

309-22

OAL Dkt. No. EDU 04320-21, EDU 10019-21 (on remand)

Agency Dkt. No. 55-4/21

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of
Newark, Essex County,

Respondent.

The record of this matter, the October 7, 2022 Order of Administrative Law Judge (ALJ) Kimberly A. Moss, petitioner's request for interlocutory review, and the Newark Board of Education's (Board) response thereto have been reviewed and considered.

This matter involves the transfer of twelve school buildings from the Board to the Newark Housing Authority (NHA), pursuant to a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties for the benefit of the Board and the City of Newark. The Agreement provided that any sites conveyed to the NHA would be subject to a right of reversion, which the Board could exercise if the NHA had not developed a site project or demonstrable plans for a site within three years of the Agreement. The NHA sold one of the sites – the Maple Avenue School – to a third party in 2017, and that party sold the property to petitioner, which is developing the property as a public charter school.

The Board filed a complaint against the NHA and petitioner in Superior Court, seeking to enforce its rights to reversion of the Maple Avenue School property on the grounds that a site project had not been completed and the property was not being used for one of the Agreement's permitted uses. Thereafter, petitioner filed the petition of appeal in this matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with school facilities regulations. After the ALJ granted the Board's motion for summary decision, the Commissioner remanded the matter, finding that "[w]hile the Agreement itself is not a school facilities project, the Board's pursuit of litigation to exercise the right of reversion contained in the Agreement could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations." *Friends of Team Charter School, Inc. v. Bd. of Educ. of the City of Newark, Essex Co.*, Commissioner Decision No. 258-21 (October 19, 2021).¹

Following the remand, the parties filed motions for summary decision. Petitioner argued that the Board's Superior Court complaint was not filed in accordance with the law because the Board had not authorized the filing and had not obtained the Commissioner's approval, which petitioner alleges is necessary because the complaint constitutes a school facilities project. The Board argued that the pursuit of litigation does not require the Board's or the Commissioner's approval. The ALJ concluded that the issue of whether the Superior Court complaint is a school facilities project is premature because the determination depends on the decision of the Superior Court. The ALJ noted that if the Superior Court complaint is decided

¹ The Commissioner's decision also rejected the ALJ's conclusion that the petition of appeal was untimely.

against the Board, the petition of appeal in this matter would be moot. Accordingly, the ALJ denied the parties' motions for summary decision.

Petitioner requested interlocutory review of the ALJ's order. Petitioner contends that the question of whether the Board was required to pass a resolution authorizing the filing of the Superior Court complaint and/or to obtain Commissioner approval of the filing as a school facilities project is a question that arises under the school laws and is therefore within the Commissioner's primary jurisdiction. According to petitioner, it is inappropriate for the ALJ to defer a ruling until the Superior Court issues a decision when there is a live controversy under the school laws and the Board could be enjoined from its activities if they are in violation of those laws. Petitioner also argues that the ALJ's Order does not explain why a decision by the Superior Court concerning real property and contract claims would be probative on the issues of the Board's authority to take action without a Board resolution or Commissioner approval. Petitioner asks the Commissioner to enter summary decision in its favor and to enjoin the Board from further prosecuting the Superior Court complaint.

In response, the Board concurs with petitioner that the ALJ's order warrants immediate review. The Board agrees with petitioner that the issue of whether the Superior Court complaint is a school facilities project is not premature. However, the Board contends that summary decision should be granted in its favor and that the petition of appeal should be dismissed.

Upon review, the Commissioner concludes that the question of whether the filing of the Superior Court complaint required the approval of the Board, or of the Commissioner as a school facilities project, is ripe for review. These determinations depend on the application of

the school laws, which are within the Commissioner's jurisdiction pursuant to *N.J.A.C. 18A:6-9*. The Superior Court does not have the authority to determine whether a Board resolution was required to file the Superior Court complaint.² Furthermore, the Commissioner disagrees with the ALJ that a ruling by the Superior Court against the Board could render the question of whether the Superior Court complaint is a school facilities project moot. The ALJ appears to have reasoned that if the Board is not permitted to exercise its right of reversion, then it will not be engaging in any activities on the property that could constitute a school facilities project. However, as stated in the Commissioner's previous decision in this matter, the Superior Court complaint itself may constitute a school facilities project. That question also falls within the Commissioner's jurisdiction pursuant to *N.J.A.C. 18A:6-9*, and not the jurisdiction of the Superior Court. If it is determined that the Superior Court complaint is a school facilities project, and that the Board should have obtained the Commissioner's approval of that project prior to filing the complaint, then the complaint should not proceed.

While the Commissioner concludes that the questions of Board and/or Commissioner approvals of the Superior Court complaint are ripe for review at this time, the Commissioner declines to address them on the limited record available as part of the request for interlocutory review.

² The Commissioner notes that the ALJ's Order indicates that petitioner did not provide any regulation that states that a superintendent cannot commence a civil action without a resolution by the Board. However, the ALJ did not make any findings or reach any conclusions on this issue.

Accordingly, this matter is remanded to the OAL for a determination on the parties' motions for summary decision³ and any other proceedings necessary to bring this matter to a close.

IT IS SO ORDERED.⁴


ANGELINA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022

Date of Mailing: November 16, 2022

³ The Commissioner does not reach a conclusion about whether the parties' motions meet the standard for summary decision, pursuant to *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995). On remand, the ALJ is free to determine that there are material facts in dispute or that there are other factors that preclude summary decision. Alternatively, if the ALJ concludes that the *Brill* standard has been met and that it is appropriate to decide the matter on a summary basis, a decision on the merits of the motions should be issued.

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT.NO. EDU 10019-21

AGENCY DKT. NO. 55-4/21

FRIENDS OF TEAM CHARTER SCHOOL, INC

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF

NEWARK, ESSEX COUNTY,

Respondent.

Thomas O Johnson, Esq. for petitioners (Johnson Law Firm LLC, attorneys)

Matthew J. Tharney, Esq., for respondent, (Sattiraju & Tharney, LLP, attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

By way of background, the matter was originally filed at the Office of Administrative Law (OAL) as a contested matter on May 11, 2021, with docket number EDU 258-21. Respondent filed a motion for summary judgement in that matter on April 13, 2021. Petitioner filed opposition to the motion on June 23, 2021. Respondent filed a reply to the opposition on July 14, 2021. I granted respondent's motion on July 22, 2021. On October 19, 2021, the New Jersey Commission of Education remanded the matter, where

it was filed with the OAL on December 8, 2021. Respondent filed a motion for summary decision on June 2, 2022. Petitioner filed a motion for summary decision on June 8, 2022. Both parties filed opposition to the others motion for summary decision on June 20, 2022.

FACTUAL DISCUSSION

As stated in the prior decision, on April 2016, Newark Board of Education (Board or NPS or respondent) entered into a site disposition and development agreement (Agreement) with the Newark Housing authority (NHA). The Board agreed to transfer twelve school buildings to NHA. NHA agreed to convey those buildings to third parties for the benefit of the Board and the City of Newark.

There is also a provision in the agreement Article 5.2 which states:

“Any sites conveyed to the NHA shall be subject to a right of reversion exercisable by Newark Public Schools (NPS) if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement.”

Maple Avenue School was included in the agreement. The Board transferred title of Maple Avenue School to NHA on June 30, 2016.

On or about December 27, 2017, NHA sold the Maple Avenue School property 33 Maple Avenue Urban renewal LLC (33 Maple LLC). On March 12, 2020, 33 Maple LLC sold the property to petitioner. Petitioner is developing the property as a public school.

On April 6, 2020, the Board filed a complaint in Superior Court Chancery Division Essex County titled Newark Board of Education v. Newark Housing Authority Docket No ESX-C 67-20. The Complaint is for breach of covenant of good faith and fair dealing, tortious interference with contract, and unjust enrichment. The Board seeks to enforce its rights of reversion to the Maple Avenue School on the grounds that a site project had not been completed and the property was not being used for one of the agreements

permitted uses. The Board's attorneys in that matter are Sattiraju & Tharney LLP who were among the law firms selected in accordance with the Board's policies and procedures for ensuring prudent use of legal services and authorized by resolution the Board to represent its interests. Sattiraju & Tharney LLP were assigned this matter by the Board's general counsel.

On April 27, 2020, an amended complaint was filed naming plaintiff as a defendant. The amended complaint was served on plaintiff on May 4, 2020. The Board filed a second amended complaint on August 31, 2020. Plaintiff filed a motion to dismiss the Superior Court Complaint on October 2, 2020. That motion was denied on December 20, 2020.

The filing of the Complaint and Amended Complaint were not authorized by the Board. There were no resolutions by the Board authorizing the filing of the complaint. The Board is advised of the status of the civil action. The Board did not obtain the Commission of Education's approval to obtain property. Mr. Leon, the Superintendent of Schools in Newark, in a deposition on May 3, 2022, testified that if the litigation was successful, the property would be used for student instructional purposes.

Petitioner alleges that this is a school facility matter and that in addition to not having a Board resolution, respondent did not obtain the Commissioners approval to acquire property. Respondent argues that the pursuit of litigation does not require the Board's or the Commissioner's approval. The civil action is currently pending in Superior Court.

LEGAL ANALYSIS AND CONCLUSION

Petitioner and Respondent seeks to summarily dismiss petitioner's claim. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary

judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Petitioner argues that respondent was required to obtain Board approval and approval of the Commissioner to file the civil action. It cites the Educational Facilities Construction and Finance Act (EFCFA) N.J.S.A. 18A:7G-1 et seq. The Department of Education is responsible for review and approval of school facilities projects. The regulations require a resolution from the board of Education of the district authorizing the submitting of the application to the to the Department of Education for a school facilities project.

In the civil action, respondent argues that it is entitled to revision of the property in question due to violation of the contract. Petitioner did not provide any regulation that states that a superintendent cannot commence a civil action without a resolution by the Board of Education.

N.J.A.C. 6A: 26-3.2 (a) (1)(2) (3) provides:

(a) Any school district seeking to initiate a school facilities project shall apply to the Division on a Commissioner-provided form for

approval of the school facilities project. School facilities projects include:

1. New construction;
2. Rehabilitation, provided that the rehabilitation or capital maintenance consists of the entire building system in the same school facility building section, as building section is defined in the approved LRFP, unless one or more of the components of a mechanical, electrical, or plumbing building system is required for the continued operation of such system;
3. Acquisition of existing buildings to accommodate unhoused students;

N.J.A.C. 6A: 26-1.2 defines school facility project as:

"School facilities project" means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or any other personal property necessary for, or ancillary to, any school facility. School facilities project includes, but is not limited to, fixtures; furnishings and equipment; site acquisition; site development; services of design professionals such as engineers and architects; construction management; legal services; financing costs; and administrative costs and expenses incurred in connection with the project. To qualify as a school facilities project, the project must be new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Maintenance projects intended solely to achieve the design life of a school facility and routine maintenance do not constitute school facilities projects.

In this matter, respondent filed a civil action in superior court for reversion of the property that was Maple Avenue School to revert back to respondent because the contract that transferred the property was breached. Petitioners argues that civil lawsuit is a school facility project and that the civil action was not filed in accordance with law because the Board did not authorizer the civil action which is pending in Superior Court.

The civil action is not a new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building which are the requirements for a school facilities project in the regulation. The civil action

is based on whether respondent is entitled to reversion of the property based on the contract.

I **CONCLUDE** that the issue of whether the civil action is a school facilities project is premature at this time. If the civil action is decided in favor of respondent, then the question of whether the civil action is a schools facility project should be addressed. If the civil action is decided against respondent, this matter would be moot. A part of the determination as to whether the filing of the civil action is a school facilities project is the decision of the Superior Court on the contract action.

ORDER

Based on the foregoing, it is **ORDERED** that the Motions of petitioner and respondent for summary decision is **DENIED**. A status conference will be conducted on October 25, 2022 @ 3:00p.m.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

October 7, 2022



DATE

KIMBERLY A. MOSS, ALJ

ljb