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

PRESENT: Jane S. Solomon Justice PART 55

L. Chais

-v-

Tech. Career Institutes

INDEX NO. 114949/01

MOTION DATE 11/20/02

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for Dismiss Complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

SCANNED APR 04 2002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

Moreover, as per agreement on the record in open court, the parties shall follow up with the Trial Support Office (Room 158) for a preliminary conference.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/1/02

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

LINDA CHAIS,

Index No. 114949/2001

Plaintiff,

- against -

TECHNICAL CAREER INSTITUTES,

Defendant.

..... X

JANE **S.** SOLOMON, J.:

Pro se plaintiff Linda Chais brings this action, which sounds, ***inter alia***, in educational malpractice, fraud, breach of contract, and violation of section 349 of the General Business Law ("GBL"), against defendant Technical Career Institute s/h/a Technical Career Institutes ("TCI"). TCI, a privately-owned vocational training school located in New York County, moves to dismiss the Complaint, for failure to state a cause of action, pursuant to CPLR 321 1(a)(7).

Facts

Plaintiff alleges that in December 1992, at the age of 33, she enrolled in an associate's degree course in electronic engineering at TCI. Allegedly, she became interested in TCI after watching a television commercial announcing that TCI could "prepare you for the technology of the future and . . . start you off in a new career." Complaint, at ¶ 5. After seeing the television commercial, she visited TCI and spoke to Eva Har-Even, who allegedly promised her that an associate's degree in electronic engineering would guarantee her a job in the technological field, with a minimum starting salary of $25,000 per year.

Plaintiff alleges that when she visited the school to inquire about their training courses, TCI administered a math test to her. Even though she was given more than the regularly allotted

time to complete the math test, she still failed it. She was then placed in a remedial math certificate program. Allegedly, Dean Maybar assured her that if she scored A's and B's in the remedial math course, she would be able to register in the engineering associate degree program. Plaintiff alleges that she did score the A's and B's that term, but Dean Maybar told her that she had to complete another certificate math program before she could enroll in the engineering associate degree program. She alleges that other students who had passed the remedial math certificate program were allowed to enter the engineering program. Plaintiff asserts that the second certificate course delayed her entry into the associate degree program and increased her tuition costs.

Plaintiff states that TCI personnel informed her that women were in higher demand in the engineering field, and were more likely to be hired, than their male counterparts. TCI allegedly assured her that it would have no problem placing her in a job in the engineering field once she earned the associate degree. Because of these assurances, plaintiff allegedly spent more than four years in pursuit of an associate degree that should have been completed in two years. During this time, plaintiff allegedly told her instructors, more than once, that she was having difficulties with the course. Despite her difficulties with the course material, TCI allegedly encouraged her to remain in the course.

Plaintiff asserts that she completed the engineering course in August 1996. Sometime after that, TCI helped her get a job as a fax repairer for Harvard Paper Company. She lost that job after a week, allegedly because "the employer stated she was not a technician." Complaint, at ¶ 12. Plaintiff also alleges that after she completed the course, TCI sent her to more than 50 job interviews, including three job fairs, where she discovered that potential employers did not

want to train her for entry-level positions. Plaintiff alleges that employers told her that they were not interested in hiring her, as she had no concentration in any technical field. She then entered a three-month training program in the use of word processing software packages, which the Hispanic Labor Committee had sponsored. When she finished that course, she got work as an office temp, the same work that she was doing before she entered TCI.

Plaintiff says that she maintained herself and her child on public assistance during the time that she was enrolled at TCI, and borrowed money from several institutions to finance her training. She is still on public assistance and is unable to repay her student loans, which now approximate $54,000, including accrued interest. Her inability to repay the student loans has allegedly impaired her credit rating and destroyed her financially.

Plaintiff alleges that her experience with TCI also left her permanently disabled, asserting that she became psychologically damaged and had to be treated for anxiety attacks and manic depression once she realized that she could not secure the promised employment in the technological field. To support this claim, she submits copies of medical records evidencing her treatment for depression and other psychoses. A record from the Brookdale Hospital Medical Center, Department of Psychiatry ("Brookdale"), dated December 3, 1996, notes that plaintiff was "frustrated and angry with the school as they are not helping her find a job," and that she was considering taking legal action against the school. Another record reveals that on September 21,2001, a HIP doctor diagnosed that she was suffering from a disabling bipolar disorder.

Plaintiff maintains that she would never have entered, or remained, in the engineering program, if TCI had not assured her of success in the technological field. She now claims that TCI induced her to enroll and to remain there for four years even though it was aware that her

education, training, and background rendered her incapable of either absorbing or using the engineering program. Plaintiff wants TCI to repay her student loans, including all accrued interest. She also seeks unspecified monetary damages for emotional distress and related punitive damages. Based on plaintiffs factual averments, the Complaint, although lacking separate numbered causes of action, asserts the following cognizable claims against TCI: breach of contract; fraud; violation of section 349 of the General Business Law ("GBL"), which prohibits deceptive and unfair business practices; and intentional infliction of emotional distress.

TCI moves to dismiss the Complaint, contending, *inter alia*, that plaintiff has failed to state a claim upon which relief can be granted.

Discussion

The court can grant TCI's motion to dismiss the Complaint for failure to state a claim, pursuant to CPLR 3211(a)(7), only if it appears beyond doubt that plaintiff can prove no set of facts in support of a claim that would entitle her to relief. The court must accept as true all material facts well pleaded in the Complaint and must make all reasonable inferences in the light most favorable to plaintiff. *See, Leon* v *Martinez*, 84 NY2d 83, 87-88 (1994). In addition, as a pro se litigant, plaintiff may receive wide latitude, due to her lack of formal legal training and unfamiliarity with court procedures. *See, Sabatino* v *Albany Med. Ctr. Hosp.*, 187 AD2d 777, 778 (3d Dept 1992). Nevertheless, a litigant's pro se status does not afford her any greater rights than any other party, and plaintiffs pleadings and legal arguments must still satisfy minimum legal standards. *See, Goldmark* v *Keystone & Grading Corp.*, 226 AD2d 143, 144 (1st Dept 1996); *Roundtree* v *Singh*, 143 AD2d 995,996 (2d Dept 1988).

Educational malpractice

TCI contends that the Complaint should be dismissed because, fundamentally, it sounds in educational malpractice, which for reasons of public policy, New York does not recognize.

Although plaintiff never uses the term educational malpractice, her complaint liberally adopts language from *Joyner v Albert Merrill School* (97 Misc 2d 568,576 [Civ Ct, NY County 19781 ["defendants fraudulently induced plaintiff into a contract for vocational education, knowing that plaintiff was not by training, education or background capable of absorbing or using their particular training program"]). In her opposition papers, plaintiff also relies on *Andre v Pace Univ.* (161 Misc 2d 613,623 [Yonkers City Ct 19941, *revd* 170 Misc 2d 893 [App Term, 2d Dept 1996]), in which the Civil Court held that the university was negligent and, therefore, liable to the student plaintiffs for educational malpractice, for "failing to competently and properly teach" a Pascal computer course. However, plaintiff does not mention that, upon the university's appeal, the Appellate Term reversed the reversed City Court ruling and dismissed the complaint, holding that the students' entire action had stated a nonactionable claim for educational malpractice. 170 Misc 2d, at 899. The Appellate Term also explained that, while a claim for educational malpractice might be cognizable under traditional theories of tort law, New York had a public policy barring such claims. *Id.* at 896-897.

To the extent that plaintiff claims that TCI failed to assess her mental or emotional capacity, or her ability to absorb or use the engineering course, she does state an impermissible claim sounding in educational malpractice. See, *Hoffman v Board of Ed. of the City of New York*, 49 NY2d 121 (1979) (courts were not the proper institution to test the validity of an educator's decision to place a student in a particular program); *Savino v Board of Ed. of School Dist. No. 1*

of Westbury, NY, 123 AD2d 314 (2d Dept 1986) (doctrine of educational malpractice encompasses cases where the failure to properly train allegedly resulted from an incorrect assessment of a student's intellectual capacity). Therefore, although plaintiff never uses the term educational malpractice, the court notes that any such claim must be dismissed, to the extent that it exists in the Complaint.

Nonetheless, the court will not adopt TCI's reasoning, and classify all of plaintiffs cognizable causes of action as educational malpractice, as such a ruling would ensure that similarly-situated plaintiffs could never obtain any redress in the courts. *See, Moy v Adelphi Inst., Inc.*, 866 FSupp 696, 706 (ED NY 1994). For while educational malpractice is not actionable, causes of action sounding in fraud and other intentional torts may be viable if properly pleaded and proved. *See, Paladino v Adelphi Univ.*, 89 AD2d 85 (2d Dept 1982). Also, if a private school contracts to provide certain specified services and then fails to meet its obligations, a contract action with appropriate consequential damages is viable. *See, Clark v Trustees of Columbia Univ.*, 1996 WL 609271 (SD NY); *Moy v Adelphi Inst., Inc.*, *supra*, 866 F Supp, at 707; *Brown v Hambric*, 168 Misc 2d 502 (Yonkers City Ct 1995); *Village Community School v Adler*, 124 Misc 2d 817 (Civ Ct, NY County 1984).

Breach of contract

It is undisputed that plaintiff was enrolled at TCI for four years; therefore, she has established that she had an educational contract with the school, which owed her a duty to act in good faith when dealing with her. *See, Olsson v Board of Higher Ed. of the City of New York*, 49 NY2d 408, 414 (1980). The parties' rights and obligations to each other would have been spelled out in TCI's bulletins and advertisements, and in any enrollment contract that plaintiff

signed. ***See, Andre v Pace Univ.,supra,*** 170 Misc 2d, at **896. As** plaintiff asserts that TCI did not deliver on its promises to her, examination of TCI's promotional materials and any promises that its personnel made to plaintiff is appropriate, to ascertain what, if anything, TCI promised plaintiff both before and after she enrolled there. ***See generally, Joyner v Albert Merrill School,*** 97 Misc 2d 568, ***supra*** (at trial, 69-year-old Mexican-born student made it clear that he would not have entered or continued in defendants' course if they had not promised him a job); ***Stad v Grace Downs Model and Air Career School,*** 65 Misc 2d 1095, 1099 (Civ Ct, Queens County 1971) (guaranty of placement became integral part of enrolment contract).

To assess whether TCI met its implied duty of good faith in its dealings with plaintiff, a review of TCI's records is also appropriate, to determine whether plaintiff received the required hours of instruction, from licensed and certified teachers. ***See, Moy*** v ***Adelphi Inst.,*** *Inc.*, ***supra,*** 866 F Supp, at 701. The court should also ascertain whether TCI graduated plaintiff with failing or incomplete grades and dropped courses, or whether plaintiff was given an aptitude test that accurately measured her potential for success in the technological field. ***See, ibid.***; ***Joyner v Albert Merrill*** *School*, ***supra,*** 97 Misc 2d, at 574 (high grade given to plaintiff on "aptitude" test was clearly calculated to mislead and deceive him). This is especially significant, in light of plaintiffs allegations that TCI dissuaded her from quitting the course, despite her oft-stated difficulties with the course material. ***See, ibid.; see also, Albert Merrill School v Godoy,*** 78 Misc 2d 647,652 (Civ Ct, NY County 1974) (breach of unconscionable contract found with the court's reasoning that the student would have canceled course, had he not been told throughout that he was qualified and should continue). Therefore, any claim that plaintiff has stated for breach of contract cannot be dismissed, pursuant to CPLR 3211(a)(7).

Fraud

Plaintiff alleges that TCI fraudulently induced her to enroll, and to remain, in the school with false promises that its associate degree in electronic engineering could significantly enhance her income-earning potential and ensure her a career in technology.

To state a fraud claim, plaintiff must allege that TCI (1) made a representation; **(2)** as to a material fact, (3) which was false, (4) and which it knew to be false, (5) for the purpose of inducing her reliance on it. *Brown v Lockwood,* 76 AD2d 721 (2d Dept 1980). The standard for materiality is whether or not a reasonable person would attach importance to the misrepresented fact in formulating a choice of action in the transaction in question. *See, Moy v Adelphi Inst., Inc., supra,* 866 F Supp, at 705-706. Ordinarily, no cause of action for fraud arises where the only fraud alleged relates to a breach of contract. *S.S.I.G. Realty, Inc. v Bologna Holding Corp.,* 213 AD2d 617 (2d Dept 1995); *Moy v Terranova,* 1999 WL 118773, *6 (ED NY). However, claims that one made promises with a preconceived intent of not performing them allege a representation of present fact collateral to, but providing inducement for, the contract, and is not duplicative of a claim for breach of contract. *Deerfield Commn. Corp. v Chesebrough-Ponds. Inc.,* 68 NY2d 954,956 (1986); *Paladino v Adelphi Univ., supra,* 89 AD2d, at 96.

Plaintiff asserts that she enrolled at TCI as a direct result of TCI's alleged promise to find her a job in the technological field, with a minimum starting salary of $25,000, upon her completion of the engineering associate degree program. The promise of placement was a material fact, and her alleged reliance on it was justifiable, as the promise of placement could have affected a reasonable person's decision of whether or not to attend TCI, and then remain for four years. *See, Moy v Adelphi Inst., Inc., supra,* 866 F Supp, at 706; *Joyner v Albert Merrill*

School, supra, 97 Misc 2d, at 576-577 (plaintiff successfully established that vocational school fraudulently induced him into a contract for a computer programming course and promised that he could get a $10,000-a-year job upon completion, despite knowing that he was not by training, education, or background capable of absorbing or using their particular training program, and that by virtue of the state of the job market, plaintiff could never secure such employment).

However, notably absent from plaintiffs allegations, is the element of scienter, which is needed to support a fraud claim. Plaintiffs allegation, that TCI knew that its representations were false, and never had any intention of fulfilling its part of the bargain, is undercut by her statements that TCI assisted in her placement as a fax repairer at the Harvard Paper Company, and sent her on many job interviews. Plaintiff has not alleged that technological jobs paying starting salaries of $25,000 were not available when she was seeking a job in, or after, August 1996. *Cf.*, ***State of New York v Interstate Tractor Trailer Training, Inc.*, *66*** Misc 2d **678** (Sup Ct, NY County 1971) (Interstate's representations as to earnings which graduates could readily obtain had no basis in fact, and would clearly tend to deceive or mislead those persons seeking to better themselves in a new field of employment). Nor has plaintiff alleged that women engineers were not in demand, or that potential employers were not seeking their services during the relevant time frame, in her attempt to support her claims that TCI's advertisements and recruitment promises were deliberately false and misleading.

Furthermore, plaintiffs allegations about TCI's salary promises and the guarantees that she would attain her career objectives with a TCI associate degree in engineering are not actionable, as they represent promises of future events over which TCI had little or no control. Her fraud claim, based on the fact that TCI's television commercials promised to prepare her for

the technology of the future and to start her off in a new career is similarly unavailing, as such statements would constitute mere opinions, or puffery, and are neither capable of proof nor actionable. ***See, Paladino v Adelphi Univ., supra,*** 89 AD2d, at 94; ***see also, Bank v Brooklyn Law School,*** 2000 WL 1692844 (ED NY) (allegation that law school promoted itself with advertisements that its graduates made an average starting salary of $60,328, in an attempt to attract first rate students and enhance its reputation, did not give rise to a strong inference of an intent to deceive).

Under these circumstances, plaintiff has failed to state the required elements of a fraud claim, and any such claim must be dismissed, pursuant to CPLR 3211(a)(7).

Violation of GBL § 349

Plaintiff also argues that TCI utilized deceptive and fraudulent business practices to get her to enroll, thereby violating GBL § 349, a statute that prohibits deceptive business practices and applies to educational contracts. ***See, e.g., Andre v Pace Univ., supra,*** 161 Misc 2d, at 623-624; ***State of New York v Interstate Tractor Trailer Training,*** 66 Misc 2d 678, ***supra.***

The elements of a violation of GBL § 349 are (1) proof that the alleged practice was deceptive or misleading in a material respect, and (2) proof that plaintiff was injured. ***See, Gaidon v Guardian Life Ins.*** Co. ***of Am.,*** **94** NY2d 330, 343 (1999). **A** deceptive act or practice is a representation or omission that creates unrealistic expectations and is likely to mislead a reasonable consumer acting reasonably under the circumstances. ***See, id.,*** at 344. There is no requirement that plaintiff prove that defendant's practices or acts were intentional, fraudulent, or even reckless. Nor does plaintiff have to prove reliance on defendant's alleged deceptive practices. ***Brown*** v ***Hambric, supra,*** 168 Misc 2d, at 509. However, as a threshold matter, to

satisfy GBL § 349, plaintiffs claims must be predicated on a deceptive act or practice that is "consumer oriented." *Guidon* v *Guardian Life Ins.* Co. *of* ***Am., supra,*** 94 NY2d, at 344.

Plaintiffs claim, that TCI engaged in deceptive business practices, by using television commercials to promise her, and others similarly situated, certain training and subsequent placement in jobs paying a relatively high salary, suffices to establish that TCI's practices were directed at the public at large. The claims regarding the salaries attainable by TCI's graduates is a representation that could arguably create unrealistic expectations, and mislead reasonable consumers. Plaintiff also states the other components of a section **349** claim. She alleges that TCI's deceptive advertising was misleading in a material way, as evidenced by her enrolment at TCI for four years, in pursuit of a two-year associate degree, and the $54,000 now owed for student loans that she assumed during that time. Plaintiff has alleged injury, namely, her inability to repay the significantly large student loans, flowing from her failure to acquire the skills that would enable her to secure a job with the commensurate salary. **As** plaintiffs allegations satisfy the criteria for a violation of GBL § 349, this claim cannot be dismissed for failure to state a claim upon which relief can be granted, pursuant to CPLR 3211(a)(7).

Intentional Infliction of Emotional Distress

Plaintiff seeks damages for TCI's alleged intentional infliction of emotional distress, relying upon her diagnosed psychoses and related treatment, which she claims result directly from TCI's failure to find her a job. The tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the alleged injury; and (iv) severe emotional distress. ***See,*** *Howell* v *New* ***York*** *Post*

Co., Inc., 81 NY2d 115, 121 (1993). The outrageous conduct element may be decided as a matter of law, thus serving to filter out baseless complaints that do not belong in court, and to assure that a plaintiffs claim of severe emotional distress is genuine. *Ibid.* Liability for such a claim will be found only where the alleged conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized community. *Ibid.*

Here, plaintiff, despite her sympathetic profile,' fails to allege the extreme and outrageous conduct required to satisfy a claim for intentional infliction of emotional distress. Therefore, this claim must be dismissed as a matter of law. *See, ibid.* Consequently, plaintiffs claims for punitive damages, which are premised on her claim for intentional infliction of emotional distress, must also be dismissed. *See, Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 616-617 (1994).

Statute of Limitations

TCI contends that this action, which was filed on August 6, 2001, is time barred. According to TCI, this action accrued in December 1992, when plaintiff enrolled at the school, or, at the very latest, in December 1996, when plaintiff informed a Brookdale physician that she was considering taking legal action against TCI, based on its alleged failure to help her find a

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'Plaintiff fits the profile of most enrollees at vocational propriety schools: a poor person on welfare with little education, hoping to maximize her chances for subsequent higher-paying employment and desperately seeking to improve herself and her living conditions. *See*, Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 Geo LJ, 753,756-760 (2001); *see also, Moy v Adelphi Inst., Inc.*, *supra*, 866 FSupp, at 699 (noting that all plaintiffs, like the majority of Adelphi's student body, had little or no education and that, for most, governmental assistance was the primary source of income).

job.

Plaintiffs cause of action for breach of contract would be subject to a six-year limitations period, which starts to run on the date of the alleged breach. CPLR 213(2); ***see also, Joyner v Albert Merrill School, supra,*** 97 Misc 2d, at 573. However, the cause of action for the alleged violation of GBL § 349 has a three-year Statute of Limitations. ***Guidon v Guardian Life Ins. Co. of Am.,*** 96 NY2d 201, 210-212 (2001) (plaintiffs' claims under GBL § 349, that defendants used deceptive business practices in selling insurance policies with vanishing premiums, seek to recover upon a liability created or imposed by statute, so are governed by three-year Statute of Limitations in CPLR 214[2]).

Plaintiff completed the associate degree course in August 1996, and allegedly utilized TCI's placement services after that date. Therefore, her claims for breach of contract and the violation of GBL § 349 accrued in, or after, August 1996, when TCI allegedly failed to find her a $25,000 job in the technological field. ***See, Joyner v Albert Merrill School, supra,*** 97 Misc 2d, at 573-574 (causes of action for fraud and breach of contract accrued when plaintiff completed his training in 1971, or on the 1975 date when defendants ceased to mislead him about his employment prospects). As plaintiff commenced this action in August 2001, the claims sounding in breach of contract, with respect to the costs of the engineering associate degree, are within the applicable six-year limitations period. However, plaintiffs failure to give precise dates when the remedial math courses started or ended preclude any findings about the running of the Statute of Limitations for those courses, to the extent that any contract for them can be distinguished from the contract for the associate degree.

Similarly, the lack of information regarding the dates that plaintiff utilized TCI's

placement services, after August 1996, prevent any determinative finding of when the Statute of Limitations for TCI's alleged violation of GBL § 349 lapsed. *Cf.* ***Guidon v Guardian Life Ins. Co. of Am.***, ***supra,*** 96 NY2d, at 211 (plaintiffs' injuries occurred when they were first called upon to pay additional premiums beyond the date by which they were led to believe that policy dividends would be enough to cover all premium costs). Under this reasoning, plaintiffs claim accrued when she realized that TCI would not honor its alleged promise to help her secure employment in the technological field. ***See, ibid*** ;***see also, Joyner v Albert Merrill School, supra,*** 97 Misc 2d, at 573. Although the December 3, 1996, Brookdale record indicates that, on that date, plaintiff was still expecting TCI to deliver on its alleged promise, it is unclear if, or when, plaintiff used TCI's placement services after that date. This defect in plaintiffs pleadings, and in her papers opposing this motion to dismiss, compels the court to find that the three-year limitations period ran in December 1999. ***See generally, Roundtree v Singh,*** 143 AD2d 995, ***supra*** (despite her pro se status, plaintiffs pleadings and legal arguments must still satisfy minimum legal standards).

Thus, the claim for TCI's alleged violation of GBL § 349 must be dismissed as time barred. This claim is, however, dismissed without prejudice, and, subject to a proper motion, plaintiff may seek leave to amend her complaint to correct this deficiency.

Finally, this decision passes only upon the sufficiency and timeliness of those claims discerned in the Complaint. Plaintiff still has to prove the truth of her allegations, if she is to survive a motion for summary judgment, or succeed in the event of a trial. ***See, Walkovszky v Carlton,*** 23 NY2d 714, 715 (1968).

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied in part and granted in part; and it is further

ORDERED that plaintiffs claims to the extent that they sound in fraud, intentional infliction of emotional distress, and violation of GBL § 349 are severed and dismissed; and it is further

ORDERED that this action shall continue with respect to plaintiffs claim for breach of contract.

The foregoing shall constitute the decision and order of this court.

Dated:

ENTER:

J.S.C.

JANE S. SOLOMON