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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LEI KE,

Appellant

v.

JOHN FRY, JENNIFER HAMILTON,
AMY FUCHS, SAMUEL PARRISH,
RICHARD HOMAN, MARIANNE SAHAR
(ON BEHALF OF ANTHONY SAHAR,
DECEASED), JOHN DALTON, JOSEPH
SALOMONE, BARBARA SCHINDLER,
EUGENE HONG AND JOHN
GYLLENHAMMER

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2587 EDA 2016

Appeal from the Order August 10, 2016
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): No. 2073 January Term, 2016

BEFORE: BENDER, P.J.E., RANSOM, J., and FORD ELLIOT, P.J.E.

MEMORANDUM BY RANSOM, J.:

FILED JUNE 15, 2017

Lei Ke, Appellant, appeals from the order entered August 10, 2016, which granted Appellees' preliminary objections and dismissed Appellant's complaint. We affirm.

The relevant facts are as follows:

[Appellant] matriculated at Drexel University School of Medicine in August 2007, at which time he received a copy of the 2006 Student Handbook. According to [Appellant], the contents of the 2006 Student Handbook are a contract that sits at the center of [Appellant]'s claims in the case *sub judice*. The Student Handbook provides that a grade of "U", or unsatisfactory, is considered a failing grade while a grade of "MU," or marginally unsatisfactory, is an interim grade used to show a student is in danger of failing, but allows the student an opportunity to

remediate the grade. During his second year of medical school, [Appellant] failed four courses, receiving grades of "U" in each course. [Appellant] alleges that rather than allowing him to take "makeup exams without paying extra tuition and fees," Drexel Medicine made him repeat the failed courses, at a cost of \$38,893.24. Additionally, Drexel Medicine, through Dean of the Medical School Dr. Richard Homan, presented [Appellant] with the "2009 letter," which provided that if he failed any clinical course, he would be dismissed from the school. [Appellant] repeated the four courses and passed, at which time he was to proceed into clinical rotations.

[Appellant] took the Step 1 United States Medical Licensing Examination ("Step 1") in September 2010 and commenced his family medicine clinical rotation, performing his clerkship with Dr. Anthony Sahar at Dr. Sahar's office in Long Branch, New Jersey; [Appellee] Dr. John Dalton also supervised [Appellant] during the clerkship. Although [Appellant] received what he deemed "a shining evaluation" at the midpoint of his clerkship, Dr. Sahar ultimately failed [Appellant] for the clerkship. [Appellant] alleges he received a "U" in this clerkship due to Dr. Sahar's prejudice against [Appellant]'s ethnicity and because Dr. Sahar misinterpreted a question asked by [Appellant] in front of a patient as a challenge to Dr. Sahar's authority and medical judgment. [Appellant] also failed the required shelf exam following his clerkship with Dr. Sahar; as a result, [Appellant] failed the entire family medicine clinical rotation. During his family medicine clerkship, [Appellant] learned he also failed the Step 1 exam. [Appellant] re-took the Step 1 exam in early 2011.

Meanwhile, [Appellant] appealed his grade in the clerkship to [Appellee] Dr. Jennifer Hamilton, the director of the Drexel Medicine Family Medicine Clerkship program. Dr. Hamilton refused to change [Appellant]'s clerkship grade from "U" to "MU." [Appellant] then appealed Dr. Hamilton's decision to [Appellee] Eugene Hong, Chairman of the Family Medicine Department at Drexel University School of Medicine. Dr. Hong refused to change [Appellant]'s grade. [Appellant] appealed Dr. Hong's decision to [Appellee] Dr. Barbara Schindler, Vice Dean of Education and Academic Affairs at Drexel Medicine. Although Dr. Schindler refused to change [Appellant]'s grade, she allowed him to repeat the family medicine clinical rotation, including the clerkship. Accordingly, even though he failed the Step 1 exam, the family medicine clerkship, and the shelf exam, Drexel

Medicine did not dismiss [Appellant]; rather, [Appellant] was again permitted the opportunity to re-take all of the courses and exams he failed.

Prior to [Appellant] starting his OB/GYN clerkship in February 2011, [Appellee] Drexel Medicine, through [Appellee] Dr. Amy Fuchs, Associate Dean of Academic Affairs, presented [Appellant] with "the February 2011 letter" which imposed several additional conditions on Plaintiff if he wished to remain enrolled at the school. These conditions included that he must complete all of his remaining clerkships in the Philadelphia area, and that any grade less than "Satisfactory," including a grade of "U" or "MU," would result in his dismissal from Drexel Medical School. Although [Appellant] passed his OB/GYN clerkship, he failed his OB/GYN shelf exam; as a result, [Appellant] received a "MU" grade in the OB/GYN clinical rotation, Drexel Medicine dismissed [Appellant] from the medical school. [Appellant] pursued all available appeals, without success.

Trial Court Opinion, 10/24/16, at 4-5 (unpaginated) (footnotes omitted).

In September 2011, Appellant filed a complaint with the Pennsylvania Human Relations Commission to be reinstated at Drexel University College of Medicine ("Drexel Medicine"). Appellant then filed a complaint with the Department of Education, Office of Civil Rights seeking reinstatement. In November 2011, Appellant filed a complaint in the United States District Court for the Eastern District of Pennsylvania, alleging a racially motivated breach of contract in violation of 42 U.S.C. § 1981(b). The District Court denied Appellant's summary judgment motion and granted the Appellee's cross-motion for summary judgment. ***Ke v. Drexel Univ. et al.***, 2015 WL 5316492 (unreported opinion) (E.D. Pa. 2015). In March 2016, the United States Court of Appeals for the Third Circuit affirmed the District Court's judgment, and the United States Supreme Court denied certiorari and

Appellant's request for a hearing. ***Ke v. Drexel Univ. et. al.***, 645 F. App'x. 161 (3d. Cir. 2016), *cert. denied*, 137 S. Ct. 384 (2016), *reh'g denied*, 137 S. Ct. 720 (2017).

In January 2016, Appellant commenced this action by filing a writ of summons against Appellees. In March 2016, Appellant filed a complaint alleging several violations of the Unfair Trade Practice and Consumer Protection Law. ("UTCPL"). Appellant's basic assertion was that Drexel Medicine violated the UTCPL in fraudulently modifying the terms of the 2006 Student Handbook. Appellees filed preliminary objections asserting that Appellant's claims were barred by the doctrines of collateral estoppel, *res judicata* and *lis pendens* based on the rulings of the United States District Court and United States Court of Appeals for the Third Circuit. In August 2016, the court sustained Appellees' preliminary objections and dismissed Appellant's complaint.

Appellant timely filed a court-ordered Pa. R.A.P. 1925(b) statement. In his 1925(b) statement, Appellant generally challenges the August 10, 2016, order relying on Pa.R.A.P. 1925(b)(4)(vi):

If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the statement will not be grounds for finding waiver.

The trial court issued a responsive opinion.

Appellant raises the following issues for our review:

1. Whether an invalid "final judgment" on federal questions in federal courts bars a litigant's state action predicated on state causes of action.
2. Whether collateral estoppel requires the specification of the issue to be precluded.
3. Whether unfair and deceptive educational services are actionable under the UTPCPL.

Appellant's Brief at 4.¹

Appellant asserts a breach of contract claim alleging that Appellees violated the UTPCPL in fraudulently modifying the terms of the 2006 Student Handbook. Appellant appeals from the order granting Appellee's preliminary objections and dismissing his complaint. Our scope of review over a trial court's decision to sustain a litigant's preliminary objections is well-settled:

Our standard of review mandates that on an appeal from an order sustaining preliminary objections which would result in the dismissal of suit, we accept as true all well-pleaded material facts set forth in the Appellant[s] complaint and all reasonable inferences which may be drawn from those facts. This standard is equally applicable to our review of PO's in the nature of a demurrer. Where, as here, upholding sustained preliminary objections would result in the dismissal of an action, we may do so only in cases that are clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear

¹ The first matter argued in Appellant's brief is not contained in his statement of issues, nor in his generalized 1925(b), which challenges the August 10, 2016 order. Rather, the argument refers to Appellant's preliminary objections denied by the trial court on June 14, 2016. Appellant's Brief at 21. Matters raised for the first time on appeal are not properly preserved for appellate review and will not be considered. **See *Kimmel v. Somerset Cty. Cmm'r*, 333 A.2d 777, 779 (1975).** Accordingly, we conclude that this issue has not been preserved for our review.

with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objection.

We review for merit and correctness – that is to say for an abuse of discretion or an error of law. This case was dismissed at the preliminary objections stage on issues of law, our scope of review is thus plenary.

Reardon v. Allegheny College, 926 A.2d 477, 480 (Pa. Super. 2007)

(citation omitted).

The first and second issues raised in Appellant's statement of issues, addressed in Sections II A and II B of Appellant's brief, both concern the doctrine of collateral estoppel.² We will address them together, as they are dispositive and accordingly we will not address Appellant's third issue. To determine whether Appellant's claim is barred by collateral estoppel we must evaluate the following factors:

- (1) The issue decided in the prior case is identical to one presented in the later case;
- (2) There was a final judgment on the merits;
- (3) The party against whom the plea is asserted was a party or in privity with a party in the prior case;

² We need not address Appellant's arguments in detail. Appellant suggests that collateral estoppel does not apply here because this Court is not bound by federal judgments and because numerous exceptions to the doctrine apply. To the contrary, federal judgments are owed their due force and full effect in state courts. ***In Re Stevenson***, 40 A.3d 1212, 1222 (Pa. 2012). Further, there are no exceptions to the doctrine relevant here.

- (4) The party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and
- (5) The determination in the prior proceeding was essential to the judgment.

Catroppa v. Carlton, 998 A.2d 643, 646 (Pa. Super. 2010).

The doctrine of collateral estoppel "operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit." ***Day v. Volkswagenwerk Aktiengesellschaft***, 464 A.2d 1313, 1318 (Pa. Super. 1983). In the instant matter, the doctrine was properly applied. Each of the factors will be addressed below.

Appellant first raised his breach of contract claim in the United States District Court for the Eastern District of Pennsylvania, asserting that his dismissal from Drexel Medicine was a racially motivated breach of contract. The contract at issue was the 2006 Student Handbook. The court rejected Appellant's claim, granting Appellee summary judgment. On appeal, the Third Circuit held that:

[Appellant]'s contract with [Drexel Medicine] had been modified by the conditions imposed by the Dean on his initial re-enrollment, and the conditions imposed by the Promotion Committee after receiving a "U" in the Family Medicine clinical. [Appellant] accepted those conditions each time by re-enrolling or continuing his enrollment at [Drexel Medicine]. Thus, [Appellant] was subject to the more stringent condition that an "MU" was sufficient for his dismissal. And we do not find any evidence in the record that racial animus, either direct or circumstantial, motivated the imposition of those conditions.

Ke v. Drexel Univ. et. al., 645 F. App'x. at 165 (Concluding that the 2016 Student Handbook contract was not breached, as its terms were modified in 2009 and 2011).

Despite the fact that Appellant is now presenting his claim as a violation of the UTPCPL, the underlying issue is the same. In the instant case Appellant asserts that "his single MU grade in his repeat second year would not warrant his expulsion under the 2006 Student Handbook." Appellant's Reply Brief at 3. Thus, his underlying claim here is that he was dismissed in violation of the terms set forth in the 2006 Student Handbook, and thus Drexel Medicine was in breach of contract. This first factor has already been resolved by the federal courts in favor of Appellee.

The second factor; that final judgment in the previous action was rendered on the merits of the issues has also been met. A judgment is deemed final for purposes of collateral estoppel unless or until it is reversed on appeal. ***See Shaffer v. Smith***, 673 A.2d 872 (Pa. 1996). Appellant filed a complaint in the United States District Court in the Eastern District of Pennsylvania, which denied Appellant's summary judgment motion and granted Appellees' cross-motion for summary judgment. Appellant then filed an appeal to the Third Circuit, which affirmed the district court's ruling, and the United States Supreme Court denied certiorari. ***Ke v. Drexel Univ. et. al.***, 645 F. App'x. 161 (3d. Cir. 2016), *cert. denied*, 137 S. Ct. 384 (2016), *reh'g denied*, 137 S. Ct. 720 (2017).

The third factor has been met as Appellant was a party to both actions. The fourth factor; that the party against whom the defense is raised must have had a full and fair opportunity to litigate the issue was also met. Here, Appellant initiated the complaint in federal court, litigated his claim, and summary judgment was awarded. Further, the Third Circuit affirmed on appeal, and the U.S. Supreme Court denied further review. ***Id.***

Finally, the determination in the federal action was essential to the judgment thus satisfying the fifth factor. The Court found that Appellant's breach of contract claim was without merit, reasoning that:

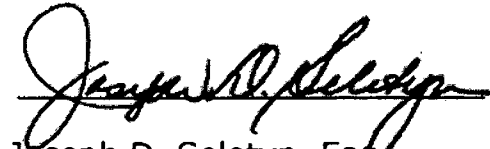
[Appellant] argues that the Student Handbook allowed him to remediate a grade of "MU," and thus he should not have been dismissed for the "MU" in his OB/GYN clerkship. But [Appellant]'s contract with DUCOM had been modified by the conditions imposed by the Dean on his initial re-enrollment, and the conditions imposed by the Promotion Committee after receiving a "U" in the Family Medicine clinical. [Appellant] accepted those conditions each time by re-enrolling or continuing his enrollment in DUCOM. Thus, [Appellant] was subject to the more stringent condition that a "MU" was sufficient for his dismissal. And we do not find any evidence in the record that racial animus, either direct or circumstantial, motivated the imposition of those conditions.

Ke v. Drexel et. al., 645 F. App'x. at 165.

It is clear that all issues have been litigated and determined finally; and Appellant cannot relitigate them in this action. Thus, the trial court properly granted Appellees' preliminary objections.

Application for relief is granted.³ Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/15/2017

³ On April 21, 2007, Appellant filed an application for relief, seeking leave to file an addendum to his appellate brief. We grant Appellant's motion for relief; however, the addendum is nonsensical and does not alter the court's opinion.

**IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT**

LEI KE,

: No. 2587 EDA 2016

Appellant

v.

JOHN FRY, JENNIFER HAMILTON,
AMY FUCHS, SAMUEL PARRISH,
RICHARD HOMAN, MARIANNE SAHAR
(ON BEHALF OF ANTHONY SAHAR,
DECEASED), JOHN DALTON, JOSEPH
SALOMONE, BARBARA SCHINDLER,
EUGENE HONG AND JOHN
GYLLENHAMMER

ORDER

IT IS HEREBY ORDERED:

THAT the application filed July 17, 2017, requesting reconsideration/
reargument of the decision dated June 15, 2017, is DENIED.

PER CURIAM

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

LEI KE

v.

JOHN FRY, et al.

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:
:

**JANUARY TERM 2016
NO. 2073**

OFFICE OF THE CLERK
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OPINION

New, J.

October , 2016

For the reasons set forth below, the Court requests its Order dated August 10, 2016, be affirmed.

FACTUAL AND PROCEDURAL HISTORY

This case is the third chapter in the legal odyssey arising from Plaintiff Lei Ke's 2011 dismissal from Defendant Drexel University School of Medicine.¹

Plaintiff matriculated at Drexel University School of Medicine in August 2007, at which time he received a copy of the 2006 Student Handbook.² According to Plaintiff, the contents of the 2006 Student Handbook are a contract that sits at the center of Plaintiff's claims in the case

¹ In 2011, Plaintiff filed a lawsuit against Drexel Medicine, Dr. Anthony Sahar, Dr. Samuel Parrish, Dr. Amy Fuchs, Dr. Jennifer Hamilton, and Dr. Richard Homan in the Eastern District of Pennsylvania. The case was assigned to the Honorable Joel Slomsky. After two years of litigation, Judge Slomsky granted the defendants' motion for summary judgment and entered judgment in their favor. By unpublished per curiam Opinion dated March 27, 2016, the Third Circuit affirmed the Eastern District's entry of judgment in favor of the Drexel Defendants. In 2013, Plaintiff filed suit against Drexel University in the Philadelphia Court of Common Pleas. The Common Pleas case, Ke v. Drexel University, June Term 2013 No. 3506, is currently stayed.

² Plaintiff's Complaint is rambling, incoherent, and omits many facts detailed in Judge Slomsky's Opinion and the Third Circuit Opinion. Nevertheless, this Court restricts its factual recitation to those well-pleaded facts contained in Plaintiff's Complaint.



sub judice. The Student Handbook provides that a grade of “U,” or unsatisfactory, is considered a failing grade while a grade of “MU,” or marginally unsatisfactory, is an interim grade used to show a student is in danger of failing, but allows the student an opportunity to remediate the grade. During his second year of medical school, Plaintiff failed four courses, receiving grades of “U” in each course. Plaintiff alleges that rather than allowing him to take “makeup exams without paying extra tuition and fees,” Drexel Medicine made him repeat the failed courses, at a cost of \$38,893.24. Complaint at ¶ 18. Additionally, Drexel Medicine, through Dean of the Medical School Dr. Richard Homan, presented Plaintiff with “the 2009 letter,” which provided that if he failed any clinical course, he would be dismissed from the school.³ Plaintiff repeated the four courses and passed,⁴ at which time he was to proceed into clinical rotations.

Plaintiff took the Step 1 United States Medical Licensing Examination (“Step 1”) in September 2010 and commenced his family medicine clinical rotation, performing his clerkship with Dr. Anthony Sahar at Dr. Sahar’s office in Long Branch, New Jersey; Defendant Dr. John Dalton also supervised Plaintiff during the clerkship. Although Plaintiff received what he deemed “a shining evaluation” at the midpoint of his clerkship, Dr. Sahar ultimately failed Plaintiff for the clerkship. Plaintiff alleges he received a “U” in this clerkship due to Dr. Sahar’s

³ A student’s grade in the clinical rotation consisted of two parts: 1) 80% of a student’s grade was based on the clerkship, where students spent approximately one month practicing medicine under the supervision of licensed physicians, and 2) the remaining 20% was based on the student’s performance on the end of clerkship exam. *E.g.* Complaint at ¶¶ 67, 99(2).

⁴ The Court notes Plaintiff alleges he passed the four courses. Complaint at ¶ 19. Both Judge Slomsky’s Opinion and the Third Circuit Opinion indicate Plaintiff failed one of the four courses a second time; however, he was not dismissed from the University. Rather, Plaintiff was permitted to remediate his grade by sitting for, and passing, the National Board of Medical Examiners subject exam, also known as a “shelf exam.” *Ke v. Drexel University*, ___ F.Appx. ___, 2016 WL 1105404 at *1 (3d Cir. March 22, 2016); *Ke v. Drexel University*, 2015 WL 5316492 at *3 (E.D. Pa. September 4, 2015).

prejudice against Plaintiff's ethnicity⁵ and because Dr. Sahar misinterpreted a question asked by Plaintiff in front of a patient as a challenge to Dr. Sahar's authority and medical judgment. Plaintiff also failed the required shelf exam following his clerkship with Dr. Sahar; as a result, Plaintiff failed the entire family medicine clinical rotation. During his family medicine clerkship, Plaintiff learned he also failed the Step 1 exam. Plaintiff re-took the Step 1 exam in early 2011.

Meanwhile, Plaintiff appealed his grade in the clerkship to Defendant Dr. Jennifer Hamilton, the director of the Drexel Medicine Family Medicine Clerkship program. Dr. Hamilton refused to change Plaintiff's clerkship grade from "U" to "MU." Plaintiff then appealed Dr. Hamilton's decision to Defendant Dr. Eugene Hong, Chairman of the Family Medicine Department at Drexel University School of Medicine. Dr. Hong refused to change Plaintiff's grade. Plaintiff appealed Dr. Hong's decision to Defendant Dr. Barbara Schindler, vice dean of education and academic affairs at Drexel Medicine. Although Dr. Schindler refused to change Plaintiff's grade, she allowed him to repeat the family medicine clinical rotation, including the clerkship. Accordingly, even though he failed the Step 1 exam, the family medicine clerkship, and the shelf exam, Drexel Medicine did not dismiss Plaintiff; rather, Plaintiff was again permitted the opportunity to re-take all of the courses and exams he failed.

Prior to Plaintiff starting his OB/GYN clerkship in February 2011, Defendant Drexel Medicine, through Defendant Dr. Amy Fuchs, associate dean of academic affairs, presented Plaintiff with "the February 2011 letter" which imposed several additional conditions on Plaintiff if he wished to remain enrolled at the school. These conditions included that he must complete all of his remaining clerkships in the Philadelphia area, and that any grade less than

⁵ Plaintiff was born in China.

“Satisfactory,” including a grade of “U” or “MU,” would result in his dismissal from Drexel Medical School. Although Plaintiff passed his OB/GYN clerkship, he failed his OB/GYN shelf exam; as a result, Plaintiff received a “MU” grade for the OB/GYN clinical rotation. On May 13, 2011, following his receipt of the “MU” grade in the OB/GYN clinical rotation, Drexel Medicine dismissed Plaintiff from the medical school. Plaintiff pursued all available appeals, without success.

Plaintiff commenced this action on January 17, 2016 by filing a Writ of Summons against 1) John Fry, President of Drexel University, 2) John Gyllenhammer, in-house counsel for Drexel University, 3) Dr. Eugene Hong, 4) Dr. Jennifer Hamilton, 5) Dr. Amy Fuchs, 6) Dr. Samuel Parrish, 7) Dr. Richard Homan, 8) Dr. Marianne Sahar as administratrix of the estate of Dr. Anthony Sahar, 9) Dr. John Dalton, 10) Joseph Salomone, Registrar of Drexel University, and 11) Dr. Barbara Schindler. The Complaint, filed on March 19, 2016, alleges four violations of the Unfair Trade Practice and Consumer Protection Law: Count I – violation of § 201-2(4)(i), Count II violation of § 201-2(4)(ii), Count III violation of § 201-2(4)(xiv), and Count IV violation of § 201-2(4)(xxi).

All Defendants filed Preliminary Objections. The Drexel Defendants’ Preliminary Objections argue 1) demurrer to each UTPCPL claim, and 2) Plaintiff’s claims are barred by the doctrine of collateral estoppel based on the rulings of Judge Slomsky and the Third Circuit. Additionally, Dr. Dalton and the Estate of Dr. Sahar both argue this Court lacks personal jurisdiction over them. Plaintiff filed a Response to Defendants’ Preliminary Objections in which he addresses the merits of the personal jurisdiction claims and the application of collateral estoppel; however, Plaintiff’s response does not address the demurrers filed by Defendants. By Order dated August 10, 2016, this Court sustained Defendants’ Preliminary Objections and

dismissed Plaintiff's Complaint. The next day, Plaintiff filed this appeal.

ANALYSIS

In reviewing preliminary objections, a trial court must accept as true all well-pleaded material facts set forth in the complaint and any reasonable inferences therefrom. Glover v. Urden Law Offices, P.C., 139 A.3d 195, 196 (Pa. 2016). Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint, and should only be granted when the pleader is unable to prove facts legally sufficient to establish the right to relief. Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011).⁶

In his first claim, Plaintiff alleges all Defendants violated § 201-2(4)(i) of Pennsylvania's Unfair Trade Practices and Consumer Protection Act. Under the UTPCPL, a defendant has committed an unfair or deceptive trade practice by "passing off goods or services as those of another . . ." 73 P.S. § 201-2(4)(i).

A review of the Complaint shows there are no allegations of any Defendant passing off any goods or services as those of another. Indeed, there are no allegations that any Defendant offered, let alone passed off, any goods or services at all. See 13 Pa.C.S.A. §2105 (a) (defining "goods" as all things which are movable at the time of identification to the contract other than the money in which the price is to be paid); Black's Law Dictionary 1576 (10th ed. 2014)(defining services as being employed to serve another; duty or labor to be rendered by one person to another). The Complaint alleges Defendants "tried to pass off the 2009 and 2011 letters ... as the goods or services/terms and conditions offered by the 2006 Student Handbook." Complaint at ¶ 52. Thus, Plaintiff argues Defendants attempted to pass off the contractual terms

⁶ For the purposes of this Opinion and for the sake of judicial economy, this Court assumes *arguendo* it has personal jurisdiction over Dr. Dalton and Dr. Sahar.

contained in “the 2009 letter” and “the February 2011 letter” in place of the contractual terms contained in the 2006 Student Handbook. Id. at ¶¶ 49-46. It is hornbook law that a contract is neither a good nor a service; rather, a contract is a promise or an agreement between parties. See e.g. Williston on Contracts § 1:1 (4th ed.) (defining a contract as “a promise or set of promises for breach of which the law provides a remedy ...”). For this reason, Plaintiff failed to state a claim under § 201-2(4)(i).

Furthermore, this Court is collaterally estopped from addressing Plaintiff’s arguments that Drexel Medicine improperly dismissed him for receiving a “MU” grade in his OB/GYN course even though the Student Handbook provided that an “MU” was only an interim grade. “Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated.” Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995). “Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party ... against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.” Catroppa v. Carlton, 998 A.2d 643, 646 (Pa. Super. 2010).

One cause of action raised by Plaintiff in his federal case was “racially motivated breach of contract” under 42 U.S.C. § 1981. See Ke, 2015 WL 5316492 at * 31 (E.D.P.A. September 4, 2015). Judge Slomsky granted summary judgment in favor of the defendants on this claim, finding there was no racially motivated breach of contract. Id. In their Opinion affirming Judge Slomsky, the Third Circuit found there was not a breach of contract because “[Plaintiff’s]

contract with [Drexel Medicine] had been modified by the conditions imposed by the Dean on his initial re-enrollment [“the 2009 letter”], and the conditions imposed by the Promotion Committee after receiving a “U” in the Family Medicine clinical [“the February 2011 letter”]. [Plaintiff] accepted those conditions each time by re-enrolling or continuing his enrollment in [Drexel Medicine]. Thus, [Plaintiff] was subject to the more stringent condition that an “MU” was sufficient for his dismissal.” Ke, ___ F.Appx. ___, 2016 WL 1105404 at *3.

The Third Circuit’s decision meets all of the requirements for collateral estoppel to apply. First, the issue decided by the Third Circuit – that “the 2009 letter” and “the February 2011 letter” were legally valid amendments to the contractual terms contained in the 2006 Student Handbook – is also present in this case. Second, the Third Circuit’s Opinion was a final adjudication on the merits because the Third Circuit resolved the substantive conflict between the parties.⁷ Black Top Paving v. Equimark Commercial Finance, 35 Pa. D. & C.3d 462, 464 (Pa. Ct. Com. Pl. 1985)(stating “to determine whether the issue was decided on the merits, the court must look to the entire record ... with a view toward establishing exactly what the factfinder ... decided”). Third, the party against whom collateral estoppel is being used, Plaintiff Lei Ke, was a party to both actions. Fourth, Lei Ke, as the plaintiff in both actions, had a full and fair opportunity to litigate this issue in the Eastern District and in the Third Circuit. See also Ke, ___ F.Appx. ___, 2016 WL 1105404 at *4 fn 12 (stating “We commend Judge Slomsky for his patience and diligence in guiding this case to resolution”). Finally, as demonstrated above, the

⁷ This Court notes that although Plaintiff filed a Petition for Writ of Certiorari with the United States Supreme Court on July 20, 2016, the Supreme Court has not yet acted on Plaintiff’s Petition. See Ke v. Drexel University, et al., Docket No. 16-5793 (U.S. 2016). Since the United States Supreme Court has not yet reversed the Third Circuit, the Third Circuit’s decision is final for purposes of collateral estoppel. Shaffer v. Smith, 673 A.2d 872, 874-75 (Pa. 1996)(holding that a judgment is final for purposes of collateral estoppel unless and until it is reversed on appeal).

Third Circuit's determination that "the 2009 letter" and "the February 2011 letter" were legally valid amendments to the contractual terms contained in the 2006 Student Handbook was essential to the finding that Plaintiff failed to establish a claim of racially motivated breach of contract.

Plaintiff argues the doctrine of collateral estoppel does not apply for two reasons. First, Plaintiff argues this Court is not bound by the holdings of federal courts.⁸ This argument is misplaced. Pennsylvania state courts are not bound by the legal reasoning of the lower federal courts; however, Pennsylvania state courts are bound by judgments of the lower federal courts. In Re Stevenson, 40 A.3d 1212, 1222 (Pa. 2012). Since collateral estoppel requires a final judgment of a court of competent jurisdiction and Pennsylvania courts are bound by judgments of lower federal courts, Pennsylvania courts are bound by federal decisions for the purposes of collateral estoppel. Id. Second, Plaintiff argues that if collateral estoppel does apply, it applies to his benefit. This is because in the 2013 Common Pleas case, Plaintiff included a claim based on the UTPCPL. The Honorable Marlene Lachman overruled the defendants' preliminary objection to the UTPCPL claim. Accordingly, Plaintiff argues this Court is collaterally estopped from sustaining the Preliminary Objections to his UTPCPL claims in this case because Judge Lachman previously overruled preliminary objections to his UPTCPL claim in the 2013 Common Pleas case. This argument applies the doctrine of collateral estoppel incorrectly. As is

⁸ To support this argument, Plaintiff cites the Superior Court's unreported decision in Newell v. Colorado Café, 2015 WL 6457835 at *2 fn. 2 (Pa. Super. 2015). Although Superior Court I.O.P. §65.37 provides that an unpublished memorandum decision "shall not be relied upon or cited by a Court or a party in any other action or proceeding ...," this Court reviewed the Newell decision and finds it to be easily distinguishable. In Newell, the Superior Court, at footnote 2, noted that it was not bound by the legal reasoning of the lower federal courts; here, this Court is being asked to recognize *judgments* of the federal courts.

discussed above, collateral estoppel only applies when there has been a final judgment. Judge Lachman's ruling was not a final judgment because it did not end the litigation, dispose of the entire case, or effectively puts any litigant out of court. Popowsky, 647 A.2d at 305.

Accordingly, Judge Lachman's ruling on Plaintiff's UTPCPL claims in the 2013 Common Pleas case has no effect, for collateral estoppel purposes, on this case. For all of the foregoing reasons, this Court is collaterally estopped from deciding any claim based on the averment that Drexel Medicine improperly dismissed Plaintiff for receiving a "MU" grade in his OB/GYN course even though the Student Handbook provided that an "MU" was only an interim grade.

Turning to Plaintiff's second claim, under § 201-2(4)(ii), a defendant commits an unfair or deceptive trade practice by "[causing] the likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services." 73 P.S. § 201-2(4)(ii).

While Plaintiff's Complaint is replete with allegations that the Drexel Defendants caused confusion or misunderstanding, none of the allegations concerning confusion or misunderstanding relate to the source, sponsorship, approval, or certification of *goods or services*. Instead, all of the allegations concerning confusion or misunderstanding relate to the contractual terms contained within the 2006 Student Handbook, the 2009 letter and the 2011 letter. See Complaint at ¶¶ 62-64(15). Accordingly, for all of the reasons set forth above, Plaintiff's Complaint fails to state a claim under § 201-2(4)(ii).

Plaintiff's third claim is based on a violation of § 201-2(4)(xiv) of the UTPCPL. Under § 201-2(v)(xiv), a defendant commits an unfair or deceptive trade practice by "failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to, or after a contract for the purchase of goods or services is made." 73 P.S. § 201-2(4)(xiv). Here, the only written guarantee or warranty alleged, or alluded to, by Plaintiff is the terms of 2006 Student

Handbook. See generally Complaint.

Plaintiff argues Defendants failed to honor the guarantees provided by the Student Handbook because they denied him the ability to appeal his family medicine clerkship grade to the dean of the medical school, even though the Student Handbook provided such a right. See Complaint at ¶ 73 (alleging the Handbook provided “Students may make a final appeal of an action of the Student Appeals Committee to the Dean of the College of Medicine. Students may appeal to the Dean only when they have made all other appeals up to and including an appeal to the Student Appeals Committee The student may appeal the decision of the Student Promotions Committee to the Dean of the College of Medicine”). Yet in the very same paragraph, Plaintiff admits he did not file an appeal to the dean of the medical school, instead, alleging “[Plaintiff] was *thinking* of appealing his false family medicine clerkship grade” Id. (emphasis added). While Plaintiff then attempts to explain *why* he did not appeal, he never alleges that he *tried* to appeal and was denied the right to do so. Id. Logically, the Drexel Defendants cannot be found to have failed to comply with their own written warranty by failing to provide Plaintiff with a chance to appeal when Plaintiff admits he did not seek such an appeal.

Plaintiff avers three other ways in which the Defendants violated § 201-2(4)(xiv) – 1) Defendants knew he had not failed his family medicine clerkship, see Complaint at ¶¶ 67-68, 2) Plaintiff should have been permitted to take the family medicine shelf exam again, see Complaint at ¶¶ 69-70, and 3) Plaintiff was denied his “due process rights” by not being given a hearing with Dr. Fry, the president of Drexel University, following his dismissal from the medical school. Complaint at ¶¶ 71-72. None of these arguments supports a claim for failing to honor the terms of a warranty. First, Plaintiff’s argument concerning Defendants “knowing” that he had not failed his family medicine clerkship is neither factually correct nor legally relevant.

While Plaintiff strenuously disagrees with the reasons underlying his failing grade in the family medicine clerkship, Plaintiff himself admits he received a failing grade in his family medicine clerkship. Furthermore, any knowledge Defendants had with respect to the basis for Plaintiff's family grade in his family medicine clerkship is irrelevant to the question of whether Defendants honored the warranty set forth in the Student Handbook. Second, Plaintiff's arguments concerning allowing him to make up the family medicine shelf exam are irrelevant because the fact remains that he received a "U" in his family medicine clinical rotation because he failed the clerkship portion of the clinical rotation. Finally, Plaintiff's averment that he was denied a hearing with President Fry are meritless because Plaintiff does not cite any term of the 2006 Student Handbook guaranteeing a hearing before the president of the university. For all of these reasons, Plaintiff failed to state a cause of action under § 201-2(4)(xiv).

In his final claim, Plaintiff alleges a violation of the "catch-all" provision of the UTPCPL. Under the "catch-all" provision, a defendant commits an unfair or deceptive trade practice by "engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." 73 P.S. § 201-2(4)(xxi).

Here, Plaintiff succinctly states the basis for his "catch-all" UTPCPL claim when he pleads, "specifically, defendants' unfair and deceptive conduct is shown in their having formulated all the contracts on the one hand and violating them on the other hand as though contracts existed purely to let them manipulate and students had not right to them at all." Complaint at ¶ 78. Plaintiff then recites the litany of complaints that were litigated, reviewed, and rejected, in the federal litigation. Complaint at ¶¶ 78-100.

Plaintiff's allegations of fraud and deception all surround the allegation that Defendants improperly dismissed him from the medical school in contravention of the contractual terms

contained in the 2006 Student Handbook. However, as discussed in detail above, this Court is collaterally estopped from determining whether Defendant Drexel Medicine acted improperly in dismissing Defendant from the medical school because the federal courts have previously found that there was no breach of contract.

For the reasons set forth above, Plaintiff's Complaint fails to set forth any valid claims against any defendant. Furthermore, this Court found that there was not a reasonable possibility that the filing of an amended pleading could cure the infirmities discussed above; accordingly, this Court did not permit Plaintiff the opportunity to file an amended complaint. See Wiernik v. PHH U.S. Mortg. Corp., 736 A.2d 616, 624 (Pa. Super. 1999)(stating "where allowance of an amendment would ... be a futile exercises, the complaint may be properly dismissed without allowance for amendment")(internal citation omitted).

WHEREFORE, for the reasons set forth above, this Court requests that the Superior Court affirm its Order of August 10, 2016.

BY THE COURT:



ARNOLD L. NEW, J.

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

LEI KE,

Petitioner

v.

JOHN FRY, JENNIFER HAMILTON, AMY
FUCHS, SAMUEL PARRISH, RICHARD
HOMAN, MARIANNE SAHAR (ON
BEHALF OF ANTHONY SAHAR,
DECEASED), JOHN DALTON, JOSEPH
SALOMONE, BARBARA SCHINDLER,
EUGENE HONG AND JOHN
GYLLENHAMMER,

Respondents

No. 454 EAL 2017

Petition for Allowance of Appeal from
the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 27th day of March, 2018, the Application to File an Addendum, which was docketed on October 9, 2017, be GRANTED, and the Applications to File an Addendum, Motions for Leave to File a Response, and the Petition for Allowance of Appeal be DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEI KE,

Plaintiff,

v.

DREXEL UNIVERSITY, et al.,

Defendant.

CIVIL ACTION
NO. 11-6708

OPINION

Slomsky, J.

September 4, 2015

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Moreover, DUCOM's student handbook—the legality of which Plaintiff does not contest—mandates that the Promotions Committee review the academic record of any student with more than one grade below Satisfactory in a given year to determine whether the student should be dismissed. Accordingly, even without the conditions imposed on Plaintiff for his continued enrollment at DUCOM, his poor academic performance could have been considered grounds for dismissal.

Upon a showing by Defendants that a legitimate non-discriminatory reason motivated the dismissal, Plaintiff is required to show that Defendants' "reason [for dismissal] was false, and that discrimination was the real reason." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 412-13 (3d Cir. 1999). Plaintiff has failed to make such a showing. Accordingly, Plaintiff has not raised a genuine issue of material fact to permit the Court to disbelieve Defendants' reason for dismissing Plaintiff, or to believe that racial discrimination motivated Plaintiff's dismissal. For these reasons, Defendants' Motion for Summary Judgment on Counts I and IV which contain claims that Defendants intentionally discriminated against him in violation of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, respectively, will be granted.

B. Plaintiff Has Failed to Establish a Claim for Racially Motivated Breach of Contract Under 42 U.S.C. § 1981

In addition to bringing a claim of intentional discrimination under 42 U.S.C. § 1981 as alleged in Count I, Plaintiff attempts to bring a claim under the same statute that he titles "racially motivated breach of contract" in Count VII against all Defendants. Plaintiff summarizes this claim as follows:

[s]o [D]efendants violated § 1981(b) when they breached contracts with [P]laintiff because of their discriminatory intent, which was their racial motivation not to let [P]laintiff, a student born in "Communist China," enjoy fully the "benefits, privileges, terms, and conditions" of the student handbook, student manuals, and

Drexel University's Code of Conduct [] and 'Academic Policies.' [sic] while treating white and [African-American] students more favorably.

(Doc. No. 632 at 32.) The problem with Plaintiff's claim, however, is that this claim is duplicative of his Count I claim and therefore summary judgment will be entered in Defendants favor on this claim.

According to Plaintiff, "racially motivated breach of contract" under Section 1981 requires a showing that Defendants breached their contract with Plaintiff because of his race. This is simply a repackaging of his intentional discrimination claim under Section 1981. As described above, in order to succeed on a claim of intentional discrimination under 42 U.S.C. § 1981, a plaintiff must show: (1) that he belongs to a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in Section 1981, including the right to make and enforce contracts. Brown, 250 F.3d at 797. Plaintiff here has attempted to create a duplicative cause of action under Section 1981 by rebranding it "racially motivated breach of contract." For the same reasons advanced in the section above, however, Plaintiff has failed to establish that discrimination influenced Defendants' decision to dismiss Plaintiff—a breach of contract according to Plaintiff. Accordingly, he has not raised a genuine issue of material fact that his Count VII discrimination claim was "racially motivated."

The cases Plaintiff relies on to support this claim all involve breach of contract claims under state law. See Nathanson v. Medical College of Pa., 925 F.2d 1368, 1387 (3d Cir. 1991) (analyzing disabled student's state law breach of contract claim under Pennsylvania law); DMP v. Fay School ex rel. Bd. of Trustees, 933 F. Supp. 2d 213, 222 (D. Mass. 2013) (analyzing student's state law breach of contract claim under Massachusetts law); Kimberg v. Univ. of Scranton, No. 3:06cv1209, 2007 WL 40971, at *3 (M.D. Pa. Feb. 2, 2007) (analyzing dismissed

student's state law breach of contract claim against university under Pennsylvania law); Morris v. Yale Univ., 63 A.3d 991 (Conn. App. Ct. 2013) (alleging state law cause of action for breach of contract).²⁷

None of these cases refer to a cause of action for "racially motivated breach of contract" under 42 U.S.C. § 1981. Consequently, Plaintiff's claim for "racially motivated breach of contract" under Section 1981 fails and summary judgment will be granted in favor of Defendants on Count VII.

C. Plaintiff Has Failed to Raise a Genuine Issue of Material Fact Regarding His Claim of a Hostile Educational Environment

Plaintiff contends in Count III that he was subject to a hostile education environment in violation of 42 U.S.C. § 1981 by Drexel University, Dr. Sahar, and Dr. Parrish. The elements of this Section 1981 claim are the same as the elements of a hostile work environment under Title VII of the Civil Rights Act. McKenna v. Pac. Rail Serv., 32 F.3d 820, 826 n.3 (3d Cir. 1994). To succeed on a hostile educational environment claim, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was harassed because of race; (3) that defendant had actual knowledge of and was deliberately indifferent to the harassment; and (4) that the harassment was so severe and objectively offensive that it deprived plaintiff of access to the educational benefits or opportunities provided by the school. Daryl Releford v. Pennsylvania State Univ., No. 10-cv-1621, 2011 WL 900946, at *6 (M.D. Pa. March 14, 2011).

In examining whether an educational environment is "hostile," a court must examine the totality of the circumstances, such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

²⁷ On March 20, 2014, Plaintiff voluntarily dismissed his claim of breach of contract under Pennsylvania law. (Doc. No. 450.)

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 15-3377

LEI KE,
Appellant

v.

DREXEL UNIVERSITY; JOHN FRY;
RICHARD HOMAN; SAMUEL PARRISH;
AMY FUCHS; JENNIFER HAMILTON;
ANTHONY SAHAR

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-11-cv-06708)
District Judge: Honorable Joel H. Slomsky

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 16, 2016

Before: FUENTES, VANASKIE and SCIRICA, Circuit Judges

(Opinion filed: March 22, 2016)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

nom. Allston v. Lower Merion Sch. Dist., 135 S. Ct. 1738 (2015). The District Court painstakingly examined all of the evidence regarding students who received “U”s or “MU”s, who did not pass shelf exams or clinical rotations, and who were allegedly treated more favorably than Ke. The District Court, examining “all of the surrounding facts and circumstances,” see id. at 276, found no evidence that would lead to an inference that Ke was dismissed because of his race. See Dkt. #683 at 33-54. After examining the record, we similarly find no such evidence.

B. Racially-motivated Breach of Contract

As noted, we agree with the District Court that the record presents no evidence, direct or circumstantial, of discrimination. Thus, Ke’s claims of a “racially-motivated breach of contract,” and his claim that he endured a hostile education environment must fail. As for the contract claim, Ke argues that the Student Handbook allowed him to remediate a grade of “MU,” and thus he should not have been dismissed for the “MU” in his OB/GYN clerkship. But Ke’s contract with DUCOM had been modified by the conditions imposed by the Dean on his initial re-enrollment, and the conditions imposed by the Promotion Committee after receiving a “U” in the Family Medicine clinical. Ke accepted those conditions each time by re-enrolling or continuing his enrollment in DUCOM. Thus, Ke was subject to the more stringent condition that an “MU” was sufficient for his dismissal. And we do not find any evidence in the record that racial animus, either direct or circumstantial, motivated the imposition of those conditions.

As for the hostile environment claim, we agree with the District Court that most of the comments Ke referenced do not in any way suggest a discriminatory motive.⁸ And the comments by Dr. Sahar, see supra note 7, were limited in scope, and were not “sufficiently severe or pervasive to alter the conditions [of the clerkship] and create an abusive working environment.” See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (analyzing a hostile work environment in the Title VII context).⁹

C. Retaliation Claim

We agree with the District Court that Ke’s retaliation claims under Title VI and § 1981 fail because he did not allege that he engaged in protected activity. In other words, Ke does not claim that he was retaliated against because he complained of racial discrimination. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005) (holding in Title IX context that “retaliation against individuals because they complain of sex discrimination is intentional conduct that violates the clear terms of the statute” (quotation marks omitted)). While protected activity “includes not only an employee’s filing of formal charges of discrimination against an employer but also informal protests of discriminatory employment practices, including making complaints to management,” see Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193 (3d Cir. 2015) (quotation marks

⁸ For example, Ke complains that he was labeled as “awkward and immature,” “the weirdest guy I’ve ever met,” and “introverted.” None of these phrases implies racial animus.

⁹ We further note that Dr. Sahar was not present for much of the clerkship.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LEI KE : JUNE TERM, 2013
: :
vs. : No. 003506
: :
DREXEL UNIVERSITY : CONTROL No. 14022577

MEMORANDUM ORDER

AND NOW, this 31st day of March, 2014, upon consideration of Defendant Drexel University's Preliminary Objections to the Plaintiff's First Amended Complaint and the Plaintiff's response thereto, it is hereby **ORDERED** and **DECREED** that the Preliminary Objections are **OVERRULED in part** and **SUSTAINED in part** as follows:

1. The motion to strike the entire First Amended Complaint because of its inclusion of the individual defendants is **OVERRULED** as to Defendant Drexel University only. Drexel and its attorneys have not shown that they have the right or authority to act for the individual defendants and to assert objections and defenses on their behalves.¹

¹ The docket does not indicate that the Plaintiff served any of the defendants with original process as required by Pa.R.C.P. 400 et seq. Drexel waived any defects to service *on Drexel* by having its attorneys enter an appearance on its behalf and by filing preliminary objections which did not raise any issues regarding service *on Drexel*. The attorneys for Drexel entered their appearance on behalf of Drexel University *only*. They filed these preliminary objections on behalf of Drexel University *only*. The individual defendants are not represented *in this case* by Drexel's attorneys and neither Drexel nor its attorneys may act for them. Without proper service of original process or a waiver thereof, the individual defendants have not been made parties to this action. ***Burger v. Borough of Ingram***, 697 A.2d 1037, 1040 (Pa. Cmwlth. 1997) ("every name which appears in the caption of a complaint or a pleading is not necessarily a party to



2. The demurrer to punitive damages is **SUSTAINED without prejudice** as to Defendant Drexel University only.

3. The prior action pending or *lis pendens* motions to dismiss Counts I, III, IV, and V are **OVERRULED** as to Defendant Drexel University only.²

the action. ... Parties to an action are those who are named as such in the record of a case and have been properly served with process."); *Hill v. Ofalt*, 2014 PA Super 17, --- A.3d ---, 2014 WL 464212 at *4 n.5 ("Milestone never became a 'party to the action,' as Appellant never served Milestone with original process and Milestone never entered an appearance in this case.").

² Drexel did not sustain its burden of proving that the state and federal cases are the same, the parties are the same, and the rights asserted and relief prayed for are the same. *Crutchfield v. Eaton Corp.*, 2002 PA Super 286, 806 A.2d 1259, 1262. "The question of a pending prior action "is purely a question of law determinable from an inspection of the pleadings." *Id.* The federal court Third Amended Complaint is 206 paragraphs and 61 pages long and includes seven counts based on violations of federal statutes and three counts based on Pennsylvania law. Plaintiff's First Amended Complaint in the present action is 228 paragraphs and 86 pages long and has seven counts based on Pennsylvania law and none based on federal law. Drexel's attorneys did not analyze the specific allegations in the state court complaint. "This Court will not act as counsel and will not develop arguments on behalf of" a litigant. *Irwin Union Nat. Bank & Trust Co. v. Famous*, 2010 PA Super 145, 4 A.3d 1099, 1103. "It is not this Court's responsibility to comb through the record seeking the factual underpinnings" of a party's claim. *Id.*

Drexel's attorneys did not cite any authority for the dismissal of the entire state court complaint when they essentially conceded that three of the seven counts are *not* duplicated in the federal complaint. Drexel's attorneys also did not address the issue presented by three of the alleged duplicative causes of action being based on state law in the present complaint whereas they are based on federal law in the federal complaint. Nor did Drexel's attorneys address the issue of the different number of defendants in each case. *Virginia Mansions Condominium Ass'n v. Lampl*, 380 Pa.Super. 452, 456-457, 552 A.2d 275, 278 (1988) (the Superior Court rejected a claim of *lis pendens* because "neither the number nor the identity of the defendants in Lampl's complaint and counterclaim pleadings matched at the time VMCA's preliminary objections were before the court.").