[* 1]

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

PRESENT: Hon. NICHOLAS FIGUERON Justice PART 46

Index Number : 117591/2006
ARONS, RAYMOND R.
VS
COLUMBIA UNIVERSITY
Sequence Number : 002
ARTICLE 78

INDEX NO. 117591/06
MOTION DATE 2/22/07
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

Motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is considered for disposition 001 and decided in the accompanying decision, order and judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

IS SIGNED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/10/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
RAYMOND R. ARONS,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

COLUMBIA UNIVERSITY IN THE CITY
OF NEW YORK,

Respondent.

Index No. 117591/06

DECISION, ORDER AND JUDGMENT

Nicholas Figueroa, J.:

Motion sequences 001 and 002 are consolidated for disposition in the following decision, order, and judgment.

Petitioner seeks a judgment pursuant to CPLR Article 78 reversing and annulling respondent's decision to terminate his employment. Although petitioner proceeds by petition, that document was initially captioned "Verified Petition and Complaint", the word complaint is crossed out, in ink, apparently by petitioner's attorney, and petitioner has not included a summons with his papers. However, the petition alleges causes of action based on breach of contract and fraudulent misrepresentation and demands monetary damages. Respondent, in motion sequence 002, moves to dismiss the petition on the ground that it is time-barred, having been commenced more than four months after the decision to terminate petitioner's employment.

Petitioner was appointed as an adjunct assistant professor in 1987. He received a promotion in 1997 and 2004. He was an associate clinical professor when respondent informed him in a June

9, 2005 letter, that it would not renew his employment contract beyond December 31, 2005.

Prior to his termination, between 2002 and 2005, respondent's salary was partially funded by grants from private foundations. Respondent paid the balance of his salary.

Petitioner alleges that when he received the termination letter on June 9, 2005, Alan Rosenfeld, Dean of respondent's Mailman School of Public Health, informed him that the termination letter would be rescinded and that petitioner would be reinstated, if sufficient salary support could be provided for the cost of his salary as had been provided between 2002 and 2005.

Petitioner alleges that he obtained salary commitments totaling $80,000 a year for the years 2006, 2007, and 2008. On July 1, 2005, petitioner provided Rosenfeld with letters from the financial backers showing the amounts they would pay. Petitioner argues that by obtaining this financing , he "fulfilled his obligation in the contractual arrangement stated by Dean Rosenfeld for the continuation of his position with salary for the year 2006-2007."

On September 8, 2005, petitioner submitted the letters he furnished to Rosenfeld to Richard Parker, chairman of the sociomedical sciences department at the Mailman School of Public Health. Petitioner, under Columbia University Statute §71(e)(3), asked "for a written statement from you as to the specific reasons for the department's decision not to renew my appointment as Officer of Instruction." Petitioner alleges Rosenfeld did not respond to his communication. Petitioner states that Parker did not respond to his letter either.

On September 19, 2005, petitioner filed a grievance with respondent's Faculty Affairs Committee. Petitioner's statement of the case alleged that the nonrenewal was based on "personal animus, nature of terminal degree, sexual orientation, and age."

According to petitioner's complaint, Rosenfeld "has held personal animus toward petitioner since they were both staff at Presbyterian Hospital. The factual basis for this prejudice originates

during the Edward Noroian and Joseph Snyder Administration of Presbyterian Hospital and Clinic where Rosenfeld was a physician and [petitioner] was an administrator. The history resulted in bias and unequal treatment surrounding [petitioner's] four year review in 2001, request for promotion in 2003, and letter of nonrenewal in 2005."

Continuing, petitioner stated that Nancy Vanderventer, respondent's Acting Director of Soociomedical Sciences, told him, in 2000, that there would be no four year review of his performance.

Petitioner contended that Vanderventer reduced the physical space available to him, removed his staff, "had no students referred to him as an advisor from his department", had him "removed as Practician Director of MPH Placements, and was not invited to move with his department into its new location in 2001."

Petitioner contended that Parker became chairman of the Department of Sociomedical Sciences in 2001. Petitioner described Parker as "...a well-known anthropologist, belonging to the Society of Lesbian and Gay Anthropologists. His sexual orientation has controlled the direction of much of the new research and resources of the department since 2001." Petitioner contended that he was excluded from faculty affairs and never invited to present his work at weekly seminars, because he is heterosexual.

Petitioner also contended that "Parker has hired, and promoted primarily homosexual faculty" and that "the grants and projects he has undertaken address primarily issues of sexuality, transgender, and health issues of the gay population."

Petitioner next argued that the majority of the new faculty Parker hired had doctorates in the social sciences, but that petitioner's doctorate is in public health and that the former persons were the only ones promoted; however, petitioner then contended that "the animosity between petitioner

and Parker was so intense that Parker never informed petitioner that he received his promotion."

Petitioner contended that Rosenfeld's failure to reply to his July 1, 2005 letter "confirm[ed] his bias, prejudice and animus towards petitioner..."

Petitioner stated that he tape recorded his June 9, 2005 meeting with Rosenfeld. He asserted that it was at this meeting that Rosenfeld said he would rescind the letter of nonrenewal, if petitioner obtained funding and Parker agreed.

Petitioner stated that one of the signatories to the letter, Mary Mundinger, Dean of respondent's School of Nursing, "improperly signed" it "under pressure." Petitioner alleged that, "In that her department provided petitioner with no salary support, she was informed that she had no option but to sign off on the letter of nonrenewal because of the reciprocal nature of joint appointments between the School of Nursing and the School of Public Health."

Petitioner stated that he was terminated two months before he turned sixty-five and "eligible for Social Security without penalty." He stated that terminating him close to retirement age was "unreasonable and defies the reasonable and prudent man standard. This is yet another example of prejudicial behavior that is arbitrary and capricious."

On April 26, 2006 respondent's Faculty Affairs Committee issued a report recommending that the letter of nonrenewal be rescinded and that petitioner be reinstated. The report noted that there was no evidence that Rosenfeld held any personal animus towards petitioner. The report stated that although petitioner's fourth year review was delayed, such delays are common in petitioner's department. The report also noted that when petitioner was promoted after the review, he understood that his appointment was a yearly, renewal appointment.

The report found that there was no bias against petitioner based on the nature of his degree. As of December, 2005, Parker had hired or promoted eight persons with petitioner's degree. As of

February 6, 2006, of the four people who received letters of nonrenewal, two were Ph.D., and two held petitioner's degree.

The report found that it was proper for Mundinger to sign the nonrenewal letter, as petitioner had a joint appointment in the nursing and public health schools.

Although the report found that petitioner was the oldest person among the faculty members who received nonrenewal letters, it also found that he was not terminated because of age discrimination.

However, the report found that there was no basis to terminate petitioner because of the nature of his funding. The report found that the manner in which petitioner's salary was partially funded by outside sources was acceptable. It found that petitioner received commitments for outside funding and that his June 9, 2005 and July 1, 2005 letters, to Rosenfeld and Parker, demonstrated the sources and amounts of the financial commitments he received.

Moreover, according to the report, respondent overstated the amounts it claimed to have paid towards petitioner's salary and understated the amounts received from outside sources. Therefore, the report found that it considered respondent's "claim that Prof. Arons was terminated on account of a 'low level of external support' as arbitrary and discriminatory, with no basis in fact." Continuing, the report stated, "it is difficult to see how Parker could recommend nonrenewal starting Jan. 1, 2006 on fiscal grounds."

The report found that there had been no response to petitioner's letters seeking rescission of the nonrenewal letter and rejected as inadequate Rosenfeld's statement that the letter "fell through the cracks" as an excuse for his failure to respond.

However, the report recommended that the financial arrangement by which petitioner, and other faculty members, received funding be terminated. The report called this the "passed-through"

arrangement. The report stated, "Clearly, it is not an appropriate procedure for professors to receive checks from private foundations and then deposit them with someone in the chair's office. Such an approach can easily lead to mismanagement and inappropriate accounting of monies."

The report recommended petitioner's reinstatement.

On July 19, 2006, respondent's Provost, Alan Brinkley, informed the Faculty Affairs Committee that its recommendation was rejected and that petitioner would not be reinstated.

Brinkley stated that he agreed with the report's conclusion that "pass through" accounts should be discontinued. He noted that in the future, the school would not accept money from "outside agencies in support of faculty salaries that are not obtained and managed through the University's system of sponsored research administration."

However, Brinkley rejected the recommendation to reinstate petitioner. Although the "pass through" arrangement was being discontinued because of the way it operated, Brinkley noted that, "Full-time faculty members in the School of Public Health are expected to raise their own financial support from external sources. Professor Arons failed to meet that expectation and consequently received between 50 and 100 percent of his salary from departmental sources between 2001-2002 and the 2005-2006[sic]." Brinkley found that the report incorrectly calculated the amounts petitioner received from outside sources, and noted that respondent paid seventy percent of his salary from 2005 to 2006.

Brinkley conceded that after petitioner received the nonrenewal letter, he obtained external funding for almost ninety percent of his salary. However, the funding was by the discredited "pass through" means.

Brinkley determined that petitioner would not be reinstated.

On October 10, 2006, petitioner, relying on respondent's Code of Academic Freedom and Tenure §§75(f)(1) and (2), requested a review by respondent's Trustees and asked for reinstatement and other relief.

On October 17, 2006, Patricia Catapano, respondent's Associate General Counsel, informed petitioner that no appeal was available to him under §75(f)(1) and (2). Catapano stated §73(b) of the Code provides that "if, but only if" the Faculty Affair Committee finds substantial evidence for believing that discrimination because of age or other protected discrimination has occurred, there may be a hearing under §75(e). However, because the report found no evidence of age discrimination in petitioner's nonrenewal, there would be no hearing. As there was no hearing, under §75(e), there could be no appeal from a hearing under §75(f). Therefore, Catapano wrote, "there will be no further proceedings on this matter."

Petitioner commenced this Article 78 proceeding on November 24, 2006. Respondent moved to dismiss the petition as time-barred, arguing that the June 9, 2005 nonrenewal notice was the final determination that petitioner should have challenged, that the subsequent determinations were not determinations from which an Article 78 proceeding could be taken, and that the grievance proceeding did not toll the four-month statute of limitations.

Respondent argues that the June 9, 2005 nonrenewal letter was final, as a cause of action for a case based on wrongful employment termination, which accrues when the employee receives notice that employment will end. Continuing, it argues that although petitioner's termination could possibly be rescinded, the formal nonrenewal letter did not become "any less binding or final." Moreover, respondent asserts that petitioner knew by September 19, 2005 that the letter would not be rescinded, as by that date his letters to Rosenfeld and Parker, requesting rescission, remained unanswered, as he noted in the internal grievance he filed that day.

Respondent argues that because the internal grievance procedure was voluntary, it did not toll the statute of limitations. Because petitioner was not obligated to file a grievance before commencing an Article 78 proceeding, the grievance did not extend his time to file that proceeding.

The motion to dismiss the proceeding is granted, as the time to file the instant proceeding accrued on the date petitioner learned he would be terminated. Therefore, his time to commence the proceeding expired on October 9, 2005, four months after the June 9, 2005 termination. There were no events extending his time to file and since the instant proceeding was commenced on November 24, 2006, it is untimely (CPLR §217(1)).

The June 9, 2005 notice to petitioner was unequivocal. It stated that, "We are writing to inform you that your appointment as Clinical Professor of Sociomedical Sciences...will not be renewed beyond December 31, 2005." Petitioner "acknowledge[d his] receipt and understanding of this letter", in writing on June 14, 2005. The statute of limitations started running when petitioner received the notice, as "The act of giving complainant notice that she would not be reappointed gave rise immediately to a 'cause of action'...and therefore started the running of the statute of limitations." (*Matter of Queensborough Community College of the City University of New York v. State Human Rights Appeal Board and Marenco*, 41 AD2d 926).

Nor does the fact that Rosenfeld indicated that he would consider withdrawing the notice lessen the notice's finality. This equivocal statement did not create "...the impression that the determination was...intended to be nonconclusive" (see *Matter of Edmead v. Mcguire*, 67 NY2d 714, 716). Moreover, "...the mere reconsideration of an otherwise final...determination will not extend the period of limitations within which to seek review of the determination (citations omitted)." (*Chase v. Board of Education of Roxbury Central School District*, 188 AD2d 192, 197).

Moreover, even if the statement about reconsideration could have given petitioner the impression that there would be a reconsideration, he knew by September 19, 2005, that the termination would not be withdrawn. The failure to withdraw the termination was one of the grounds of the internal grievance petitioner filed on September 19, 2005; therefore, the statute ran by January 2006, at the latest.

The internal grievance procedure did not toll the statute of limitations. The grievance procedure was voluntary. The respondent's Chapters and Statutes, §73(b), states that if an instructor alleges that he or she was not reappointed because of race, color, religion, sex, age, or national origin, "he or she may complain in writing to the Faculty Affairs Committee..." The language that a person "may" utilize the procedure demonstrates that the procedure was voluntary, not mandatory (see *Bargstedt v. Cornell University*, 304 AD2d 1035, 1036). Therefore, petitioner could have commenced an Article 78 proceeding without resorting to the grievance proceeding, and the voluntary internal appeal did not toll the statute (*Matter of Queensborough Community College v. New York State Human Rights Appeal Board and Marenco, id.* at 926).

Even if the voluntary grievance proceeding tolled the statute, respondent's provost notified petitioner that he would not be reinstated on July 19, 2006; therefore, the instant proceeding was still time-barred, as it was commenced on November 24, 2006, five days more than four months from the provost's determination.

Petitioner's argument that his causes of action for monetary damages remain timely, as they are subject to a six year statute of limitations, is without merit. The damages petitioner seeks for fraudulent misrepresentation and breach of contract are merely ancillary to the Article 78 relief he seeks: declaring that his termination was arbitrary and capricious and that the termination be rescinded. As the damages request is incidental to the main claims under Article 78, it is governed

by the four month statute (see *Park v. Board of Trustees of the City University of New York*, 68 NY2d 702).

In any event, the petition does not support a finding that there was a contract breach or a fraudulent misrepresentation.

Even if petitioner had received a promise that he would be reinstated if he obtained ninety percent financing, respondent correctly notes that petitioner obtained only eighty-eight percent funding.

Nor has petitioner demonstrated that he relied on any statements from respondent to his detriment. He has not demonstrated that any statement respondent made caused petitioner to suffer any harm because of justified reliance on such statement. Absent a showing of detrimental reliance, petitioner has not established a cause of action for fraudulent misrepresentation (see *Global Minerals and Metals Corp. v. Holme*, 35 AD3d 93, 98).

Accordingly, it is

ORDERED that the motion to dismiss the petition is granted, and it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision, order and judgment of the court.

Dated: September 10, 2007

ENTER

J.S.C.