

Lane v Pace Univ.

2012 NY Slip Op 31464(U)

May 31, 2012

Supreme Court, New York County

Docket Number: 101976/2008

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 101976/2008
LANE, MICHAEL K.
vs.
PACE UNIVERSITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CALL # 65

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1, 2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3</u>
Replying Affidavits _____	No(s). <u>4, 5</u>

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 04 2012

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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 5/31/12
MAY 31 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
MICHAEL K. LANE,

Index No. 101976/08

Plaintiff,

Motion date: 3/6/12

Motion no.: 002

-against-

DECISION & ORDER

PACE UNIVERSITY and THE CITY OF NEW YORK,

FILED

Defendants.

JUN 04 2012

-----X
BARBARA JAFFE, JSC:

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For plaintiff:
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By notice of motion dated October 24, 2011, defendant Pace University (Pace) moves pursuant to CPLR 3212 for an order dismissing plaintiff's complaint against it. Plaintiff opposes.

Plaintiff asserts a claim against Pace for breach of implied contract based on his allegations that while he was enrolled as a student at Pace, Pace agreed that it would accord him the right to the protections of its rules, regulations, code of conduct, bylaws, and guidelines, that it violated its rules and guidelines by suspending him, and that he sustained damages as a result (Affirmation of Edward Hynes, Esq., dated Jan. 23, 2012, Exh. F).

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An implied contract between a school and a student arises based on the understanding that if the student complies with the terms required by the school, he or she will obtain the degree sought. (*Eidlisz v New York Univ.*, 61 AD3d 473 [1st Dept 2009], *affd as mod* 15 NY3d 730

MOTION SUPPORT OF
NYS SUPREME COURT

[2010]; *Downey v Schneider*, 23 AD3d 514 [2d Dept 2005]; *Baldrige v State*, 293 AD2d 941 [3d Dept 2002], *lv denied* 98 NY2d 608). “Only specific promises set forth in a school’s bulletins, circulars, and handbooks, which are material to the student’s relationship with the school, can establish the existence of an implied contract.” (*Cheves v Trustees of Columbia Univ.*, 89 AD3d 463 [1st Dept 2011], *lv denied* 18 NY3d 807 [2012]; *Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]).

In *Cheves*, the court dismissed the plaintiff’s breach of contract claim on the ground that no provision in the alumni relations brochure guaranteed alumni unfettered access to the school’s campus, and thus the plaintiff could not establish that the defendant had breached a specific promise to him. (89 AD3d at 464). In *Keefe*, the plaintiff failed to establish that the defendant had promised to use a pass/fail grading system instead of a letter grading system. (71 AD3d at 570-571). In each case, the plaintiff’s breach of contract claim was dismissed based on specific facts, not on the ground that a breach of contract claim may not be sustained as a matter of law by a student against his or her school. (*See also Jones v Trustees of Union Coll.*, 92 AD3d 997 [3d Dept 2012] [student failed to state breach of contract claim as he did not identify specific internal rule, regulation or code college violated in expelling him based on crime he allegedly committed]; *Gary v New York Univ.*, 48 AD3d 235 [1st Dept 2008] [plaintiff did not demonstrate that defendant had failed to comply with policies and procedures in terminating her enrollment]; *Martin v Pratt Inst.*, 278 AD2d 390 [2d Dept 2000], *lv denied* 96 NY2d 715 [2001][dismissing breach of contract claim as provision in student bulletin permitted defendant to withhold plaintiff’s diploma and transcript]; *see eg Ferrari v Iona Coll.*, 943 NYS2d 526, 2012 NY Slip Op 03735 [1st Dept] [documentary evidence established that plaintiff’s termination did not breach

provisions of faculty handbook]; *Marks v Smith*, 65 AD3d 911 [1st Dept 2009], *lv denied* 15 NY3d 704 [2010] [breach of contract claim dismissed as university was not required to follow its procedures for terminating plaintiff as she did not have status covered by procedures]).

Here, plaintiff has alleged that Pace breached its disciplinary policies and procedures by failing to hold an informal or formal hearing ten days after the parties' informal resolution attempt failed and by suspending him for five years when a suspension normally lasts no longer than one academic year. Plaintiff has thus sufficiently asserted a breach of implied contract claim against Pace. (See *Tedeschi v Wagner Coll.*, 49 NY2d 652 [1980] ["when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed"]; *O'Neill v NYU Univ.*, _ AD3d _, 2012 NY Slip Op 03570 [1st Dept] [reinstating plaintiff's breach of contract claim based on allegations that defendant failed to follow its disciplinary procedures in terminating him]; *Wenz v Albert Einstein Coll. of Med. of Yeshiva Univ.*, 264 AD2d 838 [2d Dept 1999] [granting plaintiff summary judgment on liability on breach of contract claim as defendant did not provide plaintiff with required notice before terminating him as set forth in its regulations]).

As the issue of whether Pace failed to follow its disciplinary policies involves credibility determinations which may not be resolved on a motion for summary judgment (*Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]), and as numerous factual issues remain, Pace has not established its entitlement to summary dismissal of the complaint.

Moreover, courts have distinguished between determinations made by schools related to academic and non-academic matters in deciding when a party is required to assert a claim challenging such determinations in the context of an Article 78 proceeding rather than a plenary

action, and have held that when the claim involves a determination related to a student's academic performance, it must be asserted via an Article 78 proceeding. As stated by the Court of Appeals:

Unlike disciplinary actions taken against a student (citation omitted), institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators . . . Accordingly, although we have emphasized that the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review . . . that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute.

(*Matter of Susan M. v New York Law School*, 76 NY2d 241 [1990]; compare with *Tedeschi*, 49 NY2d at 660 ["Suspension or expulsion for causes unrelated to academic achievement, however, involve determinations quite closely akin to the day-to-day work of the judiciary . . . the courts have, therefore, looked more closely at the actions of educational institutions in such matters."]).

Here, as it is undisputed that Pace's disciplinary determination did not involve any academic issues, plaintiff is not required to assert his claim against Pace in an Article 78 proceeding. (Compare *Eidlisz*, 61 AD3d at 475 [plaintiff properly brought action for breach of contract rather than Article 78 proceeding as, among others, school allegedly failed to bill plaintiff as it had promised him and failed to notify him of de-enrollment by e-mail as student handbook provided], *affd as mod* 15 NY3d at 732 [while finding that triable issues existed as to whether implied contract existed between student and school, observing that if school denied student degree based on student's academic performance, action should have been brought as Article 78 proceeding]; *Cavanagh v Cathedral Preparatory Seminary*, 284 AD2d 360 [2d Dept 2001] [observing that suspension of student may be reviewed judicially to determine whether

school acted irrationally or arbitrarily or whether it complied with its own rules or regulations], with *Keles v Trustees of Columbia Univ. in the City of New York*, 74 AD3d 435 [1st Dept 2010], *lv denied* 16 NY3d 890 [2011] [action should have been brought as Article 78 as claims related to school's academic determinations and were not cognizable as breach of contract]; *Frankel v Yeshiva Univ.*, 37 AD3d 760 [2d Dept 2007], *lv denied* 9 NY3d 802 [student's challenge to termination from program for academic deficiencies should have been brought as Article 78 proceeding]; *Risley v Rubin*, 272 AD2d 198 [1st Dept 2000], *lv denied* 96 NY2d 701 [2001] [as plaintiff did not identify specific contractual term that was allegedly breached, claim was reviewable only in Article 78 proceeding]; *Klinge v Ithaca Coll.*, 244 AD2d 611 [3d Dept 1997] [as college complied with procedures set forth in handbook in terminating plaintiff, plaintiff's sole remedy was to commence Article 78 proceeding].

Accordingly, it is hereby

ORDERED, that defendant Pace University's motion for summary judgment is denied; and it is further

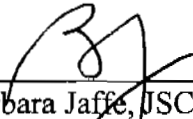
ORDERED, that as plaintiff has discontinued his claims against defendant City of New York, the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff is directed to serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

FILED

JUN 04 2012

DATED: May 31, 2012
New York, New York


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

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