SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **33**

Justice

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RAHMAN JEFFERS, ROSALENA VELAZQUEZ, CARLA BENJAMIN, GEORGE MAWFIL, LYNDA BEDEAU, OLUWABUSAYO ALAKE, OPHALYN GARIANDO, TRICIA GUARIN, ANGELA PUGLIESE, TODD PEREZ, SHALINI TIWARI, BELEENA KOSHY, DWAYNA MORRIS, STEPHANIE VEILLARD, RODLANDE CENAFILS, ABRAHAM VARGHESE, RUSLAN BERDICHEVSKY,

Plaintiffs,

- v -

AMERICAN UNIVERSITY OF ANTIGUA, and AMERICAN UNION OF ANTIGUA, GCLR, LLC,

Defendants.

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INDEX NO. 153386/2012

MOTION DATE

MOTION SEQ. NO. 004 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 210, 211, 212, 213, 214, 215, 217

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered as follows:

Plaintiffs, who are nine graduates and eight former students of American University of Antigua School of Nursing (AUA) in the Caribbean Island nation of Antigua, commenced this action to recover their tuition, costs, and damages from AUA and related entities. In motion sequence 004 (MS4), defendant AUA moves for summary judgment on the only remaining cause of action – breach of contract. Plaintiffs oppose and cross-move for summary judgment as to liability and seek an inquest on damages. In motion sequence 005 (MS5), defendant Manipal Education America, LLC (MEA), formerly known as and sued herein as GCLR, LLC, moves, unopposed, for summary judgment based on a lack of privity with plaintiffs.

Defendant AUA's initial motion for summary judgment was denied as premature by another Justice of this Court, Hon. Joan Madden, since no discovery had occurred (*Jeffers v American University of Antigua*, 2014 NY Slip Op 30669[U] [Sup Ct, New York Cty 2014]). On appeal, the Appellate Division, First Department modified and granted summary judgment in favor of AUA on plaintiffs' claims for fraud, negligent misrepresentation, unjust enrichment, and conversion, but did not disturb the denial of summary judgment on the breach of contract claim (*see Jeffers v Am. Univ. of Antigua*, 125 AD3d 440, 440 [1st Dept 2015]). Upon remittitur to Justice Madden, defendants moved for various discovery sanctions (MS3).

Justice Madden's decision and order on MS3, dated August 3, 2016, resulted in: (1) preclusion of plaintiffs Jeffers, Bedeau, Tiwari, Perez, Velaquez, Guarin, Benjamin, Gariando, Veillard, Pugliese, Vanghese, Cenafils, Mafwil, Morris and Kosky from introducing any documentation not previously disclosed prior to said order, and from asserting any additional claims for damages not detailed in their responses to defendants' interrogatories; (2) preclusion of plaintiffs Alake and Berdichevsky from offering any evidence at trial whatsoever; and (3) leave for defendants to once again move for summary judgment (*see Jeffers v Am. Univ. of Antigua*, Sup Ct, NY Cty, August 3, 2016, index No. 153386/2012). The August 3, 2016 order also permitted defendants to continue discovery and depose plaintiffs should defendants' second motion for summary judgment – the instant motion – be denied.

The relevant undisputed facts were discussed by Justice Madden and the First Department; they are briefly summarized here. AUA promised its graduates an Associated Science of Nursing degree (ASN) which would qualify them to take the National Council License Examination for Registered Nurses (NCLEX) in the United States. Upon passing the NCLEX, AUA graduates could directly enroll in a "one-year R.N. to B.S. in Nursing" program at the City University of New York Lehman College, and obtain a Bachelor of Science Degree in Nursing (BSN) upon graduation (*Jeffers*, 125 AD3d at 441).

The first class of AUA nursing students graduated in late 2009, however, they were not permitted to take the NCLEX in New York that year. Pursuant to New York law, graduates of a foreign nursing program may take the NCLEX only if they graduated from a program that "the licensing authority or appropriate governmental agency of said country certifies to the [NY State Education Department] as being preparation for practice as a registered professional nurse" in the jurisdiction where the program is located (*see* 8 NYCRR 64.1[a][3]). In 2009, the New York State Department of Education's Division of Professional Education (NYSED) determined that AUA was not approved by the General Nursing Council of Antigua and Barbuda, and thus, was not a certified nursing program in that country. Consequently, its graduating students were not eligible to take the

NCLEX. Hence, without passing the NCLEX, AUA graduates were not qualified to enroll in Lehman College's one-year BSN program.

In December 2011, two years after the first AUA class graduated, NYSED reversed its earlier decision[1], and determined that AUA was properly accredited in Antigua and Barbuda. This qualified AUA graduates to sit for the NCLEX in New York and, upon passing, enroll in Lehman College's "one-year" BSN program, as promised by AUA years earlier. In the interim, Lehman College allowed AUA graduates to enroll in its Generic Nursing Program, which did not require completion of the NCLEX (*Jeffers*, 125 AD3d at 441).

Defendants' summary judgment motion argues that they delivered on all their promises. On the issue of NCLEX eligibility, AUA claims that since graduates were eventually qualified to sit for the NCLEX, albeit two years after the first class graduated, it fulfilled its obligations to plaintiffs. Defendants also argue that plaintiffs failed to establish damages, an element of a breach of contract, mainly because defendants offered graduating AUA students admission to Lehman College's Generic Nursing Program, which is discussed in greater detail below.

Plaintiffs cross-move for summary judgment and allege that AUA misrepresented that its graduates would be eligible to take the NCLEX immediately upon graduation. Plaintiffs state that without passing that examination, they could not enroll directly into the City University of New York Lehman College's "one-year R.N. to B.S." and graduate with a Bachelor of Science Degree in Nursing as promised. Plaintiffs assert that they were in limbo for two years before defendants resolved their issue with NYSED.

As to damages, when confronted with the initial denial of eligibility to take the NCLEX, the individual plaintiffs endured a variety of outcomes: some entered Lehman College's generic BSN program and upon that graduation were eligible to sit for the NCLEX (*see e.g.* Pltfs' Cross-motion, Twari Aff, Exh I; Koshy Aff, Exh L); some transferred to unaffiliated nursing programs which did not accept earned AUA credits (*see e.g.* Pltfs' Cross-motion, Bedeau Aff, Exh O); and some withdrew from pursuing a nursing career in the United States altogether (*see e.g.* Pltfs' Cross-motion, Benjamin Aff, Exh P).

On a motion for summary judgment it is necessary that the movant establish a cause of action or defense sufficiently to warrant the court as a matter of law in

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[1] AUA commenced an Article 78 proceeding against NYSED for its determination not to certify AUA's nursing program. NYSED reversed its determination just prior to a hearing in Albany Supreme Court. However, despite NYSED's voluntary reversal, AUA persisted in its Article 78 petition; the Court determined that AUA's claim against NYSED on this issue was moot (*American University of Antigua v CGFNS, Intl*, Sup Ct, Albany Cty, March 4, 2013, Gilpatric, J., *aff'd Matter of American University of Antigua v CGFNS Intl*, 126 AD3d 1146 [3d Dept 2015]).

directing judgment in its favor, and the movant must do so by tender of evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*see Zuckerman v City of New York*, 49 NY2d at 562). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [lst Dept 2002]).

To survive summary judgment, a breach of contract claim requires proof of a contract, plaintiffs' performance thereunder, defendant's breach thereof, and resulting damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiffs must establish the contract's essential terms, including specific provisions upon which liability is predicated (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Plaintiffs contend that they should have been eligible to take the NCLEX upon their AUA graduation so that they could "automatically matriculate" into Lehman College's BSN program. Defendants argue that the neither their marketing material, "fact book", nor any other AUA communication promised that graduates would be eligible to sit for the NCLEX immediately upon graduation. Defendants stated that it "did not guarantee any student that he or she would be immediately certified to take the NCLEX[ ] examination in New York or elsewhere since there could be personal circumstances that might result in the delay or denial of a graduate's application to take the NCLEX[ ] examination" (Defts' Memo of Law, pp 25-26). AUA claimed that its promises were limited to "provid[ing] an education and an ASN degree that would qualify a student to take the NCLEX[ ] examination in the United States" (Defts' Mot, Moreno Aff, ¶ 81).

The issue of when an AUA student can be certified to take the NCLEX is central to both sides. Plaintiffs claim it should be automatic upon graduation while defendants argue that there is no such guarantee, and the students were eventually eligible to take the NCLEX. "When a contract does not specify time of performance, the law implies a reasonable time" (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]). A court shall look to the relevant facts and circumstances of a case to determine a reasonable time (*id.*).

The Appellate Division, First Department, in discussing the breach of contract claim in this case, stated that " 'promises set forth in a schools' bulletins,

circulars, and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract' " (*Jeffers v Am. Univ. of Antigua*, 125 AD3d at 441-2, quoting *Cheves v Trustees of Columbia Univ.*, 89 AD3d 463, 464 [1st Dept 2011], *lv denied* 18 NY3d 807 [2012]; *Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]). The Appellate Division pointed to AUA's "fact book" aimed at prospective students which promised "that AUA graduates would be eligible to take the NCLEX, and, upon passing that exam, 'automatically matriculate' into Lehman College's 'one-year RN to BSN program.'" (*id.* at 442, quoting the AUA "fact book").

Considering the facts and circumstances here, it is implicit that AUA students would immediately be eligible to sit for the NCLEX upon graduation. The purpose of the "one-year RN to BSN program" was to achieve the BSN degree more quickly than a generic program. Students applying to the program aimed to complete their BSN degrees within a total of three consecutive years. Indeed, the Appellate Division acknowledged the time for performance of the implied contract by directly quoting the phrases "automatically matriculate" and "one-year RN to BSN program" from AUA's fact book. As such, it cannot be said that the promises made by AUA were not without a timeframe as defendants argue.

Turning to the question of damages, defendants argue that plaintiffs did not suffer any damages because AUA offered students a reasonable alternative towards achieving a BSN degree within three years. AUA persuaded Lehman College to waive the requirement that its graduates must pass the NCLEX to be admitted to its generic BSN program. Defendants assert that every AUA graduate that applied for admission into Lehman College's generic BSN program was accepted (Defts Mot, Moreno Aff, Exh 2 [Georges Aff] ¶15). AUA argues that those who did not apply did so at their own detriment.

AUA's Dean of American International College of Arts and Science-Antigua, Jorge Moreno, explained that a BSN from Lehman required 120 credits. Incoming AUA students would have had to complete 90 credits to be admitted into the "one-year RN to BSN program" (Defts Mot, Moreno Aff). He claimed that any AUA graduate with 90 credits "should have been able to complete the remaining requirements for a [generic] BSN degree [at Lehman College] in one academic year." (*id.* at ¶ 23). He further stated that the "principal difference between the RN to BSN nursing program that Lehman College had contracted to provide AUA graduates and the generic BSN nursing program at Lehman was the ability to take more online educational courses." (*id.*).

Defendants further point out that plaintiffs Velazquez, Tiwari, Guarin, and Koshy all entered the generic BSN nursing program at Lehman the year after their graduation from AUA and three of these students completed their generic BSN degrees in three consecutive years (Defts Mot, Moreno Aff, Exh 2 [Georges Aff] ¶18).

Defendants claim that these three plaintiffs –Velazquez [2], Tiwari, Guarin – then failed to sit for the NCLEX despite their eligibility to do so (Defts Mot, Moreno Aff, Exh 2 [Georges Aff] ¶¶14-18).

However, the affidavits of these three students contradict that account. Plaintiff Velazquez enrolled in Lehman College's generic BSN program in 2011, obtained a BSN in 2012, and took the NCLEX three times, failing twice, eventually passing in August 2014 (Pltfs' Cross-mot, Velazquez Aff, Exh K ¶ 40-41). Similarly, plaintiff Twari passed the NCLEX on her third try in May 2014 (Pltfs' Cross-mot, Twari Aff, Exh I, ¶¶ 39-40). Plaintiff Guarin affirms that she sat for the NCLEX twice and failed both times (Pltfs' Cross-mot, Guarin Aff, Exh M, ¶¶ 37-39). She does not state if she ever passed the exam (*id.*). These plaintiffs claim that passing the NCLEX was made more difficult by the passage of time from their AUA graduation even though they were able to graduate with a BSN from Lehman the year after their AUA graduation. As to plaintiff Koshy, she entered Lehman College's generic BSN program and affirmed that it took her three years to complete the generic BSN degree (Pltfs' Cross-mot, Koshy Aff, Exh L ¶39). Considering the variety of outcomes for plaintiffs, issues of fact exist as to their damages.

Plaintiffs Jeffers, Cenafils, Bedeau, Mafwil, Pugliese, and Veillard withdrew from AUA upon learning that their graduating classmates were not eligible to sit for the NCLEX. Defendants argue that the failure of this group of plaintiffs to complete their AUA coursework excused any non-performance by AUA. Defendants rely on a contract doctrine that states "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006] *quoting Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971]). However, it cannot be said that this doctrine applies as a matter of law on these facts. It is unclear whether plaintiffs' withdrawals were, as they claimed, solely based on their colleagues' lack of eligibility to sit for the NCLEX or something else entirely.

The same logic applies to the remaining plaintiffs. Plaintiffs Benjamin, Gariando, Perez, Morris, and Varghese all graduated from AUA, but did not apply to the generic program at Lehman College. Questions of fact concerning their damages remain. As such, the parties' respective motions for summary judgment must be denied.

Defendants' motion complains that plaintiffs Mafwil, Morris, and Koshy's interrogatories responses were unverified and failed to comport with CPLR § 3133.

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[2] Defendants' affidavit by Catherine Alicia Georges, the Chairperson of the Nursing Department of Lehman College, appears to erroneously refer to plaintiff Velazquez as "Vazquez" (Defts' Mot, Moreno Aff, Exh 2 [Georges Aff]). This court refers to plaintiff Velazquez as presented in the caption of this action, Rosalena Velazquez.

Plaintiffs did not submit a reply to defendants' opposition to the cross-motion or otherwise address the failure to verify these interrogatory responses. While the order dated August 3, 2016, on MS3 for discovery sanctions, precluded plaintiffs from asserting any claims for damages not detailed in their responses to defendants' interrogatories (*see Jeffers v Am. Univ. of Antigua*, Sup Ct, NY Cty, August 3, 2016, Madden, J., index No. 153386/2012), the instant motion is not for further discovery sanctions, and this court will not address the unverified interrogatories here other than to again point to the law of the case. The August 3, 2016 order determined that should defendants' motion for summary judgment fail, defendants may depose plaintiffs (*id.*). Therefore, as discovery will continue, the lack of verification on the interrogatories at summary judgment is of no moment. The parties shall appear for a compliance conference to address further discovery as instructed below.

Defendant MEA's unopposed motion for summary judgment is based upon its affirmative defenses that it was acting as an agent for a disclosed principal, AUA, and lacked any privity of contract with plaintiffs. The motion is granted.

Accordingly, it is hereby

ORDERED, as to motion sequence 004, defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment are denied, it is further

ORDERED, as to motion sequence 005, defendant Manipal Education America, LLC, formerly known as and sued herein as GCLR, LLC, motion for summary judgment is granted without opposition. The clerk of the court is directed to enter judgment in favor of defendant Manipal Education America, LLC, formerly known as and sued herein as GCLR, LLC.

The parties are directed to appear for a compliance conference on February 7, 2018, at 9:30 A.M. in part 33, located at 71 Thomas Street, Room 103. Plaintiffs shall be prepared to set firm dates for plaintiffs' depositions at the conference.

Defendants shall serve a copy of this order with notice of entry on all parties and the clerk of the court within 30 days of its entry.

1/10/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	x OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE

153386/2012 JEFFERS, RAHMAN I. vs. AMERICAN UNIVERSITY OF ANTIGUA
Motion No. 004 005