

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JUDI DOBNER THERAPIST AGENCY LLC,,

Petitioner-Plaintiff,

DECISION AND ORDER

Index No.: 035398/16

-against-

COUNTY OF ROCKLAND, DEBRA ROTH,
Assistant Director, Children's Services, Rockland
County Department of Health, and the
ROCKLAND COUNTY DEPARTMENT OF
HEALTH

Respondents-Defendants.

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LOEHR, J.

The following papers numbered 1-8 were read on the motion of Petitioner for an order annulling a determination of the Respondents-Defendants to discontinue a contract between Petitioner and Respondent Rockland County and not to honor invoices presented by Petitioner for services provided, and the motions of Respondents-Defendants to dismiss the Amended Petition-Complaint.

Papers Numbered

- Notice of Petition(#1)- Amended Verified Petition-Complaint - Exhibits 1
- Notice of Motion(#2) - Affirmation - Exhibits 2
- Memorandum of Law in Support(#2) 3
- Memorandum in Opposition(#2) 4
- Notice of Motion(#3) - Affirmation - Exhibits 5
- Memorandum of Law in Support(#3) 6
- Decision and Order dated November 15, 2016 7
- Letter from State Education Department dated January 11, 2017 8

Upon the foregoing papers and as alleged in the Amended Petition-Complaint or established by documentary evidence, Plaintiff Agency provides services for children with developmental disabilities in the areas of speech therapy, occupational therapy, physical therapy, special education teachers, teachers of the deaf, teachers of the visually impaired, social workers, psychologists and nutritionists. Plaintiff provides these services through therapists and other professionals licensed by the New York State Education Department in accordance with a child's Individualized Education Program ("IEP") or an Individualized Family Service Plan, and Plaintiff contracted with these individuals to provide those services to children with disabilities. On November 1, 2013, Plaintiff and Defendant County entered into a contract (the "Contract") for Plaintiff to provide such services to children ages three to five years who had been identified as having developmental disabilities or delays and determined to be eligible for such services by the school district pursuant to Section 4410, Part 200 of the New York Education Law. The Contract was for one year: July 1, 2013 to June 30, 2014. Of apparent relevance to this matter, the Contract provided:

"1.b. The MUNICIPALITY shall reimburse the PROVIDER for services rendered under the terms of this Contract within 90 days upon receipt of proper invoices from the PROVIDER. The total amount of such reimbursement under this contract shall not exceed the sum of \$4,200,000.00.

* * *

"2.d. The CONTRACTOR specifically represents and warrants that . . . the CONTRACTOR has and shall have, and to the extent applicable, its employees, agents and subcontractors have and shall have, all required and up-to-date New York state approvals, authorization(s), certification(s), registration(s), licenses(s) or permit(s) required by the State, County or local authorities for the services.

* * *

"7. COMPENSATION

"b. The parties recognize and acknowledge that the obligations of the County under this Agreement are subject to and contingent upon the County's receipt of funds from the NYSDOH to operate the related Services and Independent Evaluator Programs for the applicable fiscal year.

"c. The COUNTY monies provided to CONTRACTOR pursuant to this Agreement, shall be based upon the actual rates set by New York State or the Federal Government, either directly

or by reimbursement; in such case COUNTY retains the right and discretion to adjust payments of COUNTY funds to CONTRACTOR, based on actual rates COUNTY receives or is to receive from New York State or Federal Government.

* * *

“11. TERMINATION

“b. The COUNTY, upon thirty (30) days notice, may terminate this Agreement, in whole or in part when the COUNTY deems it to be in its best interest. In such event, the CONTRACTOR shall be compensated and the COUNTY shall be liable only for payment for services already rendered under this Agreement prior to the effective date of termination.” The County could also terminate the contract for cause without prior notice (§ 11.c.).

While the Contract was effective, according to its terms, for one year through June 30, 2014, and was not formally renewed, it is alleged that Plaintiff continued to provide services thereafter at the Defendants’ request, and continued to be compensated under the Contract through October 2015. There is also evidence that the Special Education Quality Assurance Hudson Valley Regional Office conducted a Preschool Re-approval Review with respect to Plaintiff and identified areas of programmatic noncompliance. These were corrected and a full compliance letter was issued on November 17, 2014, and a letter stating that Plaintiff met the requirements of the preschool re-approval process was issued on April 26, 2016. That notwithstanding, the Defendants apparently formally canceled the Contract on April 8, 2016 without any prior notice and has failed to pay or process Plaintiff’s invoices for services provided after October 2015. Additionally, on April 8, 2016, Defendant Roth, Assistant Director, Children’s Services, Rockland County Department of Health, allegedly began calling all the therapists and other professionals who worked for Plaintiff and told them to discontinue working for Plaintiff with respect to the services Plaintiff was performing pursuant to the Contract and/or as continued and/or as requested by the Defendants and allegedly instructed them to provide their services through Plaintiff’s competitors.¹

Plaintiff commenced this hybrid action on or about August 1, 2016 in Supreme Court,

¹ Defendants have moved to dismiss on essentially procedural grounds, reserving the right to address the underlying merits if the motion is denied. Thus, why Defendants continued and then canceled the Contract and why it stopped processing Plaintiff’s invoices after October 2015 has not been set forth.

Westchester County. The Petition-Complaint seeks both Article 78 relief and damages. The Defendants, in lieu of answering, moved to dismiss the Petition-Complaint as failing to state valid claims. Alternatively, Defendants moved to change venue to Rockland. While that motion was pending, Plaintiff amended the Petition-Complaint to add some additional factual allegations, whereupon Defendants renewed their motion to dismiss or change venue with respect to the Amended Petition-complaint. While Justice Minihan did not feel the Article 78 claims were meritorious, she did not dismiss the Petition, although she did transfer venue to Supreme Court, Rockland County.²

The Amended Petition-Complaint contains four causes of action. The First Cause of Action would annul the April 8, 2016 cancellation of the Contract without notice as arbitrary and capricious. The Second Cause of Action would annul the County's decision not to process and pay Plaintiff's invoices for services provided in violation of lawful procedure: Education Law § 4410(11)(a). The Third Cause of Action is against Defendant Roth for her tortious interference with Plaintiff's contracts/business relationships with its professional employees. The Fourth Cause of Action is far from clear. Plaintiff first alleges that a Contract was in effect on April 8, 2016 when Defendants cancelled it,³ although it is unclear whether Plaintiff is asserting that such was implied in fact based on the parties conduct or implied in law based on Defendants' receipt of Medicaid funds based on Plaintiff's uncompensated services (*see Parsa v State of New York*, 64 NY3d 143, 148 [1984]). The Cause of Action then complains that Defendants breached the Contract by terminating it without notice *and* that such was a violation of due process.

With respect to the Contract, it expired according to its own terms on June 30, 2014. It is alleged, however, that it was continued in fact through the conduct of the parties and/or in law by virtue of Plaintiff having provided services at Defendants' request coupled with the County having received Medicaid reimbursement therefor. As Defendants have moved pursuant to CPLR 3211, these facts must be assumed and the cause of action dismissed only if fails to state a claim as a matter of law. Moreover, Education Law § 4410, as interpreted by the State Education

² While all the parties are Rockland residents, the proceeding was brought in Westchester pursuant to CPLR 506(b).

³ The fact that Defendants went to the trouble of cancelling it some two years after the written Contract expired is evidence that all the parties recognized that some type of contractual relationship was still in effect.

Department – the agency entrusted with its interpretation (see *Flacke v Onondage Landfill Systems, Inc.*, 69 NY2d 355, 362 [1987]) – has opined that: “In accordance with Education law § 4410, a municipality does not have the authority to withhold or deny payments to an approved provider of preschool special education services base on findings of noncompliance with programmatic requirements.” As there was a Contract, it was allegedly continued, Defendants have allegedly received reimbursement therefor and the Education Law does not allow a municipality to withhold payments for services provided under such program, the Amended Petition-Complaint alleges valid claims for breach of contract as well as a claim under Article 78 for a failure to follow the Education Law (*Abiele Contracting, Inc. v New York City School Construction Authority*, 91 NY2d 1, 7-8 [1997]). Similarly, if the Contract was continued under the same terms, unless terminated for cause, the failure to give prior notice was a breach. Finally, Defendant Roth’s alleged advice to Plaintiff’s employees to breach their contracts with Plaintiff asserts, at least at this point, a valid claim for tortious interference with contracts (see *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *Murray v Sysco Corporation*, 273 AD2d 760 [3d Dept 2000]). Without knowing exactly what she said and why she said it to these third parties, the Court cannot say it fails to state a claim as a matter of law.

To the extent the Amended Petition-Complaint seeks to annul the termination of the Contract or for damages for the non-renewal of the Contract, as the Contract provided that it was terminable when the County deems it to be in its best interest, there is nothing to review. This Court cannot substitute its judgment for the County’s when it decides what is in its best interest. And a contract terminable at will is not a property interest that can be taken without due process.

This constitutes the decision and order of the Court.

Dated: New City, New York
January 13, 2018



HON. GERALD E. LOEHR
J.S.C.

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