

Kruglyak v New York Univ.

2010 NY Slip Op 30113(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 400945/09

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

VLADIMIR KRUGLYAK,
Plaintiff,

Index No.: 400945/09

Motion Date: 09/10/09

- v -

Motion Seq. No.: 01

NEW YORK UNIVERSITY, LEN DIXON and
FRANK SICIGNANO,
Defendants.

Motion Cal. No.: 17

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

FILED
JAN 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAGES NUMBERED
<u>1, 2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers,

Defendant New York University (NYU) moves, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss the complaint as against it.

In the fall of 2007, plaintiff enrolled at NYU's School of Continuing and Professional Studies, and planned to graduate with a bachelor's degree in 2009. On November 24, 2008, plaintiff withdrew from NYU, allegedly because the university refused to accept certain transfer credits from another educational institution.

Plaintiff, proceeding pro se, instituted the present action

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):

by filing his complaint on April 22, 2009, almost five months after his withdrawal from NYU, alleging the following three causes of action: (1) NYU violated its transfer student policy by refusing to accept plaintiff's transfer credits from another domestic university, resulting in damages to plaintiff of \$47,880.00 in federal loans, and damages of \$52,120.00 in housing, transportation and student supply costs; (2) NYU distributed plaintiff's image without his consent under improper context; and (3) NYU abused the Higher Education Act (HEA).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. Bonnie & Co. Fashions, Inc. v Bankers Trust Co., 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. Khayyam v Doyle, 231 AD2d 475 (1st Dept 1996).

Plaintiff's cause of action based on an alleged violation of NYU's internal policy should have been brought in the context of an Article 78 proceeding, which is governed by a four-month statute of limitations. Quintas v Pace University, 23 AD3d 246 (1st Dept 2005). As the Court stated in Washington v Bernard M.

Baruch (City University of New York) College (221 AD2d 163, [1st Dept 1995] [citation omitted]),

The court properly concluded that plaintiff's challenge to defendant's 1985 determination, refusing to accept for transfer plaintiff's credits . . . , was barred by the four month period of limitations applicable to CPLR article 78 proceedings. Even if plaintiff's challenge to defendant's determination were not time barred, public policy compels judicial restraint where academic decisions of educational institutions are challenged.

Consequently, even if this court were to decide that the four-month statutory period for instituting this action were not applicable, plaintiff still could not prevail, because

to preserve the integrity of the credentials conferred by educational institutions, the courts have long been reluctant to intervene in controversies involving purely academic determinations.

Matter of Susan M. v New York Law School, 76 NY2d 241, 246 (1990) (citation omitted); see also Gary v New York University, 48 AD3d 235 (1st Dept 2008). Therefore, plaintiff's cause of action alleging that NYU violated its policy in failing to accept plaintiff's transfer credits from another domestic university shall be dismissed.

Similarly, plaintiff's cause of action alleging that NYU distributed his image without his consent shall be dismissed. The complaint fails to articulate the manner in which the alleged dissemination of plaintiff's image occurred, and it also fails to state that such dissemination was made to further NYU's commercial interests.

New York does not recognize a common-law right to privacy, and only a limited right to privacy is afforded citizens under the New York Civil Rights Law §§ 50 and 51. . Messenger v Gruner + Jahr Printing and Publishing, 94 NY2d 436 (2000).

Sections 50 and 51 of the Civil Rights Law prohibit the use of a person's 'name, portrait, picture or voice' for advertising or trade purposes without that person's written consent. The Court of Appeals has instructed that Civil Rights Law §§ 50 and 51 are to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.

Guerrero v Carva, 10 AD3d 105, 115-116 (1st Dept 2004) [internal quotation marks and citation omitted]. Plaintiff has not alleged that NYU used his image in any commercial manner, and, consequently, this cause of action cannot be maintained. Howell v New York Post Company, Inc., 81 NY2d 115 and 82 NY2d 690 (1993).

Lastly, plaintiff's cause of action alleging a violation of HEA shall dismissed. As recently articulated by the United States District Court for the Southern District of New York, [a]lthough the Second Circuit has not yet ruled whether the HEA provides a private right of action, district courts within the Second Circuit uniformly have held that the HEA does not provide a private right of action, as have other Courts of Appeal that have addressed the issue.

Josey v Sallie Mae, Inc., 2009 WL 2518643 *5, 2009 US Dist LEXIS 72157 *15 (SD NY 2009) (citations omitted).

Therefore, in accordance with federal precedent, plaintiff may not privately assert this claim, and it must be dismissed.

Plaintiff's opposition argument rests primarily on an assertion that NYU was involved in a fraud, which is not alleged in the complaint, and that NYU failed to provide documentation in its motion to support its assertions. The court finds these arguments unpersuasive on a motion aimed at the sufficiency of the allegations in the complaint. Plaintiff also attempts to argue the merits as to why NYU should have accepted his transfer credits, which, as discussed above, is beyond judicial review.

Accordingly, it is hereby

ORDERED that defendant New York University's motion to dismiss the complaint GRANTED and the Clerk is directed to enter judgment DISMISSING the complaint in its entirety.

This is the decision and order of the court.

Dated: JAN 19 2010

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

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