

Motion Sequence #4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of,

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE,
and JULIE NORRIS,

Index No. 153826/2017

Petitioners,

-against-

Hon. Nancy M. Bannon

FORDHAM UNIVERSITY,

Respondent,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules.

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR
LEAVE TO AMEND THE VERIFIED PETITION**



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PRELIMINARY STATEMENT

Respondent Fordham University (“Fordham” or the “University”) respectfully submits this Memorandum of Law in opposition to the motion of Petitioners Ahmad Awad (“Petitioner Awad”), Sofia Dadap (“Petitioner Dadap”), Sapphira Lurie (“Petitioner Lurie”), and Julie Norris (“Petitioner Norris”) (collectively “Petitioners”) brought pursuant to New York Civil Practice Law and Rules (“CPLR”) § 3025(b), for an order granting Petitioners leave to amend the petition filed in this action on April 26, 2017 (the “Verified Petition”). Specifically, Petitioners seek to amend the Verified Petition solely to add Veer Shetty (“Proposed Petitioner Shetty”) as a Petitioner in this action. Proposed Petitioner Shetty is a sophomore student at Fordham who claims that he wants to join the proposed student club at issue, Students for Justice in Palestine (“SJP”) but is unable to do so because of the University’s decision to deny SJP status as a recognized club on campus.

The University opposes Petitioners’ motion to amend the Verified Petition for a multitude of reasons. First, Proposed Petitioner Shetty lacks standing to oppose the University’s December 2016 decision to deny official recognition to SJP since he was not a student at the time and was not involved in the application process in any way. Further, Proposed Petitioner Shetty did not file his own application for a similarly themed student club and obviously never had an application denied by Fordham. As such, there is no controversy between Fordham and Proposed Petitioner Shetty that is capable of adjudication. Finally, Proposed Petitioner Shetty’s claims as to the prior application are barred by the applicable statute of limitations. As a result and as more fully set forth herein, Petitioners’ motion to amend the Verified Petition is devoid of merit, futile and therefore must be denied.

STATEMENT OF FACTS

The facts relevant to the instant motion are fully set forth in the University's motion to dismiss dated June 5, 2017. See ECF Docket Entry No. 14 to No. 53. For the Court's convenience, the University briefly summarizes the relevant facts and procedural history of this matter below.

Relevant Facts

In the fall of 2015, a group of Fordham students expressed an interest in forming a local chapter of SJP on the University's Lincoln Center campus. On November 19, 2015, four undergraduate Fordham University students, including Petitioner Awad, submitted a proposed constitution to start a student SJP club to the University Student Government ("USG"), as required by the University Club Guidelines. Thereafter, as set forth in the University Club Guidelines, a robust, interactive dialogue occurred between the prospective club leaders, the USG Operations Committee and Dr. Dorothy A. Wenzel as the Director for Student Involvement. The purpose of these discussions was to review the proposed club's constitution, define the proposed club's function and purpose, and to propose any modifications to the proposed constitution. This interactive process took place over the course of a few months, during which time the students interested in starting SJP were able to meet with and ask and answer questions from administrators.

On November 17, 2016, the USG Senate voted to approve SJP as a club at Fordham's Lincoln Center campus, subject to a final determination by the Dean of Students as outlined in the University Club Guidelines. On December 22, 2016, after reviewing the application and other materials, the Dean of Students for Fordham's Lincoln Center campus, Keith Eldredge, denied SJP official club status on the Lincoln Center campus. In his correspondence with the proposed club representatives, Dean Eldredge provided some of his concerns regarding the proposed club, including the fact that the sole purpose of the proposed club was to advocate political goals of a specific group against a specific country, which clearly conflicts with the mission and values of

the University. Dean Eldredge also noted the complexities of the political nature of the club and that the purpose and goals of the proposed club call for the “boycott, divestment and sanctions of Israel,” which presents a barrier to open dialogue, mutual learning and understanding at the University. Dean Eldredge did however note that he welcomed the students to have continued conversation about alternative ways to promote awareness of the Israeli-Palestinian conflict and the issues that surround it from multiple perspectives.

Dissatisfied with the University’s decision, Petitioners thereafter filed this Article 78 proceeding.

Procedural History

On April 26, 2017, Petitioners filed their Verified Petition challenging the University’s decision to deny SJP official club status. On June 5, 2017, the University moved to dismiss the Verified Petition for failure to state a cause of action and a defense founded upon documentary evidence. On November 2, 2017, Petitioners filed a Motion for Preliminary Injunction and Expedited Discovery. On January 2, 2018, this Court heard oral argument on the University’s motion to dismiss and Petitioners’ motion.

On February 8, 2019 Petitioners brought the instant motion to amend their Verified Petition solely to add Proposed Petitioner Shetty as a Petitioner. The parties thereafter stipulated to a briefing schedule and the instant motion is returnable on March 13, 2019.

ARGUMENT

While a motion to amend a pleading is generally freely granted, “where the proposed amendment is palpably insufficient or patently devoid of merit, leave to amend should be denied.” Darby Grp. Companies, Inc. v. Wulforst Acquisition, LLC, 130 A.D.3d 866, 867, 14 N.Y.S.3d 143, 145 (2d Dept. 2015); Y.A. v. Conair Corp., 154 A.D.3d 611, 612, 62 N.Y.S.3d 116, 118 (1st Dept. 2017). “When a proposed amendment to a pleading is devoid of merit, leave to amend should

be denied so as to avoid needless, time-consuming litigation.” Terminal Cent., Inc. v. Henry Modell & Co., 212 A.D.2d 213, 217, 628 N.Y.S.2d 56, 59 (1st Dept. 1995).

Further, some New York courts, including the First Department, have held that leave to amend a pleading “should ‘not be granted upon mere request without appropriate substantiation.’” Hoppe v. Bd. of Directors of 51-78 Owners Corp., 49 A.D.3d 477, 477, 854 N.Y.S.2d 689, 690 (1st Dept. 2008) (quoting Brennan v. City of New York, 99 A.D.2d 445, 446, 470 N.Y.S.2d 621, 622 (1st Dept. 1984)). The First Department has stated that, in an effort to conserve judicial resources, “examination of the merit of the underlying proposed amendment is mandated. Where no cause of action has been stated to begin with, leave to amend will be denied.” Spitzer v. Schussel, 48 A.D.3d 233, 233, 850 N.Y.S.2d 431, 432 (1st Dept. 2008). “[T]he party seeking the amendment has the burden of establishing the merit of the proposal.” Manhattan Real Estate Equities Grp. LLC v. Pine Equity NY, Inc., 27 A.D.3d 323, 815 N.Y.S.2d 28, 29 (1st Dept. 2006).

As will be explained in detail below, Petitioners have wholly failed to meet their burden to establish that Proposed Petitioner Shetty is a proper petitioner in this action. Petitioners fail to provide any evidence to support their assertion that Proposed Petitioner Shetty is in any way related to the University’s decision to deny SJP recognized club status other than the mere statement that he now in 2019 “want[s] to be part of an official club at Fordham called Students for Justice in Palestine.” See Affidavit of Veer Shetty, dated January 16, 2019 (“Shetty Aff.”) at ¶ 4. There is no dispute that Proposed Petitioner Shetty is not alleged to have been enrolled at Fordham at the time of the decision in December 2016. In addition, Petitioners ignore the fact that any claims Proposed Petitioner Shetty may have related to the University’s 2016 decision are unequivocally time barred. Further, Petitioners do not allege that Proposed Petitioner Shetty took any action to start his own club, prepare a proposed constitution or otherwise apply to Fordham in any way to start his own club. Finally, had he made such an application, he does not allege, nor could he, that

his new application was or would have been denied by Fordham. As such, without such a determination, as between Proposed Petitioner Shetty and Fordham there is no controversy and thus this matter is not ripe for adjudication.

Petitioners' motion to amend the Verified Petition should therefore be denied.

POINT I

PROPOSED PETITIONER SHETTY DOES NOT HAVE STANDING NOR ARE HIS CLAIMS RIPE FOR ADJUDICATION

Petitioners' motion to amend the Verified Petition must be denied as Proposed Petitioner Shetty does not have standing to be added as a petitioner in this action. To have standing to challenge an administrative decision in an Article 78 action, the petitioner must demonstrate that he has suffered an injury in fact. New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211, 810 N.E.2d 405, 407 (2004); Roberts v. Health & Hosps. Corp., 87 A.D.3d 311, 318, 928 N.Y.S.2d 236, 242 (1st Dept. 2011). To establish injury in fact, the petitioner must show that he "will actually be harmed by the challenged" action or decision. New York State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211. The alleged injury must be one that is personal to the petitioner, meaning that it is "distinct from that of the general public." Roberts, 87 A.D.3d at 318 (quoting Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 587, 706 N.E.2d 1180, 1183 (1998)); Roistacher v. Council of City of New York, 199 A.D.2d 68, 68, 604 N.Y.S.2d 115, 115 (1st Dept. 1993). Further, "the injury itself must be more than conjectural." New York State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211.

Here, Proposed Petitioner Shetty has not suffered an injury in fact stemming from Fordham's decision to deny SJP official club status in 2016. Proposed Petitioner Shetty does not allege that he was and in fact, admits that he was not enrolled in the University at the time of its decision regarding SJP. See Shetty Aff., at ¶ 1 ("In January 2018, I commenced my studies at

Fordham University. I am now in my second year and expect to receive my diploma in 2021.”) Proposed Petitioner Shetty further fails to allege that he submitted his own application to start a similar club and was denied by Fordham. As such, the controversy is not ripe for adjudication.

1. Proposed Petitioner Shetty Was Not a Student at The Time of the University’s Decision.

Petitioners’ assertion that Proposed Petitioner Shetty’s claims are identical to those raised by Petitioners is entirely without merit. Proposed Petitioner Shetty first enrolled as a student at Fordham in January 2018. See Shetty Aff., at ¶ 1. It is undisputed that the University made its decision to deny SJP recognized club status on December 22, 2016, over a year before Proposed Petitioner Shetty even began attending Fordham. Because Proposed Petitioner Shetty was not a student at the time, he could not have possibly been injured by the University’s decision regarding that particular application to have an SJP chapter under that particular proposed constitution.

Proposed Petitioner Shetty was also not at all involved in SJP’s 2015 application process to the University. He was not involved in drafting SJP’s proposed constitution, he did not attend meetings with administrators to discuss the proposed club, nor was he in any way involved in the interactive process during SJP’s application. As such, Petitioners’ assertion that Proposed Petitioner Shetty’s claims are the same as theirs is entirely without merit.

Further, in his affidavit, Proposed Petitioner Shetty states that his reason for wanting to become a petitioner in this action is because he is “interested in discussing Palestinian rights with people at Fordham who are also interested in this issue.” See Shetty Aff., at ¶ 4. Proposed Petitioner Shetty, however, has made no attempt to file his own application to start a club in which he and other students could discuss Palestinian rights and issues. The University’s 2016 decision to deny SJP’s particular application in no way prevents Proposed Petitioner Shetty from submitting his own application to start a club that now could be accepted by the University, particularly if he

presents his application and club constitution in such a way that it addresses the University's concerns with Petitioners' 2015 application and constitution. However, because Proposed Petitioner Shetty has made no such application to the University, it is impossible for him to argue that he has in some way been injured.

Therefore, it is clear that Proposed Petitioner Shetty has not suffered any injury in fact as a result of the University's denial of Petitioners' application as he was not a student at the time the decision was made nor has he even attempted to form his own club, let alone have his application denied by the University.

2. Proposed Petitioner Shetty Has Alternative Outlets Through Which He Can Discuss Palestinian Rights with Other Students.

Further, Proposed Petitioner Shetty cannot claim to have suffered an injury in fact because of the University's decision as he has other outlets through which he can discuss Palestinian rights with other students. As demonstrated above, one way in which Proposed Petitioner Shetty could accomplish this goal is by applying to start his own club in which he could discuss these issues in a way that alleviates the University's concerns with Petitioners' proposal. Further, Fordham offers a number of other activities and events at which Proposed Petitioner Shetty can discuss these issues. For example, on February 6, 2019, the University hosted a workshop program as part of the "Add Your Voice Speakers Tour" in which students participated in discussions with both Israeli and Palestinian activists.¹ See <https://www.ovcampus.org/tour>.

As stated in its Reply Memorandum in Further Support of its Motion to Dismiss (see ECF Docket Entry No. 77), Fordham encourages students such as Proposed Petitioner Shetty to

¹ This is just one of many forums that Proposed Petitioner Shetty could use to discuss Palestinian rights with other students. See also <https://news.fordham.edu/event/different-take-israel-palestine-1979-present/> (last visited March 3, 2019); <https://medium.com/the-jewish-post/an-interesting-historical-overview-of-the-israeli-palestinian-conflict-beea9db9cafl> (last visited March 3, 2019); <https://news.fordham.edu/inside-fordham-category/lectures-and-events/historian-outlines-roots-of-israeli-palestinian-conflict/> (last visited March 3, 2019).

continue to have debate and discourse concerning Palestinian-Israeli issues. Although Petitioners may not be able to have these debates and discussions under the moniker of their choosing, the University is in no way preventing this conversation from occurring on campus or at University supported events.

Therefore, Petitioners' motion to amend their Verified Petition must be denied.

3. Proposed Petitioner Shetty's Claims Are Not Ripe for Adjudication.

In addition to lacking standing, Proposed Petitioner Shetty's claims are not ripe for adjudication. Generally, to challenge a decision under Article 78, the action at issue "must be 'final and binding upon the petitioner.'" Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d 92, 98, 49 N.E.3d 1165, 1168-69 (2016) (quoting Walton v. New York State Dep't of Corr. Servs., 8 N.Y.3d 186, 194, 863 N.E.2d 1001, 1005 (2007)). An action is considered final where "the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." Adirondack Council, Inc. v. Adirondack Park Agency, 92 A.D.3d 188, 190, 936 N.Y.S.2d 766, 768 (3d Dept. 2012) (quoting Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519, 496 N.E.2d 183, 189 (1986)).

In this instance, Fordham has not made any decision related to Proposed Petitioner Shetty, let alone one that could be considered "final and binding." As stated above, Proposed Petitioner Shetty has not made an application to the University to start his own club. As such, it is impossible for Proposed Petitioner Shetty to argue that the University made a final decision or in fact, any decision, that inflicted some kind of injury upon him and is therefore ripe for adjudication. The only University decision at issue in this matter was one made in 2016, well before Proposed Petitioner Shetty was even a student at the University. As explained above, Proposed Petitioner Shetty was not in any way involved in Petitioners' application process to the University. As a

result, it cannot be argued that the University's 2016 decision regarding Petitioners' application was "final and binding" on Proposed Petitioner Shetty.

Because he has not filed his own application to start a club nor was he a student at the time of the University's decision regarding Petitioners' application, Proposed Petitioner Shetty does not have a claim against the University that is ripe for adjudication.

POINT II

PROPOSED PETITIONER SHETTY'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

1. Proposed Petitioner Shetty's Claims Are Barred by The Four-Month Statute of Limitations Under CPLR § 217(1).

In addition to not having standing to challenge the University's decision, any claims Proposed Petitioner Shetty may have regarding the University's decision are barred by the applicable statute of limitations. Actions brought to challenge the decision of a college or university under Article 78 are subject to a four-month statute of limitations as set forth in CPLR § 217(1). Benson v. Trustees of Columbia Univ., 215 A.D.2d 255, 626 N.Y.S.2d 495 (1st Dept. 1995); Silverman v. New York Univ. School of Law, 193 A.D.2d 411, 597 N.Y.S.2d 314 (1st Dept. 1993). According to CPLR § 217(1), the statute of limitations begins to run immediately "after the determination to be reviewed becomes final and binding upon the petitioner."

In this case, the University issued its decision regarding SJP on December 22, 2016, well over two years prior to the filing of Petitioners' motion to amend the Verified Petition to add Proposed Petitioner Shetty to this action. There is no doubt that Petitioners are challenging the University's single, isolated decision that occurred on December 22, 2016. As such, the statute of limitations began to run on that date and expired on April 22, 2017.²

² The parties entered into a tolling agreement that extended Petitioners time to file this action to May 3, 2017.

Even if Petitioners argue that Proposed Petitioner Shetty's claims arose at some later date because he was not enrolled as a student at the time of the University's decision, they would still be time-barred. Because the University made its decision regarding SJP before Proposed Petitioner Shetty was enrolled as a student, any claim he may have had related to that decision would have existed immediately upon his enrollment. Thus even if Proposed Petitioner Shetty's admitted enrollment date of January 2018 (see Shetty Aff., at ¶ 1) is used for the statute of limitations calculation, his current attempt to assert his claims is still well beyond the applicable four-month limitations period.

Therefore, Proposed Petitioner Shetty's claims are unquestionably barred by the four-month statute of limitations under CPLR § 217(1).

2. **Proposed Petitioner Shetty's Claims Do Not Relate Back to Petitioners' Claims.**

Finally, Proposed Petitioner Shetty's claims do not relate back to Petitioners' claims. The relation back doctrine allows a plaintiff or petitioner to "correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired." Giambrone v. Kings Harbor Multicare Ctr., 104 A.D.3d 546, 548, 961 N.Y.S.2d 157, 159 (2013). (internal citation omitted). While the nature of a party's mistake is irrelevant, adding a new party under the relation back doctrine will not be permitted where there was no mistake. Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC, No. 652884/2013, 2015 WL 6437570, at *4 (N.Y. Sup. Ct. 2015). A new party plaintiff or petitioner can relate his or her claims back to the original complaint or petition for statute of limitations purposes "only if both claims arise out of the same transaction or occurrence and the new plaintiff and original plaintiff are so closely related or united in interest that the original claim would have given the defendant notice." Fazio Masonry, Inc. v. Barry, Bette & Led Duke, Inc., 23 A.D.3d 748, 749, 803 N.Y.S.2d 729, 730 (3d Dept. 2005);

Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC, No. 652884/2013, 2015 WL 6437570, at *5 (N.Y. Sup. Ct. 2015).

Here, there is no question that Petitioners did not make a mistake in failing to include Proposed Petitioner Shetty in their original Verified Petition. Because Proposed Petitioner Shetty was not a student at the time of the University's 2016 decision, it would have been impossible for Petitioners to include him as a petitioner in this action. As such, Petitioners cannot argue that they made a mistake in failing to include Proposed Petitioner Shetty in their original Verified Petition such that they should be entitled to relate his claims back to theirs.

Further, Proposed Petitioners Shetty's claims do not arise out of the same transaction or occurrence as Petitioners' nor can Proposed Petitioner Shetty be said to be united in interest with Petitioners' claims such that the University would have had notice of them. As explained above, Petitioners' claims arise out of an application they made to the University in 2015 and the University's decision regarding same in 2016, before Proposed Petitioner Shetty was enrolled at the University. Proposed Petitioner Shetty cannot have claims that arise out of an application and decision that was made over a year before he was student at Fordham.

In addition, Proposed Petitioner Shetty's claims are not united in interest with Petitioners' claims. Proposed Petitioner Shetty was not at all involved in Petitioners' year long application process to the University to have SJP recognized as an official club. Of even greater importance, the University could not have possibly been on notice that Proposed Petitioner Shetty would attempt to assert claims related to Petitioner's original application and the University's 2016 decision as Proposed Petitioner Shetty was not enrolled as a student at the University at the time of the University's decision or at the time this action was commenced.

Thus Proposed Petitioner Shetty's claims do not relate back to Petitioners' claims for statute of limitations purposes as Petitioners did not make a mistake in failing to include Proposed

Petitioner Shetty in their original Verified Petition, Proposed Petitioner Shetty's claims do not arise out of the same occurrence as Petitioners' and Proposed Petitioner Shetty's claims are not united in interest with Petitioners' such that the University was on notice that he may assert such claims.

CONCLUSION

For the foregoing reasons, the University has demonstrated that Petitioners' motion to amend the Verified Petition is palpably devoid of merit. Petitioners' motion to amend should be denied in its entirety, together with such other relief as this Court deems just and proper.

Dated: Garden City, New York
March 4, 2019

Respectfully submitted,
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