

Brens v Long Is. Univ.
2014 NY Slip Op 31688(U)
May 20, 2014
Sup Ct, Queens County
Docket Number: 702448/2013
Judge: Jr., Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.

IA PART 32

ORIGINAL

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JOSE BRENS,

Index No: 702448 2013

Plaintiff,

-against-

Motion Date: January 16, 2014

LONG ISLAND UNIVERSITY,

Mot. Seq. No. **FILED**

JUN - 3 2014

Defendant.

COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 6 read on this motion by defendant Long Island University for an order dismissing the complaint on the grounds of documentary evidence, statute of limitations and failure to state a cause of action, pursuant to CPLR 3211(a)(1)(5) and (7).

	Papers <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-5
Memorandum of Law in Opposition.....	
Reply Affirmation.....	6

Upon the foregoing papers the motion is determined as follows:

Plaintiff Jose Brens was academically dismissed as a nursing student at defendant Long Island University on June 15, 2011. Plaintiff alleges that he suffers from a physical and mental disability; that in 2009 his disability impaired his ability to attend classes; that he notified LIU of his disability and with the advice and consent of LIU he did not enroll in class in the Fall 2009; that he enrolled in class in Spring 2010 but that due to his disability he was unable to attend class or perform his studies to the extent required; and that in March 2010 he requested and was granted permission to withdraw from his classes for medical reasons. It is alleged that he subsequently learned that he had received grades of UW (unofficial withdrawal) for the Spring 2010 term; that these grades did not affect his academic standing; that he contacted LIU and was assured that the UW grades were a mistake and would be corrected; and that he sought the corrections between June 2010 and

June 2011; that LIU knew that he withdrew from these classes due to his disability; that it should have provided him with a reasonable accommodation by removing the UW grades from his transcript; and that its failure to do so, and the subsequent academic dismissal constituted an unlawful discriminatory practice under the New York City Human Rights Law.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court’s “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2nd Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2d Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]).

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.; accord*, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)” (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv. to appeal denied*, 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998])

The documentary evidence submitted herein consisting of a course enrollment card, demonstrates that April 1, 2010, plaintiff voided his March 31, 2010 withdrawal from two

courses, N192 and N198. Said enrollment card was signed by an LIU advisor and by Mr. Brens.

Defendant LIU, in its letter dated June 15, 2011, academically dismissing plaintiff stating, in pertinent part, that: "Accepted policies of the School of Nursing specify that no student may remain in the program if she/he has failed more than one nursing course, failed a nursing course twice, or has a Grade Point Average of less than 2.5. A review of your record indicated the following failures and/or index:

Fall 2008 you received a C- in N197.

Spring 2009 you received a C- in N198. According to School of Nursing policies, you should have been dismissed from the program. Dean Dawn Kilts allowed you to remain in the program given that you provided evidence of a newly diagnosed illness. The condition of you remaining in the program was that you take the remainder of that year to take care of your health.

Spring 2010 you returned to the School of Nursing and registered for two nursing courses: N192 and N198. Your performance in N198 was unsatisfactory and you made the decision to withdraw on March 31, 2010. You then re-registered for the course on April 1, 2010 but did not attend class."

LIU maintains an office of Disability Support Services on its campus, and it is undisputed that students with disabilities who desire accommodations are required to self-report their disability, submit appropriate documentation of their disability, and meet with professional staff members.

In challenging his academic dismissal, along with allegations based on discrimination, plaintiff should have brought a proceeding under CPLR article 78, rather than this plenary action (see *Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Clogher v New York Med. Coll.*, 112 AD3d 574 [2d Dept 2013]; *Gary v New York Univ.*, 48 AD3d 235, 236-237 [1st Dept 2008]; *Bottalico v Adelphi Univ.*, 299 AD2d 443 [2d Dept 2002]). Since the plaintiff commenced the instant action on June 26, 2013, long after the expiration of the four-month statute of limitations period applicable to CPLR article 78 proceedings, his claims are time-barred (see *Clogher v New York Med. Coll.*, 112 AD3d at 574; *Padiyar v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 73 AD3d 634, 635 [1st Dept 2010]).

The court further finds that the complaint fails to state a claim for a violation of the New York City Human Rights Law. Although plaintiff alleges that LIU failed to offer him a reasonable accommodation by removing the UW grades, he does not allege that he

requested an accommodation, or otherwise notified LIU that he was seeking an accommodation when he withdrew from the Spring 2010 classes on March 31, 2010.

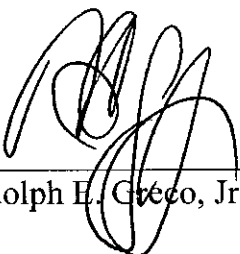
The court further finds plaintiff's allegations pertaining to his academic dismissal are contradicted by the documentary evidence. The academic dismissal letter makes no reference to UW grades. Rather, it appears that the dismissal was based upon plaintiff's failure to maintain the required grade point average, and his failure to attend course N198, a class in which he was enrolled. In addition, the course enrollment card dated April 1, 2010, and signed by the plaintiff demonstrates that he voided his withdrawal from courses N198 and N192, and that the courses were added back on April 1, 2010. Plaintiff does not allege that he thereafter withdrew from these courses a second time, or that he sought an accommodation with respect to his failure to attend classes in the Spring 2010 term.

Finally, to the extent that plaintiff alleges that the failure to correct or remove the UW grades constituted a discriminatory act under the New York City Human Rights Law, this claim is barred by a three year statute of limitations, as plaintiff was admittedly aware of his grades no later than June 2010 (Administrative Code of the City of New York §8-502[d]).

Plaintiff in opposition to the within motion has only submitted a memorandum of law. In view of the fact that plaintiff has not cross moved for leave to amend his complaint, the court declines to entertain this request which was set forth in said memorandum of law.

In view of the foregoing, defendant's motion to dismiss the complaint is granted.

Dated: May 20, 2014



Rudolph E. Greco, Jr., J.S.C.