

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA  
CIVIL DIVISION

RHO CHAPTER OF THE CHI PHI  
FRATERNITY,

No.: C-48CV-2011-10433

Plaintiff/Petitioner,

v.

LAFAYETTE COLLEGE,

Defendant/Respondent.

**PLAINTIFF, RHO CHAPTER OF THE CHI PHI FRATERNITY  
PRELIMINARY OBJECTIONS TO THE PRELIMINARY OBJECTIONS  
OF LAFAYETTE COLLEGE IN THE NATURE OF A DEMURRER**

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(2), Plaintiff, Rho Chapter of the Chi Phi Fraternity (hereinafter "Chi Phi"), files these Preliminary Objections to the Preliminary Objections filed by Lafayette College on November 22, 2011, to the Complaint of the Plaintiff that was filed on October 28, 2011. Support of these Preliminary Objections, Chi Phi avers as follows:

1. The Pennsylvania Rule of Civil Procedure 1028(a)(2) provides that,

Preliminary Objections may be filed by any party to any pleading and are limited to the following grounds:

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(2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter:

2. Preliminary Objections are considered a pleading pursuant to Pa.R.C.P.1017(a)(4).

3. The Preliminary Objections filed by Lafayette College violate Pa.R.C.P.1028(a)(4) in that the College ostensibly raises a demurrer while improperly inserting

selective and additional facts that are not of record, and are at issue, purporting to support its argument for dismissal.

4. Pennsylvania law has long held that in ruling on Preliminary Objections, on the grounds of legal insufficiency in the nature of a demurrer, a Court can only consider those factual matters disclosed in the record. Martin v. Department of Transportation, 556 A.2d 969 (Pa. Cmwlth. 1989).

5. As has been stated for many years, Courts may not consider testimony or anything outside of the pleadings when ruling upon a Preliminary Objection in the nature of a demurrer, nor can a Court consider facts appearing only in legal briefs or collateral matters. See Standard Pennsylvania Practice 2d, Vol. 5, §25:80, p. 193.

6. Plaintiff's Preliminary Objections in the nature of a demurrer repeatedly rely upon questions and issues of fact that are wholly inappropriate for such consideration. The nature of the matters raised by Lafayette College in their Preliminary Objections are more appropriately addressed in an Answer and New Matter requiring responsive pleading by the Plaintiff as to why said facts are in error.

7. Specifically, the Preliminary Objections of Lafayette College argue that it has certain rights arising from the referenced 1909 Agreement and the 2006 Agreement; however, applicability of those Agreements turns on issues of fact regarding the various definitional terms used in those documents. See Preliminary Objections of Lafayette College at ¶21.

8. While the interpretation/application of this terminology turns on issues of fact, which will be addressed, substantively, the College goes further by injecting new facts into their argument that are not of record via the Complaint filed by the Plaintiff. Specifically, the College states in Paragraph 18 of the Preliminary Objections:

With respect to Chi Phi's request that the Court enjoin the College from "possessing" or "using" or "causing injury" to Vallamont after January 2, 2011 (sic), 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. (emphasis supplied).

9. The above statement by the College is an unverified statement of fact and raises an issue of fact requiring discovery.

10. Moreover, Plaintiff has pled in its Complaint past conduct of the College against other fraternity's houses that gives legitimate concern over the future of Vallamont. (See Complaint, Paragraphs 69-73).

11. Additionally, the College inappropriately pleads in Paragraph 20 of its Preliminary Objections stating, "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." Again, such unverified statements are improper and in violation of Pa.R.C.P.1028(a)(4) in that the conduct of the College in its Preliminary Objections is that of a "speaking demurrer" which is inappropriate and must be stricken, as provided by Pa.R.C.P.1028(a)(2). See Standard Pennsylvania Practice 2d, Vol. 5, §25:75 at p. 188.

12. The College inappropriately injects such additional facts for the sole purpose of trying to foist an argument that there is no "case in controversy" with regard to the future of Vallamont. It is interesting to note that the Preliminary Objections, while injecting said additional facts, are strangely silent as to the College's intent toward Vallamont as to the Summer or Fall of 2012.

13. For the above reasons, Chi Phi contends that the Preliminary Objections of Lafayette College to its Complaint fail to conform to the law and rules of Court prohibiting pleading facts not of record in support of a demurrer, thereby being an impermissible “speaking demurrer” and should, therefore, be stricken.

Respectfully submitted,

NOEL, KOVACS & McGUIRE, P.C.

By:



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Date: December 12, 2011

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**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing Plaintiff, Rho Chapter of the Chi Phi Fraternity Preliminary Objections to the Preliminary Objections of Lafayette College in the Nature of a Demurrer together with supporting Brief, upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.C.P. 440:

Service by Electronic Mail and First Class Mail  
Postage Prepaid, Addressed as Follows:

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