

**Kennedy v Adelphi Academy**

2007 NY Slip Op 31588(U)

April 23, 2007

Supreme Court, Queens County

Docket Number: 0015128/2006

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

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MICHAEL KENNEDY, et al.		Number <u>15128</u> 2006
-against-		Motion
		Date <u>January 30,</u> 2007
ADELPHI ACADEMY, et al.		Motion
	x	Cal. Number <u>15</u>

The following papers numbered 1 to 13 read on this motion by defendants for an order (1) dismissing all claims by plaintiffs Grazyna Kennedy, Helen Kennedy, Joseph Kennedy and Kaitlyn Kennedy on the grounds of lack of standing, pursuant to CPLR 3211(a)(3); (2) dismissing the first cause of action for breach of contract against the Adelphi Academy Board of Trustees, sued herein as the Adelphi Academy Board of Directors, and all individual defendants; (3) dismissing the first cause of action for breach of contract against the Adelphi Academy; (4) dismissing the second cause of action for defamation against all of the defendants; (5) dismissing the third cause of action for conversion and the seventh cause of action for replevin; (6) dismissing the fourth cause of action for tortious interference with contractual relations as to all defendants; (7) dismissing the fifth cause of action for an injunction as to all defendants; (8) striking all scandalous and prejudicial paragraphs in the complaint; and (9) awarding sanctions against plaintiffs and plaintiffs' counsel, pursuant to 22 NYCRR 130-1.1(a) and (j). Plaintiffs cross-move in opposition and seek an order (1) deeming certain sections of the amended complaint to relate back to the original complaint filed on July 11, 2006, pursuant to CPLR 203(f); and (2) awarding sanctions against defendants pursuant to 22 NYCRR 130-1.1(a).

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Upon the foregoing papers it is ordered that these motions are determined as follows:

The within action was commenced on July 11, 2006. After the defendants served the within motion to dismiss the complaint, pursuant to CPLR 3211, and before it was fully submitted to the court, plaintiffs amended the complaint as of right on December 22, 2006.

CPLR 3025(a) allows a party to amend a pleading as of right within 20 days after a responsive pleading is served (see CPLR 3025[a]). The defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) extended the defendants' time to answer (see CPLR 3211[f]) and thus extended the time in which the plaintiffs could amend their complaint as of right (see CPLR 3025[a]; STS Mgmt. Dev. v New York State Dep't of Taxation & Fin., 254 AD2d 409, 410 [1998]; Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, 138 Misc 2d 799 [1988]).

It is apparent from the papers submitted by the parties that the defendants seek to have the court treat their motion to dismiss as directed to the amended complaint. Therefore, the court will apply the defendants' motion to the amended pleadings (see Terrano v Fine, 17 AD3d 449 [2005]; Livadiotakis v Tzitzikalakis, 302 AD2d 369, 370 [2003]; Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35, 38 [1998], revd on other grounds 91 NY2d 30 [1997]).

Defendant Adelphi Academy is a private school, chartered by the New York State Board of Regents and is located in Brooklyn, New York. Plaintiff Michael Kennedy was employed by the Adelphi Academy as the head of the upper school pursuant to a written contract for the period of July 14, 2004 to July 13, 2005. Mr. Kennedy also entered into a contract of employment with the Adelphi Academy dated June 17, 2005, as the head of the upper school, with an additional stipend for "head of guidance" for the period of July 15, 2005 through August 14, 2006.

Mr. Kennedy's employment with the Adelphi Academy was terminated on July 1, 2005. Prior to his termination three other employees at Adelphi Academy accused Mr. Corhan of being involved in a number of financial improprieties. Mr. Kennedy alleges that he was interrogated by the defendants and that when he expressed a favorable opinion of one of the terminated co-workers, he too was terminated. He alleges that his termination letter stated that "the Board of Trustees has determined that your employment contract with the Academy will not be renewed and your employment with the Adelphi Academy is terminated effective today, July 1, 2005. Any contract executed extending or renewing your employment with

Adelphi was without the knowledge or consent of the Board of Trustees and, therefore, is null and void. You are reminded that you have an absolute duty of confidentiality as it relates to any and all information you have learned or acquired regarding all aspects of Adelphi Academy". Mr. Kennedy further alleges that the defendants sought to deny him unemployment benefits and alleges that they informed the Department of Labor that he had been terminated because he had failed to maintain official student records, evaluate students' academic positions, failed to supervise and failed to adequately prepare the summer school program. Mr. Kennedy, however, also alleges that he did obtain unemployment benefits.

Plaintiff Grazyna Kennedy is the wife of Michael Kennedy. Infant plaintiffs Helen, Joseph and Kaitlyn Kennedy are the children of Michael and Grazyna Kennedy.

Defendant Albert Corhan is the Director of the Adelphi Academy. Defendant Arthur Maresca is the Chairman/President of the Board of Trustees of Adelphi Academy and defendants Dolores Corhan, Kenneth G. Haag, Dr. Joseph L. Assini, and Elina Mazzei-Fiebal are members and officers of the Board of Trustees. Defendant Suzzane Corhan was the president of the Board of Trustees until 2004.

In Leon v Martinez (84 NY2d 83, 87-88 [1994]), the Court of Appeals observed that, on a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . [citations omitted]" (see Cayuga Partners LLC v 150 Grand, 305 AD2d 527 [2003]). Such a motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action (see Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). However, if in opposing the motion the defendant adduces documentary proof which disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted (see Ahmed v Getty Petroleum Mktg., 12 AD3d 385 [2004]).

Here, the first cause of action of the amended complaint by Michael Kennedy against the Adelphi Academy is for breach of the employment contracts. Defendants assert that the contract

explicitly reserves to the Academy the right to terminate the contract at its sole discretion, and, therefore, plaintiff cannot maintain a cause of action for breach of the employment contracts is not supported by the documentary evidence. The contract on its face states under paragraph 3 "Term of Contract" that "[i]t is understood that the employer has the right to terminate this contract prior to such ending date or to extend such term of this contract beyond the ending date, in the employer's sole discretion, upon receipt and evaluation of the information required pursuant to the policies of the Board of Trustees." Paragraph 5 entitled "Termination" provides in pertinent part that "[t]his contract shall not be terminated by the employer except as provided for in the policies of the Board of Trustees." The court finds that as the contract makes explicit reference to the policies of the Board of Trustees, and as said policies are not presently before the court, defendants have not established that the contracts at issue were terminated or cancelled "pursuant to the policies of the Board of Trustees." Therefore, the court finds that the complaint sufficiently states a cause of action for breach of contract, and defendants' request to dismiss this cause of action is denied.

Plaintiffs' second cause of action of the amended complaint alleges that the Adelphi Academy made defamatory statements concerning plaintiff's job performance and abilities as a teacher which were communicated orally by telephone and in writing by fax to the New York State Department of Labor, the federal government, and to 17 prospective employers including the New York City Department of Education. Although this claim is alleged against all of the defendants, the complaint states that the allegedly defamatory statements were made by the Adelphi Academy. Plaintiff has not identified any of the individual defendants as the speakers of the alleged defamatory words, or as authors of the alleged defamatory writings, and does not identify any one as acting on behalf of the Adelphi Academy. The complaint, therefore, fails to state a claim for defamation against the Adelphi Academy and the individual defendants (see CPLR 3016). To the extent that plaintiff's counsel argues that each of the individual defendants conspired to defame the plaintiff, such a claim is in the nature of a civil conspiracy, which is not a cognizable tort in this state (see Alexander & Alexander of N.Y. v Fritzen, 68 NY2d 968 [1986]; Jailman v Selendy, 7 Misc 3d 1007A [2005]). To the extent that plaintiffs allege that defamatory statements were made to the "federal government," plaintiffs concede that these allegations are insufficient. To the extent that plaintiffs assert that the allegedly defamatory statements were made by the Adelphi Academy to the Department of Labor in connection with plaintiff's application for unemployment benefits, plaintiffs concede that such statements are privileged, having been made in connection with a quasi-judicial proceeding (see Singletary v All Metro Aids, Inc.,

247 AD2d 252 [1998], lv denied 92 NY2d 804 [1998]; Seymour v New York State Elec. & Gas, 215 AD2d 971, 627 [1995]; Kornsweig v Urban Athletics Madison LLC, 13 Misc 3d 1217A [2006]). Therefore, that branch of defendants' motion to dismiss the second cause of action for defamation is granted.

Plaintiff Michael Kennedy in the third cause of action of the amended complaint asserts a claim for conversion, and in the sixth cause of action asserts a claim for replevin. Mr. Kennedy apparently seeks to recover personal property consisting of books, lesson plans and pictures which he asserts remain on the property of the Adelphi Academy. A cause of action for replevin or conversion requires a demand for the property and a refusal (Guggenheim Found. v Lubell, 77 NY2d 311, 317-318 [1991]; Feld v Feld, 279 AD2d 393, 394-395 [2001]). A demand need not use the specific word "demand" so long as it clearly conveys the exclusive claim of ownership. A demand consists of an assertion that one is the owner of the property and that the one upon whom the demand is made has no rights in it other than allowed by the demander (Feld v Feld, supra). Plaintiff does not allege that he made any demand for the return of his personal property or that any such demand was refused. Therefore, as the complaint fails to state a cause of action for either conversion or replevin, defendants' request to dismiss the third and sixth causes of action is granted.

Plaintiff Michael Kennedy in the fourth cause of action of the amended complaint alleges that the individual defendants tortiously interfered with his contract with the Adelphi Academy. A claim of tortious interference with contractual relations requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (Foster v Churchill, 87 NY2d 744 [1996]). Here, the individual defendants are current or former officers and members of the school's Board of Trustees. "[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer . . . [and did not commit] independent torts or predatory acts directed at another'" (Murtha v Yonkers Child Care Assn., 45 NY2d 913, 915 [1978], quoting Matter of Brookside Mills [Raybrook Textile Corp.], 276 App Div 357, 367 [1950]; see also Foster v Churchill, 87 NY2d 744, 750-751 [1996]; S.F.P. Realty Corp. v G.S. Rockaway Dev., 206 AD2d 417 [1994]; Citicorp Retail Servs. v Wellington Mercantile Servs., 90 AD2d 532 [1982]). Although it is asserted that the actions of the defendants, current and former trustees and officers of the school's Board of Trustees were committed in furtherance of their own personal interests and not those of the Adelphi Academy, plaintiff does not assert that the

individual defendants committed independent torts aimed at the plaintiff prior to the termination of the employment contracts. Therefore, as plaintiff's allegations are insufficient to support a claim for tortious interference with a contract against the individual defendants, the fourth cause of action is dismissed.

Defendants' request to dismiss the fifth cause of action to enjoin the defendants from uttering false or defamatory statements regarding the plaintiffs is granted. Since the complaint does not state a claim for defamation, plaintiffs cannot maintain a claim for injunctive relief (see Kosson v Algaze, 203 AD2d 112 [1994]; Penn Warranty Corp. v DiGiovanni, 10 Misc 3d 998 [2005]). Therefore, defendants' request to dismiss the fifth cause of action is granted.

The seventh cause of action of the amended complaint by Michael Kennedy alleges a claim for the intentional infliction of emotional distress against all of the defendants. This claim was not raised in the original pleading. Plaintiffs assert, however, that it relates back to the original pleading, pursuant to CPLR 203(f). The original allegations regarding the manner in which the school was operated, and the removal of non-parties from the school premises does not constitute conduct directed at the plaintiffs, and, thus, does not give notice of the newly-stated claim. In addition, plaintiffs' prior allegations regarding the letter of termination, Mr. Kennedy's loss of employment and employment-related benefits, as well as his prior claims for conversion, replevin, and requests for punitive damages are also insufficient to "give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved" in the present claim for the intentional infliction of emotional distress. Furthermore, the actions complained of do not rise to the level of conduct which is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (Murphy v American Home Prods. Corp., 58 NY2d 293, 303 [1983]; see Howell v New York Post Co., 81 NY2d 115, 122 [1993]). Therefore, defendants' request to dismiss the seventh cause of action is granted, and that branch of plaintiffs' cross motion which seeks to deem this cause of action to relate back to the original complaint is denied.

In the eighth and ninth causes of action of the amended complaint, infant plaintiffs Helen, Joseph and Kaitlyn Kennedy and Grazyna Kennedy allege claims for breach of contract and tortious interference with contract. These plaintiffs' allege that they received medical benefits, and a reduction in tuition at the Adelphi Academy in connection with Michael Kennedy's employment by Adelphi Academy, and state that these benefits are contained in the

employee handbook issued to Michael Kennedy. These plaintiffs, however, were neither parties to, nor a third-party beneficiary of, the employment contracts or any other contract with which the defendants allegedly interfered. Further, the fact that these benefits are described in the employee handbook does not create a contractual relationship between the Adelphi Academy and the employee's spouse or children. At the most, Grazyna Kennedy and Helen, Joseph and Kaitlyn Kennedy are incidental beneficiaries of the employment contact and, thus, lack standing to maintain the claims for breach of contract and tortious interference with contractual relations (see LoPresti v Mass. Mut. Life Ins. Co., 30 AD3d 474 [2006]; McGuire v Sterling Doubleday Enters., L.P., 19 AD3d 600 [2005], leave to appeal denied 7 NY3d 701 [2006]). Therefore, that branch of defendants' motion which seeks to dismiss the eighth and ninth causes of action of the amended complaint is granted.

In view of the foregoing, defendants' motion to dismiss the complaint is granted to the extent that the second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action of the amended complaint is granted. Defendants' request to dismiss the first cause of action for breach of contract is granted only as to the individual defendants.

Defendants' request to strike from the pleading the terms "Hijacked Academy" and "Children Exploitation Defendants" on the grounds that the use of such terms are scandalous and prejudicial is granted (see CPLR 3024[b]). Regardless of the strong feelings and animosity the plaintiffs may have towards the defendants, the use of these derogatory terms have no place in the pleadings. In addition, the request to strike the irrelevant material and inflammatory language contained in paragraphs 1 through 11, 14, 16, 17, 33, 34, 38-58, 70-74, 76, 79-88, 93-95, 105, 106, 109, 110, 111, 113, 125, 151, 157 and 160 through 161 is granted. Plaintiffs are directed to serve and file a second amended complaint which conforms with this order, within 10 days after the service of this order together with notice of entry. The time in which to serve an answer to the second amended complaint is extended to 20 days from the date of service of the second amended complaint. Defendants' request for sanctions is denied.

Plaintiffs' cross motion to deem certain paragraphs of the amended complaint to relate back to the original complaint is denied, and the request for sanctions is denied.

Dated: April 23, 2007

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J.S.C.