

Matter of Welsh v Hershkowitz

2009 NY Slip Op 30395(U)

February 18, 2009

Supreme Court, New York County

Docket Number: 114211/08

Judge: Nicholas Figueroa

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

HON. NICHOLAS FIGUEROA,

DECEMBER

PART 46

Justice S.C.

Index Number : 113765/2008

WELSH, SYLVIA

VS.

HERSCHKOWITZ, SAMUEL M.D.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 113765-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

are read on this 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~~ petition is dismissed, by
the accompanying Decision 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).

Dated: 2/18/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

In the Matter of the Petition of

SYLVIA WELSH,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules

Index No. 114211/08

- against -

**DECISION AND
JUDGMENT**

SAMUEL HERSHKOWITZ, M.D., as former
Director, NYU PSYCHOANALYTIC INSTITUTE,
CHARLES TOLK, M.D., as Director, NYU
PSYCHOANALYTIC INSTITUTE, AND NEW YORK
UNIVERSITY,

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
1415)
Respondents.

-----X

Nicholas Figueroa, J.:

In this Article 78 proceeding, petitioner Sylvia Welsh challenges as arbitrary and capricious the refusal of NYU Psychoanalytic Institute to renew her membership on its faculty. Her petition asks for reinstatement or, in the alternative, an order directing the Institute to abide by such procedure as is required under the "Principles and Standards of Ethics of Psychoanalysts" ("Principles and Standards") published by the American Psychoanalytic Association ("the APA," of which the Institute is itself a member). Petitioner has named the Institute and New York University (with which the Institute is affiliated) as respondents.

Respondents have filed separate motions to dismiss. Both move for dismissal on the ground that petitioner has failed to state a cognizable cause for relief (CPLR § 3211[a][7]). The

Institute further moves to dismiss on the additional ground that petitioner has failed to exhaust her administrative remedies (CPLR 7801[1]). Petitioner has cross-moved for leave to amend.

Petitioner, who is on the faculty of the University's School of Medicine, has a doctoral degree in Clinical Psychology, a New York State license to practice psychology, and certification from the APA as a training and supervising analyst. From 1993 through 2007, she was on the faculty of the Institute, which is an unincorporated association that clinically trains and certifies psychoanalysts. As reflected in the Institute's 14-page Faculty Manual, appointments of Institute faculty members are renewable annually.

In 2007, after completing an Institute training program, petitioner became one of its training and supervising analysts. In November of that year, however, petitioner was advised by e-mail from the Institute's then Director that she (along with counsel if she wished) was to meet with the Institute's Executive Committee concerning "certain issues of professionalism ... raised in previous e mails." The meeting took place on December 8, 2007, and it was informal (i.e., no witnesses appeared, no documents were tendered, and no record was made). Some two weeks thereafter, a two-page letter from the Committee memorialized the general concerns regarding petitioner's professionalism that had been discussed at the meeting. The letter ended by putting petitioner on notice that, if the Committee perceived any further unprofessional conduct on her part, it would refer the matter to the Institute's Ethics and Education Committees (the latter being the ultimate arbiter of Institute policy and appointments). In a 12-page, single-spaced letter to the Director and the Executive and Education Committees, petitioner acknowledged that many of the concerns addressed at the meeting related to her "admittedly angry and inappropriate e-mails to [the Director]," but in the main offered a detailed defense of her past difficulties with various

others at the Institute.

Some six months later, by letter dated June 25, 2008, petitioner was advised by the Education Committee that it had voted not to renew her membership. Petitioner thereupon turned to the University, asking it to review the matter through the formal grievance procedures it applies to disputes with its own faculty (as described in the University's Faculty Handbook). The University, however, declined to do so. Petitioner then commenced the present proceeding. It is noted that the Institute's Faculty Manual does not allude to the University's Faculty Handbook or otherwise purport to make non-renewals of faculty membership subject to any particular type of hearing, notice, or other formality.

The premise of the University's motion to dismiss is that the University and the Institute are separate entities and that the petition does not allege that the University had any role in the Institute's challenged action. The CPLR 3211[a][7] prong of the Institute's motion, on the other hand, is based on the premise that, as an unincorporated association, the Institute is not subject to Article 78.

Although the petition identifies numerous respects in which the University has "a strong connection with" the Institute, such connection does not per se establish that the two are legally one and the same and that an action by the Institute is therefore attributable to the University. Notwithstanding the various ways in which the University's School of Medicine is alleged to support the Institute, the allegations in the petition do not add up to the proposition that the Institute is so controlled by the University as to be the latter's alter ego (see Walkovszky v Carlton, 18 NY2d 414). In other words, the petition is devoid of allegations indicating that the University was acting through the Institute in relation to this matter notwithstanding their

separate legal identities, i.e., that the Institute's refusal to renew petitioner's membership is attributable to the University and that the latter is accordingly subject to an order under Article 78 with respect to the matter. The amendment to the petition proposed by petitioner in her cross-motion—which would add to the pleading a paragraph requesting an injunction on the University to “treat the .. [Institute's decision not to renew her faculty membership] as being within the ambit of the procedures in ... its Faculty Handbook and allowing Petitioner to pursue the hearing and appeal procedures available to her thereunder”—add no material substance to her allegations in this connection. The cross-motion is therefore denied.

As for the Institute, relief under Article 78 is as a rule not available against an unincorporated association (Matter of Ivey, 111 AD2d 648; Weidenfeld v Keppler, 84 AD 235). Although there are exceptions to such rule where the respondent is not a governmental agency (see, e.g., Levandusky v One Fifth Avenue Corp., 75 NY2d 530; Cullinan v Ahern, 212 AD2d 103; Snyder-Plax v American Arbitration Association, 196 AD2d 872), no such exception arises unless respondent has been created pursuant to a State statute or charter (see, e.g., Lindemann v American Horse Shows Association, Inc., 164 Misc 2d 937) and thus is “quasi-governmental” (Matter of Gray v Canisius College of Buffalo, 76 AD2d 30, 33). No such exception is presented here.

But even if the Institute were subject to suit under Article 78, it would not follow that petitioner states a case for the relief she seeks. It is undisputed that the Institute is only one of a score of associations in the Greater Metropolitan Area performing certification and training functions for the psychoanalytic profession. In other words, the Institute does not hold the only keys to petitioner's employment in the psychoanalytic field. Accordingly, unlike precedents

such as Lindemann v American Horse Show Association, Inc., *supra*, and cases cited therein), no property right of petitioner's is at stake here and there is thus no constitutional dimension to her claim that she has been denied some particular process due her in relation to such a right. Nor did petitioner have any basis to expect that renewal of her membership on the Institute faculty was to be determined by any particular process, whether under the APA's Principles and Standards or under the Institute's Faculty Manual, given the absence of any promise of such process in either publication.


In view of the foregoing, there is no need to consider the exhaustion-of-remedies argument raised by the Institute.

Accordingly, it is ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and Judgment of the court.

Dated: February 18, 2009

ENTER:



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