19-166

No.

In the Supreme Court of the United States

Matthew J. Rosenwasser, Petitioner

v.

Fordham University,
Joseph McShane, President and
John Carroll, Head of Security, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

When a federally-funded university consistently, deliberately and intentionally denies a Title IX investigation, the Statute of Limitations for Title IX is tolled while due process litigation is ongoing in the Courts.

List of Parties to Proceeding

1. Fordham University
2. John Carroll, Head of Security, Fordham University
3. Joseph McShane, President, Fordham University
4. Matthew J. Rosenwasser, Pro Se Appellant

Corporate Disclosure Statement

1. John Carroll, Head of Security, Fordham University: employed by Fordham University
2. Joseph McShane, President, Fordham University; employed by Fordham University
4. Matthew J. Rosenwasser, Pro Se Appellant; no ownership stake in Fordham University; not employed by Fordham University

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Statement of the Basis for the Jurisdiction

The Judgement of the Court of Appeals was entered on May 7, 2019. A petition for rehearing was denied on June 19, 2019. This Court's jurisdiction rests on 20 U.S.C. § 1681 (Title IX).

Constitutional Provisions and Statutes

Constitutional Provisions

Statutes

STATEMENT OF THE CASE

20 U.S.C. §1681, also known as Title IX, was signed into law on June 23, 1972. It is administered by the Department of Education and serves as the federal law governing sexual harassment and sexual assault cases on all university campuses that receive federal money in the form of loans, grants and/or research funds. When sexual assault and/or sexual harassment charges are filed with a university's security department, a Title IX investigation is automatically triggered and is overseen by the university. A full investigation is to be performed by the university without requests by the accuser or the person being accused. Both parties are to be informed of their federal rights under Title IX before and during the Title IX investigative process. Title IX does not have a Statute of Limitations written into the code. Should a university fail to enforce Title IX, it would loose access to all federal funds. Title IX applies to students, staff, contractors and 3rd parties on campus.

On May 17, 2010, I was forcibly ejected from the Library at Fordham University's Lincoln Center campus after a security guard filed false sexual harassment and stalking charges against me 2 weeks prior. While I was being expelled from campus, I was not shown the false charges that were filed against me and I was not allowed to respond to them.

On May 18, 2010, I sent an email to the Dean of Students requesting to be shown the false charges and an investigation.

On May 19, 2010, I sent a 2nd email to the Dean attempting to refute the false allegations based on what little I was told about them. On May 20, 2010, I sent a 3rd email, this time to the Head of Security John Carroll, once again attempting to refute the false allegations. On May 21, 2010, I sent a 4th email, again to the Head of Security, providing a list of security guards that could act as witnesses, and noted that video recordings at particular places on Fordham's campus could be used to refute the false charges. A 5th email was sent to the Head of Security on the same day informing him that the Night Manager at the Library would be able to provide material assistance in proving the charges false. On or about May 23, 2010, a letter from the Head of Security John Carroll was sent stating that he was permanently banning me from Fordham's campus and would be arrested should I attempt to step foot on the campus that he controlled. In addition, Mr. Carroll said that he would not investigate the false charges, a clear violation of Title IX (though I did not know this at the time, since the existence of Title IX was deliberately withheld from my by Fordham.)

On May 24, 2010, a 6th email was sent to Mr. Carroll stating once again that the video recordings in the public areas of the University would be able to refute the false charges.

On May 25, 2010, a 7th email was sent to Mr. Carroll which essentially repeated the email of May 24. On June 24, 2010, Fordham was contacted for the 8th time via letter to Fordham's Legal Counsel Tom Dejulio requesting a full investigation, provided the names of 5 security guards in addition to the night manager of the library as witnesses, and provided approximate dates to search the video camera recordings for evidence. On June 28, 2010, Fordham was contacted for the 8th time when I sent a letter to Fordham's President Joseph McShane where I once again requested a full investigation, provided the names of 5 security guards in addition to the night manager of the library as witnesses, and provided approximate dates to search the video camera recordings for evidence. Given that Fordham was refusing to do an investigation and was denying me my due process rights, I wrote to several local elected officials on August 18, 2010, requesting their assistance. On August 20, 2010, State Senator Padavan sent a letter to Fordham's President Joseph McShane requesting an investigation into the matter. On August 30, 2010, Senator Padavan's office received a letter from Mr. Carroll stating one false allegation but nothing about an investigation.

In the Fall of 2011, after multiple requests for an investigation, and Fordham's refusal to do one, I filed a case with the New York State Supreme Court against Fordham for violation of

the due process clauses of the Constitution, the 5th and 14th Amendments. It should be noted that Fordham did not, at any time, inform me of Title IX with regards to my rights as a 3rd party under that law. As such, I filed the State case with the best knowledge I had at that time of Constitutional due process law. Fordham intentionally stretched the case out by failing to produce Mr. Carroll for a deposition for several years. During this time, I found about Title IX and my rights under it with regards to Fordham's refusal to do grant me my rights by doing a Title IX investigation. I attempted to introduce it to the NY State case, but by then it was too late. Eventually, the NY State case was dismissed on May 12, 2017.

On July 10, 2017, I filed case 17-cv-05191 with the Southern District of NY, this time requesting that Fordham be held liable for failing to uphold my rights under Title IX. The Southern District dismissed the case on March 15, 2018, as having surpassed the statute of limitations, which it put at 3 years, stating it fell under New York State law governing personal injury, not federal law. On March 30, 2018, an appeal was filed with the 2nd Circuit, case number 18-905. The Appeal was denied on May 7, 2019 and a rehearing was denied on June 19, 2019.

REASONS FOR GRANTING THE WRIT

When pursuing a due process case that falls under Title IX, the statute of limitations should be tolled, especially when the educational institution deliberately withholds the existence of Title IX, the exercise of Title IX rights for both parties and a Title IX investigation. While pursuing a Constitutional due process case, this fulfills the 3 tests as outlined in *Smith v. American President Lines, Ltd., (571 F.2d 102, 109 (2d Cir. 1978)*) The 3 tests are:

1. Defendant actively mislead plaintiff with regards to the cause of action
2. Plaintiff has been prevented from asserting his rights
3. Plaintiff has, in a timely manner, asserted his rights mistakenly in the wrong forum

It should be noted that only 1 of the 3 tests outlined in *Smith v. American President Lines* has to be passed in order to toll the Statute of Limitations. In cases where Universities deliberately withhold the existence of Title IX, refuse to do a Title IX investigation and where students pursue their Constitutional due process rights in a Court of Law, all 3 tests are passed. When such tests are passed, the Statute of Limitations is tolled. In case 18-905, the 2nd Appeals Court overlooked these factors.

In *Thompson v. Overmeyer, (No. 4:14-CV-01160, 2015 WL 365692, (M.D. Pa. Jan. 27, 2015)*), the Court concluded that "There are no bright line rules in determining when equitable tolling is warranted, and courts should "favor flexibility over adherence to mechanical rules." "

There are several cases in the federal docket that show precedence with regards to the defendant actively misleading plaintiffs and engaging in deception. *Flint v. City of Philadelphia, No. CIV. A. 98-95, 1998 WL 303727, (E.D. Pa. May 6, 1998)*, stated that the defendant "actively misled [the plaintiff]", and as a result, "this deception caused [the plaintiff] noncompliance with the limitations period" and "the critical facts that would have alerted a reasonable person to the alleged unlawful conduct...are sufficient to invoke equitable tolling." Furthermore, the 3rd Circuit stated in *Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1392 (3d Cir. 1994)*, the defendant "actively misled [the Plaintiff]...and (2) the critical fact that would have alerted a reasonable person to the alleged unlawful [actions]. We find that these allegations, taken as true and giving [the plaintiff] the benefit of all reasonable inferences, are sufficient to activate the doctrine of equitable tolling." Finally, in *Stone v. National Bank & Trust Company, No. 92-CV-211, 1996 WL 310351, (N.D.N.Y. June 6, 1996)*, "[e]quitable tolling prevents the running of a statute of limitations against a plaintiff who is unaware that he has a cause of action because of

defendant's fraudulent acts or concealment." *Stone* also notes that "The doctrine [of tolling] may be applied in cases where the defendant is shown to have 'engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of the cause of action.' "

There are a number of cases where the Statue of Limitations has been tolled for plaintiffs that diligently pursue their rights but were prevented from doing so by the defendant. In *Scary v. Philadelphia Gas Works, 202 F.R.D. 148, 153 (E.D. Pa. 2001)*, the Court found "that equitable tolling is appropriate in this case [since] The Court finds that Scary acted with "reasonable diligence." Secondly, in *Walck v. Discavage, 741 F. Supp. 88, 92 (E.D. Pa. 1990)*, the Court stated that the "plaintiff demonstrated due diligence in pursuing her claim against defendant by filing suit in...state court and serving defendant with her complaint prior to the running of the limitations period." Additionally, the SDNY, ruling in *Bridgeway Corp. v. Citibank, N.A., 132 F. Supp. 2d 297, 303 (S.D.N.Y. 2001)*, it was found that the "plaintiff has certainly acted with reasonable care and diligence in pursuing its claims against defendant. Moreover, as already discussed, enforcement of the statutes of limitations would prevent plaintiff from having its day in court." Finally, in *Richardson v. City of Chicago, No. 12-CV-9184, 2018 WL 2412397, (N.D. Ill. May 29, 2018)*, it was found that where a pattern [of racketeering activity] remains obscure in the

face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty" in filing suit within the limitations period following discovery of injury".

Federal caselaw has provided several examples of tolling when filing in the wrong forum. In the 2nd Circuit, the case of *Polanco v. U.S. Drug Enf't Admin., 158 F.3d 647, 649 (2d Cir. 1998)*, stated that "Even if the action is timebarred, the district court may consider whether it is saved by the doctrine of equitable tolling, on the theory that [the Plaintiff] initially filed his action in the wrong court." In *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n, 866 F.2d 616, 626 (3d Cir. 1989)*, the 3rd Circuit "discussed a variation on the tolling concept that hinges not on the misconduct of the defendant, but rather on the plaintiff's mistake in filing in the wrong forum. There, we noted the accepted application of equitable tolling to cases where the plaintiff raised the precise statutory claim in issue, but did so in the wrong court." The 7th Circuit noted in *Granger v. Rauch, 388 F. App'x 537, 543 (7th Cir. 2010)*, that "Under the doctrine of equitable tolling, [the Plaintiff] should not be penalized for innocently selecting the wrong forum." The court ruling in *Ryan v. New York State Thruway Auth., 889 F. Supp. 70, 79 (N.D.N.Y. 1995)* reasoned that the "tolling of the time bar may be permitted as "a matter of fairness" if a plaintiff asserts her rights in the wrong forum."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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