SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MELINA SPADONE, individually and as Parent and Natural Guardian of ASHER PALMER, an Infant,

Plaintiff,

-against-

THE LANG SCHOOL,

Defendant.

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Index No. 151964/2015

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking damages relating to her son's enrollment and subsequent removal from the defendant school. Defendant now moves for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiff's complaint in its entirety. For the reasons set forth below, defendant's motion is granted.

The relevant facts as alleged in the complaint are as follows. Defendant The Lang School ("Lang" or the "school") is a not-for-profit private school that holds itself out as a progressive, independent K-12 school that effectively serves the needs of "twice exceptional" children, including, among others, children with ADHD, dyslexia, Asperger's, anxiety and other learning differences ("2e Students"). Plaintiff's son, Asher Palmer ("Asher"), is such a student. In December 2013, plaintiff Melinda Spadone ("Spadone") signed an Enrollment Agreement

under which Lang offered Asher a placement for the second half of the 2013-2014 school year (the "2013 Agreement"). Asher did well at the school and on or about January 24, 2014, approximately one-month after Asher began attending Lang, Lang offered Spadone a place for Asher for the 2014-2015 school year. As a result, Spadone again signed an Enrollment Agreement for the 2014-2015 school year (the "2014 Agreement"). Both agreements explicitly provided that: "The School reserves the right to terminate this Agreement at any time if, for any reason, in the judgment of the School, enrollment is not in the best interest of your child or of other children enrolled in the School."

On or about June 3, 2014, there was an incident in Asher's engineering class during which Asher purportedly acted in an unacceptably aggressive way towards his engineering teacher and classmates. In response, the school did not expel Asher, but rather informed Spadone that if Asher again acted in an unacceptable manner, he would be expelled without further warning (the "One and Done Policy"). Further, the school informed Spadone that Asher would not be allowed to return to Lang in the Fall for the 2014-2015 school year because it could not support his needs (the "Termination Decision"). Asher's Special Education Itinerant Teachers ("SEITs") and outside psychologist told the school that this policy was inappropriate, unhelpful and potentially traumatic for Asher. Specifically, Asher's psychologist told the school that it would be very detrimental for Asher to have to transition to another new school setting in the Fall and he strongly encouraged Lang to reconsider its decision. Additionally, Spadone herself told the school that the Termination Decision would substantially undermine Asher's progress to date, and his ability to be accepted into another school. Plaintiff alleges that the school representative responded by telling her "any school will take a child with behavioral

issues for the right amount of money." Plaintiff characterizes this statement as a veiled "shakedown" to garner more financial support in order to bring Asher back to Lang. Rather than allow Asher to finish out the school year and inevitably face expulsion, Spadone removed Asher from Lang on or about June 12, 2014.

According to the complaint, Lang's decision to terminate Asher's enrollment for the following Fall was confusing, hurtful and traumatic for Asher and he became distraught and depressed. Further, plaintiff alleges that the decision adversely impacted his ability to succeed on subsequent school interviews.

Based on the above actions, Spadone commenced the instant action on or about February 26, 2015, asserting three causes of action against the school: (1) breach of contract; (2) fraud; and (3) negligent infliction of emotional distress. Defendant now moves for an order dismissing these causes of action on the grounds that they either fail to state a cause of action and/or are barred by documentary evidence. In response to the motion to dismiss, plaintiff filed an amended complaint on March 28, 2015. The amended complaint contains the same causes of action but includes additional allegations. In a stipulation filed on June 9, 2015, Lang chose to apply its motion to dismiss to the amended complaint. *See Sage Realty Corp. v. Proskauer Rose*, 251 A.D.2d 35 (1st Dept 1998) ("the moving party has the option to decide whether its motion should be applied to the new pleadings"). Thus, the court shall analyze defendant's motion to dismiss in relation to the amended complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when

plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the present case, defendant's motion for an order dismissing plaintiff's first cause of action for breach of contract is granted on the ground that it fails to state a cause of action as the relief sought can only be granted in an Article 78 proceeding. It is well settled that "[w]hile decisions of academic institutions are not immune from judicial scrutiny, review should be restricted to special proceedings under CPLR article 78, and only to determine whether the decision was arbitrary, capricious, irrational or in bad faith." *Keles v. Trustees of Columbia Univ. in the City of N.Y.*, 74 A.D.3d 435 (1st Dept 2010) (citing *Mass v. Cornell Univ.*, 94 N.Y.2d 87, 92 (1999)); *see also Kickertz v. New York Univ.*, 110 A.D.3d 268, 272 (1st Dept 2010). Indeed, in the context of claims against educational institutions, the Court of Appeals has made clear that a breach of contract action cannot stand where enforcement of the contract as requested would require the court to decide core academic determinations. *See Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 128 (1984).

Here, plaintiff cannot maintain a breach of contract claim against Lang as her claim is one to challenge the decisions of an academic institution and may only be brought in an Article 78 proceeding. Although plaintiff styles her claim as one for breach of contract, it is not based on a breach of a specific enforceable promise by defendant. Rather, plaintiff challenges defendant's determination not to invite Asher back for the 2014-2015 school year and, what plaintiff styles as, the school's "One and Done Policy," i.e. if Asher again acted in an unacceptably aggressive manner he would be expelled without further warning. Both of these allegations challenge the schools' judgment on core academic policy of proper discipline and enrollment. Thus, these decisions are not cognizable in a breach of contract action.

Further, the court cannot convert this action to a special proceeding under Article 78 as plaintiff's claim would be time barred as this action was brought well past the four-month statute of limitations for Article 78 proceedings as the schools actions occurred in June 2014 and this action was not brought until February 2015. *See Keles*, 74 A.D.3d at 436 ("The court properly declined to covert the action to a special proceeding under article 78, since plaintiff's claims would have been barred by the four-month statute of limitations applicable thereto").

Additionally, even if the court could entertain the breach of contract claim against the school, plaintiff's complaint still fails to state a cognizable breach of contract claim. To state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2nd Dept 2010).

Here, plaintiff's complaint fails to state a cause of action for breach of contract as it fails

to allege a breach of any enforceable contractual obligation. Plaintiff asserts that defendant breached the 2013 and 2014 Agreements by choosing to not invite Asher back for the 2014-2015 school year and by informing her that Asher risked expulsion if he again acted in an unacceptably aggressive manner. These allegations cannot support a breach of contract claim as plaintiff fails to identify any contractual provision pursuant to which Asher would have been entitled to enrollment in the 2014-2015 academic year or entitling him to an additional warning prior to expulsion. Indeed, plaintiff cannot identify such provision as the both the 2013 and 2014 Enrollment Agreements provided that "The School reserves the right to terminate this Agreement at any time if, for any reason, in the judgment of the School, enrollment is not in the best interest of your child or of other children enrolled in the School." Accordingly, plaintiff's complaint fails to state a cognizable breach of contract claim.

Additionally, defendant's motion for an order dismissing plaintiff's second cause of action for fraudulent inducement is granted on the ground that it also fails to state a cause of action. To plead a cause of action for fraud, a plaintiff must allege misrepresentation of a material fact, falsity, scienter, reliance and injury. *See Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). The alleged misrepresentations "must be misstatements of material fact or promises made with a present, but undisclosed intent not to perform them." *Schulman v. Greenwich Associates, LLC*, 52 A.d.3d 234 (1st Dept 2008). "[M]ere promissory statements about what is to be done in the future" is insufficient. *Id.*; *see also Consolidated Bus Tr., Inc. v. Treiber Group LLC*, 97 A.D.3d 778 (2nd Dept 2012) ("Representation of opinion or a predication of something which is hoped or expected to occur in the future will not sustain an action for fraud."); *Beason v. Kleine*, 96 A.D.3d 1611, 1615 (4th Dept 2012) ("representations . . . that are

not statements of existing fact but merely expressions of future expectations or that are promissory in nature at the time made and relate to future actions or conduct are insufficient to support a cause of action . . . for fraud").

In the present case, plaintiff fails to state a claim for fraud as she does not allege misrepresentation of a material fact but only mere promissory statements that constitute opinion. Plaintiff bases her fraud claim on the following representations by Lang: (i) it managed its 2e Students with collaboration from parents and special educators, and by remediating students' weaknesses; (ii) it understood the special needs of 2e Students, and it effectively served those needs by, among other things, proving an "encouraging" and "nurturing" and not "punitive" education environment; (iii) it operated to play to a student's strengths and special social and emotional needs; (iv) it provided an atmosphere of care that was patient and long-term oriented, and in which 2e Students could feel safe and comfortable; (v) Asher was a 2e Student and a perfect fit for Lang; and (vi) it was qualified, willing and able to provide an appropriate and long-term education environment for Asher. These alleged representations are not-actionable as they are not statements of existing fact capable of proof, but rather opinion about the school and its future ability to support Asher, which does not provide a basis for the imposition of liability. In other words, these statements clearly represent mere expressions of future expectations that are promissory in nature and are not statements of known fact.

Moreover, plaintiff's fraudulent inducement claim is also deficient as she could not have reasonably relied on the school's purported statement that it would provide "a stable and long-term education environment" to Asher because this declaration was directly contradicted by the terms of the Enrollment Agreement wherein the school reserved the right to terminate the

Agreement "at any time if, for any reason, in the judgment of the School, enrollment is not in the best interest of your child or of other children enrolled in the School." Thus, based on this reservation to revoke enrollment at any time, it was not reasonable to believe that Asher would stay at the school indefinitely under any circumstances.

Additionally, defendants' motion for an order dismissing plaintiff's claim for negligent infliction of emotional distress is granted on the ground that it fails to state a cause of action. "A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." *Shelia C. v. Povich*, 11 A.D.3d 120, 130 (1st Dept 2004). Moreover, a claim for negligent infliction of emotional distress must be supported by allegations of conduct by the defendant that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362 (1st Dept 2005).

In the present case, plaintiff's complaint is devoid of any specific allegations that defendant's actions endangered her or Asher's physical safety or caused them to fear for their safety. While plaintiff alleges that the school's actions could have caused Asher emotional "trauma" that "could endanger Asher physically," such allegation is far too vague and speculative to sustain a claim for negligent infliction of emotional distress. Indeed, such allegation is belied by the fact that the school did not actually expel Asher, but Spadone hereself chose to withdraw Asher from Lang prior to the end of the school year. Thus, any alleged

physical danger Asher was in in leaving the school was the result of Spadone's actions, not the schools.

Additionally, defendant's alleged actions fail to arise to the level of conduct necessary to sustain a claim for negligent infliction of emotional distress. Simply put, the school's alleged Termination Decision, "One and Done Policy" and isolated "veiled shakedown" does not constitute conduct so outrageous in character and so extreme in degree to go beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable in a civilized society. While soliciting a bribe in order to retain a 2e Student, if true, is abhorrent behavior that the court does not condone or endorse, it simply is not sufficient, on its own, to meet the exceedingly high standard necessary to maintain a claim for negligent infliction of emotional distress.

Moreover, to the extent plaintiff contends in a footnote in her opposition papers that although not explicitly plead, her complaint also states a cause of action for intentional infliction of emotional distress, such contention is without merit as such claim also requires allegations that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362 (1st Dept 2005). Thus, as this court has already determined such allegations are not plead, plaintiff cannot maintain a claim for intentional infliction of emotional distress.

Accordingly, based on the foregoing, defendant's motion is granted and this action is dismissed. The Clerk is directed to enter judgment accordingly.

Dated: 8/4/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.