New York County Clerk's Index No. 162361/2015

Court of Appeals of the State of New York

ALLEN C. DAWSON,

Plaintiff – Appellant,

-against-

NEW YORK UNIVERSITY,

Defendant – Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f) Defendant-Respondent New York University states that it is a not-for-profit education corporation approved by the Regents of the University of the State of New York with no corporate parents and identifies the following entities as subsidiaries and affiliates:

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Dated: New York, New York
August 26, 2021

Respectfully Submitted,

By: 
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Defendant-Respondent New York University ("NYU" or "the University") respectfully submits this memorandum of law in opposition to the motion of Plaintiff-Appellant Allen Dawson ("Plaintiff," "Appellant," or "Dawson") for leave to appeal from the Decision and Order of the Appellate Division, First Department dated April 19, 2018 (the "Decision"), which unanimously affirmed the Decision and Order of the Supreme Court, New York County (Hon. Manuel J. Mendez), dated January 20, 2017, dismissing his complaint.

PRELIMINARY STATEMENT

Plaintiff is a former student at the NYU School of Professional Studies ("SPS"), whose admission was rescinded when SPS discovered that he had lied on his application for admission. Plaintiff moves for leave to appeal to this Court from the Appellate Division's unanimous decision affirming the Supreme Court's Decision and Order, which dismissed his complaint on the grounds that his claims were time-barred under the four-month statute of limitations applicable to Article 78 proceedings, and denied his cross-motion to amend the complaint. *See* Record on Appeal ("R") 12-14; *Dawson v. New York Univ.*, No. 162361/2015, 2017 WL 276331 (N.Y. Sup. Ct. New York Cty January 20, 2017), *aff'd* 160 A.D.3d 555 (1st Dep't 2018).

The First Department properly applied well-established precedent in holding that "although plaintiff alleges that he was subjected to unlawful discrimination, the

complaint is actually 'a challenge to a university's academic and administrative decision[ ]' [and thus] it is barred by the four-month statute of limitations for a CPLR article 78 proceeding." *Dawson v. New York University*, 160 A.D.3d 555, 555 (1st Dep't 2018).

The First Department correctly applied settled law to the circumstances of this particular case, and Appellant does not identify any ground that warrants review by the Court of Appeals. There is no novel issue or issue of public importance, no conflict with prior decisions of this Court, and no conflict among the departments of the Appellate Division. *See* 22 NYCRR § 500.22(b)(4).

COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Did the First Department properly affirm the trial court's dismissal of Plaintiff's complaint as time-barred by the four-month statute of limitations applicable to proceedings under N.Y. CPLR Article 78, when the crux of his complaint is a challenge to the University's decision to rescind his admission when it learned that he had lied on his application for admission?

Defendant respectfully submits that the First Department properly affirmed the trial court's dismissal of Plaintiff's Complaint and the denial of Plaintiff's cross-motion to amend the complaint, and that Plaintiff has not articulated any substantial basis to be granted leave to appeal to this Court.

RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiff's complaint centered around NYU's academic and administrative decision on May 30, 2013 to rescind Plaintiff's admission when it discovered a misrepresentation on his admissions application regarding whether he had ever been convicted of a crime. (R 7). In his complaint, Dawson challenged NYU's decision by, among other things, theorizing that his admission to SPS was rescinded because he is African American. (R 17-18, 20).

Background

In Spring 2013, SPS administrators received documents indicating that Dawson had been convicted of third degree assault in 1997. (R 34). The administrators determined that the documents were inconsistent with information that Mr. Dawson had provided in his application to SPS, signed and dated June 6, 2010, which misrepresented his criminal history. *Id*. Specifically, Dawson had responded to a question on the application regarding criminal history by indicating that he had not been convicted of a crime. (R 12, 19, 36)

By letter dated May 7, 2013, SPS Dean Dennis Di Lorenzo wrote to Mr. Dawson informing him of the information learned by the school, explaining that false information in an admissions application is grounds for rescinding a student's admission, and offering Dawson an opportunity to reply. (R 35). In Dawson's reply letter, he stated that he did not dispute the allegation but had only a vague

recollection of the particular incident at issue, notwithstanding that he had been sentenced to seven months in prison. (R 34). Dawson further stated his belief that certain types of convictions did not need to be reported. (R 12, 29, 35).

On May 30, 2013, Dean Di Lorenzo replied by letter, noting that the documents from Dawson's criminal case clearly indicated that he had pled guilty to assault in the third degree and had been sentenced to seven months imprisonment, and that a 3-year order of protection had been imposed. (R 35). Dean Di Lorenzo further concluded that the statement on Dawson's application regarding his criminal history was false, and that Dawson had not presented any compelling excuse for the misrepresentation. Dean Di Lorenzo informed Dawson that his admission to the SPS McGhee Division was therefore being rescinded. (R 13, 18, 35).

Procedural History

Plaintiff filed the complaint in this action on December 2, 2015, more than two and a half years later. NYU responded by moving to dismiss the action pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7) on February 1, 2016. (R 22-23). In response to NYU's motion, Plaintiff filed a cross-motion to amend the complaint. (R 38).

On January 20, 2017, New York Supreme Court Justice Manuel Mendez entered a Memorandum Decision and Order granting NYU's motion to dismiss Plaintiff's Complaint and denying his cross-motion to amend the complaint. (R 13-

14). The court found that "although couched in terms of discrimination, the complaint is a challenge to a university's academic and administrative decision and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding, the appropriate vehicle for such a challenge." (R 13). The court further denied the defendant's motion to amend the complaint finding that it was "in essence" also a "challeng[e] to [NYU's] academic and administrative decision," and thus time-barred by the applicable four-month statute of limitations. (R 14).

The First Department unanimously affirmed the trial court's decision on April 19, 2018, adopting the trial court's reasoning. *See Dawson*, 160 A.D.3d at 555. On July 12, 2018, Plaintiff moved in the Appellate Division for leave to appeal the First Department's Decision to the New York Court of Appeals. The First Department denied the request on October 18, 2018. *See* Exhibit A to Appellant's Memorandum of Law in Support of Leave to Appeal to the Court of Appeals ("Appellant's Mem.").

ARGUMENT

I. Legal Standard

A motion for leave to appeal may only be granted where the questions presented merit review by the Court of Appeals, "such as that the issues are novel or of public importance, present a conflict with prior decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4); *see also* NY C.P.L.R. 5713 (granting permission to

appeal to Court of Appeals requires finding that there are questions of law that in the opinion of the Appellate Division ought to be reviewed).

II. Plaintiff's Motion for Leave to Appeal Should be Denied

There is no basis upon which to grant Plaintiff's motion for leave to appeal. The First Department's unanimous Decision applied settled law in affirming the dismissal of Petitioner's complaint and does not present a novel or serious issue of public importance which warrants review by this Court. *See* 22 NYCRR § 500.22(b)(4).

a. It is Well-settled That Challenges to the Administrative and Educational Decisions of Universities Must Be Brought Via an Article 78 Proceeding Within Four Months.

In controversies that involve colleges' and universities' academic and administrative decisions, this Court has long recognized that "a CPLR article 78 proceeding is the route for judicial review of such matters, not a plenary action." *Maas v Cornell Univ.*, 94 N.Y.2d 87, 92 (1999). The decision Plaintiff is challenging here involves precisely the kind of administrative decisions that this Court has deemed to "involve the exercise of highly specialized professional judgment" on which educational institutions are "better suited to make relatively final decisions." *Id*. There is thus no conflict between the First Department's decision and the prior decisions of this Court. There is also no conflict among the departments of the Appellate Division as to this point – on the contrary, all the departments have

reached the same conclusion, that the four-month statute of limitations applies in these circumstances. *See e.g. Diehl v St. John Fisher Coll.*, 278 A.D.2d 816, 816 (4th Dep't 2000); *Demas v Levitsky*, 291 A.D.2d 653, 660 (3d Dep't 2002); *Bottalico v Adelphi Univ.*, 299 A.D.2d 443 (2d Dep't 2002). It is equally clear that an Article 78 petition must be brought within four months after the determination to be reviewed becomes final and binding. *See Gertler v. Goodgold,* 107 A.D.2d 481, 487 (1st Dep't 1985), *aff'd* 66 N.Y.2d 946 (1985).

It is also well-established that a plaintiff cannot avoid the statute of limitations applicable to claims that should be brought under Article 78 merely by alleging discrimination. *See Alrqiq v. New York Univ.*, 127 A.D.3d 674, 674-75 (1st Dep't 2015), *lv. denied*, 27 N.Y.3d 910 (2016) (claim for race and national origin discrimination relating to a university's decision not to grant admission to plaintiff was time-barred by four-month statute of limitations); *Padiyar v. Albert Einstein Coll. of Med. of Yeshiva Univ.*, 73 A.D.3d 634, 635 (1st Dep't 2010), *lv. denied*, 15 N.Y.3d 708 (2010) ("The instant plenary complaint, while couched in terms of unlawful discrimination … is in fact a challenge to a university's academic and administrative decisions and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding") (citations omitted). In another recent unanimous decision, the Second Department agreed that the trial court properly dismissed the plaintiff's discrimination, contract and fraud claims "because those causes of action

in actuality challenged the administrative determination expelling the plaintiff from NYCOM, and therefore should have been asserted in a proceeding pursuant to CPLR article 78 within four months." *Attalah v. New York College of Osteopathic Medicine*, 189 A.D.3d 1324, 1325 (2d Dep't 2020).

Accordingly, there is no conflict among the appellate divisions regarding this well-settled principle, and indeed, there has not been a single dissenting justice in any of these cases or in the First Department decision below. *Alrqiq*, 127 A.D.3d at 675; *Padiyar*, 73 A.D.3d at 635; *Attallah*, 189 A.D.3d at 1326; *see also Mule v. Hawthorne Cedar Knolls Union Free Sch. Dist.*, 290 A.D.2d 698, 699 (3d Dep't 2002)("[A]n aggrieved party may not avoid the four-month [limitations] period by characterizing the agency's action as a denial of due process rights."); *Roebling Liquors Inc. v. Urbach*, 245 A.D.2d 829, 830 (3d Dep't 1997) ("a party may not assert constitutional claims in an attempt to subvert the [s]tatute of [l]imitations provided by CPLR 217 when the essence of the party's challenge is to the specific actions of an administrative agency"). The bedrock principle articulated by these cases is that a plaintiff cannot circumvent the Article 78 four-month statute of limitations by couching a challenge to a university's administrative decision as a different type of claim. That is exactly what Appellant attempted to do here, as he filed his lawsuit more than two years after NYU's decision to rescind his admission.

His attempt to do so was appropriately rejected by the trial court and the First Department. *See* R 13-14; *Dawson*, 160 A.D.3d at 555.

Notably, had Plaintiff properly brought a timely Article 78 proceeding to challenge the rescission of his admission, it would have been dismissed as meritless. This Court rejected an identical challenge to a school's ability to rescind an individual's admission upon learning of a misrepresentation in an admissions application. *Powers v. St. John's Univ. School of Law*, 25 N.Y.3d 210, 218 (2015) (denying Article 78 challenge to school's decision to rescind student's admission after he had completed several semesters when it learned that he had made misrepresentations about the nature of a prior drug conviction).[1]

There is no question that the essence of Appellant's complaint here is a challenge to NYU's decision to rescind his admission based on his misrepresentation regarding his criminal history. Although Plaintiff couches his challenge to the University's decision as one of alleged discrimination in violation of Title VI, the factual allegations in his complaint make the actual nature of his complaint clear. *See* R 19 at ¶ 18 (conceding that his dismissal was "as a result of the alleged misrepresentation [regarding his criminal history],"); ¶ 16 (claiming that Plaintiff

[1] Indeed, Dawson's conduct in this matter was more egregious in that he failed to disclose his prior conviction at all, while the plaintiff in *Powers* had disclosed a conviction in his application materials but had misrepresented the seriousness of the conviction. *See Powers*, 25 N.Y.3d at 218.

thought "a misdemeanor did not have to be disclosed"); R. 20 at ¶ 23 (arguing that "[I]t was improper for NYU to use a thirteen year old misdemeanor conviction to dismiss Plaintiff from the program"). The fact that Appellant's complaint seeks an injunction compelling his reinstatement further demonstrates that he is directly challenging the decision to rescind his admission. *See* R 20.

In addition to the fact that this case involves the application of a well-established legal principle, it is not a matter of public importance. This case involves a former student who was dismissed from college eight years ago because he was caught lying on his admissions application. It is not a matter of such significant weight that it warrants this Court's attention. Plaintiff's claim to the contrary is belied by his delay of more than two and a half years before he even filed his complaint, and his extraordinary three-year delay in seeking review of the First Department's decision.[2]

[2] The timeliness of Appellant's motion for leave to appeal to this Court is highly questionable. While as a technical matter it may have been timely filed since it was served within 30 days of the date that Appellant recently served notice of entry of the Appellate Division's October 18, 2018 decision denying leave to appeal to this Court, as a practical matter, nearly three years have elapsed since that decision and it has been more than three years since NYU served Appellant with notice of entry of the underlying First Department decision on June 12, 2018. *See* Appellant's Mem. at 3. Even if his motion is timely, however, his significant delay in pursuing this matter provides another independent basis for this Court to decline to grant him leave to appeal.

b. There is No Conflict Between Article 78's Four-Month Statute of Limitations and Title VI.

Appellant's claim of a purported conflict between the Article 78 four-month statute of limitations and Title VI of the Civil Rights Act of 1964 is unavailing. State law may be overridden by federal law where a federal statute contains an express clause preempting state law, where pre-emptive intent may be implied from the scope of the federal statute, or where there is an actual conflict between state and federal law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). None of these situations is present here. Plaintiff does not point to any federal statutory language that purportedly conflicts with applying a four-month statute of limitations to challenges to a University's academic or administrative decision that are couched as discrimination claims. Notably, Title VI does not even *contain* a statute of limitations, and the relevant case law makes clear that the courts must look to *state* law to determine the applicable limitations period. *See Martin v. State Univ. of New York*, 704 F. Supp. 2d 202, 234 (E.D.N.Y. 2010) (noting Title VI's lack of a statute of limitations, and that the applicable statute of limitations in some circumstances should be taken from New York's limitations period for personal injury causes of action). Accordingly, since the well-settled applicable state law here provides that Article 78's four-month statute of limitations applies, there is no federal/state conflict created by applying New York State's four-month statute of limitations to

Plaintiff's challenge to NYU's decision to rescind his admission as discriminatory on the basis of his race in violation of Title VI.

c. The Purcell Case Cited by Appellant Does Not Support His Request

Appellant relies heavily on a 2019 federal case, *Purcell v. New York Institute of Technology – College of Osteopathic Medicine*, 931 F.3d 59 (2d Cir. 2019), but that case provides little support for his request that this Court review the First Department's unanimous decision in this matter. First, as the *Purcell* court recognized, the circumstances of that case are distinguishable from those presented here, since *Purcell* involved a lawsuit in federal court involving federal claims, while this case involves the application of Article 78, a state statute, to claims brought in state court. *See id*. at 64 n.28. Second, *Purcell* is distinguishable because there was no determination by the Second Circuit akin to the holding of the trial court and Appellate Division here that "[a]lthough plaintiff alleges that he was subjected to unlawful discrimination, the complaint is *actually* a challenge to a university's academic and administrative decision[ ]." *Dawson*, 160 A.D.3d at 555 (emphasis added). Third, *Purcell* noted factual allegations directly linking the school's dismissal decision to discriminatory intent. *See Purcell*, 91 F.3d at 62 (summarizing allegations that NYIT staff members made derogatory remarks about plaintiff's mental health and sexual orientation in the context of reinstatement proceedings). By contrast, the complaint here is devoid of facts from which one might plausibly

infer discriminatory intent and as the trial court recognized, the basis for Appellant's claim is that "it was improper for Defendant to dismiss him from SPS for a misrepresentation on his admissions application that he had never been convicted of a crime." *See* R 14. Plaintiff's complaint was a transparent attempt to evade the four-month statute of limitations by cloaking his administrative challenge as a claim of discrimination. Finally, it is important to note that the discussion by the *Purcell* court regarding the application of Article 78 in a state court proceeding is *dicta* and is not controlling here.

CONCLUSION

For the foregoing reasons, Respondent NYU respectfully requests that the Court deny Appellant's motion for leave to appeal.

Dated: New York, New York
August 26, 2021

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
) ss.:
)
COUNTY OF QUEENS)

KAREN VINSEIRO, does hereby solemnly affirm, declare and says:

I am over the age of 18 and not a party to the within action.

On August 27, 2021, I served upon Appellant Allen Dawson, the foregoing MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL:

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by enclosing two (2) copies addressed to the above in a United Parcel Service overnight delivery envelope and depositing the envelope into a United Parcel Service drop off box prior to the latest time designated by United Parcel Service for overnight delivery.

KAREN VINSEIRO

Affirmed to before me this
27th day of August, 2021

NOTARY PUBLIC

DEBORAH A. CONQUEST
Notary Public, State of New York
02CO5087088
Qualified in Suffolk County
Commission Expires October 27, 2024