

<b>Fleischman v New York City Dept. of Educ.</b>
2010 NY Slip Op 32449(U)
August 31, 2010
Supreme Court, New York County
Docket Number: 104997/06
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH

PART 62

Justice

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

Plaintiff,

- v -

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

Defendants.

INDEX NO. 104997/06

MOTION DATE July 1, 2010

MOTION SEQ. NO. 003

MOTION CAL. NO.

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 of authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

The following papers, numbered 1 to 3 were read and this court has rendered summary judgment

Notice of Motion — Affidavits — Exhibits

Answering Affidavits — Exhibits

Reply

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ORDERED that this motion by defendants Board of Education of the City School District of the City of New York, s/h/a The New York City Department of Education, and the City of New York, seeking summary judgment dismissing plaintiff's complaint as against them pursuant to CPLR § 3212, is granted for the reasons stated more fully below.

Plaintiff,<sup>1</sup> a former New York City teacher, commenced this action by filing of a summons and complaint on April 11, 2006. In it, plaintiff alleged that he was accepted into the New York City Teaching Fellows Program (hereinafter "the Program") In or about April 2003, a program in which The New York City Department of Education (hereinafter "Board of Education" or "Board")<sup>2</sup> agreed to subsidize plaintiff's tuition for a Master's Degree in Elementary Education at Mercy College. Plaintiff alleges that the New York State Department of Education (hereinafter "DOE") regulations required, *inter alia*, the Board and plaintiff to enter into certain written agreements regarding teaching load, mentoring, planning, observation, advisement and evaluation of plaintiff's teaching. Plaintiff was also required, pursuant to these regulations, to receive daily mentoring by an experienced teacher in the area of his proposed certification for the first eight weeks of his teaching and that he continue to receive mentorship for the remainder of his

<sup>1</sup> Although this action is captioned as a class action lawsuit, listing plaintiff Andrew Fleischman individually and also "on behalf of all similarly situated persons," plaintiff has taken no action to seek class certification and does not now do so. Accordingly, the term "plaintiff" in this decision and order refers to Fleischman individually.

<sup>2</sup> Plaintiff, in his opposition to the instant motion, voluntarily discontinues all causes of action against the City of New York. As such, the motion is granted without opposition as to the City of New York and plaintiff's claims against it will not be discussed herein.

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

first year, which plaintiff alleges did not occur. Further, plaintiff alleges the DOE regulations mandated that he be assigned a full teaching load within his area of proposed certification and that his teaching should have been observed by "an educated pedagogue, typically a principal or assistant principal," which was not done. Rather, plaintiff alleges, he was assigned as a substitute teacher without a permanent teaching assignment and eventually removed from the classroom and put on "administrative assignment" without cause.

In July 2005, Mercy College expelled plaintiff from its Master's Degree program for his failure to complete his Capstone Project, which plaintiff alleges required engagement in classroom instruction which he did not have due to being put on administrative assignment. Once he was expelled from Mercy College, his "Transitional B" teaching certification was revoked and, thereafter, his employment was terminated due to a lack of certification.

Plaintiff has alleged a claim for breach of contract against the Board with regard to his participation in the Teaching Fellows Program, based on the above allegations, and also asserts a claim of fraud against the Board based on false advertising and representations to the public regarding the Program. Specifically, plaintiff alleges that public representations regarding the Program indicated individuals who enrolled would earn subsidized Master's Degrees and other benefits in return for their commitment to teach in New York City Public Schools, and that these representations were intended to induce individuals to rely on them and enroll in the program. These representations were false, according to the complaint, in that the Board did not implement any rules or regulations to ensure that Teaching Fellows would receive the benefits of the Teaching Fellows Program, including Master's Degrees in their area of specialization. Further, plaintiff alleges that these representations were made with knowledge by the Board that they were false, "or with utter disregard for the actual truth or falsity of them," and that plaintiff would not have joined the Program had he known of their falsity. Finally, plaintiff also alleges that the Board acted irrationally, arbitrarily and contrary to law in all its dealings with plaintiff, including terminating him from employment and from the Program.<sup>3</sup>

Plaintiff filed his Note of Issue on or about November 30, 2009, after which the Board made this motion seeking summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint as against it. The Board argues that, 1) plaintiff's challenge to his termination should have been brought as a petition pursuant to Article 78, not as a plenary action, and that this claim must fail because plaintiff cannot prove he was terminated in bad faith; 2) plaintiff's breach of contract claim must be dismissed for failure to exhaust his administrative remedies and because plaintiff cannot prove that an enforceable contract was breached; and 3) plaintiff's claim of fraud must be dismissed as a matter of law because he cannot prove that the alleged representations were false. Plaintiff opposes the motion.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (See *Winograd v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The material facts are contained in the parties' motion papers and pleadings and are not in serious dispute unless otherwise noted below. The Board's Teaching Fellows Program is an alternative certification program whereby individuals complete an abbreviated pre-service training program then begin teaching while concurrently pursuing a Master's Degree in Education at a higher education institution that contracts with the Board. The purpose of the Program is to recruit new teachers for high-needs schools and in subject areas where there is a shortage of certified teachers. The pre-service training program takes

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<sup>3</sup> By decision and order dated October 24, 2007, Justice Joan A. Madden granted motions for summary judgment made by defendants Mercy College and The United Federation of Teachers, dismissing plaintiff's complaint as against them.

place over the summer, and upon successful completion, Teaching Fellows start teaching at the beginning of the next school year. According to the testimony of Vicki Bernstein, Director of the Office of Alternative Certification, each Teaching Fellow was responsible for securing his or her own teaching position and, despite the fact that the Board held job fairs and made other efforts to support the Fellows in that effort, the Board does not take responsibility for placement of Fellows in full-time teaching positions. Plaintiff, however, alleges in his complaint that DOE regulations required the Program to assign him a full teaching load as part of the Program.

For the Master's Degree aspect of the Program, the Board contracts with private universities and assigns Fellows to a college or university where he or she will attend classes. These contracts between the Board and the university require that the university provide an educational program registered with and approved by the DOE for purposes of allowing an enrollee to obtain a Transitional-B teaching certificate, a special type of certification that allows individuals currently enrolled in a Master's Degree program to teach simultaneously. According to Bernstein's testimony, the Board acts in an ongoing advisory capacity but plays no role in designing and implementing the individual Master's Degree programs. The Master's Degree program is subsidized by the Board, but Fellows are required to reimburse the Board if they fail to successfully complete the degree program.

After plaintiff completed the pre-service training in the summer of 2003, he was assigned to teach at I.S. 192, but during orientation and prior to being assigned a classroom, he was told that another more senior teacher was being assigned to teach there instead and there were no other classes for him to teach. Afterwards, plaintiff believes he was assigned to substitute teach at P.S. 138 for about three weeks before going to P.S. 205 from October 2003 to January 2004. At P.S. 205, plaintiff taught every day wherever he was needed, but did not have a classroom of his own. In January, plaintiff was moved to J.H.S. 127 for approximately a month, again substituting for other teachers in different classrooms, before going to the Eagle School, P.S. 140 in February 2004. Plaintiff testified that he went back and forth between two morning pre-Kindergarten classrooms on an irregular schedule, and in the afternoons he did study groups with older students who needed additional help. It was his understanding that this position was long-term and that he was no longer a substitute.

On April 27, 2004, plaintiff was sent to the District Office, where he was told he would be placed on what is officially termed "administrative assignment," or commonly referred to as being assigned to the "rubber room." Although there are "rubber rooms" throughout the five boroughs, plaintiff was directed to report to a location in the Bronx. Although plaintiff, in his testimony, is vague and professes to having never really been told why he was removed from the classroom, he does acknowledge that there was an allegation of corporal punishment or use of excessive force against a pre-Kindergarten student and that the student's mother had come to the school and publicly yelled at plaintiff and accused him of this on April 27, 2004. Plaintiff disputed the student's account both at his deposition and in a statement made on the day in question, in which he acknowledged that he may have touched or "tapped" the back of the student's neck, but did not use force, while also alleging that the student had a history of disruptive behavior, had slapped plaintiff in the face when plaintiff tried to quiet him, and had twice previously struck plaintiff. At his deposition, plaintiff asserted that he was unaware of any investigation into the allegations and that he did not discuss the allegations with anyone after being reassigned to the "rubber room." It is undisputed, however, that plaintiff took no action to contest or challenge his reassignment.

According to plaintiff, he informed Mercy College of his reassignment and discussed with the dean, Connie Bond, his inability to complete the Capstone Project, which plaintiff states was supposed to be based on actual teaching and student progress in the classroom. Plaintiff testified that Bond suggested he try to get a volunteer teaching position at a private school or find some other way to meet the requirements of the Master's Program, but made no other efforts to help him complete the Capstone Project. By letter dated July 2005, more than a year after plaintiff was reassigned to the "rubber room," Margaret M. Cucinell, Dean for Graduate Studies at Mercy College, notified plaintiff that he received a failing grade in the Capstone Project and, as a result, he was being expelled without being awarded a Master's Degree. Plaintiff did not inform the Board of his expulsion. Although he denied having been told explicitly, plaintiff acknowledged that it was implied that remaining enrolled in the Master's program was a requirement of remaining in the Teaching Fellows Program. In August 2005, plaintiff received a letter from Vicki Bernstein informing him that because of his expulsion from Mercy, he was no longer eligible to participate in the Program, but plaintiff remained on the Board's payroll until December 12, 2005, nearly

twenty months after he was removed from the classroom, when Maria Quinones, Human Resources Manager, notified him by letter that because plaintiff's State Certification was invalid, his employment was terminated effective December 13, 2005. Plaintiff did not challenge this termination either administratively or by Article 78 petition; rather he filed a Notice of Claim against the defendants and commenced this action alleging breach of contract, fraud, and engaging in conduct which was irrational, arbitrary and contrary to law.

### Breach of Contract Claims

In its motion for summary judgment, the Board first argues that this action should be converted to an Article 78 petition. According to the Board, although the plaintiff couches the claims in terms of contractual obligations, plaintiff's Claim Six explicitly alleges its conduct was irrational, arbitrary and contrary to law, the basis of an Article 78 petition. Further, the complaint bases the Board's obligations to provide certain mentoring and to assign plaintiff a full-time teaching load on New York State Department of Education regulations, and does not allege that these obligations were part of a contract between the Board and plaintiff.

Plaintiff opposes the motion on several grounds. As an initial matter, plaintiff's attempt to deem himself a third-party beneficiary of the Master Contract between Mercy College and the Board must fail. On October 27, 2007, Hon. Joan A. Madden issued a decision and order granting motions for summary judgment by defendants Mercy College and the United Federation of Teachers, in which she analyzed this claim by plaintiff and specifically held,

[B]ased on the Master Contract, Fleischman is not an intended [third-party] beneficiary . . . [The Contract] specifically states that its intent is to benefit the 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.

Accordingly, Justice Madden's prior order clearly held that plaintiff may not succeed on a breach of contract claim as a third-party beneficiary of the Master Contract.

Plaintiff argues that, while the claims *could* be raised as an Article 78 petition, because plaintiff asserts breach of contract and fraud claims, a plenary action may also be maintained to allow for full discovery and where full equitable relief is available under the traditional rules of contract law. (Citing to *Goldman v White Plains Center for Nursing Care, LLC, et al.*, 9 Misc. 3d 977 (Sup. Ct. New York Cty, August 19, 2005, Hon. Alice J. Schlesinger).<sup>4</sup> In support of his argument that this is best prosecuted as a breach of contract claim, rather than an Article 78 petition, plaintiff argues that the Teaching Fellows Program was a *quid pro quo* arrangement:

In return for the agreement to teach at least three years in the NYC public school system, the [Board] will underwrite the cost of the master's degree in the individual's chosen area of specialization and provide all the support and training needed for teacher certification. The [Board] promised plaintiff a subsidized master's degree in return for plaintiff's commitment to teach for the [Board]. Some terms of this agreement were expressly articulated, such as the [Board]'s requirement that plaintiff agree to reimburse it for the cost of his master's degree if he withdrew from the program, and other terms were implicit. Although there was no formal written contract between plaintiff and the [Board], there was an oral or implied contract.

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<sup>4</sup> It should be noted that, contrary to plaintiff's assertions, the court in *Goldman, supra*, found that the plaintiff's contract claim, for which Article 78 relief was available, was properly asserted as part of her plenary action because it accompanied an age discrimination claim, a cause of action for which Article 78 relief is not available and for which plaintiff was entitled to the full spectrum of discovery and traditional equitable relief, none of which is the case here.

First, based on the allegations contained in the complaint, these claims clearly should have been raised in an Article 78 petition. Plaintiff bases what he terms the "breach of contract" on the state regulations he contends the Board was required to implement. It is these regulations which plaintiff points to in the complaint as the basis for the Board's obligation to provide certain mentoring, to assign him a full teaching load, and to observe his classroom instruction. "Because the focus of the controversy is on an agency's alleged violation of state regulations, not on a breach of an express contractual right, Article 78 is the appropriate avenue of redress." (*Centolanzl v New York City Department of Education*, Index No. 117617/05, Hon. Michael D. Stallman, Sup. Ct. New York Cty., August 24, 2006; *Advanced Refractory Technologies, Inc. v Power Auth. of the State of New York*, 81 NY2d 670, 679 [1993]). As plaintiff was informed of his immediate removal from the Teaching Fellow Program by letter dated August 4, 2005, any challenge to this removal is time-barred as it had to have been filed by Article 78 petition within four months of that date, or by December 4, 2005. (CPLR § 7804[c]).

While plaintiff's complaint bases his "breach of contract" claims on the alleged failure to comply with state regulations, in his opposition papers he attempts to assert that an implied contract, separate and distinct from the regulations, was created between plaintiff and the Board, which created legally enforceable obligations to provide mentoring and to place plaintiff in a classroom with a full teaching load, among other obligations, in exchange for plaintiff agreeing to work in New York City public schools for at least three years. Although not explicitly alleged in the complaint, because of the drastic nature of the relief sought, an analysis of plaintiff's contract claims is in order.

It is well-settled that to create a binding contract, "there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." (2 *Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp.*, 93 NY2d 584, 589 [1999] [citation omitted]). "A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the 'presumed' intention of the parties as indicated by their conduct." (*Jemzura v. Jemzura*, 36 NY2d 496, 503-4 [1975] [internal citations omitted]). "It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct." (*Id.*).

Plaintiff bears the burden of proving the existence of a valid and enforceable contract, whether express or implied. As an initial matter, most of the terms of the implied contract as asserted by plaintiff are unenforceable and void as violative of the Statute of Frauds. As the Board rightly points out, General Obligations Law § 5-701(a) requires that any contract which "[b]y its terms is not to be performed within one year from the making thereof . . . be in writing, and subscribed to the party to be charged therewith, or by his lawful agent." Plaintiff alleges that the implied contract guaranteed he would obtain a subsidized Master's Degree over the course of two years and that he would be placed in a classroom with a full teaching load for a minimum of three years, both terms that make any alleged implied contract unenforceable pursuant to the General Obligations Law.

In addition, "a contract cannot be implied in fact where the facts are inconsistent with its existence." (*Lubeck Realty, Inc. v Flintkote Co.*, 170 A.D.2d 800 [3<sup>rd</sup> Dept 1991]). The evidence in this record is overwhelmingly contrary to plaintiff's assertions in his opposition papers. At his own deposition, plaintiff, 1) testified that he knew the Capstone Project was a requirement for completing his Master's Program prior to signing the commitment form; 2) admitted it was implied and understood that remaining in the Master's Program was a requirement of remaining in the Teaching Fellows Program, although he did not recall being told that explicitly; and 3) although he initially testified he was never told that maintaining his Transitional-B certification was a condition of remaining in the Teaching Fellows Program, when shown the Teaching Fellows Program Enrollment Guide, plaintiff admitted he read the Guide prior to enrolling and that he filled out the Fellow Commitment Form found therein. The Fellow Commitment Form explicitly states,

I understand that in order to remain a Teaching Fellow with the corresponding benefits of the Fellowship, I must maintain good standing in the following areas: . . . As an employee of the New York City Department of Education. As a student as determined by the institution of higher education in which I am enrolled. . . .

Plaintiff was also shown the 2003 Handbook for the Teaching Fellows Program and he testified he was provided with a copy prior to beginning the Program. On page five of the Handbook, a list of requirements for remaining in the Program was listed, including the requirement to maintain good standing with the Department of Education (now the Board of Education), which plaintiff admitted he had a chance to review prior to beginning the Program.

As for the alleged promise to provide mentoring to plaintiff, other than the regulations alluded to in the Complaint, plaintiff never identifies any individual or document that promised plaintiff a particular type or frequency of mentoring, or regular mentoring at all. However, assuming *arguendo* that plaintiff was told that mentoring was a benefit that he would receive as a Fellow, plaintiff's own deposition testimony establishes that he was assigned a mentor at Mercy College. Marsha Lazarus was, according to plaintiff, a full time teacher at Mercy who taught several of his Master's Program classes. According to plaintiff, he had a class with Lazarus once a week and, although it "happened very rarely," she did go to plaintiff's schools. Plaintiff testified at his deposition that there was never a time when he tried to reach out to Lazarus and she was unavailable, but did state, "she didn't show up at my school as she was supposed to." When asked to specify the basis of his belief that she was supposed to physically go to his school, plaintiff responded, "That's the mentoring that everybody was receiving. She was showing up at everybody else's schools." When asked whether he was ever told by an individual or in documentation that the assigned mentor was obliged to go to each student's school, plaintiff was not aware of having been explicitly promised that kind of attention. As plaintiff was only in a teaching environment between September 2004 and April 2005, and he could not articulate or point to any evidence regarding either how often Lazarus went to his schools or the schools of the other roughly 20 other students for whom she was a mentor, there is no evidence that her level of mentorship breached any implied obligations that may have existed.

#### Wrongful Termination

As to plaintiff's December 13, 2005 termination by the Board, although plaintiff has alleged that the termination violated the parties' implied contract, pursuant to the above, any such agreement violated the General Obligations Law and is unenforceable as a contract issue. However, that administrative determination could clearly be the subject to a proper Article 78 petition. As plaintiff commenced this action within four months of his termination by filing the instant summons and complaint on April 11, 2006, the claim is timely made and shall be converted to a petition for Article 78 relief.

However, although plaintiff's termination is the type of administrative determination subject to review pursuant to Article 78, plaintiff cannot prevail on this claim either. First, plaintiff failed to avail himself of available administrative remedies. Specifically, it is undisputed that plaintiff never filed a grievance with the Board regarding his termination despite the fact that the Collective Bargaining Agreement plaintiff was subject to provided for specific grievance procedures. (See *Cantres v Board of Education*, 145 AD2d 359, 360 [1st Dept 1988]).<sup>5</sup> Second, plaintiff does not dispute the Board's assertion that at the time of his termination, plaintiff remained a probationary employee. A probationary employee, it has been held, may "be discharged for 'almost any reason, or for no reason at all' as long as it is not 'in bad faith or for an improper or impermissible reason.'" (*Duncan v Kelly*, 9 NY3d 1024 [2008], quoting *Matter of Swinton v Saflir*, 93 NY2d 758 [1999]). Further, it is plaintiff who has the burden of showing that he was terminated in bad faith, (*Thomas v Abate*, 205 AD2d 454 [1st Dept 1994]), an allegation plaintiff has not made. Plaintiff would be hard-pressed to make such an allegation, as plaintiff has admitted he was made aware that successful completion of a Master's Program and maintenance of his Transitional-B certification were both requirements for continued employment by the Board. Finally, plaintiff's claim that his termination was irrational, arbitrary and contrary to law is unavailing for the reasons already stated.

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<sup>5</sup> Plaintiff's removal from the classroom and assignment to the "rubber room" was also never challenged pursuant to Article 78, is not the subject of plaintiff's complaint here, and would be time-barred in any event, having occurred on April 27, 2004, more than four months prior to the commencement of this action.

Fraud

Plaintiff's allegations of fraud assert that the Board's public and private representations that "individuals who enrolled in the Teaching Fellows Program would earn subsidized Masters Degrees in their declared area of specialization and receive numerous other benefits of the Teaching Fellows Program in return for their agreement to teach in the New York City public school system," were knowingly false or made with utter disregard for the truth or falsity of them, because the Board has failed to implement rules or regulations designed to ensure that Teaching Fellows actually receive such benefits. However, as Justice Stallman held in *Centolanzi*, which asserted almost identical claims,

The flaw in plaintiff's logic is that [the Board's] alleged representation did not promise that [the Board] would ensure that every individual enrolled in the Teaching Fellows program would succeed. On the contrary, plaintiff's Fellow Commitment Form specifically states, in pertinent part: "I understand that in order to remain a Teaching Fellow with the corresponding benefits of the Fellowship, I must maintain good standing in the following areas: . . . As an employee of the New York City Department of Education."

Although plaintiff attempts to distinguish this case from *Centolanzi* by asserting that plaintiff here has testified to the specific benefits he believed he was to receive, such allegations do not alter the legal analysis of plaintiff's fraud claim.<sup>6</sup>

Accordingly, it is

ORDERED that plaintiff's complaint against defendant City of New York is voluntarily discontinued by plaintiff; it is further

ORDERED that this motion by defendant The New York City Department of Education for summary judgment dismissing plaintiff's complaint as against it, is granted to the extent that Claim One, Claim Two and Claim Six are dismissed, except as to those portions of Claims One and Six as they relate to plaintiff's termination, which are hereby converted to a petition for Article 78 relief; it is further

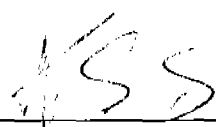
ORDERED and ADJUDGED that upon conversion to a petition for Article 78 relief, petitioner's challenge to his termination is hereby denied and dismissed; it is further

ORDERED that defendant New York City Department of Education is entitled to costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED that defendants serve a copy of this decision, order and judgment, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre St) and the Clerk of the DCM Office (80 Centre St) within 20 days of entry hereof.

This constitutes the final decision, order and judgment of the Court.

Dated: August 31, 2010

  
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Hon. Karen S. Smith, J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST

<sup>6</sup> The Court notes that counsel for plaintiff herein was also counsel for plaintiff in the *Centolanzi* action.