Phillips Lytle LLP

Via U.S. Mail

February 26, 2020

Rensselaer County Supreme Court Clerk
Rensselaer County Courthouse
80 Second Street
Troy, New York 12180

Re: *Criss, et al. v. The Rensselaer Alumni Association*
Index No. 2019-263996
Hon. Andrew G. Ceresia

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced matter is an original plus one copy of the following:

1. Defendant's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Amended and Supplemental Complaint and in Opposition to Plaintiff's Request to Convert to Summary Judgment; and

2. Affidavit of Service.

Please return a filed copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Phillips Lytle LLP

By

Marc H. Goldberg

MHG/e-f
Enclosures

cc: Cornelius D. Murray, Esq.
Elliott J. Ehrenreich, Esq.

O & A Rec'd
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

GEORGE W. CRISS III, DAVID A. GLOWNY, JOHN A. KROB, THEODORE F. MIRCZAK, JR., JAMES NAPOLITANO, JOSEPH TEMPLIN, PETER VANDERMINDEN, AND PETER VANDERZEE,

Plaintiffs,

- against -

THE RENSSELAER ALUMNI ASSOCIATION,

Defendant.

Index No. 2019-263996

Hon. Andrew G. Ceresia

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE AMENDED AND SUPPLEMENTAL COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' REQUEST THAT IT BE CONVERTED TO ONE FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant The Rensselaer Alumni Association ("RAA") submits this reply memorandum of law in further support of its motion to dismiss Plaintiffs' verified amended and supplemental complaint (the "Motion"), in reply to Plaintiffs' opposition to the Motion (the "Opposition"), and in opposition to Plaintiffs' request that this motion be converted to one for summary judgment.

For the reasons discussed herein, and in the initial papers, it is respectfully submitted that RAA's Motion should be granted and Plaintiffs' claims dismissed in their entirety.

ARGUMENT

It is well settled that in deciding a motion to dismiss made pursuant to CPLR 3211, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *see Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-42 (2017); *54 Marion Ave., LLC v. City of Saratoga Springs*, 162 AD3d 1341, 1342 (3d Dep't 2018). In this context, the relevant inquiry is whether the Plaintiff has a cause of action, not whether it has stated one. *See Maddicks v. Big City Props., LLC*, 34 N.Y.3d 116, 123 (2019); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *Muncil v. Widmir Inn Rest. Corp.*, 155 A.D.3d 1402, 1403 (3d Dep't 2017). Even applying this liberal standard to the instant case, Plaintiffs fail make out a cognizable claim. *See City of Albany v. Normanskill Creek, LLC*, 165 AD3d 1437, 1439 (3d Dep't 2018) (dismissing complaint in its entirety where allegations in the complaint were patently without merit); *DerOhannesian v. City of Albany*, 110 A.D.3d 1288,

1292 (3d Dep't 2013) (affirming dismissal of the complaint in its entirety where allegations in the complaint were patently without merit).

For the reasons discussed herein, and in the moving papers, the Complaint should be dismissed in its entirety.

POINT I

THE OPPOSITION PROFFERS NOTHING TO OVERCOME THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

A. Article III, § 2 of RAA's By-laws does not violate N.Y. Not-for-Profit-Corp. Law § 603.

With regard to Plaintiffs' first claim—that Article III, § 2 of RAA's By-laws ("the By-laws") is unlawful—such claim is wholly without merit because, as previously stated, it is belied by the plain language of N.Y. Not-for-Profit-Corp. Law § 603 and RAA's governing documents. N.Y. Not-for-Profit-Corp. Law § 603 states that "[s]pecial meetings of the members may be called by the board and by such person or persons as may be authorized by the certificate of incorporation or the by-laws." As a default provision, N.Y. Not-for-Profit-Corp. Law § 603 further states that a special meeting "may be convened by the members entitled to cast ten percent of the total number of votes entitled to be cast as such meeting, who may, in writing, demand the call of a special meeting . . . ." Consistent with this statutory provision, Article III, § 2 of the By-laws permits a special meeting of its members and states that "[t]he Secretary shall call . . . a [s]pecial [m]eeting upon written request of . . . ten percent (10%) of members . . . ." Thus, as permitted by N.Y. Not-for-Profit-Corp. Law § 603, the By-laws allow its members to call for a special meeting and establish the procedure for doing so, which is in accordance with the statutory default provisions.

The Opposition suggests that Article III, § 2 is somehow unlawful because it was amended while a petition seeking a special meeting was pending. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss to Amended and Supplemental Complaint and In Support of Plaintiffs' Request to Convert to Summary Judgment ("Plaintiffs' MOL") at 18-19. This timing argument is wholly unfounded because there is nothing in N.Y. Not-for-Profit-Corp. Law § 603, or any other controlling statute or governing document for that matter, that discusses when an amendment of this sort can be made. *See* N.Y. Not-for-Profit-Corp. Law § 602 (Westlaw through L.2019, ch. 758, L.2020, ch. 21). Plaintiffs further argue that Article III, § 2 is unlawful because the threshold established in the By-laws is too onerous and the increase from the historic threshold is too dramatic. Plaintiffs' MOL, at 19. To this point, Plaintiffs assert that, "if the By-laws had too large a requirement" the default provisions in N.Y. Not-for-Profit-Corp. Law § 603 should be read to replace such requirement. Plaintiffs' MOL, at 19. Even if this argument was supported by the law, which it is not, the practical effect of Plaintiffs' argument is unclear because the threshold prescribed in the By-laws, which Plaintiffs claim is too burdensome, and the default statutory threshold, which Plaintiffs propose should be applied instead, are the same. Accordingly, where Plaintiffs' arguments are both legally and logically unsound, they should be rejected and the Complaint dismissed. *See generally Budin v. Davis*, 172 A.D.3d 1676, 1678 (3d Dep't 2019) (affirming motion court's decision to dismiss claims that were inconsistent with the statutory provisions underlying such claims); *Fernicola v. N.Y. State Ins. Fund*, 293 AD2d 844, 845 (affirming motion court's decision to dismiss claims that were "wholly unsupported" by the relevant law).

B. Article III, § 4 of RAA's By-laws does not violate N.Y. Not-for-Profit-Corp. Law § 608.

Turning to Plaintiff's second claim—that Article III, § 4 of the By-laws is unlawful because it was not approved in accordance with N.Y. Not-for-Profit-Corp. Law §§ 608(c) or 608(e)—such claim is similarly flawed. As stated in RAA's moving papers, RAA's Board of Trustees ("the Board") is vested with the authority to amend its By-laws.[1] *See* N.Y. Not-for-Profit-Corp. Law §602(b); By-laws Article XI, § 1. Consistent with such authority, conferred upon the Board by statute and by the By-laws, the Board amended its By-laws and established a quorum requirement of 100 members at an annual or special meeting. *See* N.Y. Not-for-Profit-Corp. Law § 602(b); By-laws Article III, § 4; By-laws Article XI, § 1. Indeed, this Court properly recognized that the Board possessed the authority to make such amendment. *See* Order Denying Plaintiffs' Motion for Preliminary Injunction, at 3, *Criss v. Rensselaer Alumni Assoc.*, No. 2019-263996 (Sup. Ct. Sept. 24, 2019).

Plaintiffs now argue that the amendment of the quorum requirement, although appropriate, was procedurally improper because it was not submitted to the members for a vote or to the Supreme Court for permission to make such change. Plaintiffs' MOL, at 21-23. To this point, Plaintiffs maintain that N.Y. Not-for-Profit-Corp. Law § 608(c) requires that such change be put to a vote of the membership. This argument must be rejected, however, because it wholly misconstrues the requirements of N.Y. Not-for-Profit-Corp. Law § 608(c). As germane to Plaintiffs claim, N.Y. Not-for-Profit-Corp. Law § 608(a) states that a majority of members "shall constitute a quorum," but is subject to the exception stated in N.Y. Not-for-Profit-Corp. Law §608(b), which permits the certificate of

[1] Defendant's Memorandum of Law in Support of its Motion to Dismiss the Amended and Supplemental Complaint ("Def. MOL"), at pp 5-6.

incorporation or the by-laws to establish a lesser quorum equal to the lesser of 100 members or one-tenth of the membership. N.Y. Not-for-Profit-Corp. Law § 608(c) allows for amendment of the certificate of incorporation or By-laws to conform to the lesser quorum requirement enunciated in with N.Y. Not-for-Profit-Corp. Law § 608(b) and states that such amendment "may be taken at a special meeting of members."[2] Plaintiffs' claim with regard to N.Y. Not-for-Profit-Corp. Law § 608(c) fails, though, because it disregards two important features of this statutory scheme. One, N.Y. Not-for-Profit-Corp. Law §608(c) is permissive rather than mandatory, which is evidenced by the use of the word *may* in the relevant statutory subdivision—an "[a]ction to amend the certificate of incorporation or by-laws to conform to paragraph (b) *may* be taken at a special meeting of members . . . ." (emphasis added). Two, N.Y. Not-for-Profit-Corp. Law § 608(c) does not vest this authority *solely* with the members; the Board still retains its rights to amend its Bylaws consistent with N.Y. Not-for-Profit-Corp. Law §602(b), its Charter and By-laws Article XI, § 1. Thus, while N.Y. Not-for-Profit-Corp. Law § 608(c) may allow for an action to amend the quorum requirement to be done at a special meeting of the members, it certainly does not require it.

To the extent that Plaintiffs also argue that N.Y. Not-for-Profit-Corp. Law § 608(e) otherwise requires judicial permission to amend the quorum requirement, such argument similarly misconstrues the requirements of N.Y. Not-for-Profit-Corp. Law §608(e). N.Y. Not-for-Profit-Corp. Law § 608(e) states that "[i]f for any reason it has proved

[2] Notably, Not-for-Profit-Corp. Law § 608(c) does not apply every time a not for profit corporation seeks to amend its quorum requirement. Indeed, by its plain language, an amendment to conform an organization's quorum requirements taken pursuant to Not-for-Profit-Corp. Law § 608(c) "may be taken only once." Such limitation is consistent with the statutory purpose of Not-for-Profit-Corp. Law § 608(c), which was added to make it easier for not-for-profit corporations to amend their quorum requirement following a change in the law. *See Sealey v. Am. Soc'y of Hypertension, Inc.*, 10 Misc. 3d 572, 576 (Sup Ct. N.Y. Cty. Nov. 2, 2005) (discussing the statute's legislative history), *aff'd* 26 A.D.3d 254 (1st Dep't 2006).

to be impractical or impossible for a corporation to obtain a quorum in order to conduct a meeting of its members," a director, officer, or member can petition Supreme Court to dispense with its quorum requirements. Such statute, by its plain language, simply does not apply in this instance and does not, as Plaintiffs allege, require the Board to obtain judicial permission before amending the quorum requirement in its By-laws. Accordingly, Plaintiffs' claim must be dismissed because it is wholly unsupported by and inconsistent with the statutory authority Plaintiffs rely upon. *See* N.Y. Not-for-Profit-Corp. Law §§ 608(c), 608(e) (Westlaw through L.2019, ch. 758, L.2020, ch. 21).

C. Article III, § 1 and Article VI, § 2 of RAA's By-laws are not in conflict with RAA's Charter.

In their third claim, Plaintiffs allege that Article III, § 1 and Article VI, § 2 of the By-laws, which prescribe RAA's voting procedure, wholly deprives members of their right to vote and, therefore, is in conflict with RAA's Charter. N.Y. Not-for-Profit-Corp. Law § 703(b) permits RAA to establish procedures for electing its Board, stating specifically that "[d]irectors shall be elected or appointed in the manner and for the term of office provided in the certificate of incorporation or the by-laws." Consistent with this statutory authority, RAA's Charter states that the Board of Trustees is "to be elected by the membership," and the By-laws Article III, § 1 and Article VI, § 2 prescribe the procedures for doing so. Specifically, Article VI, § 2 requires the Nominating Committee to assemble a slate of candidates, which must be approved by the Board, and then the approved slate is voted on by the members at RAA's annual meeting, where members are free to vote for or against the slate in accordance with mandate of RAA's Charter.

In the Opposition, Plaintiffs now repeat the same argument that was previously rejected by this Court when it denied Plaintiffs' motion for a preliminary

injunction.[3] Order Denying Plaintiffs' Motion for Preliminary Injunction at 2-3, *Criss v. Rensselaer Alumni Assoc.*, No. 2019-263996 (Sup. Ct. Sept. 24, 2019). Namely, that the voting procedure established in the By-laws divests Plaintiffs of their right to vote by permitting the Board to establish a slate of candidates to be put up to vote. Plaintiffs' MOL, at 16-17. As stated above, an association may establish voting procedures in its by-laws. *See* N.Y. Not-for-Profit-Corp. Law § 703(b). Consistent with that statutory authority, RAA has done so here, implementing by-laws that establish a voting procedure, which culminates in a vote by the membership. Although the voting procedures narrow the field of candidates to a single, Board-approved slate, "it is the members who ultimately cast the determining votes." Order Denying Plaintiffs' Motion for Preliminary Injunction at 3, *Criss v. Rensselaer Alumni Assoc.*, No. 2019-263996 (Sup. Ct. Sept. 24, 2019). Thus, under the voting procedures described in RAA's duly-authorized By-laws, the members retain their right to vote in accordance with the specifications in RAA's Charter and Plaintiffs' claim must be dismissed.

D. Article V, § 1(c) of RAA's By-laws does not violate N.Y. Not-for-Profit-Corp. Law § 712(a)(2).

Plaintiffs' fourth claim—that Article V, § 1(c) of the By-laws impermissibly delegates the power to elect officers to the Executive Committee in violation of N.Y. Not-for-Profit-Corp. Law § 712(a)(2)—is also without merit as it reflects a fundamental misunderstanding of the relevant statutory provisions. N.Y. Not-for-Profit-Corp. Law

[3] As relevant to the applicability of this Court's prior decision, Plaintiffs argue that such decision does not constitute law of the case here because the procedural posture of that prior decision deprived them of a full and fair opportunity to litigate the issues. Plaintiffs' MOL, at 26-27. Although a decision on a motion for preliminary injunction ordinarily does not constitute law of the case, such decision is instructive and relevant here, where Plaintiffs merely repeat the same arguments that were previously set forth and flatly rejected by this Court. *See Troy Sand & Gravel Co. v. Fleming*, 156 A.D.3d 1295, 1304 (3d Dep't 2017) (noting that denial of petitioner's motion for preliminary injunction did not constitute law of the case, but finding that petitioner's claims nevertheless lacked merit).

§712(a)(2) permits the creation of an executive committee, but prohibits such committee from "[t]he filling of vacancies in the board of directors or in any committee." By its plain terms, this statutory provision applies to vacancies that arise on the Board of Trustees or on any committee and, making no mention of officers, does not apply to officers. In contrast, N.Y. Not-for-Profit-Corp. Law § 713, specifically discusses officers, stating "[t]he board may elect or appoint a chair or president, or both, one or more vice-presidents, a secretary and a treasurer, and such other offices as it may determine, or *as may be provided in the by-laws.*" (emphasis added). Consistent with the requirements of N.Y. Not-for-Profit-Corp. Law § 713, Article V of the By-Laws establish procedures for appointing officers, including allowing the Executive Committee to appoint officers to fill vacancies that unexpectedly arise during the course of an officer's term.

Despite the obvious distinction in the relevant statutory provisions, Plaintiffs argue that the provisions of N.Y. Not-for-Profit-Corp. Law § 712(a)(2) apply to officers in this instance because the officers are chosen from the pool of Trustees. Plaintiffs' MOL, at 20-21. However, there is *no* statutory language, and Plaintiffs point to none, indicating that either N.Y. Not-for-Profit-Corp. Law § 712(a)(2) or § 713 should be read to require special treatment of officers that also happen to be Trustees. Had the drafters wanted to create such exception or otherwise require such treatment the statute plainly would have said so. *See DeVera v. Elia*, 32 N.Y.3d 423, 456 (2018) (in a case presenting an issue of statutory interpretation observing that "[i]f . . . the legislature intended to [create an exception], the legislature would have used terms that clearly expressed this carve-out"); *Feminists Choosing Life of N.Y., Inc. v. Empire State Stem Cell Bd.*, 87 A.D.3d 47, 53 (3d Dep't 2011) (in a case

presenting an issue of statutory interpretation observing that "if the Legislature had intended to prohibit [a certain action] it could have said so explicitly").

E. Article XI, § 1 of RAA's By-laws does not violate N.Y. Not-for-Profit-Corp. Law § 602.

Plaintiffs' final claim—that Article XI, § 1 is unlawful because it gives the Board sole authority to adopt, amend and repeal the By-laws in violation of N.Y. Not-for-Profit-Corp. Law § 602—is also fundamentally flawed. N.Y. Not-for-Profit-Corp. Law § 602(b) states that an association's "by-laws ***may*** be adopted, amended, or repealed by the members at the time entitled to vote in the election of directors and, unless otherwise provided in the certificate of incorporation or the by-laws adopted by the members, by the board." (emphasis added). Notably, N.Y. Not-for-Profit-Corp. Law § 602 is a permissive statute, evidenced by use of the word "***may***" as opposed to must or shall, which does not require any specific powers be delegated to or reserved for the members. Instead, this statutory provision can best be read as establishing a default where both the members and the board have the power to adopt, amend, or repeal by-laws, unless the Certificate of Incorporation or by-laws state otherwise. Here, both RAA's Charter and the By-laws deviates from such statutory default. Specifically, RAA's Charter vests the Board with the authority to adopt by-laws, stating, "the Board ***shall*** have the power to adopt by-laws." (emphasis added). Similarly, the By-laws state that the By-laws "***may*** be amended at a meeting of the Board by approval of two-thirds of the Board." (emphasis added). Although RAA's governing documents deviate from the permissive default provisions of N.Y. Not-for-Profit-Corp. Law § 602, such statute expressly allows for and contemplates such deviation. *See* N.Y. Not-for-Profit-Corp. Law § 602.

The Opposition maintains that N.Y. Not-for-Profit-Corp. Law § 602 unequivocally grants members the right to adopt, amend, and repeal an association's by-laws and that such right is superior to any similar right possessed by the Board. Such argument, though, completely disregards the permissive nature of N.Y. Not-for-Profit-Corp. Law § 602, and instead construes the statute as a mandatory grant of authority—an interpretation that is inconsistent with the statute's plain language. Moreover, Plaintiffs wholly ignore that part of the statute that permits either the certificate of incorporation or by-laws to deviate from the statutory default. Accordingly, where Plaintiffs' position is inconsistent with the plain language of N.Y. Not-for-Profit-Corp. Law § 602, Plaintiffs' claim must be dismissed. *See generally Hinton v. Vill. of Pulaski*, 33 N.Y.3d 931, 937 (2019) ("[w]hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (internal quotation marks and citation omitted)); *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) ("the starting point in any case of interpretation must always be the language itself giving effect to the plain meaning thereof").

POINT II

PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Finally, Plaintiffs ask this Court to treat RAA's motion as one for summary judgment and award summary judgment to Plaintiffs. CPLR 3211(c) permits the Court to convert RAA's Motion to one for Summary Judgment, subject to the requirement that the parties be given adequate notice of such conversion. *See Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508 (1988) (court "could not properly convert defendants' motion into a motion for summary judgment absent 'adequate notice to the parties'" (quoting CPLR 3211(c))); *Four*

Seasons Hotel Ltd. v. Vinnik, 127 A.D.2d 310, 320 (1st Dep't 1987) ("summary judgment is unavailable to either side prior to joinder of issue absent CPLR 3211(c) notice"). An exception to the CPLR 3211(c) notice requirement, which Plaintiffs seek to invoke here, permits the court to convert the Motion without notice, if the case involves a purely legal question, rather than any issue of fact. *Mihlovan v. Grazavu*, 72 N.Y. 2d at 508; *Concord Assocs., L.P. v. EPT Concord, LLC*, 130 A.D.3d 1404, 1407 (3d Dep't 2015); *Spilka v. Town of Inlet*, 8 AD3d 812, 813 (3d Dep't 2004). Where a court chooses to convert such motion, "the court may render a determination and declare the rights of the parties." *Spilka*, 8 AD3d at 813; *see Historic Albany Found. v. Breslin*, 282 A.D.2d 981, 983-84 (3d Dep't 2001).

RAA does not dispute that this case involves a purely legal question because as discussed in greater detail above, the matter is simply one of statutory interpretation. To the extent the Court considers the factual averments in the affidavits submitted in support of the Opposition, it is respectfully submitted that such affidavits are wholly irrelevant and of no bearing on the statutory interpretation questions before this Court. Turning to the substantive issues presented herein, Plaintiffs' contention that they are entitled to summary judgment on each of their claims, must be rejected because, as discussed herein, Plaintiffs' strained interpretation of the relevant statutes cannot be squared with the plain language of such statutes. Furthermore, and for all the same reasons discussed herein and in its initial papers, RAA is entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, RAA's Motion to Dismiss should be granted, Plaintiffs' request that this motion be converted to one for Summary Judgment should be

denied, and the Complaint dismissed in its entirety, together with such other and further relief as the Court deems just and proper.

Dated: Albany, New York
February 26, 2020

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

GEORGE W. CRISS III, DAVID A. GLOWNY, JOHN A. KROB, THEODORE F. MIRCZAK, JR., JAMES NAPOLITANO, JOSEPH TEMPLIN, PETER VANDERMINDEN, and PETER VANDERZEE,

Plaintiffs,

v.

THE RENSSELAER ALUMNI ASSOCIATION

Defendant.

AFFIDAVIT OF SERVICE

Index No.: 2019-263996

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

EMILY FRANZEN, being duly sworn, deposes and says:

I am employed by the law firm of Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, 8th Floor, Albany, New York 12207, counsel to defendant, The Rensselaer Alumni Association. I am over the age of eighteen years, and I am not a party to this action.

On February 26, 2020, I served Defendant's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Amended and Supplemental Complaint and in Opposition to Plaintiffs' Request to Convert to Summary Judgment in the above-referenced proceeding upon:

Cornelius D. Murray, Esq.
O'Connell & Aronowitz
54 State Street
Albany, New York 12207

by first class mail, by depositing a true copy of the same enclosed in a postpaid, properly addressed wrapper, in an official depository maintained by the United States Postal Service within the State of New York.

Emily Franzen

Sworn to before me this
26th day of February, 2020

Notary Public

MITZI STICKLES
Notary Public, State of New York
No. 01ST6390579
Qualified in Columbia County
Commission Expires April 15, 2023