

**Durand v Adelphi University**

2008 NY Slip Op 33563(U)

May 29, 2008

Supreme Court, Nassau County

Docket Number: 3695/08

Judge: Thomas A. Adams

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## SHORT FORM ORDER

## SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37  
NASSAU COUNTY

KRISTIAN DURAND, in a matter seeking the reversal of an order of suspension from attending Adelphi University as a student and reinstatement thereat, mandamus and certioari CPLR 7801 et seq.,

Petitioner(s),

MOTION DATE: 5/7/08

INDEX NO.: 3695/08

-against-

SEQ. NO. 1

ADELPHI UNIVERSITY, DR. ROBERT SCOTT, PRESIDENT OF ADELPHI UNIVERSITY, ANGELO B. PROTO, VICE PRESIDENT ADMINISTRATION and STUDENT AFFAIRS, the DIVISION OF STUDENT AFFAIRS and all persons, Committees, departments or tribunals of the aforesaid institution with jurisdiction and power to vacate findings and reinstate/register a student,

Respondent(s)

The petitioner's application, pursuant to CPLR article 78, to reverse and annul the respondents' January 3, 2008 determination which, after a hearing, suspended him for a year (i.e., January, 2008 - January, 2009) is determined as hereinafter provided.

On November 9, 2007 at approximately 3:30 p.m. a female student at the respondents' Garden City campus reviewed her online bank statements and discovered that a number of unauthorized transactions had occurred earlier that day with her debit card. She immediately realized that her wallet had been stolen at approximately 10:45 a.m. when she briefly left her bag unattended on the counter of a women's restroom in the lower level of the University Center. Since one of the transactions occurred at the school's bookstore, at about 3:45 p.m. she informed the store's manager who alerted public safety which filed a report (see March 18, 2008 supplemental affidavit of Guy Seneque, Exhibit A). An

additional review confirmed that other unauthorized transactions had occurred at a nearby mall utilizing her credit card and that forty dollars in cash was missing.

An initial investigation including an interview with the bookstore sales clerk and an examination of the receipt (see supplemental affidavit, Exhibit I) as well as an inspection of security photographs (see March 12, 2008 affidavit of Guy Seneque, Exhibit F) implicated the petitioner and a female companion, Frances Juarez, who later that day returned the empty wallet to the respondents' lost and found.

The petitioner was subsequently confronted by campus security and he provided a written statement (see Seneque supplemental affidavit, Exhibit B) denying involvement. Rather, he asserted that Ms. Juarez approached him and merely asked him to accompany her to the store with "a new credit card". On November 20, 2007 Guy Seneque, respondents' Assistant Director of Residential and Judicial Programs, wrote to the petitioner requesting an immediate conference (see Seneque affidavit, Exhibit B). During a November 27, 2007 meeting with Mr. Seneque, which the petitioner's father attended, the petitioner supplied a second, consistent handwritten statement (see Seneque supplemental affidavit, Exhibit C). Conversely, during a November 28, 2007 meeting, Ms. Juarez acknowledged stealing the wallet. Moreover, she supplied a handwritten statement declaring, inter alia, that the petitioner "snatched the wallet from [her]" and was, in effect, an active participant. His participation allegedly included, but was not limited to, their unsuccessful attempt to withdraw money from an on-campus ATM (see Seneque supplemental affidavit, Exhibit D).

On December 3, 2007 the victim filed a complaint with the respondents in accordance with the school's Code of Conduct (see Seneque affidavit, Exhibits A & C). The petitioner's answer and witness statements contesting the charges and demanding a hearing were interposed on December 10, 2007 (see Seneque affidavit, Exhibit D). In addition, the petitioner was advised of the alleged infractions (i.e., forgery, unauthorized use of documents and theft), range of potential sanctions and opted for a disciplinary conference instead of a formal hearing (see Seneque affidavit, Exhibit E).

At the December 19, 2007 conference with Assistant Director Seneque the petitioner appeared with his parents and disputed Ms. Juarez's account of the event. With the assistance of a faculty advocate, Professor A. Starkey, and his girlfriend, Esther Henk, the petitioner argued that Ms. Juarez had falsely implicated him in order to obtain lenient treatment. The following day, December 20, 2007, Mr. Seneque was apprised of the existence of video surveillance footage from the ATM and bookstore. He promptly notified the petitioner and they reviewed the video together on December 21, 2007 (see Seneque affidavit, Exhibit G).

Ultimately, after assessing the evidence and the petitioner and Ms. Juarez's credibility, on January 3, 2008 Mr. Seneque issued a determination (see Seneque affidavit, Exhibit H). The charge of forgery was not sustained, however, the petitioner was found to have violated Section 10.9 of the University's Code of Conduct (see Seneque affidavit, Exhibit A) i.e., theft. The sanction imposed consisted of a one year (i.e., January, 2007 - January, 2008) suspension. Pursuant to Section 26 of the Code of Conduct, the petitioner appealed the determination to the Vice President for Administration and Student Services, Angelo B. Proto, who denied the appeal and affirmed the January 3, 2008 finding on January 11, 2008 (see Seneque affidavit, Exhibit I).

The petitioner's application argues, in sum, that the respondents' determination is arbitrary and capricious and not based upon substantial evidence because they abused their discretion in assessing the Ms. Juarez and his credibility. As a consequence of their purported "reckless rush to judgment", the petitioner was allegedly "Duked" and became a victim himself (see April 6, 2008 reply affirmation of Laurence Stuart Warshaw, Esq.). He steadfastly contends that he simply accompanied Ms. Juarez to the ATM, bookstore and shopping mall unaware that the debit and credit cards were stolen.

"It is well established that judicial review of an educational institution's disciplinary determination involving non-academic matters is limited to whether the institution substantially adhered to its own published rules and guidelines and was not arbitrary and capricious" (Quercia v New York University, 41 AD3d 295, 296). Although the petitioner asserts, in conclusionary fashion, that he

was not afforded due process, "a private school student is not entitled to the full panoply of due process rights unless a threshold showing of State involvement is made" (Cavanagh v Cathedral Preparatory Seminary, 284 AD2d 360, 361). Moreover, the record supports the conclusion that the respondents substantially complied with the disciplinary procedure delineated within the Code of Conduct. There is, for example, no admissible evidence to substantiate the petitioner's claim that he was "coerced", "with a gun to his head" into waiving his right to a formal disciplinary hearing and that he opted for a conference merely due to the "strain" of examinations (see January 21, 2008 affidavit, paras. 7 & 10).

In any event, notwithstanding the petitioner's excessive and overheated rhetoric, he was accorded every right to which he was entitled in the context of a disciplinary proceeding instituted by a private university, the determination was rendered in accordance with the university's published Code of Conduct and is rationally based upon the exercise of honest discretion after a full review of the operative facts and therefore neither arbitrary nor capricious (see Galiani v Hofstra University, 118 AD2d 572). The respondents' assessment of the participants' respective credibilities can not be accurately characterized as irrational when, for instance, the petitioner was not alerted by Ms. Juarez's alleged inability to use her own credit card at the ATM. Nor is the sanction inappropriate or disproportionate to the offense (see Quercia supra at 297; Galiani supra at 572).

Accordingly, the petitioner's application, pursuant to CPLR article 78, to reverse and annul the respondents' January 3, 2008 determination is denied. The foregoing constitutes the order and judgment of the court (see CPLR §7806).

Dated: 5/29/08

  
A.J.S.C.  
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**ENTERED**

JUN 02 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**