

Taranto v New York Univ.
2015 NY Slip Op 30304(U)
February 9, 2015
Supreme Court, Kings County
Docket Number: 507146/13
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

-----X

LENORE TARANTO,

Plaintiff,

-against-

NEW YORK UNIVERSITY, ET AL,

Defendants.

-----X

DECISION/ORDER

Index No. 507146/13

**Submitted: 12/18/14
Mot. Seq. #1**

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' pre-answer motion to dismiss the complaint.

Papers	Numbered
Notice of Motion and Exhibits Annexed and Memo of Law.....	<u>1-9</u>
Affirmation In Opposition and Exhibits Annexed.....	<u>10-14</u>
Reply Memo of Law	<u>15</u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants New York University (NYU), several divisions of said university and several employees of NYU sued in their capacity as employees, which parties represent all of the NYU defendants, hereinafter referred to as "the NYU defendants", move, pre-answer, to dismiss the complaint as to them. Defendant Carmel Richmond Nursing Home, Inc., (Carmel) and two employees of Carmel, Lakhter and Reyes, sued in their capacity as employees, also moved to dismiss the complaint as to them. The latter motion (seq #2) was granted after oral argument, by short form order, and the complaint was dismissed as to them. The court reserved decision as regards the

instant motion. For the reasons which follow, the motion is granted and the complaint is dismissed.

Background

This is an action commenced in 2013 by plaintiff, a former student at NYU in their master's program in occupational therapy. She started in the fall of 2008 and attended full time for one year. She then enrolled as a part-time student. During her studies, in the fall semester of 2010, she participated in a fieldwork clinical placement with accompanying seminar (the course is called "Fieldwork I") at defendant Carmel Richmond Healthcare and Rehabilitation Center, run by the Carmelite Sisters for the Aged and Infirm. In November of 2010, Carmel asked NYU to terminate her placement, for several reasons, including deficiencies in her performance and knowledge and her failure to follow their dress code (Affidavit of Patricia M. Carey). NYU did so, and she received a failing grade for the course. She had other failing grades, and was dismissed from the program. She indicated she was going to appeal the dismissal but before she did so¹, she was subsequently, in February of 2011, reinstated, her grade for the clinical placement was changed to an incomplete, and she was permitted to retake the course without paying the tuition a second time. When she completed the course and the field placement, she received a "A-" in place of the incomplete, and she graduated with the applicable degree in January 2013. Ms. Carey, the Associate Dean for Student Affairs at Steinhardt, the school of NYU which the program is part of, also annexes copies of plaintiff's transcript, the syllabus for the Fieldwork I course, a copy of the letter from Carmel to NYU recommending plaintiff's fieldwork be terminated at their

¹Counsel for movants indicates she did complete the appeal process, but Ms. Carey's letter indicates she did not.

facility and a copy of Ms. Carey's letter dated 2/22/11 to plaintiff reinstating her as a matriculated student following a conversation with plaintiff to that end. From the transcript, it appears that plaintiff did not take any courses in the spring of 2011, despite being reinstated, or in the fall of 2011. She retook the course Fieldwork I in spring 2012, then took classes in summer 2012 and fall of 2012, after which she graduated.

On November 14, 2013, plaintiff commenced this action. Her amended verified complaint is dated January 29, 2014 and comprises 200 numbered paragraphs. She seeks compensatory damages, punitive damages, treble damages and attorney's fees. The Carmel defendants were dismissed on the grounds that plaintiff was not an employee of theirs, and that an intern in a clinical placement via a university cannot sue for wrongful termination of an unpaid internship, as clearly set forth in *Greenberg v Fielding*, 2010 NY Slip Op 30902(U) [Sup Ct NY Co].

As regards the NYU defendants, the amended complaint alleges the following causes of action, without differentiation between the Carmel defendants which have been dismissed and the NYU defendants (as stated in the plaintiff's headings): negligence; breach of contract; breach of the covenant of good faith and fair dealing; negligent hiring, retention, training and supervision; negligent infliction of emotional distress and fraud.

The NYU defendants move to dismiss pursuant to CPLR 3211 on the grounds that plaintiff's claims are time barred, as they had to be set forth in an Article 78 brought within the four month statute of limitations for Article 78 proceedings, and for failing to state a cause of action. It is noted that the moving defendants failed to provide the court with working copies of their motion papers with exhibit tabs, as required by the

court's part rules, which made reviewing this motion somewhat unwieldy.

Defendants argue that an Article 78 proceeding is plaintiff's exclusive remedy, as she is challenging a university's academic and administrative decisions. They aver that CPLR § 217 clearly provides "that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon petitioner". The applicable determination herein is not specified, but presumably was plaintiff's dismissal from the university.

Defendants also argue that plaintiff cannot sue for breach of contract as a result of being given a failing grade, even if the grade was not subsequently changed to an Incomplete, as a decision of a university based on a student's academic performance is subject to judicial review only under Article 78.

Defendants next argue that plaintiff's claim for breach of the duty of good faith and fair dealing is intrinsically tied to the breach of contract claim and is thus duplicative.

As to plaintiff's claims for negligence and negligent hiring, retention, training and supervision and negligent infliction of emotional distress, defendants aver that there is no cause of action for educational malpractice. That is, it seems the argument goes, plaintiff was owed no duty that defendants could have breached, so if she was damaged, they are not responsible.

Finally, as to plaintiff's claim for fraud, defendants argue that she does not make the necessary claims in the complaint to set forth a cause of action for fraud.

Plaintiff opposes the motion with an attorney's affirmation and an affidavit from the plaintiff. Therein, counsel argues that defendants committed tortious acts against the plaintiff in terminating her clinical placement on her third day there, on the meager

grounds that she had not worn a lab coat, took lunch at the wrong time, didn't ask enough questions, and didn't lock a wheelchair properly, concluding that she was unprofessional and "beyond repair", and therefore this motion should be denied as he hasn't even had a chance to conduct discovery. He opines that plaintiff should have been given a warning and an opportunity to correct her behavior. He doesn't cite any law or contractual term that so provides. Plaintiff's affidavit states that she was not provided with an employee handbook, manual or other document regarding Carmel's policies, and therefore she feels she had no way to know what was expected of her. She further refutes the reasons Carmel gave for requesting that she be terminated from their program. As to NYU, plaintiff claims she was not properly supervised, and that the seminar instructor was supposed to meet with her before failing her in the fieldwork class. She claims she lost the spring 2011 semester because she was not reinstated until February, after classes had begun. She does not explain why she didn't enroll for the fall of 2011 either. She alleges she "lost" a year of earnings as she graduated a year late, but she didn't attend full time for the year before this incident, or in the years afterward.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall*

Apartments Co., LLC, 14 AD3d 479, 480 [2nd Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

However, if the statute of limitations has run, this is a legal question which is ripe for adjudication in a pre-answer motion.

The court concludes that plaintiff’s claims against the NYU defendants are all

claims addressed to the judgment of the university, and therefore had to be brought in an Article 78 proceeding within four months of her dismissal from the program. Her reinstatement may have mitigated NYU's damages, so to speak, but did not entitle plaintiff to bring a plenary action. As the court quotes in *Matter of Gilbert v State Univ. of N.Y. at Stony Brook*, 73 A.3d 774 (2d Dept 2010):

"Judicial review of the determinations of educational institutions regarding the academic performance of students 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 Williams v State Univ. of N.Y.--Health Science Ctr. at Brooklyn*, 251 AD2d 508, 674 NYS2d 702 [1998], quoting *Matter of Susan M. v New York Law School*, 76 NY2d 241, 246, 556 NE2d 1104, 557 NYS2d 297 [1990]).

In her first cause of action, plaintiff claims the NYU defendants were negligent, and in her affidavit in opposition to the motion, she elaborates by stating that they were negligent by not permitting her to attend classes at the beginning of the spring 2011 semester as a non-matriculated student while her appeal of her dismissal was pending, and for failing to properly follow their internal appeal procedures by, among other things, scheduling an appeal hearing before first meeting with her (paragraph 52). These are not claims sounding in negligence, and needed to be brought in an Article 78 proceeding, where plaintiff would have been entitled to compensatory damages if she established that she was wrongfully terminated and "lost" a semester.

In her second cause of action, plaintiff claims breach of contract. Since the plaintiff's cause of action to recover damages for breach of contract only alleges violations of the defendants' internal rules and procedures, and do not form a basis for a discrimination cause of action, the plaintiff is only entitled to CPLR article 78 review.

See *Wander v St. John's Univ.*, 99 AD3d 891 (2d Dept 2012), citing *Maas v Cornell Univ.*, 94 NY2d at 92; *Risley v Rubin*, 272 AD2d 198, 708 NYS2d 377 [2000]; *Holm v Ithaca Coll.*, 256 AD2d 986, 988, 682 NYS2d 295 [1998]; *Gertler v Goodgold*, 107 AD2d at 484.

Next, as regards plaintiff's cause of action for breach of the covenant of good faith and fair dealing, this claim requires a contract, whether express or implied, and, as stated above, claims of breach of contract by a student against a university must be brought in an Article 78 proceeding. Further, plaintiff's claims are duplicative of the breach of contract claims and must be dismissed on that basis as well. *Baer v Complete Off. Supply Warehouse Corp.*, 89 AD3d 877 (2d Dept 2011).

The remainder of the plaintiff's causes of action are entirely inapplicable to the matter. A cause of action for fraud requires allegations that the defendant misrepresented a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury. Plaintiff has made no such claims against the NYU defendants.

A cause of action for negligent hiring and/or supervision requires a bodily injury which would not have occurred were it not for the negligence of the party sued in hiring or retaining an employee with knowledge of his propensity for the conduct which caused the injury. This cause of action is used for bar patrons who claim they were assaulted by bouncers. It is clearly not applicable herein.

As regards plaintiff's cause of action for negligent infliction of emotional distress,


the facts alleged do not make out this cause of action, which requires acts "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency". See *McGovern v Nassau County Dept. of Social Servs.*, 60 AD3d 1016 (2d Dept 2009), citing *Ruggiero v Contemporary Shells*, 160 AD2d 986, 987, 554 NYS2d 708 [1990]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 759, 868 NYS2d 281 [2008]; *Stanton v Carrara*, 28 AD3d 642, 813 NYS2d 515 [2006]).

It is noted that plaintiff does not allege she was discriminated against by any of the defendants under the New York City or New York State Human Rights laws, which would take claims against a university out from under the Article 78 rubric as they are not deemed "related to academic achievement". *Wander v St. John's Univ.*, 99 AD3d 891 (2d Dept 2012).

In conclusion, the NYU defendants' motion is granted and the complaint is dismissed.

The foregoing constitutes the decision, order and judgment of this Court.

Dated: Brooklyn, New York
February 9, 2015



 Hon. Debra Silber, A.J.S.C.
 Hon. Debra Silber
 Justice Supreme Court

FILED
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