SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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EMANUELE CASTANO,

Plaintiff,

- v -

THE NEW SCHOOL, JENNIFER FRANCONE, JERRY CUTLER

Defendants.

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INDEX NO. 158348/2018

MOTION DATE 05/30/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 26, 33, 35

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29, 30, 34, 36

were read on this motion to/for DISMISS.

In this action, plaintiff, a former faculty member of defendant The New School ("TNS") who became the subject of a Title IX investigation as the result of allegations by a female student who accused plaintiff of sexual misconduct, seeks damages allegedly resulting from the TNS investigation of said allegations. In motion sequence number 001, Defendants The New School, Jennifer Francone, and Jerry M. Cutler (hereinafter "Defendants"), seek an Order pursuant to CPLR § 216.1(a) to seal certain documents submitted to the court in this action, which plaintiff does not oppose.

In motion sequence number 002, Defendants The New School, Jennifer Francone, and Jerry M. Cutler (hereinafter "Defendants"), seek an Order pursuant to CPLR 3211 (a)(1), (5) and (7) to dismiss the complaint based on a general release precluding plaintiff's claims and for

failure to state a cause of action upon which relief can be granted. Plaintiff opposes motion sequence 002. The motions are consolidated for disposition.

BACKGROUND/CONTENTIONS

Plaintiff began his tenure at TNS in 2003 as an Assistant Professor, was promoted to Associate Professor in 2006 and Full Professor in 2014. Plaintiff served as co-Chair of the Department of Psychology and Director of the Graduate Program of Cognitive, Social and Developmental Psychology, starting in 2014. (NYSCEF Doc. No. 2, ¶¶ 12-13). In the summer of 2017, plaintiff became the subject of a Title IX investigation as the result of allegations by a female student who accused the former faculty member of sexual misconduct, sexual assault, and using his position to engage in sexual relations with her.

In response to the allegations, TNS commenced an investigation which included multiple interviews of the complainant, plaintiff, and other witnesses. Upon completion of the investigation, TNS and plaintiff entered into a separation agreement in which he took an immediate leave of absence from TNS (effective October 16, 2017), resigned his employment effective December 31, 2017, executed a full release of TNS and its employees of any claims, and agreed to not commence "any action or proceeding of any kind" against TNS. In addition, plaintiff agreed to arbitrate any claims for any breaches of the separation agreement. (NYSCEF Doc. No. 17). Notwithstanding the terms of the negotiated separation agreement, TNS contends that plaintiff has commenced this lawsuit complaining that he does not agree with the way TNS investigated the allegations of sexual misconduct and has further separately filed an arbitration against TNS asserting breaches of the separation agreement. (NYSCEF Doc. Nos. 1, 2 and 18).

In opposition, plaintiff maintains that he has alleged causes of action that are both outside of the release he negotiated and signed and that fall outside the scope of agreements he agreed to arbitrate. Specifically, plaintiff claims that TNS made affirmative misrepresentations and misleading statements to intentionally and maliciously deceive him into taking his leave, and that TNS intentionally concealed from him the true nature of the complaints against him and that their investigation of him when not advising him that the student had accused him of "non-consensual" sex. Plaintiff contends that the release does not bar the claims alleged in the complaint because the fraud he complains of relates to the consideration for the release itself. In addition, plaintiff contends that he is free to commence arbitration because the agreement's arbitration clause is limited and only applies to the specific instance of when the agreement is breached.

In reply, TNS avers that the separation agreement contains an integration clause which bars plaintiff's fraudulent inducement claim; specifically, TNS notes that plaintiff contractually agreed that he received no extra-contractual "representations or promises," and thus he cannot now contend that such representations and promises both existed and somehow fraudulently induced him to enter into the agreement. Likewise, TNS contends that plaintiff has failed to cite any legal precedent or factual support to buttress his claim that he is free to pursue his claims through arbitration, notwithstanding the separation agreement.

STANDARD OF REVIEW/ANALYSIS

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

Where dismissal of an action is sought, pursuant to CPLR 3211 (a) (1), on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence "utterly refutes plaintiff's factual allegations" and "conclusively establishes a defense to the asserted claims as a matter of law" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433, 992 NYS2d 2 [1st Dept 2014] [internal citations omitted]). The court is "not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint" and can "consider documentary evidence proved or conceded to be authentic" (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471, 882 NYS2d 22 [1st Dept 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318, 515 NYS2d 1 [1st Dept 1987] [internal quotation marks omitted]).

If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*McGuire v. Sterling Doubleday Enters., L.P.*, 19 A.D.3d 660, 661, 799 N.Y.S.2d 65 [1st Dept., 2005]). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiffs claim." *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 963, 728 N.Y.S.2d 824 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605, 762 N.E.2d 930, 737 N.Y.S.2d 52.

A motion to dismiss may be granted pursuant to CPLR 3211(a)(7) if "the pleading fails to state a cause of action" (CPLR 3211[a][7]). "[T]he pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as

alleged fit within any cognizable legal theory" (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019]).

Here, Defendants argue that the complaint must be dismissed in its entirety as it is barred by the plain terms of the separation agreement and release, and that should the Court find any claims not barred by the release, plaintiff must be compelled to arbitrate any said claims. Specifically, Defendants contend that plaintiff clearly and unambiguously released his claims through the agreement and release. Plaintiff explicitly "agree[d] to forever release the University Entities and persons for all liability for any loss, injury, claim, or cause of action arising from his employment with Employer."(NYSCEF Doc. No. 17, § 3(a).) In addition, plaintiff agreed not to commence "any action or proceeding of any kind" based on "any act, omission, transaction, or occurrence up to and including the date of the execution of this Agreement." (*Id* § 3(a)).

Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276, 952 N.E.2d 995, 929 N.Y.S.2d 3 [2011]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98, 824 NYS2d 210 [1st Dept 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware*, 92 NY2d 934, 935, 703 NE2d 757, 680 NYS2d 899 [1998], quoting *Mangini v McClurg*, 24 NY2d 556, 563, 249 NE2d 386, 301 NYS2d 508 [1969]).

In addition, it is well settled that "[a] release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" (*Centro*, 17 N.Y.3d at 276, quoting *Mangini*, 24 N.Y.2d at 566-67). Here, both parties were represented by sophisticated counsel who negotiated the terms of the separation agreement and release, which release included an integration clause. (NYSCEF Doc. No. 17, § 6(b)). Plaintiff

contractually agreed that "neither University nor any representative of it has made any representations or promises to him other than as set forth" in the agreement, and that "[n]o other promises or agreements shall be binding." (*Id.*).

A review of the complaint demonstrates that plaintiff's claims against TNS and the individual defendants are barred by the release. Plaintiff alleges in his first cause of action that Defendants "misled," "lied" and "manipulated" plaintiff, and thus fraudulently induced him into taking a leave of absence. (NYSCEF Doc. No. 2, ¶¶ 52-53.) Plaintiff further alleges that "[b]ut for the omissions, lies, and fraud intentionally carried out by Defendants, Plaintiff would not have taken his leave from The New School." (NYSCEF Doc. No. 2 ¶ 58; ¶ 62). Notably, all the allegedly misleading, false, and manipulative actions took place before plaintiff signed the settlement agreement, as his leave of absence preceded his signing and acceptance of the separation agreement and release. Plaintiff's fraud cause of action cannot be salvaged under the rubric of fraud by concealment, and vague allegations that Defendants induced plaintiff to enter into an agreement he would never have otherwise entered into. "To plead a claim for . . . fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations". (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376, 754 NYS2d 245 [1st Dept 2003] ["A cause of action for fraudulent concealment requires, in addition to the four . . . elements (of fraud, i.e., material misrepresentation of fact, scienter, reasonable reliance, and damages), an allegation that the defendant had a duty to disclose material information and that it failed to do so"]). Defendants had no duty to disclose to plaintiff the specific details of the student's confidential complaint. (See, *P.T. Bank Central Asia v. ABN AMRO Bank*; 301 A.D.2d 373, 376 [1st Dept 2003]).

Likewise, plaintiff's negligence claim, the second cause of action, alleges that TNS allegedly failed to "conduct a proper investigation," "provide Plaintiff with the actual statement and complaint," "not [] lie" to him, "investigate fully," and comply with other purported duties regarding its investigation into Plaintiff's misconduct. (NYSCEF Doc. No. 2, ¶¶ 65-75). Again, notably, these actions and misdeeds ascribed to Defendants, took place during Defendants' investigation of the student's confidential complaints against plaintiff, which necessarily had to have occurred prior to the time that plaintiff agreed to release his claims as set forth in the separation agreement and release. Indeed, a review of the complaint confirms that all the underlying facts alleged by plaintiff in support of his negligence claim, predate execution of the separation agreement and release.

Accordingly, plaintiff released all claims based on acts which pre-date the separation agreement and general release. Simply put, there is nothing in plaintiff's complaint that creates an issue of fact or any ambiguity as to the meaning of the separation agreement and release. A release "should never be converted into a starting point for...litigation except under circumstances and under rules which would render any other result a grave injustice." (*Centro*, 17 N.Y.3d at 276).

Notwithstanding plaintiff's attempts to distinguish the legal authority cited in support of Defendants' motion, it is pure casuistry to contend, as plaintiff does, that he received no extra-contractual "representations or promises," and that such representations and promises both existed and somehow fraudulently induced his agreement. In other words, because plaintiff contractually agreed that he received no representations or promises not "set forth" in the agreement, no such representations or promises could have induced him to enter into the agreement. Indeed, plaintiff is contractually barred from asserting a fraudulent inducement

claim, as he contractually agreed that "neither University nor any representative of it has made any representations or promises to him other than as set forth" in the agreement, and that "[n]o other promises or agreements shall be binding." (NYSCEF Doc. No. 17, § 6(b)). (See, *Pate v. BNY Mellon-Alcentra Mezzanine HI, LP*, 163 A.D.3d 429, 430 [1st Dept 2018]; *Kremer v. Sinopia LLC*, 104 A.D.3d 479, 480 [1st Dept 2013]; *Leonard v. Gateway II, LLC*, 68 A.D.3d 408, 409 [1st Dept 2009]).

Moreover, plaintiff's contention that he was wronged by Defendants actions in not telling him that his accuser's claim was of a non-consensual nature and otherwise complaining of the way Defendants conducted their investigation, ignores well-established precedent holding that Defendants had no statutory or common law duty which required them to disclose the details of the student's confidential complaint to plaintiff. (*P.T. Bank Central Asia v. ABN AMRO Bank*; 301 A.D.2d 373, 376 [1st Dept 2003]; *Strasser v. Prudential Securities, Inc*., 218 A.D.2d 526, 527 [1st Dept 1995]). Indeed, plaintiff appears to acknowledge this precedent, when he alleges that Defendants refused his multiple requests to provide him with "the full statement and complaint", alleging that the Defendants then told him, "we ask the questions". (NYSCEF Doc. No. 2, ¶24). Nevertheless, plaintiff attempts to cure his pleading deficiencies relative to his fraud cause of action, by claiming that Defendants had "superior knowledge". As Defendants correctly note, the "superior knowledge" doctrine only applies when a party fails to disclose "essential facts" about a "transaction," such as the financial condition of a company being purchased, thereby rendering the transaction "inherently unfair." (*Swersky v Dreyer & Traub*, 219 A.D.2d 321, 328 [1st Dept 1996]). Plaintiff here, has failed to make any such showing.

The transaction at issue involved the negotiation of the separation agreement, which concerned plaintiff's release of claims in exchange for various benefits. This transaction had

nothing to do with the details of the student's confidential complaint. Moreover, plaintiff knew that TNS was not providing him with all pertinent information, and as such, these alleged nondisclosures could not have deceived or induced him, nor could he have justifiably relied upon such omissions. In fact, plaintiff has admitted that he "decided it was in his best interest to leave his role at the New School and pursue new opportunities." (NYSCEF Doc No. 29, p.10). Likewise, plaintiff's allegations that an unnamed Dean, that plaintiff knew well and relied on, reassured him that TNS would not remove plaintiff from its website does not cure his inability to plead a cause of action sounding in fraud. It is well settled that a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. (See, *Rocanova v Equitable Life Assurance*, 83 NY2d 603, 614, 634 N.E.2d 940, 612 N.Y.S.2d 339 [1994]). Accordingly, to the extent plaintiff's allegations concerning representations made by TNS concerning plaintiff's presence on the website may constitute a breach of contract claim, under the terms of the separation agreement, any such contract claim must be arbitrated. (NYSCEF Doc. No. 17, § 6(d).). Notably, plaintiff is presently arbitrating this claim. (NYSCEF Doc. No. 18). Thus, any representations regarding the TNS "website" and plaintiff's presence thereon, cannot support a fraud claim

Similarly, there is simply no evidence of fraud or other misconduct on Defendants' part in failing to advise plaintiff that the student had accused him of non-consensual sex or of the specific date that the student's allegations were made to Defendants. Plaintiff has failed to demonstrate that Defendants had a duty to disclose the confidential details of the student's complaint, and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud. Accordingly, plaintiff has simply failed to plead, with the

requisite specificity, a cause of action sounding in fraud, as such a claim requires "some act which deceived" plaintiff. (*Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318, 318 [1st Dep't 1994]).

Additionally, the Court finds that Section 6 (d) of the separation agreement and plaintiff's commencement of an arbitration where he explicitly alleges that his removal from TNS's website was a breach of the separation agreement, compel the conclusion, that to the extent plaintiff has such a claim, it must be resolved through arbitration. (NYSCEF Doc. Nos. 17 and 18).

Defendants' motion insofar as it seeks sanctions against plaintiff is denied. A court has the discretion to "award ... costs in the form of reimbursement for actual expenses" and/or impose financial sanctions for frivolous conduct. (*Ortega v. Rockefeller Ctr. N. Inc.*, 2014 N.Y. Misc. LEXIS 6079 at *4 [Sup. Ct. N.Y. Cnty. Oct. 3, 2014]). Conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." *Id*. This determination is discretionary and the court rejects Defendants' motion seeking to impose sanctions against plaintiff.

Finally, as noted, in motion sequence number 001, Defendants seek to seal certain exhibits and documents submitted to the court in this action, which plaintiff does not oppose. Upon review of the record and the documents requested to be sealed, the court, having determined, in accordance with Part 216 of the Uniform Rules for the Trial Courts, that good cause exists for the sealing in part of the file in this action and the grounds therefor having been specified, the motion to seal is granted.

CONCLUSION

Accordingly, it is now

ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal the Agreement and General Release between the parties attached as Exhibit B to the Moskowitz Affidavit, sworn to on December 13, 2018 (Doc. No. 9 in the docket of the New York State Courts Electronic Filing System) and the confidential AAA Statement of Claim attached as Exhibit C to the Moskowitz Affidavit, sworn to on December 13, 2018 (Doc. No. 10 in the docket of the New York State Courts Electronic Filing System), submitted in support of the defendants' motion to dismiss this action and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that motion sequence number 002, filed by defendants, The New School, Jennifer Francone and Jerry M. Cutler, to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/5/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE