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Rho Chapter of the Chi Phi Fraternity,
Plaintiff/Petitioner,
v.
Lafayette College,
Defendant/Respondent

:
: COURT OF COMMON PLEAS OF
: NORTHAMPTON COUNTY, PA
:
: CIVIL DIVISION
:
: No. C-48CV2011-10433

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CIVIL DIVISION
NORTHAMPTON COUNTY

**DEFENDANT LAFAYETTE COLLEGE'S
PRELIMINARY OBJECTIONS TO THE COMPLAINT FOR INJUNCTIVE RELIEF**

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4), defendant Lafayette College (“Lafayette” or the “College”) hereby files these preliminary objections in the nature of a motion to dismiss the Complaint of plaintiff Rho Chapter of the Chi Phi Fraternity (“Plaintiff” or “Chi Phi”)¹ for legal insufficiency (Demurrer). In support of these preliminary objections, Lafayette avers as follows:

¹ Although Plaintiff chooses to call itself the Rho Chapter of Chi Phi Fraternity (Complaint ¶ 1), in reality it is the Rho Chapter Association of Chi Phi Fraternity. (See Compl. ¶ 26). This is (cont’d.)

PERTINENT ALLEGATIONS FROM THE COMPLAINT AND ITS EXHIBITS

1. In 1909, Lafayette and Chi Phi executed an agreement (“1909 Agreement”) governing the parties’ rights and interests in a “Chapter House” that Chi Phi planned to construct on Lafayette’s campus. (Compl. Ex. 3.)² That house is known as “Vallamont.” (Compl. ¶ 3.)

2. Under the 1909 Agreement, Lafayette agreed that Chi Phi would “have the right to occupy [Vallamont] for the purposes of a Fraternity House and to have students of the College lodge therein free from assessed rent under the general rules of the College.” (Compl. Ex. 3, ¶ 1; Cf., Compl. ¶ 31.) Vallamont was to be “used exclusively as a Fraternity house, not to be occupied or used by any other persons than member[s] of the Fraternity or for any other purpose without the consent of the College first had and obtained” (Compl. Ex. 3, ¶ 2; Cf. Compl. ¶ 33.). Absent the College’s approval, Chi Phi cannot populate Vallamont with anyone other than Chi Phi student members. (*Id.*)

3. Chi Phi agreed that it would provide regulations “for the full and faithful observance of the College Rules” and would “at all time faithfully submit to and observe” these regulations. (Compl. Ex. 3, ¶ 4.) These regulations were to conform both with Lafayette’s rules then in place and any fraternity rules later enacted by the College. (*Id.*)

4. The 1909 Agreement also provides “that should the local Chapter of the Rho Chapter Association of Chi Phi ever become inactive or extinct, the College is to have the use

significant, in that the Rho Chapter Association (i.e. the organization of alumni that contracts with the College and brings the instant suit) is to be distinguished from a local campus chapter that consists of undergraduate members. The latter is the group that the former seeks to have recolonized.

² The Complaint (“Compl.”) is attached as Exhibit A to these Preliminary Objections.

and right to occupy the building for such purposes in connection with the College as the College deems proper, until such time as the said Chapter is revived.” (Compl. Ex. 3, ¶ 5)

5. In 2005, after the student members were charged with serious violations of the College’s Code of Conduct, Chi Phi chose to close its local undergraduate chapter. Chi Phi admits that “[i]n 2005, Chi Phi determined that its then undergraduate members were not living up to the standards of conduct of the fraternity.” (Compl. ¶ 39.) As a result of this misconduct, Chi Phi’s student members were switched from active to “alumni status.” (Compl. ¶ 40.) As a result of its voluntary closure, the College permitted Chi Phi to apply to the Board of Trustees for recolonization, but not before five years had passed.

6. On August 23, 2006, Lafayette and Chi Phi reached an agreement concerning the terms of occupation of Vallamont (“2006 Agreement”) for a four-year period. (Compl. Ex. 4.) Chi Phi has stated that the purpose of the Agreement was to set forth the College’s use of Vallamont “until such time as the Chapter is revived” -- which are the words from the 1909 Agreement. (See Compl. Ex. 2 (Chi Phi Plan of Return) at 2.2.)

7. The 2006 Agreement makes explicit at the outset that “the 1909 Agreement remains in full force and effect.” (Compl. Ex. 4 at 1.) It also states upfront that Chi Phi has the “right to apply for recolonization” (*Id.*) It does not say that Chi Phi has to right to be recolonized.

8. The initial term of the 2006 Agreement began May 24, 2006, and ended May 24, 2010. (Compl. Ex. 4 at 1.) During that time, Lafayette would “occupy the premises for general student housing for sophomore, junior, or senior male students,” and the initial tenant would be Delta Upsilon Fraternity. (Compl. Ex. 4, ¶ 5.) Lafayette was required to undertake responsibilities such as maintaining the premises, improving the house to comply with applicable

laws and regulations, and paying insurance. (*See generally* Compl. Ex. 4.) Lafayette would then “return the premises to the Rho Chapter [of Chi Phi] at the expiration of” the 2006 Agreement. (Compl. Ex. 4, at ¶ 13.) However, the 1909 Agreement remained “in full force and effect.” (*Id.* at 1.)

9. The 2006 Agreement states in Paragraph 12 that “[t]he Rho Chapter has the right to apply for recolonization consistent with its own recolonization requirements and the College further agrees that the recolonization shall be guided by the fraternity/sorority recolonization guidelines adopted by the trustee committee on athletics and student affairs on June 21, 1993.” (Compl. Ex. 4, ¶ 12.) The 2006 Agreement did not address the discretion of the Board in reviewing any such application, and neither do the 1993 Guidelines address or in any way limit the acknowledged discretion of the Board of Trustees in reviewing any such application. (*See* Compl. Ex. 4 (2006 Agreement); Ex. 10 (1993 Guidelines)).

10. In 2009, the College formed a “Working Group on Greek Life and Campus Community” (the “Working Group”) to broadly study Greek life at Lafayette, and submit a report to the Board with recommendations. (*See* Compl. ¶¶ 44). The Working Group spent over 18 months studying Greek life at the College and preparing the report. (*Id.*)

11. On July 29, 2010, Lafayette and Chi Phi agreed to extend the term of the 2006 Agreement to May 24, 2011 (“2010 Extension Agreement”) because of the ongoing Working Group study. (Compl. ¶ 46; Ex. 5.) The 2010 Extension Agreement again states that the 1909 Agreement “remains in full force and effect.” (*See* Compl. Ex. 5 at 1.)

12. The 2010 Extension Agreement also states that “[t]o the extent that any term of this Letter Agreement is in conflict with any provisions or terms of the 2006 Agreement, this Letter Agreement shall control.” (*Id.*)

13. In the 2010 Extension Agreement, the parties specifically addressed the issue of the Board's discretion in acting on a Chi Phi application for recolonization. With respect to that, it said:

When such application for recolonization is made, the application shall be reviewed by, and may only be approved by, the College's Board of Trustees, which is the sole governing body with the authority to make such a decision. The Board will decide, in its discretion, whether to grant recolonization, *considering any and all such facts or conditions it deems proper and/or applicable*, including but not limited to the extent to which the application for recolonization may or may not advance the mission of the College, at such time. In exercising its decision-making discretion, the Board, may also elect to consider the report from the Working Group on Greek Life and Campus Community, among other materials or information, if any. *The Board also has final decision-making discretion in the determination of which factors, if any, it may consider when exercising this decision-making discretion regarding the recolonization application.*

(Compl. Ex. 5 at 1 (emphasis added).)

14. On March 25, 2011, Chi Phi submitted its application for recolonization to the College's Board of Trustees, even though the Working Group had not yet completed its Report. (See Compl. ¶¶ 55-59.) Chi Phi and Lafayette both understood that the Board of Trustees "will decide, in its discretion, whether to grant recolonization, considering any and all such facts or conditions it deems proper and/or applicable" (Compl. Ex 5 at 1.) The 2010 Extension Agreement reaffirms that the Board "has final decision-making discretion in the determination of which factors, if any, it may consider when exercising [its] decision-making discretion regarding the recolonization." (Compl. Ex 5 at 1.)

15. On October 22, 2011, the Lafayette Board of Trustees adopted the recommendations of the Working Group on Greek Life, including the recommendation of a

three-year implementation period for the group's recommendations and simultaneous evaluation period of compliance with the recommendations by existing fraternities and sororities on the College Campus. (See Letter From James Krivoski to Jerome A. Blakeslee, Jr., attached to the Complaint as Ex. 14.) At the end of the three-year period, if the outlined objectives in the Working Group report have not been achieved, or if established interim benchmarks indicating satisfactory progress toward their achievement have not been met, the College will consider all options, including expulsion of Greek organizations from the College campus. (*Id.*)

16. On October 22, 2011, the Board of Trustees also adopted the recommendation of the Board of Trustees' Committee on Student Life that no Greek organizations, including Chi Phi, Rho Chapter, be granted approval to recolonize and return to Campus at this time. (Compl. Ex. 14.) If, following this three year period, the Board concludes that the objectives have been achieved, the Board agreed that it would consider a request from Chi Phi to recolonize. (*Id.*)

ARGUMENT

17. The Complaint essentially asks the Court to prevent Lafayette from using Vallamont in the Spring Semester 2012, and to force Lafayette to allow Chi Phi to recruit new undergraduate Chi Phi fraternity members who will be able to live in Vallamont beginning in the Spring Semester of 2012. Both of these requests are legally unfounded and should be disposed of by sustaining these Preliminary Objections.

18. With respect to Chi Phi's request that the Court enjoin the College from "possessing" or "using" or "causing injury" to Vallamont after January 1, 2011, there is no factual basis for such a request. Chi Phi does not identify a single statement by the College that it intends to use or injure Vallamont in the Spring Semester of 2012 and, in fact, the College does not intend to do so.

19. Accordingly, there is no pending or threatened harm either to Vallamont or to Chi Phi's asserted ownership rights in the building on which an injunction (and certainly not a preliminary injunction of the sort that Chi Phi seeks here) could be based.

20. Moreover, Chi Phi's assertion that Lafayette's continuing use of Vallamont "would violate many covenants the College has made to Chi Phi" (Compl. ¶ 3) is without legal foundation. To the contrary, under the relevant written agreements, the College has the right to use Vallamont until Chi Phi is recolonized (*i. e.*, "revived"). Thus, the College's (at this point theoretical rather than actual) use of Vallamont would violate no covenants between the College and Chi Phi, but the College does not intend to use Vallamont in the Spring of 2012 and will indeed return Vallamont to Chi Phi.

21. The 1909 Agreement provides that Lafayette has the "use and right to occupy" Vallamont while the "local Chapter" of Chi Phi is "inactive or extinct." (Compl. Ex. 3, ¶ 5.) The 1909 Agreement further specifies that Lafayette retains that "use and right" until said Chapter is "revived." (*Id.*) Chi Phi admits in its Plan of Return that the purpose of the 2006 Agreement was to provide for the College's use of Vallamont until the local Chapter is "revived." (Compl. Exs. 2, 13.)

22. Both the 2006 Agreement and the 2010 Extension Agreement make clear that the 1909 Agreement remains in "full force and effect." (Compl. Ex 5 at 1; Ex. 4 at 1.) Thus, upon expiration of the 2006 Agreement and the 2010 Extension Agreement, Lafayette would "return the premises to the Rho Chapter [of Chi Phi]" subject to Lafayette's and Chi Phi's rights and obligations with respect to the property under the 1909 Agreement, including Lafayette's right to use Vallamont until the local Chapter is "revived." (Compl. Ex. 3 at ¶ 5; Ex. 4 at ¶ 13.)

23. Plaintiff does not have a local undergraduate chapter on the Lafayette campus and cannot do so until that chapter is recolonized by the College. Plaintiff's "local Chapter" is indeed "inactive" under the 1909 Agreement, as it has not yet been "revived." Unless the local chapter of Chi Phi is recolonized, Chi Phi cannot occupy Vallamont under the 1909 Agreement, nor place students there who are not Chi Phi members. (Compl. Ex. 3 at ¶¶ 1, 2.) This is precisely why Plaintiff, Chi Phi's alumni association, has applied for recolonization.

24. Plaintiff now, in essence, seeks to have the Court recolonize Chi Phi and substitute the Court's decision on recolonization for the October 22, 2011 decision of the College's Board of Trustees to deny Chi Phi's application without prejudice while the Working Group Report is being implemented and evaluated. (See Compl. ¶¶ 74, 84, 86, 88, 90, 93(a), (d).)

25. However, there is absolutely no contractual or legal basis upon which the Court could substitute its judgment for that of the College's Board of Trustees and force the College to treat Chi Phi as a recolonized undergraduate fraternity on Lafayette's campus.

26. The discretion of the Board of Trustees in deciding Plaintiff's recolonization application is specifically confirmed by the unambiguous terms of the 2010 Extension Agreement (Compl. Ex. 5), signed by representatives of the College and Chi Phi in light of the pendency of the Working Group Report. That Agreement (Compl. Ex. 5) states:

- a. That "the application [for recolonization] shall be reviewed by, and may only be approved by, the College's Board of Trustees."
- b. That the Board is "the sole governing body with the authority to make such a decision."
- c. That "the Board will decide, in its discretion, whether to grant recolonization, considering any and all such facts or conditions it deems proper and/or applicable,

including but not limited to the extent to which the application for recolonization may or may not advance the mission of the College, at such time.”

- d. That, “[i]n exercising its decision-making discretion, the Board, may also elect to consider the report from the Working Group on Greek Life and Campus Community, among other materials or information, if any.”
- e. And that “[t]he Board also has final decision-making discretion in the determination of which factors, if any, it may consider when exercising this decision-making discretion regarding the recolonization application.”

27. This (agreed upon and understood) discretion of the Board prevents Chi Phi from asking the Court to substitute its discretion for that of the Board and overturn the denial of its application while the Working Group recommendations are being implemented and evaluated.

28. Chi Phi’s reliance on Paragraph 12 of the 2006 Agreement and the 1993 Guidelines is unavailing, because neither the 2006 Agreement nor the 1993 Guidelines that it references address the Board of Trustees’ discretion in deciding whether to approve an application for recolonization. (*See* Compl. Ex. 4, Ex.10)

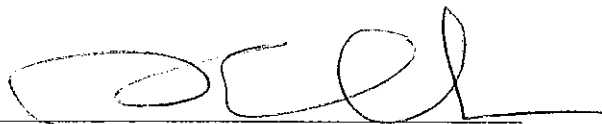
29. Moreover, the 2010 Extension Agreement specifically states that if there is any conflict between the 2010 Extension Agreement and the 2006 Agreement, the 2010 Extension Agreement shall control. (Compl. Ex. 5.)

30. Finally, Plaintiff does not even bother to cite any contractual or other basis for its request that the College has an obligation to provide Chi Phi lists of the College’s students or other Chi Phi alumni, and its request that the Court order the College to do so is therefore unfounded as well.

WHEREFORE, defendant Lafayette College respectfully requests that the Court sustain these Preliminary Objections and dismiss the Complaint against it with prejudice.

Dated: November 22, 2011

Respectfully submitted,



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