

<b>Holiday v Poffenbarger</b>
2009 NY Slip Op 31263(U)
June 9, 2009
Supreme Court, Kings County
Docket Number: 38046-2006
Judge: Michael A. Ambrosio
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At an IAS Civil Term Part 31, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on June 9, 2009

PRESENT: **HONORABLE MICHAEL A. AMBROSIO**

CHARLES HOLIDAY,  
PLAINTIFF,

- AGAINST -

NATHAN POFFENBARGER, CORNELL UNIVERSITY AND  
MU CHAPTER OF THE SIGMA PI FRATERNITY OF THE  
UNITED STATES, INC.,  
DEFENDANT.

INDEX No.: 38046-2006

**DECISION AND ORDER**

JUNE 9, 2009

The Following papers numbered 1 to 22 used on this motion:

Notice of Motion - Order to Show Cause - Affidavit(s)

Affirmation(s), Petition, and Exhibits Annexed \_\_\_\_\_

Answering Affidavit(s) and Affirmation(s) \_\_\_\_\_

Reply Affidavit(s) and Affirmation(s) \_\_\_\_\_

Other Papers \_\_\_\_\_

PAPERS NUMBERED

1-4, 5-8, 10-11, 12-13

14, 15, 16, 17, 18

19, 20, 21, 22

Upon the foregoing papers, defendant Cornell University (Cornell) moves, pursuant to CPLR 3211 (a)(1), (7) for an order dismissing plaintiff Charles Holiday's amended complaint against it. In the alternative, Cornell moves for relief under CPLR 3211 (c), whereby the court treats its motion as one for summary judgment and further awards Cornell summary judgment dismissing plaintiff's complaint against it. Defendant Sigma Pi Fraternity of the United States, Inc. (Sigma Pi) cross-moves, pursuant to CPLR 3211 (a)(1), 3211 (a)(7), CPLR (a)(8) and CPLR 3211 (c), for an order dismissing plaintiff's complaint against it. In the alternative, Sigma Pi seeks leave to serve a late answer. In a separate motion, Cornell moves, pursuant to CPLR 510 (3), for an order changing the place of trial from Kings County to Tompkins County. Sigma Pi cross-moves for an order changing the place of trial from Kings County to Tompkins County.

***Background Facts and Procedural History***

During the early morning hours of February 18, 2006, plaintiff sustained various injuries after

being stabbed with a knife by defendant Nathan Poffenbarger. The assault took place near an archway adjacent to Baker Hall on Cornell University's Ithaca, New York campus. At the time of the attack, Poffenbarger was a Cornell student and plaintiff, who attended Union College, was visiting Cornell. Prior to the stabbing, during the evening of February 17, 2006, Poffenbarger and several other underage Cornell students met in an on-campus dormitory room belonging to Melissa Kujda and consumed a substantial amount of alcohol.<sup>1</sup> Among these students was Jennifer Malvica, who was the Resident Advisor (RA) on the floor where the dorm room was located.<sup>2</sup> The alcohol was supplied by Ms. Kujda and Poffenbarger paid Ms. Kujda five dollars as reimbursement for the liquor he consumed.

At approximately 11:00 P.M., some of these students including Poffenbarger and Ms. Malvica decided to attend a party at a fraternity house owned by Sigma Pi and located at 730 University Avenue.<sup>3</sup> According to Ms. Malvica, once at the fraternity house, Poffenbarger evolved into a "nasty drunk." Specifically, Ms. Malvica (who remained with Poffenbarger up until the time of the stabbing) told investigators that he became extremely upset and began referring to an African-American Sigma Pi member who refused to allow them entrance into a room as "nigger." Ms. Malvica further stated that Poffenbarger tried to cut the line to get into the bathroom and that when he saw another African-American Sigma Pi member, he "was saying something to the effect of that nigger is backing up his buddy." Ms. Malvica told investigators that she attempted to keep

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<sup>1</sup>At his deposition, Poffenbarger estimated that he drank 12 to 15 shots of vodka and Southern Comfort in the dormitory.

<sup>2</sup>Although she initially tried to cover-up the fact that she was in Ms. Kujda's room, Ms. Malvica ultimately admitted to investigators that she was present in the room and drank two shots of Southern Comfort and a beer.

<sup>3</sup>Although Sigma Pi owns the property on which the fraternity house is situated, said property is completely surrounded by the Cornell campus.

Poffenbarger under control and covered his mouth with her hand when he uttered these racial epithets.

At some point after midnight, Cornell Police officers appeared at the fraternity house in response to a noise complaint. Thereafter, members of Sigma Pi decided to shut down the party and guests were told to leave. However, Poffenbarger refused to leave the fraternity house and at some time between 12:45 to 1:00 A.M. on February 18, 2006, he became involved in a physical and verbal altercation in the foyer of the house with several members of Sigma Pi including Anthony Majette, who is African-American. In particular, Poffenbarger, who is Caucasian, repeatedly called Majette “nigger” and “fucking nigger.” Thereafter, Poffenbarger was physically ejected from the fraternity house and allegedly kicked and beaten by Sigma Pi members outside the premises. At this point, plaintiff and two acquaintances (all of whom are African-American) happened to be passing the vicinity of the dispute and, upon overhearing Poffenbarger’s racist taunts, confronted him. Poffenbarger then yelled “shut up you fucking niggers” at plaintiff and his friends. According to Ms. Malvica, she attempted to defuse the situation and physically pushed Poffenbarger away from the area toward the Baker Tower archway on Cornell’s West Campus. However, Poffenbarger continued to make offensive racial comments and plaintiff and his friends followed him and Ms. Malvica.

As this was occurring, Cornell student and Sigma Pi member Peter Strang flagged down City of Ithaca Police Officer Michael C. Nelson and informed him of the escalating confrontation that was taking place. Officer Nelson then approached the area and witnessed what appeared to be Poffenbarger shoving plaintiff near the archway. In fact, Officer Nelson had just witnessed Poffenbarger stab plaintiff in the neck/shoulder area with a five-inch knife that had been clipped to

his belt throughout the evening. Upon seeing Officer Nelson approach, Poffenbarger fled the area. Officer Nelson then began to talk to plaintiff, who did not realize that he had been stabbed until he noticed blood on his clothing. Plaintiff then requested medical assistance and Officer Nelson called for an ambulance. Poffenbarger turned himself into the police later that day and was charged with second degree assault. Ultimately, Poffenbarger pled guilty to felony assault as a hate crime and tampering with evidence and was sentenced to one and one-third to four years in state prison.

By summons and complaint dated December 7, 2006, plaintiff, who is a resident of Kings County, commenced the instant action against Poffenbarger in Kings County Supreme Court. Thereafter, in a motion dated January 8, 2008, plaintiff moved for a default judgment against Poffenbarger and for leave to serve a supplemental summons and amended complaint adding Cornell and Sigma Pi as party defendants. In an order dated February 11, 2008, Hon. Robert Miller of this court granted plaintiff's motion.

By supplemental summons and amended complaint dated February 26, 2008, plaintiff asserted several causes of action against Cornell and Sigma Pi. Specifically, the second cause of action in the amended complaint alleges that Cornell was negligent in its ownership, operation, and management of the University inasmuch as it failed to maintain the school premises in a reasonably safe condition, failed to take steps to protect its students from the foreseeable criminal acts committed by Poffenbarger, failed to provide adequate supervision of students and activities on its campus, and in negligently causing or allowing the illegal consumption of alcohol to occur on its campus. The third and fourth causes of action in the amended complaint further alleges that Cornell violated the Dram Shop Act (General Obligations Law §§ 11-100 and 11-101) inasmuch as it knowingly caused Poffenbarger, who was under the age of 21, to be intoxicated by unlawfully

selling, furnishing to or unlawfully assisting Poffenbarger in procuring alcoholic beverages and that Poffenbarger's assault upon plaintiff was caused in part by said intoxication. Similarly, the fifth cause of action in the amended complaint alleges that Sigma Pi was negligent in its ownership, management and control of the fraternity house and that Sigma Pi negligently failed to control the conduct of Poffenbarger. In addition, the sixth and seventh causes of action in the amended complaint alleges that Sigma Pi violated the Dram Shop Act.

On or about April 11, 2008, Cornell made the instant pre-answer motion to dismiss the amended complaint. On or about June 24, 2008, non-party Sigma Pi Fraternity International, Inc. (International) cross-moved to dismiss the amended complaint against it. However, International later withdrew its motion as moot when plaintiff indicated that International was not a party to this action. On or about July 22, 2008, plaintiff moved for a default judgment against Sigma Pi. However, this motion was subsequently withdrawn. On August 4, 2008, the parties appeared before Hon. David Schmidt for oral argument on Cornell's motion to dismiss. After oral argument, Justice Schmidt reserved decision on the motion and directed that the parties conduct discovery on the issue of whether the Cornell Police Department responded to the Sigma Pi party on the evening of February 17-18 and witnessed Poffenbarger's behavior prior to the stabbing. On or about October 20, 2008, Sigma Pi moved to dismiss the amended complaint against it and Justice Schmidt again reserved decision.

While the motions to dismiss were pending, certain discovery took place. In particular, Poffenbarger submitted to a deposition while serving his prison sentence. In addition, on December 12, 2008, Timothy Marsh, a Cornell Police Officer who responded to a complaint at the Sigma Pi house prior to the stabbing, appeared for a deposition. Furthermore, the matter was transferred from

Justice Schmidt's part to the instant part. On or about February 27, 2009, Cornell made the instant motion to change venue of this case from Kings County to Tompkins County, where Cornell is located. Thereafter, Sigma Pi cross-moved for this same relief.

*Motion to Change Venue*

Cornell moves for an order, pursuant to CPLR 510 (3), to change the place of trial from Kings County to Tompkins County on the grounds that the convenience of material witnesses and the ends of justice will be promoted by the change. In support of its motion, Cornell submits an affidavit by Nelson E. Roth, the Deputy University Counsel for Cornell who represents Cornell in this matter. Mr. Roth provides the names and addresses of several present and former Cornell students including Anthony Majette, Peter R. Strang, Jennifer Malvica, and Chloe B. McDougal. According to Mr. Roth, all of these witness live in Tompkins County or in counties in close proximity to Tompkins County. Mr. Roth also notes that these witnesses all gave statements to the police after the stabbing which indicate that they are material witnesses to the relevant events that occurred both before and after the assault. In addition, Mr. Roth states "on information and belief" that all of these witnesses would provide testimony at trial and that they would be significantly inconvenienced by having to travel to Kings County to testify.

Mr. Roth's affidavit also identifies several Cornell employees who he expects to call as witnesses including Cornell Police Officers Timothy Marsh and Lieutenant David Nazar, as well as Patricia Case and Lisa Blockus Brown, who worked in Cornell's Office of Fraternity and Sorority Affairs at the time of the underlying incident. According to Mr. Roth, these individuals are critical witnesses in this case inasmuch as they have first-hand knowledge of Cornell's investigation of the assault, Cornell's lack of notice regarding the danger presented by Poffenbarger, as well as the

limitations on Cornell's role in dealing with privately owned fraternity houses such as Sigma Pi. Mr. Roth also maintains that all of these witnesses would be severely inconvenienced were they forced to travel to Kings County in order to testify since they all live and work in Tompkins County.

Mr. Roth further identifies Timothy J. Huddle, M.D., who treated plaintiff at the hospital immediately following the stabbing. According to counsel, Dr. Huddle is a material witness as to the injuries and damages plaintiff claims in this lawsuit. Mr. Roth further maintains "on information and belief" that Dr. Huddle resides in Chemung County, New York, approximately 45 minutes from Ithaca and that both his medical practice and personal life will be adversely affected if he has to travel to Kings County to testify.

Finally, Mr. Roth avers that the interests of justice will be served by transferring venue to Tompkins County inasmuch Unified Court System records indicate that, through the week of January 4, 2009, Kings County Supreme Court, Civil Term has 31,442 total pending cases while Tompkins County has only 351 total pending cases.

In addition to Mr. Roth's affidavit, Cornell submits an affidavit by Officer Michael C. Nelson of the Ithaca Police Department who, as previously stated, witnessed Poffenbarger stab plaintiff. Officer Nelson states that, if the case goes forward, he understands that his testimony both at trial and pre-trial deposition will be necessary since he witnessed the assault. Officer Nelson further states that having to travel the significant distance from Tompkins County to Kings County will impose great personal hardship on him and would also interfere with his ability to perform his duties as a police officer.<sup>4</sup>

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<sup>4</sup>Sigma Pi's cross-motion to transfer venue to Tompkins County relies entirely upon Cornell's arguments and evidentiary showing.

In opposition to Cornell's motion, plaintiff maintains that the motion is untimely inasmuch as CPLR 511 (a) requires that motions to change venue under CPLR 510 (3) must be made "within a reasonable time after commencement of the action." Here, plaintiff's action against Cornell has been pending in Kings County for an entire year, during which time, Cornell has appeared for oral argument and filed a motion to dismiss the amended complaint. Plaintiff maintains that Cornell only sought to change venue to Tompkins County when the matter was transferred from Justice Schmidt to this part. Plaintiff further maintains that this is not a legitimate basis for seeking relief under CPLR 510 (3).

Alternatively, plaintiff argues that Cornell's motion must be denied on the merits. In particular, plaintiff notes that it is apparent from Mr. Roth's affidavit that, with the exception of Ithaca Police Officer Nelson, he failed to contact the non-party witnesses identified in the motion since Mr. Roth bases his claims "upon information and belief." Moreover, plaintiff maintains that some of the claims set forth in Mr. Roth's affidavit are inaccurate. In this regard, plaintiff submits a letter from the father of Jennifer Malvica which indicates that she no longer resides in New York State and that she would not honor plaintiff's request to appear for a deposition. Thus, plaintiff maintains that Cornell has failed to demonstrate that these witnesses would be willing to testify or that they would be inconvenienced by having to travel to Kings County, both of which are required when seeking relief under CPLR 510 (3). In addition, plaintiff notes that under well-settled New York case law, the convenience of Ms. Case, Ms. Blockus Brown, Lt. Nazar and Officer Marsh is to be given no weight inasmuch as they are all employed by Cornell. Finally, plaintiff identifies several individuals who he intends to call as witnesses, all of whom reside in locations which are closer to Kings County than Tompkins County.

CPLR 510 (3) provides that “[t]he court, upon motion, may change the place of trial of an action where: the convenience of material witnesses and the ends of justice will be promoted by the change.” Furthermore, CPLR 511 (a) requires that such motions be made “within a reasonable time after commencement of the action.” Under relevant case law, a party seeking to change the location of a properly venued action based upon the convenience of material witnesses must satisfy “a rigorous set of evidentiary requirements” consisting of four parts (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C510:3). In particular, the movant must: (1) identify the names, addresses and occupations of the prospective witnesses; (2) disclose the facts to which the proposed witnesses will testify at trial; (3) show that the proposed witnesses are in fact willing to testify; and (4) show how the witnesses in question would be inconvenienced in the event a change of venue were not granted (*O’Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172-173 [1995]). Other considerations, including trial calendar congestion and the county in which the underlying claim arose become relevant “only after the requisites outlined above have been met” (*id.* at 174).

Initially, there is no merit to plaintiff’s argument that Cornell failed to move to change venue within a reasonable time after commencement of the action. Specifically, although Cornell did not make its motion until one year after being served with the amended summons and complaint, the matter is still at its pre-answer stage and only limited discovery has taken place (*see 25/27 Corp. v Mormile*, 43 AD3d 1154 [2007]). However, because it failed to satisfy its heavy evidentiary burden in seeking relief under CPLR 510 (3), Cornell’s motion to change venue must be denied. In particular, Cornell’s motion is based in part upon the inconvenience that will be suffered by its employees, Ms. Case, Ms. Blockus Brown, Officer Marsh, and Lieutenant Nazar. However, it is

well-settled that the convenience of material witnesses employed by a party to the action is afforded no weight in determining proper venue under CPLR 510 (3) (*Margolis v United Parcel Serv., Inc.*, 57 AD3d 371 372 [2008]; *Davis v Firman, M.D.*, 53 AD3d 1101, 1102 [2008]; *Gissen v Boy Scouts of Amer.*, 26 AD3d 289, 291 [2006]; *Flynn v Niagara Univ.*, 198 AD2d 262, 263 [1993]).

Cornell further relies upon the purported inconvenience of certain present and former Cornell students in support of its motion to change venue, namely Anthony Majette, Peter R. Strang, Jennifer Malvica, and Chloe B. McDougal. Although Cornell has provided the names and addresses of these potential witnesses and disclosed the facts to which they would testify at trial (based upon their statements to the police after the assault), it has failed to show that these witnesses would be willing to testify or how they would be inconvenienced if the trial is not transferred to Tompkins County. Specifically, the Appellate Division, Second Department has held that an evidentiary showing regarding these two elements can only be made through the submission of sworn statements from the proposed non-party witness (*Agostino Antiques, Ltd. v CGU-American Employers' Ins. Co.*, 6 AD3d 469, 470 [2004]). Other Departments have ruled that, at the very least, moving counsel must aver that he or she contacted the witnesses and obtained the necessary information regarding their willingness to testify and inconvenience (*see Frontier Ins. Co. in Rehabilitation v Big Apple Roofing Co., Inc.*, 50 AD3d 1239, 1239-1240 [2008]). Here, Cornell has failed to submit sworn statements from these witnesses. Furthermore, the moving papers give no indication that these witnesses were contacted and all claims regarding how they would be inconvenienced and their willingness to testify are based upon "information and belief." Such speculative evidence is insufficient to satisfy the third and fourth evidentiary requirements set forth in the *O'Brien* case. Similarly, inasmuch as Cornell failed to indicate that it contacted plaintiff's treating physician Dr. Huddle, it may not rely upon this

potential witness in support of its motion to change venue under CPLR 510 (3).

Finally, Cornell has made the required evidentiary showing with respect to Ithaca Police Officer Michael Nelson. In particular, Cornell has provided Officer Nelson's name and address and set forth the facts to which he will testify. Moreover, Officer Nelson's affidavit is sufficient to demonstrate that he would be willing to testify at trial and that traveling to Kings County would be a major inconvenience for him. However, although courts must give added weight to the convenience of local government officials including police officers when considering a motion under CPLR 510 (3) motion (*see Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908, 909 [2008]), the convenience of a single such witness is generally insufficient to justify a change of venue under the statute (*Rosenthal v Bologna*, 211 AD2d 436, 437-438 [1995]). This is particularly true in the instant case inasmuch as Officer Nelson's testimony would be of limited value with respect to the question of whether Cornell (or Sigma Pi) may be held liable for the attack upon plaintiff. Specifically, although Officer Nelson witnessed the stabbing, there is no dispute regarding this issue. Poffenbarger pled guilty to this crime and fully admitted to stabbing plaintiff at his deposition. Furthermore, plaintiff has already obtained a default judgment against Poffenbarger. Accordingly, Cornell's motion, and Sigma Pi's cross motion to change the place of trial to Tompkins County is denied.

#### ***Cornell's Motion to Dismiss***

Cornell moves to dismiss the amended complaint against it under CPLR 3211 (a)(1) and (7). In particular, with respect to plaintiff's second cause of action, which alleges that Cornell was negligent in its ownership, operation, and management of the University's premises, Cornell maintains that documentary evidence conclusively demonstrates that Cornell did nothing to

cause/create the dangerous condition presented by the armed, intoxicated, and belligerent Poffenbarger, nor did it have any basis for foreseeing the violent, racially-motivated attack ultimately perpetrated by Poffenbarger. In addition, to the extent that the second cause of action alleges that Cornell was negligent in failing to adequately supervise its students, Cornell maintains that the cause of action must be dismissed pursuant to CPLR 3211 (a)(7) inasmuch as under relevant New York law, colleges and universities have no legal duty to shield their students from the dangerous activities of other students.

With respect to plaintiff's third and fourth causes of action, which allege violations of General Obligations Law §§ 11-100 and 11-101, Cornell maintains that documentary evidence conclusively demonstrates that it neither sold nor furnished alcoholic beverages to Poffenbarger prior to the assault. Consequently, Cornell maintains that these claims must be dismissed as well.

In support of its motion, Cornell submits an affidavit by Lieutenant Nazar of the Cornell University Police, who supervised the investigation of the stabbing incident. Cornell further submits a copy of the entire New York State Incident Report for the case, which includes numerous witness statements given to investigators concerning the relevant events that took place on the evening of February 17-18, 2006. According to Lt. Nazar, as of February 18, 2006, the Cornell University Police had no record of any kind concerning Poffenbarger and no record of any violent crimes having been reported at the location where the incident occurred. Moreover, Cornell maintains that the Incident Report demonstrates that Cornell had no information prior to the stabbing that Poffenbarger was acting aggressively. In this regard, Cornell notes that, although its police officers appeared at the fraternity party prior to the stabbing, this was in response to a noise complaint, and had nothing to do with any violent incidents involving Poffenbarger. Further, Cornell points out that both Officer

Nelson, who witnessed the stabbing, and plaintiff, who was stabbed, did not see Poffenbarger's knife or realize that he had stabbed anyone until after blood began to appear on plaintiff's clothing. If the Ithaca police officer and victim who actually witnessed the stabbing were unable to perceive the danger posed by Poffenbarger until after the attack occurred, Cornell maintains that there is no basis for any finding that it should have foreseen of the assault ahead of time and acted to prevent it. Finally, Cornell notes that the witness statement given to the police all indicate that Poffenbarger was supplied with alcohol on the evening in question solely by fellow students in the dorm room, and possibly by members of Sigma Pi.<sup>5</sup> Under the circumstances, Cornell maintains that plaintiff's causes of action against it under General Obligations Law §§ 11-100 and 11-101 must be dismissed.

As an alternative basis for relief, Cornell moves under CPLR 3211 (c), for an order directing that Cornell's motion will be treated as one for summary judgment. Upon the granting of this relief, Cornell seeks summary judgment dismissing the amended complaint against it based upon the same "documentary evidence" that Cornell relies upon in moving under CPLR 3211 (a)(1).

In opposition to Cornell's motion to dismiss the complaint pursuant to CPLR 3211 (a)(7), plaintiff argues that, contrary to Cornell's claim, his second cause of action is not a claim based upon an in loco parentis theory. Rather, plaintiff's second cause of action seeks to hold Cornell liable as a landowner who failed to exercise reasonable care to protect plaintiff from the reasonably foreseeable criminal conduct of Poffenbarger. According to plaintiff, under New York case law, this is a viable cause of action against colleges and universities which is adequately pled in the amended

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<sup>5</sup> At his deposition, Poffenbarger testified that he "seemed to remember" someone giving him a beer at the fraternity and drinking the beer. However, he could not remember who gave him the beer. Ms. Malvica stated in her witness affidavit that a student named "Alexi" gave Poffenbarger a beer at the party and that she took the beer from Poffenbarger and drank it herself.

complaint. Under the circumstances, plaintiff argues that Cornell's motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) must be denied.

Plaintiff further maintains that, in reality, the gravamen of Cornell's motion is that plaintiff cannot establish a triable issue of fact as to Cornell's liability for Poffenbarger's attack on plaintiff and therefore, Cornell should be granted summary judgment. However, plaintiff argues that Cornell's motion is clearly premature inasmuch as to date, little pre-trial discovery has taken place. In any event, plaintiff argues that the evidence Cornell relies upon in support of its motion (i.e., the police incident report), along with the deposition testimony given by Cornell Police Officer Timothy Marsh actually present material issues of fact which require the denial of Cornell's motion. Specifically, plaintiff avers that there is evidence that, through its agents and employees, Cornell had notice of the potentially dangerous situation presented by Poffenbarger and failed to exercise reasonable care to protect plaintiff from the reasonably foreseeable criminal acts committed by this assailant

In support of this argument, plaintiff argues that, as a Resident Advisor, Ms. Malvica was an employee or agent of Cornell. In this regard, plaintiff notes that Cornell's own "Policy Notebook" states that "[s]taff and faculty members [including student employees] are agents of the university. As such, they are expected to uphold the standard promulgated by this policy, through the maintenance of a workplace free of . . . alcohol abuse, and to behave in a responsible manner around these substances." In addition, plaintiff points to Ms. Malvica's statement to investigators that, as an RA, it was her job to "control a situation."

Plaintiff further notes that Ms. Malvica's statement to investigators indicates that she was present with Poffenbarger throughout the evening in question, watched him consume large amounts

of alcohol and further observed him become increasingly belligerent throughout the evening. However, at no point did Ms. Malvica attempt to stop the under-age Poffenbarger's alcohol consumption. Indeed, according to plaintiff, Ms. Malvica actually facilitated Poffenbarger drinking. In addition, Ms. Malvica stated that she witnessed Poffenbarger yell racial epithets at African American members of the Sigma Pi fraternity prior to the stabbing incident and tried to control him by placing her hand over his mouth. According to plaintiff, as Cornell's agent, Ms. Malvica's actions and knowledge must be imputed to Cornell, and therefore, Cornell had actual knowledge of Poffenbarger's drunken, belligerent, and racist conduct prior to the racially-motivated attack upon plaintiff yet failed to take steps to prevent the reasonably foreseeable assault.

Plaintiff further maintains that there are issues of fact regarding whether the Cornell Police force had notice of the danger presented by Poffenbarger prior to the stabbing, and whether it negligently failed to take steps to address this dangerous situation. In support of this argument, plaintiff notes that Cornell police responded to a complaint at the incident Sigma Pi house shortly prior to the stabbing incident. In particular, Officer Marsh testified that shortly before the assault, two females flagged him down and complained that they were being "bothered" by a group of males outside the fraternity house and that there was underage drinking occurring at the premises. Accordingly, Officer Marsh proceeded to the Sigma Pi house whereat, according to his testimony, he did not observe anything amiss and proceeded to a different fraternity house. However, plaintiff maintains that Officer Marsh's testimony in this regard lacks credibility. Specifically, plaintiff argues that "the trier of fact is entitled to conclude that when Marsh arrived at the party shortly before the stabbing incident, he saw what was there to be seen: a party in which underage students including plaintiff's assailant, were being served alcoholic beverages, and where an intoxicated and

belligerent Poffenbarger was yelling out racial epithets and was then beaten by several members of the fraternity.” At the very least, plaintiff maintains that he is entitled to further discovery including audiotapes of the police radio transmissions for the evening in question, as well as an opportunity to depose members of the Sigma Pi fraternity in order to determine if the Cornell police were aware of the threat posed by Poffenbarger prior to the stabbing.

Finally, plaintiff maintains that he has a viable claim against Cornell under General Obligations Law § 11-100, which imposes liability for unlawfully furnishing or assisting in the procurement of alcoholic beverages by underage persons. Plaintiff maintains that Cornell may be held liable under this statute for the actions of Ms. Malvica, who was vested with the authority to prohibit the unlawful consumption of alcohol in her dormitory. In this regard, plaintiff notes that Ms. Malvica not only failed to prevent Poffenbarger from consuming massive amounts of alcohol in the dormitory, she actually joined him in consuming several shots of alcohol. According to plaintiff, “Malvica’s giving the ‘green light’ to Poffenbarger at a minimum raises a question of fact as to whether Malvica ‘assisted’ Poffenbarger in becoming intoxicated.”

In reply to plaintiff’s opposition papers, Cornell argues that, although he attempts to characterize his claims against Cornell as sounding in premises liability, in reality, plaintiff’s claim is based upon an in loco parentis theory that is not recognized by New York Courts. In this regard, Cornell points to plaintiff’s argument that as a RA, Ms. Malvica was somehow responsible for “controlling” Poffenbarger’s actions. Cornell further argues that there is no authority for the proposition that a university may be held vicariously liable for the actions/inactions of an off-duty Resident Advisor who fails to anticipate and prevent an attack by a student at a location away from his or her dormitory. In addition, Cornell contends that it cannot be held liable under a premises

liability theory for any events that transpired at the Sigma Pi house inasmuch as the land upon which the fraternity house is located is privately owned by the Mu Chapter of Sigma Pi. In support of this claim, Cornell submits a copy of a deed and survey map which indicate that Cornell does not own the subject property. Furthermore, Cornell argues that there is no merit to plaintiff's claim that the Cornell Police had notice of Poffenbarger's belligerent actions prior to the assault inasmuch as the police appeared at the fraternity party in response to a simple noise complaint. In this regard, Cornell submits a copy of the Cornell Police Department's "call sheet" for this complaint which makes no mention of any violent behavior. Finally, Cornell maintains that its alternative request that the court treat the motion as one for summary judgment is not premature. Specifically, Cornell avers that plaintiff has failed to submit an affidavit which demonstrates that additional discovery may uncover evidence which will support his claims against Cornell or otherwise provide a basis for denying Cornell's summary judgment motion.

#### *Analysis*

Turning first to that branch of Cornell's motion which seeks dismissal of the amended complaint based upon the failure to state a cause of action, it is well-settled that, on a motion to dismiss pursuant to CPLR 3211 (a)(7), "the . . . complaint is to be afforded a liberal construction. The facts as alleged in the . . . complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Goldfarb v Schwartz*, 26 AD3d 462, 463 [2006]). With respect to plaintiff's second cause of action, it is true, as Cornell notes in its motion papers, that "New York has affirmatively rejected the doctrine of in loco parentis at the college level" (*Luina v Katherine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2007]). However, under appropriate

circumstances, a college or university may be held liable for failing to exercise reasonable care to protect a student from reasonably foreseeable criminal or dangerous acts committed by third persons on its premises (*Luina*, 37 AD3d at 556; *Ayeni v Count of Nassau*, 18 AD3d 409, 410 [2005]). Here, plaintiff's second cause of action specifically alleges that Cornell was negligent in failing to protect him from the reasonably foreseeable criminal acts committed by Poffenbarger on Cornell's campus. Accordingly, contrary to Cornell's argument, the allegations in plaintiff's second cause of action are sufficient to state a cognizable claim.<sup>6</sup>

Cornell's motion also seeks dismissal of the amended complaint based upon documentary evidence under CPLR 3211 (a)(1). However, the so-called "documentary evidence" that Cornell relies upon in support of this branch of its motion consists of the police "Incident Report" for the underlying crime, which itself contains dozens of exhibits including some 48 separate witness statements/affidavits and "narrative supplements" filed by police officers who responded to and investigated the crime. Although there is little case law specifically defining what constitutes documentary evidence under this provision, "the word apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10). Thus, the evidence typically relied upon in support of a motion under CPLR 3211 (a)(1) encompasses the "range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence" (*id.*). However, "affidavits submitted by a defendant do not constitute documentary

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<sup>6</sup>Cornell's motion papers do not argue that plaintiff's third and fourth causes of action, which allege violations of General Obligations Law §§ 11-100 and 11-101, fail to state a cause of action.

evidence upon which a proponent of dismissal [under CPLR 3211 (a)(1)] can rely” (*Gepin v Fogarty*, 59 AD3d 837 [2009]; see also *Realty Investors of USA Inc. v Bhaidaswala*, 254 AD2d 603, 604-605 [1998], Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10). The reason for this is that claims in an affidavit can always be disputed or contradicted by other affidavits and testimonial evidence. Accordingly, in seeking dismissal of the complaint, Cornell’s reliance upon a pre-answer CPLR 3211 (a)(1) motion is misplaced inasmuch as the myriad of affidavits/witness statements and narrative supplements which serve as the basis for this motion do not constitute the type of documentary evidence contemplated under the statute.

In reality, and as plaintiff’s opposition papers correctly note, Cornell’s motion seeks summary judgment prior to issue being joined based upon the argument that the witness statement/affidavits obtained during the investigation of the stabbing conclusively demonstrate that Poffenbarger’s assault upon plaintiff was a sudden, unexpected, and unforeseeable criminal act and that Cornell otherwise lacked notice of the danger presented by Poffenbarger. Generally, a party is precluded from seeking summary judgment prior to the joinder of issue (*see* CPLR 3212 [a]) unless, pursuant to CPLR 3211 (c), it first obtains the court’s consent to treat its dismissal motion as one for summary judgment. Although Cornell’s motion papers do in fact seek relief under CPLR 3211 (c) as an alternative basis for dismissal of the complaint, courts usually must grant adequate notice to the opposing party before converting a CPLR 3211 motion into one for summary judgment (CPLR 3211 [c]; *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1998]). Here, no such notice has been granted to plaintiff. However, an exception to the notice requirement rule exists where the parties “chart a summary judgment course” and argue the merits of their respective positions (*id.*; *Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, \_\_AD3d\_\_, 2009 Slip Op 03136 [2d Dept 2009];

*Tendler v Vais Knesses of New Hempstead, Inc.*, 52 AD3d 500, 502 [2008]). This is precisely what has occurred in the instant case. In particular, as discussed above, Cornell seeks summary judgment on the merits based upon numerous affidavits and witness statements compiled during the investigation of the stabbing. Moreover, although plaintiff contends that he requires and is entitled to additional discovery, the main thrust of his opposition papers is that Cornell's evidentiary submissions actually establish issues of fact as to whether Cornell breached its duty to keep him safe from Poffenbarger's foreseeable attack. Indeed, plaintiff's opposition papers contain additional evidentiary submissions in support of this argument including Poffenbarger's deposition testimony and Officer Marsh's deposition testimony. Thus, it is clear that both parties have charted a summary judgment course by arguing the merits of plaintiff's claims against Cornell. Consequently, notwithstanding the fact that issue has not been joined and that no CPLR 3211 (c) notice has been given to plaintiff, the court will treat Cornell's motion as being one for summary judgment.

With respect to plaintiff's second cause of action (and as was noted above) although "New York has rejected the doctrine of in loco parentis at the college level and colleges 'in general have no legal duty to shield their students from the dangerous activity of other students' . . . under appropriate circumstances, a college may be held liable for injuries sustained by a student while on campus" (*Luina*, 37 AD3d at 556, quoting *Eiseman v State of New York*, 70 NY2d 175 [1987]). In particular, like any other property owner, a college or university has "a duty to exercise reasonable care to protect the plaintiff from reasonably foreseeable criminal or dangerous acts committed by third persons on campus" (*Ayeni*, 18 AD3d at 410). Thus, for example, a college may be held liable for a sexual assault upon one of its students by an intruder who gained entry to her dormitory through an unlocked door when there was evidence that the college failed to keep the subject doors locked

despite several prior complaints about nonresident strangers loitering in the lounges and hallways of the dormitory (*Miller v State of New York*, 62 NY2d 506 [1984]). In contrast, no liability will attach to a college when a student/plaintiff is the victim of a sudden assault and there is no evidence from which a trier of fact could determine that the college could have anticipated and prevented the attack (*Luina*, 37 AD3d at 555; *Ayeni*, 18 AD3d at 409; *Adams v State of New York*, 210 AD2d 273 [1994]).

Here, Cornell has made a prima facie showing that Poffenbarger's assault upon plaintiff was an unforeseeable event and that it did not otherwise breach any duty owed toward him. Specifically, Cornell has submitted a sworn affidavit by Lt. Nazar of the Cornell University Police which indicates that it had no record of any prior incidents involving Poffenbarger. This affidavit also indicates that the Cornell police had no record of any prior violent incidents taking place in the area where the stabbing occurred. Furthermore, with respect to the events preceding the assault upon plaintiff, Cornell has submitted evidence in the form of numerous witness affidavits which indicate that Poffenbarger first began to act in a violent manner shortly before the actual stabbing when he got into a racial-charged physical altercation with members of the Sigma Pi fraternity, first inside, then outside the fraternity house. This evidence also indicates that the confrontation quickly enveloped plaintiff and his friends and shortly thereafter, Poffenbarger stabbed plaintiff without warning in full view of an Ithaca Police Officer Nelson who was responding to the altercation. Indeed, the stabbing took place so quickly that neither plaintiff nor Officer Nelson realized what had happened until blood began to appear on plaintiff's clothing after Poffenbarger fled the area. Taken together, this evidence is sufficient to demonstrate that the assault upon plaintiff was a sudden, unexpected, and unforeseeable act and that Cornell had no opportunity to prevent or stop the attack.

Accordingly, the burden shifts to plaintiff to raise a triable issue of fact regarding Cornell's liability under his second cause of action.

In opposition to Cornell's motion, plaintiff relies upon two arguments. First, plaintiff maintains that evidence before the court indicates that Cornell had notice of Poffenbarger's belligerence and racial animosity prior to the stabbing through its employees and therefore, there are triable issues of fact as to whether the stabbing was foreseeable and whether Cornell breached its duty to protect him from the assault. In the alternative, plaintiff maintains that, given the early stage of this proceeding, summary judgment should not be awarded until he has an opportunity to conduct discovery.

With respect to plaintiff's first argument, there is no merit to his claim that Cornell may be charged with notice of Poffenbarger's belligerent and racist conduct at the fraternity house prior to the assault through its Resident Advisor "employee" Ms. Malvica. In this regard, although Ms. Malvica violated Cornell's rules and policy by allowing and joining with Poffenbarger and other students in consuming alcohol in a dormitory building which she was responsible for overseeing, there is no evidence that Poffenbarger was acting in a violent or racist manner at this point in the evening. Standing alone, the mere fact that Poffenbarger was intoxicated in the dormitory did not make it reasonably foreseeable that he would stab a fellow student in a racially-motivated attack later in the evening. It was not until Poffenbarger and Ms. Malvica arrived at the Sigma Pi fraternity house that Poffenbarger began to act belligerently and make racist comments. At this point, Ms. Malvica was not functioning in her capacity as a Cornell RA, but rather, was merely a student at a social function in a privately-owned fraternity house. Plaintiff has failed to cite any authority for the proposition that it may be charged with knowledge of Poffenbarger's conduct at the fraternity party

based upon Ms. Malvica's presence at the party.

Plaintiff further maintains that there is an issue of fact as to whether Cornell had notice of Poffenbarger's dangerous conduct prior to the stabbing inasmuch as Cornell Police responded to a complaint at the Sigma Pi fraternity house prior to the stabbing. Accordingly, plaintiff avers that there is an issue of fact as to whether Poffenbarger's subsequent criminal conduct was reasonably foreseeable. However, none of the evidence before the court at this time including the police "detail call sheet" for the complaint or the witness affidavits indicate that the Cornell Police had any interaction with Poffenbarger at the fraternity house prior to the stabbing or that these officers observed Poffenbarger's belligerent conduct at this time. Accordingly, plaintiff has failed to submit sufficient evidence to raise a triable issue of fact as to whether Cornell could have reasonably foreseen Poffenbarger's criminal assault.

Turning to plaintiff's alternative argument that Cornell's motion is premature inasmuch as limited discovery has taken place to date, CPLR 3212 (f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion ...." It is well-settled that "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Gasis v City of New York*, 35 AD3d 533, 534-535 [2006]). Instead, the party opposing the summary judgment motion must "offer an evidentiary basis to show that discovery may lead to relevant evidence" (*id.* at 534). If such a showing is made, the court may deny a summary judgment motion as premature notwithstanding the fact that the movant has made a prima facie showing of its entitlement to summary judgment (*Premier Real Estate Co., LLC v Sherwood*, \_\_AD3d\_\_, 2009 NY Slip Op 04041 [2d Dept 2009]).

In the instant case, the court has determined that plaintiff has failed to introduce sufficient evidence to raise a triable issue of fact regarding Cornell's liability under his second cause of action. However, the court finds that plaintiff's evidence is sufficient to show that additional discovery may lead to relevant evidence that is necessary to plaintiff's opposition to Cornell's summary judgment motion. Specifically, although as noted above, at this time there is no evidence to demonstrate that the Cornell Police witnessed Poffenbarger's belligerent conduct and racist comments when they responded to a "noise complaint" at the Sigma Pi fraternity house on the evening in question, the witness affidavits and police "detail call sheet" indicate that the police responded to the fraternity house at or around the same time period that Poffenbarger became involved in the altercation with members of Sigma Pi in the foyer of their house. Specifically, in an affidavit, witness Jeremy J. Phillips, who describes himself as a "sober monitor for the [fraternity] party" states that:

"[a]t about 12:45 AM I went up to the 1<sup>st</sup> floor and saw some fraternity brother trying to remove [Poffenbarger] from the party. He was being very difficult with the fraternity members who were trying to escort him out of the party. I joined in to assist with his removal. During this struggle this guy ripped my orange colored sober monitor shirt. Finally we were able to get him outside . . ."

Other witnesses to this altercation in the fraternity house including Ansel Brasseur, Matt Caris, and Sam Elechert estimated that it occurred at approximately 1:00 A.M., while Peter Strang estimated that it took place at approximately 1:15 A.M. At the same time, the Cornell University Police detail call sheet indicates that both Cornell and Ithaca police officers were dispatched and "on scene" at the address of the fraternity party at 12:42:46 A.M. and 12:48:14 A.M. and that the complaint was "cleared" at 1:03:05 A.M. Given this evidence, and considering the pre-answer phase of this litigation, plaintiff is entitled to conduct discovery as to whether the Cornell Police were present or

otherwise had notice of this violent confrontation involving Poffenbarger which occurred approximately 15 to 30 minutes before the stabbing inasmuch as it may lead to relevant evidence regarding the issues of the foreseeability of the subsequent assault and whether Cornell could have prevented the attack from taking place.<sup>7</sup> In particular, plaintiff is entitled to seek depositions of Sigma Pi members who witnessed Poffenbarger's conduct in the fraternity house prior to the stabbing in order to determine if the Cornell Police were present at that time.<sup>8</sup>

Accordingly, that branch of Cornell's motion which, in effect, seeks summary judgment dismissing the second cause of action is denied without prejudice to renew upon completion of discovery.

Cornell also moves for summary judgment dismissing plaintiff's third and fourth causes of action, which allege that Cornell violated the Dram Shop Act (General Obligations Law §§ 11-100 and 11-101) by unlawfully selling, furnishing and/or assisting Poffenbarger in procuring alcoholic beverages. In so moving, Cornell maintains that the uncontroverted evidence before the court demonstrates that at no point did it furnish Poffenbarger with alcoholic beverages on the evening of February 17-18, 2006. In support of this claim, Cornell points to the witness affidavits as well as Poffenbarger's own deposition testimony, both of which indicate that Poffenbarger was provided

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<sup>7</sup>At oral argument, Cornell claimed that its police officers lacked jurisdiction over the Sigma Pi fraternity house pursuant to Education Law § 5709 inasmuch as Cornell does not own the property upon which the house is situated. However, this statute gives Cornell Police jurisdiction over "other lands and property under the supervision, administration and control of said university." Here, there are clearly factual issues regarding whether the fraternity, which was completely surrounded by the Cornell campus, was under the supervision, administration and control of Cornell.

<sup>8</sup>The court notes that plaintiff did depose Officer Timothy Marsh of the Cornell University Police who responded to the Sigma Pi house on the evening in question. However, Officer Marsh could not remember whether he entered the house or not. In contrast, Nicholas Jette, the fraternity's social chairperson, stated in a sworn affidavit that two Cornell Police officer appeared at the party (at approximately midnight) and walked through the basement, first, second, and third floors of the house.

with numerous shots of alcohol by fellow student Melissa Kujda in her dorm room prior to going to the Sigma Pi party. This evidence also indicates that Poffenbarger may have been provided with beer while at the Sigma Pi fraternity house. However, there is no evidence that Cornell itself sold or provided plaintiff with alcohol prior to the stabbing. Under the circumstances, Cornell argues that there is no basis for plaintiff's Dram Shop Act claims against it.

As previously stated, in opposition to this branch of Cornell's motion, plaintiff maintains that there is an issue of fact as to whether Ms. Malvica assisted in unlawfully furnishing Poffenbarger with alcohol. In this regard, plaintiff notes that Ms. Malvica was a Cornell RA who was in charge of the dormitory floor on which Poffenbarger was binge drinking, and she was vested with the authority to prohibit this unlawful conduct. However, instead of carrying out her duty, Ms. Malvica joined Poffenbarger in consuming several shots of liquor. According to plaintiff, Malvica's giving the "green light" to Poffenbarger to binge drink is enough to raise an issue of fact as to whether Cornell violated the Dram Shop Act.

General Obligations Law §§ 11-100 and 11-101 imposes liability upon those who cause injury by unlawfully furnishing, selling or assisting in the procurement of alcoholic beverages to underage persons (*see Jacobs v Amodeo*, 208 AD2d 1171, 1172 [1994]). Furthermore, "[b]eing in derogation of the common law, these statutes are to be strictly construed" (*Dunphy v J&I Sports Enter., Inc.*, 297 AD2d 23, 25 [2002]). Although the term "furnishing" under General Obligations Law § 11-100 is broad enough to encompass conduct other than actually handing over alcohol to minors, a "passive participant who merely knew of the underage drinking and did nothing else to encourage it" is not subject to liability under the statutes (*Rust v Reyer*, 91 NY2d 355, 361 [1998]). Instead, there must be evidence that the defendant played an integral role in the scheme to make

alcohol available to underage party guests such as volunteering to host the party ahead of time and/or providing pre-party storage for the alcoholic beverages (*id.*). Moreover, a violation of General Obligations Law § 11-101 requires the commercial sale of alcohol (*Gaige v Kepler*, 303 AD2d 626, 628 [2003]).

Here, the evidence before the court demonstrates that Poffenbarger was unlawfully supplied with alcoholic beverages prior to the stabbing solely by fellow students in his dormitory and possibly at the Sigma Pi fraternity party. Moreover, the evidence indicates that, although Ms. Malvica joined Poffenbarger in consuming alcohol in Ms. Kujda's dormitory room, she did not furnish him with this liquor or in any way actively assist anyone in the procurement of this alcohol as required in order to state a claim under General Obligations Law § 11-100. In this regard, there is no merit to plaintiff's argument that Ms. Malvica's knowledge of and participation in the underage drinking in the dormitory room can be construed as furnishing the alcoholic beverages consumed by Poffenbarger inasmuch as the alcohol consumption did not take place in Ms. Malvica's room and she played no role in planing the dormitory get-together. Instead, Ms. Malvica was "a passive participant who merely knew of the underage drinking and did nothing else to encourage it" (*Rust*, 91 NY2d at 361). Further, there is no evidence that Ms. Malvica (or anyone else "employed" by Cornell) engaged in the commercial sale of alcohol to Poffenbarger as required to state a claim under General Obligations Law § 11-101. Thus, even if Cornell could be held liable for Ms. Malvica's actions in the dormitory prior to the assault given her status as a Resident Advisor, this would not provide a basis for holding Cornell liable under the Dram Shop Act.

Finally, plaintiff has failed to make any showing that additional discovery would uncover evidence that Cornell violated the Dram Shop Act. Accordingly, that branch of Cornell's motion

which seeks to dismiss plaintiff's third and fourth causes of action is granted.

***Sigma Pi's Cross Motion to Dismiss***

Sigma Pi cross-moves to dismiss the amended complaint against it pursuant to CPLR 3211 (a)(1), (a)(7), and 3211 (c). In support of its cross motion, Sigma Pi submits an affidavit by James H. Keene, III, the President of Mu Chapter of Sigma Pi Fraternity of the United States, Inc. According to Mr. Keene, Sigma Pi is a corporate entity that owns the Sigma Pi fraternity house at Cornell and leases the house to individual tenants, who are members of the local Sigma Pi Fraternity at Cornell. Mr. Keene further avers that the corporate Sigma Pi is a separate and distinct legal entity from the local Sigma Pi Fraternity at Cornell University. In addition, Mr. Keene avers that the corporate Sigma Pi does not and cannot directly control or supervise the day-to-day activities of its tenants. Thus, Mr. Keene maintains that the corporate Sigma Pi: (1) had no advanced notice of the party that took place at the Sigma Pi fraternity house on the evening in question; (2) did not have any presence at or participation in the party; (3) did not know of Poffenbarger's presence at the party until after the police investigation had taken place; (4) did not have knowledge of Poffenbarger's intoxication at the party; and (5) never furnished, sold, or assisted Poffenbarger in procuring alcohol. Accordingly, Sigma Pi maintains there is no basis for plaintiff's negligence or Dram Shop Act claims against it.<sup>9</sup>

In opposition to Sigma Pi's cross motion, plaintiff maintains that Sigma Pi's cross motion is premature. Specifically, plaintiff argues that Sigma Pi is not entitled to pre-answer dismissal of

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<sup>9</sup>Sigma Pi's cross motion also alleges that plaintiff failed to properly serve it with the amended summons and complaint inasmuch as the party identified in the affidavit of service (one Tucker Whitecomb), was not authorized to accept legal papers for Sigma Pi. However, this jurisdictional defense was raised in opposition to plaintiff's motion for a default judgment against Sigma Pi. Inasmuch as plaintiff has withdrawn this motion, the matter is now moot.

the claims against it based upon the conclusory allegations set forth in Mr. Keene's affidavit to the effect that Sigma Pi was an out-of-possession landlord which lacked any responsibility for the events that transpired at its fraternity house. According to plaintiff, he is entitled to depose a Sigma Pi officer in order to determine the veracity of these claims. In addition, plaintiff argues that he is entitled to a copy of any lease agreement that exists between the corporate Sigma Pi and its tenants in order to determine the respective rights and obligations of the various Sigma Pi entities vis a vis the fraternity house.

### *Analysis*

Initially, although Sigma Pi's notice of cross motion indicates that it seeks dismissal of the complaint under CPLR 3211 (a)(7) for failing to state a cause of action, the motion papers fail to contain any argument in this regard. Rather, Sigma Pi's cross motion to dismiss is based solely upon purported "documentary evidence" in the form of Mr. Keene's affidavit. Specifically, Sigma Pi maintains that this affidavit conclusively demonstrates that it had no notice of the party that occurred at its fraternity house on the night in question and that it lacked the ability and responsibility for controlling the events that transpired. However, as the court previously noted, an affidavit does not constitute documentary evidence under CPLR 3211 (a)(1) (*Gepin*, 59 AD3d at 837; *Realty Investors of USA Inc.*, 254 AD2d at 604-605 [1998], Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10). Accordingly, that branch of Sigma Pi's motion which seeks dismissal pursuant to CPLR 3211 (a)(1) is denied. Finally, unlike in its opposition to Cornell's motion to dismiss, plaintiff has not charted a summary judgment course with respect to Sigma Pi's cross motion. Thus, the court may not treat Sigma Pi's cross motion as being one for summary judgment.

Accordingly, Sigma Pi's cross motion to dismiss the amended complaint is denied. To the extent that the cross motion seeks leave to file and serve a late answer to the pleading, said branch of the cross motion is granted and Sigma Pi is directed to serve an answer within 30 days of entry of this order.

*Summary*

In summary, the court rules as follows: (1) Cornell's motion and Sigma Pi's cross motion, pursuant to CPLR 510 (3), to change the place of trial from Kings County to Tompkins County are denied; (2) that branch of Cornell's separate motion which seeks dismissal of the amended complaint against it pursuant to CPLR 3211 (a)(1) and (7) is denied. That branch of Cornell's motion which seeks, in effect, summary judgment dismissing the amended complaint against it is granted with respect to plaintiff's third and fourth causes of action and denied without prejudice to renew with respect to plaintiff's second cause of action. Sigma Pi's cross motion to dismiss the amended summons and complaint against it pursuant to CPLR 3211 (a)(1), (7), and (c) is denied.

This constitutes the decision and order of the court.

**ENTER**



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Michael A. Ambrosio