

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

5000

Present:

HON. KENNETH A. DAVIS,

Justice

MICHAEL FRANCHETTI, CATHERINE FRANCHETTI
and DR. MICHAEL FRANCHETTI,

TRIAL/IAS, PART 5
NASSAU COUNTY

Plaintiff(s),

SUBMISSION DATE: 8/3/07
9/14/07
INDEX No.: 14795/05

-against-

HOFSTRA UNIVERSITY,

MOTION SEQUENCE # 4,5,6

Defendant(s).

The following papers read on this motion:

Notice of Motion/Cross Motion.....	XXX
Answering Papers.....	XX
Reply.....	X
Memorandum of Law.....	XXX

Motion by Defendant Hofstra University for an order awarding summary judgment and dismissing the complaint is granted and the complaint is dismissed. Additional motion by Defendant Hofstra University for an order striking the affirmation of Lucia Maria Caravino and exhibits attached to Plaintiffs' Note of Issue, denying Plaintiffs' improper request set forth therein, and precluding any trial objections regarding Defendant's production of witnesses at trial is denied as moot. Cross-motion by Plaintiffs Michael Franchetti, Catherine Franchetti and Dr. Michael Franchetti for summary judgment is denied.

This action arises out of the indefinite suspension of

Plaintiff Michael Franchetti (hereafter Franchetti or Plaintiff) from Hofstra University for possession of illegal drugs. After one semester Plaintiff applied for and was granted readmission.

The complaint asserts three causes of action concerning Franchetti's suspension sounding in breach of contract, a due process violation and false imprisonment. None have been supported by admissible evidence.

The uncontroverted facts include the following. On September 24, 2004 a Resident Advisor at Nassau Hall at defendant Hofstra University smelled marijuana coming from Room 111, Plaintiff's dorm room. When University Public Safety Officers entered the room, only Plaintiff's roommate was present. Plaintiff was out. The Public Safety Officers observed a glass pipe and a search resulted in the confiscation of marijuana and various drug paraphernalia belonging to Plaintiff's roommate. The Public Safety Officers also observed a Motorola radio on Plaintiff's desk, the same model as those used by University Public Safety. They searched Plaintiff's possessions, including a locked box, and found a hallucinogenic substance commonly known as "mushrooms" as well as pills in a plastic bag.

Plaintiff later went to the Public Safety Office to retrieve an Appearance Summons issued to him. While there Plaintiff was interviewed and completed an incident report admitting the mushrooms and pills were his and for his own personal use. He gave written permission for his parents to be informed of the charges against him.

At deposition Plaintiff stated that at the Security Office he

discussed the fact that he received an "appearance summons" and was told to "contact the Department of Student Services to schedule a meeting for the incident." He described the meeting as "short and brief." (T127) Plaintiff did not indicate that he was coerced or restrained in any manner. He walked back to his dorm room after the meeting and went on with his normal school routine.

On October 1 Plaintiff met with Dean Federici for an "Informational Meeting" regarding the possession charges. He was provided with an "Acknowledgment of Student's Rights and Disciplinary Procedures". The form advised of the drug charge in writing. Dean Federici explained Plaintiff's options to him and Plaintiff chose to accept responsibility for the incident rather than contest it. He waived an administrative hearing or review by a student judiciary board. This choice carried with it a request that the Dean of Students Office "apply the appropriate sanction."

Dean Federici advised Plaintiff regarding the appeals process available to him. When Plaintiff received a penalty of an indefinite suspension, he appealed the sanction. Dean of Students, Gina-Lyn Crance, denied the appeal on the grounds that Plaintiff failed to show that the sanction was too harsh, that there was new evidence to warrant a rehearing or that his rights were not honored during the judicial process. Plaintiff was not granted a refund of unused tuition payments or other expenses.

In April of 2005, Plaintiff petitioned for reinstatement and was granted permission to reenroll for the fall semester. In his application Plaintiff stated that he had become "more mature and

responsible" and had developed a "deeper sense of accountability" for his actions. Nevertheless, Plaintiff did not enroll in the fall and together with his parents commenced this lawsuit for damages.

In order to obtain summary judgment the movant "must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests" and "unsubstantiated allegations or assertions are insufficient for this purpose " (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

Addressing the merits of the claim for false imprisonment, no facts are alleged to support this claim. A plaintiff asserting a claim for false imprisonment "must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Martinez v. City of Schenectady*, 97 NY2d 78, 85 [2001]).

Defendant offers the deposition testimony of Plaintiff, who stated that on the 24th of September he had a "short" meeting at the Security Office, and then continued on with his normal school routine, including going to classes and "throwing a frisbee". Neither his submitted affidavit nor his deposition testimony asserts any claim of confinement. Accordingly the cause of action is dismissed.

With regard to the claim of breach of contract, the contract

between the University and Plaintiff did not require the University to provide an education to a student who violates the disciplinary rules. Plaintiff's affidavit dated June 20, 2007 acknowledges that every student 'is required to abide by the school's rules and regulations found within the handbook 'Guide to Pride'". In addition he acknowledged that students living on campus are "subject to the rules and regulations of the housing contract each resident signs when living in a dormitory." There was no contract between the defendant University and Plaintiff's parents Catherine and Dr. Michael Franchetti.

Plaintiff's possession of unlawful drugs, whether the pills and hallucinogenic substance or the hallucinogenic substance alone, clearly violated the University's housing contract rules and regulations. By signing the housing application Plaintiff agreed to "abide by the Residential Living Agreement" and acknowledged receiving a copy of same. He also agreed to "abide by all rules and regulations established for the residence halls by the Office of Residential Life, outlined in *The Living Factor*, the *Judicial Code* and individual living units (Exhibit B). The Residential Living Agreement prohibits "illegal drugs and paraphernalia" anywhere "in the residence halls" (*supra*). Under the *Judicial Code* possession of illegal drugs is subject to a "minimum sanction" of suspension "for at least one full semester" (Exhibit A p 130).

Plaintiff breached his obligation to the University and it was entitled to impose a sanction of suspension for one semester. No evidence of breach on the part of the University is presented

(see, *Mason v. Central Suffolk Hosp.*, 3 NY3d 343, 349 [2004], citing *Tedeschi v. Wagner College*, 49 NY2d 652, 661-662 [1980])

It is noted that counsel for Plaintiff has averred that Plaintiff was a minor when he entered into the subject contract, thus implying that the contract is voidable. This assertion is belied by Plaintiff's deposition testimony that his birth date is March 15, 1985. "A contract made on or after September first, nineteen hundred seventy-four by a person after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy" (General Obligations Law § 3-101). Accordingly, counsel's assertion is without factual foundation, as Plaintiff signed the housing application on February 5, 2004 at a time when he was 18 years of age and not a minor for contractual purposes.

Turning to Plaintiff's due process violation claim, the essence of the claim is that the University conducted an unlawful search of his room, that the fruit of that search should be suppressed, and that without evidence of illegal drugs the University is without grounds for his suspension .

Plaintiff's due process claim suffers from several infirmities. He fails to show that there was "state action", a prerequisite to a due process claim. He also fails to address his uncoerced written admission of possession of illegal drugs, and fails to address the contract which permits his room to be "entered and searched in the event of reasonable grounds to believe that a crime or infraction of Residential Life regulations is being committed" (Exhibit B - Residential Living Agreement).

There is no challenge to the predicate for the University Security Officers having entered Room 111. An RA called security upon smelling marijuana coming from Room 111. They entered and witnessed a glass pipe, which constitutes unlawful paraphernalia, and the smell of marijuana. A search uncovered marijuana owned by Plaintiff's room mate and prescription drugs and a hallucinogenic substance in Plaintiff's desk (in a locked box). Whether characterized as a crime or an infraction, the circumstances provided grounds for a search under the relevant provision.

Plaintiff places great emphasis upon the fact that he was not in the room at the time, implying that the search of his possessions in the room was not lawful even under the University's rules. However, Plaintiff need not have been present to have breached University rules by having unlawful drugs in his room, and the presence of a police radio in open view on his desk involved him. In any event, he voluntarily admitted that the found items belonged to him, and accepted the sanction to be imposed.

More significant than the predicate for the search is the absence of state action here, a required element of a due process violation based upon an unlawful search and seizure (see e.g., *People v. Haskins*, 48 AD2d 480, 482 [3d Dept 1975]).

Where suspension is predicated upon grounds "unrelated to academic achievement, the operative standard requires that the [private] educational institution proceed in accordance with its own rules and guidelines" (*Harris v. Trustees of Columbia University in City of New York*, 62 NY2d 956 [1984] [rev'd on dissenting opn below, 98 AD2d 58, 70 [1st Dept 1983]]). The full

protections of constitutional due process are not implicated as there is no state action (*Tedeschi v. Wagner College*, 49 NY2d 652, 661-662 [1980]; *Maas v. Cornell University*, 94 NY2d 87, [1999]; *People v. Haskins*, 48 AD2d 480, 482 [3d Dept 1975][no police involvement]; *People v. Boettner*, 50 AD2d 1074 [4th Dept 1975]). As noted only adherence to the university's "published regulations" and "the exercise of honest discretion after a full review of the operative facts" is required (*Galiani v. Hofstra University*, 118 AD2d 572, [2d Dept 1986][action addressing disciplinary proceeding by a private university]).

Plaintiff has not suggested that Hofstra failed to adhere to its own regulations. In accordance with the Judicial Code Plaintiff was served with an Appearance Summons, was provided with a copy of the "Acknowledgment of Students' Rights and Disciplinary Procedures", was notified in writing of the sanction imposed against him, was instructed on how to appeal such sanction, was afforded the opportunity to appeal the sanction, was permitted to request reenrollment, and was granted reenrollment. No violation of the Code has been identified (see Exhibit A [flow chart p 126]).

Plaintiff's unsupported assertion that the State has a major presence at Hofstra and thus renders Hofstra's action state action is insufficient to create a triable issue. Plaintiff's reliance upon *Ryan v. Hofstra University* (67 Misc2d 651 [Sup.Ct. Nassau County 1971]) is misplaced. Plaintiff has not demonstrated state involvement, and has failed in his burden to show that "the State somehow involved itself in what would otherwise be deemed private activity" (*Beilis v. Albany Medical College of Union Univ.*, 136

AD2d 42, 44 [3d Dept 1988]).

Plaintiff's reference to *Ryan* as authority, without offering evidence, is insufficient in light of later binding appellate authority which does not find state action at Hofstra (*Galiani v. Hofstra University*, 118 AD2d 572, [2d Dept 1986], *supra*). Moreover, in part *Ryan* relies upon governmental financial participation to establish state action. Such predicate has been expressly repudiated, as state financial assistance alone "is insufficient to permit court involvement in a school's disciplinary proceedings" (*Beilis v. Albany Medical College of Union Univ.*, *supra*).

As plaintiffs have failed to raise a triable issue of fact in response to defendant's prima facie showing of entitlement to summary judgment as a matter of law, summary judgment is awarded to defendant and the complaint is dismissed.

This decision constitutes the order of the court.

Dated: _____

OCT 19 2007



KENNETH A. DAVIS

J.S.C.

ENTERED

OCT 23 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**