SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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DR. DARIAN MCDERMOTT,

Plaintiff,

- v -

THE BOARD/DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK; DAVID FANNING, Principal, A. Phillip Randolph HS, sued in his individual as well as official capacity,

Defendants.

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INDEX NO. 159989/2022

MOTION DATE 04/25/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

Defendant the Board/Department of Education of the City of New York ("DOE") moves, pursuant to CPLR 3211, to dismiss the complaint brought by plaintiff Dr. Darian McDermott.

Background

The following facts are drawn from the complaint and are assumed to be true for purposes of this motion (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 51 [2022]). Plaintiff, a teacher formerly appointed by DOE, worked at A. Philip Randolph High School from 2015 until September 9, 2021, when she was discontinued (NYSCEF Doc. No. 2, complaint ¶¶ 1 and 24). Defendant David Fanning ("Fanning") is the high school's principal (*id.*, ¶ 2). Plaintiff was 65 years of age in 2015, and when Fanning learned of her age during the onboarding process, he allegedly told her, "Oh my goodness, I didn't know you were that old" (*id.*, ¶ 16).

Plaintiff alleges that after prevailing on a grievance she had filed against Fanning in 2017, defendants retaliated against her by treating her differently than other similarly situated employees because of her age (*id.*, ¶¶ 6, 10 and 17). Plaintiff claims her termination for alleged incompetence was merely a "cover" for age discrimination (*id.*, ¶ 6).

In September 2019, plaintiff was eligible to receive tenure, but Fanning purportedly forced her to sign an "Extension of Probation" agreement" or else he would place a letter in her file (*id.*, ¶ 18). Plaintiff claims she signed the extension under duress (*id.*). In 2020, Fanning allegedly denied plaintiff tenure and kept her in probationary status without just cause (*id.*, ¶ 19). In or around that time, United Federation of Teachers ("UFT") Chapter leader Dr. Evan Lowenthal wrote that plaintiff "has been on probation longer than any teacher I have known" and that "[t]he principal's verbal tone has been hostile and unprofessional, belying the idea that he was objective and concerned with her professional development" (*id.*, ¶ 19). In April 2020, a teacher on the Social Studies Department Global team, of which plaintiff was a member, received tenure after four years and one day of service (*id.*, ¶ 20). On March 24, 2021, Fanning observed plaintiff and gave her an "Ineffective" rating, although Fanning allegedly used the wrong lesson plan in his rating (*id.*, ¶ 22). Then, on May 25, 2021, interim UFT Chapter leader Michael McCarthy ("McCarthy") wrote about a meeting he had attended with plaintiff and Fanning about unspecified "accusations of impropriety" an unnamed accuser had made against plaintiff (*id.*, ¶ 23). McCarthy believed the accusations were "less than credible" because several student statements "were suspiciously uniform, to the point of suggesting careful coordination among the witnesses" and "the witnesses interviewed all happened to be friends of the main accuser, whereas a more impartial investigation would have interviewed a random selection of students from the class in which these transgressions were alleged to have taken place" (*id.*).

Plaintiff was "discontinued" from DOE on September 9, 2021 (*id.*, ¶ 24). She appealed the termination to Superintendent Vivian Orlen ("Orlen") and requested tenure, but Orlen refused without citing a reason (*id.*, ¶ 25). Article 21 (D) in UFT's Collective Bargaining Agreement gives any UFT member the right to appeal a denial of tenure/discontinuance (*id.*), and plaintiff filed a "C-31 Appeal with UFT to overturn the termination" (*id.*, ¶ 9). Plaintiff alleges that "UFT promised her appeal would be scheduled, then never contacted her further" (*id.*, ¶ 25). Plaintiff further alleges that Orlen and Fanning had no right to terminate her employment without holding a hearing under Education Law § 3020-a (*id.*, ¶ 26). After her termination, defendants placed plaintiff's fingerprints and social security number into a database maintained by DOE's Office of Personnel Investigations ("OPI") along with a "Problem Code" notation, which bars plaintiff from any future employment with DOE or with any DOE vendor (*id.*, ¶¶ 4 and 6). Plaintiff alleges that defendants never told her "when she was flagged or why," and that she learned of the Problem Code designation when she sought new employment (*id.*, ¶¶ 6 and 41).

Plaintiff commenced this action on November 21, 2022. The verified complaint pleads four causes of action for: (1) tenure by estoppel, alleging that her termination was the result of an abuse of process; (2) bad faith age discrimination; (3) age discrimination; and (4) a name-clearing hearing. Plaintiff seeks an order: declaring her tenured by estoppel and her discontinuance deemed null and void; restraining defendants from retaliating against her for participating in this litigation; removing plaintiff's fingerprints and social security number from the Problem Code database; awarding compensatory damages, including back pay, front pay, seniority, all other benefits and emoluments of employment, damages for emotional distress and loss to her professional and personal reputation, out-of-pocket expenses, punitive damages against Fanning, statutory pre- and

post-judgment interest, along with attorneys' fees and disbursements (*id*., ¶¶ 5 and 17). In lieu of serving an answer, DOE moves to dismiss the complaint. Plaintiff opposes the motion.

Discussion

On a motion to dismiss brought under CPLR 3211, "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "'[A]llegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [citation omitted]). Dismissal is warranted if "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 142 [2017]). Whether the plaintiff can prove the allegations is not part of the court's calculus (*EBC I, Inc. v Goldman Sachs & Co*., 5 NY3d 11, 19 [2005]).

A. The First Cause of Action for Tenure by Estoppel

The complaint alleges that plaintiff's termination was "arbitrary and capricious and in violation of the New York State Education Law;" plaintiff had acquired tenure by estoppel; and plaintiff was terminated without due process because she was not given a hearing under Education Law § 3020-a (NYSCEF Doc. No. 2, ¶¶ 28-29).

DOE argues that the relief plaintiff seeks falls within the scope of CPLR article 78, and plaintiff failed to timely commence a proceeding.

The court must "look for the reality, and the essence of the action and not its mere name" in applying the appropriate statute of limitations (*Morisson v National Broadcasting Co*., 19 NY2d 453, 459 [1967]). The gravamen of plaintiff's complaint concerns defendants' alleged failure to act under Education Law §§ 2573 (5) and 3012 (1) (a) (ii). Education Law § 3012 (1) (a) (ii) provides that teachers appointed after July 1, 2015[1] are subject to a four-year probationary period. Education Law § 2573 (5) (b) states that at the expiration of the probationary period for a teacher appointed after July 1, 2015, the superintendent of schools shall make a written report recommending that teacher for a permanent appointment, provided certain conditions have been met. Instead of granting plaintiff tenure under this procedure, DOE terminated her.

"A special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government" (*Matter of Razzano v Remsenburg-Speonk UFSD*, 162 AD3d 1043, 1045 [2d Dept 2018] [internal quotation marks and citation omitted]). Here, the allegations in the complaint "present[ ] the classic formulation of an article 78 proceeding and 'whether the determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion'" (*Foster v City of New York*, 157 AD2d 516, 518 [1st Dept 1990] [citation omitted]). Thus, a CPLR article 78 proceeding, not a plenary action, is the appropriate vehicle for judicial review of such action (*see Maas v Cornell Univ*., 94 NY2d 87, 92 [1999]).

[1] The complaint references Education Law § 3012 (1) (a) (ii) , and there is no dispute on this record that plaintiff was hired after July 1, 2015.

An article 78 proceeding must be commenced within four months after the determination is made (CPLR 217 [1]). As is relevant here, "a decision to terminate the employment of a probationary teacher is final and binding on the date the termination becomes effective" (*Matter of Triana v Board of Educ. of the City School Dist. of the City of N.Y.*, 47 AD3d 554, 557 [1st Dept 2008]). Plaintiff admits that she was terminated on September 9, 2021, but she did not bring this action until November 21, 2022. Thus, the first cause of action for tenure by estoppel is time-barred (*see Kahn v New York City Dept. of Educ*., 18 NY3d 457, 465 [2012]; *Matter of Wagner v New York City Dept. of Educ*., 222 AD3d 445, 445 [1st Dept 2023]).

Plaintiff, in response, argues that she may maintain a claim for tenure by estoppel based on defendants' alleged deceit. Plaintiff asserts that the two "Extension of Probation Agreements" she signed are null void because Paragraph 13 in each agreement states that "[n]othing contained in this agreement shall preclude [plaintiff] from applying and being selected for other positions … within the New York City Department of Education" (NYSCEF Doc. No. 17, plaintiff's exhibit 4). Plaintiff claims that defendants never informed her of the Problem Code and that she first learned of it more than four months after her termination. Plaintiff also submits that she is entitled to a hearing based on Education Law § 2573 (5), and that the failure to offer her a hearing constitutes an abuse of process (NYSCEF Doc. No. 13, plaintiff's mem of law at 7) and a violation of the due process provisions of Education Law § 3020-a (NYSCEF Doc. No. 2, ¶¶ 7 and 28).

Plaintiff's arguments are unpersuasive. First, plaintiff concedes that "[s]he was out of time to file an Article 78" (NYSCEF Doc. No. 13, plaintiff's mem of law at 6). Second, the cases cited in plaintiff's opposition all involved article 78 proceedings (*see e.g. Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist.*, 90 NY2d 110 [1997]). Likewise, the standard plaintiff asserts governs her tenure by estoppel claim, namely whether her "termination was for a

constitutionally impermissible reason, otherwise in violation of law, in bad faith, or arbitrary" (*Matter of Pepin v New York City Dept. of Educ.*, 39 Misc 3d 1214[A], 2012 NY Slip Op 52477[U], *1-2 [Sup Ct, NY County 2012]), is the same standard applied in article 78 proceedings. Thus, her attempt to recast her untimely tenure by estoppel claim in a plenary action fails. Plaintiff has not set forth other basis for extending or tolling the four-month limitations period.

Nor is the provision in Education Law § 2573 (5) (b) requiring a hearing under Education Law § 3020-a before a teacher may be terminated for cause applicable in this instance. Education Law §§ 2573 (5) (b) and 3020-a apply to teachers who have been granted tenure (*see Matter of Remus v Board of Educ. for Tonawanda City School Dist.*, 96 NY2d 271, 276 [2001]). Given plaintiff's failure to timely commence an article 78 proceeding to challenge her termination and enforce her tenure rights by estoppel, the argument that she is entitled to a pre-termination hearing is unpersuasive (*Matter of Triana*, 47 AD3d at 561; *see also Matter of Brennan v City of New York*, 123 AD3d 607, 608 [1st Dept 2014] ["[a]s a probationary teacher, petitioner was not entitled to a pre-termination hearing pursuant to Education Law § 3020-a"]). In any event, the alleged failure to hold a pre-termination hearing does not salvage the untimeliness of the tenure by estoppel claim.

The complaint also fails to plead a claim for abuse of process. The complaint recites the elements for that tort (NYSCEF Doc. No. 2, ¶ 33), but "no process, criminal or civil, was issued" (*Scollar v City of New York*, 160 AD3d 140, 148 [1st Dept 2018]). Accordingly, the first cause of action is dismissed.

B. The Second and Third Causes of Action for Age Discrimination

The second and third causes of action plead claims for "bad faith" age discrimination and age discrimination, respectively (NYSCEF Doc. No. 2, ¶¶ 40 and 46), presumably under Executive Law § 296 et seq. (the State HRL) and New York City Administrative Code § 8-107 et seq. (the City HRL) (*id*., ¶ 15).

DOE argues that the age discrimination claims should be dismissed on two grounds. First, the claims are time-barred. Second, the complaint fails to plead a claim for age discrimination.

Education Law § 3813 (2-b) states, in pertinent part, that "no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose." Age discrimination claims are subject to this one-year statute of limitations (*Matter of Amorosi v South Colonie Ind. Cent. School Dist*., 9 NY3d 367, 369 [2007]). Here, the age discrimination claims are time-barred as plaintiff commenced this action more than one year after the claims arose (*see Lasher v New York City Dept. of Educ.*, 215 AD3d 590, 590 [1st Dept 2023]).

The complaint also fails to adequately plead a claim for age discrimination under the State and City HRLs. Both State and City HRLs proscribe employment discrimination based on an individual's age (Executive Law § 296 [1] [a]; Administrative Code § 8-107 [1] [a] [2]). Because a claim brought under the State or City HRL must give "'fair notice' of the nature of plaintiff's claim and their grounds" (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019], quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]), the plaintiff only needs to plead facts sufficient to establish a *prima facie* case of age discrimination (*McCabe v Consulate Gen. of Can.*, 170 AD3d 449, 449-450 [1st Dept 2019]). Therefore, the complaint must allege that the plaintiff: (1) is a member of a protected class; (2) is qualified for

the position; (3) was subjected to adverse employment action or was treated differently or less well than other employees; and (4) the adverse action or different treatment of plaintiff occurred under circumstances giving rise to an inference of discrimination (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

Even under the liberal pleading standards applied in employment discrimination actions (*see Vig*, 67 AD3d at 145), the complaint fails to adequately allege a claim for age discrimination (*see Harrington*, 157 AD3d at 584-585). At a minimum, the complaint satisfies the first three elements of a *prima facie* case. Plaintiff, who was 65 years of age in 2015, is a member of a protected class (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 271 [2006]), and was qualified for the position (*see Gregory v Daly*, 243 F3d 687, 696 [2d Cir 2001] ["by hiring the employee, the employer itself has already expressed a belief that [the plaintiff] is minimally qualified"]). Termination constitutes an adverse employment action (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 [1st Dept 2015]). As to the fourth element, however, the complaint fails to plead any facts tending to show that plaintiff was terminated under circumstances that would give rise to an inference of discrimination (*see Lewkowicz v Terence Cardinal Cook Health Ctr.*, 212 AD3d 443, 443 [1st Dept 2023], *lv denied* 39 NY3d 914 [2023]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). "'Discriminatory motivation may be inferred from, among other things, 'invidious comments about others in the employee's protected group[,] or the more favorable treatment of employees not in the protected group'" (*Mazzeo v Mnuchin*, 751 Fed Appx 13, 14 [2d Cir 2018] [citation omitted]). The complaint alleges that Fanning once remarked, "Oh my goodness, I didn't know you were that old" (NYSCEF Doc. No. 2, ¶ 16), but the complaint fails to plead a causal connection between this remark from 2015 and plaintiff's termination six years later (*see Lively v*

Wafra Inv. Advisory Group, Inc., 211 AD3d 432, 433 [1st Dept 2022]; *Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020]). Apart from this one remark, the complaint fails to plead other, specific facts tending to show a discriminatory animus based on age (*see Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 570 [1st Dept 2014]). The complaint also fails to adequately plead that other employees who did not share plaintiff's protected characteristic were treated more favorably (*see Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014]). The complaint alleges that a member of the Social Studies Department Global team received tenure after four years and one day of service (NYSCEF Doc. No. 2, ¶ 20). However, the complaint fails to set forth this teacher's age so that it would be reasonable to infer that plaintiff was treated less well because of her age (*see Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 489 [1st Dept 2021]).

Plaintiff, in response, does not address whether the age discrimination claims are timely. Instead, plaintiff argues that dismissal is inappropriate because DOE has not proffered admissible evidence of a nondiscriminatory motive or facts that conflict with her argument. Contrary to plaintiff's contention, DOE is not required to submit evidence in admissible form. The present motion is one for dismissal under CPLR 3211 and addresses only whether the pleading is deficient on its face. Plaintiff may remedy pleading defects through the submission of an affidavit amplifying the allegations in her complaint (*Leon*, 84 NY2d at 88), but she has not chosen to do so here. The second and third causes of action are dismissed.

C. The Fourth Cause of Action for an Evidentiary Hearing

The complaint alleges that an evidentiary hearing is necessary because the decision to deny plaintiff tenure "is not rational nor is it based on any evidence" and "was in bad faith" (NYSCEF Doc. No. 2, ¶ 54). Plaintiff ultimately seeks the removal of the Problem Code associated with her name in OPI's database.

DOE maintains that plaintiff should have brought her claim for a name-clearing hearing as an article 78 proceeding, and that the claim should be dismissed as untimely.

As with the tenure by estoppel claim, the requests for an evidentiary hearing and for the removal of the Problem Code fall within the scope of CPLR article 78 and are untimely (*see Matter of Connors v. City of New York*, 205 AD3d 518, 518 [1st Dept 2022]; *Matter of Pepin v New York City Dept. of Educ.*, 148 AD3d 443, 443 [1st Dept 2017], *lv denied* 29 NY3d 912 [2017]; *Matter of Green v New York City Police Dept*., 235 AD2d 475, 476 [2d Dept 1997]).

Plaintiff concedes that an article 78 proceeding is the proper vehicle to challenge DOE's action, given her argument that the placement of a Problem Code "is arbitrary and capricious as a matter of law" (NYSCEF Doc. No. 13 at 12). Furthermore, *Matter of Higgins v LaPaglia*, (281 AD2d 679, 681 [3d Dept 2001]), cited by plaintiff for the proposition that she is entitled to an evidentiary hearing, was brought as an article 78 special proceeding. The fourth cause of action is dismissed as untimely.

D. The Unpled Cause of Action for Fraud

Plaintiff contends that she has successfully pled a cause of action for fraud. However, plaintiff did not specifically plead a cause of action for fraud in the complaint.

A six-year statute of limitations governs fraud claims (CPLR 213 [8]), but as DOE points out, claims against DOE must be brought within one year (Education Law § 3813 [2-b]; *see also First Bible Baptist Church, Inc. v Gates-Chili Cent. School Dist.*, 172 AD2d 1057, 1057 [4th Dept 1991]; *Gargano v Massapequa Union Free Sch. Dist.*, 2022 NY Misc LEXIS 9696, *9 [Sup Ct, Nassau County, Mar. 14, 2022, Pineda-Kirwan, J., index No. 604815/2021]). In addition, a cause of action for fraud must be pled with particularity (CPLR 3016 [b]). In reviewing the complaint, it is unclear what specific acts form the basis of the unpled fraud claim. The complaint alleges that "[t]he conduct and actions of [d]efendants in creating a fraudulent scheme to falsely accuse [p]laintiff of undefined misconduct," which resulted in her termination, were unlawful (NYSCEF Doc. No. 2, ¶ 49). Not only does the complaint fail to articulate the particular details of this alleged scheme (*see Cronos Group Ltd. v XComIP*, LLC, 156 AD3d 54, 61 [1st Dept 2017]; *Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487, 488 [1st Dept 2014]), but it appears that plaintiff commenced this action against DOE more than one year after the unpled cause of action accrued.

Plaintiff's reliance on *Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.* (87 NY2d 183, 189-190 [1995]) is misplaced as that article 78 proceeding involved tenure by estoppel and not an action for fraud. Plaintiff's discussion on whether a teacher may waive a right to claim tenure by estoppel is similarly unhelpful with respect to the unpled fraud claim. Last, it is unclear whether plaintiff is attempting to apply the six-year statute of limitations for fraud claims to the first cause of action for tenure by estoppel. Nevertheless, the argument

lacks merit because the purported fraud alleged in the complaint is wholly unrelated to plaintiff's ability to timely commence an article 78 proceeding (*see Matter of Alper Rest. Inc. v Town of Copake Planning Bd.*, 149 AD3d 1336, 1336-1337 [3d Dept 2017]).

E. Dismissal of the Complaint against Fanning

DOE argues that the complaint should be dismissed against Fanning, as well, because he has not been served with the complaint. The present motion, however, was not brought on Fanning's behalf (NYSCEF Doc. No. 4). Plaintiff, in response, submits an affidavit of service from a licensed process server sworn to on January 30, 2023 (NYSCEF Doc. No. 18, plaintiff's exhibit 5). The affidavit of service reveals that Fanning was personally served with the summons and complaint pursuant to CPLR 308 (1). Thus, this branch of DOE's motion is denied.

Conclusion

Accordingly, it is hereby:

ORDERED that the motion brought by defendant Board/Department of Education of the City of New York to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant David Fanning; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the amended caption is as follows:

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

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DR. DARIAN MCDERMOTT, Index No. 159989/2022

Plaintiff,

- against -

DAVID FANNING, Principal, A. Phillip Randolph HS, sued in his individual as well as official capacity,

Defendant.

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; and it is further

ORDERED that this case is transferred to a General IAS part, as none of the remaining parties are represented by the Office of the Corporation Counsel, and neither the City of New York nor any of its agencies remains as a named party in this action; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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).

5/16/2024
DATE

J. MACHELLE SWEETING, J.S.C.

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