UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

KOH TSURUTA, Plaintiff, vs. AUGUSTANA UNIVERSITY, Defendant.	CIV. 4:16-4107-KES ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Defendant, Augustana University, moves to dismiss Count I (Breach of Contract), Count II (Negligent Hiring, Training, and Supervision), and Count III (Declaratory Judgment) of plaintiff's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Docket 8. Plaintiff, Koh Tsuruta, opposes the motion. Docket 11 at 1. For the following reasons, defendant's motion is denied.

Factual Background

The facts alleged by Tsuruta in his complaint are as follows:

Augustana University is a university in Sioux Falls, South Dakota. Docket 1 at 1. Tsuruta was a student at Augustana. *Id.* In the summer of 2015, another student accused Tsuruta of committing rape. *Id.* at 2. The alleged rape took place on July 3, 2015. *Id.* Tsuruta denied this claim and informed Augustana that the accusation was false. *Id.* Tsuruta asked Augustana to intervene at that time. *Id.*

On August 4, 2015, following Augustana's suggestion, the student making the allegation reported it to Minnehaha County law enforcement. *Id.* On August 5, 2015, the student filed a complaint with Augustana in accordance with its Equal Opportunity Policies and Procedures handbook ("Handbook"). *Id.* Tsuruta was immediately suspended pending the outcome of the Augustana's investigation. *Id.*

Augustana adjudicated the complaint on October 8, 2015, over Tsuruta's objection. *Id.* Tsuruta invoked his Fifth Amendment rights and failed to provide a defense. *Id.* at 2. As a result of the investigation and the adjudication of the complaint, Augustana expelled Tsuruta. *Id.* at 4. Tsuruta now challenges the fairness of Augustana's investigation. *Id.* Tsuruta argues that the investigation was tainted because the lead officer was previously terminated for dishonesty by the Sioux Falls Police Department. *Id.* at 3.

Furthermore, Tsuruta alleges that the other employees involved with the investigation were not appropriately trained to handle rape cases and that Augustana failed to consider that Tsuruta could not commit the rape as alleged due to a motor vehicle accident that injured his feet. *Id.* He also alleges that the complainant falsely accused others of rape and sexual misconduct and that the investigator failed to interview relevant witnesses, including neighbors. *Id.* Ultimately, the criminal charges against Tsuruta were dropped after he provided the prosecution with exculpatory information. *Id.* at 3. Tsuruta now seeks to be reinstated at Augustana and have his expulsion reversed. *Id.* at 5. Augustana moves to dismiss the action. Docket 8 at 1.

Legal Standard

A court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Inferences are construed in favor of the nonmoving party. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556 (2007)).

Discussion

I. Breach of Contract Claim

In order to prove a breach of contract claim, a party must show (1) an enforceable promise; (2) a breach of the promise; and (3) resulting damages. *Bowes Constr., Inc. v. S.D. Dep't of Transp.*, 793 N.W.2d 36, 43 (S.D. 2010). Additionally, every contract contains an implied covenant of good faith and fair dealing. *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990). A breach of contract occurs when there is " 'a violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's performance.' " *Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, 894 (S.D. 2006) (quoting Black's Law Dictionary 182 (7th ed. 1999)).

First, there is an enforceable agreement between Tsuruta and

Augustana. " 'As a general principle, the relationship between a university and a student is contractual by nature.' " *Aase v. South Dakota*, 400 N.W.2d 269, 270 (S.D. 1987) (quoting *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984); *Corso*, 731 F.2d at 531 (finding that Creighton University's student handbook governed the terms of the contract). Here, the Handbook creates a contractual relationship between the parties. The Handbook provides the procedure to follow when a complaint is made.

Second, Tsuruta contends that Augustana breached its contract. Docket 1 at 5. In pertinent part, the Handbook states that the Equity Grievance Process ("EGP") is applicable to students, administrators, and faculty. Docket 10-1 at 2. A complaint is assigned to an EPG member shortly after being filed. *Id.* at 14. The Handbook states every investigation will be thorough and will include interviews with relevant parties and witnesses. *Id.* The Handbook also gives students six rights: (1) to be treated with respect by Augustana officials; (2) to take advantage of support groups; (3) to have an advocate during this process; (4) to refuse to resolve an issue through conflict resolution; (5) to have grievances heard in accord with Augustana's procedures; and (6) to be informed of the outcome in writing. *Id.* at 23-24.

In this case, Tsuruta alleges that Augustana did not give him a fair and thorough investigation. *Id.* at 4. Tsuruta alleges that Augustana failed to consider that he could not commit the rape as alleged because he injured his feet in a motor vehicle accident. *Id.* at 3. Tsuruta also alleges that the investigator failed to consider conflicting evidence and that the complainant

had made false accusations of rape in the past. *Id.* When considering these facts in favor of the nonmoving party, Tsuruta has alleged sufficient facts to show Augustana breached the contract.

Lastly, damages must result from the contract breach. Here, Tsuruta alleges that he was injured by a loss of educational opportunity, emotional distress, and other economic losses. Docket 1 at 6.

Therefore, after viewing the facts and the inferences from those facts as true and considering them in a light most favorable to Tsuruta, the court finds that Tsuruta has provided sufficient facts to survive a motion to dismiss on his breach of contract claim.

II. Negligent Hiring, Training, and Supervising Claim

As a threshold issue, Augustana argues that Tsuruta cannot bring a negligence claim if there is a breach of contract claim as well. Docket 9 at 11. But, the South Dakota Supreme Court has stated that "if the relationship of the parties is such as to support a cause of action in tort, that cause of action is not to be denied because the parties happened also to have made a contract." *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413, 420 (S.D. 2014).

Augustana also argues that the negligence claim is blocked by the economic loss doctrine. South Dakota adopted the economic loss doctrine in *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 333 (S.D. 1994). The doctrine, however, was limited to transactions under the Uniform Commercial Code. *Kreisers*, 852 N.W.2d at 421. South Dakota has yet to extend this

doctrine. *Id.* Moreover, when South Dakota was formulating this doctrine, the court cited to Minnesota law that declined to extend the doctrine beyond the Uniform Commercial Code as well. *Id.* Therefore, the economic loss doctrine does not apply in this case.

" 'Generally, the law imposes no duty to prevent the misconduct of a third person.' " *Finkle v. Regency CSP Ventures Ltd. P'ship*, 27 F.Supp.3d 996, 999 (D.S.D. 2014) (quoting *Walther v. KPKA Meadowlands Ltd. P'ship*, 581 N.W.2d 527, 531 (S.D. 1998). Still, the South Dakota Supreme Court has recognized that an employer can be held liable for its employees' actions, and that negligent hiring and supervision may give rise to liability. *Id.* (citing *Rehm v. Lenz*, 547 N.W.2d 560, 566 (S.D. 1996).

To bring a negligence claim, a plaintiff must prove three elements: " '(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure.' " *Kirlin v. Halverson*, 758 N.W.2d 436, 448 (S.D. 2008) (quoting *State Auto Ins. Companies v. B.N.C.*, 702 N.W.2d 379, 386 (S.D. 2005)). "Broadly stated, a negligent hiring claim suggests that *at the time an employee was hired,* it was negligent for an employer to engage the employee's services based on what the employer knew or should have known about the employee." *Kirlin*, 758 N.W.2d at 452 (emphasis in original). Additionally, a negligent training claim alleges that the employer "inadequately or defectively *coached, educated, or prepared* its employees for the performance of their job duties," and a negligent supervision claim suggests that the "employer inadequately or defectively *managed,*

directed or oversaw its employees." *Id.* (emphasis in original).

Here, when the allegations in the complaint are taken as true, and the inferences are construed in the light most favorable to the nonmoving party, Tsuruta states a plausible negligence claim on which relief can be granted. Tsuruta states in his complaint that Augustana was negligent when it hired, trained, and supervised its Title IX employees. Docket 1 at 6. Tsuruta supports his allegations by alleging that the investigation that was carried out by University employees was disorganized and was conducted by individuals who were not properly trained to investigate rape allegations. *Id.* at 3, 6. For instance, the complaint asserts the investigator failed to notice that Tsuruta is physically disabled and could not carry out the attack. *Id.* The complaint also alleges that the investigator's notes contained information contrary to testimony about the rape and that the lead investigator had been fired for suspected dishonesty. *Id.* at 3-6. Furthermore, the complaint states the investigator failed to interview relevant witnesses and detect exculpatory emails deleted before the complainant gave the emails to the investigator. *Id.* at 3. As noted above, Tsuruta alleges he suffered a loss of educational opportunities, loss of future income, and suffered an emotional injury. *Id.* at 7.

Thus, after viewing the facts and inferences from those facts as true and considering them in a light most favorable to Tsuruta, the court finds that Tsuruta has pleaded sufficient facts to survive a motion to dismiss on his negligent hiring, training, and supervising claim.

III. Declaratory Judgment Claim

"The Declaratory Judgement Act gives federal courts the power to 'declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.' " *Aegis Food Testing Labs., Inc. v. Aegis Scis. Corp.*, 913 F. Supp. 2d 742, 745 (D.S.D. 2012) (quoting 28 U.S.C. § 2201(a)). "The test to determine whether there is an actual controversy within the meaning of the Declaratory Judgment Act is whether 'there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Equip. Mfrs. Inst. v. Janklow*, 88 F. Supp. 2d 1061, 1065 (D.S.D. 2000) (quoting *Marine Equip. Mgt. Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993)). Declaratory judgment is a remedy, not a substantive claim. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007).

When viewing the facts and inferences in favor of the nonmoving party, there is a substantive controversy in this case. As was stated above, Count I (Breach of Contract) and Count II (Negligent Hiring, Training, and Supervising) survive the motion to dismiss and are substantive issues between adverse legal parties. Because Tsuruta has stated plausible claims in the complaint, Tsuruta's ability to receive the remedy of a declaratory judgment survives the motion to dismiss. The court will not construe this, however, to be a separate cause of action.

Conclusion

Tsuruta has pleaded sufficient facts to support his claims in Count I and Count II. Thus, it is

ORDERED that defendant's motion to dismiss (Docket 8) is denied.

DATED this 16th day of June, 2017.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE