MEMORANDUM DECISION
JUDGMENT

INDEX No. 33105-2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001-CASE DISP
R/D: 020707
S/D 043007

MARISSA WHARRY

PLTF'S/PET'S ATTY:
MICHAEL B. SCHULMAN, P.C.
145 Pinelawn Road, Suite 310N
Melville, New York 11747

Plaintiff,

- against -

LINDENHURST UNION FREE SCHOOL DISTRICT, NEIL LEDERER, AS SUPERINTENDENT OF SCHOOLS, and JOHN DOE 1-10

DEFT'S/RESP'S ATTY:
GUERCIO & GUERCIO, ESQS.
77 Conklin Street
Farmingdale, New York 11735

Defendants.

Upon the following papers numbered 1 to 14 read on this motion for an order pursuant to CPLR §3211 (a)(4) & (7)

Notice of Motion/Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers ____
Answering Affidavits and supporting papers 10-12 Replying Affidavits and supporting papers 13-14
__ Other ____; ~~and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant Lindenhurst Union Free School District ("School District") for an order pursuant to CPLR §3211 (a)(4) (7) dismissing plaintiffs complaint is determined as follows:

Plaintiff "Wharry" was defendant Lindenhurst High School's varsity gymnastics coach for 24 years. Plaintiff claims the "School District" arbitrarily terminated her as coach based upon a parent's complaint to the School Superintendent.

Plaintiff has two actions pending in Supreme Court: this action and a related CPLR Article 78 petition. "Wharry's" complaint in this action sets forth two causes of action claiming a violation of her civil rights based upon the "Districts'" arbitrary and capricious decision not to rehire her (first cause of action) and a claim of tortious interference with prospective employers based upon alleged malicious statements made by "District" employees to other school districts administrators interested in hiring "Wharry" as a gymnastics coach (second cause of action)

Defendants motion seeks an order dismissing both causes of action claiming the civil rights claim is duplicative of "Wharry's" claim in her CPLR Article 78 petition and the tortious interference claim fails to state a viable cause of action against the "District".

By short form Order dated January 18, 2007 this Court denied defendant "School District's" motion pursuant to CPLR §7804 (f) to dismiss "Wharry's" CPLR Article 78 petition and denied defendant "School District's" motion pursuant to CPLR §3211 (a) (7) and Education Law §3813 to dismiss based upon "Wharry's" failure to timely file a notice of claim against the "District". Plaintiffs motion for an order pursuant to Education Law §3813 (2)a and GML §50-e (5) was granted to the extent that "Wharry" was permitted to file a notice of claim nunc pro tunc and both actions were joined.

In support of this motion, defendant submits two affirmations of counsel and claims that plaintiffs complaint must be dismissed since no viable cause of action exists against the "School District". Defendant claims "Wharry's" first cause of action claiming a violation of "Wharry's" civil rights must be dismissed since the identical claim of arbitrariness is set forth in "Wharry's" CPLR Article 78 petition. Defendant claims that CPLR §3211 (a) (4) provides that under such circumstances the civil rights claim must be dismissed. Defendant also argues that even if the Court determines that plaintiffs wrongful termination claim differs from "Wharry's" CPLR Article 78 claims, no viable cause of action is stated since: 1) if "Wharry" is considered an at-will employee, she can be terminated at any time for any reason; 2) if "Wharry" is considered an "at will" public employee she had no property interest in her coaching position for which she was denied due process rights; and 3) "Wharry" was not terminated from her coaching position but was merely not re-hired and therefore no valid claim is stated based upon the "District's" refusal to rehire and/or terminate her. Defendant also claims that no viable tortious interference cause of action is stated since no specific facts are stated to support an inference that the "School District" administrators were motivated solely by a desire to harm her or to show that communications alleged to have been made to other District administrators were objectively false.

In opposition plaintiff submits an attorney's affirmation and claims no basis exists to dismiss plaintiffs complaint. Plaintiff claims this Court's prior Court order which sustained "Wharry's" CPLR Article 78 petition collaterally estops the "School District" from raising the identical agreement seeking to dismiss plaintiffs civil rights claim. Plaintiff claims that her second cause of action for tortious interference sets forth the sufficient facts to make out a viable claim against the School District and argues that defendants motion is frivolous.

CPLR §3211 (a) (4) & (7) provides:

> Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that :
>
> 4. there is another action pending between the same parties for the same cause of action in a court or any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 7. the pleading fails to state a cause of action.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

Plaintiffs first cause of action claiming a violation of plaintiffs civil rights provides that the "District" refused "to hire and/or rehire and to terminate "Wharry" as a result of "Wharry's" refusal to permit a student to participate in a gymnastics event. The complaint states:

> 17 That as a result of the plaintiff's decision not to allow Kurtz to participate, the defendant, Lederer, on or about November 28, 2005 arbitrarily and capriciously decided not to recommend the plaintiff, Wharry, to continue as a coach of the gymnastics team of the Lindenhurst High School and Lindenhurst Middle School.....
>
> 20 That the refusal to hire and/or rehire and to terminate plaintiff, Wharry, was arbitrary and capricious in nature.
>
> 21 That the decision by defendant, Lederer, not to recommend plaintiff, Wharry, to be rehired and/or terminated was arbitrary and capricious in nature and was due solely to the fact that plaintiff, Wharry, refused to endanger the welfare of Kurtz.

Although labeling her first cause of action as a civil rights violation, the substance of plaintiffs claims are identical to the claims alleged in the CPLR Article 78 petition, in that the defendant "School District" arbitrarily and capriciously terminated her as gymnastics coach based upon a single incident involving a student's failure to abide by the coach rules. Defendants motion to dismiss this cause of action must therefore be granted since the CPLR Article 78 petition fully addresses the merits of this claim. Moreover no civil rights cause of action has been stated since "Wharry" had no legitimate property interest in continuing employment as the school's varsity gymnastics coach and her due process rights were not therefore violated.

Plaintiffs second cause of action alleges tortious interference with "Wharry's" ability to obtain employment as a gymnastics coach at two other school districts stemming from a claimed malicious course of conduct undertaken by unknown School District representatives. To state a cause of action for tortious interference with prospective business advantage it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby (Jacobs v. Continuum Health Partners, Inc., 7AD3d 312, 776 NYS2d 279 (1st Dept., 2004)

Paragraphs 24 & 25 of the complaint set forth plaintiff's factual claims of tortious interference:

> 24. That the defendant, Lederer, and defendant "John Doe 1-10", whose names are presently unknown and fictitious, undertook a course of conduct to prevent plaintiff, Wharry, from obtaining other employment as a gymnastics coach for other school districts on Long Island, to wit: specifically, Connetquot and Copiague.
>
> 25. That the actions of defendant, Lederer, and defendant, "John Doe 1-10", were malicious in nature, done knowingly, and with the intent to cause harm to the plaintiff, Wharry,. That they were interfering with plaintiff, Wharry's attempt to obtain employment.

Plaintiffs second cause of action fails to plead sufficient facts to support a viable claims for tortious interference since no specific facts are alleged to support any inference that defendants representatives acted maliciously, wrongfully or for the sole purpose of harming plaintiff. Defendant's motion for an order dismissing this cause of action must also be granted. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for an order pursuant to CPLR §3211 (a0(4) and (7) is granted. The complaint is hereby dismissed.

Dated: July 23, 2007

MELVYN TANENBAUM

J.S.C.

FINAL DISPOSITION