

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

REPLY AFFIRMATION

**REPLY AFFIRMATION OF ARTHUR R. BLOCK IN FURTHER SUPPORT OF THE
PTA'S MOTION FOR LEAVE TO REARGUE FOR LEAVE TO RENEW AND FOR AN
AWARD OF ATTORNEYS' FEES AND EXPERT APPRAISER'S FEES**

ARTHUR R. BLOCK, 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 the attorney for the objector-respondent-intervenor The Japanese School of New York PTA ("PTA"). I previously submitted an affirmation dated July 6, 2006 in support of the PTA's combined motions for leave to reargue, for leave to renew, and for an award to the PTA of fees arising from litigation of valuation and standing issues and of the cost of its independent expert appraisal report. I am submitting the instant affirmation in reply to the respective opposition papers served by the petitioner, Japanese Educational Institute of New York ("JEI"), and by the Attorney General. See Affidavit of Rikiji Tomita sworn to on July 17, 2006 ("Tomita Aff.") and Petitioner JEI's Memorandum of Law in Opposition dated July 18, 2006 ("JEI Mem."); see also Affidavit of Attorney General sworn to on July 17, 2006 ("Atty. Gen. Aff.").

2. Submitted herewith on behalf of the PTA is the Reply Affidavit of Hamako King sworn to on July 21, 2006 ("King Aff."). Mrs. King's affidavit corroborates the Affidavit of

Emil F. Jachmann sworn to on July 5, 2006 (“Jachmann Aff.”) and refutes the Tomita Affidavit (submitted in opposition by JEI) with respect to JEI’s agreement to make a lump sum payment to the Westchester Fairfield Hebrew Academy (“WFHA”) for one half the cost of installing a new electronic security system at the Greenwich Campus. Mrs. King was personally present on May 5, 2006 at an official briefing session conducted by JEI representatives during which JEI stated it had agreed to make the lump sum payment. Mr. Tomita was not present at that session.

3. For the reasons set forth in the PTA’s moving papers and reply papers, its motion to reargue, to renew, and for reimbursement of appraiser fees and attorney’s fees should be granted.

Reargument and Renewal

4. The Court required a remedial amendment to the instant Contract¹ in order to assure that in the future JEI would not give up the alleged \$5 million value of the last five years of the maximum term of the leaseback. The PTA’s motion shows that the Court overlooked major loopholes in the amendment and it overlooked its powers under § 511(d) to cure the loopholes by prescribing terms upon which its approval of the transaction would be conditioned. The PTA also presented new evidence demonstrating the seriousness of the problem presented by the loopholes.

5. In its opposition to the motion, JEI urges the Court to disregard the merits of the PTA’s substantive arguments about the charity’s potential loss of \$5 million. This echoes JEI’s response to the PTA’s objections to the petition, when JEI told the Court that for procedural reasons it must turn a blind eye to the Kerin Appraisal of \$26.8 million, the Greenwich Township Valuation of \$28.3 million, and to all of the PTA’s other evidence and arguments about valuation and educational purpose.

¹ The Agreement of Sale between JEI and the Westchester Fairfield Hebrew Academy.

6. JEI began its efforts to preclude the Court from seeing or considering critical evidence of property valuation with its submission to the Court of the petition and the proposed Order to Show Cause, which was signed on March 13, 2006. The Greenwich Township Valuation notice was sent to JEI near the end of November 2005, nearly four months prior to the court filing. Moreover, on January 17, 2006, the PTA provided JEI with a copy of the Kerin Appraisal and of the Greenwich Township Valuation. Nevertheless, JEI's petition and exhibits, and its affirmation in support of the proposed order to show cause, asked the Court to approve a sale for \$20 million without telling the Court about either the \$26.8 million appraisal or the \$28.3 million fair market value statement in the official assessment notice. Its apparent strategy was to hope that the PTA would not appear in Court and, if it did, JEI would remove the PTA from the court proceedings with an application to dismiss for alleged lack of standing.

7. But for the vigilance of the PTA, the Court would never have known that there was a serious valuation problem.

8. Later, when the Court was prompting JEI and WFHA to amend the transaction to protect \$5 million in value, it was again the PTA's representative that pointed out that JEI had accepted wording of a proposed contract amendment which could render the multi-million dollar promise illusory. This forced JEI to make change the wording of its second version of a modification of the Contract.

9. Now, in the course of this motion practice, the PTA's vigilance has prompted another protection of JEI's charitable assets. The PTA's moving papers disclosed that JEI had agreed to make a lump sum payment of approximately \$100,000 to WFHA even though JEI had no obligation under the Contract to make such a payment. JEI now asserts that it never made such a commitment. See Tomita Aff. However, the King Reply Affidavit submitted by the PTA

shows that JEI representatives confirmed that agreement in an official briefing of the PTA. Thus, JEI's latest statement that it will not make the payment can be seen as another retreat by JEI from an improvident and unnecessary expenditure of charitable assets due to the diligence of the PTA.

10. The Court should address the merits of the PTA's request for a supplemental order prescribing conditions for monitoring and enforcement of the \$5 million future payment provision.

11. With regard to the technical procedural arguments of JEI (and some similar arguments by the Attorney General), it is necessary for the Court to consider the unique procedural history leading up to the PTA's motion to reargue and motion to renew.

12. After the petition was submitted and oral argument was concluded, the Court initiated off the record supplementary proceedings. The Court made the law firm of Richard Emery a participant in these off the record proceedings even though the firm's client was not a party, did not have standing to be a party, and had not even applied to the Court to be a party. Next, the Court invited and then accepted the filing of two affidavits by the non-party's president, and invited and accepted two proffers from JEI that amounted to material amendments to the application. Throughout these supplemental proceedings the Court did not permit the PTA to submit any papers responding to JEI's first proffer of an amendment, to its second proffer, or the affidavits of the non-party. The Court did not even give the PTA an opportunity to comment on the wording of the form of order submitted by JEI for signing by the Court.

13. The PTA did make use of a brief opportunity to speak in an off the record telephone conference to give the Court one example of the problems with the terms of the first proffered amendment. But the Court wrongfully precluded the PTA from objecting in writing to

either the first or second version of the amendment and did not even afford an off the record oral opportunity to react to the second and final amendment.

14. Even though the Court recognized the standing of the PTA to “show cause why the application should not be granted,” N-PCL § 511(b), the Court did not allow the PTA to show cause why the materially amended application should not be granted.

15. In light of the Court’s actions, JEI’s position that the PTA did not sufficiently raise its objections to the amendment to the application is a Catch-22 argument. It would be arbitrary, capricious and an abuse of discretion for the Court to deny the PTA leave to reargue and to fail to address the merits of the PTA’s argument that the Court overlooked dispositive points of fact and of law.

16. In any event, the Court must address the merits of the PTA’s arguments about the defects in the amendment and in the Order because the PTA has also made a proper motion for leave to renew. JEI’s gratuitous promise to make a lump sum payment of approximately \$100,000 to WFHA clearly is new evidence that a more carefully crafted order is necessary to effectuate the \$5 million future payment provision.²

Reimbursement of Appraiser and Attorney’s Fees

17. The PTA’s motion for reimbursement of expert appraiser fees and attorney’s fees is based on statutory law, see N-PCL §§ 510-511, and common law, see Smithers v. St. Luke’s-Roosevelt Hospital Ctr., 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dept. 2001) (Smithers I) and In

² Also, the allegations in the California Attorney General’s complaint against Sempra Energy Trading Corporation are probative of the fact that the person who initiated the purchase negotiations with JEI and who executed the Contract on behalf of WFHA has considerable expertise with agreements setting forth conditions for payments in the future of large sums of money. If the Court has allowed major loopholes and enforcement problems to exist in the terms of its order and in the amendment of the Contract regarding the future conditional payment of \$5 million to JEI, then it is unlikely that those loopholes will not go unnoticed by WFHA.

re Estate of R. Brinkley Smithers, 195 Misc.2d 510, 760 N.Y.S.2d 304 (Surr. Ct. Nassau Co. 2003) (Smithers II).

18. In Smithers I, the Appellate Division recognized a private right of action enabling a person other than the Attorney General to sue a New York State not-for-profit organization to ensure that gifted funds were properly used.

19. In Smithers II, the Surrogates Court held that that when such a person advanced the costs of litigation and through the lawsuit advanced the proper use of the charitable funds, then to deny reimbursement to that person “would vitiate the right of a private right of action created by the Appellate Division [in Smithers I].” 195 Misc.2d 510, 516.

20. In the instant case, to deny the PTA reimbursement would vitiate the right of standing for objectors and “interested parties” created by N-PCL §§ 510-511. Also, to deny reimbursement would result in unjust enrichment. See Estate of Altman, 1 Misc.3d 566, 770 N.Y.S.2d 582 (Surr. Ct. Bronx Co. 2003) (holding that because services of counsel for objectors benefited entire estate then equity required that estate pay the counsel’s fees and thereby prevent unjust enrichment.).

21. The Attorney General and JEI say that the PTA’s request for reimbursement is unprecedented and must be denied. They are unable, however, to cite to any precedent holding that in a proceeding under N-PCL §§ 510-511 the Court must deny reimbursement to an objector that provided the Court with critical evidence of property values that the charity’s attorneys had tried to suppress, and whose actions brought about an amendment to the proposed disposition of property that protected millions of dollars of the charity’s assets.

22. The Attorney General’s opposition to the PTA’s application is in line with its unsuccessful protests in Smithers I and in Smithers II against the emerging judicial policy that

enables vigilant private parties to bring to the judiciary's attention instances of failures to protect charitable assets.

23. The Attorney General opposed Mrs. Smithers' assertion of a private right of action in Smithers I³ and it opposed Mrs. Smithers' application for reimbursement in Smithers II,⁴ but the Appellate Division and the Surrogates Court, respectively, completely rejected the Attorney General's arguments.

24. As a leading treatise on New York State not-for-profit corporation law has observed, Smithers I "could implicate a fundamental change in the ability to keep charities accountable for their use of charitable funds." Victoria Bjorkland, James J. Fishman & Daniel L. Kurtz, New York Nonprofit Law and Practice: With Tax Analysis 133 (Supp.) (1997 and Supp. 2005). According to this treatise, the Surrogates Court decision in Smithers II to reimburse the private party was based on "compelling policy reasons." Id. at pp. 133-34 (Supp.) and note 217.3. Material support for vigilant private parties was needed or else the objective of the judicially recognized private right of action would be vitiated.

25. Disregarding that Smithers I and Smithers II are precedents aimed at "keep[ing] charities accountable," the Attorney General and JEI try to characterize Smithers II as a narrow ruling relevant only to trusts and estates law. Their technical efforts to distinguish Smithers II are to no avail.

26. For example, the Attorney General argues that Smithers II is inapplicable because Mrs. Smithers was a fiduciary, rather than an "interested party," and this gave her a unique

³ In the lower court, "[t]he Attorney General also moved to dismiss [Mrs. Smithers' action against the hospital] for lack of standing and for failure to state a cause of action." 281 A.D.2d at 127, 133. The lower court granted the motion. Mrs. Smithers appealed. On appeal, the Attorney General changed its position on the merits of Mrs. Smithers claim against the hospital, and used its change of position to argue to the Appellate Division that it should not to reach the issue of Mrs. Smithers' standing. Id. At 133-34. The First Department rejected the Attorney General's arguments entirely. First, it reached the issue of standing. Second, it reversed the standing dismissal and held that Mrs. Smithers did have standing.

⁴ See 195 Misc.2d 510, 513

entitlement under SPCA 2110. See Atty. Gen. Aff. at par. 6. This attempted distinction between a fiduciary and an “interested party” ignores that SCPA 2110 by its own express terms authorizes reimbursement not only to a fiduciary but also to “a devisee, legatee, distributee or any party interested.” (Emphasis added.) In the not-for-profit law context of the instant case, the PTA’s standing is based upon the identical phrase in N-PCL § 511(b), “[a]ny party interested.” (Moreover, the PTA represents beneficiaries of the charity, who are analogous to legatees and distributes.)

27. Similarly, the arguments of JEI and the Attorney General that the PTA is not a prevailing party are merely an avoidance of Smithers II and the judicial policy behind it. The PTA is not an adversary of the JEI corporation and does not claim to have prevailed over the corporation. To the contrary, the PTA acted in the interest of the charitable corporation and prevailed over the corporation’s current representative to provide the Court with vital information about the fair market value of the organization’s main asset and to protect that asset when JEI’s representatives were recklessly eager to turn it over to a favored third party without assuring that the corporation would receive fair consideration. See also Estate of Wiltshire, 4 A.D.2d 981, 167 N.Y.S.2d 981, 982 (3d Dept. 1957) (holding that estate should pay fees of counsel who did not prevail on his client’s claim because the counsel “unearthed true facts of the decedent’s family” that promoted the accurate disposition of assets to other parties.)

28. JEI’s officials expended substantial amounts of the charity’s resources to pay a team of five lawyers (including the former head of the Attorney General’s Charities Bureau) to try to convince the Court to close its eyes to the Kerin Appraisal and to the Greenwich Township Valuation and to strike all of the PTA’s submissions.

29. The Charities Bureau of the Attorney General let the \$20 million price sail through its office and gave it a no objection indorsement notwithstanding the PTA's solid evidence of a glaring valuation problem.

30. But for the vigilance of the PTA, the major valuation problem would never have been presented to the Court.⁵ To deny the PTA reimbursement for the Kerin Appraisal and for a reasonable portion of its attorney's fees would contradict the not-for-profit law principles set forth in Smithers I and Smithers II and would cause an unjust enrichment of the corporation by the PTA.

31. Accordingly, the Court should grant the PTA's motion for an award that reimburses it for expert appraiser fees and partial attorney's fees.

Conclusion

32. For all of the aforesated reasons, objector-respondent-intervenor PTA's motion should be granted in its entirety.

33. The Court should issue a supplemental order that provides appropriate guarantees for enforcement of the \$5 million compensation provision, and that makes an award to the PTA of \$9,500 for appraisal fees and the reasonable attorneys' fees it incurred on the valuation and standing issues.

Dated: New York, New York
July 24, 2006

ARTHUR R. BLOCK

⁵ This is similar to Smithers I, where the Appellate Division noted "that it was only Mrs. Smithers's vigilance that brought [the charity's misuse of funds] to light . . ." 281 A.D.2d 127, 134. In the instant case, as in Smithers, the Attorney General would not acknowledge the seriousness of the problem that a private party brought to its attention. Indeed, in the instant case the Attorney General merely executed a boilerplate statement of no objection, and did not even tell the Court that there were both an independent appraisal and a recent government assessment/valuation that raised a serious question about whether the charity would receive fair consideration.