Rogoff v Long Is. Univ.
2020 NY Slip Op 30147(U)
January 10, 2020
Supreme Court, Kings County
Docket Number: 510388/2019
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:510388/2019
Motion Date:10-7-19
Mot. Cal. No.: 51

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EDWARD ROGOFF,

Plaintiff,

-against-

DECISION/ORDER

LONG ISLAND UNIVERSITY,

Defendant.

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The following papers numbered 1 to 4 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Defendant's Memorandum of Law in Support.....	2
Plaintiff's Memorandum of Law in Opposition.....	3
Defendant's Memorandum of Law in Reply.....	4

Upon the foregoing papers, the motion is decided as follows:

The plaintiff, EDWARD ROGOFF, commenced this action alleging claims against the defendant, LONG ISLAND UNIVERSITY ("LIU"), for breach of contract, age discrimination and retaliation in violation of both the New York State Human Rights Law and the New York City Human Rights Law. Defendant now moves for an order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing plaintiff's complaint in its entirety.

Plaintiff alleges in the complaint that he is sixty-seven years and employed as a Full Professor at LIU-Brooklyn. He maintains that from August 27, 2015 to June 1, 2018, he was employed at LIU-Brooklyn as the Dean of the School of Business, Public Administration and Information Sciences and that he was recruited for the position by Jeff Kane, who was then the Provost and Senior Vice President of Academic Affairs of LIU-Brooklyn. He goes on to allege that prior to accepting the position, he had discussions with

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both Kane and Lee Kelly, who was then the Interim Director of Human Resources at LIU-Brooklyn, about his terms of his employments. He alleges that both Kane and Kelly made clear to him that following his Deanship, he would be given a one-year Deanship sabbatical at his Dean's salary and would then transition to an academic faculty position at the School of Business and be paid seventy-five percent (75%) of his Deanship salary. He was allegedly told that the post Deanship terms of employment were in accordance with LIU-Brooklyn's prevailing policy for transitioning Deans to the academic faculty at the end of their term of Deanship.

Plaintiff alleged that he accepted these terms of employment and on March 19, 2015, he was provided with a formal appointment letter which was later superceded by a revised appointment letter dated July 6, 2015. This appointment letter, which is the only evidentiary proof annexed to defendant's moving papers, reflects that plaintiff was being retained as the Dean of the School of Business for the term of August 27, 2015 to August 31, 2018, that his annual salary would be $255,000 and that "[o]ther terms and conditions of employment will be in accordance with University policy." After receiving this letter, plaintiff claims that he assumed the Deanship position on August 27, 2015. Plaintiff also alleges that he was awarded tenure as an academic faculty member of the School of Business effective August 2015.

Plaintiff alleges that he served as the Dean of the School of Business from August 27, 2015 until late May 2018 when he was relieved of the position. As of that time, his annual salary was alleged to be $262,000. He alleges that he was advised that he would nevertheless receive his full Deanship salary through August 31, 2018.

Plaintiff further alleges that by letter dated May 30, 2018, he was advised that effective September 1, 2018, he would be transitioned to LIU-Brooklyn's academic faculty as a Full Professor but that he would only receive an annual salary of $86,319.64, a sum substantially less than seventy-five percent (75%) of his Deanship salary. Moreover, he alleges that he was never given a one year sabbatical. He alleges that after lodging an objection to these terms, by letter dated October 11, 2018, he was told that the University did not recognize his rights under the LIU- Brooklyn's Transition Terms and Transition Policy.

Plaintiff commenced this action on July 26, 2019. Defendant responded by making this instant motion. Defendant maintains that since the gist of plaintiff's claims involve matters of an academic nature, his only recourse was to commence a special proceeding pursuant to CPLR article 78, which was time barred when this action was commenced. Defendant also claims that plaintiff's entire agreement with the defendant is set forth in a letter dated July 6, 2105, and since the letter does set forth the contractual terms that plaintiff claims were breached, the parol evidence rule precludes plaintiff from establishing those terms. Finally, plaintiff contends that the allegations in the complaint are insufficient to state causes of action for the remaining claims.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Wander v. St. John's Univ.*, 99 A.D.3d 891, 893, 953 N.Y.S.2d 68, 70; *Leon v.*

Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Norment v. Interfaith Ctr. of N.Y.,* 98 A.D.3d 955, 98 A.D.3d 955). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231; *see EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26). Applying this standards, defendant's motion to dismiss the cause of action for breach of contract pursuant to CPLR 3211(a)(7) must be denied.

Courts of this State "have long been reluctant to intervene in controversies involving purely academic determinations" (*Matter of Zanelli v. Rich,* 127 A.D.3d 774, 775, 8 N.Y.S.3d 217) and thus have a restricted role in dealing with and reviewing controversies involving such matters (*Maas v. Cornell Univ.,* 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 721 N.E.2d 966, quoting *Gertler v. Goodgold,* 107 A.D.2d 481, 487, 487 N.Y.S.2d 565). Judicial review of a decision of an academic institution involving an academic matter is generally only obtainable through a special proceeding under CPLR article 78, with the sole issue for the Court being "whether the decision was arbitrary, capricious, irrational, or in bad faith" (*Keles v. Trustees of Columbia Univ. in the City of N.Y.,* 74 A.D.3d 435, 435, 903 N.Y.S.2d 18); *Keles v. Hultin*, 144 A.D.3d 987, 988, 42 N.Y.S.3d 235, 236 (N.Y. App. Div. 2016). In accordance with these principles, courts have consistently refused to invade and have only rarely "assumed academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially

in institutions of higher learning." (*Matter of Pace Coll. v. Commission on Human Rights,* 38 N.Y.2d 28, 38, 377 N.Y.S.2d 471, 339 N.E.2d 880; *accord, State Div. of Human Rights v. Columbia Univ.,* 39 N.Y.2d 612, 619, 385 N.Y.S.2d 19, 350 N.E.2d 396; *Matter of Salomon v. New York State Human Rights Appeal Bd.,* 70 A.D.2d 991, 417 N.Y.S.2d 805; *Gertler v. Goodgold*, 107 A.D.2d 481, 486, 487 N.Y.S.2d 565, 569, *aff'd,* 66 N.Y.2d 946, 489 N.E.2d 748). On the other hand, claims that are contractual in nature may be brought against an academic institution through an action at law. (See *Matter of Golomb v. Board of Educ.,* 92 A.D.2d 256, 460 N.Y.S.2d 805; *Gertler v. Goodgold*, 107 A.D.2d 481, 486, 487 N.Y.S.2d 565, 569, *aff'd,* 66 N.Y.2d 946, 489 N.E.2d 748 (1985).

Here, plaintiff's breach of contract claims appear to be premised on defendant's alleged breached of its promise to pay the plaintiff an agreed upon salary following his Deanship and to afford him a sabbatical as he was allegedly promised. These claims, on their face, can properly be construed as contractual in nature having little to do with academic matters.

Defendant's reliance on *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 94, 721 N.E.2d 966, 970 is misplaced. The *Maas* Court addressed whether the plaintiff stated a breach of contract claim against the defendant by alleging that the defendant breached its contract with him by addressing a series of sexual harassment claims levied against by several students in a manner that was contrary to the defendant's own rules and Code. The Court dismissed the action finding that the plaintiff should have commenced an Article 78 proceeding to challenge the defendant's handling of the claims. In the Court's view, how the defendant in *Maas* decided to address the sexual harassment claims is more akin to an

academic matter rather than a purely contractual one. Here, plaintiff's dispute is over money and time off and arguably do not academic matters.

Further, in dismissing the plaintiff's complaint in *Maas*, the Court specifically stated:

> The University nowhere reflected an intent that the provisions of its Code would become terms of a discrete, implied-in-fact agreement, for purposes such as are alleged in this lawsuit. The Code itself is heavily informational in nature and does not express or support the implication of any promise on the part of the University. While the Code and its attendant regulations promulgate the University's sexual harassment policy and provide procedures for dealing with sexual harassment claims, *Maas'* essential employment duties and rights are only indirectly affected by these provisions. Finally, in this regard, Cornell's handbook clearly states that it can be altered at any time (impliedly unilaterally), and cautions readers and affected persons to seek out the most updated edition. That feature is hardly the harbinger of a legally binding set of arrangements. We conclude, therefore, that there is no support in this record or in relevant authority sources to sustain Maas' implied contract cause.

(*Maas*, 94 N.Y.2d at 94, 721 N.E.2d at 970). Here, the rules and written policies of the defendant which plaintiff claims were breach are before the Court for review. Moreover, the *Maas* Court specifically noted that an employee's action at law against an employer based on its written policies may be maintained if the employer "made the employee aware of its express written policy * * * and that employee detrimentally relied on that policy in accepting the employment" (*Maas*, 94 N.Y.2d at 93, 721 N.E.2d at 969, citing *Matter of De Petris v. Union Settlement Assn.*, 86 N.Y.2d 406, 410, 633 N.Y.S.2d 274, 657 N.E.2d 269; *see also, Weiner v. McGraw–Hill, Inc.*, 57 N.Y.2d 458, 464–466, 457 N.Y.S.2d 193, 443 N.E.2d 441). The complaint in this case sufficiently alleges that the defendant, through Kane and Kelly, made him aware of defendant's written policies concerning how he would be paid and what benefits he would receive following the termination of his Deanship position and that he detrimentally relied upon these policies in

accepting the position.

Turning to plaintiff's claims based on New York State Human Rights Law and the New York City Human Rights Law, while it is true that courts are reluctant to intervene in controversies involving purely academic determinations of educational institutions, "the fact that an employer is an educational institution does not permit it to discriminate against its employees on the basis of age, or otherwise insulate it from liability for violations of the New York State Human Rights Law or the New York City Human Rights Law " (*Wander v. St. John's Univ.*, 99 A.D.3d 891, 893, 953 N.Y.S.2d 68, 71). "To state a cause of action alleging age discrimination under the New York Human Rights Law (Executive Law § 296), a plaintiff must plead facts that would tend to show (1) that he or she was a member of a protected class, (2) that he or she was actively or constructively discharged or suffered an adverse employment action, (3) that he or she was qualified to hold the position for which he or she was terminated or suffered an adverse employment action, and (4) that the discharge or adverse employment action occurred under circumstances giving rise to an inference of age discrimination" (*Godino v. Premier Salons, Ltd.*, 140 A.D.3d 1118, 1119, 35 N.Y.S.3d 197, 199). To state a cause of action alleging age discrimination under the New York City Rights Law, the pleading requirements are essentially the same (*Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 113, 946 N.Y.S.2d 27, 31). Plaintiff's complaint sufficiently states all these elements.

Defendant's contention that plaintiff fails to state an adverse employment action is without merit. If plaintiff establishes that he was contractually entitled to a one year sabbatical at the same salary he was receiving as Dean and a salary of 75% of his Deanship salary when his position as Dean termination, plaintiff's allegations that he was not provided with these benefits

can certainly be construed as adverse employment action. As fully discussed above, plaintiff's complaint sufficiently alleges in the complaint that he was entitled to these benefits despite defendant's claim to the contrary. Further, plaintiff's allegations that several older deans were removed from their positions and that President Cline told him that his views were outdated and old fashion and that the University would flourish when he and other members of the old guard ceased to apply their outdated standards were sufficient, at this stage of the proceedings, to meet the pleading requirement that the alleged adverse employment actions occurred under circumstances giving rise to an inference of age discrimination (*Mirro v. City of New York*, 159 A.D.3d 964, 966, 74 N.Y.S.3d 356, 359).

Plaintiff complaint also sufficiently states causes of action for retaliation for all of the reasons stated by plaintiff's counsel in Point IV of his Memorandum of Law in Opposition.

Finally, defendant's motion to dismiss pursuant to CPLR 3211(a)(1) is denied. "A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law' " (*Rodolico v. Rubin & Licatesi, P.C.*, 114 AD3d 923, 924-925 [2d Dept 2014], quoting *Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Sabre Real Estate Group, LLC v. Ghazvini*, 140 AD3d 724 [2d Dept 2016]; *Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 AD3d 840, 841 [2d Dept 2013] ["dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"]).

The only documentary evidence submitted by the defendant in support of its motion

pursuant to CPLR 3211(a)(1) is plaintiff's appointment letter dated July 6, 2015. Defendant contends that since the letter does not set forth the contractual terms that plaintiff claims were breached and since the parol evidence rule precludes plaintiff from establishing these terms through extrinsic evidence, the breach of contact claim must be dismissed. While the parol evidence rule generally forbids proof of extrinsic evidence to add to or vary the terms of a writing, the rule only applies where it evident from the terms of the writing that the entire agreement between the parties was intended to be completely embodied in the writing (*Fogelson v. Rackfay Const. Co.,* 300 N.Y. 334, 338, 90 N.E.2d 881). Such is not the case here since the letter clearly states that "[o]ther terms and conditions of employment will be in accordance with University policy." Thus, defendant has not established that the parties intended the letter to embody the entire agreement between them and that the plaintiff is barred from introducing evidence extrinsic to the letter to establish the terms of the contract.

The Court has considered defendant's remaining argument in support of the motion and find them to be without merit.

For all of the above reasons, it is hereby

ORDERED that defendant's motion is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: January 10, 2020

PETER P. SWEENEY, J.S.C.
HON. PETER P. SWEENEY, J.S.C.