At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York heard on submission.

STATE OF NEW YORK
SUPREME COURT::COUNTY OF TOMPKINS

John Tsialas and Flavia Tomasello,
as Personal Representatives of the
Estate of Antonio Tsiaslas, deceased,
Plaintiff,

vs

DECISION & ORDER
Index No. EF2020-0061

Cornell University, Phi Kappa Psi Fraternity, Inc.,
New York Alpha of Phi Kappa Psi Association, Inc.,
Andrew Scherr, Shane Rohe. Daniel Satcher,
Benjamin Schwartz, Nolan Berkenfeld,
Pietro Palazzolo Russo, Jack Stettner,
Felipe Hanuch and John Jacobs,
Defendants.

GERALD A. KEENE, Acting J.S.C.

Defendant Cornell University ("Cornell") moves, pursuant to CPLR §§ 3211 (a) (1) and (a) (7), to dismiss the claims against Cornell in the Amended Complaint filed by Plaintiffs John Tsialas and Flavia Tomasello, ("plaintiffs") as Personal Representatives of the Estate of Antonio Tsiaslas ("Antonio"), deceased.

Background Facts and Procedural History

This case arises from the tragic death of the Plaintiffs' son, Antonio Tsialas, who was a freshman at Cornell University in Ithaca, New York. On Thursday October 24, 2019, Antonio was invited to attend a rush party at Phi Kappa Psi on the Cornell campus. The Plaintiffs allege that Antonio was hazed and served alcohol by members of the fraternity at an illegal rush event at the fraternity house. The party ended and Antonio left the fraternity house. On Friday October 25, 2019, Plaintiff Flavia Tomasello was in Ithaca for First Year Parents weekend and was suppose

to meet Antonio at the Cornell bookstore that morning but he never arrived. She attempted to contact him several times and there was no answer on his cell phone. The Plaintiffs attempted to find Antonio all day and reported this disappearance to the Cornell University Police Department. On Saturday October 26, 2019, Antonio's body was found in the Fall Creek Gorge in Ithaca.

In the Amended complaint, the Plaintiffs assert an action for negligence (Count 1) and premises liability (Count 2) against Cornell. The Plaintiffs allege that Cornell was (1) negligent on its regulation and monitoring of fraternities on campus, particularly Phi Kappa Psi; and (2) responsible for Antonio's death as the property owner of 120 Mary Ann Wood Drive, the Psi Kappa Psi fraternity house that is owned by Cornell and leased by the fraternity. The Plaintiffs are seeking damages for (1) the injuries and mental and physical pain suffered by Antonio prior to his death;(2) for their son's fear of impending death; and (3) past, present, and future economic losses and compensation for the Plaintiffs for their mental pain and suffering caused by their son's death.

The Plaintiffs allege that Cornell University has had a long history and culture of fraternity hazing and other misconduct over the years by the Greek organizations and that the misconduct has been well known to the Cornell administration. In 2001 Cornell administration created a Hazing Task Force. In 2003, a Cornell administrator acknowledged that Cornell had a problem with hazing and sought to enact new programs to prevent hazing and monitor new member programs at fraternities. In 2011, Cornell administration attempted to abolish all fraternity pledging and instituted other reforms. On May 4, 2018, Cornell President Martha Pollack, issued a public statement acknowledging the history of hazing problems at Cornell and announced new reforms "aimed at protecting our students and improving norms in Greek letter organizations at Cornell." On December 18, 2019, a public statement was issued regarding the death of Antonio Tsialas and admitted that the University's efforts to stop the history of hazing were inadequate.

The Plaintiffs allege that Antonio died because Cornell had an inadequate response to a longstanding and very serious hazing problem that has plagued the University for years. Further, the Plaintiffs allege that the members of Phi Kappa Psi knew that Cornell would not be likely to

impose any meaningful discipline upon them personally for violating anti-hazing and alcohol rules. None of the members in this case have been expelled from Cornell for planning or hosting the "dirty rush event" or for illegally serving alcohol or for illegally hazing the young freshman or for anything that they did that lead to the death of Antonio. The Plaintiffs allege that failure to expel any of the defendants for hazing and make them personally accountable for their actions has allowed the misconduct in the fraternities to continue and Antonio's death is another predictable consequence of Cornell's inadequate response to the misconduct to Greek letter organizations on its campus. The Plaintiff's allege that Cornell University had a duty to put an end of hazing and the University knew that by not putting an end to the hazing culture and directly resulted in the death of Antonio.

The Plaintiffs allege in Count 1 that Cornell had a duty to provide a safe environment for its students to live, socialize and attend school. Cornell exerted significant control over Greek life on campus and therefore had a duty to act in a non-negligent manner with respect to stopping the misconduct of Greek letter organizations that were subject to its control.

The Plaintiffs allege that Cornell breached the duty and was negligent in the following aspects: (a) in failing to implement meaningful anti-hazing measures on the Cornell campus prior to October 24, 2019; (b) in failing to enforce its policies regarding fraternity rush parties and rush activities; (c) in failing to properly discipline the officers and members of Phi Kappa Psi on October 23, 2019 so they understood what they should not plan or host any type of hazing event in the future ; (d) in failing to discipline the officers and members of other fraternities and sororities on the Cornell campus who participated in hazing events in order to send a message to the Greek letter community that there would be severe personal consequences; (e) in failing to require Cornell Police Department or roving security to conduct random spot checks at fraternity or sorority houses for potential violations of event management policies or the law; (f) in allowing Phi Kappa Psi which the university owns to be used for "dirty rush events"; (g) in failing to install security cameras inside and outside of fraternity and sorority houses that the university owns in order to monitor activities; (h) in failing to require Greek letter organizations to retain independent event monitors for all events; (i) in failing to require Greek letter organizations to retain third-party vendors for alcohol service and security; (j) in failing to

inquire about the reason why multiple vehicles from Phi Kappa Psi were picking up freshmen males in front of the Robert Purcell Community Center on October 24, 2019 at 8:30 pm; (k) in failing to stop the "Christmas in October" rush event from taking place on October 24, 2019; (l) in failing to require all chapter advisors to know enough about the events that were being planned at fraternities or sororities that they were advising so they would intervene or stop unauthorized or illegal activities; (m) in failing to require that every Greek letter organization chapter house have a live-in adult who would be responsible for monitoring and supervising the events taking place in the chapter house.

The Plaintiffs allege that the negligence of the defendant, Cornell University, was a substantial factor in causing all of the injuries, compensatory damages, punitive damages, harms, losses and wrongful death suffered by the Plaintiffs and their son without any negligence on the part of the decedent or the Plaintiffs contributing thereto. Therefore, the Plaintiffs allege that as a direct and proximate result of said negligence, Antonio died and the Plaintiffs were caused to suffer the damages.

The Plaintiffs allege in Count 2 that Cornell University owned the Phi Kappa Psi chapter house located at 120 Mary Ann Wood Drive, Ithaca, New York. The Plaintiffs allege that Cornell knew or should have known that the fraternity house was being used to perpetuate its traditions, commit acts of hazing, and otherwise violate policies of Cornell University, Phi Kappa Psi and the laws of the State of New York. Further, the Plaintiffs allege that Antonio was an invitee to the Phi Kappa Psi chapter house on October 24, 2019 and that Cornell University had a duty to ensure that the premises would be used in a reasonably safe manner for a safe purpose and to warn those who would be using the premises of conditions which it knew or should have known would pose a risk of harm to an invitee.

The Plaintiffs allege that Cornell University breached those duties and was negligent in at least the following respects: (a) in allowing the premises to be used for hazing activities; (b) in allowing alcohol to be served to freshmen students, including Antonio, who were under the age of 21 years old. Further, the Plaintiffs allege that Cornell University knew or should have known about these illegal and unsafe conditions and taken immediate action to correct them. Therefore, the negligence of Cornell University was a substantial factor in causing all of the injuries,

compensatory damages, punitive damages, harms, losses and wrongful death suffered by the Plaintiffs and their son without any negligence on the part of the decedent or the Plaintiffs contributing thereto. Therefore, the Plaintiffs allege that as a direct and proximate result of Cornell's negligence, Antonio died and the Plaintiffs were caused to suffer the damages described above.

On May 4, 2020, Cornell filed a Notice of Motion including an affidavit of Kara Miller, documentary evidence and a Memorandum of Law in Support of the Motion to Dismiss the complaint. Cornell argues that the Plaintiff's negligence claim against Cornell must be dismissed because colleges and universities do not stand *in loco parentis*. Therefore, higher education institutions are not responsible for torts committed by one student against another and do not have a legal duty to prevent one student from injuring another. Further, Cornell argues that the premises liability claim should be dismissed. Cornell argues that the plaintiff's premises liability claim fails as a matter of law because landowners can only be held responsible if they are aware of a dangerous condition on the premises and their failure to address this condition directly caused or materially contributed to an injury on the premises. Cornell argues that because Antonio's injuries and death did not occur on the property of Cornell and Cornell was not aware that the fraternity had plans to hold a rush party on October 24, 2019 they can not be held responsible.

On May 29, 2020, the Plaintiff filed a Response in Opposition to Cornell's Motion to Dismiss. The Plaintiffs argue that the amended complaint sufficiently pleads claims for negligence and premises liability against Cornell and that Cornell's motion should be denied. The Plaintiffs argues that the amended complaint alleges that Cornell exercised significant control over Greek life and that it attempted to regulate the fraternity's conduct. Therefore, the plaintiff argues that Cornell owed a duty to take reasonable steps necessary to ensure the safety of those who would be harmed by foreseeable acts of hazing. Further, the plaintiff asserts that Cornell's duty to Antonio also stems from its ownership of the fraternity house where the party took place.

On June 8, 2020, Cornell submitted a Reply Memorandum of Law in further support of its motion to dismiss. Cornell argues that the Plaintiffs failed to articulate any cognizable cause

of action against Cornell in the Amended Complaint or in their opposition to the motion to dismiss. Cornell argues that the University did not have a duty to protect Antonio from the dangerous activities of other students with respect to the negligence claim. Cornell argues that the they did not organize, plan or supervise the rush event and did not have a legal duty to supervise their students. Further, Cornell argues that the premises liability claim must be dismissed since New York Courts have declined to impose liability upon landowners for injuries that occurred off premises or off campus. Therefore, the Cornell claims that the Amended Complaint fails as a matter of law and should be dismissed with prejudice.

LAW

On a motion to dismiss pursuant to CPLR § 3211, "the court must afford the pleading a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every inference" (EBC 1, Inc v Goldman Sachs & Co., 5 N.Y.3d 11 (2005); *see* Goshen v Mutual Life Ins. Co of N.Y., 98 N.Y2d 314 (2002); *see also* Whitebox Concentrated Convertible Arbitrage Partners, L.P v Superior Wells Servs., Inc., 20 N.Y.3d 59 (2012)). A motion to dismiss pursuant CPLR § 3211(a)(1) "will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Carr v Wegmans Food Markets, Inc., 182 A.D, 3d 667 (3rd Dept., 2020) *quoting* Fontanetta v John Doe 1 et al, 73 A.D.3d 78 (2010); *see* Leon v Martinez, 84 N.Y.2d 83 (1994)). What may be deemed "documentary evidence" for purposes of this subsection is quite limited. "Materials that clearly qualify as documentary evidence include documents ... such as mortgages, deed[s], contracts, and any other papers, the contents of which are essentially undeniable" (Id; Koziatek v SJB Dev. Inc., 172 A.D.3d 1486 (2019); *see* Fontanetta v John Doe 1, *supra*). Here, Cornell submitted documentary evidence, with Exhibits B-K such as the anti-hazing policy, anti-hazing policy compliance form, e-mails, Greek Judicial hearing Board findings, as well as the Miller Affidavit. Cornell argues that these documents are referenced and relied on in the Amended complaint, while other documents refute allegations in the complaint and thereby undermine the presumption of truth for those allegations. Furthermore, the documentary evidence submitted demonstrates that Cornell did not approve or supervise and was not aware of the secret

plans of the fraternity to hold a party on Thursday October 24, 2019 and that the fraternity was prohibited from hosting social events due to fire code issues. Under CPLR § 3211(1)(a), dismissal is warranted whenever the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law." (Held v Kaufman, 91 N.Y2d 425 (1998) *quoting* Leon v Martinez, 84 N.Y.2d 83 (1994)). Once the documentary evidence contradicting the complaint is presented to a court on a motion to dismiss under CPLR § 3211, the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one" (Id.; *quoting* Schmidt & Schmidt, Inc. v. Town of Charlton, 68 A.D.3d 1314, 1315, 890 N.Y.S.2d 693 (2009); *see* Leon v. Martinez, 84 N.Y.2d 83 (1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Chenango Contr., Inc. v. Hughes Assoc., 128 A.D.3d 1150 (2015)).

On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction (*see* CPLR 3026) and "accept the facts as alleged in the complaint as true, accord the plaintiff's the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Noonan v. City of New York, 9 N.Y.3d 825 (2007) *quoting* Leon v Martinez, 84 N.Y2d 83 (1994)). The grounds for dismissal under CPLR § 3211(a)(7) are also strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits (Carr v Wegmans Food Markets, Inc., *supra*; *see* Rovello v. Orofino Realty Co., 40 N.Y.2d 633(1976); Sokol v. Leader, 74 A.D.3d 1180 (2010)). Further, a court resolving a motion to dismiss for failure to state a claim cannot base the determination upon submissions by the defendant – no matter how compelling the claims made in such submissions may appear (Id.; *see* Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342 (2013); *see also* Marston v. General Elec. Co., 121 A.D.3d 1457(2014)). For a motion pursuant to CPLR § 3211(a)(7), the party opposing dismissal is allowed a remedy not available to the party seeking dismissal; the court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, since the ultimate criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one" (Id.; *quoting* Schmidt & Schmidt, Inc. v. Town of Charlton, 68 A.D.3d 1314 (2009); *see* Leon v.

Martinez, 84 N.Y.2d 83 (1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Chenango Contr., Inc. v. Hughes Assoc., 128 A.D.3d 1150 (2015)). "Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC 1, Inc v Goldman Sachs & Co., 5 N.Y.3d 11 (2005)). In the instant case, the court finds that the plaintiff has pled a valid cause of action for negligence and premises liability against the defendant.

Therefore, the defendant's motion to dismiss the amended complaint is denied.

This constitutes the decision and order of the court.

Dated: September 4, 2020
Ithaca, New York

Hon. Gerald A. Keene
Acting Justice of the Supreme Court

Cc: Mary Hodges, Chief Clerk, Tompkins County Supreme Court
David W. Bianchi, Attorney for Plaintiffs
E. Stewart Jones, Jr., Attorney for Plaintiffs
Jonathan B. Fellows, Esq. ,Attorney for Defendant Cornell University
Kate I. Reid, Esq.,Attorney for Defendant Cornell University