SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

----------X **PART 6**

NEW YORK INSTITUTE OF TECHNOLOGY,

Plaintiff,

INDEX NO.: 23134/08

-against-

MOTION DATE: 01/04/12
SEQUENCE NO. 001, 002

SARABJEET SAREEN,

Defendant.

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Upon the foregoing papers, the motion by defendant Sarabjeet Sareen for summary judgment, pursuant to CPLR §3212 is denied. The cross-motion by plaintiff New York Institute of Technology (hereinafter "NYIT") for leave to amend its verified reply to defendant's counterclaims is granted to the extent directed below, however, plaintiff's application for summary judgment, pursuant to CPLR §3212, or alternatively pursuant to CPLR §3211(a)(1) and (a)(7), is denied.

This is a collection action in which plaintiff seeks to collect $21,259.39, plus interest from October 10, 2000, in tuition payments from the defendant after the defendant's involuntary dismissal from the New York College of Osteopathic Medicine of New York Institute of Technology (hereinafter "NYCOM").

Defendant Sarabjeet Sareen entered NYCOM in the fall semester of 2007. She thereafter failed two of her required courses, resulting in her dismissal from NYCOM on February 12, 2008 for poor academic performance.

Defendant contends that the plaintiff's claim for tuition is based upon the Student Handbook in effect between the plaintiff and the defendant at the time of her dismissal, which contained a provision which provided for the reimbursement of tuition to students who withdrew from NYCOM, according to a schedule of when they withdrew from the school. The handbook provision at issue included a partial tuition refund to students depending upon the week within the semester at which the student withdrew, and specifically stated that there will be no refund of tuition to a student who withdraws after the start of the fourth week of the semester. As the defendant was dismissed after the fourth week of the semester, NYCOM contends that it is entitled to payment of the full semester's tuition, and that the defendant is not entitled to a refund of tuition, in accordance with the "Tution Refund Policy" stated within the Student Handbook. Defendant claims that nowhere in the provision is there a mention of an obligation of a student who is involuntarily dismissed from the school. The provision states that it pertains to "a student who withdraws" and does not make mention of students who are involuntarily dismissed from the school. In addition, defendant cites to deposition testimony of Thomas A. Scandalis, the Dean of the school, who testified that although the school had a policy regarding tuition payment in case of withdrawal from the school, he was unsure as to whether the school had any policy regarding tuition payment in the event that a student was dismissed. He further testified that withdrawal is initiated by the student, whereas the decision to dismiss a student is made by the school.

In addition, defendant contends that Clair Jacobi, the Director of Financial Aid for the plaintiff, testified that the following year, the Student Handbook was altered to add the word "dismissal" to "withdrawal" in the identical policy provision. She further testified that the handbook was changed after "staff and students" brought to her attention that the 2007-2008 handbook policy provision was not clear with respect to same. Ms. Jacobi also testified, however, that during the orientation for new students entering the Class of 2011, which included the defendant, the students were specifically advised, before their first tuition payment was due,

that the Tuition Refund Policy in the handbook applied both to withdrawing and dismissed students.

Defendant moves for summary judgment arguing that the ambiguity in the contract (Student Handbook) should be construed against the drafter, in this case the plaintiff, and that the word "withdrawal" should not be construed to encompass "dismissal." As such, defendant contends she is entitled to summary judgment.

Plaintiff filed its Note of Issue in this action on May 5, 2011. Defendant served the within motion on July 5, 2011, but failed to file same with the Court until July 15, 2011, after the time limit set by this Court's Certification Order. The Certification Order in this action, dated March 2, 2011, specifically states that "[m]otions for summary judgment must be filed within 60 days of the filing of the note of issue." Accordingly, the defendant's motion was untimely filed. Defendant contends that her motion is timely, as it was timely served upon the plaintiff's counsel within 60 days after the Note of Issue filing, and that she believed that the motions merely had to be "made" within 60 days, which pursuant to CPLR §2211 would mean that they had to be served within 60 days.

The certification order is clear in its statement that summary judgment motions must be *filed* within 60 days of the filing of the note of issue. As such, by plain reading of the order, plaintiff's motion is late and is accordingly denied as untimely. (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004); *Andrea v. Arnone*, 5 N.Y,3d 514, 840 N.E.2d 565 (2005); *Micelli v. State Farm Mutual Auto. Ins. Co.*, 3 N.Y.3d 725, 819 N.E.2d 995 (2004)).

Regardless of same, however, there are several questions of fact which would preclude the granting of summary judgment to the defendant (or the plaintiff) herein, had the motion been timely filed. The Student Handbook states the tuition shall not be refunded where a student "withdraws" any time after the start of the fourth week of the semester, and nowhere in the provision does it specifically state that the term "withdraws" includes, or does not include, students who are dismissed. It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. (*Slamow v. Delcol*, 174 A.D.2d 725, 726, 571 N.Y.S.2d

335 (2 Dept. 1991); *Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 191, 492 N.E.2d 756 (1986); *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 807 N.E.2d 876 (2004). A contract provision is ambiguous, however, if it is reasonably or fairly susceptible of different interpretations or may have two or more different meanings. (*Geothermal Energy Corp. v. Caithness Corp.*, 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dept. 2006); *Feldman v. National Westminster Bank*, 303 A.D.2d 271, 760 N.Y.S.2d 3 (1st Dept. 2003)). A court may not rewrite into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. (*Id.*; *See, Marine Assocs. v. New Suffolk Dev. Corp.*, 125 A.D.2d 649, 510 N.Y.S.2d 175 (2d Dept. 1986)). Whether an agreement is ambiguous is a question of law for the courts, and ambiguity is determined by looking within the four corners of the agreement. (*Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998)). When a term or clause is ambiguous, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is the trier of fact. (*Geothermal Energy Corp. v. Caithness Corp.*, 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dept. 2006)).

The applicable provision in the Student Handbook is ambiguous, and the parties' proffered extrinsic evidence, namely the deposition testimony of the witnesses herein, is conflicting and fails to clarify the meaning of the provision or the intent of the parties. As such, questions of fact exist which warrant the denial of summary judgment. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

In addition, plaintiff's cross-motion for summary judgment, pursuant to CPLR §3212, or alternatively for dismissal pursuant to CPLR §3211(a)(1) and (a)(7), is also denied as untimely. Plaintiff did not file the its cross-motion until September 15, 2011, four months after the filing of the Note of Issue, and two months after the time limit set in the Certification Order expired. The plaintiff's excuse that it changed counsel one month *after* the expiration of the time to move for

summary judgment is insufficient to demonstrate "good cause" to warrant the granting of leave to file a late summary judgment motion. (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004); *Andrea v. Arnone*, 5 N.Y,3d 514, 840 N.E.2d 565 (2005); *Micelli v. State Farm Mutual Auto. Ins. Co.*, 3 N.Y.3d 725, 819 N.E.2d 995 (2004)).

With respect to the portion of plaintiff's motion which seeks to amend its Reply to defendant's counterclaims, with the proposed Supplemental Verified Reply annexed as Exhibit "R" to its cross-motion, same is granted to the extent that plaintiff's Supplemental Verified Reply is deemed an Amended Verified Reply and, as such, supersedes and replaces the initial Reply to Counterclaims and becomes the only Reply. (*Elegante Leasing, Ltd. v. Cross Trans. Svc., Inc.*, 11 A.D.3d 650, 782 N.Y.S.2d 919 (2d Dept. 2004); *Metcalf v. Progressive Ins.*, 29 Misc.3d 1225(A); 918 N.Y.S.2d 398 (Sup. Ct. Kings Cty. 2010)). CPLR §3025(b) states that "a party may amend his pleading, or supplement it...at any time by leave of court or stipulation of all parties. Leave shall be freely given upon such terms as may be just...." Leave to amend a pleading is to be freely given where, as here, there is no showing of genuine prejudice or surprise to the nonmoving party, and no showing that the proposed amendment is "palpably insufficient as a matter of law" or "totally devoid of merit." (*Consolidated Payroll Services, Inc. v. Berk*, 794 N.Y.S.2d 410 (2d Dept. 2005); *Bolanowski v. Trustees of Columbia University in City of New York*, 21 A.D.3d 340, 800 N.Y.S.2d 560 (2d Dept. 2005); *Alatorre v. Hee Ju Chun*, 44 A.D.3d 596, 848 N.Y.S.2d 174 (2d Dept. 2007); *Maspeth Federal Savings and Loan Ass'n*, 67 A.D.3d 750, 888 N.Y.S.2d 599 (2d Dept. 2009)). Mere lateness is not a barrier to the amendment of a pleading. It must be lateness coupled with significant prejudice to the other side. (*Edenwald Contr. Co., Inc. v. City of New York*, 60 N.Y.2d 957, 471 N.Y.S.2d 55 (1983); *Public Adm'r of Kings County v. Hossain Constr. Corp.*, 27 A.D.3d 714, 815 N.Y.S.2d 621 (2d Dept. 2006)). Additionally, a plaintiff seeking to amend a pleading is not required to establish merit of the proposed amendment, but the proposed amendment must fit within a cognizable legal theory as a defense (or cause of action). (*Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008)).

In the instant matter, the defendant has not demonstrated that she would be prejudiced or surprised by the amendment of plaintiff's Reply to her counterclaims. (*See, Ricchezza v.*

Metropolitan Transp. Auth., 79 A.D.3d 998, 914 N.Y.S.2d 903 (2d Dept. 2010)(court properly granted defendant leave to amend its answer to include a statute of limitations defense where the plaintiff failed to demonstrate any prejudice or surprise resulting from the delay in amending the pleading). While defendant argues that she is prejudiced in that she would have considered an earlier settlement offer rather than rejecting said offer if she knew that the plaintiff would be raising statute of limitations and CPLR Article 78 defenses (that offer being that the plaintiff would withdraw its claims against her if she would withdraw her claims against plaintiff), as noted by the plaintiff in its reply memorandum to the instant motion, the affidavit of Catherine Flickinger makes it clear that plaintiff's offer to discontinue its claims against the defendant if she discontinues her claims against NYIT remains open. Further, the plaintiff is not asserting any additional new facts within its Reply to defendant's counterclaims, and defendant does not contend that plaintiff's proposed amended Reply involves changes in fact which would have affected how she prosecuted her counterclaims or conducted discovery in this matter.

Accordingly, plaintiff is granted leave to amend its Reply to defendant's counterclaims, as annexed to her cross-motion as Exhibit "R," and same is deemed served upon the defendant.

This constitutes the decision and Order of this Court.

Dated: February 29, 2012

Anthony L. Parga, J.S.C.

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