

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO

PETER TOWNSEND, et al.

Plaintiffs/Appellants,

Case No. 2008CV0300

v.

Judge Wolaver

ANTIOCH UNIVERSITY,

Magistrate Reynolds


Defendant/Appellee.

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that Plaintiffs are appealing from the Judgment Entry on Defendants' Motion to Dismiss filed in this action on November 26, 2008 to the Second

District Court of Appeals. A copy of the Judgment Entry is attached as Exhibit 1.

Respectfully submitted,

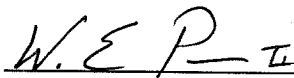


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CERTIFICATE OF SERVICE

I certify that Plaintiffs' Notice of Appeal was served on Defendant/Appellee Antioch University by sending a copy to its attorneys Kathleen M. Trafford, Esq., Porter Wright Morris & Arthur LLP, 41 S. High Street, Columbus, Ohio 43215 and William R. Groves, Esq., 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 10th day of December, 2008.


W. Evan Price II (0056134)

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TERRI A. MAZUR, CLERK
COMMON PLEAS COURT
GREENE COUNTY, OHIO

**IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO
GENERAL DIVISION (CIVIL)**

PETER TOWNSEND, ET AL.

PLAINTIFFS

vs.

ANTIOCH UNIVERSITY

DEFENDANT

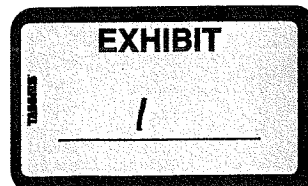
**CASE NO. 2008 CV 0300
JUDGE WOLAVER
MAGISTRATE REYNOLDS**

**JUDGMENT ENTRY ON
DEFENDANTS' MOTION TO
DISMISS**

**FINAL APPEALABLE
ORDER**

This litigation concerns the financial crisis experienced by Antioch College that caused the Antioch University Board of Trustees to declare a state of financial exigency and take steps to suspend the operations of the College. The Court is saddened by the difficulties that the College has experienced and the resulting loss of employment not only to Plaintiffs but to other employees of the College and to other residents of the community as well. The Court regrets that the highly renowned Antioch College, that has graduated so many distinguished alumni through its proud history, may have to close its doors to so many talented and motivated students of this and future generations. The loss is significant and the Court had hoped that such loss could have been averted.

Nevertheless, the Court will perform its duty to determine the procedural and substantive aspects of the litigation and the Motion to Dismiss now before the Court.



08-11-4280

Procedures. (*Id.* ¶ 7, Exhibit 2). The Board of Trustees resolved to suspend the operations at Antioch College, effective July 1, 2008, with the goal of reopening Antioch College in 2012. (*Id.* Exhibit 2).

“[L]ess drastic means” is a phrase that appears in the definition of “Financial Exigency” in the Antioch College Faculty Personnel Policies and Procedures at Section IV.

Section IV. TERMINATION OR REDUCTION OF FACULTY of the Antioch College FACULTY PERSONNEL POLICIES AND PROCEDURES² at Para. IV(A)(56) defines Financial Exigency “as a situation where an imminent financial crisis exists which threatens the survival of the College and cannot be alleviated by *less drastic means*. This can be caused by a steady or sudden decline in students or a sudden or steady increase in deficit in operating expenses.” (Emphasis added)

The Declaration of Financial Exigency (Exhibit 2 to the First amended Complaint) includes background information and a description of the then-current situation. The Board concluded that it had no alternative but to declare a state of financial exigency and suspend operations of the college. The Trustees directed that a written plan for budget curtailment be developed and “in terms of faculty reductions,” such plan was to be “developed in consultation with the dean of Faculty and ADCIL pursuant to Section IV, B, paragraph 59 of the Faculty Personnel Policies.”

Attached to the Declaration at Exhibit A to the Amended Complaint, was the Antioch University Board of Trustees’ Resolution 6.09.07:29, that declared a state of financial exigency and stated in pertinent part,

“IT IS THEREFORE RESOLVED, that the Board hereby declares a state of financial exigency exists at Antioch College;

“RESOLVED FURTHER, that the President of the College, in collaboration with the Chancellor, the Vice chancellor and CFO and Counsel for the University, is hereby authorized and directed to take the actions contemplated under the College’s Faculty personnel Policies to abate the exigency including but not limited to terminating the employment contracts of the faculty.”

² EXHIBIT 1 TO Complaint filed on March 10, 2008, also referenced in Amended Complaint , Para. 5

7079-11-80

Antioch University Board of Trustees' Resolution 11.2.07:1 stated in pertinent part:

“*

*

*

NOW THEREFORE BE IT RESOLVED, that the Board of trustees hereby ratifies and approves the agreements in principle with the Alumni Board dated November 2, 2007 (Agreements in Principle), as reviewed at this meeting.

RESOLVED FURTHER that Resolution 6.9.07:18 is hereby rescinded and replaced with the following resolution:

The Board directs the Chancellor:

*

*

*

3. to develop, and if necessary to implement, after consultation with the Executive Committee of the University Board of Trustees, a contingency plan for the suspension of operations at Antioch College in the event:

*

*

*

(b) the Fiscal Year 2008 or any future year contributions as set forth in the Agreements in principle are not received as contemplated....”

*

*

*

“RESOLVED FINALLY that nothing contained in the foregoing resolutions shall in any way alter or change Resolution 6.9.07:29 declaring financial exigency at Antioch College.”

The Antioch College faculty members dismissed the 2007 case without prejudice on November 13, 2007. (First Amended Complaint, ¶ 16)

08-11-4284

Civ.R. 12(B)(6) provides, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted." Civ.R. 8(a) provides, "A pleading that sets forth a claim for relief...shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief."

In reviewing a complaint upon a motion to dismiss pursuant to Civ.R. 12(B)(6), the Supreme Court has held that a court must presume that all factual allegations of the complaint are true and that all reasonable inferences must be made in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. In order to grant a Civ.R. 12(B)(6) motion to dismiss, it must appear beyond doubt that plaintiffs can prove no set of facts warranting relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753. "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

Civ.R. 12(B)(1) provides, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter."

When considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(B)(1), the Court must decide whether the complaint includes assertions of a cause of action that the Court has the authority to determine. *Vinson v. Diamond Triumph Auto Glass*, 149 Ohio App.3d 605, 607, 778 N.E.2d 149, 150, 2002-Ohio-5596 (Ohio App. 2 Dist., 2002). Furthermore, the Court is not limited to the allegations contained in the Complaint when deciding whether it has subject matter jurisdiction pursuant to a Rule 12(B)(1) motion to dismiss. *Id.*

08-11-4286

Plaintiffs have asked this Court to issue a mandatory injunction compelling the Antioch University Board of Trustees to specifically perform the Faculty Personnel Policies and Procedures³ “by implementing the least drastic means to alleviate financial problems at Antioch College.” Implicitly, and as a predicate to the injunctive relief they seek, Plaintiffs have asked this Court to substitute its judgment for that of the Antioch University Board of Trustees and to determine that Antioch University has not used “less drastic means” than declaring a financial exigency, to alleviate Antioch College’s financial difficulties.

When considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(B)(1), the Court must decide whether the complaint includes assertions of a cause of action that the Court has the authority to determine. *Vinson v. Diamond Triumph Auto Glass*, 149 Ohio App.3d 605, 607, 778 N.E.2d 149, 150 (Ohio App. 2 Dist., 2002).

In this Case, making the decision as to the means required to alleviate Antioch’s financial problems and making the decision whether it was necessary to declare a state of financial exigency rather than use less drastic means, are not within the authority of the Court. Those decisions are uniquely within the authority and discretion of the Antioch University Board of Trustees as set forth in the Faculty Policies and Procedures and as recognized by Case law applicable to the responsibilities of Trustees or Directors.

The Court of Appeals of Ohio (2nd District) has held: “In fact there exists in the law a general presumption that a corporation's management is in a better position to make business judgments, and those decisions are presumed to be made in good faith. *See: Gries Sports Ent. v. Cleveland Football Co.* (1986), 26 Ohio St.3d 15 at 20.”⁴ The Second District Court of Appeals recognized the “business judgment rule” that has its basis in Delaware law as applied in *Gries Sports Enterprises, Inc., supra*. As the business judgment rule presumes, the Board of Trustees are in a better position than this Court to make business judgments concerning the operation and management of Antioch University. And the decision whether to declare a state of financial exigency or to use

³ The Policies and Procedures became effective on July 1, 1997 and apply to all faculty hired before, on, or after that date (See p. 1 of Policies, Ex. 1).

⁴ *Master Consol. Corp. v. BancOhio Nat. Bank* (1990), 1990 WL 65666, 16 (Ohio App. 2 Dist.)

08-11-4288

Policies and Procedures.” Plaintiffs allege that the College Faculty has performed all their obligations under the “Faculty Personnel Policies and Procedures,” but that the University has breached their obligations under the Policies and Procedures. (First Amended Complaint, Para. 26).

Plaintiffs recognize that the Faculty Policies and Procedures are part of their employment contract with the College and the University, and includes duties and responsibilities owed by Plaintiffs to the University and to Plaintiffs by the University. Plaintiffs’ prayer for relief is that the Court will order the specific performance of that part of the Plaintiffs’ employment contracts represented by the Faculty Policies and Procedures.

But the law of Ohio precludes the Court from ordering specific performance of the Plaintiffs’ employment contracts including the Faculty Policies and Procedures:

In *Masetta v. National Bronze & Aluminum Foundry Co.*(1953), 159 Ohio St. 306, 112 N.E.2d 15, the Supreme Court held that:

“It has long been settled law that a court of equity will not decree specific performance of a contract for personal services. This court has recognized this principle of law whenever occasion arose. See *Port Clinton Rd. Co. v. Cleveland & Toledo Rd. Co.*, 13 Ohio St. 544; *New York Central Rd. Co. v. City of Bucyrus*, 126 Ohio St. 558, 186 N.E. 450; *Hoffman Candy & Ice Cream Co. v. Department of Liquor Control*, 154 Ohio St. 357, 96 N.E.2d 203.

“The Supreme Court of Michigan made a clear and concise statement in *Mosshamer v. Wabash Ry. Co.*, 221 Mich. 407, 191 N.W. 210, 211, with which we fully agree. It is:

“* * * it is not the function of the courts to say to the employer by mandatory injunction, You must employ A. and discharge B. If A. has a contract with the employer which is breached, the court of law is always open to him to recover the damages occasioned him by its breach, but a court of equity may not by mandatory injunction thus interfere with the running of the employer's business.’

“The general rule is well stated in 28 Am.Jur., 285, § 93, as follows:

08-11-4290

- (1) the Court does not have jurisdiction over this cause of action so as to interfere in the operations and business management decisions of Antioch University.
- (2) Plaintiffs have failed to state a claim upon which relief may be granted because:
 - (a) the Court may not order specific performance of Plaintiffs' employment contracts, and
 - (b) the Court may not grant Plaintiffs permanent injunctive relief and a mandatory injunction when Plaintiffs have an adequate remedy at law in the form of damages for alleged breach of contract.

VI. Order:

Accordingly, the Court GRANTS Defendant Antioch University's Civ.R.12(B)(1) Motion to Dismiss for lack of subject matter jurisdiction, and the Court GRANTS Antioch University's Civ.R. 12(B)(6) Motion to Dismiss for Failure to State a Claim upon which Relief may be granted.

The Court hereby DISMISSES the First Amended Complaint with prejudice as to the injunctive relief sought in the First Amended Complaint, but without prejudice to a claim at law for money damages that the Plaintiffs may seek in some other litigation. The Court assigns Court costs to Plaintiffs.

IT IS SO ORDERED.



JUDGE STEPHEN A. WOLAYER
11/25/18 9

CERTIFICATE OF SERVICE: A copy hereof was faxed to:
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Columbus, 10 West Broad Street, 21st Floor, Columbus, OH 43215-3422 (FAX# 614-
221-0479)
David A. Weaver, Esq., William R. Groves, Esq., One South Limestone Street, Suite 800,
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Kathleen M. Trafford, Esq., Kendall S. Verrett, Esq., 41 South High Street, Columbus,
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on the date of filing.



Assignment Commissioner

08-11-4292