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CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GOVERNING AUTHORITY, ETC., ET AL
Plaintiff

OHIO DEPARTMENT OF EDUCATION, ETC.
Defendant

Case No: CV-15-847974

Judge: DANIEL GAUL

JOURNAL ENTRY

PLAINTIFFS' MOTION FOR PRELIMINARY INUNCTION, FILED 07/07/2015, IS DENIED. ORDER SIGNED AND ATTACHED. OSJ.

O.S.J. 07/27/2015

Judge Signature Date

07/27/2015

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLEVELAND COMMUNITY SCHOOL, et al.	)	
Plaintiffs	)	Case No. CV-15-847974
v.	)	Judge Daniel Gaul
THE OHIO DEPARTMENT OF EDUCATION	)	Memorandum Opinion And Order
Defendant	)	

Before this Court is Plaintiffs' Motion for Preliminary Injunction. An oral hearing on the record was held regarding Plaintiffs' motion on July 23, 2015. For the reasons that follow, Plaintiffs' Motion for Preliminary Injunction is DENIED.

Parties:

Plaintiff, Cleveland Community School, is a kindergarten through fourth grade community school located in Cleveland. Cleveland Community School was established as a startup community school in 2005. Plaintiff, Villaview School, is a fifth through ninth grade community school located in Cleveland. Villaview School was established as a startup community school in 2006. Together, these two schools are known as the Cleveland Community Schools.[1] Plaintiff, Erica Johnson, is a parent of three children, ages 16, 14 and 11, that attend Cleveland Community Schools.

[1] Ohio calls its charter schools "community schools." They are considered public schools, organized as non-profit corporations, operated pursuant to contracts between their "governing authorities" and their "sponsors." R.C. 3314.01.

Defendant, the Ohio Department of Education, is an instrumentality of the State of Ohio, which in part, oversees the operation of Ohio's community schools. Defendant's Office of School Sponsorship assumed sponsorship of the Cleveland Community Schools on April 27, 2015 after the State Board of Education revoked Portage County Educational Service Center's ("Portage County ESC") ability to sponsor community schools under R.C. 3314.015.

Procedural History:

This case commenced on July 7, 2015 with the filing of Plaintiffs' Complaint for Declaratory Judgment. Plaintiffs' Complaint also seeks temporary, preliminary and permanent injunctions "requiring [Defendant's] continued sponsorship and operations of the [Cleveland Community Schools]."

On July 7, 2015, Plaintiff's motion for temporary restraining order keeping the Cleveland Community Schools open, pendent lite, was granted by Administrative Judge John J. Russo. The order restrained Defendant from: (1) prematurely abandoning its sponsorship of the Cleveland Community Schools; and (2) closing the Cleveland Community Schools. The temporary restraining order was granted to avoid any action being taken to the detriment of Plaintiffs and the students of the Cleveland Community Schools until a determination could be made as to the merits of this case.

On July 15, 2015, this Court extended the temporary restraining order to reflect the date selected by the Parties for the hearing on Plaintiffs' Motion for Preliminary Injunction. The temporary restraining order was extended and made effective and enforceable until the close of business on July 27, 2015.

Facts:

A hearing on the record was held regarding Plaintiffs' Motion for Preliminary Injunction on July 23, 2015. The following facts were adduced through witness testimony and exhibits entered into evidence.

Portage County ESC began their sponsorship of the Cleveland Community Schools on July 1, 2013. In addition to sponsoring Cleveland Community Schools, Portage County ESC also sponsored six other community schools. The contract entered into by and between the Portage County ESC and the Cleveland Community Schools was for an initial term of one year commencing on July 1, 2013 and continuing until June 30, 2014. It is undisputed that the contract automatically renewed for a "renewal term" which commenced on July 1, 2014 and continued until June 30, 2015.

Early in 2015, Defendant became aware that Portage County ESC could potentially lose their ability to sponsor community schools. In April, Portage County ESC formally lost its ability to sponsor community schools. As a result of Portage County ESC's failure, on April 27, 2015, Defendant issued notices to the eight community schools that had been sponsored by Portage County ESC. These notices stated that Defendant's Office of School Sponsorship would assume sponsorship of the community schools.

An April 29, 2015 letter sent by the Defendant to Tonyika Bringht, President of the Governing Authority of Cleveland Community School and Villaview School, and Lillian Brown, Chief Executive Officer of the Cleveland Community School and

Villaview School, detailed the passing of sponsorship from Portage County ESC to Defendant's Office of School Sponsorship. The letter stated, in part, that:

> The sponsorship authority of the Portage County ESC has legally ended. By law, sponsorship of the Cleveland Community and Villaview Community Schools passed to the Ohio Department of Education's Office of School Sponsorship on April 27, 2015.
>
> Since this change has been anticipated, School Sponsorship has been engaged in evaluating the school and its academic, organization, and financial performance.

On June 1, 2015, Defendant sent a Notice of Intent to Suspend to the Cleveland Community Cleveland. The Notice detailed the Defendant's intent to suspend the operation of Cleveland Community Schools. The letter states that:

> On April 27, 2015, the Ohio Department of Education revoked the authority of the Portage County Educational Service Center to sponsor community schools in the state of Ohio. On that date, the Department's Office of School Sponsorship ("Sponsor") assumed the sponsorship of Cleveland Community School ("School") pursuant to 3314.015(C) of the Revised Code and Article 11.3(f) of the sponsorship contract.
>
> Section 3314.072 of the Revised Code and Article 11.9 of the sponsorship contract state that the Sponsor may suspend the operations of the School for the following reasons:
>
> 1. Failure to meet student performance requirements stated in the contract,
> 2. Failure to meet generally accepted standards of fiscal management,
> 3. Violation of a provision of the contract or applicable state or federal law, or
> 4. Other good cause.
>
> The School's performance has generally been a failure. As evidenced in the attached review, that school has completely failed to meet the student performance requirements of the contract and generally failed to meet

> the student performance requirements of the contract and generally has a long history of poor academic performance. It is generally being outperformed by the surrounding available school options available to students.
>
> As you are aware, the School has violated state and federal law related to the provision of special education services and has failed to correct deficiencies and follow a corrective action plan as directed by the Departments' Office of Exceptional Children.
>
> The Governing Authority and Ms. Brown may have also violated state ethic and criminal laws related to Ms. Brown moving from the Board chairperson to the Superintendent's position at a salary. The lack of general quality governance and poor performance also constitute good cause supporting a suspension of the school at this time. This notice is to inform you that the sponsor intends to suspend operations of the school for failure to meet student performance requirements stated in the contract, violation of provisions of the contract and state and federal law, and other good cause. The Governing Authority has five days from receipt of this notice to provide sufficient evidence that deficiencies have been corrected and/or a plan to remedy each and every violation of contract and law. The school must also show that students are and will be better served at the School than at other available options.

Upon receipt of Defendant's notice of intent to suspend Cleveland Community Schools, the Schools filed a complaint against the Ohio Department of Education. *See, Cleveland Community Schools, et al. v. Ohio Department of Education*, Cuyahoga County C.P. No. 846622. The case was randomly assigned to Judge Michael Donnelly. Judge Donnelly set a hearing on Cleveland Community Schools' motion for a preliminary injunction. The scheduled hearing on the Cleveland Community Schools' motion was not held, as the parties reached a settlement agreement.

The settlement agreement entered into by the parties in Cuyahoga County C.P. No. 846622 states, in part, that:

> The R.C. 3314.03 contract between the Governing Authority of the Cleveland Community Schools[s] with the former Portage County Educational Service Center referred to in Plaintiffs' complaint terminates at 11:59 PM on June 30, 2015, by virtue of section 11.5 of that contract because Portage County ESC cannot continue as a new start-up sponsor and the next Term Year would have begun on July 1, 2015. The Governing Authority of Cleveland Community School[s] hereby waives all rights of appeal regarding that termination, including those rights provided by R.C. Chapter 3314. Cleveland Community School[s] will continue to exist until 11:59 PM on June 30, 2015.
>
> * * *
>
> Plaintiffs will dismiss the Case, with prejudice, by 5:00 PM on Wednesday, June 10, 2015.
>
> As soon as the dismissal referred to [above] is filed, ODE will rescind the notice of intent to suspend the Cleveland Community School and the Villaview Community School.
>
> * * *
>
> ODE will not interfere with the efforts of the Cleveland Community School and/or the Villaview Community School to obtain new sponsors. This provision does not prevent ODE from sharing public records concerning the schools upon request; from future regulatory action concerning the schools; or from responding to communications from the public, the media, or other potential sponsors. The parties agree that any new sponsor or contract under R.C. 3314.02 or R.C. 3314.03 must comply with R.C. Chapter 3314, Ohio Admin. Code Title 3301, and all other applicable laws.

In accordance with the settlement agreement, Cleveland Community Schools dismissed their claims in Cuyahoga County C.P. No. 846622, with prejudice, on June

10, 2015. Cleveland Community Schools then made multiple efforts to obtain new sponsors by the June 30th deadline.

Tonyika Bringht and Lillian Brown testified as to the efforts made to secure a new sponsor. Specifically, Cleveland Community Schools made attempts to enter into sponsorship agreements with Windham Local Schools, Jefferson County Educational Service Center and Southern Local School District. Ms. Bringht and Ms. Brown testified that both Windham Local Schools and Jefferson County Educational Service Center backed out before a resolution adopting sponsorship could be executed.

On July 1, 2015, identical resolutions were signed by John Wilson, Superintendent of the Southern Local School District, and Lillian Brown. The resolution requested that the "Office of Community Schools assign its sponsorship of [the Cleveland Community Schools] that it assumed from Portage County Educational Service Center to Southern Local School District, effective immediately." The resolution was received the same day by Defendant.

On July 2, 2015, Defendant notified the Cleveland Community Schools that the resolution would not be accepted. The letter stated:

> The Office of School Sponsorship received a copy of a resolution requesting assignment of Cleveland Community School's sponsorship contract yesterday evening, July 1, 2015. Unfortunately, your sponsorship contract expired on June 30, 2015 pursuant to both the terms of the contract and the settlement agreement entered into on June 10, 2015. As such, the Office of School Sponsorship is unable to assign your sponsorship contract to Southern Local School District. Further, Southern Local School District lacks both the statutory and contractual authority to assume sponsorship of Cleveland Community Schools.

The letter went on to request that the Cleveland Community Schools work with Defendant to ensure "an orderly closure of the Cleveland Community Schools," so that the schools' "former students find a new quality school option for the upcoming school year."

Upon receipt of the July 2, 2015 letter, Plaintiffs initiated this lawsuit in which it argues that Defendant did not have statutory authority to close the school once it assumed sponsorship on April 27, 2015.

Analysis:

"Injunctions are an extraordinary remedy, equitable in nature and their issuance may not be demanded as a matter of right." *Crestmont Cadillac Corp. v. GMC*, 8th Dist. Cuyahoga No. 83000, 2004-Ohio-488. Accordingly, it follows that the moving party has a substantial burden to meet in order to be entitled to a preliminary injunction.

Under Ohio law, a party seeking a preliminary injunction "must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim." *Id.* citing *Vanguard Transp. Sys. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 673 N.E.2d 182 (10th Dist. 1996).

The four elements required for injunctive relief are as follows: (1) the moving party must show a substantial likelihood it will prevail on the merits of the underlying claim; (2) the moving party must suffer irreparable injury without the injunctive relief; (3) issuance of the injunction will not unjustifiably harm third parties; and (4) public interest is served. *Kyrkos v. Superior Beverage Group, Ltd.*, 8th Dist. Cuyahoga No.

99444, 2013-Ohio-4597; *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d. 1, 684 N.E.2d 343 (8th Dist.1996). In granting injunctive relief, a court must focus on balancing the equities between the parties. *Franklin Cty. Dist. Bd. of Health v. Paxon*, 152 Ohio App.3d 193, 2003-Ohoi-1331, 787 N.E.2d 59 (10th Dist. 2003).

A trial court's decision on injunctive relief will not be disturbed absent an abuse of discretion. *Kyrkos, supra,* at ¶13, citing *Garono v. State*, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988).

In this case, Plaintiffs' motion for preliminary injunction fails to meet multiple prongs necessary for injunctive relief to be granted. Most importantly, Plaintiffs are unable to show a substantial likelihood of prevailing on their underlying claims. Accordingly, Plaintiffs' motion for injunctive relief must fail.

Plaintiffs' claims may be barred by the res judicata, thereby making it impossible for Plaintiff to prevail on their underlying claims.

"Where a party to an action consents to a judgment of dismissal with prejudice, such judgment concludes the rights which he did assert or should have asserted therein to the same extent as they would have been concluded if the action had been prosecuted to a final adjudication against those rights." *Horne v. Woolever*, 170 Ohio St. 178, 163 N.E.2d 378 (1959). The "claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Grava v. Parkman Township*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). A transaction is defined as a common nucleus of operative facts. *Id.* Two cases based on the same core facts arise from a single transaction even though they involve different legal

theories casting liability on an action and those theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief. *Id.* at 328-383.

In this case, Plaintiffs claims are based on the same common nucleus of operative facts as the claims asserted in Cuyahoga County C.P. No. 846622. Indeed, Plaintiffs' complaint in Cuyahoga County C.P. No. 846622 sought to keep the Cleveland Community Schools open "through June 30, 2015, the date of expiration of the Portage sponsorship agreements." The only difference is that Plaintiffs now assert that Defendant's statutory interpretation of R.C. 3314.015(C) is incorrect. This claim could have been asserted in Cuyahoga County C.P. No. 846622. Accordingly, Plaintiffs' claims may be barred by res judicata. If Plaintiffs' claims are indeed barred by res judicata, then Plaintiffs would be unable to prevail on the merits.

Furthermore, Plaintiffs' claim that Defendant's statutory interpretation of R.C. 3314.015(C) is incorrect does not have a substantial likelihood of prevailing on the merits. R.C. 3314.015(C) states:

> If at any time the state board of education finds that a sponsor is not in compliance or is no longer willing to comply with its contract with any community school or with the department's rules for sponsorship, the state board or designee shall conduct a hearing in accordance with Chapter 119 of the Revised Code on that matter. If after the hearing, the state board or designee has confirmed the original finding, the department of education may revoke the sponsor's approval to sponsor community schools. In that case, the department's office of Ohio school sponsorship, established under section 3314.029 of the Revised Code, may assume the sponsorship of any schools with which the sponsor has contracted until the earlier of the expiration of two school years or until a new sponsor as described in division (C)(1) of section 3314.02 of the Revised Code is secured by the school's governing

> authority. The office of Ohio school sponsorship may extend the term of the contract in the case of a school for which it has assumed sponsorship under this division as necessary to accommodate the term of the department's authorization to sponsor the school specified in this division.

Plaintiffs argue that once Defendant assumed sponsorship of Cleveland Community Schools, that it was required to keep the schools open and remain their sponsor "until the earlier of the expiration of two school years or until a new sponsor * * * is secured by the school's governing authority." Meanwhile, Defendant argues that when it assumed sponsorship of Cleveland Community Schools it assumed the position of Portage County ESC. The sponsorship contract by and between Portage County ESC and Cleveland Community Schools was set to expire June 30, 2015.

The interpretation of R.C. 3314.015 advanced in this case by the Plaintiffs is inconsistent of the theory they advanced in Cuyahoga County C.P. No. 846622. That case's settlement agreement stated that:

> The R.C. 3314.03 contract between the Governing Authority of the Cleveland Community Schools[s] with the former Portage County Educational Service Center referred to in Plaintiffs' complaint terminates at 11:59 PM on June 30, 2015, by virtue of section 11.5 of that contract because Portage County ESC cannot continue as a new start-up sponsor and the next Term Year would have begun on July 1, 2015. The Governing Authority of Cleveland Community School[s] hereby waives all rights of appeal regarding that termination, including those rights provided by R.C. Chapter 3314. Cleveland Community School[s] will continue to exist until 11:59 PM on June 30, 2015.

As such, the parties in settling Cuyahoga County C.P. No. 846622 apparently agreed that the sponsorship agreement would expire June 30, 2015. The testimony of Lillian Brown also reflected that the settlement in Cuyahoga County C.P. No.

846622 was meant to give Cleveland Community Schools until June 30, 2015 to find a new sponsor. This is inconsistent with their current position that Defendant must remain as sponsor for up to two years from the date when Defendant assumed sponsorship of Cleveland Community Schools.

Furthermore, in the event that the statue is ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *State ex rel. Turner v. Eberlin*, 117 Ohio St.3d 381, 2008-Ohio-1117, 884 N.E.2d 39, citing *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). In this case, Defendant's construction of the statute is likely to be permissible in the event that it is ambiguous.

Accordingly, Plaintiff fails to show a substantial likelihood of prevailing on their underlying claim.

While Plaintiffs' inability to prove a substantial likelihood of prevailing on their underlying claims is determinative of the pending motion for preliminary injunction, this Court also finds that the Plaintiffs are unable to prove irreparable harm in the absence of injunctive relief.

At the July 23, 2015 hearing, the Court heard testimony of Erica Johnson. Ms. Johnson is a parent of three children that attend Cleveland Community Schools. Ms. Johnson testified that her children have excelled at Cleveland Community Schools. Before attending Cleveland Community Schools, one of Ms. Johnson's daughters was kicked out of her two prior schools. Ms. Johnson also had difficulty having previous schools honor her daughter's individual education plan. Indeed, Ms.

Johnson testified that before attending Cleveland Community Schools, her 9th grade daughter was unable to read. While Ms. Johnson's testimony suggests progress made by her own daughters whose educational needs had previously gone unmet, the overwhelming evidence adduced at the hearing suggest that Cleveland Community Schools has consistently failed their students and failed to deliver the educational results promised.

Mark Michael, Director of School Sponsorship, Ohio Department of Education, Office of School Sponsorship, testified that Villaview had negative value added each of the last two years. In the 2012-2013 Report Card for Villaview Community School, the school received an overall Performance Index score of a D. A school's Performance Index measures the test results of every student in the school. In the 2013-2014 Report Card for Villaview Community School, the school received a Performance Index score of an F.

Likewise, in the 2012-2013 Report Card for Cleveland Community School, the school received an overall Performance Index score of a D. In 2013-2014 Report Card for Cleveland Community School, the school received a Performance Index score of an F. A review of the testimony and evidence shows that the Cleveland Community Schools continually failed to deliver the student outcomes promised or meet minimum performance expectations.

Plaintiffs' own witnesses testified that the Cleveland Community Schools have been struggling under state standards, especially when it comes to meeting special education requirements. Indeed, the Cleveland Community Schools have lost access

to certain special education funding due to its inability to meet minimum required performance levels.

Additionally, the Court also heard evidence that upon closing, Defendant would make efforts to relocate Cleveland Community School's displaced students to new schools. Many of the schools located within 2 miles of Cleveland Community Schools have significantly better academic achievement metrics. While this Court is sympathetic to the impact closing the Cleveland Community Schools will have on employees and vendors, it is hard to see how transitioning students, whose educational needs have gone unmet at the Cleveland Community Schools, to better performing schools will result in irreparable harm.

For these reasons, in addition to failing to prove a substantial likelihood of prevailing on the merits of their underlying claims, Plaintiffs are also unable to prove irreparable harm in the absence of injunctive relief.

Defendant also argues that Plaintiffs fail to prove that the issuance of the injunction will not unjustifiably harm third parties and that public interest is served by the issuance of the requested injunctive relief. However, this Court does not need to address these arguments as Plaintiffs failure to show a substantial likelihood of succeeding on their underlying claims is determinative of their motion.

Conclusion:

Accordingly, for the reasons stated in this opinion and order, Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED

7/27/15
Date

Judge Daniel Gaul