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

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS ("NYSER"), by its President, JAY WORONA, RUBNELIA AGOSTINO, MIRIAM ARISTY-FARER, KATHRYN BARNETT, AVA CAPOTE, MILAGROS ARCIA G. CHANGLERTH, MONA DAVIDS, JANET DURAN, ROLANDO GARITA, SARA HARRINGTON, SONJA JONES, NICOLE IORIO, HEIDI MOUILLESSEAUX-KUNZMAN, GRETCHEN MULLINS-KIM, ANNETTE RENAUD, ELLEN TRACHTENBERG, HEIDI TESKA-PRINCE, ANDY WILLARD, NATASHA CAPERS, JACQUELINE COLSON, NICOLE JOB, CHRIS OWENS, SAM PRIOZZOLO, PATRICIA PADILLA, LYNN SANCHEZ, and ROBERT JACKSON, Plaintiffs, -and- THE CITY OF YONKERS, Intervenor-Plaintiff, vs. THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, and JOHN B. KING, Jr. as President of the University of the State of New York, and Commissioner of Education, Defendants	Consolidated Index No. 100274/2013 (formerly 650450/2014)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

The State's motion for a stay should be denied because it seeks without basis to delay a decision on cross motions for partial summary judgment which have essentially been fully briefed, and it does so primarily on the inapplicable ground that discovery will be extensive. The State's argument based on discovery is irrelevant because Plaintiffs do not seek discovery prior to decision on the pending motions—because none is needed—and in any event, as the State itself points out, discovery is stayed automatically pending determination of the motions for summary judgment. Defs.' Memo. at 4, n.3; CPLR 3214(b)[1]. The State's alternative ground for requesting a stay, that questions of law should be decided by appellate courts before this action proceeds, has been soundly rejected by the courts that have considered it and should be rejected here. Particularly because Plaintiff seeks relief from the deprivation of a constitutional right, this Court should proceed to decide the summary judgment motions before it.

PROCEDURAL HISTORY

Plaintiffs adopt Defendants' statement of the procedural history of this case. However, Plaintiffs also note that although Defendants filed their Notice of Appeal to the Appellate Division, First Department, on December 15, 2014, to date they have not perfected their appeal. Apparently, they will do so before their October 5, 2015 date to file their opening brief in the appeal. Defendants' delay in perfecting the appeal indicates that proceeding with alacrity in this case is not a priority for them, and their request for a stay is simply another strategy to delay ultimate resolution of this case, to the detriment of the educational opportunities of millions of New York State's school children.

[1] Moreover, in the event these motions do not resolve the case, Defendants may move for a stay after they are decided.

ARGUMENT

1. This Is Not a Proper Case in Which to Grant a Stay and the State Has Not Shown Otherwise.

The State bases its motion on N.Y. C.P.L.R. 2201, which states, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Courts routinely deny motions seeking stays to await an appellate determination, recognizing that "the issuance of a stay is discretionary with the court, which discretion will be exercised sparingly and only when other remedies are inadequate and the equities involved are apparent and strong." In re Weinbaum's Estate, 51 Misc. 2d 538, 539, 273 N.Y.S.2d 461, 463 (Sur. 1966).

An exemplary case is Schwartz v. New York City Housing Authority, 219 A.D.2d 47, 48-49, 641 N.Y.S.2d 885, 886-87 (2d Dep't 1996), where the appellate court denied a motion to stay a trial pending appeal of the denial of the defendant's motion for summary judgment. Noting that CPLR 2201 was inapplicable because the motion was addressed to an appellate court, the Court nevertheless decided the issue under its inherent power to grant a stay where the order appealed from "will disturb the status quo and tend to defeat or impair our appellate jurisdiction." Id. at 48, 641 N.Y.S.2d at 886 (citations omitted). Schwartz stands for the proposition that a pending appeal of a motion for summary judgment does not require a stay of the *trial*. Schwartz therefore counsels that, *a fortiori*, the pending appeal of a motion to dismiss does not warrant a stay of cross motions for summary judgment.

What is more, the appellate decision here is far from "imminent," see Miller v. Miller, 109 Misc. 2d 982, 983, 441 N.Y.S.2d 339, 340-41 (Sup. Ct. 1981), and, if and when a decision comes, it will only be a decision of the Appellate Division, subject to further review by the Court

of Appeals. Defendants would then undoubtedly seek a stay pending the Court of Appeals' decision, further delaying resolution of Plaintiffs' claims.

The two cases on which the State relies concern vastly different factual and legal scenarios from this case and offer no support for a stay here. In fact, both involve requests for stays pending the completion of related criminal proceedings. In Britt v. International Bus Services, Inc., 255 A.D.2d 143, 144, 679 N.Y.S.2d 616, 617 (1st Dep't 1998), the court stayed a civil action pending the criminal trial arising from the same conduct, based on the "compelling factor" that the defendant intended to invoke his constitutional right against self-incrimination. The court also noted the "severity of the pending criminal charges" and that the defendant's testimony was "critical and necessary" in the civil action, because without it the defendants would be unable to assert a competent defense. Similarly, in Zonghetti v. Jeromack, 150 A.D.2d 561, 562, 541 N.Y.S.2d 235, 237 (2nd Dep't 1989), the stay was granted pending the completion of a criminal action against one of the defendants. Here, as further set forth below, the constitutional concerns favor denial rather than grant of a stay, and the State's cited cases are inapposite.

2. Plaintiffs Would Be Prejudiced by a Stay

Defendants' request for a stay should be denied because granting the stay would prejudice Plaintiffs, who seek to vindicate a constitutional right. See DeSiervi v. Liverzani, 136 A.D.2d 527, 527, 523 N.Y.S.2d 147, 148 (2d Dep't 1988) (holding that the protection of a constitutional right was more important than inconvenience to the other party). Plaintiffs' motion for summary judgment demonstrates that the State itself concedes the State is not providing the Foundation Aid funding it determined was necessary to provide a sound basic education. See Plaintiffs' Memorandum of Law on Reply in Further Support of Their Motion for Partial

Summary Judgment and in Opposition to Defendants' Cross-Motion for Partial Summary Judgment at pp. 5-11. Delaying decision vindicating Plaintiffs' constitutional right to the opportunity for a sound basic education would prejudice Plaintiffs, as courts have found that depriving people of constitutional rights, even for brief periods of time, constitutes irreparable harm. See Hussein v. State, 19 N.Y.3d 899, 908 (2012) (Smith, J., concurring) ("[I]f plaintiffs, the parents of children in ... public schools [that would benefit from additional funding], are constitutionally entitled to have this money spent on their children's education, they are entitled to it now. They would be rightly dismayed to learn that their claims will not ripen for several years, until after their children have graduated."); Time Square Books, Inc. v. City of Rochester, 223 A.D.2d 270, 278 (4th Dep't 1996) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)) ("Thus, courts have found that infringement of the constitutionally guaranteed right of free expression, "for even minimal periods of time, unquestionably constitutes irreparable injury."); Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 854 (Sup. Ct. N.Y. Cnty. 1979) ("When a plaintiff establishes that failure to preserve the status quo would result in the deprivation of its constitutional right to due process, '[t]his alone demonstrates irreparable harm.'"); see also Swinton v. Safir, 93 N.Y.2d 758, 765-66 (1999) (holding that proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies).

Courts in other jurisdictions have agreed that further delays are unacceptable in considering whether delay could result in irreparable harm from denying a constitutional right to education. See, e.g., Hoke Cnty. Bd. of Educ. v. State, 358 N.C. 605, 616 (2004) ("We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already

passed through our State's school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily."); Montoy v. State, 279 Kan. 817, 844-45 (2005) ("[W]e cannot continue to ask current Kansas students to 'be patient.' The time for their education is now."). Therefore, Defendants' request for a stay should be denied because Plaintiffs would be prejudiced by such a delay.

CONCLUSION

Plaintiffs respectfully request that Defendants' motion for a stay of this action pending the appeal of the denial of Defendants' motion to dismiss be denied.

Dated: August 21, 2015

By: /s/ Michael A. Rebell
Michael A. Rebell
Attorney at Law
475 Riverside Drive
Suite 1373
New York, NY 10027
rebellattorney@gmail.com
Attorney for Plaintiffs

By: /s/ Douglas T. Schwarz
Douglas T. Schwarz
John A. Vassallo, III
Brendan T. Chestnut
Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, NY 10178
Tel.: (212) 309-6000
Fax: (212) 309-6273
douglas.schwarz@morganlewis.com
jvassallo@morganlewis.com
brendan.chestnut@morganlewis.com
Attorneys for Plaintiffs NYSER