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This memorandum is uncorrected and subject to revision before  
publication in the New York Reports.  
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No. 128  
Leonard Eidlitz,  
Respondent,  
v.  
New York University, et al.,  
Appellants.

Nancy Kilson, for appellants.  
Robert L. Plotz, for respondent.  
American Council on Education et al., amici curiae.

MEMORANDUM:

The order of the Appellate Division should be modified, without costs, by denying plaintiff's motion for summary judgment and, as so modified, affirmed.

In this breach of contract action, plaintiff seeks an order compelling defendants to award him a degree. Defendants

maintain that this action should have been brought as a CPLR article 78 proceeding and is therefore time-barred. Plaintiff moved for summary judgment granting him specific performance, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court denied plaintiff's motion, granted defendants' cross motion, and dismissed the complaint. The court concluded that the case should have been brought as an article 78 proceeding and was untimely. The Appellate Division reversed, denied defendants' cross motion, granted plaintiff's motion, and directed defendants to award plaintiff a degree, diploma and any authorizations necessary to allow him to take the dental boards. This Court granted defendants leave to appeal.

The lower courts erred in reaching their respective conclusions. On this record, defendants have not established that they are entitled to the benefit of the statute of limitations defense applicable to an article 78 proceeding. Further, contrary to the determination of the Appellate Division, there are issues of fact as to whether defendants' decision to deny plaintiff a degree was based on purely financial considerations, or whether academic considerations were involved. More information is necessary in order to ascertain whether there was an implied contract between the parties and, if so, whether the parties satisfied their respective obligations under such implied agreement. If, however, defendants' decision was in fact based upon plaintiff's academic performance, the action should

have been brought as a proceeding under article 78, subject to review solely for arbitrariness or irrationality (see Matter of Olsson v Board of Higher Educ. of City of N.Y., 40 NY2d 408, 413-414 [1980]), and would be untimely.

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Order modified, without costs, by denying plaintiff's motion for summary judgment and, as so modified, affirmed, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 24, 2010