

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Application of The Japanese Educational Institute
of New York,

Petitioner.

For an order approving the sale of assets pursuant to
N-PCL §§ 510 and 511.

Index No. 06-103400

IAS Part 13

Hon. Sheila Abdus-Salaam

AFFIRMATION

AFFIRMATION OF JADE JOAN HON REGARDING PTA'S STANDING

JADE JOAN HON, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms, pursuant to CPLR 2106, the truth of the following under penalty of perjury:

1. I am an associate of Szold & Brandwen, P.C., the attorneys for objector-respondent Japanese School of New York PTA ("PTA"), and as such am fully familiar with the facts and circumstances described herein.

2. I submit this affirmation in opposition to the request of petitioner Japanese Educational Institute of New York ("JEI") that the PTA be excluded from this proceeding, and in support of the PTA's Cross-Motion for Intervention.

3. I am providing the Court with copies of three unpublished lower court decisions that underlie three short Second Department orders of affirmance that are the legal grounds for the petitioner's standing request. See Petitioner's Memorandum of Law Concerning the PTA's Lack of Standing ("JEI Memorandum").

4. As will be discussed more fully in the accompanying PTA's Memorandum of Law on Standing and Intervention, when one reads the sparsely worded appellate orders in light

of the trial court decisions that are being affirmed, one sees that the cited cases do not support JEI's request.

5. I also researched the record of a recent Second Department decision that is not mentioned in the JEI Memorandum. The Supreme Court's decision shows that the motion court allowed parties to appear in the proceeding that were neither officers, members nor creditors of the organization that had initiated a proceeding under N-PCL § 511.

6. I also obtained from the record on appeal a copy of an Order to Show Cause submitted by the Attorney General on an application to reopen the proceeding. The Attorney General listed eight parties that it denominated "interested parties" under § 511(b), and specified that the Court should direct the Attorney General to serve all of them and give them an opportunity to be heard.

7. The Order to Show Cause confirms that the Charities Bureau of the Attorney General does not follow JEI's hostile approach to standing for beneficiaries of a not-for-profit organization. Thus, in the instant case, the Attorney General's "no objections" notice was issued upon the assumption that this Court would receive and fully consider the PTA's objections to JEI's petition.

The Court Documents

8. The JEI Memorandum relies exclusively on the limited language of three Second Department appellate decisions, namely Matter of Friends World College v. Nicklin, 249 A.D.2d 393, 671 N.Y.S.2d 489 (2d Dept. 1998); Bridge to Spiritual Freedom v. Cubides, 304 A.D.2d 574, 759 N.Y.S.2d 328 (2d Dept. 2003); and Congregation Atzei Chaim v. 26 Adar N.B. Corp., 2006 WL 552633 (2d Dept. 2006).

9. I reviewed the records on appeal for both Friends World College and Bridge to Spiritual Freedom on microfiche at the New York County Lawyers' Association Library, where I found and made copies of the lower court's decisions.

10. Annexed hereto as Exhibit A is a copy of the Order of Hon. Marquette L. Floyd, dated November 25, 1996, ("Floyd Order") which is the order that was affirmed in Friends World College.

11. A review of the Floyd Order reveals that the lower court did not make any ruling at all applying the "Any party interested" phrase at the beginning of the final sentence of § 511(b). Rather, the motion court found that two parties did not qualify to assert affirmative defenses pursuant to N-PCL §720. Specifically, the Floyd Order stated (at p. 2):

Although not counterclaiming herein, the effect of Nicklin and Raphael's affirmative defenses, as proposed, would be to limit the corporation's activities, and as such, they may be considered to come within § 720 N-PCL as to actions against directors and officers, to set aside or enjoin conveyances, an accounting, neglect of duties, etc. This statute specifies who may bring such action (in relevant part): "(a) a director or officer of the corporation." Nicklin or Raphael are neither.

12. There is no indication that Nicklin or Raphael ever asserted that aside from § 720 they had a right to appear and object pursuant to § 511 as interested parties. Certainly the Floyd Order makes no ruling regarding the meaning of the statutory phrase "Any party interested."

13. Because the Second Department decision does not explain the lower court's holding, it may be misinterpreted. The decision mentions that the underlying proceeding was commenced pursuant to § 511, but it fails to note that the striking of the affirmative defenses of two parties was solely based upon § 720. It is a little clarifying, however, that the appellate decision does not affirmatively state that it is ruling on § 511. Also, like the lower court, the appeals court decision does not even mention the statutory term "Any party interested" that is

relied upon by JEI. And the precise wording of the appellate decision also reflects that § 720 was in play, not § 511. The decision says “they were not trustees, officers, or directors of the College.” This tracks the § 720 categories of “director [a/k/a trustee] or officer.” There is no mention of the words “member” or “creditor” which are part of the sentence in § 511 that JEI (incorrectly) argues must control the meaning of the subsequent phrase “Any party interested.”

14. In short, when one reads Exhibit A side by side with the appellate decision in Friends World Church one sees the holding of the Second Department was not at all what JEI claims it is.

15. Annexed hereto as Exhibit B is a copy of the Memorandum Decision dated July 24, 2001 of the Supreme Court, Suffolk County, in Bridge to Spiritual Freedom. The lower court decision reveals that there was no holding on the question of the meaning of “Any person interested” in the beginning of the last sentence of § 511(b). Rather, the parties at issue solely claimed a right to participate in the proceeding on the basis of being members of the organization. The court held an evidentiary hearing to determine the correct membership roll of the organization and determined that the challenged parties were not members and therefore did not have member-standing.

16. I also reviewed the lower court records and briefs of Congregation Atzei Chaim on file at the Kings County Supreme Court. Annexed hereto as Exhibit C is a copy of the Order and Decision of Justice Theodore T. Jones dated July 13, 2004.

17. The lower court decision reveals that Congregation Atzei Chaim is a mortgage foreclosure action involving a religious corporation with a long and complicated history in the courts. The Court’s holding in relation to § 511 was that the statute was not relevant to the case at all because Religious Corporations Law § 12 “specifically exempts a purchase money

mortgage or purchase money security agreement” from the procedures of §§ 510-511. In dictum the lower court said that two parties in the case would lack standing to challenge the transaction. But there is no reference to the “Any party interested” phrase of § 511, only a citation to Friends World College. As noted above, the standing ruling in Friends World College was based upon § 720, not the “Any party interested” phrase of § 511.

18. Finally, I also researched a copy of the record on appeal of In re Application of Noble Drew Ali Plaza Housing, a case in which the Attorney General successfully moved to vacate the order of the supreme court which had approved a N-PCL § 511 petition upon learning of new evidence. See In re Matter of Noble Drew Ali Plaza Hous. Corp., 24 A.D.3d 578, 808 N.Y.S.2d 302 (2d Dept. 2005).

19. The PTA’s brief on standing cites Noble Drew Ali Plaza as an example of a recent Second Department case in which the Attorney General, following its regular policy, took an inclusive view of “Any party interested” standing under § 511(b), and its approach was accepted by the lower court and by the Appellate Division.

20. I am providing the Court with copies of three documents from the record on appeal that give detailed corroboration of the expansive view of standing applied in that proceeding.

21. Proceeding in chronological order, I annex hereto as Exhibit D a copy of the Attorney General’s Order to Show Cause. The Attorney General lists eight interested parties that should be given the opportunity to appear, including parties that would be affected by the order even though they are not officers, members or creditors.

22. Next, is the Order of Hon. Gerard H. Rosenberg dated August 29, 2003 which determines, in part, what parties must be allowed to participate in a renewed § 511 proceeding, annexed hereto as Exhibit E.

23. Finally, annexed hereto as Exhibit F is the order appealed from, Order of Hon. Gerald H. Rosenberg dated February 19, 2004. I am providing it to confirm that through the completion of the lower court's deliberations on the merits, there was no question raised about the standing of any of the eight parties that the Attorney General indicated must be given an opportunity to be heard.

24. Based upon the court documents that I am providing herewith, it is respectfully requested that the Court should reject JEI's attempted application of the Second Department cases cited in JEI's brief to prevent the PTA's evidence from being heard in this case.

Dated: New York, New York
April 10, 2005

JADE JOAN HON