

Matter of Welsh v Herschkowitz

2009 NY Slip Op 32473(U)

October 21, 2009

Supreme Court, New York County

Docket Number: 113765/08

Judge: Nicholas Figueroa

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

PRESENT: HON. NICHOLAS FIGUEROA,
Justice

PART 46

Index Number : 113765/2008

WELSH, SYLVIA

vs

HERSCHKOWITZ, SAMUEL M.D.

Sequence Number : 004

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
OCT 26 2009
COUNTY CLERK
NEW YORK

Dated: October 21, 2009

NA
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 : PART 46

-----X
In the Matter of the Article 78 Petition of

SYLVIA WELSH,

Petitioner,

Index No. 113765/08

- against -

SAMUEL HERSCHKOWITZ, M.D., as Former Director,
NYU PSYCHOANALYTIC INSTITUTE, et al.,

**DECISION AND
ORDER**

Respondent.
-----X

Nicholas Figueroa, J.:

The Article 78 petitioner moves for leave to reargue a decision of this court dated February 18, 2009. The decision granted respondents' motions to dismiss and denied petitioner's cross-motion to amend the petition.

The instant proceeding challenged the decision of an unincorporated association, NYU Psychoanalytic Institute, to let petitioner's annual membership on its faculty lapse. The Institute and its affiliate, New York University, were joined as respondents. Petitioner sought an order requiring the Institute to reinstate her; directing it to adopt "due process hearing procedures"; and prohibiting it from bringing charges against her for actions prior to the petition's filing or, in the alternative, directing it to pursue such charges "within the ambit of due process procedures."

Despite the University's joinder as a respondent, the petition did not seek relief against it. After respondents moved to dismiss, however, petitioner cross-moved for leave to amend her petition to seek an injunction directing the University "to treat [the Institute's decision not to renew petitioner's Institute membership] ... as being within the ambit of the procedures in ... [the University's] Faculty handbook and allowing Petitioner to pursue the hearing and appeal

procedures available to her thereunder”

The facts underlying this proceeding were traced in full in the court’s prior decision and require repetition here only in part.

Petitioner is a doctor of clinical psychology on the faculty of the University’s School of Medicine. From 1993 through 2007, she was also on the faculty of the Institute, which clinically trains and certifies psychoanalysts. Petitioner has been certified as a training and supervising analyst by the Institute as well as by the American Psychoanalytic Association.

In December 2007, petitioner met informally with the Institute’s Executive Committee to discuss the Committee’s concerns about petitioner’s purported lack of “professionalism.” Some two weeks later, a letter from the Committee memorialized the meeting’s discussions and put petitioner on notice that any further problem with her conduct would be brought to the attention of the Institute’s Ethics and Education Committees (the ultimate arbiters of Institute policy and appointments).

Approximately six months later, a letter from the Education Committee advised petitioner that it had voted not to renew her annual 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 declined, however, apparently not persuaded that such intercession in the Institute’s affairs was appropriate. Petitioner then commenced the present proceeding. It is noted that the Institute’s own 14-page 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. Petitioner does not allege that the University’s Faculty Handbook

* 4]
contains any reference to the Institute.

As noted in the prior decision, the Institute's motion to dismiss was based on the premise that, as an unincorporated association, the Institute is not subject to mandamus under Article 78. The University for its part moved to dismiss on the ground that, in effect, it could not be mandamus'd to reverse an action of a legally distinct entity such as the Institute. As reflected in the February 2009 decision, this court concluded that respondents' motions were meritorious. The instant motion challenges that conclusion.

Under settled principles, a motion for leave to reargue is addressed to the court's sound discretion (*Foley v Roche*, 68 AD2d 558, 567), and such leave may be granted only if the motion attempts to show that the prior decision resulted from the court's failure to see or correctly apprehend relevant fact or law (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27).

Petitioner first argues that this court was wrong to conclude that the Institute, as an unincorporated association, is not subject to Article 78 intervention in its affairs, such as membership (e.g., *Matter of Ivey*, 111 AD2d 648; *Weidenfeld v Keppler*, 84 AD 235). To counter that conclusion, petitioner poses the following arguments: that "[t]he doctrine" invoked by the court "is one whose time has passed"; that the Article 78 distinction between an unincorporated association and a corporation is untenable where (as in the case of the Institute) the former does business in this State and is therefore statutorily required to file a certificate of doing business (General Business Law § 130); that, under section 7802, an "aggregation of persons" may be made Article 78 respondents and an unincorporated association fits into that phrase; and that an amendment to the General Association Law post-dating the *Weidenfeld* decision effectively erased the distinction that *Weidenfeld* made between unincorporated associations and corporations

[* 5]

for Article 78 purposes. Although these arguments may be problematic in deeper respects as well, it is perhaps enough to note the short response to each. Thus, even if arguendo it were agreed that the view of *Weidenfeld* and its progeny were indeed *passée*, this court would still be bound by those higher court rulings until, if ever, they were overruled; an unincorporated association's own certification of facts about itself, as and where required under the General Business Law, is hardly tantamount to the corporate-life-giving charter or franchise or certification from the State that justifies the State's involvement in the internal workings of a corporation (e.g., *Matter of Ivey, supra*; *Weidenfeld v Keppler, supra*; see, e.g., *Gray v Canisius College of Buffalo*, 76 AD2d 30, 33; *Clark v Curtis*, 273 AD 797, 798; *Davis v Northern New York Sports Officials' Council*, 18 Misc 3d 1129(A); *Vanderbilt Museum v American Ass'n of Museums*, 113 Misc 2d 502, 508-09; *Casey v Nuttall*, 62 Misc 2d 386, 389-90); the "aggregations of persons" to whom section 7802 expressly refers are only those "whose action may be affected by a proceeding under this article [78]"; and decisions post-dating the General Association Law amendment have confirmed that unincorporated associations as a rule remain beyond the reach of Article 78 (see, e.g., *Matter of Ivey*; *Vanderbilt Museum v American Ass'n of Museums, supra*, and cases cited therein).

Nor for that matter could this be converted (CPLR 103[c]) to a case for equitable (as opposed to Article 78) relief against the Institute per se. After all, irreparable harm is one of the prerequisites to such relief. In this connection, petitioner claims that her Institute certification is "nontransferable" and that she is therefore unable to get trainer and analyst work outside of the Institute without having "to start over again." Even if these had been sworn factual allegations, rather than only claims presented in legal memoranda, such bare assertions would hardly be

cognizable by a court sitting in equity (*compare Lindemann v American Horse Shows Ass'n, Inc.*, 164 Misc 2d 937). Moreover, even if irreparable harm were assumed, it alone would not be enough to warrant an equitable remedy. By contrast, it is noted that such a case for an injunction (as opposed to the mandamus sought here) might have been made if the Institute had failed to follow its own internal rules as announced to faculty members via the Institute's printed manual (*Simons v Berry*, 240 NY 463).

Petitioner argues, however, that the University Faculty Handbook governs matters involving Institute membership because the Institute is in effect a subdivision of the University. Accordingly, petitioner proposes that the renewal of her Institute membership should have been determined under the formal procedures set forth in the University Faculty Handbook; that the University may be directed to invoke and follow those procedures in a case such as this; and that the Institute, even if not directly subject to mandamus, is bound to honor the results of such a proceeding as a function of its relationship with the University.

The problem with these contentions appeared to be two-fold at the time the original motions were considered. First, apart from mere conclusory allegations that do not warrant an assumption of truth on a motion to dismiss (*see, e.g., Rau v Borenkoff*, 262 AD2d 388, 389; *Mazur v Ryan*, 98 AD2d 974, 976; *People v Reid*, 82 Misc 2d 583, 584-85), the petition does not state facts which if proved would show that University procedures are applicable to Institute faculty issues. To be sure, petitioner's papers in opposition to the motions to dismiss had offered some facts to support the petition's conclusory allegations. Nevertheless, even crediting petitioner's list of the two entities' strong interconnections, petitioner has also failed to state a legal theory by which those connections might render the Institute's faculty issues the University's

legal responsibility. To be sure, petitioner's papers note, for example, that the University allowed the Institute to use its letterhead and to publicize itself as "part of" the Psychiatry Department of the University's School of Medicine. This type of "holding out" might of course be relevant in some case involving a third party's detrimental reliance on such representation. But petitioner does not explain how a representation of that sort has bearing on whether an Institute faculty member was entitled to ignore the remaining distinctions between the two entities, including the open fact that each of those entities chose to be bound by a set of published faculty regulations very different from the other's.

In the same connection, petitioner asserts that respondents' "failure" to support their motions to dismiss with documentary evidence is a ground to suspect that there is more to petitioner's case against the University than meets the eye. The court does not agree, however, that respondents were obliged to try to prove a negative – that they are not so intertwined as to impose the one's regulations upon the other – and that respondents' choice not to make such an effort is as telling as petitioner suggests.

In any event, petitioner points to a page in her reply on her cross-motion to amend her petition, in which she had asked for an opportunity to take discovery, to search for evidence of some understanding between respondents that Institute faculty issues are subject to the University's Faculty Handbook. For the sake of argument, it is assumed that so oblique a request for discovery in an Article 78 proceeding, submitted replete with documentary support, might under some circumstance be appropriately granted. However, as it happens, there is no warrant to hold the present motion in abeyance while petitioner tries to marshal evidence as she proposes to do. That is, whatever the content of respondents' various agreements with one another, the best

index of their specific understanding as to how Institute faculty issues are to be resolved is supplied by what is already known: the Institute Faculty Manual, *i.e.*, demonstrative evidence of the Institute's self-determination as to faculty issues.

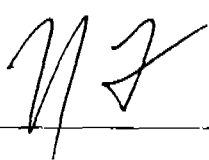
For the foregoing reasons, petitioner's motion for leave to reargue is granted, and, upon re-argument, the court adheres to its prior decision.

This constitutes the decision and order of the court.

Dated: October 21, 2009

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OCT 26 2009
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