

**Sjogren v Board of Trustees of Dutchess
Community Coll.**

2021 NY Slip Op 33717(U)

January 11, 2021

Supreme Court, Dutchess County

Docket Number: Index No. 2019-50578

Judge: Hal B. Greenwald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on January 11, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
LYNN SJOGREN

Plaintiff(s)

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v.

DECISION AND ORDER
(Motion Sequence 1)

BOARD OF TRUSTEES OF
DUTCHESS COMMUNITY COLLEGE,
SUNY DUTCHESS a/k/a
DUTCHESS COMMUNITY COLLEGE and
COUNTY OF DUTCHESS,

Defendant(s)

-----X
Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Defendant's Notice of Motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affirmation of David Manson, Esq. Memorandum of Law/ Exhibits A-I	1
Affirmation of Nikolas S. Tamburello, Esq. in Opposition/ Memorandum of Law in Opposition/Exhibits A-E	2
Reply Affirmation of David Manson, Esq.	3

RELEVANT BACKGROUND

Plaintiff commenced a negligence action against the Defendants, alleging that as a student enrolled at Dutchess Community College ("DCC") and participating in a mandatory physical education course, Plaintiff was owed a duty of reasonable care to prevent injuries. However Plaintiff contends that she sustained injuries by participating in the physical education class The injuries Plaintiff suffered were the result of a wanton breach of this duty by Defendant by compelling Plaintiff to engage in physical activities despite Plaintiffs warnings of her significant pre-existing back problem and resulted in severe and permanent injury, required Plaintiff to

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undergo surgery, hospitalization, medical care and treatment, and rendered Plaintiff incapable of performing her usual activities and endure pain and discomfort for an unknown length of time in the future. *See*, Plaintiff's Verified Complaint

Defendants file the instant motion, seeking dismissal of the Plaintiff's complaint or, in the alternative, summary judgment, be granted in its entirety. Defendants argue that Plaintiff voluntarily signed a release and waiver of liability discharging DCC for all liability of any negligence for injuries to her person and the waiver should be enforced. Defendants contend that Plaintiff claims are barred under the doctrine of assumption of risk. Defendants declare that Plaintiff expressly assumed the risk of personal injury, agreeing to participate in an educational program provided by DCC, and acknowledged that she understood that she was fully responsible for her choice to use or apply the instruction at her own risk. *See*, Affirmation of David Manson, Esq.; *see also* Memorandum of Law in Support

Plaintiff opposes the motion and argues that the waiver is unenforceable because Defendants acts were willful or grossly negligent. Plaintiff contends that to meet her graduation requirements she was required to take a physical education class. Plaintiff admits that she signed the waiver and release, but states she was reluctant to submit the signed documents to participate in the class. Plaintiff declares that she made the instructor aware of her limitations at the first lab and was told that it was mandatory that she participate at some level. Plaintiff alleges that on March 29, 2018, she informed Ms. Secor (instructor) that she was afraid to engage in the activity due to her history of back problems but was told to engage in the activity, without modifications; and as a result, was the onset of her injury. Plaintiff alleges that she was compelled to participate in the physical education class, and it was not voluntary therefore, the doctrine of assumption of risk should not apply. Plaintiff asserts that Defendant's documentary proof is insufficient for dismissal, and that there are issues of material fact regarding Plaintiff's alleged assumption of risk, warranting a trial and denial of summary judgment on Defendant's behalf. *See*, Affirmation of Nikolas S. Tamburello, Esq.; *see also*, Memorandum of Law in Opposition.

In reply, Defendants note that Plaintiff is now asserting claims in gross negligence, when its complaint directed as a claim of negligence. Defendants argue that Plaintiff's claim does not meet the standard of gross negligence and that the waiver and release at issue, is in reference to negligence only, therefore enforceable. Defendants argue that the cases cited by Plaintiff are distinguishable from the case at hand – as Plaintiff was not forced to take the class or participate,

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and because the waiver and release was in clear language whereby Plaintiff stated understood the risk. *See*, Reply Affirmation of David Manson, Esq.

DISCUSSION

To prevail on a cause of action alleging negligence, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages. Absent a duty of care, there is no breach, and without breach there can be no liability. The existence of a legal duty presents a question of law for the court. Dismissal pursuant to CPLR 3211(a)(1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff's factual allegations, and conclusively disposes of the plaintiff's claims as a matter of law. *See*, Pasquaretto v Long Is. Univ., 106 A.D.3d 794, 794-95 (2nd Dept. 2013).

It is well settled that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Normally, if the facts are uncontested summary judgment is appropriate. However, this is not always so in negligence suits, because even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law. Since summary judgment deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. *See*, Andre v Pomeroy, 35 N.Y.2d 361, 364 (1974)

New York law generally enforces contractual provisions absolving a party from its own negligence where the language of the agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence. Such an agreement will be viewed as wholly void, however, where it purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual. Public policy, however, forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by "grossly negligent conduct". Gross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing. *See*, Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 823-24 (1993); *see also*, Lago v Krollage, 78 N.Y.2d 95, 99-100 (1991).

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Defendants have not provided sufficient proof to warrant dismissal pursuant to CPLR 3211, or a grant of summary judgment in their favor pursuant to CPLR 3212. The factual allegations of Plaintiff are not refuted by the documentary evidence and Defendants fail to demonstrate the absence of triable issues in the instant matter. The crux of both of these applications turn on the reasonableness of the acts or conduct of the parties.

As to the issue of dismissal, the documentary evidence does not refute Plaintiff's factual allegations or conclusively dispose of Plaintiff's claims as there are issues of fact surrounding the circumstances which Plaintiff entered said agreement, that would determine whether this Court should view the agreement as enforceable. Thus, dismissal of Plaintiff's complaint would be inappropriate.

As to summary judgment, it is undisputed that the Plaintiff executed and submitted a waiver and release to participate in the physical education course. However, the conduct and reasonableness of the acts of both parties under these circumstances raises triable issues of fact. Even if the Court were to deem that Defendants met their burden of proof as a matter of law, showing documentary evidence that Plaintiff signed and submitted the waiver, assuming the risk of injury by her participation in the class – Plaintiff rebutted such proof with question of facts as to the reasonableness and circumstances which she signed the waiver and release and the reasonableness of the instructor under the circumstances. Issue spotting, not issue determination is the Court's role on summary judgment. When there are triable issues of fact, summary judgment is inappropriate.

Based on the foregoing, Defendants' applications for dismissal of the complaint or in the alternative summary judgment in its favor, are both **denied**.

Accordingly, it is hereby,

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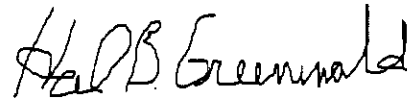
ORDERED, that Defendants' applications for dismissal of the complaint or in the alternative summary judgment in its favor, is denied.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: January 11, 2021
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.

cc:

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