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United States District Court,
W.D. New York.

Philip YIP, Plaintiff,
v.
BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, et al., Defendants.

No. 03–CV–00959C(SR). | Sept. 29, 2004.

Attorneys and Law Firms

Philip Yip, Union, NJ, pro se.

Peter B. Sullivan, New York State Attorney General, Buffalo, NY, for Defendants.

Opinion

CURTIN, J.

***1** This action was commenced by plaintiff *pro se* on August 22, 2003 by the filing of a 96–page complaint with 373 paragraphs and 77 attached exhibits. The complaint was originally filed in the United States District Court for the District of New Jersey, and was transferred to this court pursuant to 28 U.S.C. § 1406(a) by order of United States Magistrate Judge Patty Schwartz, dated December 8, 2003. Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing this action as time-barred and, with respect to certain of the claims, for failure to state a claim upon which relief can be granted (Item 21). Alternatively, defendants seek an order pursuant to Rule 12(e) compelling plaintiff to file and serve a more definite statement with respect to any claim not dismissed. Plaintiff has responded by "cross-motion" in opposition to defendants' motion (Item 30).

For the reasons that follow, defendants' motion is granted, and the complaint is dismissed.

BACKGROUND

The following factual summary of is derived from the allegations in plaintiff's complaint, the exhibits annexed thereto, and certain matters of record in a prior action in this court entitled *Philip Yip v. Clement Ip, et al.*, No. 84–CV–1403C (dismissed by order dated July 9, 1992, for lack of subject matter jurisdiction), and in a prior action in the New York State Court of Claims entitled *Philip Yip v. State of New York*, Claim No. 68889 (dismissed at close of trial by order dated October 30, 1986 for failure to prove wrongful dismissal), incorporated herein by reference. [1]

The central facts of the complaint relate to plaintiff's dismissal from an academic program at the Roswell Park Cancer Institute [2] leading to the degree of PhD in Physiology from the State University of New York ("SUNY"). Plaintiff began the PhD program in January of 1978 (Item 1, ¶ 2). He alleges that in 1980 he learned that his PhD advisor, Dr. Clement Ip, and Ip's wife, Dr. Margot Ip (also a Roswell researcher), had improperly appropriated the plaintiff's research (*id.* at ¶ 11). He further alleges that Dr. Edwin Mirand, Dean of the Roswell Park academic program, expelled plaintiff from the program by memorandum dated December 3, 1981, in retaliation for his complaints about the Ips' actions (*id* . at ¶ 41 & Exs. 36, 37). [3] The memorandum stated:

> [Y]ou have voluntarily withdrawn from the Division as of July 1, 1981, and have not applied for reinstatement.
>
> Therefore, we will not allow you to re-enter the Roswell Park Division for academic reasons, documented by probation letters issued on January 26, 1979 and January 13, 1980, and based upon your voluntary withdrawal from the program.

(Ex. 37.)

On July 25, 1983, the plaintiff applied for readmission (*id.* at ¶ 48 & Exs. 40, 41). By letter dated September 13, 1983, Dr. Mirand advised plaintiff that he would be admitted into a program leading to a terminal Master of Science Degree, under certain conditions, and that this offer would be open only until September 20, 1983 (Ex. 43). Plaintiff responded on September 15, 1983, requesting additional time to consider the offer (Ex. 46). By letter of September 21, 1983, Dr. Mirand advised the plaintiff that his time to accept the offer was extended to October 1, 1983 (Ex. 47).

***2** The plaintiff never accepted the offer. Instead, he retained legal counsel, who filed an action in January 1984 in the New York State Court of Claims against the State of New York, seeking money damages based on plaintiff's expulsion from the Roswell Park program (Item 1, ¶¶ 65, 66). On

December 4, 1984, while the state court action was pending, plaintiff filed an action in this court against Drs. Clement Ip and Margot Ip for money damages based on claims of common law copyright infringement, misappropriation of research materials, and unfair competition.

By letter of May 6, 1985, plaintiff once again applied for readmission to the PhD program at Roswell. This letter was responded to by Carolyn J. Pasley, Associate Counsel for SUNY, who advised the plaintiff that Dr. Mirand's correspondence of September 13 and 21, 1983 "constitutes the State University's final determination in this matter" (Ex. 52).

Plaintiff's State Court of Claims action proceeded to trial in 1986. Plaintiff alleges that he learned during the Court of Claims trial that Dr. Mirand had "fraudulently manipulated" plaintiff's academic record to cause his dismissal from the program (Item 1, ¶ 59). On October 30, 1986, after trial, Court of Claims Judge Edgar C. NeMoyer issued a written decision in which he granted the State's motion to dismiss based on the merits, "namely, failure of the claimant to prove by a preponderance of the credible evidence the substantive claim that he was wrongfully dismissed by the SUNY Graduate School or the Roswell Park Graduate Division" (Ex. 58, p. 14). [4]

Plaintiff alleges that he made complaints to other bodies, including a complaint to the federal government in June 1986 which resulted in a letter from the United States Department of Education Office of Civil Rights advising that they would investigate the matter (Ex. 66). He also wrote in May 2002 to New York State Governor George Pataki, to which defendant Robert King, Chancellor of SUNY, responded by letter dated June 27, 2002 that the matter had been "exhaustively examined" by way of the University's grievance process, review by the National Institutes of Health, and the state court system, all finding in favor of the University (Ex. 69). By letter of February 19, 2003, plaintiff was advised by defendant Andrew Edwards, Counsel for SUNY, that his complaints had been resolved "much more than a decade ago," and that if he continued to make calls to University offices, the matter would be referred to "appropriate police authorities" (Ex. 74). Finally, by letter dated May 27, 2003, plaintiff was advised by John O'Connor, Vice Chancellor and Secretary of SUNY, that it was the "final decision" of the University to deny plaintiff's request to investigate his claims of improper treatment any further, since those matters had been "exhaustively examined and rejected in multiple fora" (Ex. 76).

As mentioned, plaintiff filed this action on August 22, 2003. Named as defendants are the Board of Trustees of SUNY; Thomas Eagan, as Chairman; Steven Sample, as Ex–President; Mr. King, as Chancellor; Mr. Edwards, as University Counsel; and Dr. Mirand. After plaintiff's extensive factual allegations, the complaint sets forth the following claims for various forms of monetary relief:

***3** Count One: Violation of Civil Rights, Discrimination and Retaliation

Count Two: Due Process Violation

Count Three: Equal Protection Violation

Count Four: Wrongful Expulsion

Count Five: Fraud

Count Seven: Common Law Whistle Blower Protection

Count Eight: Freedom of Information Act Violation

Count Nine: Libel

Count Ten: Threat

Count Eleven: Dereliction of Duties and Negligence

Defendants move to dismiss these claims as time-barred, or for otherwise failing to state a claim upon which relief can be granted. For the following reasons, defendants' motion is granted.

DISCUSSION

I. Standard for Dismissal under Rule 12(b)(6)

In determining a motion to dismiss under Rule 12(b)(6), the court must accept as true all well-pleaded factual allegations of the complaint and must draw all inferences in favor of the pleader. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir.1993); *Bey v. Welsbach Elec. Corp.*, 2001 WL 863419 (S.D.N.Y. July 30, 2001). In order to avoid dismissal, plaintiff must do more than plead mere "[c]onclusory allegations or legal conclusions masquerading as factual conclusions...." *Gebhardt v. Allspect, Inc.*, 96 F.Supp.2d 311, 333 (S.D.N.Y.2000) (quoting 2 James Wm. Moore, MOORE'S FEDERAL PRACTICE ¶ 12.34[a] [b] (3d

ed.1997)). Dismissal is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *accord Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir.1994).

The defense of statute of limitations is properly raised by a Rule 12(b)(6) motion where the complaint on its face shows noncompliance with the limitations period. *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1385 n. 1 (3d Cir.1994); *see also Adams v. Crystal City Marriott Hotel,* 2004 WL 744489, at *2–*3 (S.D.N.Y. April 6, 2004). When evaluating statute of limitations defenses in the context of a motion to dismiss, the court "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." *Oshiver,* 38 F.3d at 1384 n. 2.

It is noted that in addressing a motion to dismiss where the plaintiff is proceeding *pro se,* the allegations of the complaint should be judged by a more lenient standard than that accorded to a formal pleading drafted by lawyers. *Hughes v. Rowe,* 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980); *see also Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994) (*pro se* submissions to be read liberally and interpreted "to raise the strongest arguments they suggest"). Nevertheless, proceeding *pro se* does not altogether relieve the plaintiff of the usual pleading requirements, *Bey,* 2001 WL 863419, at *2, and a plaintiff who has demonstrated his or her familiarity with the court system will be granted less leeway than one who faces the prospect of prosecuting a case without a lawyer for the first time. *See, e.g., Davidson v. Flynn,* 32 F.3d 27, 31 (2d Cir.1994).

II. Statutes of Limitations

A. Counts One, Two and Three: 42 U.S.C. § 1983

***4** While not specifically pleaded, plaintiff's various constitutional claims [5] (interpreted liberally in plaintiff's favor) arise under 42 U.S.C. § 1983, which provides a civil cause of action for deprivation of federal rights as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....
>
> Since Congress has not established a statute of limitations for a federal cause of action under Section 1983, the federal courts borrow the relevant state law limitation period for personal injury actions to determine whether the claim was timely. *See Wilson v. Garcia,* 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *see also Pearl v. City of Long Beach,* 296 F.3d 76, 79 (2d Cir.2002). In New York, the applicable statute of limitations for Section 1983 actions is three years. *Eagleston v. Guido,* 41 F.3d 865, 871 (2d Cir.1994). Thus, in order for plaintiff's federal constitutional claims to be timely, this action must have been commenced within three years from the date that his causes of action accrued. [6] Under federal law, an action accrues when a plaintiff knows or has reason to know of the alleged injury which forms the basis of his action. *Pearl,* 296 F.3d at 80.

Here, the action was commenced by the plaintiff's filing in New Jersey on August 22, 2003. His Section 1983 claims can be considered timely only if they arose after August 22, 2000.

Clearly, the events forming the basis of plaintiff's constitutional claims occurred many years before August 2000, and plaintiff's own conduct and factual allegations reveal that he was aware of these events well before that date. He previously filed a number of legal actions related to the facts and circumstances of his dismissal from the PhD program, [7] and he was advised in June 1985 that the prior notices given to him in September 1983 by Dr. Mirand constituted the University's "final determination" of the matter (Ex. 52). By his own admission, plaintiff learned at the time of his 1986 trial in the State Court of Claims that Dr. Mirand had allegedly tampered with plaintiff's academic record (Item 1, ¶ 59). The plaintiff's numerous allegations of fraud, negligence, "academic malfeasance," failure to investigate, perjury at his 1986 trial, and other conduct on the part of defendants forming the basis of his constitutional claims largely relate to this alleged tampering, about which plaintiff knew or should have known more than seventeen years prior to the filing of this action.

Plaintiff contends that the defendants' violation of his constitutional rights is ongoing, as evidenced by the May 27, 2003 letter from Mr. O'Connor (Ex. 76). Where a plaintiff can demonstrate an ongoing or continuing violation of his federally protected rights, "the plaintiff is entitled to bring suit challenging all conduct that was a part of the violation, even conduct that occurred outside the limitations period."

Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir.1994). However, the federal courts look unfavorably on continuing violation arguments, and have applied the theory only under "compelling circumstances," such as where the unlawful conduct takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred; where there is an "express, openly espoused policy [that is] alleged to be discriminatory;" or where there is a pattern of covert conduct such that the plaintiff only belatedly recognizes its unlawfulness. *Brown v. Local 701 of Intern. Brotherhood of Electrical Workers*, 2000 WL 1222174, at *9 (N.D.Ill., August 23, 2000) (citing *Stewart v. CPC Int'l, Inc.*, 679 F.2d 117, 120–21 (7th Cir.1982)).

***5** The mere fact that wrongful acts may have a continuing impact is not sufficient to find a continuing violation. *Blankman v. County of Nassau*, 819 F.Supp. 198, 207 (E.D.N.Y.1993) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 257, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (continuing violation can not be based on the continuing effects of earlier unlawful conduct); *United Air Lines v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) (same)). Nor is the fact that the plaintiff's ongoing protests, objections, requests for reconsideration, and persistent demands for administrative and judicial review have caused the dispute to linger to the present day. *See Jaghory v. New York State Dept. of Education*, 1996 WL 712668, at *5 (E.D.N.Y. December 5, 1996); *see also Ricks*, 449 U.S. at 261 (in employment discrimination context, mere requests for reconsideration do not extend the normal statute of limitations period); *Morse v. University of Vermont*, 973 F.2d 122, 125 (2d Cir.1992) (claim for discriminatory dismissal from Masters of Education program accrued, at latest, when university withdrew offer of readmission; internal administrative review of allegedly discriminatory decision had no effect on running of statute of limitations period).

In this case, whether measured from the June 1985 "final determination" by the University, or from the 1986 Court of Claims trial, plaintiff's claims for damages or other relief pursuant to Section 1983 based on alleged violations of his constitutional rights accrued well prior to August 22, 2000, and nothing in the complaint suggests the presence of "compelling circumstances" sufficient to invoke the continuing violation doctrine. Accordingly, Counts One (Violation of Civil Rights, Discrimination and Retaliation), Two (Due Process Violation), and Three (Equal Protection Violation) are dismissed as barred by the three-year statute of limitations for Section 1983 actions.

B. Count Four: Wrongful Expulsion

In Count Four of the complaint, entitled "Wrongful Expulsion," plaintiff alleges that he was wrongfully terminated from his academic program. Read liberally and interpreted to raise the strongest possible arguments, the closest these allegations come to a cognizable cause of action would be a claim of violation of a contractual right. *See State of New York v. Fenton*, 68 A.D.2d 951, 951, 414 N.Y.S.2d 58, 59 (3d Dep't 1979) (Relationship between student defendant and State University was contractual in nature) (citing *Anthony v. Syracuse University*, 224 A.D. 487, 231 N.Y.S. 435 (4th Dep't 1928)). As such, Count Four would be governed either by the six-year limitation period for contracts of N.Y.C.P.L.R. § 213(2), or the same period for "an action for which no limitation is specifically prescribe by law." N.Y.C.P.L.R. § 213(1). In either event, this claim is untimely, since the "expulsion" took place in December 1981–nearly twenty-two years prior to the filing of this action.

Plaintiff argues that the running of the limitations period for his wrongful expulsion claim should be tolled until he received the May 27, 2003 letter from Mr. O'Connor informing him of the University's final determination of his request to investigate the circumstances of his dismissal from the PhD program. This argument is rejected. There is no provision in New York's C.P.L.R. allowing for the tolling of the statute of limitations for reasons such as these, and principles of equitable tolling are available "to a very limited extent" only where "a claimant is, through absolutely no fault of his own, unable to sue." *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 33, 544 N.Y.S.2d 359, 367 (2d Dep't 1989). The plaintiff's ongoing and persistent demands for administrative or judicial review of his December 1981 dismissal from the PhD program cannot in any way be attributable to conduct on the part of defendant warranting equitable tolling of the six-year limitations period for his "wrongful expulsion" claim.

***6** Accordingly, since the complaint on its face shows noncompliance with the limitations period, plaintiff can prove no set of facts in support of his claim for wrongful expulsion which would entitle him to relief. This claim is dismissed as time-barred.

C. Count Five: Tortious Interference

In Count Five, plaintiff asserts that each of the individual defendants tortiously interfered with his relationship with the Graduate School. Such a claim, if cognizable, would be governed by the three-year limitations period of N.Y.C.P.L.R. § 214(4). *See Spinap Corp., Inc. v. Cafagno,* 302 A.D.2d 588, 756 N.Y.S.2d 86 (2d Dept.2003).

In support of his tortious interference claim, plaintiff alleges that the defendants "skirted the policies of the graduate school" (Item 1, ¶ 220), "violated the policies of the University on admission/readmission" (*id.*, ¶ 221, 756 N.Y.S.2d 86), and "aided and abetted Defendant Mirand to arbitrarily assign plaintiff to a non-approved-and-non-existing terminal Master of Science (M.S.) program ..." (*id.*, ¶ 224, 756 N.Y.S.2d 86). These events, if true, all took place in the early 1980s, and therefore all of the facts necessary to the cause of action for tortious interference existed more than three years before this action was commenced.

Plaintiff contends that the statute did not begin to run until June 27, 2002, the date of Chancellor King's letter to plaintiff informing him that his charge of improper dismissal had been exhaustively examined at several administrative and judicial levels, and rejected. As with the "wrongful expulsion" claim, there is nothing in the complaint to warrant equitable tolling of the limitations period to accommodate plaintiff's ongoing and persistent demands for administrative or judicial review of his December 1981 dismissal from the PhD program.

Accordingly, since the complaint on its face shows noncompliance with the limitations period, plaintiff can prove no set of facts in support of his claim for tortious interference which would entitle him to relief. This claim is dismissed as time-barred.

D. Count Six: Fraud

In Count Six, plaintiff alleges that defendants doctored plaintiff's academic record to cover up the Ips' scientific misconduct, and committed perjury at the 1986 Court of Claims trial by, among other things, submitting these falsified records as evidence. [8] This claim is also time-barred.

The New York statute of limitations for fraud is six years from the date of commission, or two years from the date the plaintiff discovered, or should have discovered, the fraud, whichever is longer. N.Y.C.P.L.R. §§ 203(f), 213(8); *see also Long Island Lighting Co. v. Imo Indus. Inc.,* 6 F.3d 876, 887 (2d Cir.1993). Plaintiff acknowledges that he learned of the alleged doctoring of his grades at his Court of Claims trial, when his academic record was introduced as evidence (Item 1, ¶ 235). Thus, all of the facts necessary to the fraud claim based on falsification of records or perjury existed some sixteen years before this action was commenced.

***7** Accordingly, plaintiff's claims of fraud with respect to alleged falsification of his academic record and alleged perjury at his 1986 trial are dismissed as time-barred.

E. Count Seven: "Common Law Whistle Blower Protection"

In Count Seven, plaintiff claims "Common Law Whistle Blower Protection" (Item 1, ¶¶ 246–74). No such cause of action exists, either in federal or New York common law. [9] New York recognizes statutory "whistle blower protection" for private sector employees, in Labor Law § 740, and for public employees, in Civil Service Law § 75–b, in very limited circumstances which have no application here. In any event, if plaintiff were eligible to sue under this provision, he would be required to do so "within one year after the alleged retaliatory personnel action was taken." N.Y. Labor Law § 740(4)(a) (which applies as well to public employee actions, pursuant to N.Y. Civil Service Law § 75–b(3)(c)).

Since plaintiff was clearly aware of all the facts necessary to state a claim for whistleblower protection many years prior to the filing of the complaint in this case, this claim is time-barred.

F. Count Eight: "Freedom of Information Act Violation"

In Count Eight, plaintiff alleges that he wrote Chancellor King on February 11, 2003 seeking a copy of his academic record under the Freedom of Information Act, but his request was denied. The denial came by way of defendant Edwards' February 19, 2003 letter, stating that "there will not be a response" to plaintiff's letter to the Chancellor (Ex. 74). Plaintiff seeks money damages based on this alleged violation of the Freedom of Information Act.

Since the complaint refers to records of New York State, the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, has no application. New York's Freedom of Information Law ("FOIL"), N.Y. Public Officers Law Article 6, may be enforced by means of a proceeding pursuant to N.Y.C.P.L.R. Article 78, *see* N.Y. Pub. Off. Law § 89(4)(b), but it does not give rise to a private cause of action to recover money damages. *Sank v. City University of New York,* 2002 WL

523282, at *9 (S.D.N.Y. April 5, 2002); *Warburton v. State*, 173 Misc.2d 879, 881–82, 662 N.Y.S.2d 706, 708 (N.Y.Ct.Cl.1997). Of course, this court has no jurisdiction over an Article 78 proceeding.

In any event, under N.Y.C.P.L.R. § 217(1), an Article 78 proceeding against a body or officer "must be commenced within four months after ... the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty...." Here, the state official's denial of plaintiff's FOIL request is alleged to have occurred on or about February 19, 2003. To be timely, an Article 78 proceeding seeking review of this denial must have been commenced by June 19, 2003. Accordingly, to the extent it might have resulted in some type of injunctive relief from this court, the filing of the complaint on August 22, 2003 renders plaintiff's FOIL claim untimely.

***8** To the extent it seeks money damages, Count Eight is dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

G. Count Nine: Libel

Plaintiff alleges that, on information and belief, defendant King published his June 27, 2002, letter to the plaintiff (Ex. 69) to an unidentified third party. This alleged publication forms the basis for Count Nine of the complaint (Item 1, ¶¶ 291–301).

The limitations period for defamation under New York law is one year. N.Y.C.P.L.R. § 215(3). For the purpose of computing the running of the one-year statute of limitations, the cause of action accrues on the day the statements at issue were made. *Vasile v. Dean Witter Reynolds Inc.*, 20 F.Supp.2d 465, 495 (E.D.N.Y.1998). Since the letter containing the allegedly defamatory statements was "published" on or about June 27, 2002, plaintiff's defamation claim, filed on August 22, 2003, is untimely.

H. Count Eleven: "Dereliction of Duties and Negligence"

In Count Eleven, plaintiff reiterates the factual allegations pertaining to his dismissal from the PhD program, and restates several of the allegations supporting the preceding Counts in the complaint, to allege "dereliction of duties and negligence" on the part of the Board of Trustees as a collective body (*see, e.g.*, Item 1, ¶ 361). To the extent this claim is asserted for negligence based on any actions prior to August 22, 2000, it must be dismissed as time-barred under the three-year limitations period of N.Y.C.P.L.R. § 214.

To the extent Count Eleven alleges negligence based on conduct or events occurring after August 22, 2000, it is dismissed for failure to state a claim upon which relief can be granted, as discussed in Section III(C) *infra*.

III. Failure to State a Claim

A. Count Six: Fraud

Plaintiff also alleges in Count Six that defendants King and Edwards committed fraud by continuing to lie about matters pertaining to plaintiff's academic dismissal in their respective letters of June 27, 2002, and February 19, 2003. Defendants acknowledge that, while lacking in merit, the fraud claims based on these letters would at least be timely. However, the court's review of the matters set forth in these letters clearly shows that plaintiff can prove no set of facts in support of his fraud claims against defendants King and Edwards which would entitle him to relief.

Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact (2) which the defendant knew to be false, (3) made with the intention of inducing reliance, (4) upon which the plaintiff reasonably relied, and (5) which caused injury to the plaintiff. *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir.2001); *see also Barclay Arms, Inc. v. Barclay Arms Assoc.*, 74 N.Y.2d 644, 646–47, 542 N.Y.S.2d 512, 540 N.E.2d 707 (1989). Because nothing in either of defendant King's or defendant Edwards' letters could reasonably be construed as a misrepresentation or omission of material fact which the particular defendant knew to be false, plaintiff's fraud claim with respect to these defendants fails at the *prima facie* pleading stage.

***9** In his June 27, 2002 letter, Chancellor King stated as follows:

> As you know, your charge of improper academic dismissal was thoroughly reviewed through the University at Buffalo's established grievance process. This review upheld your dismissal. In addition, an external panel of the National Institutes of Health reviewed the charges of alleged scientific misconduct and completely

> exonerated the accused scientists. Finally, upon your initiation of civil suits against the university, in all matters the court found in favor of the university.

(Ex. 69). Plaintiff contends that this statement is false because no grievance procedures were ever conducted by the University. This contention is belied by the extensive exhibits attached to the complaint indicating that plaintiff submitted several requests for academic review and reinstatement (Exs.38, 40–42), which were acted upon through appropriate University channels (*see* Exs. 43, 47). As Judge NeMoyer indicated in his October 30, 1986 decision after trial, plaintiff did indeed file a grievance with the University in July 1983, along with several formal and informal requests for readmission (Ex. 58, at 6). Upon receipt and review of plaintiff's requests, the University and Roswell Park " 'amply fulfilled their obligation to act in good faith' when they offered Mr. Yip the opportunity for limited readmission, so that he could submit his Master's thesis and be considered for a Master's degree for the work he had undertaken." (*Id.* at 10, 542 N.Y.S.2d 512, 540 N.E.2d 707).

Plaintiff also contends that defendant King's statement is false because the review conducted by the National Institutes of Health was incomplete. However, the completeness of the review has no bearing on the correctness of Chancellor King's statement. To the contrary, the exhibits attached to the complaint sufficiently demonstrate that the National Institutes of Health undertook an investigation of the alleged scientific misconduct on the part of the Ips, and completely exonerated them (Ex. 70). This is precisely what Chancellor King reported in his June 27, 2002 letter.

The same holds true with respect to the statements made by Mr. Edwards. In his February 19, 2003 letter, Mr. Edwards stated as follows:

> You are well aware of the University at Buffalo's resolution [of your] complaints. As you know, those resolutions occurred much more than a decade ago. There is simply no basis for reopening time-barred matters that were finally resolved within the University and by the Courts. I note that your attempt to reopen these closed matters through litigation was rejected by State Supreme Court and the Appellate Division, Fourth Judicial Department in 1996.

(Ex. 74) (internal quotation marks and citations omitted). Plaintiff contends that this statement is false because he did not attempt to reopen his case through litigation in the state courts. However, as noted above in note 7, *supra*, matters of public record in the state court system suggest otherwise. Specifically, in addition to the action in the New York Court of Claims, plaintiff commenced at least two other lawsuits in New York State Supreme Court asserting claims related to the circumstances of his dismissal from the program, all of which were dismissed: *Yip v. Ip*, Index No. H–46988, commenced in January 1984, and *Yip v. Ip*, Index No. 15269/92, commenced in 1992. In its written memorandum of July 12, 1996 upholding the State Supreme Court's dismissal of the 1992 action, the Appellate Division, Fourth Department, specifically noted that plaintiff "withheld information from the court regarding prior and pending litigation, in which he asserted substantially the same claims against defendants," and that the causes of action in the 1992 suit were "virtually identical" to the causes of action alleged in both the 1984 Supreme Court suit and the 1984 Court of Claims suit. *Yip v. Ip*, 229 A.D.2d 979, 979, 646 N.Y.S.2d 481, 481 (4th Dep't 1996).

***10** In addition, nothing in the complaint can be construed to allege that Chancellor King and Mr. Andrews made their statements with the intent to induce reliance by plaintiff, or that plaintiff somehow relied on those statements to his detriment. Simply put, even if plaintiff could show that the statements were false, and that defendants King and Edwards knew they were false, plaintiff cannot show that he suffered any harm as a result of his reliance on those statements.

Accordingly, plaintiff's claims of fraud with respect to statements made by defendants King and Edwards are dismissed for failure to state a claim upon which relief can be granted. [10]

B. Count Ten: Threat

In Count Ten, plaintiff alleges that defendant Edwards wrongfully and maliciously threatened plaintiff in his February 19, 2003 letter by stating that, if plaintiff continued to make calls to University offices, the matter would be referred to "appropriate police authorities" (Ex. 74; Item 1, ¶ 317). Plaintiff also alleges that the Board of Trustees "aided

and abetted Defendant Edwards, Jr. in making the threat to call the police" (Item 1, ¶ 318).

Interpreted liberally to raise the strongest arguments they suggest, these allegations can be considered an attempt to plead a cause of action for intentional infliction of emotional distress, which is recognized under New York law. There is no analogous federal cause of action.

To prevail on a claim for intentional infliction of emotional distress in New York, a plaintiff must plead and prove the following four elements: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress; (3) a causal relationship between the conduct and the resulting injury; and (4) severe emotional distress. *See Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir.1996) (citing *Howell v. N.Y. Post Co.,* 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993)). As explained by the New York Court of Appeals in *Howell:*

> The first element-outrageous conduct —serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine. In practice, courts have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law.

Howell, 81 N.Y.2d at 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (citations omitted). Consequently, the courts have found the "outrageous conduct" requirement "rigorous, and difficult to satisfy." *Id.* at 122, 596 N.Y.S.2d 350, 612 N.E.2d 699 (quoting PROSSER AND KEETON, TORTS § 12, at 60–61 (5th ed.)). In fact, liability for intentional infliction of emotional distress has been found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v. American Home Products Corp.,* 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983). "The law does not seek to compensate individuals for threats, annoyances or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting." *Zimmerman v. Carmack,* 292 A.D.2d 601, 601, 739 N.Y.S.2d 430, 431 (2d Dep't.2002) (internal quotation marks and citation omitted).

***11** Evaluated under this standard, Mr. Edwards' statement about possibly referring the matter to police authorities cannot be considered so outrageous or extreme as to go beyond all possible bounds of decency. Indeed, when considered in context along with the exhaustive history of plaintiff's complaints, Mr. Edwards' statement constituted a legitimate response to plaintiff's continued writing and calling University representatives over the course of more than twenty years.

Accordingly, plaintiff can prove no set of facts in support of his "threat" claim which would entitle him to relief for intentional infliction of emotional distress.

C. Count Eleven: "Dereliction of Duties and Negligence"

As mentioned above, in Count Eleven plaintiff alleges "dereliction of duties and negligence" on the part of the Board of Trustees as a collective body. More specifically, plaintiff claims that the Board "owe[ ]d a duty of care to protect plaintiff from culpable, tortious, discriminatory and retaliatory acts of university administrators" (Item 1, ¶ 362), "failed to exercise oversight role to supervise university administrators" (*id.* at ¶ 363, 739 N.Y.S.2d 430), and "failed to protect students in its care by not establishing procedures for reporting scientific misconduct ..." (*id.* at ¶ 364, 739 N.Y.S.2d 430). He seeks monetary relief in the form of compensatory and punitive damages (*id.* at ¶¶ 367–72, 739 N.Y.S.2d 430).

Plaintiff's claims against the Board are barred by the Eleventh Amendment to the Constitution, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This immunity from suit precludes not only federal court actions against a state brought by citizens of other states (as the literal language of the Amendment provides), but also suits against states brought by their own citizens. *See Papasan v. Allain,* 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

For Eleventh Amendment purposes, SUNY "is an integral part of the government of the State [of New York] and when it is sued the State is the real party." *State University of New York v. Syracuse University,* 285 A.D. 59, 61, 135 N.Y.S.2d 539, 542 (3d Dep't 1954), *quoted in Dube v. State University of New York,* 900 F.2d 587, 594 (2d Cir.1990). Thus, SUNY-and the Board of Trustees as its governing body pursuant to New York Education Law § 353(1)-are state agencies

for Eleventh Amendment immunity purposes, *see Anderson v. State University of New York,* 169 F.3d 117, 119 (2d Cir.1999); *Dube,* 900 F.2d at 594, and the claims asserted against the Board in Count Eleven must be dismissed.

This Count also contains certain allegations against defendant King, based on the statements in his letter of June 27, 2002 and his refusal to release plaintiff's academic record (Item 1, ¶¶ 343–45), and against defendant Edwards, based on the statements in his letter of February 19, 2003 (Item 1, ¶¶ 347–48). To the extent these allegations can be construed to state a claim for negligence which is not time-barred, that claim is dismissed for failure to allege that defendants King and Edwards breached a legally enforceable duty owed to plaintiff, and that the defendants' breach was the actual and proximate cause of the plaintiff's injuries. *See, e.g., Lombard v. Booz–Allen & Hamilton, Inc.,* 280 F.3d 209, 215 (2d Cir.2002). As discussed above in connection with plaintiff's fraud claim, the matters set forth in the King and Edwards letters are in all respects accurate, and plaintiff cannot show that he suffered any harm as a result of the statements made.

***12** To the extent Count Eleven can be construed to allege that, at the time they wrote their letters, defendants King and Edwards had a legally enforceable duty to inquire into the plaintiff's dismissal which took place over twenty years before, no such duty exists, and so there can be no liability for a refusal to conduct such an inquiry.

Accordingly, since plaintiff can prove no set of facts in support of his "dereliction of duties and negligence" claim which would entitle him to relief, Count Eleven is dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

Based on the foregoing, defendants' motion (Item 21) is granted, and the complaint dismissed in its entirety.

So ordered.

Footnotes

1 On a motion to dismiss, the district court may consider, in addition to the facts alleged on the face of the complaint, any documents attached as exhibits or incorporated by reference. *International Audiotext Network, Inc. v. Am. Tel. & Tel. Co.,* 62 F.3d 69, 72 (2d Cir.1995).

2 At the time, the Roswell Park Cancer Institute was known as the Roswell Park Memorial Institute, and was operated by the New York State Department of Health. By statute (New York Public Authorities Law § 3553), it is now a public benefit corporation and is known as the Roswell Park Cancer Institute. It is referred to herein as "Roswell Park" or "Roswell."

3 Unless otherwise indicated, references preceded by "Ex." are to the exhibits attached to plaintiff's complaint (Item 1).

4 As alluded to above, this court dismissed plaintiff's federal lawsuit by decision and order dated July 9, 1992. In its decision, the court held that it "will not entertain any argument concerning the reasons why Mr. Yip was dismissed from school and prevented from continuing his education. That issue was resolved in *Philip Yip v. State of New York,* Claim No. [68889] ([N.Y.Ct.Cl.] October 30, 1986), and will not be relitigated." *Philip Yip v. Clement Ip,* No. 84–CV–1403C, Item 35, at p. 4.

5 These would include: Count One, ¶¶ 151–64, entitled "Violation of Civil Rights, Discrimination, and Retaliation;" Count Two, ¶¶ 165–87, "Due Process Violation;" and Count Three, ¶¶ 188–208, "Equal Protection Violation."

6 Plaintiff would fare no better if his constitutional claims were governed by the period applicable in New Jersey, where the action was commenced, since there the claims would be governed by a two-year statute of limitations. *See Cito v. Bridgewater Township Police Department,* 892 F.2d 23, 25 (3d Cir.1989).

7 In addition to the prior action in this court and the action in the New York Court of Claims, plaintiff commenced at least two other lawsuits in New York State Supreme Court asserting claims related to the circumstances of his dismissal from the Roswell Park PhD program, all of which were dismissed: *Yip v. Ip,* Index No. H–46988 (commenced in January 1984); and *Yip v. Ip,* Index No. 15269/92 (commenced in 1992), *dismissal affirmed,* 229 A.D.2d 979, 646 N.Y.S.2d 481 (4th Dep't 1996) (*See* Item 11, ¶ 3).

8 Plaintiff also alleges in Count Six that defendants King and Edwards committed fraud by continuing to lie about the matters pertaining to plaintiff's academic dismissal in their letters of June 27, 2002, and February 19, 2003. This claim is addressed in Section III(A), *infra.*

9 In certain circumstances, a plaintiff can sue for retaliation under 42 U.S.C. § 1983. *See generally Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). As discussed in Section II(A) *supra,* all of plaintiff's claims which could be brought under § 1983 are time-barred.

10 Ordinarily, dismissal of a fraud claim on the pleadings should be without prejudice to a plaintiff's filing an amended complaint to cure the deficient pleading. *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54–55 (2d Cir.1995). However, where the dismissal is pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim on which relief may be granted, and the court has ruled as a matter of law that no material misrepresentation was made, "[s]uch a defect cannot be cured by repleading." *Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 542 (2d Cir.1996). Moreover, plaintiff has had ample opportunity to state his fraud claim in his exhaustive pleadings previously filed in the state and federal courts, and has failed to do so. Accordingly, leave to replead would be futile, and dismissal of the fraud claim is with prejudice. *Cf. Vasile v. Dean Witter Reynolds Inc.*, 20 F.Supp.2d 465, 498 (E.D.N.Y.1998) (leave to amend properly denied if amendment would be futile).

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