

**Eidlisz v New York Univ.**

2008 NY Slip Op 32138(U)

July 28, 2008

Supreme Court, New York County

Docket Number: 0600105/2005

Judge: Michael D. Stallman

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

PRESENT: STALLMAN  
Justice

PART 7

Eidlisz, L

INDEX NO. 600105105  
MOTION DATE submitted 5/18/08 in NY  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

NYU

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause <sup>(+T read)</sup> — Affidavits — Exhibits <u>A-II</u>	<u>1-2</u>
Answering Affidavits — Exhibits <u>L-9: 1-6 (+A read)</u>	<u>3-4-5</u>
Replying Affidavits <u>Exs JJ-QQ (+T reply read)</u>	<u>6</u>
<u>NYU's Reply - Ex 1 (+A reply read)</u>	<u>7</u>

Cross-Motion:  Yes  No

Supplemental Affs.  
Upon the foregoing papers, it is ordered that this motion is determined in accordance with the attached memorandum decision and order.

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

**FILED**  
JUL 31 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**MICHAEL D. STALLMAN**  
J.S.C.

Dated: 7/28/08

[Signature]  
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: IAS PART 7

-----X  
LEONARD EIDLISZ,

Plaintiff,

- against -

NEW YORK UNIVERSITY and NEW YORK  
UNIVERSITY COLLEGE OF DENTISTRY,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.:

Plaintiff Leonard Eidlisz (Eidlisz) moves, pursuant to CPLR 3212, for summary judgment in his favor. The complaint alleges that plaintiff took a full course of studies at NYU College of Dentistry, passed the courses and paid over \$182,000 in tuition, but was denied his degree and diploma. The complaint asserts causes of action for specific performance of a contract and for equitable estoppel, and seeks a judgment directing the College of Dentistry to award Eidlisz his degree and diploma, and to issue the necessary authorizations to enable him to take his Dental and Northeast Regional Boards.

Defendants New York University (NYU) and NYU College of Dentistry cross-move, pursuant to CPLR 2215 and 3212, for summary judgment dismissing the complaint, contending, inter alia, that the case should have been brought as an Article 78 proceeding and is untimely.

Index No. 600105/05

Decision and Order

**FILED**  
JUL 31 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

### BACKGROUND

Eidlisz began his course of studies at the College of Dentistry in the fall of 1993. He continued his studies until the 1995-1996 academic year, which he did not complete. Eidlisz allegedly paid all of his tuition and related fees for that three-year period.

Eidlisz returned to the College of Dentistry as a full-time student for the academic year 1997-1998, and attended classes and paid his tuition and related fees for that academic year and for 1998-1999. In June 1999, Eidlisz attended graduation and his name allegedly appeared in the printed program for the Class of 1999. Following graduation, Eidlisz learned that he had not passed all of his courses, and, therefore, had not satisfied his graduation requirements.

On June 18, 2002, Eidlisz wrote to Dr. Anthony Palatta, requesting permission to be readmitted to the School of Dentistry for the 2002-2003 academic year, so that he could retake the courses he needed to complete his requirements. In his letter, he stated that, when he left the school two years earlier, he thought he had passed all of his courses, and that only in connection with his efforts to take his Boards did he learn that he had not passed two of his courses. He further stated that in the intervening time, he had had a number of family problems which had interfered with his ability to complete his studies.

On July 18, 2002, Palatta wrote to Eidlisz, indicating that he had deficiencies in three courses, and permitting him to register for those courses effective September 1, 2002, as a part-time student. The letter stated: "This is your final opportunity to complete these requirements and receive a degree from the University." Letter from Dr. Anthony Palatta to Leonard Eidlisz, dated July 18, 2002.

Eidlisz registered for the remaining courses in September 2002. It is undisputed that the bill for approximately \$20,000 that was sent to Eidlisz in August 2005, was incorrect, in that he was charged as a full-time student, rather than being charged only for the courses that he was taking. According to Eidlisz, when he received the bill, he went to the Bursar's office to inquire why the bill was so high, and was told that it would be adjusted. Eidlisz alleges that he was not told to make any payments at that time. Eidlisz further alleges that he also spoke to a woman in the Financial Aid Office, told her about the erroneous bill, and was assured that the bill would be adjusted.

According to Eidlisz, between October 2002 and November 2002, he and his family were in the process of moving from Kings Highway to 3221 Fillmore Avenue, both in Brooklyn. On October 25, 2002, the office of Credit Services wrote to Eidlisz, at his Kings Highway address, notifying him that Statements of Account had been mailed to him and that his account was delinquent, and requesting

payment. The letter stated that failure to pay "may adversely affect your Spring 2003 registration." Letter from Ms. Christina Rowland to Leonard Eidlisz, dated October 25, 2002.

Eidlisz asserts that he received neither the Statements of Account, nor the October 25, 2002 letter; however, he did receive a tuition bill in December 2002 that still reflected the erroneous tuition charges. Eidlisz states that, on December 17, 2002, he again went to the Bursar's and Financial Aid offices concerning the bill, and again was told that the bill would be adjusted and that he should not worry, and he was given information concerning financial aid.

On December 13, 2002, Palatta wrote to Eidlisz at his former Kings Highway address, warning him that his tuition was "severely delinquent" and that:

[u]nless tuition is paid in full by Monday Jan. 6, 2003, you'll be de-enrolled from the dental program. All faculty will be informed and any examinations that you may take will be voided. In addition you will lose your opportunity to complete the DDS degree.

Letter of Dr. Anthony Palatta to Leonard Eidlisz, dated December 13, 2002. That letter was apparently returned to NYU undelivered. Palatta then spoke with Christina Rowland of the Office of Credit Services, who had an updated address for Eidlisz. Palatta allegedly then re-sent the letter to Eidlisz via overnight mail.

Eidlisz contends that he never received that letter, and therefore, did not know that he was in danger of being de-enrolled.

On January 13, 2003, a letter was sent to Eidlisz stating:

This is to inform you that you were de-enrolled from [sic] College of Dentistry for Spring semester 2003 for non-payment of your term balances.

You were de-enrolled from the college because you have not displayed the ability to meet your financial obligations to the College. This matter was brought to your attention on several occasions, and your account is still in arrears.

You are no longer a student at the College and will not be permitted to attend lectures/clinics or attend to patients because you are not insured by the University. All privileges associated with your ID card are cancelled.

Letter from Christina Rowland to Leonard Eidlisz, dated January 12, 2003.

According to Eidlisz, he never received Rowland's letter, and he continued to take the classes for which he was registered. Eidlisz completed the classes and took the exams, and allegedly was not notified by his professors that he had been de-enrolled. During the spring semester, Eidlisz alleged stopped by the Financial Aid and Bursar's offices to see if his tuition had been adjusted and continued to apply for financial aid. Eidlisz contends that in none of his visits was he told that he was de-enrolled.

Eidlisz received adjusted tuition bills in July 2003 and September 2003. In September 2003, Eidlisz met with the professor for one of his courses and was told that she could not release his grades until he took care of his finances. Eidlisz paid the

[\*7]  
tuition in full on November 25, 2003, and again went to his professor, who told him to see Palatta.

Eidlisz met with Palatta in January 2004, who showed him copies of the December 13, 2002 and January 13, 2003 letters. Eidlisz alleges that in that meeting he learned for the first time that he had been de-enrolled on January 13, 2003.

In a letter dated January 25, 2003,<sup>1</sup> Eidlisz wrote to Andrew I. Spielman, Dean of Academic Affairs, indicating, inter alia, that he had paid the back tuition that he owed, and requesting Spielman's approval to receive credit for the courses that he had taken in 2002-2003.

On February 12, 2004, Spielman denied his request, stating as follows:

Based on our records you owed money to NYUCD for prior years. In your letter you state "at the time NYU contends that I was de-enrolled, NYU was still presenting me with inflated tuition bills." You should be made aware that requests for payment to the College of Dentistry are independent of one's enrollment status.

Over the past ten years you were given three separate opportunities to complete your degree requirements. As per a letter, dated July 18, 2002, Dr. Anthony Palatta notified you that "this is your final opportunity to complete degree requirements and receive a degree from the University." Unfortunately you did not meet the conditions described in those letters and you were therefore permanently de-enrolled.

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<sup>1</sup> The court presumes that the 2003 date is a typographical error and that the correct date was 2004.

Letter from Andrew I. Spielman to Leonard Eidlisz, dated February 12, 2004.

Eidlisz filed this action on or about January 11, 2005.

#### DISCUSSION

Defendants move for summary judgment dismissing the complaint, arguing first, that although the case was filed as an action, it is properly an Article 78 proceeding, and was untimely filed. Defendants further contend that Eidlisz failed to exhaust his administrative remedies, and finally, that even assuming that he could properly assert a contract claim, defendants did not breach any contract with Eidlisz.

Eidlisz argues that this case, like *Ansari v New York University* (1997 WL 257473; 1997 US Dist LEXIS 6863 [SD NY 1997]), is a contract action and that, therefore, it is timely. In *Ansari*, plaintiff sued NYU, arguing that NYU had failed to provide the facilities and staffing that it had promised in its promotional materials and that those failures constituted a breach of contract and negligent misrepresentation, and violated section 349 of the General Business Law. Although the Court in *Ansari* sustained the plaintiff's breach of contract and General Business Law claims, it also noted that "judicial review of academic and administrative decisions must be brought in an Article 78 proceeding." *Ansari v New York University*, 1997 WL 257473 at \*2, 1997 US Dist LEXIS 6863 at \*6-7, citing *Gertler v Goodgold*, 107 AD2d 481, 486 (1<sup>st</sup> Dept),

*affd* 66 NY2d 496 (1985); see also *Maas v Cornell Univ.*, 94 NY2d 87, 92 (1999) (Article 78 proceedings rather than plenary actions are the appropriate vehicle for judicial review of "university" cases).

The very nature of the relief sought here underscores the conclusion that this case relates to the sort of academic and administrative decisions that the court in *Ansari* indicated are properly the subject of an Article 78 proceeding, rather than an action on a breach of contract. An Article 78 proceeding, by its nature, is brought to obtain relief in the nature of a writ of certiorari, mandamus, or prohibition. CPLR 7801. Here, plaintiff seeks an order directing defendants to award him his degree. Such an order relates to "the exercise of subjective professional judgment" (*Gertler v Goodgold*, 107 AD2d at 485), in contrast with, for example, an action for damages for breach of contract, or a return of academic fees. See e.g. *Matter of Golomb v Board of Educ. of City School District of City of New York*, 92 AD2d 256 (2d Dept 1983) (a petition seeking recovery of back salary is akin to damages for breach of contract and cannot be made in an Article 78 petition).

Eidlisz cites *Matter of Olsson v Board of Higher Educ.* (49 NY2d 408 [1980]), for the principle that the doctrine of equitable estoppel may be applicable when seeking an order directing a university to grant a degree. The Court notes, however, that

*Olsson*, as well as the cases of *Matter of Healy v Larsson* (67 Misc 2d 374 [Sup Ct, Schenectady County 1971], *affd* 42 AD2d 1051 [3rd Dept 1973], *affd* 35 NY2d 653 [1974]) and *Matter of Blank v Board of Higher Educ.* (51 Misc 2d 724 [Sup Ct, Kings County 1966]), cited in *Olsson*, are all Article 78 proceedings, rather than actions at law.

#### CONCLUSION

The Court concludes that this case should properly have been brought as an Article 78 proceeding and is untimely, and must be dismissed having been commenced approximately eleven months after the February 12, 2004 Spielman letter, which denied plaintiff's request for approval of course credit; a year after plaintiff says he learned of the de-enrollment; and approximately two years after the de-enrollment itself. Whatever event is the accrual date, it is clear that this action was commenced long after the four month Article 78 statute of limitations had run. CPLR 217(1). It is therefore not necessary for the Court to convert this action to an Article 78 proceeding, because that would be futile. Neither need the Court reach defendants' other contentions regarding exhaustion of administrative remedies or the merits of plaintiff's contract claim.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted in accordance with this decision, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York  
July 28 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUL 31 2008  
COUNTY CLERK'S OFFICE  
NEW YORK