[Cite as *Flaim v. Med. College of Ohio at Toledo*, 2004-Ohio-5917.]

IN THE COURT OF CLAIMS OF OHIO

SEAN MICHAEL FLAIM	:	
Plaintiff	:	CASE NO. 2004-04132 Judge J. Warren Bettis
v.	:	DECISION
MEDICAL COLLEGE OF OHIO AT TOLEDO	:	
	:	Defendant

: : : : : : : : : : : : : : : : :

{¶ 1} On May 7, 2004, defendant, Medical College of Ohio at Toledo (MCO), filed a motion for summary judgment pursuant to Civ.R. 56(A). On May 18, 2004, plaintiff filed a memorandum in opposition. Thereafter, on July 27, 2004, plaintiff filed a motion for leave to file an amended memorandum in opposition, instanter. Upon review, plaintiff's motion for leave is GRANTED. The case is now before the court for a non-oral hearing on defendant's motion for summary judgment. See Civ.R. 56(C) and L.C.C.R. 4(D).

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v.*

First United Church of Christ (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} Plaintiff became a medical student at MCO in 1999. In October 2001, while plaintiff was in his third year of medical school, he was arrested by the Toledo, Ohio police and charged with several felony drug offenses. In a correspondence dated October 12, 2001, Amira F. Gohara M.D., Dean of the School of Medicine, informed plaintiff of his immediate suspension from MCO due to the charges filed against him. Dean Gohara also informed plaintiff of his right to a "hearing/investigation as part of [his] due process." Plaintiff elected to postpone his hearing until such time as the criminal charges were resolved. Plaintiff was indicted by a Lucas County Grand Jury on four felonies including: 1) two counts of aggravated possession of drugs, a felony of the third degree; 2) one count of possession of LSD, a felony of the fifth degree; and 3) one count of possession of cocaine, a felony of the fifth degree. Following a plea agreement, plaintiff pled guilty to attempted aggravated possession of drugs, a felony of the fourth degree.

{¶ 5} On June 5, 2002, plaintiff notified MCO of the termination of the criminal proceedings and requested a hearing regarding his suspension from school. On June 21, 2002, plaintiff received written notice that a hearing was scheduled for June 28, 2002, before the Committee of Student Conduct and Professional Behavior (committee). Plaintiff was permitted to testify at the hearing and have counsel present; however, counsel was not permitted to speak at the hearing. As a result of the hearing, the committee forwarded a recommendation of dismissal to Dean Gohara. On July 9, plaintiff received a letter from Dean Gohara informing him of her decision to accept the recommendation of the committee and dismiss him from MCO.

{¶ 6} Although plaintiff sets forth seven separate causes of action in the complaint, plaintiff's claims for relief sound in breach of contract, estoppel, and defamation.

{¶ 7} In *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App.3d 302, the court stated: "[I]t is axiomatic that '*** when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed

as being contractual in nature.'" Id. at 308, quoting *Behrend v. State* (1977), 55 Ohio App.2d 135, 139.

{¶ 8} Plaintiff's first contention is that MCO violated the "due process" provisions contained in section 04-017 of the student handbook, by failing to provide written notice of allegations against him; by not providing him the opportunity to cross-examine a witness, Detective Mitchell; by not permitting counsel to speak during the hearing; by not providing him with a copy of the written recommendation from the committee; and by not permitting him to appeal.

{¶ 9} Based upon a review of the relevant provisions of the student handbook, it is clear that MCO did comply with section 04-017 which does not entitle plaintiff to receive either written notice of allegations against him or a copy of the written recommendation from the committee. The relevant provisions do not allow either plaintiff the opportunity to cross-examine witnesses or his counsel to speak during the hearing. There is also no provision for appeal. Plaintiff claims, however, that oral statements made to him by MCO employees altered the terms of the student handbook with regard to due process.

{¶ 10} However, where language in a contract is clear and unambiguous, "this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. If no ambiguity exists, the terms of the contract must simply be applied without resorting to methods of construction and interpretation. Id. The Supreme Court of Ohio has held that "[i]f a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322. Additionally, contracts must be read as a whole and interpreted so as to give effect to every provision. *Farmers' National Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 337. The question of whether ambiguity or uncertainty in the language of a contract requires resort to extrinsic evidence to ascertain the intent of the parties is a question of law for the court. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214 ("if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined"); *Davis v. Loopco*

Industries, Inc., 66 Ohio St.3d 64, 66, 1993-Ohio-195; *P & O Containers, Ltd. v. Jamelco, Inc.* (1994), 94 Ohio App.3d 726, 731. ("The interpretation of a written contract is a question of law, absent patent ambiguity.")

{¶ 11} The terms of the student handbook regarding due process are, as a matter of law, clear and unambiguous. The court is therefore prohibited by law from considering the alleged oral representations of MCO employees purporting to grant plaintiff additional rights. In short, under the plain language of the handbook, plaintiff is simply not entitled to those rights that he claims were violated.

{¶ 12} Furthermore, to the extent that plaintiff argues that the decision to dismiss him from MCO was not justified, this court is required to defer to academic decisions of a college unless it perceives "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Bleicher*, supra, at 308 quoting *Regents of the Univ. of Michigan v. Ewing* (1985), 474 U.S. 214, 225. The standard of review is not merely whether the court would have decided the matter differently but whether the faculty action was arbitrary and capricious. *Bleicher*, supra.

{¶ 13} MCO's standards of conduct clearly provide for discipline including dismissal where a student is "[c]onvicted of a criminal offense or charged with an offense which may affect the public perception regarding one's performance in a given position." The standards of conduct also prohibit the "[u]se, misuse/abuse, possession, or distribution of *** narcotic or dangerous drugs" as well as the unlawful purchase, sale or possession of a controlled substance. There is no dispute that plaintiff was charged with four felony drug offenses and was convicted of a fourth degree felony as a result of a plea agreement. Plaintiff was provided a hearing in accordance with the student handbook and was subsequently dismissed by defendant for violations of the standards of conduct. Under the circumstances, a reasonable trier of fact could not possibly find that either the committee or Dean Gohara failed to exercise professional judgment in making the decision to dismiss plaintiff from MCO.

{¶ 14} In short, defendant is entitled to judgment on plaintiff's contract claim, as a matter of law.

{¶ 15} Plaintiff alleges in the alternative that he relied to his detriment upon oral representations made to him by Patricia Metting, MCO Dean of Students, regarding his rights of cross-examination, his right to counsel, and his right to receive written findings of the committee. However, where the rights and obligations of the parties are set forth in a written agreement, the equitable doctrine of promissory estoppel is unavailable. See *Lippert v. University of Cincinnati* (Oct. 3, 1996), Franklin App. No. 96API-03-349. ("Where a written contract is properly determined to be unambiguous, the trial court does not err in entering summary judgment, barring the promissory estoppel claim.") See, also, *Warren v. Trotwood-Madison City Sch. Dist. Bd. of Educ.* (Mar. 19, 1999), Montgomery Co. No. 17457. ("Promissory estoppel is inconsistent with the existence of an express written contract.")

{¶ 16} Thus, plaintiff cannot possibly recover, as a matter of law, upon a claim of estoppel.

{¶ 17} Turning to plaintiff's defamation claim, the essential elements of a defamation action, whether slander or libel, are that "the defendant made a false statement, that the false statement was defamatory, that the false defamatory statement was published, that the plaintiff was injured and that the defendant acted with the required degree of fault." *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343. Defamatory matter is defined as that which is injurious to another's reputation. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323. In an action for defamation, plaintiff's prima facie case is made when he has established a publication to a third person for which defendant is responsible, the recipient's understanding of the defamatory meaning, and its actionable character. *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243. Whether words are defamatory is a question of law to be decided by the court. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 1995-Ohio-187. Absent a "publication" of some sort, made by defendant, plaintiff cannot establish a prima facie case of defamation. *Froehlic v. Ohio Dept. of Mental Health*, 123 Ohio Misc.2d 1, 2003-Ohio-1277. (Where all of the evidence suggests that word of plaintiff's

termination was spread by her own conversations with co-workers, and her co-workers' conversations among themselves, defendant cannot be held liable for defamation.)

{¶ 18} According to plaintiff's affidavit, his defamation claim is founded upon the following defamatory statements:

{¶ 19} "***

{¶ 20} "18. At a graduation party Affiant attended in late May of 2002 at a friend's (Will Bonney's) house, Affiant was pulled aside by Andy Horrigan, another third year student at MCO and the son of Dr. Terrence J. Horrigan, an associate professor of the College's OB/GYN Department, and asked Affiant what was happening, as he had heard that Affiant 'was selling crack cocaine out of his house.' He was informed that there were rampant rumors among the students of MCO that Affiant was a drug dealer. Affiant, up until that point, had not spoken about the details of this matter to other students, and is unaware of how such detailed rumors (i.e. the matter had controlled substances as an element) could be circulating. It was also related to Affiant that Mr. Horrigan's father had told him there had been debate about '**when** to kick out' Affiant as it had been advocated at first to do so shortly after Affiant had been arrested, and that the decision had settled toward a 'wait and see' approach rather than the advocated immediate dismissal.

{¶ 21} "***.

{¶ 22} Plaintiff's affidavit also referenced the following:

{¶ 23} "28. During the hearing, Affiant was asked if he had ever 'sold drugs?'"

{¶ 24} Were plaintiff to testify that Andy Horrigan told him about "rumors" among other students, such testimony would clearly constitute inadmissible hearsay. Moreover, it is impermissible to infer from plaintiff's affidavit that MCO was the source of the alleged rumors. Additionally, to the extent that the statements regarding the alleged debate about plaintiff's status at MCO are attributable to MCO employees, there is no evidence upon which a reasonable jury could find that the statements were either false or defamatory. Finally, the question posed to plaintiff at the hearing does not qualify as a statement of fact, as a matter of law. A review of the hearing transcript reveals that plaintiff answered the question in the affirmative and then provided an explanation. In

short, the evidence presented by plaintiff in opposition to the motion for summary judgment is insufficient to create an issue of fact as to the publication of a defamatory statement by defendant.

{¶ 25} In conclusion, the court has reviewed plaintiff's motion for summary judgment, the memoranda filed by the parties, and the supporting and opposing affidavits. Upon review, and construing the evidence most strongly in favor of plaintiff, the court finds that no genuine issues of material fact exist and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted.

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SEAN MICHAEL FLAIM	:	
Plaintiff	:	CASE NO. 2004-04132 Judge J. Warren Bettis
v.	:	JUDGMENT ENTRY
MEDICAL COLLEGE OF OHIO AT TOLEDO	:	
	:	Defendant

: : : : : : : : : : : : : : : : :

A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Additionally, upon review, plaintiff's May 26, 2004, motion for sanctions is DENIED as is plaintiff's July 27, 2004, motion to file a reply brief. Plaintiff's August 17, 2004, motion to compel is DENIED as moot. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

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