UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUT

JOHN DOE[1], Plaintiff-Appellee, v. MIDDLEBURY COLLEGE, Defendant-Appellant.	Docket No. 15-2997

APPELLEE'S OPPOSITION TO APPELLANT'S MOTION FOR EXPEDITED REVIEW

The Court should not hear on an expedited basis Appellant Middlebury College's ("Appellant" or "Middlebury") appeal of the District Court's decision to issue a preliminary injunction allowing Appellee John Doe ("Appellee" or "Doe") to remain enrolled in Middlebury College and attend classes this semester. [2] Middlebury fails to demonstrate the matter is of pressing concern to the public or to the litigants to justify expedited briefing as required under Federal Rule of Appellate Procedure 2. Middlebury's purported concern about campus safety does not withstand scrutiny. If Middlebury were truly concerned about campus safety, it would have proposed a much shorter briefing schedule than the current one, which allows Doe to remain on campus for three months and nearly complete the fall semester. Moreover, Middlebury has failed take any steps to impose limitations on plaintiff that would protect against

[1] John Doe has filed a Motion to Proceed Under Pseudonym with the District Court. The parties have agreed to an extension for the Defendant's opposition to that motion until after this Court has decided Middlebury's appeal of the issuance of the preliminary injunction, and to continued use of pseudonyms until those motions are resolved.

[2] While the District Court correctly found that John Doe was still enrolled in Middlebury at the time he sought the preliminary injunction, as Appellee will explain in his principal brief, whether or not he was technically enrolled when he filed for the injunction does not change whether the injunction is warranted or the standard the court should have used to make that determination.

alleged safety risks. Thus, Middlebury's own actions demonstrate, consistent with the district court's findings, that Doe is not a safety risk. Expediting an appeal on this matter is also a waste of judicial resources. Plaintiff has proposed a litigation schedule that would have dispositive motions in the case fully briefed by mid-December. If Middlebury agreed to this schedule, a decision on the merits would be made close to the time Middlebury seeks decision on appeal here, which would render an appellate decision on the preliminary injunction moot. Finally, the timing of Middlebury's proposed briefing schedule will greatly prejudice Appellee. For these reasons, Middlebury's motion for expedited briefing should be denied.

BACKGROUND

John Doe enrolled in Middlebury College in the spring of 2013. Appellant Mot. for Expedited Review, Addendum A at 2 ("Addendum A"). In 2014, with Middlebury's approval, he applied to study abroad with the School for International Training ("SIT"), an educational institution based in Brattleboro, Vermont. Compl. ¶¶ 17-19. Before leaving to study with SIT, Middlebury provided John Doe with its handbook for students studying abroad with non-Middlebury programs, and required him to sign a release affirming that he understood that, while on the SIT program, he was required to comply with SIT's rules and regulations and would be subject to its discipline if he violated those rules. *See* Compl. ¶¶ 74-75.

In November 2014, while he was abroad with SIT, another SIT student ("Jane Doe"), who does not attend Middlebury, falsely accused John Doe of sexual assault after they engaged in a brief consensual sex act. *See* Compl. ¶¶ 50, 60. SIT immediately investigated the case, pursuant to its sexual misconduct policy, and held a full hearing in Vermont where each party was represented by an experienced advisor and where each testified, presented evidence, cross-examined one another, and examined the only other witness who was in the room at the time of

the sex act. Compl. ¶¶ 38-49. After consideration of the documentary evidence and live testimony, SIT found John Doe not responsible for sexual misconduct. Addendum A at 2. SIT kept Middlebury updated on the progress of its investigation and determination, and Middlebury administrators took no action against John Doe at this time. Addendum A at 2.

Middlebury relied on SIT's finding that John Doe did not violate any policies and allowed him to return to Middlebury in January 2015. Compl. ¶ 60. In late January, after being contacted by Jane Doe who expressed her dissatisfaction with the SIT process and implicitly suggested that she might report Middlebury to the federal government for investigation if it did not take action against John Doe, Middlebury suddenly started a repeat investigation into Jane Doe's allegation about what occurred on the SIT trip more than two months earlier. Addendum A at 2. Middlebury justified this sudden need to investigate after months of inaction by claiming it was for the safety of its students, although Middlebury's policies do not allow it to re-investigate a case that was already decided by another institution. *Id.* After conducting an unjustifiably prolonged, biased, and fundamentally unfair investigation, Middlebury found John Doe responsible for engaging in sexual assault in violation of its policies.[3] Compl. ¶¶ 78-133.

Two days after exhausting his administrative remedies at Middlebury, John Doe filed the instant suit alleging: (1) Middlebury violated its contract with him by re-investigating an already-decided case in violation of its policies, by unjustifiably delaying the investigation such that evidence was lost or corrupted, and by engaging in an entirely biased and unfair investigation designed to find John Doe responsible for sexual assault regardless of the evidence; (2)

[3] Middlebury repeatedly refers to its finding as "forcible rape" and "forcible sexual intercourse." Middlebury could not, and did not, find John Doe responsible for the crime of "rape" (and Jane Doe never reported the alleged assault to any law enforcement agency). Middlebury's policies prohibit sexual assault (and do not use the term "forcible") and that is the offense for which it erroneously found John Doe responsible.

Middlebury violated the covenant of good faith and fair dealing; and (3) Middlebury violated Title IX of the Education Amendments of 1972 by pursuing the investigation and decision in a manner that is biased against men. *See* Compl. John Doe moved for a preliminary injunction to allow him to remain enrolled in Middlebury until the case was decided on the merits. On September 16, 2015, Judge J. Garvan Murtha granted the preliminary injunction, finding that Doe would suffer irreparable harm absent the injunction, that he presented a serious question going to the merits of his case to make it fair grounds for litigation, and that the balance of hardships tipped in Doe's favor. *See* Addendum A.

ARGUMENT

There is no good cause to hear this appeal on an expedited basis. Middlebury's arguments to the contrary, and the schedule it has proposed, demonstrate that its goal is simply to have a second decision maker determine whether the injunction should continue to the January term and to cause the very harm to John Doe that he is litigating to prevent.

Middlebury claims that it requires expedited review because the preliminary injunction has deprived it of its ability to exercise discipline over John Doe and has undermined its "efforts to ensure campus security." Appellant Mot. for Expedited Review 5-6. The advisory committee notes to Fed R. App. P. 2 governing suspension of the regular appellate rules state that the purpose of the rule is to "expedite the determination of cases of pressing concern to the public or to the litigants." Fed. R. App. P. 2, advisory committee's notes. Appellant has not argued that there is any public concern at issue in this case. Middlebury's actions have already demonstrated, and the District Court correctly found, that "Middlebury does not view Plaintiff as a threat to the Middlebury community," Addendum A at 8, and that the interference with its disciplinary

process Middlebury faces as a result of the injunction is not a great harm. *Id.* It is certainly not "of pressing concern" as the rule requires.

Middlebury argues that it has an interest in promoting campus safety that justifies its motion to expedite review of this appeal. Appellant Mot. for Expedited Review 5. Middlebury allowed John Doe to return to campus in January 2015, relying on SIT's finding that he committed no sexual assault, and allowed him to remain on campus without any restrictions throughout the spring semester while it investigated the allegation. Similarly, although John Doe offered to the District Court that he would accept restrictions if allowed to return to campus for the fall 2015 semester, *see* Addendum A at 8, the judge did not order any such restrictions, *see id.*, and Middlebury has never asked John Doe to comply with any restrictions for the fall 2015 semester. Any argument Middlebury makes about its safety concerns with respect to having John Doe on campus are contradicted by its actions.

Middlebury argues that adhering to the Federal Rules in this case will foreclose its ability to challenge the preliminary injunction or its ability to exercise its disciplinary authority over Doe. Appellant Mot. for Expedited Review 5. Middlebury appealed the preliminary injunction and moved for expedited review of its appeal, but has proposed a schedule that is not expedited in any sense of the word. Instead of focusing on the underlying litigation in this case, Middlebury seeks to divert counsel's attention, and this Court's resources, toward its baseless appeal.

Plaintiff has proposed a litigation schedule in the District Court that would have dispositive motions fully briefed by mid-December.[4] The District Court's decision on the merits,

[4] Plaintiff's counsel has been negotiating with counsel for Middlebury for the past week regarding an expedited discovery and scheduling order for the litigation in this case. Plaintiff has proposed a schedule that would have all dispositive motions fully briefed by December 15, 2015; Middlebury has not yet agreed to that schedule. Plaintiff-Appellee will move the District Court to order this schedule.

either dismissing Appellee's claims or allowing him to proceed to trial, would effectively make the appeal of the preliminary injunction moot. Under plaintiff's proposed schedule either the case would be dismissed, and preliminary injunction will be dissolved, or the court would allow the case to go to trial, which would support the District Court's continuation of the preliminary injunction through trial. Given this proposed schedule, Middlebury does not explain why it has a "pressing concern" in having this appeal decided by early December, where it could have dispositive motions in the underlying case would be decided in substantially the same time frame.

Nor does Middlebury explain how proceeding on the regular briefing schedule in this appeal will preclude it from exercising disciplinary authority over Doe; Middlebury's ability to discipline Doe will be decided by the underlying litigation, not this appeal, and this Court's decision on the preliminary injunction will not alter whether a jury ultimately concludes Middlebury is permitted to discipline Doe under these circumstances.

Allowing expedited briefing will prejudice Appellee. Middlebury seeks a decision from this Court in early December, when Doe is set to begin finals. If Doe prevails, Middlebury will have succeeded only in wasting this Court's time and resources. If Middlebury prevails, Doe will be removed from school after completing all of his coursework (and paying all of his fall 2015 tuition), despite Doe's efforts to move this case toward a resolution on the merits in that time frame. If Doe is removed from Middlebury after completing his classes, but before he can take his final exams, even if he prevails in the District Court two weeks later, Middlebury will cause him to forfeit his entire semester of work because he will be unable to take his final exams, and he will lose the job he expects to begin upon graduation, the very harms he litigates against in this action.

Furthermore, expediting this appeal is unwarranted because the appeal itself is futile. This Court will only overturn a preliminary injunction if the judge abused his discretion. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). "Such abuse of discretion 'usually consists of clearly erroneous findings of fact or the application of an incorrect legal standard.'" *Id.* quoting *Nicholson v. Scoppetta,* 344 F.3d 154, 165 (2d Cir. 2003). The judge's findings of fact derived from the exhibits and affidavits of the parties, Addendum A at 2 n.4, and he applied the legal standard set forth by this Court. *Id.* at 4. Although Middlebury argued for a different legal standard to be applied, the judge made clear why under this Court's precedent that standard was inapplicable. *Id.* at 4 n.7. There is no merit to Middlebury's request to overturn the decision below, and no reason to expend the Court's resources expediting the consideration of such a futile appeal.

CONCLUSION

What Middlebury seeks in this motion, and in its underlying appeal, is to divert attention and resources from the underlying litigation of Doe's claims and further destroy John Doe's future. Because no good cause exits to expedite this Court's review of the preliminary injunction, Appellee asks that the Court deny this motion.

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Respectfully submitted,

/s/ Lisa Shelkrot

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