

**Fleischman v New York City Dept. of Educ.**

2007 NY Slip Op 33549(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0104997/2006

Judge: Joan Madden

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

PRESENT: Hon Joan A. Madden

PART 11

Index Number : 104997/2006  
FLEISCHMAN, ANDREW  
vs  
N.Y.C. DEPT. OF EDUCATION  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_ this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>+ cross-motion</sup>  be decided in accordance with the attached memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
NOV 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 24, 2007

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X

ANDREW FLEISCHMAN, individually and  
on behalf of all similarly situated persons,

Plaintiff,

-against-

Index No. 104997/06

THE NEW YORK CITY DEPARTMENT OF  
EDUCATION, CITY OF NEW YORK, THE  
UNITED FEDERATION OF TEACHERS and  
MERCY COLLEGE,

Defendants.

-----X

**FILED**  
NOV 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Joan A. Madden, J.:**

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In sequence number 001, defendant Mercy College moves to dismiss the complaint asserted against it as time-barred and for failure to state a cause of action, pursuant to CPLR 217, 3211 (a) (5) and (7), Article 78. In sequence number 002, defendant The United Federation of Teachers (the UFT) moves to dismiss the complaint asserted against it for failure to state a legally cognizable cause of action, for failure to exhaust administrative remedies, and as time-barred. Plaintiff Andrew Fleischman, individually and on behalf of all similarly situated persons, cross-moves for leave to amend the complaint to assert a cause of action against Mercy College for breach of its contract with defendant the New York City Department of Education (DOE), arising out of his capacity as a third-party beneficiary of the contract, and to assert additional factual allegations in support of his claims against the UFT for breach of the duty of fair

representation.

Fleischman alleges the following in support of the claims against Mercy College and the UFT:

In 2003, Fleischman was accepted into a Teaching Fellows program created and subsidized by the DOE. The DOE assigned him to be enrolled in the Mercy College master's degree in elementary education program for the fall 2003 semester.

The Mercy College master's degree program is subject to applicable regulations regarding the issuance of a Transitional B teaching certificate promulgated by the DOE. Mercy College failed to comply with these regulations. The regulations required: Mercy College, the DOE (formerly, the New York City Board of Education), and Fleischman to enter into written agreement concerning Fleischman's teaching load and the mentoring, planning, observing, advising, and evaluating of Fleischman and his teaching; Mercy College to provide Fleischman with daily mentoring by an experienced teacher in the area of his proposed certification for the first eight weeks of his employment as a teacher and mentoring for at least the remainder of his first year in the New York City Teaching Fellows program; Mercy College to provide Fleischman with a teaching load within his area of proposed certification; and Mercy College, the DOE, and Fleischman to agree to the time, manner, and frequency of the observations and mentoring of Fleischman.

As a direct result of Mercy College's failure to comply with the DOE regulations, Fleischman was assigned as a substitute teacher and never given a permanent teaching assignment. Eventually, he was removed from the classroom without cause and placed on "administrative assignment."

Subsequently, Fleischman contacted the UFT and requested help. However, the UFT declined to represent him, on the ground that the collective bargaining agreement (the CBA) into which the UFT and the DOE entered does not include individuals in the Teaching Fellows program.

The CBA sets forth the terms and conditions of employment for all New York City school system teachers, including nontenured teachers having temporary, provisional, and permanent licenses issued by the DOE. Fleischman concedes that the CBA does not expressly include Transitional B certificates in any license category covered by the CBA and that the UFT did not negotiate the terms and conditions of employment of individuals holding such licenses.

Fleischman, however, contends that such license or certificate holders are subject to the CBA and that the UFT should have represented his interests while negotiating and enforcing the CBA on the ground that the CBA includes licenses constituting a "new title or category of employees having a community of interest with employees in the existing bargaining unit described herein" (CBA at Art. 1). Fleischman further contends that the UFT should have represented him and enforced his rights under the CBA while he was enrolled in the Mercy College program and while he was employed by the DOE.

In July 2005, Mercy College expelled him from its master's degree program on the ground that he was not engaging in classroom instruction. As a result of the expulsion, Fleischman lost his Transitional B teaching certificate. On December 12, 2005, the DOE terminated his employment because he did not have a teaching certificate.

On these allegations, Fleischman asserts causes of action against the DOE and defendant the City of New York for breach of contract, misrepresentation, and acting irrationally,

arbitrarily, and contrary to law. Against the UFT, Fleischman alleges causes of action for breach of the duty of fair representation and intentional failure to enforce his rights as a New York City Teaching Fellow. Against Mercy College, Fleischman alleges a claim for breach of contract arising out of allegations that Mercy College violated a contract with Fleischman, violated certain DOE regulations, failed to permit Fleischman to remain enrolled in its master's degree program, and expelled Fleischman from the program.

Mercy College now seeks, first, to convert this action from a plenary action to a CPLR Article 78 special proceeding on the ground that Fleischman's claim asserted against it is essentially a challenge to Mercy College's administrative decision to expel Fleischman. Mercy College further contends that, after conversion, this action must be dismissed as barred by the four-month statute of limitations applicable to Article 78 proceedings.

In opposition, Fleischman contends that Mercy College has misconstrued the claim asserted against it and that the claim is for breach of a contract between Mercy College and himself obligating Mercy College to provide him with certain services and benefits. In addition, Fleischman cross-moves for leave to amend the complaint to add a claim against Mercy College for breach of a master contract between Mercy College and the DOE, in his alleged capacity as a third-party beneficiary of that contract.

As set forth below, Fleischman should have brought this action as an Article 78 proceeding.

The reach of Article 78 is broad, and includes within its scope "every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article" (CPLR 7802 [a]). Article 78 judicial review is

limited to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]).

An Article 78 proceeding is the proper forum with which to review suspension or expulsion determinations by a private corporation or other state-chartered society (Caso v New York State Public High School Athletic Assn., Inc., 78 AD2d 41 [4<sup>th</sup> Dept 1980]) because such an entity is "beholden to the state for [its] franchise or charter or the exercise of [its] functions, or a right was involved that was derived from the state" (Weidenfeld v Keppler, 84 App Div 235, 239 [1<sup>st</sup> Dept], affd 176 NY2d 562 [1903]; Altschuler v University of Penn. Law School, 1997 WL 129394 [SD NY 1997], affd 201 F3d 430 [2d Cir 1999], cert denied 530 US 1276 [2000]). Thus, "[p]rivate colleges and universities, having accepted a State charter, 'can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules' " (Bennett v Wells Coll., 219 AD2d 352, 356 [4<sup>th</sup> Dept 1996], quoting Gray v Canisius Coll. of Buffalo, 76 AD2d 30, 33 [4<sup>th</sup> Dept 1980]). Indeed, "[c]ourts retain a 'restricted role' in dealing with and reviewing controversies involving colleges and universities" and, therefore, "CPLR article 78 proceedings are the appropriate vehicle for such controversies because they ensure that the over-all integrity of the educational institution is maintained" (Maas v Cornell Univ., 94 NY2d 87, 92 [1999] [citation omitted]).

Accordingly, Article 78 proceedings have been held to be the proper procedure by which to review administrative determinations made by private educational institutions, such as Mercy College, where the contention is made that the respondent violated its own rules, or acted arbitrarily or capriciously in applying such rules (Radin v Albert Einstein Coll. of Medicine of Yeshiva Univ., 2005 WL 1214281, \*10 [SD NY 2005] [citation omitted] ["review of academic

and administrative decisions at private educational institutions has been limited to Article 78 proceedings [including] 'grading disputes, dismissals, expulsions, suspensions, and decisions regarding whether a student has fulfilled the requirements for graduation' " (citation omitted)]; see e.g. Susan M. v New York Law School, 76 NY2d 241 [1990] [school's decision to expel student for academic deficiency]; Olsson v Board of Higher Educ., 49 NY2d 408 [1980] [college's decision to withhold a diploma from student]; Hutcheson v Grace Lutheran School, 132 AD2d 599 [2d Dept 1987] [school's decision to expel student]; see also Caso v New York State Public High School Athletic Assn., Inc., 78 AD2d 41, supra [incorporated high school athletic association determination of student's ineligibility to participate in athletics]).

Although Fleischman couches his claim against Mercy College as a contract claim and alleges that the terms of the contract are supplied by the school's bulletins, circulars and regulations made available to him and other students (see Radin v Albert Einstein College of Medicine of Yeshiva Univ., 2005 WL 1214281, supra), the claim is essentially a challenge to Mercy College's administrative policies and procedures in operating its master's degree program, in failing to comply with the applicable DOE regulations, and in determining to expel Fleischman from its master's degree program, as contrary to law, arbitrary, and capricious.

Therefore, his claim against Mercy College should have been brought under Article 78. It is the substance of the claim, rather than its ostensible form, that determines which law applies (see Foster v City of New York, 157 AD2d 516 [1<sup>st</sup> Dept 1990]). Where, as here, the gravamen of the claim falls within the scope of Article 78, that claim must be brought as an Article 78 proceeding (see Todras v City of New York, 11 AD3d 383, 384 [1<sup>st</sup> Dept 2004] ["Inasmuch as plaintiff's claims [for back pay and pension contributions] are fundamentally premised upon the

contention that the administrative determinations terminating his employment and denying him line of duty status were wrongful, they should have been brought in a proceeding pursuant to CPLR article 78"]; Rodriguez v City of Yonkers, 279 AD2d 632 [2d Dept 2001]; Broderick v Board of Educ., Roosevelt Union Free School Dist., 253 AD2d 836 [2d Dept 1998], lv denied 93 NY2d 802 [1999]).

As Fleischman's claim asserted against Mercy College should have been asserted in an Article 78 proceeding, the claim is governed by the four-month limitations period mandated by CPLR 217 (Belmonte v Saratoga Youth Hockey, Inc., 18 AD3d 1065 [3d Dept 2005]; Todras v City of New York, 11 AD3d 383, supra; Rodriguez v City of Yonkers, 279 AD2d 632, supra; Broderick v Board of Educ., Roosevelt Union Free School Dist., 253 AD2d 836, supra). Here, Fleischman alleges that he was enrolled in Mercy College's master's degree program through the date of his expulsion in July 2005. Therefore, the limitations period expired no later than the end of November 2005. Fleischman did not commence this action until April 11, 2006, approximately eight months after the expulsion.

For these reasons, Mercy College's motion to dismiss the claim asserted against it as time-barred is granted.

Fleischman's cross motion for leave to amend the complaint to base its claim for breach of the contract (fifth cause of action) on a "Master Contract" between the DOE and Mercy College must also be denied. This claim alleges that under the Master Contract, "Mercy agreed to provide services to individuals within the Teacher Fellows Program" and to among other things, "provide plaintiff with all services required by the New York State Education Regulations

and to submit (on plaintiff's behalf) to the New York State Education Department all documents necessary to comply with these regulations, including the three year commitment of employment with [DOE].” It is further alleged that “[i]ndividuals enrolled in the Teaching Fellows Program were expressly identified as beneficiaries of the foregoing Master Contract.” The claim alleges that Mercy breached its obligations to plaintiff under the Master Contract by, among other things, “failing to obtain and submit to the New York State Education Department the three-year commitment of employment, failing to enter into either the first or second written agreement with [DOE] concerning plaintiff's teaching load, mentoring schedule, observation schedule or other matters required by state regulations, and generally failed to provide plaintiff the services required under the Master Contract” and “by failing to permit plaintiff to remain enrolled in its Masters Degree Program and by expelling plaintiff from the Masters Degree Program.”

In support of his motion to amend, Fleischman submits a copy of the Master Contract which is entitled “Requirements Agreement with the Eligible Colleges and Universities to Provide Teacher Education Program Services For Alternate Route Teacher Candidates.<sup>1</sup>” The Master Contract indicates that it was authorized by the DOE for the purpose of expanding the Teaching Fellows Program to meet the teacher staffing needs of the New York City public schools. (See Attachment A to the Master Contract).

Section 2, entitled Scope of the Agreement, indicates that the Master Contract was “designed for pre-service training, in-service course work, monthly faculty observations, and support services for alternative route teacher certification program.” Section 5, entitled

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<sup>1</sup>Alternate Route Teaching certificate program is another name for the Teaching Fellows Program

Services, describes the services provided under the Master Agreement as “all of the professional, supervisory, administrative, educational, training, advisory and other activities, as well as all supplies, equipment and facilities the Contractor (here Mercy College) furnishes to, or for the benefit of, the Board (i.e. DOE) and the Board’s administrators, teachers and other personnel.” These services are to be provided “only to those alternate route teacher candidates whom the Board assigns to [the Contractor] and...the Contractor may not reject, suspend, or otherwise refuse to provide any services to any [program participants] without prior written notification to the Chancellor or his designee(s).”

The Master Agreement further provides that the “Contractor shall provide all program participants, who are alternate route candidates, with courses of study approved by the New York State Educational Department, including course work and observations, appropriate for them to attain a Masters Degree in Education consistent with state regulations for transitional certification ” and sets forth various services to accomplish this goal including advising the students on matriculation requirements, providing a quality in-service program, and monitoring the academic progress of the participants.

In exchange for the Contractor’s provision of these services and upon the Contractor’s compliance with certain reporting requirements, the Master Contract provides that DOE will pay the Contractor \$12,000 per participant. In the event the Contractor materially breaches the contract, DOE is “entitled to refuse payment to the Contractor and to demand prompt refund of any payments that shall have been made already.”

While leave to amend a pleading shall be freely granted (Fahey v County of Ontario, 44

NY2d 934 [1978]; see CPLR 3025 [b]), where the proposed amendment is obviously without merit leave to amend will be denied (Daniels v. Empire-Orr, Inc. 151 AD2d 370, 371 [1<sup>st</sup> Dept 1989). “A third party may be the beneficiary of a public as well as a private contract....He may recover, however, only by establishing (1) the existence of valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost” (Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314, 336 [1983][citations omitted]). Furthermore. “[e]ven when the contracting parties specifically intend to confer benefits on a third-party, not all consequential damages that flow from a breach of contract are recoverable by a third-party. The contract must evince a discernable intent to allow recovery for specific damages to the third party from a breach thereof before a cause of action is stated” (Alicea v. City of New York, 145 AD2d 315, 317 (1<sup>st</sup> Dept 1988).

“The best evidence ... of whether the contracting parties intended a benefit to accrue to the third party can be ascertained by the language of the contract itself. An intent to benefit a third party can also be found when ‘no one other than the third-party can recover if the promisor breaches the contract..or..the language of the contract itself clearly evidence an intent to permit enforcement by a third party’” (id, citing, Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 66 NY2d 38, 45 [1985]). At the same time, however, “it is not necessary that third party beneficiaries be identified or identifiable at the time of the making of a contract” (In the Matter of Associated Teachers of Huntington, Inc., 33 NY2d 229, 234 [1973]).

Applying these principles here, the court finds that based on the Master Contract,

Fleishman is not an intended beneficiary of the contract such that he would be entitled to recover damages from Mercy for breach of the Master Contract with DOE. Notably, contrary to the allegations in the proposed amended complaint, although the Master Contract provides services to program participants, like Fleishman, it specifically states that its intent is to benefit DOE and its employees. In addition, nothing in the Master Contract suggests any intent to permit the program participants to enforce the terms of the contract, which specifically provides a remedy to the DOE in the event of its breach.

Thus, while providing for services to Fleishman and other program participants, the Master Contract is between Mercy and DOE and its stated purpose is to expand the Teaching Fellows Program to enable New York City public school system to meet staffing needs. Under these circumstances, Fleishman was, at best, and incidental beneficiary of the Master Contract and not an intended beneficiary. Accordingly, the motion to amend the complaint to amplify the fifth cause of action against Mercy based on this theory must be denied.

In the amended pleading, Fleishman also asserts a proposed sixth cause of action against Mercy alleging that by virtue of the Master Contract and Fleishman's participation in the Teaching Fellows Program, Mercy owed him a duty to comply with New York State Educational Department regulations relating to Transitional B certificates and breached that duty. As Fleishman is not a third-party beneficiary of the Master Contract, this proposed claim has no merit and permission to add it is denied. Furthermore, the primary thrust of this claim is a challenge to Mercy College's administrative policies and procedures in operating its master's degree program and in particular, its alleged failure to provide the classes and training required by the applicable regulations. Therefore, the proposed claim should have been brought in an

Article 78 proceeding no later than November 2005 and is untimely.

The UFT now seeks to dismiss the claims asserted against it for failure to state a legally viable cause of action, as time-barred, and for failure to exhaust administrative remedies.

In opposition, Fleischman contends that the UFT bases its motion on the erroneous belief that it processed a grievance on behalf of Fleischman up to and through the arbitration process. Fleischman cross-moves for leave to assert additional factual allegations against the UFT in support of the fourth cause of action for failure to fairly represent him and the putative class members.

In the third cause of action, Fleischman, individually and on behalf of all similarly situated persons, alleges that the UFT failed to negotiate terms and conditions of employment with respect to teachers holding Transitional B certificates and that this failure constitutes a breach of the UFT's duty of fair representation to plaintiff and to all teachers employed by the DOE under the Teaching Fellows program. In the fourth cause of action, Fleischman alleges that the UFT violated its duty of fair representation under the CBA by intentionally choosing to ignore the rights of individuals in the DOE Teaching Fellows program and to decline to represent them under the CBA, and by treating them differently than it treats other teachers in the New York City educational system with regard to representation, education about rights guaranteed by the CBA, and enforcement of those rights.

Fleischman's claims against the UFT fail to state a cognizable cause of action because Fleischman has failed to plead that the UFT's individual members authorized or ratified the alleged misconduct. The UFT is an unincorporated labor organization or

association, and is treated as such under State law. It has long been recognized that,

for better or for worse, wisely or otherwise, the Legislature has limited . . . suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven. Despite procedural changes, substantive liability in such cases is still, as it was at common law, 'that of the members severally.'

Martin v Curran, 303 NY 276, 282 (1951) (emphasis added), quoting Sperry Prods., Inc. v Association of Am. R.R., 132 F2d 408, 410 (2d Cir 1942), cert denied 319 US 744 (1943); see Gen. Assn. Law § 13. The pleading requirement applies to a cause of action for violation of a union's duty of fair representation with respect to members' rights under a CBA (Walsh v Torres-Lynch, 266 AD2d 817 [4<sup>th</sup> Dept 1999] [holding that plaintiff teacher's failure to allege that each union member authorized or ratified alleged breach of duty of fair representation rendered complaint fatally defective as against teachers' union]).

Fleischman's allegations that the UFT's decision not to represent Transitional B certificate holders is "political" and based on a viewpoint held by the "vast majority" of the UFT's membership (see Complaint at ¶ 50) is not sufficient to fulfill the pleading requirement, which requires an allegation that each and every individual member acquiesced in, or ratified, the alleged misconduct (see Martin v Curran, 303 NY at 282).

For these reasons, the UFT's motion to dismiss the claims asserted against it is granted.

In the proposed amended complaint, Fleischman does not assert factual allegations that correct this fatal pleading deficiency. Therefore, that branch of the cross motion to amend the complaint to add additional facts to the claims asserted against the UFT is denied.

Accordingly, it is

ORDERED that motion sequence number 001 is granted and the fifth cause of action asserted against defendant Mercy College is severed and dismissed, with costs and disbursements to Mercy College as taxed by the Clerk of the Court; and it is further

ORDERED that motion sequence number 002 is granted and the third and fourth causes of action asserted against defendant The United Federation of Teachers is severed and dismissed, with costs and disbursements to the UFT as taxed by the Clerk of the Court; and it is further

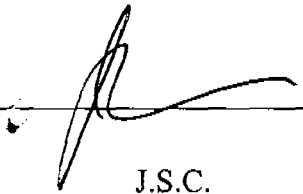
ORDERED that the cross motion to amend is denied; and it is further

ORDERED that the first, second, and sixth causes of action asserted against defendants The New York City Department of Education and the City of New York shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 24, 2007

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J.S.C.

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