

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Docket No. 08-E-0294

B.V. BROOKS, KENNETH F. CLARK, JR., MARISA DEANGELIS KANE, JOHN H. PLUNKETT, DOUGLAS R. RAICHLE, ROBERT G. REED III, AND JOHN STEEL III,

Petitioners

v.

TRUSTEES OF DARTMOUTH COLLEGE,

Respondent

MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT OF RESPONDENT TRUSTEES OF DARTMOUTH COLLEGE

Respondent Trustees of Dartmouth College (“Dartmouth” or the “College”), by and through its attorneys, hereby moves for summary judgment against all of plaintiffs’ claims and requests oral argument on its motion. In support thereof, Dartmouth states as follows:

1. Plaintiffs are seven members of the Association of Alumni of Dartmouth College (the “Association”) who seek equitable relief for the benefit of the Association based on an alleged 1891 agreement between the Association and the College. Plaintiffs allege that the Association and the College entered into a contract in 1891 that gives the Association the right to choose a certain number of Dartmouth Trustees and that they have standing to enforce that contract as third-party beneficiaries.

2. The Petition in this case (the “Current Lawsuit”) alleges the same causes of action as a 2007 petition filed by the Association itself (the “Prior Lawsuit”) and seeks nearly identical equitable relief for the express benefit of the Association.

3. The Association's members voted overwhelmingly to end the Prior Lawsuit against the College in a hotly contested June 2008 election of the Association's Executive Committee. According to a sworn affidavit of the Association's newly elected president, John Mathias, the "newly elected slate of Executive Committee members wanted to take whatever action was necessary to prevent the lawsuit we were dismissing on behalf of the AoA [the Association] from being instigated again by other alumni purporting to have some kind of standing to do so." (Affidavit of John H. Mathias, Jr. ("Mathias Aff."), sworn to July 14, 2009, ¶ 4.) "After discussing the issue fully," the Executive Committee "agreed that a dismissal with prejudice was the preferred method of proceeding and accomplishing our desired objective." (*Id.*) "Acting with the full authority and understanding of our AoA Executive Committee," Mathias thus instructed the Association's counsel "to cause the voluntary dismissal with prejudice of the pending AoA lawsuit." (*Id.* ¶ 5.) The Association and the College thereafter entered into a stipulation dismissing the lawsuit "with prejudice," which the Court approved on June 27, 2008, and the docket was marked "Voluntarily dismissed with prejudice."

4. Plaintiffs nevertheless filed the Current Lawsuit in an effort to vindicate the Association's supposed contractual rights under the alleged 1891 agreement. The Association, through the sworn affidavit of its president, John Mathias, has expressly condemned plaintiffs' actions:

The AoA strongly disapproves of the purported continuation by other alumni of the causes of action against Dartmouth College originally pursued in the lawsuit which we, acting for the AoA and all its members, caused to be voluntarily dismissed with prejudice on June 27, 2008.

(Mathias Aff. ¶ 7.)

5. This Court should grant summary judgment for two reasons: first, this action is barred by the doctrine of *res judicata*, and second, plaintiffs lack standing as third-party beneficiaries to sue to enforce the alleged contract between the Association and the College.

6. *Res judicata* applies because (a) plaintiffs seek to assert the same causes of action that the Association asserted in the Prior Lawsuit; (b) the Association's voluntary dismissal of the Prior Lawsuit with prejudice constitutes a final judgment on the merits; and (c) plaintiffs in the Current Lawsuit are in privity with the Association. See *Brzica v. Trs. of Dartmouth College*, 147 N.H. 443, 454 (2002) (elements of *res judicata*).

7. Because plaintiffs are members of the Association who donated money that was used to fund the Prior Lawsuit, plaintiffs are in privity directly with the Association. *General Foods Corp. v. Massachusetts Dep't of Public Health*, 648 F.2d 784 (1st Cir. 1981).

8. In addition, plaintiffs are in privity with the Association by virtue of their relationship with John MacGovern, a Dartmouth alumnus and member of the Association who financed and orchestrated both lawsuits through a nonprofit corporation of which he is the founder, president and sole employee. Besides funding both lawsuits in their entirety, MacGovern was instrumental in the filing of the Prior Lawsuit, reviewed draft court papers before they were filed in the Prior Lawsuit, recruited seven plaintiffs to bring the Current Lawsuit after the Association dismissed the Prior Lawsuit with prejudice, and communicated regularly, one-on-one, with the lawyers for plaintiffs in both lawsuits—communications he claims are privileged.

9. By financing the Prior Lawsuit and participating extensively in the litigation, MacGovern was in privity with the Association. Accordingly, MacGovern clearly would be barred from bringing the Current Lawsuit in his own name. MacGovern cannot avoid the doctrine of *res judicata* simply by recruiting seven other Dartmouth alumni as proxies and

agreeing to pay all of their attorneys' fees and expenses. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (2008).

10. Plaintiffs also lack standing as third-party beneficiaries to sue to enforce the alleged contract between the Association and the College. For such standing to exist, the performance supposedly required by the alleged contract must benefit every individual alumnus directly and individually. Plaintiffs allege, however, that the purported contract gives the Association (not individual alumni) the right to choose certain Dartmouth Trustees and that plaintiffs benefit derivatively from the supposed contract as members of the Association. Absent direct, personal benefits—which are not alleged here—members of organizations such as the Association are not permitted to sue to enforce the organization's contractual rights. The New Hampshire Supreme Court has applied this rule explicitly to corporations, and the same rationale applies to unincorporated associations, which are legal entities under New Hampshire law. *Numerica Sav. Bank, F.S.B. v. Mountain Lodge Inn, Corp.*, 134 N.H. 505, 512 (1991).

11. Moreover, for plaintiffs to have standing to sue as third-party beneficiaries, the parties to the alleged contract must have intended in 1891 to authorize every Dartmouth alumnus, in perpetuity, to bring a lawsuit to enforce the contract—even when the Association itself has elected not to sue. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). There is absolutely no evidence that the College and the Association intended this extreme result, with its potential for serial and repetitive litigation such as the Current Lawsuit, when they entered into the alleged contract in 1891.

12. Absent third-party beneficiary standing, the Current Lawsuit is simply a request by seven of the Association's 69,000 members for this Court to overturn the result of an Association election. Last year, an overwhelming majority of Association members who voted in a hotly contested election chose a slate of candidates for the Association's Executive

Committee who campaigned on an express promise to dismiss the Prior Lawsuit and put an end to divisive and costly litigation against the College. As the Association's president, John Mathias, explains in his sworn affidavit, the newly elected Executive Committee, acting on behalf of the Association, dismissed the Prior Lawsuit with prejudice so that individual alumni such as plaintiffs here could not re-file the same case that the Executive Committee had been elected to dismiss. (Mathias Aff. ¶ 4.) According to Mathias, the Association thus "strongly disapproves" of the Current Lawsuit—even though it purports to seek relief for the Association's benefit. (*Id.* ¶ 7.) Under New Hampshire law, judicial interference in the internal affairs of an association is strictly limited. *Bricker v. N.H. Medical Soc'y*, 110 N.H. 469, 470 (1970). Under the circumstances of this case as set forth in the affidavit of John Mathias, such interference would be impermissible.

13. More fundamentally, if John MacGovern can recruit seven dissenting Dartmouth alumni to bring the same lawsuit that the Association dismissed with prejudice in June 2008, he can recruit other plaintiffs to bring the same lawsuit a third time and a fourth time *ad infinitum*. This is precisely the result the Association sought to prevent when it dismissed the Prior Lawsuit with prejudice. (Mathias Aff. ¶ 4.) *Res judicata* bars such repetitive attempts, and there is no evidence that the parties to the alleged contract in 1891 intended to authorize individual Association members to bring such lawsuits.

14. There are no genuine issues of material fact, and Dartmouth is entitled to summary judgment as a matter of law.

WHEREFORE, Defendant respectfully requests that this Honorable Court enter an Order:

Granting Respondent Trustees of Dartmouth College's Motion for Summary Judgment;

Dismissing plaintiffs' claims in their entirety with prejudice;

Scheduling this Motion for Oral Argument; and
Granting such other relief as is just and proper.

Dated: July 17, 2009

Respectfully submitted,

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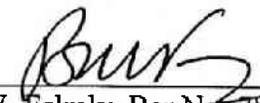


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand and electronic mail on Eugene M. Van Loan III, Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101, on July 17, 2009.



Bruce W. Felmlly, Bar No. 787