[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR. PART 33

Justice

Index Number : 103886/2012
SHIRAZI, PARI SARA
vs.
NEW YORK UNIVERSITY
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 19, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-8

Answering Affidavits — Exhibits _____ | No(s). 9-18

Replying Affidavits _____ | No(s). 19

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

decided in accordance with the Decision and Judgment annexed hereto.

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

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 or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/14/14

_____, J.S.C.
ALEXANDER W. HUNTER JR.

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 33

----------X

In the Matter of the Application of
Pari Sara Shirazi,

Petitioner-Plaintiff,

-against-

New York University, John Sexton, Mary Schmidt Campbell and Joe Juliano,

Respondents-Defendants.

----------X

Index No.: 103886/12

Decision and Judgment

HON. ALEXANDER W. HUNTER, JR.

Two separate applications were filed in this matter under motion sequences 003 and 004. Both applications will be decided herein.

The hybrid application of petitioner seeking an order pursuant to CPLR Article 78, compelling respondent New York University ("NYU") to provide her an employment contract for a five-year term, declaring that NYU breached its contractual obligations to petitioner, and further declaring that respondents defamed petitioner, is denied and the proceeding is dismissed without costs and disbursements.

The motion by respondents for an order dismissing the Second Amended Verified Petition/Complaint in its entirety, with prejudice, is granted.

Petitioner was employed in various administrative positions by NYU Tisch School of the Arts ("TSOA") and Tisch School of the Arts, Asia ("Tisch Asia"). She served as Vice Dean of TSOA from 1999 to 2011 and as President of Tisch Asia from 2007 through 2011. In 2005, petitioner was appointed to the non-tenured title of associate arts professor at TSOA. In the 2009-2010 academic year, petitioner was eligible for consideration for a five-year employment contract. Petitioner also sought promotion to the title of full arts professor. On September 20, 2010, petitioner was informed of her status as an associate arts professor, effective September 1, 2010. Although the letter did not state the term of her reappointment, petitioner assumed that she would receive a letter informing her of an appointment for a five-year term. However, the provost of NYU never took any action to appoint petitioner to a five-year term.

Petitioner became the subject of an investigation into allegations of wrongdoing involving the finances of Tisch Asia. On November 23, 2011, it was announced that petitioner resigned her positions as President of Tisch Asia and Vice Dean of TSOA. On January 31, 2012, petitioner was summarily suspended from her teaching duties. On March 17, 2012, she filed a grievance based on the: (1) continuing failure of NYU to provide her with a five-year

reappointment; (2) failure of NYU to inform her of the outcome of the review of her promotion denial; and (3) improper removal of petitioner from the classroom. Respondents informed petitioner that the grievance procedure that she cited was inapplicable and that there was no decision to be appealed.

On June 12, 2012, petitioner received a summary of the violations of NYU policy and ethical conduct guidelines that she committed. The summary specified that petitioner had egregiously abused NYU personal and travel expense polices and had mismanaged the finances of both Tisch Asia and TSOA. The employment of petitioner expired when her appointment ended on August 31, 2012.

Petitioner asserts a cause of action against all respondents for defamation; two causes of action against NYU for breach of employment contract and breach of contractual right to consideration of disciplinary charges levied against her; and an Article 78 special proceeding alleging that the actions of NYU were arbitrary, capricious, unlawful, contrary to its rules and regulations, and in bad faith. Petitioner avers that she should have received notice of a five-year appointment on or before September 1, 2010, and that the notice of appointment was ministerial in nature.

Respondents move to dismiss the Second Amended Verified Petition/Complaint in its entirety pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). Respondents aver that: (1) petitioner cannot state a cause of action for breach of contract because its faculty handbook and policy document are not contracts; (2) the Article 78 claims should be dismissed as time-barred; and (3) the defamation claims should be dismissed as privileged or non-actionable opinion.

Petitioner avers that: (1) she has pled cognizable plenary claims; (2) she has an enforceable contract with a five-year term; and (3) NYU was required to follow its disciplinary procedures prior to terminating her employment. Petitioner further avers that NYU acted in bad faith in terminating her.

In reply, respondents maintain that: (1) petitioner does not have a five-year employment contract; (2) petitioner does not have a contractual right to enforcement of certain NYU policies; (3) petitioner does not set forth any basis on which she could obtain Article 78 relief; and (4) the defamation claims of petitioner rest upon opinion or are barred by a qualified privilege.

The Article 78 claim of petitioner is in the form of mandamus. The statute of limitations for a mandamus to compel is four months from the date when a demand to perform a ministerial act is refused. **See CPLR 217; De Milio v. Borghard, 55 N.Y.2d 216, 220 (1982)**. A demand by a party should be made no more than four months after the right to make the demand arises. **Matter of Castro v. Kelly, 29 Misc. 3d 1236(A), 2010 N.Y. Misc. LEXIS 6055, *10 (Sup Ct, NY County Dec. 15, 2010)**. An aggrieved party may be charged with laches if a demand is not promptly made. **Id. at *9**.

Here, petitioner claims that she should have received notice on September 1, 2010 of her five-year appointment. Petitioner had until January 1, 2011 to demand notice of the appointment. However, there is no evidence that petitioner ever made a demand. The failure by petitioner to make a timely demand for the appointment bars her Article 78 claim. **See Castro, 2010 N.Y. Misc. LEXIS 6055, at *10**. Accordingly, the Article 78 claim of petitioner is dismissed pursuant to CPLR 3211(a)(5).

Moreover, a writ of mandamus may only be issued where there is a clear legal right to the relief sought. **Brusco v. Braun, 84 N.Y.2d 674 (1994)**. The decision by respondents not to renew the faculty appointment of petitioner was a discretionary act. Petitioner is not entitled to a writ of mandamus to receive a five-year appointment nor is she entitled to reinstatement and expungement of records, as she has not established a clear legal right to the relief she seeks.

It is well settled that employment policies may create an enforceable employment contract if the employer expressly limits its right to terminate an employee, and the employee detrimentally relies upon that limitation. **See De Petris v. Union Settlement Assn., 86 N.Y.2d 406, 410 (1995), *citing* Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 465-466 (1982)**. "Mere existence of a written policy, without the additional elements identified in *Weiner*, does not limit an employer's right to discharge an at-will employee or give rise to a legally enforceable claim by the employee against the employer." **De Petris, 86 N.Y.2d at 410**. "Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements...It would subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision." **Lobosco v. N.Y. Tel. Company/NYNEX, 96 N.Y.2d 312, 317 (2001)**. "When a complaint merely recites a litany of academic and administrative grievances couched in terms of a violation of a contractual right to tenure and is devoid of any reference to the contractual basis for the rights asserted, academic prerogatives should not be channeled into a cognizable contract action classification." **Maas v. Cornell Univ., 94 N.Y.2d 87, 93 (1999)**.

The NYU faculty handbook and policy document are insufficient to create a contractual obligation between petitioner and respondents. No writing was submitted to demonstrate that NYU agreed that its faculty handbook and policy document could or should have a contractually binding effect. Moreover, petitioner does not allege that any such writing exists or that she relied upon such writing. In stark contrast, the policy document expressly vests vast discretion in NYU to award a five-year appointment after a comprehensive review and provost approval. Accordingly, the breach of contract claims of petitioner are hereby dismissed pursuant to CPLR 3211(a)(1) and (a)(7).

"A claim for defamation must allege a false statement, published without privilege or authorization to a third party...." **O'Neill v. New York Univ., 97 A.D.3d 199, 212 (1st Dept. 2012) (internal quotation marks omitted)**. "Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue." **Thomas H. v. Paul B., 18 N.Y.3d 580, 584 (2012) (internal citations omitted)**. Although a statement may be

defamatory, a qualified privilege is extended to communications between persons who have a common interest in the subject matter. **Liberman v. Gelstein, 80 N.Y.2d 429, 437 (1992)**. A qualified privilege extends to communications between employees and management regarding job-related misconduct. **Present v. Avon Prods., Inc., 253 A.D.2d 183 (1st Dept. 1999)**. The privilege may be overcome only upon a showing of malice. **See Thomas H., 18 N.Y.3d at 586; Liberman, 80 N.Y.2d at 437**.

In her 531 paragraph petition/complaint, petitioner challenges no less than 17 statements of fact made by respondents Joe Juliano, Mary Schmidt Campbell, and John Sexton. As a matter of law, this court finds that none of the challenged statements constitute false factual statements. **Fleischer v. NYP Holdings, Inc., 104 A.D.3d 536, 537 (1st Dept. 2013)**. Moreover, the statements are subject to a qualified privilege, as they were published to NYU faculty and students with a common interest in or duty toward the viability of Tisch Asia. The complaint fails to overcome the qualified privilege, as it contains no more than conclusory allegations that the statements were made with malice.

Accordingly, it is hereby

ADJUDGED that the hybrid application of petitioner seeking an order pursuant to CPLR Article 78, compelling NYU to provide her an employment contract for a five-year term, declaring that NYU breached its contractual obligations to petitioner, and further declaring that respondents defamed petitioner, is denied and the proceeding is dismissed without costs and disbursements; and it is further

ADJUDGED that the motion by respondents for an order dismissing the Second Amended Verified Petition/Complaint in its entirety, with prejudice, is granted.

Dated: April 14, 2014

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR

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 or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).