Rutkoski v New York Univ.

2024 NY Slip Op 30062(U)

January 8, 2024

Supreme Court, New York County

Docket Number: Index No. 151514/2023

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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SYDNEY RUTKOSKI,

Plaintiff,

- V -

NEW YORK UNIVERSITY, NEW YORK UNIVERSITY COLLEGE OF DENTISTRY, ANDREA SCHRIEBER, LESLIE SMITHEY, STACI RIPKEY, CHRISTINA MORROW, DENISE TROCHESSET, ALEXANDER KERR

Defendant.

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INDEX NO. 151514/2023

MOTION DATE 06/09/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 31, 33

were read on this motion to/for DISMISS.

Upon the foregoing papers. Defendants New York University ("NYU"), New York University College of Dentistry ("College of Dentistry") (collectively, "NYU Defendants"), Andrea Schreiber ("Schreiber"), Leslie Smithey ("Smithey"), Staci Ripkey ("Ripkey"), Christina Morrow ("Morrow"), Denise Trochesset ("Trochesset"), and Alexander Kerr's ("Kerr") (collectively "Defendants") motion for an Order dismissing Plaintiff Sydney Rutkoski's ("Plaintiff") Amended Complaint is granted. Plaintiff's cross-motion for leave to file a second amended complaint is denied.

I. Background and Procedural History

Plaintiff has been a student at the College of Dentistry since the summer of 2019 (NSYCEF Doc. 9 at ¶¶ 9, 19). Plaintiff alleges that as a result of her adult attention deficit disorder ("ADHD") and anxiety disorder, the NYU Defendants granted her accommodations including but not limited to, time and one-half on exams, in-class timed assignments, and out-of-class timed exams (NYSCEF Doc. 9 at ¶¶ 23, 33).

Beginning in January 2022, Plaintiff was required by the College of Dentistry to take a course called Clinical Pathologic Correlations ("CPC") (NYSCEF Doc. 9 at ¶ 51). Plaintiff alleges that the final examination in the CPC course was administered to all students twice because of its difficulty (NYSCEF Doc. 9 at ¶ 82).

After failing both a first and second administration of the CPC examination, Plaintiff met with Professor Kerr and requested to re-take the CPC examination for a third time, with double accommodations granted (NYSCEF Doc. 9 at ¶¶ 101-102). Plaintiff alleges that Professor Kerr denied her request without any effort to engage with Plaintiff regarding appropriate accommodations (NYSCEF Doc. 9 at ¶ 103).

On June 1, 2022, Leslie Smithey and Christina Morrow informed Plaintiff that, as a result of failing the CPC course, she would need to repeat the entire academic year (NYSCEF Doc. 9 at ¶ 113).

Plaintiff commenced this action against Defendants by filing a Summons and Complaint on February 15, 2023 (NYSCEF Doc. 1). Plaintiff filed an Amended Complaint on May 9, 2023, alleging four causes of action: (1) disability discrimination, retaliation, failure to accommodate, and failure to engage in the interactive process under New York State Human Rights Law ("NYSHRL") against all Defendants; (2) disability discrimination, retaliation, failure to accommodate, and failure to engage in the interactive process under the New York City Human Rights Law ("NYCHRL") against all Defendants; (3) breach of contract; and (4) bad faith (NYSCEF Doc. 9 pp. 19-23).

Defendants brought the instant motion on June 9, 2023 seeking an Order dismissing Plaintiff's Amended Complaint in its entirety on the grounds that the Amended Complaint fails to state a claim upon which relief can be granted; that Plaintiff's claims are barred by the statute

of limitations and that Plaintiff's action is barred by documentary evidence (NYSCEF Doc. 13). On June 21, 2023 Plaintiff brought a cross-motion for an Order granting Plaintiff leave to file a second amended complaint (NYSCEF Doc. 20).[1]

II. Discussion

a. Dismissal Under CPLR 3211(a)(7)

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ...the pleading fails to state a cause of action...." In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, "the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.* 21 NY3d 324, 334 [2013]). "[T]he sole criterion is whether the pleading states a cause of action, and therefore if from its four corners factual allegations are discerned which if taken together can manifest any cause of action, a motion for dismissal must fail" (*Kusher v King* 126 AD2d 446, 467 [1st Dept 1987]).

Defendants claim that Plaintiff's Amended Complaint must be dismissed because her claims against Defendants may only be brought pursuant to a CPLR Article 78 proceeding (NYSCEF Doc. 16). Pursuant to CPLR 7803(3), an Article 78 proceeding may raise the question of "whether a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary of capricious or an abuse of discretion."

[1] It is noted that Plaintiff's Memorandum of Law in Opposition to Defendants' motion and in support of Plaintiff's cross-motion for leave to file a second amended complaint (NYSCEF Doc. 23) exceeds the word limit imposed by 22 N.Y.C.R.R. 202.8-b(e). While the failure to comply with the Court's rules is a basis to deny the cross-motion in its entirety, the Court, in its discretion, elects to address the motion on the merits.

The Court of Appeals has made clear that courts should not entertain claims that "would require the courts not merely to make judgments as to the validity of broad educational policies…but, more importantly, to sit in review of the day-to-day implementation of these policies" (*Donohue v Copaigue Union Free School Dist.* 47 NY2d 440 [1979]). However, "private colleges and universities are accountable in a CPLR Article 78 proceeding, with its well-defined standards of judicial review, for the proper discharge of their self-imposed as well as statutory obligations.…Thus, the judgment of professional educators is subject to judicial scrutiny to the extent that appropriate inquiry may be made to determine whether they abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational" (*Gertler v Goodgold*, 107 AD2d 481, 486 [1st Dept 1985]).

The Court of Appeals has further asserted that "[s]trong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance.…Unlike disciplinary actions taken against a student…institutional assessments of a student's academic performance, whether in the form of a particular grade received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators" (*Susan M. v New York Law School*, 76 NY2d 241 [1990]). Thus, courts have "declined, in the absence of bad faith, to compel a university to award a diploma where a student alleged that he failed a final comprehensive exam [*sic*] because of his reliance on the professor's misstatement as to how the exam [*sic*] would be graded [*Olsson v Board of Higher Education*, 49 NY2d 408 (1980)], or to compel a medical school to permit a student who had failed a number of courses to repeat a year [*H. v New York Medical College*, 88 AD2d 296 (1982)]" (*Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]).

Moreover, it is well settled that where a defendant's "allegedly discriminatory acts are directly related to the academic or disciplinary determinations made by defendants, or to the procedures followed in reaching those determinations, they must be brought in an article 78 proceeding, rather than a plenary action" (*Kickertz v New York Univ.*, 110 AD3d 268 [1st Dept 2013]).

Here, each of Plaintiff's claims directly relate to academic or administrative decisions of Defendants, which are subject to exclusive Article 78 review. Plaintiff's first and second causes of action claim that Defendants violated their statutory duties to Plaintiff by discriminating against her on the basis of her disability (NYSCEF Doc. 9 pp. 19-20). However, the alleged discriminatory acts claimed by Plaintiff each relate to academic and administrative decisions regarding the disability accommodations owed to Plaintiff and the testing procedures implemented by Defendants. As Defendants stated in their Affirmation in Support, Plaintiff's causes of action "stem from the Defendants' academic decision denying Plaintiff's request to modify or relax academic standards by allowing her to take the CPR examination a third time" (NYSCEF Doc. 16 p. 15).

Plaintiff's third cause of action for breach of contract alleges that the College's requirement to force Plaintiff to repeat her third year and to take courses she had already passed was "in breach of the agreement between NYU and [Plaintiff] wherein she would matriculate under the ordinary course toward graduation in four years as she completed her courses, which she was successfully achieving but for the College's refusal to implement the revised accommodation" (NYSCEF Doc. 9 at ¶ 170). As this cause of action is flatly challenging the NYU Defendants' academic decision that Plaintiff repeat her third year for failing a course, and their determination that Plaintiff was not eligible to re-take an examination a third time, like

Plaintiff's first two causes of action, Plaintiff's third cause of action must also be brought in an Article 78 proceeding.

Plaintiff's fourth cause of action for bad faith alleges that NYU acted in bad faith "[b]y refusing to grant [Plaintiff] accommodations for the April 28, 2022 make-up exam [*sic*] or that June 23, 2022 remediation exam," and by "forcing [Plaintiff] to take courses she had already passed and to pay tuition for those courses" (NYSCEF Doc. 9, at ¶ 175-176). Plaintiff's fourth cause of action, like her first three, is directly related to academic and disciplinary determinations made by a higher educational institution, and thus is subject to exclusive Article 78 review. *See, e.g., Risley v Rubin*, 272 AD2d 198 [1st Dept 2000]) (holding that a plaintiff's breach of contract claims are properly dismissed when they "implicate the type of academic and administrative decisions reviewable only in a timely-commenced proceeding pursuant to CPLR article 78"; ***see also Kickertz*** at 274-275 (Holding that a cause of action for breach of the implied duty of good faith and fair dealing alleging that "NYU engaged in bad faith conduct by implementing and enforcing its contract with plaintiff, including the Code of Ethics, selectively, allowing male students to obtain their…degrees despite findings that they cheated, but denying plaintiff her degree even though she generated the required amount of…fees," was "in essence a challenge to NYU's decision to expel plaintiff, which is subject to article 78 review").

While Plaintiff claims that the money damages sought by Plaintiff in this case cannot be afforded in an Article 78 proceeding, such a conclusion is misguided. It is well settled that "[i]n an Article 78 proceeding, the judgment issued by Supreme Court may grant restitution or damages so long as they are incidental to the primary relief sought by [the] petitioner" (*Gross v Perales*, 72 NY2d 231 [1988]). Pursuant to CPLR 7806, damages are incidental when a

petitioner might otherwise recover them "on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer."

As discussed above, the root of Plaintiff's claims in this matter directly relates to academic and administrative decisions made by Defendants, and seek compensation for the alleges consequences that those decisions had on Plaintiff. Each of Plaintiff's claims for monetary damages are incidental to Plaintiff's request for "an Order directing Defendants to remediate and amend their policies…with respect to the procedures for…requests for testing accommodations based upon disabilities and to require specific training for Professors and Administrators in the processing of such requests" (NYSCEF Doc. 9 p. 24). As such, Plaintiff claims for money damages are recoverable in an Article 78 Proceeding.

Because each of Plaintiff's claims must have been brought in an Article 78 proceeding, which is now time-barred, Plaintiff's claims must be dismissed for failure to state a claim.

b. Conversion of Plaintiff's Action to an Article 78 Proceeding is Not Warranted

Although conversion of a plenary action to an Article 78 proceeding is permitted under CPLR 103(c), it is well settled that such conversion "is not warranted where the claims are barred by the four-month [s]tatute of [l]imitations (CPLR 217) which governs [A]rticle 78 proceedings" (*Gertler v Goodgold,* 107 AD2d 481, 487 [1st Dept 1985]).

Pursuant to CPLR 217, an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." A determination generally becomes binding when the aggrieved party is notified" (*Musey v 425 E. 86 Apts. Corp.,* 154 AD3d 401 [1st Dept 2017]). Plaintiff admits in the Amended Complaint that she was notified of Defendants' decision to require Plaintiff to repeat her third year on June 1, 2022 (NYSCEF Doc. 9 at ¶ 113). The expiration of the four-month statute of limitations imposed

by CPLR 217 now bars Plaintiff's Article 78 claims. Accordingly, conversion of Plaintiff's action to an Article 78 proceeding is not warranted.

c. Plaintiff's Cross-Motion for Leave to File a Second Amended Complaint

Plaintiff's cross-motion requests an Order granting Plaintiff leave to file a second amended complaint (NYSCEF Doc. 20). It is well settled that denial of leave to file a second amended complaint is proper where the proposed amended complaint "suffers from the same fatal deficiency as the original claims" (*J. Doe No. 1 v CBS Broadcasting Inc.*, 24 AD3d 215 [1st Dept 2005]). Plaintiff's Proposed Second Amended Complaint (NYSCEF Doc. 22) contains few substantive changes from Plaintiff's Amended Complaint. Moreover, Plaintiff's Proposed Second Amended Complaint fails to remedy the deficiencies discussed above with respect to Article 78. As such, Plaintiff's cross-motion for leave to file a second amended complaint is denied.

Accordingly, it is hereby,

ORDERED that Defendants New York University, New York University College of Dentistry, Andrea Schreiber, Leslie Smithey, Staci Ripkey, Christina Morrow, Denise Trochesset, and Alexander Kerr's motion for an Order dismissing Plaintiff Sydney Rutkoski's Amended Complaint is granted, and Plaintiff's Amended Complaint is dismissed in its entirety; and it is further

ORDERED that Plaintiff Sydney Rutkoski's cross-motion for leave to file a second amended complaint is denied; and it is further

ORDERED that within ten (10) days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff Sydney Rutkoski; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

1/8/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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