

**Crow v Comumbia Univ. School of Social Work**

2012 NY Slip Op 30491(U)

February 22, 2012

Supreme Court, New York County

Docket Number: 105631/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

ELI PAINTEDCROW,  
Plaintiff,

INDEX NO. 105631/11

-against-

MOTION SEQ. NO. 003

COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK, SOCIAL WORK DEAN JEANETTE TAKAMURA, SCHOOL OF SOCIAL WORK ASSOCIATE DEAN OF ACADEMIC AFFAIRS ALLEN ZWEBEN, SENIOR ASSISTANT DEAN FOR ACADEMIC AFFAIRS MARIANNE YOSHIOKA, PROFS. MARION RIEDEL, MARGARET O'NEILL, FRED SSEWAMALA, WEN-JUI HAN and COLUMBIA SCHOOL OF JOURNALISM PROF. HELEN BENEDICT in their official capacities and individually,  
Defendants.

**FILED**

MAR 02 2012

NEW YORK COUNTY CLERK'S OFFICE

The following papers numbered 1 to 6 were read on this motion by defendants to dismiss.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answering Affidavits — Exhibits (Memo) _____	<u>4</u>
Replying Affidavits (Reply Memo) _____	<u>5</u>

Cross-Motion:  Yes  No

Defendant Columbia University School of Social Work (School), and the other eight defendants who are Columbia University employees - Jeanette Takamura, Allen Zweben, Marianne Yoshioka Marion Riedel, Margaret O'Neill, Fred Sswamala, Wen-Jui Han and Helen Benedict move to dismiss the Amended Complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action. Plaintiff opposes the motion. Oral argument was held on this motion on November 30, 2011.

**BACKGROUND**

In her Amended Complaint, plaintiff alleges that defendant Helen Benedict (Benedict), a

professor at Columbia University's School of Journalism, published *The Lonely Soldier*, which describes the experiences of several female soldiers serving in the United States military in Iraq and Afghanistan. Plaintiff's photograph appears on the book's cover and she is prominently represented in the book which is based in part on interviews that she gave to Benedict. Plaintiff complains that the book portrays her and the other female soldiers as "passive victims," which plaintiff contends presents a distorted picture. Plaintiff claims that in November of 2010, well after the book was published, the individual defendants, other than Benedict, chose to use the book as part of an academic assignment at the School. According to the Amended Complaint the assignment which is known as the Capstone Project (Project), required students to read the book and formulate diagnoses and hypothetical treatment plans for the conditions suffered by the women described in the book, including plaintiff, who alleges that she is suffering from post-traumatic stress disorder and depression. None of the students who took part in the Project is alleged to have contacted plaintiff or to have been provided any information about plaintiff other than what appears in the book, except for one student who contacted plaintiff to request permission to use plaintiff's photograph as part of her class presentation.

In April of 2011, defendant Prof. Marion Riedel (Riedel) invited plaintiff to attend the Project panel discussions and to speak to the students and faculty about her experiences. In response, plaintiff called Riedel the following day and asked to be flown to New York, at the school's expense, to "negotiate a modification" of the assignment which was to be presented by the students two weeks later (Amended Complaint ¶ 21). Riedel declined plaintiff's request, and defendant Jeanette Takamura (Takamura) offered to confer with plaintiff by video conference, but plaintiff declined. The following day plaintiff flew to New York at her own expense, and requested a meeting with Takamura. On May 3, 2011, Takamura advised plaintiff that she would meet with her the following day, and at said meeting Takamura explained to plaintiff that the school would not alter the assignment. Nonetheless, plaintiff

attended the Project panel discussions despite the defendants refusal to modify the assignment.

At the Project panel discussions on May 6, 2011, the students presented their reports and plaintiff alleges in her Amended Complaint that she suffered "emotional pain, humiliation, anguish and embarrassment" as a result of this "public presentation" of the "distorted portrayal of her psyche and identity" that is embodied in the book (*id.*, ¶ 62).

Plaintiff's Amended Complaint alleges six causes of action: (1) disability discrimination under the Americans with Disabilities Act (ADA); (2) disability discrimination under the Rehabilitation Act; (3) disability discrimination under the New York City Human Rights Code (HRL); (4) racially motivated conspiracy under 42 USC § 1985; (5) racially motivated discrimination under HRL; and (6) social work malpractice. In her prayer for relief, plaintiff requests, among other things, "a preliminary and permanent injunction preventing Defendants from further dissemination, archiving, or publicizing, in whole or in part the experiment performed or the resulting studies . . . ." Previously, plaintiff's requests for a temporary restraining order and a preliminary injunction to stop defendants from publishing the students' reports were denied, and the school indicated that it had no intention of publishing the students' work.

In support of their motion, defendants assert that the plaintiff's Amended Complaint must be dismissed in its entirety because it fails to allege any violation of a right under the ADA, the Rehabilitation Act, the HRL, or to allege any racially motivated conspiracy. Further, defendants state that intracorporate conspiracy is not actionable. Additionally, defendants claim that plaintiff is not entitled to injunctive relief both because the acts complained of are past, not present or future acts, and because she fails to meet the higher standards required to impose prior restraints on free speech.

In opposition, plaintiff contends that she was entitled to a reasonable modification of the

academic program, as this would have allowed plaintiff to present a truer picture of herself, in contrast to the alleged inaccurate portrayal of plaintiff in the book. Further, plaintiff argues that the intracorporate conspiracy doctrine is inapplicable to the instant matter, as the corporate employees here were acting on their own, not implementing a university policy.

It is plaintiff's contention that her rights under the Rehabilitation Act were violated because she was discriminated against based on her race as a native American, and because she was subject to human experimentation by means of the Project. Lastly, plaintiff maintains that her cause of action for social worker malpractice should not be dismissed because social workers are prohibited from performing professional services for which they have not been duly authorized by the patient or her representative. Plaintiff's position is that the students' academic proposed treatment falls within this prohibition.<sup>1</sup>

#### STANDARD

CPLR 3211 [a][7] provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action

On CPLR 3211 motions, the court affords the pleadings a liberal construction, takes the allegations of the complaint as true, and provides plaintiff the benefit of every possible inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). 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 v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of

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<sup>1</sup> The Court notes that plaintiff has not provided any opposition regarding the portion of defendants' motion which states that plaintiff is not entitled to the injunctive relief requested in the Amended Complaint.

the plaintiff, the pleading states no legally cognizable cause of action (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

### DISCUSSION

At the outset, it is noted that plaintiff has not alleged in her Amended Complaint that her participation in Benedict's book was anything other than voluntary, or that the use of her image on the cover of the book was without her consent. Additionally, plaintiff does not allege that prior to this action she has attempted to stop publication and dissemination of the book, which had been in publication for years prior to the academic exercise that is the subject of this litigation. In sum and substance, plaintiff only asserts that she disagrees with the way in which she was portrayed in the book.

Plaintiff's first cause of action alleges disability discrimination under the ADA (42 USC § 12101 *et seq.*). There is no dispute that plaintiff qualifies as a person with a disability under the ADA. Pursuant to the provisions of the ADA, a public facility is required to make reasonable accommodation for a person with disabilities so as to allow that person access to facilities, education and employment. In her Amended Complaint, plaintiff asserts that defendants failed to make reasonable accommodation for her mental disabilities. However, plaintiff has failed to articulate exactly what "reasonable accommodation" she requested and was refused. The only argument posited by plaintiff is that a different portrayal of her than the one appearing in the book should have been provided by defendants.

The parties have not provided, nor has the Court been able to find, any statutory mandate or judicial interpretation of the ADA that states, implies or infers that a "reasonable accommodation" under the act would include an intellectual revision of an academic exercise to accommodate a disabled individual's disagreement with her portrayal in a book for which she voluntarily agreed to be interviewed. As a consequence of the foregoing, the Court finds that

plaintiff's first cause of action fails to state a claim for which relief can be granted, and is properly dismissed.

The second cause of action in the Amended Complaint alleges disability discrimination under the Rehabilitation Act. One of the primary purposes of the Rehabilitation Act is to "assist[] States and providers of services in fulfilling the aspirations of ... individuals with disabilities for meaningful and gainful employment ... . [I]ndividuals with disabilities must be provided the opportunities to obtain gainful employment" (*Matter of Murphy v Office of Vocational and Edu. Servs. for Individuals with Disabilities, N.Y. State Educ. Dept.*, 92 NY2d 477, 484 [1998][quoting 29 USC § 701][emphasis deleted]). Plaintiff fails to allege any act on the part of defendants that discriminated against her with respect to her ability to obtain gainful employment. Therefore, this claim fails to state a cause of action and is appropriately dismissed.

Plaintiff's third cause of action alleges disability discrimination under the HRL. "[P]laintiff's vague, conclusory assertions, unsupported by factual allegations, [are] insufficient to sustain a cause of action pursuant to the New York Human Rights Law" (*Scarfone v Village of Ossining*, 23 AD3d 540, 541 [2d Dept 2005]). As a result, this cause of action is dismissed for failure to state a claim.

The fourth cause of action alleges a racially motivated conspiracy under 42 USC § 1985. "To establish a civil rights conspiracy under that statute, a plaintiff must show: (1) a conspiracy (2) for the purpose of depriving plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby the plaintiff was injured in his person or property or deprived of a right or privilege of a citizen" (*Robinson v Allstate*, 706 F Supp 2d 320, 327 [WD NY 2010]). Plaintiff has failed to allege, with any specificity, that defendants harbored an invidious discriminatory animus against any particular race, or that such animus motivated the alleged wrongful conduct

(*Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700 [2d Dept 2010]; *Concourse Rehabilitation & Nursing Ctr., Inc. v Novello*, 309 AD2d 573 [1st Dept 2003]). Hence, this cause of action is dismissed.

The fifth cause of action appearing in the Amended Complaint charges racially motivated discrimination under HRL (NYC Administrative Code § 8-101 *et seq.*). HRL provides that the provider of a public accommodation may not deny any person any of the accommodations, advantages, facilities or privileges so provided on the basis of race or disability. The Amended Complaint states that "[d]efendants unlawfully discriminated [*sic*] based upon her race by selecting her based upon her race to be subjected to unconsented assessments, diagnoses, and proposed treatment plans by groups of social work students, and/or aided and abetted this unlawful discriminatory conduct (Amended Complaint ¶ 54). In her opposition, plaintiff argues that she was denied the opportunity to participate in the presentation of the Project. However, neither the allegations in the Amended Complaint nor the argument in plaintiff's memorandum address the purpose for which the HRL was enacted. Nor do same indicate how plaintiff's consent is necessary for an academic analysis of plaintiff which is based upon an interview plaintiff voluntarily provided for a book that is published and generally disseminated. Further, the Project panel discussions were for students enrolled in an educational program, and plaintiff has not alleged that she was a student in that program or denied status as a student based upon her race. Consequently, the fifth cause of action is dismissed.

Lastly, plaintiff has claimed as a sixth cause of action, social work malpractice. Plaintiff has not alleged a therapist-patient relationship with any of the defendants or the students in the Project, which is the sine qua non of any social worker malpractice claim (*see Kraft v Yeshiva University*, 2001 WL 1191003, \*4, 2001 US Dist Lexis 16152, \*12 [SD NY 2001]). Moreover, plaintiff has failed to indicate any breach of professionalism or duty of care so as to support

such an allegation (see *Baruch v Baruch*, 224 AD2d 337 [1st Dept 1996]). Therefore, this cause of action is also dismissed.

Having determined that plaintiff's Amended Complaint is dismissed, the Court need not address defendants' arguments regarding the applicability of injunctive relief in the instant matter.

**CONCLUSION**

Based on the foregoing, it is hereby

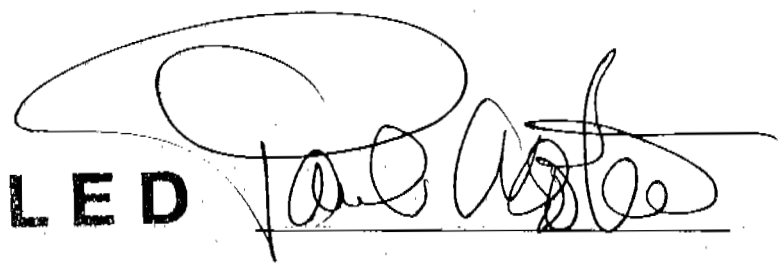
ORDERED that defendants' motion is granted and plaintiff's Amended Complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 2-22-12

**FILED**



MAR 02 2012

PAUL WOOTEN J.S.C.

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