

**Matter of Isenalume v City Univ. of N.Y.**

2013 NY Slip Op 33167(U)

December 8, 2013

Supreme Court, New York County

Docket Number: 103277/12

Judge: Paul Wooten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

In the Matter of the Application of  
**OMO ISENALUME, STACY MORTON, DANIEL,  
W. CARR, and YANA NIBELITSKY**  
Petitioners,

INDEX NO. 103277/12

MOTION SEQ. NO. 001

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

- against -

**FILED**

DEC 13 2013

**THE CITY UNIVERSITY OF NEW YORK, THE  
CITY UNIVERSITY OF NEW YORK, BARUCH  
COLLEGE, and ZICKLIN SCHOOL OF  
BUSINESS,**

NEW YORK  
COUNTY CLERK'S OFFICE

Respondents.

The following papers were read on this motion by petitioners for a judgment pursuant to Article 78.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits 1 | No(s). \_\_\_\_\_

Answering Affidavits— Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Cross-Motion:  Yes  No

Omo Isenalume, Stacy Morton, Daniel W. Carr, and Yana Nibelitsky (Nibelitsky)  
(collectively, petitioners), former students at Baruch College (Baruch), Zicklin School of Business,  
Executive Masters Program (Program), commenced this proceeding on July 17, 2012 and seek a  
Declaratory Judgment, pursuant to the Article 78 of the CPLR and General Business Law § 349, for  
the following relief from this Court: (1) Directing Baruch College to refund the entire amount of the  
petitioners' monies and/or reimbursements for loans for said tuition paid for participation in the  
Executive Masters Program for Financial Statement Analysis and Securities Valuation ("Program");  
(2) Directing Baruch College to expunge any and all grades given to the petitioners during their

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

time in the Program; (3) Granting a Declaratory Judgment against Baruch College, determining that Baruch College violated the CUNY Policy of Academic Integrity; and (4) Directing the award of punitive damages against Baruch College for knowingly participating in fraud and/or recklessly allowing fraud to continue after notice was given on multiple occasions.

Petitioners claim that they were denied access to their final grades and other than Nibelitsky, who was reinstated by the College Graduate Committee on Academic Standing (Committee), petitioners have not received a response to their student academic appeals submitted to the Committee. Petitioners claim that they were notified on March 22, 2012 of their dismissal from the Program and were informed on March 23, 2012 that they had only until the end of the business day on March 26, 2012 to file their appeals of the dismissal. Thus only four days were given to petitioners to first appeal the Committee's decision, instead of the 30 day time-frame stated on Baruch's website, which deprived them of their due process rights for a legitimate appeals process. Additionally, petitioners state that Baruch has failed to fulfill its duties to provide educational services. Specifically, it has breached the contract, namely the Academic Integrity Policy, to comply with its ethical obligations and academic integrity policy by failing to address the numerous complaints of cheating and failing to punish the cheating students and the professors that knowingly aided them. Petitioners state that they observed continued cheating within the Program, and notified a professor of two individuals who allegedly cheated in both the first and second trimesters, and that such continued complaints of cheating were ignored.

The City University of New York (CUNY) cross-moves to dismiss the complaint, pursuant to CPLR §§ 3211(a)(1), (2), and (7) and 7804(f). CUNY moves based upon documentary evidence, for lack of subject matter jurisdiction, and failure to state a cause of action on the grounds that: (1) petitioners improperly assert contract and tort claims challenging academic decisions and policy which are not cognizable in an Article 78 proceeding; (2) petitioners improperly seek declaratory relief and damages in an Articles 78 proceeding; (3) sovereign immunity bars petitioners' claim for

money damages and equitable relief; (4) petitioners assert alleged claims which fail to state a cause of action; and (5) punitive damages are not available against CUNY. CUNY proffers that petitioners' claims which seek to challenge an educational institution's academic decisions and policies do not lie and should be dismissed. Petitioners are in opposition to the cross-motion.

#### STANDARD

In the context of an article 78 proceeding courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; see also CPLR 7803[3]). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Arrocha v Board of Educ. of City of N. Y.*, 93 NY2d 361, 363 [1999] [internal quotation marks and citations omitted]).

"While decisions of academic institutions are not immune from judicial scrutiny, review should be restricted to special proceedings under CPLR article 78, and only to determine whether the decision was arbitrary, capricious, irrational or in bad faith" (*Keles v Trustees of Columbia Univ. in the City of New York*, 74 AD3d 435, 435 [1st Dept 2010], citing *Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]). "Courts have repeatedly declined to become involved in the evaluation of academic performance, reflecting 'the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment [that] these institutions are, for the most part, better suited to make'" (*Keles*, 74 AD3d at 435-436, quoting *Maas*, 94 NY2d at 92; *Matter of Olsson v Board of*

*Higher Educ. of City of N. Y.*, 49 NY2d 408, 413 [1980]; *Matter of Susan M.*, 76 NY2d at 245 [“Strong policy considerations mitigate against the intervention of courts in controversies relating to an educational institution’s judgement of a student’s academic performance”]). “This jurisprudential guidepost stems from the belief that these institutions are ‘peculiarly capable of making the decisions which are appropriate and necessary to their continued existence’” (*Maas v. Cornell University*, 94 NY2d at 92, quoting *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985]).

#### DISCUSSION

In deciding whether the Committee’s determination to expel three students from the Program was proper, this Court must look to both CUNY General Academic Regulations as well as the provisions of Article 78 of the CPLR. The documentary evidence indicates that three of four petitioners failed to meet the explicit academic standards of the Program in classes of Financial Statement Analysis and Securities Valuation at the Zicklin School of Business, which requires a cumulative GPA above 3.0, and were denied reinstatement following an appeal to the Committee. Only Nibelitsky was granted reinstatement following an appeal. In all cases, even after they served a one-term probation period, three of the four petitioners were dismissed from the program due to an unacceptable GPA of less than 3.0. The Court finds that petitioners have failed to meet their burden of proof that the respondents have acted arbitrarily or capaciously in their determination to deny reinstatement of the three terminated students, particularly in light of the respondent’s decision to reinstate one of the four students through the same appeal process that terminated the other three. The Court holds that the Committee’s determination to deny petitioners’ appeals for reinstatement, with the exception of Nibelitsky’s appeal, must be upheld.

Article 78 proceedings and declaratory judgment actions may be brought in a combined proceeding (see generally *Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Env’tl. Conservation*, 18 NY3d 289 [2011]), however a declaratory judgment action is not

appropriate to challenge an administrative procedure where review by an Article 78 proceeding is available (*Greystone Mgmt. Corp. v Conciliation & Appeals Bd. Of City of N.Y.*, 62 NY2d 763, 765 [1984]). The Court finds that the petitioners' request for declaratory judgment is denied as not only do they fail to meet their burden, full relief is available by way of their requested Article 78 relief.

In turning to petitioners' claims of misrepresentation, fraudulent inducement and violation of New York General Business Law § 349 based on statements in the brochure for the Zicklin School of Business, these claims are not actionable. "Those claims concerning misrepresentation as to the quality or comparative quality of the education to be provided by the [Zicklin School of Business] are not statements of fact capable of proof, but rather opinions which ought not provide a basis for the imposition of liability" (*Paladino v Adelphi Univ.*, 89 AD2d 85, 94 [2d Dept 1982], citing *Banner v Lyon & Healy, Inc.*, 249 AD 569 [1st Dept 1937], *affd* 277 NY 570 [1938]). These claims sound in educational malpractice which are not cognizable under New York law in contract or in tort (see *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 443 [1979] ["the Constitution places the obligation of *maintaining and supporting* a system of public schools on the Legislature"]).

Petitioners challenge CUNY's academic and administrative standards as to academic integrity because other students cheated and the school did not properly discipline these students, however this claim for breach of contract does not state a claim on which relief can be granted (see *Gally v Columbia Univ.*, 22 F Supp 2d 199, 207 [SDNY 1998] ["plaintiff's allegation that SDOS failed to adequately address plaintiff's concerns about cheating does not state a claim (for breach of contract) on which relief could be granted"]).

Looking to petitioners' claim for punitive damages, which is premised on defendants' breach of contract, misrepresentations and fraudulent behavior, only damages that are incidental to the primary relief sought are recoverable in an Article 78 petition (see CPLR 7806). Here petitioners are not seeking reinstatement to the Program, and as such their monetary requests are not incidental to any primary non-monetary relief, and thus are not recoverable in this proceeding.

Similarly, petitioners' request to have their grades expunged is denied. "[A]s a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making... [and] would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions" (*Matter of Susan M.*, 76 NY2d at 246-247).

Petitioners claim that respondent violated their due process rights and failed to follow their own rules for the appeals, as the website for Baruch states that a student is given 30 days to submit an appeal (see Attorney's Affirmation in Support, p. 8, footnote 5), however petitioners do not provide any documentation demonstrating same. In support of its cross-motion, CUNY submits the Graduate Bulletin 2009-2012 for Baruch College (the Bulletin) (Notice of Cross-Motion, exhibit 1) wherein it states that when seeking to appeal the Committee the student should call or visit the appropriate office to determine the deadline for appeals to be submitted at the next scheduled meeting of the Committee. CUNY maintains that it did substantially comply with its own rules, as is the relevant inquiry here, as the petitioners were offered the right to appeal, and the petitions conceded that the students submitted statements in defense of their appeal and the Committee convened to consider the appeals and made decisions on same. Further, CUNY states that each appeal was considered individually as evidenced by the different outcomes. Additionally, CUNY cites to a Court of Appeals case where the due process claim was rejected when the hearing offered to a student was held only a few hours or even minutes after the first notification to him of his dismissal from medical school (see *Matter of Sofair v State Univ. of N.Y. Upstate Med. Ctr. Coll. Of Medicine*, 44 NY2d 475, 478-80 [1987] ["The dismissal was predicated on an academic evaluation, bearing little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement']). Further, CUNY attaches documentation demonstrating that petitioners were notified by telephone of the results of their appeals between March 29, 2012 and March 30, 2012 (Notice of Cross-Motion, exhibit 21) even

though there is no proscribed time period for a decision on appeal, nor a method of notification in the Bulletin. As such, the Court finds that CUNY has followed its own procedures for appeals.

"We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review" (*Matter of Susan M.*, 76 NY2d at 247), and as such the herein petition is denied in its entirety.

In light of the foregoing, CUNY's cross-motion to dismiss need not be considered and is denied as moot. The Court has considered the remaining arguments and finds them unavailing.

CONCLUSION

Accordingly, it is,

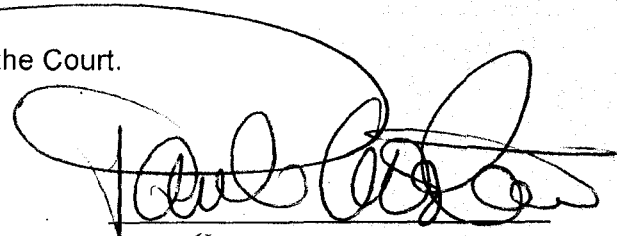
ORDERED that petitioners' application pursuant to the Article 78 of the CPLR and General Business Law § 349 is denied in its entirety; and it is further,

ORDERED that respondent City University of New York's cross-motion to dismiss pursuant to CPLR §§ 3211(a)(1), (2), and (7) and 7804(f) is denied as moot; and it is further,

ORDERED that counsel for respondent City University of New York is directed to serve a copy of this Order with Notice of Entry upon petitioners and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/8/13



PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**FILED**

DEC 13 2013

NEW YORK  
COUNTY CLERK'S OFFICE



SLM

0314

0314