IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT L. BREUDER,	)	
	)	
Plaintiff,	)	
	)	No. 15-cv-09323
v.	)	
	)	Judge Andrea R. Wood
BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 502, DUPAGE COUNTY, ILLINOIS, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants Bernstein, Hamilton, Mazzochi, and Napolitano's motion to stay all proceedings pending appeal [104] and Defendant Board of Trustees of Community College District No. 502, DuPage County, Illinois's ("Board") motion to certify for interlocutory appeal [106] are granted. Plaintiff's cross-motion to certify Defendants Bernstein, Hamilton, Mazzochi, and Napolitano's appeal as frivolous [117] is denied. Plaintiff's motion to strike the exhibits to and certain portions of the College of DuPage's reply [125] is denied as moot. See accompanying Statement for details.

STATEMENT

I. Background

This case concerns the termination of Robert Breuder from his position as President of the College of DuPage. After his termination, Breuder sued the Board of Trustees of Community College District No. 501 ("Board") and individual Board members Kathy Hamilton, Deanne Mazzochi, Frank Napolitano, and Charles Bernstein ("Individual Defendants," and together with the Board, "Defendants"), pursuant to 42 U.S.C. § 1983 ("Section 1983") for violating his rights under the Due Process Clause of the United States Constitution as well as for various state law violations. In particular, Breuder claims that, in suspending and terminating him without a proper hearing, the Defendants deprived him of his property interests in violation of his Due Process rights (Count I). Breuder also claims that in making defamatory, stigmatizing remarks about him, the Defendants deprived him of a liberty interest in violation of his Due Process rights (Count II). In addition, Breuder asserts a variety of state law claims against the Defendants. Specifically, Breuder claims that the Board breached his employment contract (Count IV), that the Individual Defendants tortuously interfered with his contract (Count V), and that the Individual Defendants defamed him (Count VI). Finally, Breuder brings a claim for conspiracy against the Individual Defendants (Count III), apparently under both federal and state law.

The Board and the Individual Defendants moved to dismiss the claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. Nos. 35, 38.) The Court denied the Board's motion in total. (Dkt. No. 100.) Specifically, with respect to Counts I and IV, the Court rejected the Board's argument that Breuder's employment contract was void *ab initio.* With respect to the Individual Defendants' motion, the Court granted it in part and denied it in part. As relevant here, the Court denied the motion with respect to Breuder's Due Process claims (Counts I and II) and his defamation claims stemming from statements made by the Individual Defendants to media outlets (in Count VI). In so doing, the Court denied the Individual Defendants' arguments that they were entitled to qualified immunity on those claims. The Individual Defendants have noticed an interlocutory appeal on the ground that their qualified immunity defense was improperly rejected and now move this Court to stay the proceedings here pending resolution of their appeal. (Dkt. Nos. 103, 104.) Meanwhile, the Board asks this Court to certify for interlocutory appeal the portion of the Court's ruling holding that Breuder's employment contract was not void *ab initio*. (Dkt. No. 106.) For his part, Breuder opposes the Board's and the Individual Defendants' motions and cross-moves this Court to certify the Individual Defendants' appeal as frivolous. (Dkt. No. 117.) [1]

II. Discussion

A. The Individual Defendants' Appeal

The Court begins its discussion with the last of the above-referenced issues: whether the Individual Defendants' appeal is frivolous. In its ruling, this Court denied the Individual Defendants' qualified immunity defense as to Counts I, II, and VI. (Memo. Op. & Order at 11–12, 13, 17–18, Dkt. No. 100.) Under *Behrens v. Pelletier*, 516 U.S. 299 (1996), an order denying qualified immunity, to the extent it turns on an issue of law, is a final judgment that is immediately appealable. *Id.* at 307, 310. In challenging the propriety of the Individual Defendants' appeal, Breuder cites the Seventh Circuit decision *Khorrami v. Rolince*, 539 F.3d 782 (7th Cir. 2008), for the proposition that where the Court sets aside a qualified immunity defense to be decided later, there is no appealable final judgment. *See id.* at 787. But *Khorrami* is readily distinguishable, as the district court in that case did not issue an order denying the qualified immunity defense. *Id.* Here, in contrast, the Court did issue an order denying the Individual Defendants' qualified immunity defense on Counts I, II, and VI. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 668 (7th Cir. 2012) (observing that *Khorrami* was distinguishable where the district court did actually deny motion to dismiss based on qualified immunity defense).

Breuder also argues that appellate jurisdiction does not lie because the denial of qualified immunity was based on the existence of factual questions not questions of law. But the Court's

[1] The Court presumes the reader's familiarity with the background facts set forth in the Court's previous opinion, *Breuder v. Bd. of Trustees of Cmty. Coll. Dist. No. 501, DuPage Cty., Illinois*, 2017 WL 839487, at *1 (N.D. Ill. Mar. 3, 2017). As it did for the Defendants motions to dismiss, the Court accepts the allegations of the Complaint as true for purposes of the instant motions. *See, e.g., Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009).

denial of the Individual Defendants' qualified immunity defense as to Count I is critically based on purely legal questions.[2] The Individual Defendants argued that Breuder's employment contract was void *ab initio*. Thus, according to the Individual Defendants, their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known" because if Breuder's contract was void then he had no property interest to ground any Due Process rights. (Indiv. Defs.' Memo. in Supp. of Mot. to Dismiss at 2, Dkt. No. 39 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). Based on the record, the Court determined that: first, the employment contract's termination provisions did not violate Public Community College Act ("PCCA") provisions regarding the Board's quorum and voting rules; second, the employment contract's termination provisions did not violate the Open Meetings Act ("OMA"); and third, the employment contract—which had a term that extended beyond the Board's term—was not statutorily beyond the ratifying Board's power. These three issues present pure questions of law.[3]

Breuder finally argues that the Individual Defendants' claims of immunity are a sham and thus the notice of appeal does not support appellate jurisdiction. But as the Seventh Circuit has instructed, this Court must act with restraint when certifying the frivolity of an appeal. *McMath v. City of Gary*, 976 F.2d 1026, 1030 (7th Cir. 1992). Here, the Individual Defendants have presented colorable arguments that the employment contract was void *ab initio*. Ultimately, this Court rejected those arguments, but they are not so wholly and utterly without merit as to be declared patently frivolous. *See Young v. Dart*, 2009 WL 2986109, at *1 (N.D. Ill. Sept. 15, 2009) (stating that interlocutory appeal of denial of qualified immunity is frivolous "when the decision concerning immunity is so plainly correct that nothing can be said on the other side" (internal quotations omitted)). Indeed, at least two of the issues rested upon the application of Illinois law to a novel set of facts. Thus, the Court denies Breuder's cross-motion to certify the Individual Defendants' appeal as frivolous.

B. The Board's Motion to Certify the Court's Ruling for Interlocutory Appeal

In this case, Breuder claims that the Board violated his Due Process rights and breached his employment contract by suspending and terminating him without a proper hearing. In response, like the Individual Defendants, the Board argued in its motion to dismiss that those claims fail because Breuder's employment contract was void *ab initio*. The Board offered the same three arguments for the invalidity of the employment contract as discussed above. The

[2] The Court's denial of the Individual Defendants' qualified immunity defense as to Counts II and VI was based on the existence of factual questions. But the fact that the Court denied qualified immunity as to Count I due to a question of law suffices to allow for immediate appellate review. *See Leaf v. Shelnutt*, 400 F.3d 1070, 1078 (7th Cir. 2005) ("A defendant may appeal the denial of qualified immunity with respect to particular claims even when he still will be required to go to trial on a matter separate from the claims for which he asserted qualified immunity." (citing *Behrens*, 516 U.S. at 312)).

[3] Breuder argues that, even if these issues are decided against him, there is an alternative basis to deny the Individual Defendants' qualified immunity defense—namely, that Policy No. 15-275 of the Policy Manual of the Board of Trustees conferred upon Breuder a property interest grounding his Due Process claim in Count I. The Court did not consider this alternative argument in its prior opinion, because the Court rejected the arguments that the employment contract was invalid and therefore did not need to reach the question of whether Breuder had another basis to support a property interest in his continued employment.

Court rejected those arguments, and the Board now asks this Court to certify that ruling for interlocutory review. The Court observes that the issues for which the Board seeks review are the very same issues raised by the Individual Defendants' appeal as of right. Given that the Seventh Circuit will be tasked with deciding those issues for the Individual Defendants, the Court concludes that it is prudent to certify the interlocutory appeal for the Board as well.

A matter is properly certified for interlocutory appeal under 28 U.S.C. § 1292(b) when (1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation; and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed. *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002). Here, the issues are questions of law that are controlling with respect to Count I and Count IV. The Board has not pointed to any controlling authority definitively resolving any of the issues in its favor, but it has provided colorable arguments indicating a genuine, non-frivolous dispute on the issues. Finally, allowing the Board to proceed on interlocutory appeal will not delay the case, given that the Individual Defendants will be appealing the very same issues. At the same time, allowing the Board to appeal along with the Individual Defendants will help to ensure that there are no inconsistencies between the disposition of the claims against the Board and those against the Individual Defendants and that there is no waste of judicious resources. Moreover, regardless of the outcome, the result of the appeal may streamline a host of issues in the case.

C. Stay of Case Pending Appeal

The Court also concludes that it is most prudent to stay the entire case pending the appeal. The Seventh Circuit has suggested that, when there is an appeal of a denial of qualified immunity, the case must be stayed with respect to the issues involved in the appeal. *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). Although there are claims against the Individual Defendants and the Board in this case that are not affected by the issues on appeal, discovery on those claims will very likely overlap with the claims involved in the appeal. For example, many of the witnesses to be deposed on Breuder's Due Process/liberty interest and defamation claims are also knowledgeable about the Due Process/property interest and breach of contract claims. Similarly, there may be documents that are relevant to issues both within and beyond the scope of the appeal. Thus, depending on the outcome of the appeal, allowing the case to proceed on the Due Process/liberty interest and defamation claims may result in the need for duplicate discovery and the needless expenditure of the parties' and the Court's resources.

D. The Board's Motion for Reconsideration

In arguing for certification of its appeal, the Board restates its argument that Breuder's employment contract violated the OMA by requiring the Board to vote on termination actions exclusively during closed sessions. The contractual provision in question concerns the Board's notice to Breuder of its intent to terminate him. The provision states in relevant part:

> On or before April 1, 2010, and April 1 of each year thereafter, the term of this Agreement will be automatically extended for an additional one (1) year period unless either party provides to the other, prior to the 15th day of March of such

> Agreement year, written notice of his or its intention to terminate this Agreement at the end of the then current Agreement term . . . . The Board's notice need not be acted upon publicly, but authorization to give such notice will be recorded in closed session minutes of the Board.

(Ex. A to Compl., Dkt. No. 1-1 at 5 of 121.)

When the Court previously considered (and rejected) the Board's argument, it understood the Board to be arguing that ***any*** vote regarding a decision on Breuder's employment in a non-public forum would violate the OMA. In determining that this did not violate the OMA, the Court noted that the OMA provides that "[a] public body may hold closed meetings to consider . . . [t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body . . . ." 5 ILCS 120/2(c)(1). Thus, even if the Board was required to consider and vote on Breuder's extension and termination in a closed session, that was allowed by the OMA. It would only violate the OMA if the Board failed to ratify that closed-session decision in an open session—that is, though the OMA allows "consider[ation]" of such employment matters in closed sessions, all final determinations must still be made in an open session. *Bd. of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Ill.*, 44 N.E.3d 1245, 1252 (Ill. App. Ct. 2015) (allowing, consistent with the OMA, signing of superintendent's separation agreement in closed session, as it was followed by a ratification vote in open session).

In the instant briefing, the Board now clarifies that it intended to argue that Breuder's employment contract violates the OMA because it requires the final determination on his extension and termination decisions to be made in a closed session and prohibits any open-session final determinations on these issues. However, the Board's argument is premised on a mistaken reading of the employment contract. First, the extension of Breuder's employment contract is automatic unless either party provides notice of an intention to terminate the contract. Such an automatic extension, built into the terms of the contract, does not constitute a "final action" for purposes of the OMA because it requires no action to take effect.[4] Second, nothing in Breuder's employment contract prohibits the Board from having an open session to finally terminate Breuder. The language to which the Board points simply states: "The Board's ***notice need not be acted upon publicly***, but authorization to give such notice will be recorded in closed session minutes of the Board." (Ex. A to Compl., Dkt. No. 1-1 at 5 of 121 (emphasis added).) This provision does not prohibit the Board from doing anything—it merely allows the Board to provide Breuder with the requisite notice of its intention to terminate him without an open session. And this is consistent with the OMA's requirements because a notice of intention to terminate is not a final action requiring an open session. *Davis v. Bd. of Ed. of Farmer City–Mansfield Cmty. Unit Sch. Dist. No. 17*, 380 N.E.2d 58, 61 (Ill. App. Ct. 1978) (holding that for

[4] The relevant "final action" occurred when the operative iteration of Breuder's employment contract was approved. The Board may contend that, as a factual matter, the Board's approval of the employment contract violated the OMA. But that argument was not before the Court in connection with the Board's Rule 12(b)(6) motion to dismiss.

purposes of OMA, notice of intent to terminate superintendent was not final action requiring open session).[5]

E. Breuder's Motion to Strike

Finally, Breuder filed a motion to strike three exhibits to the Board's Reply: (1) a letter from the Higher Learning Commission to the College, dated December 16, 2015; (2) a Performance Audit of the College of DuPage conducted by the Illinois Auditor General, dated September 2016; and (3) a collection of news articles published by the Chicago Tribune. (Pl.'s Mot. to Strike at 2, Dkt. No. 125.) Breuder also seeks to strike parts of the Board's brief that state that the Illinois Attorney General's Office took a particular position with respect to Plaintiff's contract—which Breuder contends is patently false. (*Id.* at 3.) As the Court's ruling did not rely on these exhibits or any purported position of the Illinois Attorney General's Office, the Court denies the motion as moot.

Dated: May 5, 2017

Andrea R. Wood
United States District Judge

[5] Even if the provisions of Breuder's employment contract violated the OMA, the remedy would not necessarily be to declare the contract void *ab initio*. *Bd. of Educ. Sch. Dist. No. 67 v. Sikorski*, 574 N.E.2d 736, 740 (Ill. App. Ct. 1991) (discussing variety of remedies available when public entity's action violated OMA). The Board has not provided any authority for the position that an employment contract with a provision that violates the OMA is totally null and void. The appropriate remedy may simply be severance of the allegedly faulty provision.