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| <b>Pupko v New York City Dept. of Educ.</b>  |
| 2017 NY Slip Op 31389(U)   |
| June 28, 2017  |
| Supreme Court, New York County   |
| Docket Number: 152584/15   |
| Judge: Alexander M. Tisch  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 52

-----X  
AMY PUPKO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 152584/15

NEW YORK CITY DEPARTMENT OF  
EDUCATION and MITCHELL S. PINSKY as  
Principal of Public School 115, and MITCHELL S.  
PINSKY, Individually,

Mot. Seq. No. 001

Defendants.  
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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this Motion.

|   |                 |
|---|-----------------|
|   | Papers Numbered |
| Notice of Motion and Affidavits Annexed | 1, 2            |
| Answering Affidavits                    | 3, 4            |

ALEXANDER M. TISCH, J.

Defendant New York City Department of Education (“DOE”) moves to dismiss, pursuant to CPLR 3211(a)(7) plaintiff Amy Pupko’s amended verified complaint for breach of contract for failure to state a cause of action on the grounds that it has been brought as a plenary action instead of as a special proceeding pursuant to CPLR Article 78. For the reasons set forth below, the motion is denied.

By way of background, plaintiff was a tenured teacher employed by the DOE at P.S. 115. Plaintiff entered into a stipulation, dated June 29, 2010, with DOE and Principal Mitchell Pinsky of P.S. 115 that resolved charges brought against plaintiff pursuant to Education Law § 3020-a. *See* NYSCEF Doc. No. 2. In exchange for plaintiff’s resignation, the charges were withdrawn and her unsatisfactory annual performance ratings for two school years were revised to satisfactory. *See id.* at 1-3. The stipulation also included a provision that upon plaintiff’s

request, after her resignation, she would be provided with a “neutral” letter documenting her service in a form annexed to the stipulation. *See id.* at 2. Plaintiff contends that on or about October 14, 2014 the then principal of P.S. 115, Loren Borgese, forwarded a “Reference Evaluation Form” to Valley Stream Union Free School District that was not a neutral reference. *See* NYSCEF Doc. No. 4. Plaintiff now seeks damages for breach of the June 29, 2010 stipulation from defendants.

DOE contends that plaintiff is challenging an administrative act of a government agency and that such action should have been brought as an Article 78 proceeding. The DOE argues that Borgese’s reference constitutes an administrative act. The DOE further contends that the stipulation, rather than constituting a contract, was the equivalent of an administrative determination that replaced the decision that would have been rendered if a formal hearing of the 3020-a charges had taken place. DOE relies on *Solnick v. Whalen*, 49 N.Y.2d 224 [1980], for the proposition that a four month statute of limitations period applied because a declaratory judgment action was in the nature of an Article 78 proceeding. The DOE also relies on *Broderick v. Bd. of Educ.*, 253 A.D.2d 83 [2d Dep’t 1998], for the proposition that a challenge of a final determination by a public body or officer is governed by Article 78.<sup>1</sup>

Plaintiff contends, in opposition, that the DOE’s reliance on *Solnick* and *Broderick* is misplaced because the stipulation was not the equivalent of a final determination by the DOE after a formal administrative hearing, but was instead a contract. Plaintiff maintains that stipulations of settlement have long been considered valid, binding contracts under the law. *See*

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<sup>1</sup> The decision in *Pagan v. Board of Education*, 56 A.D.3d 330 [1st Dep’t 2008], is distinguishable from the instant matter because *Pagan* involved a plaintiff that sought a declaration that her termination was null and void in violation of a signed stipulation. Such a claim is premised on the contention that such termination was wrongful, which is properly suited for adjudication pursuant to an Article 78 proceeding. *See Todras v. City of New York*, 11 A.D.3d 383 [1st Dep’t 2004].

*Rainbow v. Swisher*, 72 N.Y.2d 106 [1988].; *Clayburgh v. Clayburgh*, 261 N.Y.2d 464 [1933].

In *Abiele Contr. v. New York City Sch. Constr. Auth.*, 91 N.Y.2d 1 [1997], the Court of Appeals established a framework to determine whether an Article 78 proceeding or plenary action is appropriate as follows:

When the damage allegedly sustained arises from a breach of contract by a public Official or governmental body, then the claim must be resolved through the application of traditional rules of contract law. On the other hand, when a petitioner asserts that determination of a governmental body or public official is in ‘violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion’ and seeks nullification of the same, then an article 78 proceeding is the appropriate vehicle through which the claim may be addressed.

*Id.* at 8. None of the circumstances delineated in *Abiele*, and in CPLR Article 78, that would dictate use of an Article 78 proceeding appear to apply in the instant action. In any case, even should such circumstance apply, that would not necessarily preclude a plenary action for breach of contract. *Id.* at 7. “Where the focus of a controversy sounds in on an agency’s breach of an express contractual right, or on the agency’s violation of the implied obligations of good faith, fair dealing and cooperation, a contract action is the recommended remedy.” *Id.* at 8. A breach of contract action was found to be the appropriate form of action or proceeding when a teacher alleged lost pay due to the BOE’s breach of a stipulation. *See Mitchell v. Bd of Educ.*, 15 A.D.3d 279 [1st Dep’t 2005].

The Court finds that the stipulation entered into by the parties is the equivalent of a contract. The Court rejects the DOE’s contention that the stipulation is the equivalent of a final determination after hearing as unavailing. Therefore, the Court rejects the DOE’s contention that the plaintiff’s cause of action was improperly brought as a plenary action and that instead, an Article 78 proceeding in this action, with its limited basis for challenging a determination, is the proper means to adjudicate the instant claim. Plaintiff seeks monetary damages for the alleged

breach of the stipulation, which constitutes a quintessential breach of contract. *See Matter of Barrier Motor Fuels v. Boardman*, 256 A.D.2d 405 [2d Dep't 1998].

Accordingly, the DOE's motion to dismiss is denied. Plaintiff is directed to serve a copy of this decision on the defendant and County Clerk with notice of entry. This constitutes the decision and order of the Court.

Dated: June 28, 2017  
New York, New York



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Alexander M. Tisch, J.S.C.

**HON. ALEXANDER M. TISCH**