

Constantine v Teachers College

2011 NY Slip Op 31424(U)

May 26, 2011

Sup Ct, NY County

Docket Number: 113663/09

Judge: Jane S. Solomon

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

DECEASED

~~JOSEPH~~ SOLOMON

PART 55

Index Number : 113663/2009

CONSTANTINE, MADONNA

vs

TEACHERS COLLEGE

Sequence Number : 003

VACATE

INDEX NO. _____

MOTION DATE 3/24/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

1-6

Answering Affidavits — Exhibits _____

7-8

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion


is denied in accordance with the annexed memorandum decision and order.

FILED

MAY 27 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/20/11


~~JOSEPH~~ SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
MADONNA CONSTANTINE,

Petitioner,

Index No.: 113663/09

-against-

DECISION and ORDER

TEACHERS COLLEGE and THE TRUSTEES OF
TEACHERS COLLEGE OF COLUMBIA
UNIVERSITY,

FILED

MAY 27 2011

Respondents.

-----X
JANE S. SOLOMON, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner, formerly a tenured faculty member at
Teacher's College of Columbia University, moves, pursuant to CPLR
5015 (a), to vacate this court's order and judgment dated March
10, 2010 (March 2010 Order and Judgment), which denied her
petition, brought pursuant to CPLR Article 78, challenging the
determination of Susan H. Fuhrman (Fuhrman), President of
Teachers College, to terminate her employment.

Background

By letter dated June 1, 2009, Fuhrman advised
petitioner that she accepted the Findings and Recommendations
issued by the Faculty Advisory Committee (FAC), and terminated
petitioner's employment effective May 27, 2009. The FAC held
hearings in April and May 2009. After reviewing the record,
hearing from witnesses and assessing their credibility, the FAC
concluded that petitioner had committed plagiarism, and also that
she had fabricated documents she presented in her defense.

The plagiarism claim arises from evidence provided by Dr. Christine Yeh, a professor and former colleague of petitioner's, and two former students, who petitioner collectively labels "the Accusers" (Aff. of Madonna Constantine, ¶ 3). Rejecting petitioner's theory of the case, the FAC found that it "would require a complex conspiracy among many persons including the highest levels of the College's administration, its outside counsel, and several former students and a former faculty member" (FAC's Findings and Recommendations, at 8). In denying her Article 78 petition, this court found that petitioner "failed to demonstrate that the FAC, or Fuhrman, acted in an arbitrary or capricious manner at any stage of the events leading up to the June 1, 2009 letter" (March 2010 Order and Judgment, 2).

In this motion, petitioner again disputes the FAC's factual determinations, in part relying upon information obtained from discovery conducted in a lawsuit for discrimination she commenced in the United States District Court for the Southern District of New York, entitled *Constantine v Teachers College* (Index No. 09 Civ 9701) (the federal action).

Petitioner principally relies on four items to show that the March 2010 Order and Judgment should be vacated under CPLR 5015(a): (1) a letter from the former president of Teachers College rejecting charges of misconduct against petitioner; (2) technical information regarding computer files; (3) an affidavit

submitted in opposition to the Article 78 petition which is said to be fraudulent; and (4) e-mail messages from Columbia University administrators intended to show that there was a delay in producing institutional review board (IRB) documents¹ to her in 2008.

The IRB files themselves are not newly discovered material, because the documents apparently are referenced in letters from petitioner's counsel (Notice of Motion, Exs. I and Q), all pre-dating the Article 78 proceeding. Also, the documents were a subject for cross-examination of "the Accusers" by petitioner's counsel at the FAC hearing.

Discussion

Under CPLR 5015 (a), a court may vacate a judgment for several reasons, including newly discovered evidence (CPLR 5015 [a] [2]), fraud, misrepresentation, or other misconduct of an adverse party (CPLR 5015 [a] [3]). "In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). "The party seeking relief on the basis of newly discovered evidence must show that the evidence is material, not merely cumulative, not of a kind as would merely impeach an

¹ IRBs are documents prepared by academics to obtain university approval to research human subjects.

adverse witness's credibility, that it would probably have changed the result and that the material could not have been previously discovered by the exercise of due diligence" (*Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 39 [1st Dept 1997]).

Petitioner characterizes a letter from Arthur Levine (Levine), the former president of Teachers College, to be the most important item of newly discovered evidence. In his letter, dated July 27, 2006, addressed to Suniya Luthar, a colleague who made a formal complaint regarding petitioner's conduct, Levine states:

I have examined your claims against Professor Madonna Constantine. I have examined each of the charges except plagiarism of student papers and abuse of students. In all of the other areas your charges cannot be substantiated; in fact, they are refuted by the facts. As for claims of misconduct regarding students, I have asked you for evidence. You have told me students are unwilling to talk to me, the dean, college counsel or the ombudsman. The offer of outside counsel was also rejected by the student you contacted. As I have explained on several occasions, I cannot accept anonymous allegations against any member of this community. Therefore, I am rejecting your charges against Professor Constantine

(Levine Letter, ¶¶ 1-2).

Petitioner contends that this letter shows that Fuhrman violated the statutes of Teacher's College by reviving a grievance that had already been denied by Levine. However, on its face, Levine's letter states that it does not address the

plagiarism charges. Also, petitioner does not proffer any internal Columbia University rule which Fuhrman violated. Thus, Levine's letter is not material, and does not provide the kind of new evidence required by CPLR 5015.

With respect to Petitioner's contention that there is new evidence regarding technical computer information, she relies primarily upon a report from an expert she retained, that she argues is corroborated by respondents' computer expert. She alleges that metadata in certain electronic documents, showing the dates documents were created and modified, support her claim that she authored the disputed work before the "Accusers" created their works, so petitioner could not have committed plagiarism. The metadata was obtained from a computer hard drive that was in petitioner's possession, but she did not retrieve it from storage until June 2008, nearly a year before the FAC hearing. She sent the hard drive to an expert to perform forensic analysis to determine the dates files were created or modified. In June 2010, more than a year after the FAC hearing, she received a report from the expert that she argues supports her claim of prior authorship. This information, based on an analysis of the evidence in her possession before the FAC hearing (and therefore, before commencement of the Article 78 proceeding), could have been previously discovered by the exercise of due diligence, so it does not form a legitimate basis for a CPLR 5015(a) motion.

Petitioner's contention that testimony from respondents' expert obtained in the federal action is a further basis for vacatur is unavailing. A technician retained by Teachers College, Bryan Gorcyk, also analyzed data from the hard drive. Petitioner submits portions of his deposition testimony from the federal action (Gorcyk EBT, dated July 16, 2010, Notice of Motion, Ex. BB). Petitioner argues that the transcript shows that respondents had information supporting her position. The transcript contains Gorcyk's responses to hypothetical questions put to him by petitioner's attorney, and, apparently, shows that he could not verify testimony given at the FAC hearing by another technical expert presented by Teachers College at that hearing. At best, Gorcyk's testimony may have been useful in impeaching respondents' computer forensics expert at the FAC hearing, but it is merely cumulative to the testimony presented at the hearing by dueling experts (see, *Prote Contr. Co. v Board of Educ.*, 230 AD2d at 39).

Petitioner further argues that the March 2010 Order and Judgment should be vacated because George Davidson, outside counsel for respondents who led an investigation into charges of plagiarism against petitioner, allegedly made two fraudulent statements in an affidavit submitted in opposition to the Article 78 petition. Both statements involve Davidson's conclusions on issues concerning the priority of authorship of the disputed

texts:

In the two cases where articles by Professor Yeh had reached print after articles by [petitioner], the evidence showed that Professor Yeh's articles had in fact been composed earlier ... After reviewing [petitioner's] evidence, we concluded that her contentions were highly improbable and that it was likely that [petitioner] had fabricated the alleged earlier works in order to defend herself from charges of plagiarism. The relevant institutions had not maintained copies of documents of that vintage

(Davidson Affidavit, Respondents' Appendix of Exhibits I Opposition to Petitioner's Motion, Ex. 8, ¶¶ 14, 24).

Petitioner does not submit the Davidson Affidavit as an exhibit, it is found in respondents' opposition. The affidavit summarizes the content of a report Davidson and his law firm prepared and gave to Columbia University, and made available to the FAC and petitioner in connection with the internal administrative proceeding. The affidavit also provides a procedural history.

Petitioner claims that Davidson's statements are false; she disputes the assertion that Professor Yeh's work was composed earlier than similar work by petitioner. Petitioner contends that Davidson's statement was demonstrably false when made because petitioner's publication predated Yeh's work, so falsity of Davidson's affidavit "is a matter of public record and is not subject to debate." (Giacomo Aff., ¶ 28). That petitioner disagrees with Davidson's conclusions is not surprising; however,

it is not newly-discovered evidence of fraud. Petitioner had the opportunity to dispute Davidson's statements, and nothing here indicates fraud rather than a dispute over the facts.


Finally, petitioner argues that it would be in the interest of justice to vacate the March 2010 Order and Judgment because the judgment has served as a basis to collaterally estop her from litigating her dismissal from Teachers College in other actions. The court declines to adopt the novel holding which petitioner urges, and notes that the United States District Court, in dismissing petitioner's federal action, held that "[a]lthough defendants' papers set forth several valid grounds for summary judgment in their favor, only one need be reached at this point, for it is simple and dispositive: plaintiff's claims are barred by principles of collateral estoppel" (*Constantine v Teachers College*, 2010 US Dist LEXIS 108307, *1-2 [SD NY 2010]). While petitioner argues that reliance on the doctrine of collateral estoppel was inappropriate, this argument does not touch upon whether this court properly denied her Article 78 petition.

The court has considered all of petitioner's arguments, none of which warrant vacating the March 2010 Order and Judgment. Accordingly, it hereby is

ORDERED that petitioner's motion to vacate this court's order and judgment dated March 10, 2010 is denied.

Dated: May 26, 2011

ENTER:



Hon. JANE S. SOLOMON, J.S.C.

JANE S. SOLOMON

FILED

MAY 27 2011

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