

Sarwar v New York Coll. of Osteopathic Med. of N.Y. Inst. of Tech.
2015 NY Slip Op 30128(U)
January 26, 2015
Supreme Court, Nassau County
Docket Number: 600490/2014
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

AQIL SARWAR,

Plaintiff,

-against-

NEW YORK COLLEGE OF OSTEOPATHIC
MEDICINE OF NEW YORK INSTITUTE OF
TECHNOLOGY,

Defendant.

TRIAL/IAS PART 18
INDEX No.: 600490/14
Submission Date: 11/25/14
Motion Sequence: 001, 002

DECISION & ORDER

Papers Numbered

Sequence #001
Notice of Motion, Affirmation & Exhibits 1
Memorandum of Law in Support of Motion 2
Memorandum of Law in Opposition to Motion 3
Sequence #002
Notice of Cross Motion & Affirmation 4
Memorandum of Law in Support of Motion and in Opposition
to Cross Motion 5
Reply Affirmation 6

Upon the foregoing papers, Motion by defendant pursuant to CPLR §3211 (a)(1), (5), and (7) for judgment dismissing the complaint, or in the alternative pursuant to CPLR §306-b dismissing the complaint for failure to make timely service, is granted pursuant to CPLR 3211(a)(5) and (7). Defendant's additional request for an award of costs and attorneys' fees pursuant to 22 NYCRR 130-1.1 is denied.

Cross-motion by plaintiff for an order denying the motion and deeming its service of the summons and complaint on August 1, 2014, as sufficient, "in the interests of justice," or in the alternative permitting reservice, is denied as moot.

Plaintiff, a practicing Muslim, enrolled in defendant's private medical college in 2007. Initially, he was unable to attend a mandatory evening event because he felt sick after fasting all

Sarwar v NY College
Index No.: 600490/14

day, as required for the Muslim observance of Ramadan. Plaintiff then alleges that due to the onset of various physical ailments, he failed two of three courses in the first semester. By letter dated February 4, 2008, he was advised that he was dismissed from the program.

Plaintiff appealed to Associate Dean Achtziger and the Student Affairs Committee, but the dismissal was upheld. He also appealed to Dean Scandalis, to no avail, and alleges that he spoke to various professors in his attempt to set aside his dismissal.

On February 3, 2014, plaintiff filed the summons and complaint herein, where he alleges one cause of action for breach of contract, and one for unjust enrichment. The breach of contract claim is based upon plaintiff's allegations that defendant "prematurely" expelled him, gave him "only a sham appeal"; refused "to permit him to perform necessary remedial work" and failed "to disclose to plaintiff that the school had a mandate to winnow out its enrolled student body" (complaint at ¶41). The unjust enrichment claim is based upon defendant's retention of tuition and fees from plaintiff, in an amount exceeding \$50,000.00, following his dismissal. Plaintiff also seeks punitive damages.

Due to law office failure, the summons and complaint were not served until August 1, 2014.

In this pre-answer motion defendant seeks judgment dismissing the complaint pursuant to CPLR §3211(a)(1), (5), and (7), or in the alternative, for failure to serve the summons and complaint within six months of filing pursuant to CPLR §306-b. Defendant also seeks an award of costs and attorneys fees pursuant to 22 NYCRR 130-1.1.

Plaintiff cross-moves for an order either upholding his service "in the interests of justice," or granting him leave to reserve the summons and complaint.

CPLR §3211

On a motion pursuant to CPLR §211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference (*ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 227 [2011], citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]). However bare legal conclusions are not presumed to be true (*Goel v. Ramachandran*, 111 A.D.3d 783, 791-792 [2d Dept. 2013]; *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 667 [2d Dept. 2013]).

On a motion to dismiss pursuant to CPLR 3211(a)(5), the defendant must establish, *prima facie*, that the time in which to commence an action has expired (*Rakusin v. Miano*, 84 A.D.3d 1051, 1052 [2d Dept. 2011]; *Romanelli v. Disilvio*, 76 A.D.3d 553 [2d Dept. 2010]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*Torah v. Dell Equity, LLC.*, 90 A.D.3d 746 [2d Dept. 2011]; *Rakusin, supra*; *Romanelli, supra*).

Sarwar v NY College
Index No.: 600490/14

The criterion on a motion pursuant to CPLR §211(a)(7) is whether “the facts, as alleged, fit within any cognizable legal theory” (*Leon, supra* at 87-88).

Judicial Review of Academic Dismissal

“Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution’s judgment of a student’s academic performance” (*Matter of Susan M. v. New York Law School*, 76 N.Y.2d 241, 245 [1990]). “Courts retain a restricted role” in dealing with and reviewing controversies involving institutions of higher learning. (*Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92 [1999]). “CPLR article 78 proceedings are the appropriate vehicle because they insure that the over-all integrity of the educational institution is maintained”. *Id.*

Although couched in the complaint herein in terms of breach of contract and unjust enrichment, plaintiff’s complaint is in fact a challenge to defendant’s academic and administrative decisions, and consequently the redress for his dismissal was an Article 78 proceeding, instead of this plenary action (*Keles v. Trustees of Columbia Univ. in the City of N.Y.*, 74 A.D.3d 435 [1st Dept. 2010], lv. app. dsmd 16 N.Y.3d 890 [2011], cert. den. 132 S. Ct. 255 [2011]); *Padiyar v. Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 73 A.D.3d 634 [1st Dept. 2010], lv. app. den. 15 N.Y.3d 708 [2010]; *Gary v. New York Univ.*, 48 A.D.3d 235 [1st Dept. 2008]; *Frankel v. Yeshiva Univ.*, 37 A.D.3d 760 [2d Dept. 2007], lv. app. den. 9 N.Y.3d 802 [2007]; *Bottalico v. Adelphi Univ.*, 299 A.D.2d 443 [2d Dept. 2002]; *Diehl v. St. John Fisher Coll.*, 278 A.D.2d 816 [4th Dept. 2000], lv. app. den. 96 N.Y.2d 707 [2001]; *Melvin v. Union Coll.*, 195 A.D.2d 447 [2d Dept. 1993]).

Furthermore, as the limitations period for commencement of an Article 78 proceeding is within four months after the determination to be reviewed becomes final and binding (CPLR 217; see *Padiyar, supra*, and *Bottalico, supra*), any claim plaintiff might have had is time-barred (*Padiyar, supra*; *Frankel, supra*; *Bottalico, supra*). This finding of untimeliness applies to plaintiff’s breach of contract claim as well as the claim for unjust enrichment. (*Kickertz v New York Univ.*, 110 A.D.3d 268, 276-277 [1st Dept. 2013]). Under these circumstances, conversion by this Court of this action to a special proceeding is not available (*Keles, supra*), and the complaint must be dismissed.

For the record, this is not a case where plaintiff alleges that defendant failed to comply with its own obligations as specifically set forth in the school’s bulletins, circulars, student handbook and regulations (cf. *Clogher v. New York Med. Coll.*, 112 A.D.3d 574, 576 [2d Dept. 2013]). Nor is it a case where arbitrary action taken against a student was predicated upon grounds unrelated to academic performance (cf. *Matter of Rizvi v. New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 A.D.3d 1049 [2d Dept. 2012]). Nor yet is this a case where dismissal is premature (*Eidlisz v. New York Univ.*, 15 N.Y.3d 730 [2010]).

Plaintiff does not allege that any specific policy, rule, guideline or regulation was violated by defendant (*Gary, supra*). Instead, he suggests that religious discrimination played a

Sarwar v NY College
Index No.: 600490/14

role in his dismissal, although any claim for religious discrimination under the state Human Rights Law would be untimely under the three-year limitations period for discriminatory practices (CPLR §214(2); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 239 [1983]).

Based on the foregoing, defendant's motion to dismiss the complaint must be granted, based upon plaintiff's failure to state a cause of action upon which relief can be granted, and because the claims alleged are time-barred.

The parties' additional contentions do not warrant discussion. Defendant's request for an award of sanctions is denied, as this Court does not find that this action is frivolous within the meaning of 22 NYCRR 130-1.1.

The cross-motion is denied as moot.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: January 26, 2015
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

JAN 29 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE