THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. SUPERIOR COURT

Docket No. 08-E-294

B.V. Brooks, Kenneth F. Clark, Jr., Marisa DeAngelis Kane, John H. Plunkett, Douglas R. Raichle, Robert G. Reed III, and John Steel III

v.

Trustees of Dartmouth College

ORDER ON MOTION FOR SUMMARY JUDGMENT

The petitioners, who are alumni of Dartmouth College and members of the Association of Alumni of Dartmouth College (Association), have filed a Petition for Declaratory Judgment and Equitable Relief, alleging essentially that the respondent breached its legal and equitable obligations when it altered the composition of the Board of Trustees. The Association previously filed suit based on the same underlying facts, docket no. 07-E-289, but in June 2008 it entered into a stipulation with the respondent to dismiss the suit with prejudice. The respondent moves for summary judgment, arguing that the present suit is barred by the doctrine of res judicata and that the petitioners lack standing. The petitioners object. The parties presented oral argument on the motion on December 4, 2009. For the reasons that follow, the motion for summary judgment is GRANTED.

I. Factual and Procedural Background

Unless otherwise noted, the following facts are undisputed. In 1891, the Board of Trustees adopted a resolution permitting alumni to nominate suitable persons for five trusteeships (Alumni Trustees), which at that time constituted one-half of the Board's membership (not including the Governor of New Hampshire and President of the

College, both of whom are ex officio trustees). The Association, of which all alumni are members, was to nominate Alumni Trustees using procedures that would be provided in its Constitution. The Board would then elect those nominees. The remaining five trustees (Charter Trustees) were to be nominated and elected by the Board. Minutes of separate meetings of the Board and of the Association reflect that each approved the new method of electing trustees. The parties did not, however, memorialize the new method of election in a single written agreement signed by both. During this and prior litigation, the new method of election instituted in 1891 has been referred to as the "1891 Agreement." The Court uses this term throughout this order, without making any judgment as to whether the so-called 1891 Agreement actually constitutes a legally enforceable ongoing agreement between its parties to maintain numerical parity on the Board between Alumni Trustees and Charter Trustees.

In 1961 and 2003, the total number of members of the Board was increased, but each time parity was maintained between Alumni Trustees and Charter Trustees. In September 2007, the Board of Trustees adopted a resolution to expand its size by adding new Charter Trustees. As the result of this expansion, Alumni Trustees would comprise only one-third, and no longer one-half, of the Board. In response, the Association filed suit. It pled: Count I (Breach of Contract), Count II (Breach of Implied-In-Fact Contract), and Count III (Promissory Estoppel). Counts I and II alleged that the respondent breached an express or implied-in-fact contract to maintain parity between Alumni Trustees and Charter Trustees. Count III alleged that, even in the absence of a contract, promissory estoppel barred the respondent from eliminating parity.

In June 2008, the alumni elected a new executive committee for the Association. During the campaign, the candidates who were eventually elected opposed the Association's suit against the respondent. Upon election, the new executive committee resolved to take necessary steps to terminate the lawsuit. The Association and the respondent entered into a stipulation voluntarily dismissing the suit with prejudice. The Court approved the stipulation by order dated June 30, 2008. In November 2008, the petitioners, who are all alumni and members of the Association, filed the present action.

II. Standard of Review

The respondent moves for summary judgment. A moving party is entitled to summary judgment if the pleadings, admissions and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is material if it affects the outcome of the litigation." Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990) (quotation and ellipsis omitted). "The party opposing summary judgment must set forth specific evidence of a genuine issue of material fact." Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 739 (2005). The Court must consider the evidence presented on summary judgment in the light most favorable to the non-moving party, giving the non-moving party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Del Norte, Inc. v. Provencher, 142 N.H. 535, 537 (1997).

III. Discussion

The petitioners offer three reasons that they may maintain suit: (1) they are entitled to "vindicate their contractual rights as members of [the Association]"; (2) they

have rights as intended third-party beneficiaries of the 1891 Agreement; and (3) promissory estoppel bars the respondent from eliminating parity. In their pleadings and at oral argument, the petitioners urged the Court to approach the pending motion by considering how the doctrine of res judicata implicates each of these three theories and whether they have standing under any of these three theories. The Court will, therefore, address each of these three theories separately.

Members of the Association

The petitioners first argue that, as members of the Association, they are entitled to bring suit for breach of express or implied-in-fact contract. Count III of the petition relies upon this theory. Assuming, without deciding, that individual members of the Association have standing to enforce the alleged contract, the Court finds that the doctrine of res judicata bars the petitioners from litigating the contract claims.

> Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of res judicata and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end. The essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action.

Eastern Marine Const. Corp. v. First Southern Leasing, 129 N.H. 270, 273 (1987) (quotations and citations omitted). "Res judicata precludes the litigation in a later case of matters actually litigated, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002) (quotation omitted). "For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with

one another; (2) the same cause of action must be before the court in both instances; and (3) final judgment on the merits must have been rendered on the first action." Id.

The first element is satisfied. The respondent is the same in this action and the prior action. The petitioners are not the same, but they were represented by the Association in the prior litigation and are bound by the prior dismissal with prejudice. "A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the judgment as though he were a party." Restatement (Second) of Judgments § 41(1) (1982). A person so represented is "bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process." Id. at § 41(2).

The Restatement (Second) of Judgments explains that an individual may be bound by a judgment entered in a suit brought by an entity with authority to represent the individual's interests. For example, a judgment entered in litigation brought by "managing officers of an unincorporated association with regard to association property and contracts" is binding on members of the unincorporated association. Id. at § 41 comment b. The following illustration is provided: "The members of the council of an Indian tribe bring an action to determine the boundary line between the lands of that tribe and another. The judgment is binding on A, a member of the tribe, with respect to the ownership and occupancy rights he may have in the land as a member of the tribe." Id. at § 41 illustration 2 (emphasis added). The Association brought the prior suit to vindicate its contractual rights. Insofar as the petitioners filed the present suit based on

their status as members of the Association to vindicate those same contractual rights, they are bound by the judgment entered in the prior suit.

The second element of res judicata is also satisfied because the same cause of action is before the Court. Under modern New Hampshire jurisprudence, "cause of action" "refer[s] to all theories on which relief could be claimed on the basis of the factual transaction in question." Eastern Marine Const. Corp., 129 N.H. at 275. "Res judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action." Brizca, 147 N.H. at 455-56. "Generally, in determining whether two actions are the same cause of action for the purpose of applying res judicata, [courts] consider whether the alleged causes of action arise out of the same transaction or occurrence." Sleeper v. Hoban Family P'Ship, 157 N.H. 530, 534 (2008) (quotation and brackets omitted).

The same factual transaction—the change in the composition of the Board—forms the basis for this suit and the prior suit. The petitioners argue that nothing was actually litigated in the prior suit because it was dismissed before the issues were decided. In New Hampshire, cause of action is construed broadly. Brizca, 147 N.H. at 454. The prior suit was based on the same factual transaction, and all of the legal issues now raised either were raised or could have been raised in the prior suit. The breach of contract claims, in particular, were raised in the prior suit. The Court therefore finds that this suit presents the same cause of action as the prior suit.

The third element is also satisfied. The prior litigation was dismissed with prejudice based upon the filed stipulation. The dismissal with prejudice was a final judgment. See Cathedral of the Beechwoods v. Pare, 138 N.H. 389, 391 (1994); Moore v. Town of Lebanon, 96 N.H. 20, 22 (1949). That judgment has a "preclusive effect as to both what was actually litigated and everything that could have been litigated." Cathedral of the Beechwoods, 138 N.H. at 391.

At various points in their pleadings and oral argument, the petitioners have questioned whether the Association should have entered into the stipulation to dismiss the prior suit with prejudice. They claim that the stipulation and dismissal are "tainted" and should not be given res judicata effect. The Court finds that litigation of these arguments is barred by the Bricker doctrine. See Bricker v. N.H. Medical Society, 110 N.H. 469 (1970). Under Bricker, "[j]udicial interference in the internal affairs of associations is strictly limited and will not be undertaken in the absence of a showing of injustice or illegal action and resulting damage to the complaining member." Id. at 470. Viewed in the light most favorable to the petitioners, the facts set forth in the petition and the objection to the motion for summary judgment regarding the election of the new executive committee and termination of the prior litigation do not show injustice or illegality. The petitioners allege basically that the new executive committee was elected after openly campaigning against the litigation. Once elected, it took measures to terminate the litigation. Those measures included working with counsel, the respondent, and the respondent's counsel to draft the stipulation. These facts do not demonstrate injustice or illegality that would justify the Court involving itself in the internal affairs of

the Association. The Court will not, therefore, look behind the Association's reasons for entering into the stipulation. The dismissal with prejudice was a final judgment for res judicata purposes.

Because the three elements of res judicata are satisfied, the Court rules that the petitioners' contract claims based on their status as members of the organization are barred by res judicata.

Third-Party Beneficiaries

The petitioners' second theory is that they are intended third-party beneficiaries of the alleged express or implied-in-fact contract to maintain parity. Counts I and II of the petition are premised on third-party beneficiary status. In considering this argument, the Court assumes, without deciding, that the 1891 Agreement is a contract to maintain parity. The Court finds that the respondent is entitled to summary judgment because the facts, viewed most favorably to the petitioners, do not show that each alumnus of Dartmouth College is an intended third-party beneficiary of the contract.

"A third-party beneficiary relationship exists if . . . the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract." Tamposi Associates v. Star Mkt. Co., 119 N.H. 630, 633 (1979). "A benefit to a third party is a 'motivating cause' of entering into a contract only where the promisee intends to 'give the beneficiary the benefit of the promised performance.'" Grossman v. Murray, 144 N.H. 345, 348 (1999) (quoting Restatement (Second) of Contracts § 302(1)(b) (1981)). "'Unless the performance required by the contract will directly benefit the would-be

intended beneficiary, he is at best an incidental beneficiary.'" Id. (quoting Public Service Co. of N.H. v. Hudson Light & Power, 938 F.2d 338, 342 (1st Cir. 1991)). To establish that they are intended third-party beneficiaries, the petitioners would have to show that "recognition of a right to performance in [them] is appropriate to effectuate the intention of the parties" to the alleged contract and that the "circumstances indicate that the promisee intend[ed] to give [them] the benefit of the promised performance." Restatement (Second) of Contracts § 302(1).

The petitioners' claim that they are intended third-party beneficiaries is belied by their admission that the members of the Association could vote to empower the executive committee to end the alleged parity agreement. For the trier of fact to find that every alumnus is an intended beneficiary of the alleged contract, it would have to find that recognition of a right of performance in every individual alumnus is appropriate to effectuate the intent of the parties at the time they entered into the 1891 Agreement. By admitting that the Association, as a collective entity and without a unanimous vote of all members, could vote to eliminate parity, the petitioners necessarily concede that a right of performance in each alumnus is not appropriate and should not be recognized in order to effectuate the intent of the parties to the 1891 Agreement.

Also, the circumstances of the 1891 Agreement do not show that the parties to it intended a benefit to flow directly to each alumnus in his or her individual capacity. No facts regarding the circumstances of the 1891 Agreement are in dispute. The 1891 Agreement gave the Association, as a single, collective entity, the ability to name five trustees. It did not give each individual alumnus a right to do so. The undisputed facts

do not show that the parties to the 1891 Agreement intended each member of the Association and all future members of the Association to have the benefit, in their individual capacities, of being able to nominate half of the members of the Board. The Association currently has approximately 69,000 members. The 1891 Agreement conferred a benefit on alumni, not on each alumnus. In order to effectuate the purpose of the 1891 Agreement—giving alumni a greater role in management of Dartmouth College—it is not necessary or appropriate to recognize a right of performance in each individual alumnus. The 1891 Agreement would be entirely unworkable if it were interpreted to confer such a benefit and if such a right of performance were recognized.

It is unquestionable that each alumnus derives some benefit from membership in the Association and, in turn, from the 1891 Agreement. In fact, each alumnus likely derives a benefit from any number of contracts into which the Association has entered. This does not necessarily mean that each alumnus is an intended third-party beneficiary of every contract the Association has entered. Cf. Numerica Savings Bank v. Mountain Lodge Inn, 134 N.H. 505, 512 (1991) (recognizing that corporate shareholders are not intended beneficiaries of every contract entered into by the corporation). "Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . no duty to him is created." Restatement (Second) of Contracts § 302 comment e. The undisputed facts surrounding the formation of the 1891 Agreement viewed most favorably to the petitioners could not show that the petitioners are intended third-party beneficiaries, even though the agreement benefits them.

Moreover, were the Court to recognize the petitioners as intended third-party beneficiaries, it would embroil the judiciary in the internal governance of the Association. If a majority of the alumni have voted for leadership that does not want to enforce the 1891 Agreement, it is not the Court's place to find that a group of seven alumni may impose their will on the remaining alumni. See Bricker, 110 N.H. at 470. By recognizing a right of performance in the petitioners, the Court would interfere with the Association's internal affairs. Judicial intervention into disagreements between factions of the Association would be improper in the absence of injustice or illegality. See id. As the Court has explained above, the facts pled do not show injustice or illegality.

The Court finds that the petitioners' own admissions regarding the Association's ability to end the alleged agreement to maintain parity negates their claim that they are intended third-party beneficiaries. The Court also finds that the undisputed facts do not support the petitioners' claim that they are intended third-party beneficiaries, and that further consideration of this matter would require the Court to disregard the Bricker doctrine. For these reasons, the Court rules that the respondent is entitled to judgment, as a matter of law, on the petitioners' third-party beneficiary claims.

Promissory Estoppel

The petitioners argue that the 1891 Agreement constitutes a promise to maintain parity, that the Association and its members relied on that promise, and that promissory estoppel binds the respondent to honor the promise. Count IV of the petition is premised on promissory estoppel. If a promise was made, it was made to the Association and/or its membership as a collective whole. The Association raised this

issue in the prior lawsuit. The Court finds and rules that this claim is barred by res judicata for the same reasons that the contract claims are barred by res judicata.

IV. Conclusion

The Court has analyzed each of the petitioners' three theories of the case. The Court finds that two are barred by res judicata. With respect to the third, the undisputed facts show that the petitioners are not intended third-party beneficiaries. Accordingly, the respondent is entitled to judgment, as a matter of law. The motion for summary judgment is GRANTED.

SO ORDERED.

Dated: January 8, 2010

Timothy J. Vaughan,
Presiding Justice