

Hernandez v Teachers Coll., Columbia Univ.

2015 NY Slip Op 32771(U)

September 25, 2015

Supreme Court, Kings County

Docket Number: 1680/15

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of September, 2015.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

-----X
NATASHA HERNANDEZ,

Plaintiff,

- against -

TEACHERS COLLEGE, COLUMBIA
UNIVERSITY,

Defendant
-----X

Index No. 1680/15

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The following papers numbered 1 to 6 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Defendant's Memoranda of Law</u> <u>Plaintiff's</u>	4-5 _____
<u>Plaintiff's Memorandum of Law</u> _____	6 _____

Upon the foregoing papers, defendant Teachers College, Columbia University (defendant or the College) moves, pursuant to CPLR 214, 217, and 3211 (a) (5) and (a) (7), to dismiss the complaint of plaintiff Natasha Hernandez (plaintiff).

Facts¹

In or about 2008, plaintiff received a Bachelor of Arts degree in psychology from the College of Staten Island, City University of New York. While attending this college, plaintiff performed volunteer work tutoring and mentoring inner city high school students. Wishing to follow in the footsteps of her mother and other close relatives who were educational professionals, plaintiff aspired to serve others in accordance with her family's Christian tradition.

In the fall of 2008, plaintiff enrolled in the College's graduate program to obtain an Education Masters of Arts (Ed. M.) in Psychological Counseling (the Program). Plaintiff paid defendant the tuition and fees and enrolled in mandatory courses as required by the College's curriculum. "Upon information and belief," plaintiff maintained a satisfactory grade average of B or higher in all mandatory courses.

During the spring semester of 2009, plaintiff enrolled in an elective course designated as "Counseling Skills II" (the course), which was not a required course for her degree program. The course was held weekly, and the instructor was Professor Montoni Hodges, assisted by a Teaching Assistant (TA). For the first part of the course, plaintiff was in the group supervised by the TA. For the latter part of the course, plaintiff was in the group supervised by Professor Hodges.

¹The facts are taken from the verified complaint.

In addition to classroom instruction, the course involved students engaging in simulated counseling sessions with groups of two students, alternating between the role of counselor and patient. The students in this course were required to attend all weekly sessions but were permitted one absence or non-attendance for the semester. The students also kept written journals of the counseling sessions which were reviewed by the TA and/Professor Hodges on a weekly basis. The course did not have any written examinations, and the final examination consisted of the student's presentation of the counseling of a guest, chosen by Professor Hodges, in the role of the patient.

"Upon information and belief" the course lacked formal standards and criteria under which the students were to be graded by the instructor, the evaluation and/or grading of the students was based solely on the subjective judgment of the instructor, and the course failed to have objective scoring or grading criteria limiting the instructor from basing the student's grade solely on subjective inferences or judgments.

In or about March, 2009, plaintiff was selected to go on a mission trip to Texas which was sponsored by a non-denominational Christian organization group in which she participated. "Upon information and belief, the mission trip was for humanitarian purposes to provide assistance to residents of regions of Texas that were still suffering from the effects of a recent and/or natural disaster," and plaintiff received permission from the TA and Professor Hodges to miss one class session so that she could attend. "Upon information and belief, there was no scheduled course instruction or lecture for the one specific class session

. . . plaintiff would miss as the simulated counseling sessions . . . were the only scheduled activity.”

A few days after plaintiff was given permission to miss one weekly class for the trip, Professor Hodges had a discussion with plaintiff during which she “insinuated that . . . plaintiff would fail the . . . [c]ourse if she went on the . . . [t]rip.” Since plaintiff had received permission to go on the trip, had committed to go, and had paid the required travel/booking fees, she attended the trip. “Upon information and belief, Professor Hodges objected to the . . . [t]rip because it was sponsored by a Christian organization.”

Plaintiff timely submitted her weekly journal to the TA and/or Professor Hodges via email prior to her trip. “Upon information and belief,” during the first part of the course plaintiff did not receive any negative feedback from the TA who reviewed her journal. During the latter part of the course, Professor Hodges reviewed her journal. At first, Professor Hodges did not offer any criticism of plaintiff’s journal entries, but after plaintiff went on the mission trip, the professor began to criticize plaintiff’s journal entries “without justification,” and did not explain why the entries were insufficient or how plaintiff could correct them. Specifically, after the trip, the professor “undertook a totally hostile aggressive attitude toward . . . [p]laintiff demeaning her without reason,” telling her on more than one occasion that “she shouldn’t be in this program [b]ut should be in law school or something.”

On or about May of 2009, plaintiff completed the course and performed her presentation of a counseling session with a Ph.D. student before Professor Hodges. “Upon information and belief,” “during the 2009 spring semester . . . [p]laintiff maintained a satisfactory grade point average of B or higher in all other required and elective courses in which she was enrolled.”

In May, 2009, plaintiff received a letter from the Psychological Counseling Program Coordinator stating that the Counseling Program faculty had terminated her status in the Program and had placed a hold on her future registration at the College. In particular, the letter stated that plaintiff had received a failing grade in the Counseling Skills II course, which was an indication that she did not possess the “baseline skills needed for further training.” According to plaintiff, the letter was vague and conclusory; failed to specify why she was given a failing grade in the course and/or the specific baseline skills in which she was allegedly lacking; and failed to provide her “a means . . . to resolve any of the alleged deficiencies or improve her skills so that she could effectively request reconsideration of her alleged failing grade . . . and/or continuation in the . . . Program.”

Plaintiff timely appealed her failing grade in the course to the appropriate departmental faculty of the College and timely requested assistance from the College’s Office of the Ombudsman for reconsideration of her dismissal from the Program. As a result, in July, 2009, plaintiff met with the Ombudsman and Professor Hodges. However, Professor

Hodges failed and/or refused to discuss the situation, and left the meeting abruptly, claiming she had a flight to catch.

Subsequently, plaintiff timely requested reconsideration to the appropriate department and faculty of the College's decision to dismiss her from the Program and to place her future registration on hold. By letter dated May 13, 2011, the Coordinator of the College's Department of Counseling and Clinical Psychology informed plaintiff that her appeal and/or request for reconsideration of her dismissal and hold of future registration was denied, but no explanation was given.

In January, 2015, plaintiff commenced the instant action, alleging causes of action for, among other things, breach of contract and breach of the covenant of good faith and fair dealing.²

In June, 2015, defendants made the instant motion to dismiss the complaint pursuant to CPLR 214, 217, and 3211 (a) (5) and (a) (7), which is presently before the court.

Discussion

Determinations of educational institutions as to the academic performance of their students, while not completely beyond the scope of judicial review, are limited to the question of whether the challenged determination was arbitrary and capricious, irrational,

²The complaint also asserts that defendant engaged in deceptive practices in violation of General Business Law § 349 (a) and (c) and discriminated against plaintiff in violation of the New York State Equal Protection Clause (NY Const, art. 1, § 11), but plaintiff has withdrawn these causes of action (Affirmation of David J. Hernandez, Esq. in Opposition to Defendant's Motion to Dismiss ¶ 5).

made in bad faith or contrary to Constitution or statute (*Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]). Specifically, “[u]nlike disciplinary actions taken against a student, institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators” (*id.* at 245; *see also Matter of Zanelli v Rich*, 127 AD3d 774, 774). As such, “to preserve the integrity of the credentials conferred by educational institutions, the courts have long been reluctant to intervene in controversies involving purely academic determinations” (*Susan M.*, 76 NYd at 246; *see also Tedeschi v Wagner College*, 49 NY2d 652, 658 [1980]; *Matter of Olsson v Board of Higher Educ.*, 49 NY2d 408, 413 [1980]; *Matter of Zanelli*, 127 AD3d at 774). Accordingly, review of decisions made by academic institutions “should be restricted to special proceedings under CPLR Article 78, and only to determine whether [such] decision[s] [were] arbitrary, capricious, irrational or in bad faith” (*Keles v Trustees of Columbia Univ.*, 74 AD3d 435, 436 [2010]; *see also Gary v New York Univ.*, 48 AD3d 235, 236 [2008]; *Bottalico v Adelphi Univ.*, 299 AD2d 443, 443 [2002]).

Here, the cause of action for breach of contract alleges that upon plaintiff's admission to defendant's Ed.M in Psychological Counseling degree program, an express and implied contract arose promising that upon completion of the Program's courses and curriculum, plaintiff would obtain her degree, and that defendant breached that contract by failing to establish objective scoring standards for its Counseling Skills II course pursuant to which

plaintiff should have been graded (subjecting plaintiff to the bias of the instructor in the grading process); failing to follow its own academic standards by not providing plaintiff with additional work, guidance, and a meaningful appeals process; by dismissing plaintiff from the Program and placing her registration on hold despite her higher than B average in all required and elective courses; and failing to reconsider her dismissal and/or to readmit her into the Program. The second cause of action for breach of the covenant of good faith and fair dealing alleges that defendant failed to follow its own academic standards, as set forth immediately above.

Inasmuch as both causes of action challenge defendant's "institutional assessment[] of . . . [plaintiff's] academic performance" requiring defendant's "special expertise [as an] . . . educator[]" (*Susan M.*, 76 NY2d at 245), namely defendant's determinations to give plaintiff a failing grade in the Counseling Skills II course, to dismiss her from her masters program, and to place a hold on her future registration, plaintiff should have brought a proceeding pursuant to CPLR article 78 to determine whether defendant's purported breach of its "academic standards" and failure "to establish objective grading criteria" were arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute" (*id.* ["in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review"]; see also *Matter of Zanelli*, 127 AD3d

at 775 [court did not err in dismissing petitioner's breach of contract cause of action alleging that college failed to comply with its internal rules and procedures as claim is properly asserted and evaluated as a cause of action under CPLR article 78 - since the college's actions were not taken in bad faith, were not arbitrary and capricious, and were not irrational, the court properly dismissed the breach of contract cause of action]; *Clogher v New York Med. Coll.*, 112 AD3d 574, 575-576 [2013] [court properly granted those branches defendants' motion which were to dismiss causes of action asserted against defendant medical college as they only concerned academic and administrative decisions and should have been raised in a proceeding commenced pursuant to CPLR article 78 - since action was commenced after expiration of the four-month statute of limitations period applicable to CPLR article 78 proceedings, claims were time-barred]; *Keles*, 74 AD3d at 436 [dismissal of complaint directed at academic and administrative standards and decisions (i.e. whether, *inter alia*, plaintiff's GPA was sufficient for him to continue as a teaching assistant, whether he was correctly determined to have failed a particular test, and whether the university improperly delayed in awarding him a degree), not cognizable in a breach of contract action and Supreme Court properly declined to convert action to special proceeding under Article 78 because plaintiff's claims would have been time-barred]; *Gary*, 48 AD3d at 236 [challenge to termination of plaintiff's matriculation, along with allegations based on contract, tort and racial discrimination, should have been brought in a proceeding under CPLR article 78, rather than plenary action, and was properly dismissed as beyond judicial review]; *Bottalico*,

299 AD2d at 443 [the Supreme Court properly determined that plaintiff should have brought a proceeding pursuant to CPLR article 78 against defendant university to determine whether its decision to deny her admission to a doctoral psychology program was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute]). Based upon the foregoing, the complaint must be dismissed as beyond judicial review (*Gary*, 48 AD3d at 236).

In any event, even had plaintiff asserted her claims in an Article 78 proceeding, they would have been time-barred. An Article 78 proceeding must be commenced within four months after the determination to be reviewed becomes final and binding (*Bottalico*, 299 AD2d at 443; CPLR 217). Here, plaintiff was dismissed from the College on or about May 15, 2009, but did not commence the instant action until almost 6 years later, on or about January 19, 2015.

Despite the foregoing, plaintiff argues that her breach of contract and breach of the covenant of good faith claims are properly brought as a plenary action. In this regard, she maintains that an implied contract exists between her and the College; that her claims are based on contractual grounds, i.e. she fulfilled her obligations under the contract by taking all mandatory courses, getting good grades and paying her tuition, and defendant breached the contract by acting in bad faith and in failing to follow its academic standards; and that since she is seeking reimbursement for tuition and various other college fees, as well as

actual and punitive damages, it would have been improper to bring her claims in an Article 78 proceeding.

Plaintiff's contentions must be rejected. First, plaintiff has not alleged that "defendant failed to comply with its own obligations as specifically set forth in the school's bulletins, circulars, student handbook and regulations" (*Sarwar v New York College of Osteopathic Medicine of New York Institute of Technology*, 2015 NY Slip Op 30128 [U], *4 [Sup Ct, New York County 2015], citing *Clogher*, 112 AD3d at 576). Rather, plaintiff relies upon the College's "Academic Standard for Students Rule," as published on its website, which provide that:

"The Faculty of the College requires that all students maintain acceptable grades as well as satisfactory progress in the completion of degree requirements . . . Any department judging a student to be performing below expectations *is authorized* by the Faculty to require additional course work as a means to evaluate the student's continuance within the degree program or at the College. If satisfactory progress as defined by the department is not maintained, a student may be dismissed from the program. In addition, a student whose academic performance in course work or in other requirements is seriously below the level required for successful completion of a degree may be denied permission for continued enrollment at the College on the initiative of the Faculty of the academic department in which the student is enrolled. There is no formal appeal from such a decision, but the services of the Ombudsman may be requested by the student.

Any student receiving eight or more points with grades of C- or lower is not permitted to continue registration at the College in any capacity and may not receive a degree or diploma. Petitions for exception to this policy are to be submitted, in writing, to the Registrar with a written recommendation from the department in which the student was last enrolled. Such petitions will be

submitted to a faculty committee for review and decision. (See Exemption Procedures, Master's program)" (emphasis added).

Contrary to plaintiff's claim, these standards leave various academic determinations, including those regarding dismissal from the Program, to the discretion of the faculty of the department of the College in which a student is enrolled (*see also infra*). Second, although the complaint is couched in terms of contractual claims, as indicated above, "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" (*Sarwar v New York College of Osteopathic Medicine of New York Institute of Technology*, 2015 NY Slip Op 30128 [U], *3-4 [Sup Ct, New York County 2015], citing, *inter alia*, *Keles*, 74 AD3d 435). Finally, the claims asserted, rather than the relief sought, determines the type of proceeding which must be brought. Here, inasmuch as plaintiff seeks to challenge purely academics decisions, her claims should have been brought in an Article 78 proceeding. To the extent that plaintiff relies upon *Clogher* (112 AD3d 574 [2013]) to support her argument that her breach of contract claim is properly brought as a plenary action, it is misplaced. As noted above, the Second Department affirmed the dismissal of all claims related to academic and administrative decisions holding that they should have been raised in an Article 78 proceeding (*id.* at 575-576).

In any event, these causes of action nevertheless fail to state a claim. In this regard, the complaint alleges that the College breached its contract with plaintiff by failing to abide by its academic standards by not establishing objective scoring standards for its Counseling

Skill II course; by failing to provide plaintiff with additional work (to evaluate her continuation in the Program), meaningful guidance, and a meaningful appeals process; by dismissing plaintiff from the Program and placing any future registration on hold; and by failing to reconsider and/or re-admit plaintiff back into the Program despite having a higher than B average.

However, the academic standards cited by plaintiff do not require defendant to establish objective scoring standards, to provide students with additional work, or to give students guidance on how they can improve their baseline skills required for the Program. While the complaint alleges, and plaintiff argues, that defendant breached its contract with her by failing to provide her with additional work, the academic standards only provide that the department is authorized to do so, i.e. in its own discretion. Further, as defendant correctly contends, the College advised plaintiff that her failing grade in the counseling course indicated that she did not “possess the baseline skills needed for further training,” which demonstrates that the faculty in fact had the discretion to determine whether plaintiff actually possessed the requisite skills to continue in the Program.

In addition, despite plaintiff’s allegation that she did not receive guidance or additional work, the complaint alleges that plaintiff kept written journals of the counseling sessions which were reviewed by the TA or Professor Hodges on a weekly basis, from whom she received feedback. Moreover, although the complaint alleges that the College breached its express and implied contractual obligations by failing to provide plaintiff with a

meaningful appeals process, and failed to reconsider her dismissal and/or failed to readmit her, the academic standards state that there is no formal appeal from a decision which denies a student permission to continued enrollment. In any event, plaintiff was afforded the opportunity to address her dismissal with the College's Ombudsman, as provided for in the academic standards, and was subsequently permitted to apply for reconsideration of her dismissal.

Further, as alluded to above, it is true, as plaintiff argues, that an "[i]n 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" (*Clogher*, 112 AD3d at 575 [internal citations and quotation marks omitted]). In this regard, "[t]he essence of the implied contract is that an academic institution must act in good faith in its dealings with its students" and "[t]he 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" (*id*; see also *Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010] ["only specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract"]). However, as noted, defendant did not breach any of its academic standards, nor does plaintiff allege in the complaint or point to any obligations with which the College failed to comply, as specifically set forth in the school's bulletins, circulars, student handbook and regulations (*Sarwar v New York College of Osteopathic Medicine of*

New York Institute of Technology, 2015 NY Slip Op 30128 [U], *4 [Sup Ct, New York County 2015], citing *Clogher*, 112 AD3d at 576; *Keefe*, 71 AD2d at 570; *Shields v School of Hofstra Univ.*, 77 AD2d 867, 868-869 [1980]).

Plaintiff also argues that the College breached its contractual obligation to her because her dismissal was in bad faith, “rooted in the prejudice and hostility of the instructor toward[] . . . [her],” as opposed being based upon academic grounds. While plaintiff argues that Professor Hodges gave her a failing grade because the professor was motivated by bad faith and was prejudiced against her Christian values, the complaint fails to provide any support for this claim. In any event, where, as here, the complaint alleges that an academic decision was made because of bias based upon religion, these claims must be raised in an Article 78 proceeding (*Sarwar v New York College of Osteopathic Medicine of New York Institute of Technology*, 2015 NY Slip Op 30128 [U], *5 [Sup Ct, New York County 2015] [complaint alleging the medical student was dismissed from college based on his religion - couched in terms of breach of contract and unjust enrichment causes of action - was in reality a challenge to defendant's academic and administrative decisions, for which redress was only in an Article 78 proceeding, as opposed to plenary action]).

Plaintiff also suggests that the complaint sufficiently alleges that defendant breached its contract with her because the complaint alleges that the Program had no formal or written examination by which a student could be objectively evaluated, which subjected her to the bias of her instructors. However, that plaintiff was evaluated based upon the subjective

examination of her instructors does not mean that the College breached any contractual obligation or that the College engaged in bad faith, as “determinations regarding a student's academic qualifications ‘rest in most cases upon the subjective professional judgment of trained educators [and the courts] have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community’” (*Matter of Powers v St. John's Univ. Sch. of Law*, 110 AD3d 888, 893-894 [2013], *aff'd* 25 NY3d 210 [2015], quoting *Matter of Olsson*, 49 NY2d at 413). In any event, the academic standards do not require the College to offer any particular type of examinations, rather, they indicate that it is within the College's discretion to determine whether a student has maintained “satisfactory progress” and whether a student should be dismissed for work “below the level required for successful completion of a degree.”

Plaintiff also contends that she had a sufficiently high grade point average to continue in the Program. However, the academic standards do indicate that tuition and/or a higher than B average entitles a student to remain in the Program or to graduate. In any event, as defendant argues, this claim relates solely to defendant's academic evaluation of plaintiff, and thus is not cognizable as a breach of contract claim (*Keles*, 74 AD3d at 436).

Inasmuch as the second cause of action for breach of the covenant of good faith and fair dealing is based on the same allegations underlying the breach of contract claim, it is duplicative of the breach of contract claim, and therefore must be dismissed (*Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803 [2015]). In any event, just as the breach of

contract claim, it is only reviewable in an Article 78 proceeding, and as such is time-barred.

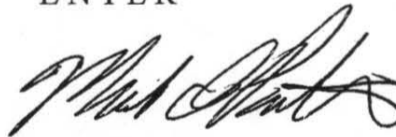
In summary, “[i]n considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether, from the complaint’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Strunk v New York State Bd. of Elections*, 126 AD3d 777, 778 [2015] [internal citations and quotation marks omitted]). In this regard, “[a]lthough the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible entitled to any such consideration” (*id.*). Here, plaintiff’s causes of action are both time-barred and fail to state a claim upon which relief can be granted.

The court has reviewed plaintiff’s remaining claims and finds them to be without merit.

Accordingly, defendant’s motion to dismiss the complaint is granted.

This constitutes the decision and order of the court.

ENTER



J. S. C.

HON. MARK I PARTNOW
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