125 A.D.3d 444
Supreme Court, Appellate Division, First Department, New York.

Edward THORNTON, et al., Petitioners–Appellants,
v.
The NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION, et al., Respondents–Respondents.

Feb. 5, 2015.

Synopsis
Background: Photography **studio** and its president brought hybrid action against, inter alia, city's department of education, alleging claims under § 1983 and seeking Article 78 review of department's decision to place **studio** on de-active status in online procurement portal through which department ordered goods and services. The Supreme Court, New York County, Carol E. Huff, J., 2013 WL 7117805, denied **studio's** motion for injunctive relief, and later sua sponte denied petition and dismissed proceeding. **Studio** appealed.

[Holding:] The Supreme Court, Appellate Division, held that remand to department was warranted for determination of whether **studio** was responsible vendor.

Affirmed in part and reversed and remanded to city's department of education in part.

Attorneys and Law Firms

****340** Law Offices Of Jeffrey Goldman, New York (Jeffrey E. Goldman of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jenna Krueger of counsel), for respondents.

ACOSTA, J.P., RENWICK, FEINMAN, CLARK, KAPNICK, JJ.

Opinion

***444** Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 16, 2014, denying the petition and dismissing this hybrid proceeding brought pursuant to CPLR article 78 and 42 U.S.C. § 1983, unanimously reversed, on the law, without costs, the article 78 claims are remanded to respondent New York City Board/Department of Education (DOE) for the issuance of a determination whether petitioner **Thornton's Classic Studios**, Inc. is a responsible vendor, the proceeding with respect to the 42 U.S.C. § 1983 claims is converted into a plenary action, and those claims are reinstated without prejudice to a motion to dismiss. Order, same court and Justice, entered November 12, 2013, which denied petitioners' motion for injunctive relief, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 13, 2014, which denied petitioners' motion for discovery, unanimously dismissed, without costs, as moot.

[1] This hybrid action arises out of respondent DOE's decision to place petitioner **Thornton's Classic Studios**, Inc. (TCS), a photography **studio**, on de-active status in the Financial Accounting and Management System (FAMIS), the online procurement portal through which the DOE orders goods and services, and subsequent actions taken by respondents. To do business with the DOE, a vendor must have an active status ***445** on FAMIS and must have been determined to be a responsible vendor pursuant to the DOE's Procurement Policy and Procedures. The DOE's determination placing TCS on de-active status in FAMIS was rationally based upon the 2012 admission of TCS's president, petitioner **Edward Thornton**, that he had continued to send a certain photographer to work in DOE schools after becoming aware that the photographer had been accused of touching a student's breast five years earlier and had pleaded guilty to the charge of endangering the welfare of a child (Penal Law § 260.10[1]) (*see Flacke v. Onondaga Landfill Sys.,* 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 507 N.E. 2d 282 [1987]).

However, the DOE acted arbitrarily and capriciously in failing to provide TCS with notice of its apparent determination of non-responsibility and of TCS's right to protest the determination, as required by its own Procurement Policy and Procedures (Sections 2–05(g)(1) and 2–06) (*see St. Joseph's Hosp. Health Ctr. v. Department of Health of State of N.Y.,* 247 A.D.2d 136, 155, 677 N.Y.S.2d 194 [4th Dept.1998], *lv. denied* 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092 [1999]; *Matter of Era Steel Constr. Corp. v. Egan,* 145 A.D.2d 795, 798, 535 N.Y.S.2d 1002 [3d Dept.1988]; *see also Matter of Mitchell v. New York City Dept. of Correction,* 94 A.D.3d 583, 942 N.Y.S.2d 499 [1st Dept.2012]).

[2] The record presents no extraordinary circumstances that would support the ****341** court's sua sponte dismissal of this

proceeding (*see Grant v. Rattoballi,* 57 A.D.3d 272, 869 N.Y.S.2d 53 [1st Dept.2008]). Respondents did not move to dismiss the 42 U.S.C. § 1983 claims (*see Nichols v. Curtis,* 104 A.D.3d 526, 527, 962 N.Y.S.2d 98 [1st Dept.2013]; *Purvi Enters., LLC v. City of New York,* 62 A.D.3d 508, 509, 879 N.Y.S.2d 410 [1st Dept.2009]; *see also Matter of Alltow, Inc. v. Village of Wappingers Falls,* 94 A.D.3d 879, 882, 942 N.Y.S.2d 147 [2d Dept.2012] [summary procedure applicable to CPLR article 78 case may not be used to dispose of causes of action for damages]). As to those claims, conversion of this proceeding into a plenary action is warranted (*see* CPLR 103[c]; *Raykowski v. New York City Dept. of Transp.,* 259 A.D.2d 367, 687 N.Y.S.2d 68 [1st Dept.1999]).

In moving for injunctive relief, petitioners failed to demonstrate a likelihood of success on the merits, irreparable injury, and that the balance of equities were in its favor (*see Nobu Next Door, LLC v. Fine Arts Hous., Inc.,* 4 N.Y.3d 839, 800 N.Y.S.2d 48, 833 N.E.2d 191 [2005]).

All Citations

125 A.D.3d 444, 3 N.Y.S.3d 339, 315 Ed. Law Rep. 430, 2015 N.Y. Slip Op. 00965