

Matter of Salvador v Touro Coll.
2014 NY Slip Op 33636(U)
October 15, 2014
Supreme Court, New York County
Docket Number: 102913/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 102913/2012
SALVADOR, LEODEGARIO D.
VS.
TOURO COLLEGE
SEQUENCE NUMBER : 003
COMPEL OR STAY ARBITRATION

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

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</u>

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

FILED

OCT 20 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

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

10/15/14

Dated: ~~10/15/14~~


HON. EILEEN A. RAKOWER, 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 15

-----X

In the Matter of the Application of
LEODEGARIO D. SALVADOR,

Index No.
102913/2012

Petitioner,

**DECISION
and ORDER**

For a Judgment Pursuant to Art. 78, CPLR 78,

- v -

TOURO COLLEGE AND TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER,

FILED
OCT 20 2014
NEW YORK
COUNTY CLERK'S OFFICE

Mot. Seq. 003

Respondents.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

On June 6, 2012, Leodegario D. Salvador (“Petitioner” or “Salvador”) commenced this Article 78 proceeding against Touro College and Touro College Jacob D. Fuchsberg Law Center (“Touro Law”) (collectively, “Respondents” or “Touro”) for monetary and equitable relief including requiring the issuance of a LLM degree, a declaration that the actions taken against Petitioner were arbitrary and capricious, special damages for a lost career as a result of not obtaining a LLM degree, and other damages together with costs of suit. The Verified Petition contained one cause of action, which alleged that “Respondents breached the implied in fact contract and acted arbitrarily and capriciously and in bad faith by refusing to confer an LLM degree.”

On January 9, 2012, Respondents filed a motion to dismiss the Petition, which the Court denied, by decision and order filed October 22, 2012. On January 7, 2013, Respondents served an answer and counterclaim to the Petition, for which Petitioner served a reply on January 28, 2013.

On July 25, 2013, Petitioner filed a motion to amend the Petition in order to add four additional causes of actions; specifically, fraud in the inducement, breach of contract, negligence, and negligent representation. Respondents opposed the motion. By decision and order filed December 5, 2013, the Court granted Petitioner's motion.

Respondents now move for an Order compelling arbitration, pursuant to CPLR §7503, as per Respondents' Student Handbook, with regard to the causes of the action set forth in the Amended Petition and Complaint of Petitioner, or alternatively, dismissing the Amended Petition pursuant to CPLR §3211(a)(1) and (a)(7).

Petitioner obtained a Juris Doctorate Degree from Novus University, an online university which is not ABA-accredited. He applied for admission to Touro Law's Masters of Law ("LLM") program on January 21, 2011. Touro Law offers two LLM programs: General LLM and LLM in US Legal Studies. The General LLM program is available to students already possessing a law degree from an ABA approved law school in the United States. The LLM in US Legal Studies program is available to graduates of foreign law schools.

On January 21, 2011, Touro accepted Petitioner into its US Legal Studies LLM program and he was enrolled for their Spring 2011 semester. It was not until September, 2011 that Touro realized that Petitioner had obtained his law degree from a non ABA-accredited, and non-foreign law school. On January 19, 2012, Respondent alleges that it informed Petitioner that his admittance was based on a factual error about his eligibility and that Touro Law would be unable to grant him an LLM degree. On that date, his status was changed to that of a non-matriculated student, and he was allegedly offered the option to withdraw and receive a refund for his 11 credits earned as of September 2011, or to continue as a non-matriculated student.

On January 26, 2012, Petitioner emailed Dean Raful, Dean Taylor, and the school's registrar Paula Klutch, claiming that Novus Law School should not be considered an unaccredited online school, but instead a foreign law school based in the Marshall Islands.

In support of Respondents' motion to compel arbitration of this matter. Respondents submit the attorney affirmation of Michael Newman, which annexes the following exhibits: Amended Verified Petition and Complaint, the Court's October 22, 2012 Order which denied Respondents' Notice to Dismiss the Petition, Student Handbook, Respondents' website detailing its LLM program requirements, a copy of the Petitioner's Admissions Application to Respondents' LLM program, dated January 21, 2011, and a copy of the affidavit of Paula Klutch, dated July 6, 2012.

Respondents contend that Petitioner's application "is governed by the Student Handbook that he was given by Touro ..." and that "only specific promises set forth in a university bulletin, circular, and handbooks, are material to the student's relationship with the school" The Student Handbook contains the following provision:

Registration and matriculation at Touro after the issuance of this Handbook is consideration for and consideration for and constitutes a student's knowing acceptance of the binding Alternative Dispute Resolution ("ADR") mechanism (including binding arbitration) contained herein. Thus, any dispute, claim or controversy arising out of or related to your application, registration, matriculation, graduation or other separation from Touro's mechanisms shall be exclusively resolved through final and binding expedited arbitration conducted solely before the American Arbitration Association ("AAA"), or any successor in interest, in accordance with the AAA Rules then in effect.

Respondents contend that Petitioner's claim bears a reasonable relationship to "any dispute, claim or controversy arising out of or related to your application, registration, matriculation, graduation ... shall be exclusively resolved through final and binding expedited arbitration ...". Petitioner, however, argues that Respondents waived arbitration by moving to dismiss on statute of limitations grounds and substantive grounds that actions taken were not arbitrary and capricious, interposing an answer with affirmative defenses and counterclaims for fraud without asserting an affirmative defense that this matter should be arbitrated, and serving demands for discovery on Petitioner including a document production request and deposition notice.

A contractual right to arbitrate may be waived if the party invoking arbitration manifests a “preference clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration.” *Zimmerman v. Cohen*, 236 N.Y. 15, 19 [1923]; *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y. 3d 363, 371 [2005]. “In deciding whether the right to arbitration [has been] waived, the court should consider factors such as the time elapsed from the commencement of the litigation to the demand for arbitration, the extent of the litigation so far, and ... [any] economic prejudice caused by delay.” *Advest, Inc. v. Wachtel*, 253 A.D. 2d 659, 660-61 [1st Dep’t 1998]. A party also can waive their right to arbitrate “by failing to assert an affirmative defense relating to arbitration in their answer, and by extensively engaging in litigation for years.” *LaRosa v. Arbusman*, 74 A.D. 3d 601, 604 [1st Dep’t 2010]. Furthermore, once the right to arbitration is waived it cannot be regained. *Ryan*, 58 A.D. 3d at 481-82; *Tengtu Int’l Corp. v. PakKwan Cheung*, 24 A.D. 3d 170, 172 [1st Dep’t 2005].

Here, Respondents have waived their right to arbitrate. Respondents failed to raise the issue in their motion to dismiss Plaintiff’s initial Complaint or to assert an affirmative defense in their answer based on the arbitration provision of the Student Handbook. In addition, Respondents sought affirmative relief in this action by asserting a counterclaim and propounded discovery upon Petitioner before asserting their right to arbitrate. Thus, Respondents’ actions are inconsistent with its claim that the parties were obligated to settle their differences by arbitration. *Flores*, 4 N.Y. 3d at 371.

Alternatively, Respondents move to dismiss the new causes of action asserted in Plaintiff’s Amended Petition pursuant to CPLR 3211(a)(1) and (a)(7). The purported documentary evidence submitted by Respondents is a portion of the Student Handbook, which states in relevant part:

Students are required to investigate for themselves as to whether the program they enroll in meets their personal, educational, and career needs. While students may expend significant sums associated with higher education, successful completion of a course, program, or degree is dependent on many factors. The payment of tuition entitles a student to register and matriculate in the courses and programs available and offered by Touro school or program in which the student is enrolled. *Except as noted in the paragraph below, no contract rights exist or are established in the student-educational institution setting. To this end, Touro disclaims any*

liability for promises, assurances, representations, warranties, or other statements made in its marketing or promotional materials and makes absolutely no promises, assurances, representations, guarantees, warranties or other statements concerning our courses and programs and a student's academic success in them. Thus, Touro further disclaims any liability in tort as well as contract in connection with any of the foregoing. In order for a degree to be earned, the required grades and grade point averages must be achieved and maintained, and all other requirements of the school and program must be fulfilled. (emphasis added).

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Respondents seek to dismiss Petitioner’s breach of contract claim. The

elements of a cause of action for breach of contract are: the existence of a contract, performance by plaintiff, the breach by defendant, and resulting damages. (*See Harris v. Seward Parking House Corp.*, 79 AD3d 425 [1st Dept 2010]). As set forth in *Clogher v. New York Medical College*, 976 N.Y.S. 2d 198, 199 [2d Dept 2013]:

An implied contract exists between [a school] and its students such that if a student complies with the terms prescribed by [the school], he or she will obtain the degree which he or she sought. The essence of the implied contract is that an academic institution must act in good faith in its dealings with its students. The rights and obligations of the parties as contained in the [school's] bulletins, circulars and regulations made available to the student, become a part of this contract.

Clogher, 976 N.Y.S. 2d at 199 (internal citations omitted).

In the Amended Complaint, Petitioner alleges that there is an implied contract between him and Touro in the sense that assuming the student complies with the terms prescribed by the university, the student will obtain the degree sought. Petitioner alleges that he performed under the contract in that he paid the necessary fees, enrolled in and successfully completed the necessary course work for an LLM degree. Petitioner alleges that Respondents breached the agreement by refusing to award Petitioner his degree even though he had completed the necessary requirements and that Petitioner suffered damages from Respondent's breach. The allegations set forth in the Amended Complaint, construed liberally, state a cause of action against Respondents to recover damages for breach of contract.

Respondents also move to dismiss Plaintiff's fraudulent inducement claim, the second claim for relief of the Amended Complaint. The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*MBIA Ins. Corp. V. Credit Suisse Securities (USA) LLC*, 32 Misc.3d 758, 927 NYS2d 517 [Sup Ct NY, 2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action.

In the Amended Complaint, Petitioner alleges that Petitioner applied for admission to the LLM program at Touro Law School in January 2011, “fully disclosed his credentials when he applied to Touro Law School”, and “relied completely on the expertise of the admissions committee when he was accepted into the program and their representations that he was qualified to enter into the program.” Petitioner further alleges:

23. The only reason why Petitioner was accepted into the program was to collect his tuition and seat.

24. Although Petitioner met the academic requirements for graduation, met the financial obligations for graduation, including the graduation ceremony fee, the Respondent knew at the time that it was not going to allow Petitioner the opportunity to graduate in order to fill a seat and obtain his tuition but still in bad faith made the representation to induce him to attend the school.

25. In fact, due to this misrepresentation, Petitioner enrolled in the school, paid the tuition and successfully completed all the course work and was otherwise eligible to graduate.

25. [sic] The representation made by Respondent that he would meet the school requirements for admission induced Petitioner to enroll in the school at considerable expenses and caused him a substantial diminution of earning while attending school full-time for approximately one year.

Here, accepting all allegations as true, Petitioner has stated a cause of action for fraudulent inducement based on the allegations that Petitioner “fully disclosed his credentials when he applied to Touro Law School”, “Petitioner relied completely on the expertise of the admissions committee when he was accepted into the program and their representations that he was qualified to enter into the program”, Respondent “knew at the time it was not going to allow Petitioner to graduate ... but still in bad faith made the representations to induce him to attend the school,” and as a result of the misrepresentation, Petitioner enrolled in the school, paid the tuition, and suffered damages when he could not graduate.

Respondents further move to dismiss Plaintiff’s negligence and negligent misrepresentation claims, Plaintiff’s third and fourth claims for relief.

The third claim for relief is for “negligence.” The Amended Complaint alleges the following allegations:

42. Respondent’s acts and omissions alleged above involved a want of ordinary care. Respondent’s [sic] had a legal duty to administer the LLM program, and to hire and retain faculty and staff to administer the program, according to a standard of conduct that is reasonable for LLM programs in the United States. Respondent had a legal duty to hire and maintain a faculty and staff according to a higher standard of care and conduct met and owed by manager or employee claiming to possess the experience, expertise, and specializations of a law school. Respondent owed a duty to Petitioner not to hire and retain negligent faculty and staff. Further, Respondent owed a duty to supervise their faculty and staff,

43. A reasonable person or entity in Respondent’s position would not have acted as Respondent did, and would have acted in a way that Respondent did not.

44. Respondent knew or should have known with reasonable certainty that their acts would cause Petitioner to suffer damages as set forth above.

45. Respondent’s failure to meet the standard of care and conduct proximately caused the harm stated in this complaint.

46. Respondent’s conduct was wanton and reckless and Defendant is liable for the foregoing acts and omissions.

47. As a result of Respondent’s negligence, Petitioner has been damaged

“The courts have uniformly refused, based on public policy considerations, to enter the classroom to determine claims based upon educational malpractice.” *Paladino v. Adelphi University*, 89 A.D.2d 85, 87 [2d Dep’t 1982]. Here, Petitioner’s claim, as stated, is based upon an alleged breach of care in administering Respondents’ LLM program, specifically with the hiring, retaining and supervising of staff, and as such, sounds in educational malpractice, which is not recognized under New York law.

The fourth claim of relief is for negligent misrepresentation. The Amended Complaint alleges the following allegations:

49. Touro has a special relationship with Petitioner and its other students which give rise to provide the students with correct and complete information. Touro represented its knowledge of its own requirements and expertise in explaining them to Petitioner at the time of advertising the LLM program and/or providing education services to them. Touro knew or should have known that Petitioner was relying upon it to provide complete and correct information about the requirements of the LLM program, rather than misrepresenting these requirements.

50. Touro made oral and written misrepresentations of existing fact to Petitioner, that falsely characterized the requirements of the LLM program.

51. Touro had a duty to fully disclose the graduation requirement for the LLM program and their failure to disclose such to Petitioner was false and misleading.

52. Touro's negligent misrepresentations as to its LLM program were the proximate cause and determinative factor in causing the loss by Petitioner of an LLM degree.

53. Touro's negligent misrepresentation to Petitioner were reckless and wanton.

54. As a result of Respondent's negligent misrepresentation, Petitioner has been damaged ...

“The theory of negligent misrepresentation ... turns on the nature of the relationship between the parties. The Court of Appeals has consistently required proof of a relationship establishing either privity of contract or a relationship very close to that.” *164 Mulberry St. Corp. v. Columbia Univ.*, 4 A.D.3d 49, 59 (1st Dept 2004). To state a claim for negligent misrepresentation, a party must allege: (1) Defendant had a duty; (2) based upon some special relationship with Plaintiff; (3) to impart correct information; (4) that the information given was false or

incorrect; and (5) that the Plaintiff justifiably relied upon that information provided. (*See Berger-Vespa v. Rondack Building Inspectors*, 293 AD3d 838, 740 NYS2d 504 [2002]). CPLR §3016(b) provides that where a cause of action or defense is based on misrepresentation, it must be stated in detail. Here, taking all allegations of the Amended Complaint as true including those asserted in connection with the fraudulent inducement claim, Plaintiff has adequately stated a claim for negligent misrepresentation.

Lastly, the portion of the Student Handbook referenced by Respondents does not flatly contradict the legal conclusions and factual allegations of the complaint as to warrant dismissal as a matter of law.

Wherefore, it is hereby,

ORDERED that Respondents' motion is granted only to the extent that the negligence cause of action of the Amended Complaint is dismissed; and it is further

ORDERED that Petitioner's remaining causes of action are severed and shall proceed; and it is further

ORDERED that Respondents are directed to file an answer to Petitioner's Amended Complaint within 20 days of service of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: OCTOBER 15, 2014



Eileen A. Rakower, J.S.C.

FILED

OCT 20 2014

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