable. In the alternative, defendants and intervenor-defendants moved for leave to renew their prior motions based on "new facts not offered on the prior motions" or "a change in the law" (CPLR 2221[e][2]), both of which plaintiffs strenuously opposed. Oral argument was held on August 25, 2015, at which time decision was reserved.

Except to the extent hereinafter provided, the motions are denied.

In principal part, movants assert the same grounds for dismissal rejected by the Court in its prior determination. To this extent, the present motions to dismiss are essentially motions for leave to reargue and, as such, are improperly "based on matters of fact not offered on the prior motion(s)" (CPLR 2221[d][2]), *e.g.*, the aforementioned legislative amendments. Accordingly, these motions are denied. Neither is the Court persuaded that the above amendments operated to render the prior motions nonjusticiable or moot, or to deprive this Court of subject matter jurisdiction (*see* CPLR 3211[a][2]; Matter of Newton v. Town of Middletown, 31 AD3d 1004, 1005-1006).

Moreover, while the introduction of "new facts" or "a change in the law" may serve as the basis for a renewal motion under CPLR 2221(e)(2), the motion will nevertheless be denied where, as here, neither of the foregoing "would change the prior determination" of the court (*id.*). In this case, the legislature's marginal changes affecting, *e.g.*, the term of probation and/or the disciplinary proceedings applicable to teachers, are insufficient to achieve the required result.

Nonetheless, given the extensive nature of discovery likely to be required in this case, it is only proper that all further proceedings in this matter should be stayed pending the determination of the Appellate Division.

Accordingly, it is

SO ORDERED.

J.S.C.

Dated: Oct 22, 2015

GRANTED
OCT 23 2015
STEPHEN J. FIALA