

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO

PETER TOWNSEND, et al.

Plaintiffs,

Case No. 2008 CV 0300

v.

Judge Wolaver

ANTIOCH UNIVERSITY,

Defendant.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

I. INTRODUCTION

The Court should deny Defendant Antioch University's Motion to Dismiss because Plaintiffs, the tenured faculty members of Antioch College (the "College Faculty"), are not seeking specific performance of the provisions of a personal services contract and they are not asking the Court to step into Defendant's shoes and make decisions regarding the operation of the College. Rather, the College Faculty seeks specific performance of Defendant's contractual obligation to implement less drastic measures than closing the College in order to alleviate the College's financial problems. Specifically, Section IV A 56 of the College's Faculty Personnel Policies and Procedures ("the Contract") permits Defendant to declare financial exigency and close the College

only when “an imminent financial crisis exists which threatens the survival of the College and cannot be alleviated by less drastic means.” (emphasis added).

Contrary to Defendant’s assertions, the College Faculty is not seeking an order requiring Defendant to continue employing them as faculty members. In fact, the College Faculty recognizes that in order to keep the College open, less drastic means may include a reduction in faculty. Nor is the College Faculty asking the Court to step into Defendant’s shoes and make decisions regarding the direction and supervision of the College. Rather, the College Faculty seeks an order requiring Defendant to adhere to its contractual obligations to implement less drastic means than closing the College, such as accepting a \$14,500,000 proposal from the Antioch College Continuation Corporation (“the AC3”), which has a plan to keep Antioch College open and operating.

II. LAW AND ARGUMENT

A. Standard of Review

A motion to dismiss under Rules 12(b)(1) and (6) should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. State ex rel. Delmonte v. Village of Woodmere, 2004 Ohio App. LEXIS 2086, at *5 (Cuyahoga County May 6, 2004).¹ All well-pleaded allegations must be taken as true and be construed most favorably toward the non-movant. Id. A court should not grant a motion to dismiss based on disbelief of a complaint’s factual allegations. Nat’l Check Bureau v. Buerger, 2006 Ohio App. LEXIS 6576, at *5-6 (Lorain County Dec. 18, 2006). In fact, in ruling on a motion to dismiss,

¹ Copies of unreported cases are attached as “Exhibit A.”

“the trial court should not dismiss the complaint because it doubts the plaintiff will win on the merits. . . . Whether the plaintiff can prevail is a matter properly determined by the proof and not the pleadings. . . . Therefore, the ruling must test only the sufficiency of the complaint.” Id.; see also Houck v. Ridgecrest Memory Gardens, Inc., 2004 Ohio App. LEXIS 4562, at *5-6 (Knox County Sept. 15, 2004); see also Zeigler v. Bove, 1998 Ohio App. LEXIS 6473, at *3-4 (Richland County Dec. 23, 1998).

Thus, while Defendant’s motion to dismiss is rife with unsupported factual statements and allegations, the Court is limited to considering only the sufficiency of the allegations contained in the College Faculty’s complaint. Defendant may not rely on allegations or evidence outside of the complaint. Zeigler, 1998 Ohio App. LEXIS 6473 at *3. A court is without authority to dismiss a complaint unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. Houck, 2004 Ohio App. LEXIS 4562 at *5-6.

B. The Remedy of Specific Performance Is Appropriate and Available to the College Faculty as a Matter of Law Because Legal Remedies Are Inadequate to Remedy Defendant’s Contractual Breaches.

Specific performance of contracts is a matter resting in the discretion of the trial court and is “controlled by principles of equity, on full consideration of the circumstances of each particular case.” Sandusky Props. v. Aveni, 15 Ohio St. 3d 273, 274 (1984) (quoting Spengler v. Sonnenberg, 88 Ohio St. 192, 203 (1913)); see also Holstein v. Crescent Cmty., Inc., 2003 Ohio App. LEXIS 4298, at *7-8 (Franklin County Sept. 9, 2003) (specific performance is a principle of equity and is controlled by considerations of justice and fair dealing). “[I]t is the duty of a court deciding whether to grant equitable relief such as specific performance ‘to adapt its practice and course of proceeding as far

as possible to the existing state of society . . . and *not*, from too strict an adherence to forms and rules established under very difficult circumstances, decline to administer justice, and to enforce rights for which there is no other remedy.” State ex rel. Wright v. Weyandt, 50 Ohio St. 2d 194, 198 (1977).

Courts grant specific performance of a contract when legal remedies are inadequate. See, e.g., Gleason v. Gleason, 64 Ohio App. 3d 667, 672 (Scioto County 1991). Damages are inadequate if:

the subject matter of the contract is of such special nature or of such a peculiar value that damages would not be a just and reasonable substitute for or representative of that subject matter in the hands of the party entitled to its benefit, or where, because of some special and practical features or incidents of the contract inhering in the subject matter, in its terms, or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any degree of certainty, so that no real compensation can be obtained by means of an action at law, in other words, where damages are impracticable.

84 Oh. Jur. Specific Performance § 8 (LexisNexis 2007).

For example, in Sashti, Inc. v. Glunt Indus., Inc., 140 F. Supp. 2d 813, 814-815 (N.D. Ohio 2001), the plaintiff sued the defendant, alleging breach of contract and seeking specific performance of a contract to supply automated heavy machinery. The defendant moved to dismiss the plaintiff’s specific performance claim for failure to state a claim upon which relief can be granted. Id. at 815. The court determined that the factual allegations contained in the plaintiff’s complaint were sufficient to establish a claim for specific performance because the plaintiff sufficiently demonstrated that legal remedies were inadequate. Id. at 817. Specifically, the plaintiff indicated that the goods which were the subject of the contract between itself and the defendant were of a special design, that no other vendor would be able to provide suitable substitute goods, and that the damages it suffered were unique and would be difficult to determine with

reasonable particularity because the plaintiff would likely incur continuing damage to its ability to conduct future business as a result of the defendant's breach. Id.

As in Sashti, legal remedies are currently inadequate to compensate the College Faculty if the College closes. Antioch College, founded in 1852, is the flagship institution of the six campus Antioch University system. (Amended Compl. at ¶¶ 1-4.) The College has been a leader in higher education in Ohio and its continued existence is vitally important to not only its faculty, but also to the students, alumni, and the Yellow Springs community. (Id.) In fact, the AC3 is ready, willing, and able to continue operating the College with a tenured faculty and has committed \$14,500,000 towards that effort. (Id. at ¶¶ 18-22.) An order requiring Defendant to perform its contractual obligations to implement less drastic means to alleviate the College's financial problems is, therefore, the only remedy for Defendant's contractual breach.

- C. The College Faculty Is Seeking the Specific Performance of a Contractual Obligation and Is Not Asking the Court to Step into Defendant's Shoes and Decide How Best to Operate the College.

Contrary to Defendant's assertions otherwise, the College Faculty is not asking the Court to step into Defendant's shoes and supervise the operation of the College. Rather, the College Faculty is merely seeking the specific performance of a contract into which Defendant freely entered, the terms of which require Defendant to take less drastic means to alleviate the College's financial problems.

In fact, this case is no different from the multitude of cases in which Ohio courts have ordered corporations to specifically perform contracts that the Board of Directors have entered into on behalf of the corporation. See Oglebay Norton Co. v. Armco, Inc., 52 Ohio St. 3d 232 (1990) (ordering specific performance of a long-term shipping

contract obligating the defendant corporation to maintain adequate shipping capacity and to negotiate with the plaintiff company during each annual shipping season through the year 2010); Nelson v. Suburban Nursing & Mobile Homes, Inc., 1993 Ohio App. LEXIS 4323 (Montgomery County Sept. 2, 1993) (ordering specific performance of a sales contract obligating the defendant corporation to sell beds to the plaintiff); Mr. Mark Corp. v. Rush, Inc., 11 Ohio App. 3d 167 (Cuyahoga County 1983) (ordering specific performance of a Purchase Agreement obligating the defendant corporation to sell its restaurant to the plaintiff). Nowhere in these cases is it suggested that an order requiring the corporation to specifically perform its contractual obligations constitutes a usurpation of the corporation's board of directors' decision making abilities regarding how the corporation should be run. Rather, the courts have simply obligated the corporations to adhere to the contracts to which they are parties.

Nonetheless, it is true that in determining whether Defendant breached the Contract, the Court must inevitably address the issue of what actually constitutes less drastic means for alleviating the College's financial problems. This issue, however, is a factual dispute and is not a judicial usurpation of Defendant's duties to supervise the operation of the College.

D. The College Faculty Is Not Seeking Specific Performance of a Contract for Personal Services.

As noted in Defendant's motion, courts do not typically grant specific performance of the provisions of a contract for personal services. Holstein, 2003 Ohio App. LEXIS 4298 at *8; see also 84 Oh. Jur. Specific Performance § 73. The College Faculty is not, however, requesting specific performance of a personal services contract because the College Faculty is not seeking continued employment at the College.

Rather, as set forth in their first amended complaint, the College Faculty seeks a permanent injunction “requiring Defendant University to specifically perform the Faculty Personnel Policies and Procedures by implementing the least drastic means required to alleviate the financial problems at Antioch College.” (Amended Compl. ¶ 10.) (emphasis added.)

The cases cited by Defendant for the proposition that the remedy of specific performance is not available to enforce the provisions of a continuing employment contract between a private college and a member of its faculty are distinguishable based on the form of relief requested in those cases. Specifically, in each of the cases, the plaintiff(s) sought an order requiring the defendant to continue employing the plaintiff(s). See Masetta v. Nat’l Bronze & Aluminum Foundry Co., 159 Ohio St. 306, 310 (1953) (seeking an order directing defendant to re-employ plaintiffs)²; Sokolowsky v. Antioch College, 1975 Ohio App. LEXIS 5951, at *1 (Greene County June 1, 1975) (plaintiffs sought permanent injunction requiring college to retain them as tenured faculty members); Felch v. Findlay College, 119 Ohio App. 357, 357-358 (Hancock County 1963) (plaintiff sought order continuing his employment as a college faculty member).

Here, unlike the plaintiff(s) in Masetta, Sokolowsky, and Felch, the College Faculty is not asking the Court to order Defendant to continue employing them as

² Defendant also cites Masetta for the proposition that this Court somehow lacks subject matter jurisdiction over this matter but fails to explain how that would apply to this case. (See Def.’s Mot. to Dismiss at 9-10.) In truth, the Masetta court neither stated that it lacked subject matter jurisdiction nor even *discussed* a lack of subject matter jurisdiction in its opinion. Rather, the Masetta court’s decision focused primarily on the general principle, stated above, that courts typically do not grant specific performance of a contract for the performance of personal services.

faculty members. Rather, the College Faculty seeks an order requiring Defendant to adhere to its contractual obligation to implement less drastic means than closing the College. (Amended Compl. ¶ 10.) Indeed, the College Faculty recognizes that the less drastic measures sought may include a reduction in faculty.

The College Faculty is also not seeking the Court's continued oversight in monitoring the Defendant's implementation of less drastic means or to step into Defendant's shoes and decide how the College is best operated. Rather, as in Sashti, a legal remedy is currently unavailable to the College Faculty, and as such, an order requiring Defendant to specifically perform its contractual obligations to seek alternative means to alleviate the College's financial problems, rather than resorting to the most drastic means of closing the College, is necessary and appropriate. Therefore, because the College Faculty is not seeking specific performance of the provisions of a personal services contract, the Court should deny Defendant's motion to dismiss.

E. The First Amended Complaint Is Not Based "Solely On Events That Post Date The Declaration Of Financial Exigency."

Contrary to Defendant's claims, Plaintiff's claims are not based on less drastic means that did not even arise until after the declaration of financial exigency. Instead, the offers of financial support received by Defendant after the declaration of financial exigency evidence why the Defendant's breach in failing to explore less drastic means in conjunction with the faculty was so egregious. By contrast, there is no evidence that Defendant even tried to explore these possibilities or that they could not have been identified before June 7, 2007. Indeed, Defendant's conduct in repeatedly spurning these opportunities over the last eleven months – including first accepting and then rejecting a proposal to donate \$14,500,000 to Defendant – evidence Defendant's

determination to close the College regardless of financial considerations. Thus, Defendant's argument tries to confuse the evidence that will be offered to support the College Faculty's claims – much of which did arise after the declaration of financial exigency – with the claim that less drastic means existed on June 7, 2007 but were ignored by the Defendant in breach of its obligations under the College Faculty's Contract.

III. CONCLUSION

In sum, this case is a standard breach of contract case. The College Faculty has properly alleged all of the elements necessary to sustain a breach of contract action against Defendant. A contract exists between Defendant and the College Faculty obligating Defendant, when declaring financial exigency at the College, to do so only when an imminent financial crisis exists that cannot be alleviated by less drastic means. Defendant has breached the Contract by taking steps to close the College when other, less drastic means exist, such as accepting the \$14,500,000 proposal from the AC3, additional alumni fundraising efforts, and/or cost cutting. As a result of Defendant's breach, the College Faculty has been damaged in a way that cannot be remedied by traditional damages and has thus requested the Court to issue a permanent injunction ordering Defendant to adhere to its contractual obligations by exploring and implementing the least drastic means available to remedy the financial problems. Contrary to Defendant's assertions otherwise, it is entirely the province of the Court to interpret contracts when a dispute arises and to enforce contracts in the event of a breach. The Court should, therefore, deny Defendant's motion to dismiss because the

Court has jurisdiction over this action and the College Faculty has properly alleged a claim against Defendant for breach of contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that Plaintiff's foregoing Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint was served on Defendant by sending a copy of it to Defendant's attorneys, Kathleen M. Trafford and Kendall S. Verrett, Porter Wright Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215, and David A. Weaver and William R. Groves, Martin Browne Hull & Harper P.L.L., One South Limestone Street, Suite 800, Springfield, Ohio 45501, by first class United States mail, postage prepaid, this ____ day of May, 2008.

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