SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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INDEX NO. 100418/2020

MOTION DATE 10/05/2020

MOTION SEQ. NO. 002

JOHN DOE 1; STUDENT A, A MINOR BY HIS PARENT AND NATURAL GUARDIAN JOHN DOE 1; JOHN DOE 2; STUDENT B, A MINOR BY HIS PARENT AND NATURAL GUARDIAN JOHN DOE 2, JANE DOE 3; STUDENT C, A MINOR BY HIS PARENT AND NATURAL GUARDIAN JANE DOE 3, ON BHEALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

- v -

ST. BERNARD'S SCHOOL, THE BOARD OF TRUSTEES OF ST. BERNARD'S SCHOOL, BY ITS PRESIDENT, THE EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES OF ST. BERNARD'S SCHOOL, BY ITS PRESIDENT, PRESIDENT OF THE BOARD OF TRUSTEES OF ST. BERNARD'S SCHOOL, TRUSTEE 1, TRUSTEE 2, TRUSTEE 3, TRUSTEE 4, TRUSTEE 6, TRUSTEE 7, TRUSTEE 8, TRUSTEE 9, TRUSTEE 10, TRUSTEE 11,TRUSTEE 12, TRUSTEE 13, TRUSTEE 14, TRUSTEE 15, TRUSTEE 16, TRUSTEE 17, TRUSTEE 18, TRUSTEE 19, TRUSTEE 20, TRUSTEE 21, TRUSTEE 22, TRUSTEE 23,TRUSTEE 24, TRUSTEE 25, INVESTMENT COMMITTEE MEMBER 1, INVESTMENT COMMITTEE MEMBER 2,

Respondents.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that the motion to dismiss the amended petition/complaint (motion seq. 002) is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the petition/complaint in its entirety, with costs and disbursements to respondents as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this hybrid proceeding pursuant to CPLR article 78 and action to recover damages for violations of General Business Law §§ 349 and 350, respondents with the exception of Trustee 19 (respondents), move pursuant to CPLR 7804 (f) and CPLR 3211, to dismiss the amended petition/complaint. For the following reasons, the motion is granted and the hybrid proceeding and action is dismissed.

BACKGROUND

St. Bernard's School (the School) is a prestigious all-male private school in Manhattan. In December 2019, the School's Headmaster, Stuart H. Johnson III (Johnson), who had served in that role since 1985, executed an employment agreement providing for his resignation at the end of the 2020-2021 school year (the resignation agreement). The School's Board of Trustees (the Board) thereafter ratified the resignation agreement.

In this hybrid proceeding and action, three anonymous students and their parents (petitioners) challenge the Board's alleged "forced removal" of Johnson from his position as Headmaster and seek to recover damages for violations of General Business Laws §§ 349 and 350 (Amended Petition/Complaint at ¶ 1, NYSCEF Doc. No. 30). Petitioners allege that the events leading up to Johnson's resignation began in May 2019, when the School's Executive Committee, led by the President of the Board, "orchestrated a secret coup" to replace Johnson and threatened him with immediate termination if Johnson refused to negotiate a resignation (*id.* at ¶ 7). According to petitioners, the Executive Committee did so because of friction that existed between the members of the Executive Committee and Johnson regarding their efforts to unduly influence the School's academic affairs and their having engaged in self-dealing, consisting of diverting business opportunities belonging to the School and directing the School's investments

to opportunities enriching themselves or their associates. Petitioners assert that the ultimate goal of the Executive Committee was to replace Johnson with a fellow "rogue trustee" who would put the personal interests of the members first.

Petitioners maintain that the Executive Committee forced Johnson's resignation without approval or knowledge of the full Board in violation of the School's by-laws. They assert in this regard that the committee lied to Johnson by telling him the full Board wanted him to resign. Johnson went along, although he preferred to stay on as Headmaster. Using the leverage obtained through its coercion, the committee negotiated Johnson's exit package and extracted a non-disclosure agreement from Johnson. It then presented the completed resignation agreement to the full Board. The remaining Board members were mislead into believing it was Johnson's idea to resign. Having been mislead in this manner, the full Board then ratified the resignation agreement. Therefore, petitioners assert, Johnson's "removal" was procedurally improper and clouded by conflicts of interest.

Petitioners further allege that Johnson's resignation incensed a large number of parents, students, faculty, and alumni. In order to combat the backlash caused by its actions, the Executive Committee then used hundreds of thousands of dollars from the School's endowment to hire attorneys and an expensive public relations firm to defend its wrongful conduct and secure Johnson's premature departure from the School.

Now before the court is respondents' pre-answer motion pursuant to CPLR 7804 (f) and CPLR 3211 to dismiss the amended petition/complaint (Mot. Seq. No. 002).[1] While the present motion was pending, petitioners moved for leave to file a second amended petition/complaint in order to include subsequent allegations (NYSCEF Doc. Nos. 54-59 [Mot. Seq. No. 005]). Specifically, they allege that in June 2020, Johnson executed an amended agreement, pursuant to which he agreed to take a sabbatical for the 2020-2021 school year, and the School and Johnson mutually released any and all claims between them. According to petitioners, the Board coerced Johnson into signing these documents by threatening him with loss of his severance and humiliation by disclosing sham allegations against him. On November 13, 2020, this court denied petitioners' motion as moot, noting that the submissions on the motion for leave to amend would be considered on the present motion (Dec & Order, NYSCEF Doc. No. 68).

DISCUSSION

Article 78 Claims

In their first cause of action, petitioners seek a writ of prohibition pursuant to CPLR 7803 (2) enjoining enforcement of Johnson's resignation agreement and his "removal" as Headmaster (Amended Petition/Complaint at ¶¶ 134-138, NYSCEF Doc. No. 30). In support of this cause of action, petitioners argue that by constructively discharging Johnson, the Executive Committee

[1] Two students and their parents initially brought this matter as an article 78 proceeding, naming only the School and the Executive Committee of the Board by its President as respondents (NYSCEF Doc. No. 003). Subsequent to respondents filing the motion to dismiss which is now before the court (Mot. Seq. No. 002), petitioners moved for leave to serve an amended petition/complaint in order to add an additional student and parent as petitioners and to add members of the School's Executive, Development and Investment Committees as respondents, as well as the President and individual trustees (Mot. Seq. No. 003). Petitioners also sought to add the claims under General Business Laws §§ 349 and 350. This court granted petitioners' motion and converted the proceeding to a hybrid action (*see Doe v St. Bernard's Sch.*, 2020 NY Slip Op 31992 [U], NYSCEF Doc. No. 48). The court also directed and ordered further submissions in support of and in opposition to respondents' motion to dismiss that incorporate all additional parties and claims granted in petitioners' motion for leave to amend (*id.*). Respondents then filed a new notice of motion seeking an order dismissing the amended petition/complaint (Mot. Seq. No. 004 [NYSCEF Doc. Nos. 35-53]). This court denied the motion as moot and ordered that the submissions would be considered on the present motion (NYSCEF Doc. No. 69).

proceeded in excess of jurisdiction, because the School's by-laws vest sole power to hire—and therefore sole power to fire—the Headmaster in the hands of the full Board (*id.* at ¶ 135). Since the Executive Committee induced the Board to ratify the acceptance of Johnson's supposedly "voluntary" resignation without providing full information concerning all material facts relevant to that ratification (i.e., that the agreement was obtained by the Executive Committee through coercion and for nefarious purposes) the Board's decision was also not a proper exercise of its powers (*id.* at ¶ 136).

In their second cause of action, petitioners seek a judgment pursuant to CPLR 7803 (3) setting aside the Board's decision to ratify Johnson's resignation agreement (*id.* at ¶¶ 139-148). In this regard, they allege that the Board's decision to accept Johnson's purported resignation was arbitrary and capricious, and/or an abuse of discretion because it was not supported by any rational process (*id.* at ¶ 140). The Board conducted no independent investigation of the facts surrounding Johnson's constructive discharge, instead rubber-stamping the outcome engineered by the Executive Committee which was the product of coercion (*id.* at ¶¶ 141-142). Petitioners allege that although it was required to do so, the Board did not take an informed vote to decide whether to terminate Johnson or otherwise end his tenure as Headmaster (*id.* at ¶ 143). In addition, they allege that the Board did not take an informed vote on whether to ratify the resignation agreement and non-disclosure agreement signed by Johnson under false pretenses (*id.* at ¶ 144).

Respondents move to dismiss these causes of action pursuant to CPLR 7804 (f), asserting that petitioners lack standing to seek such relief and that petitioners' article 78 claims are moot. Respondents also assert that petitioners fail to state a cause of action under CPLR 7803 (2) or (3).

"On a motion pursuant to CPLR 7804 (f) to dismiss a petition upon an objection in point of law, only the petition is to be considered and all of its allegations are deemed to be true" (*Long Is. Contractors' Assn. v Town of Riverhea*d, 17 AD3d 590, 594 [2d Dept 2005]). Here, the threshold question is whether petitioners' allegations establish that they have standing to maintain their article 78 claims.

To establish standing, a litigant must have "a sufficiently cognizable stake in the outcome so as to cast[] the dispute in a form traditionally capable of judicial resolution" (*Matter of Graziano v County of Albany,* 3 NY3d 475, 479 [2004] [internal quotation marks omitted]). To that end, "[t]he most critical requirement of standing . . . is the presence of 'injury in fact'" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered *a cognizable harm* that is not tenuous, ephemeral, or conjectural but is *sufficiently concrete* and particularized to warrant judicial intervention" (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019] [internal quotation marks and citations omitted][emphasis added]; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003]).

Here, petitioners allege that Johnson's resignation directly interfered with the quality of educational opportunities offered at the school, disrupted the students' progress, and deprived them of the "St. Bernard's experience" to which they committed (Amended Petition/Complaint at ¶¶ 137-138, NYSCEF Doc. No. 30). Petitioners maintain that they chose the School and

committed their children to what they expected would be a 10-year educational program because they expected Johnson to be the Headmaster for the duration of their children's education. They committed to the School for the "long haul" and had a right to expect, in return, that the School would provide the education, educators, and educational philosophy they were promised, but of which they are now being deprived. Petitioners further allege that respondents' meddling with Johnson's position has created instability and conflict at the School, distracting from the growth and development of students. They assert that this has been particularly problematic given the difficulties presented by the COVID-19 crisis.

For purposes of standing, the foregoing injuries are too abstract and conjectural, and not sufficiently concrete to constitute an injury in fact. While the amended petition/complaint also includes "class allegations" (Amended Petition/Complaint at ¶¶ 62-65, NYSCEF Doc. No. 30), they are not sufficient to establish standing and, in any event, "[t]he procedural device of a class action may not be used to bootstrap plaintiff into standing which is otherwise lacking" (*Murray v Empire Ins. Co*., 175 AD2d 693, 695 [1st Dept 1991]).

Even assuming standing, petitioners' article 78 claims are academic. Respondents submit an affidavit from Johnson, sworn March 19, 2020, wherein he states that he was represented by counsel during the negotiation of the resignation agreement, which he "voluntarily" entered into in December 2019 (NYSCEF Doc. No. 14, ¶ 4). He also states that he has "no interest" in having the resignation agreement "undone" and no desire to remain as Headmaster past the 2020-2021 school year (*id.* at ¶ 7). He further states that he has "not authorized anyone to proceed on [his] behalf to undo" the resignation agreement or to obtain an extension of his term as Headmaster, and that he does not support the petitioners' objective of doing so (*id.* at ¶¶ 9-10). Finally, he states that he made the affidavit "voluntarily and of [his] own free will, with the

advice of counsel of [his] choosing [and has] not been pressured or coerced to do so by members of the Board . . . or their representatives" (*id.* at ¶ 12)

Johnson's affidavit establishes that a determination of the claims asserted under CPLR 7803 -- which fundamentally challenge the resignation agreement as being obtained from Johnson involuntarily and the Board's ratification of such agreement as being uninformed - would not affect any actual rights of petitioners but, instead, would be an advisory opinion, which "is not the exercise of the judicial function" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529 [1977]). "[C]ourts should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties" *(id.* at 530; *see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]) [courts may not "pass on academic, hypothetical, moot, or otherwise abstract questions"]).

Although petitioners assert that the court may not consider Johnson's sworn affidavit on this motion, affidavits submitted by a respondent may warrant dismissal under CPLR 3211 where they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Graubard Miller,* 11 NY3d 588, 595 [2008][quotation marks omitted]; quoting *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]; *Smalls v St. John's Episcopal Hospital*, 152 AD3d 629, 629-630 [2d Dept 2017]). In this case, Johnson's affidavit conclusively establishes a defense to petitioners' article 78 claims as a matter of law.

It also bears noting that in or around June 2020, Johnson entered into an "Amended and Restated Employment Agreement and Settlement Agreement" pursuant to which he agreed to take a sabbatical for the 2020-2021 school year, which includes a mutual release of any and all claims between Johnson and the School (Mutual Release, NYSCEF Doc. No. 41). The release

ostensibly covers any claims Johnson may have that the retirement agreement was obtained through coercion or in violation of the bylaws. Further, the June 2020 agreement apparently supersedes the resignation agreement challenged by petitioners in their article 78 claims.

Lastly, petitioners argue that their article 78 claims are not moot because relief is still available regardless of whether Johnson returns to his post as Headmaster. In this regard, they assert that their article 78 claims do not rest solely on Johnson's reinstatement. Rather, the plot to replace Johnson was only one of many conflicted and self-interested acts that require the removal of certain trustees from the Board. To this end, the amended petition/complaint includes a request for a "declaration removing the President, Trustee 1, Trustee 6, Trustee 7, and Trustee 8 from the Executive Committee and the Board" (Amended Petition/Complaint, NYSCEF Doc. No. 30).

As best can be discerned, petitioners are seeking review of decisions allegedly made by these trustees to divert business opportunities belonging to the School and to direct the School's investments to opportunities enriching themselves or their associates. They are asking the court to order removal of these trustees from the Board based on such decisions. However, petitioners have failed to allege that they fall within the class of persons authorized by the Not-For-Profit Corporation Law to challenge the conduct of these trustees and to seek their removal from the Board (*see* N-PCL § 720 [b]; *see also* N-PCL §§ 706, 714).

In light of the foregoing, the court need not reach the additional arguments advanced by respondents in support of dismissing petitioners' article 78 claims.

Thus, the first and second causes of action in the amended petition/complaint are dismissed.

General Business Law §§ 349 and 350 Claims

Petitioners' third through sixth causes of action seek to state claims under General Business Law §§ 349 and 350 (Amended Petition/Complaint at ¶¶ 149-174, NYSCEF Doc. No. 30). They allege that respondents had conversations with, and solicited donations from parents, students and alumni without disclosing Johnson's imminent departure. Petitioners further allege that respondents represented, via letters and the School's website, that donations would be used for educational purposes, need-based scholarships, and diversity efforts, without disclosing that funds would go towards paying for lawyers and an expensive public relations firm in connection with Johnson's departure. Petitioners also allege that respondents solicited such donations without disclosing that the funds would go towards self-interested transactions benefiting members of the Board personally and, in particular, the members of the Investment Committee, in violation of their fiduciary duty to the School, and to the School's detriment.

Respondents move to dismiss these causes of action pursuant to CPLR 3211 (a) (7). On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, the court "must accept plaintiffs' allegations as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether plaintiffs have a cause of action. At the same time, defendants bear the burden of establishing that the complaint fails to state a viable cause of action" (C*onnolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018][internal citation omitted]).

Here, petitioners' allegations fail to state a cause of action to recover damages for violation of General Business Law §§ 349 and 350. General Business Law § 349 declares "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state [to be] unlawful." General Business Law § 350 provides

that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." The Court of Appeals has

> "explained that, to state a claim under sections 349 or 350, a plaintiff *must allege that a defendant has engaged in (1) consumer-oriented conduct*, that is (2) materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice. Thus, a plaintiff claiming the benefit of either section 349 or 350 must charge conduct of the defendant that is consumer-oriented or, in other words, demonstrate that the acts or practices have a broader impact on consumers at large"

(*Plavin v Group Health Inc.*, 35 NY3d 1, 10 [2020] [internal quotation marks and citations omitted] [emphasis added]). "Private contract disputes, unique to the parties [do] not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 25 [1995]).

While the fund-raising activities of nonprofit organizations are not exempt from having to comply with sections 349 and 350 (*see Marcus v Jewish Natl. Fund [Keren Kayemeth Leisrael]* 158 AD2d 101, 104 [1st Dept 1990]), the solicitations and donations at issue here represent private transactions between the Board, the School, and certain anonymous parents and alumni of the School. Petitioners fail to allege any conduct attributable to respondents that had a potential broad impact on consumers at large (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995] ["The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large"]). To the extent petitioners may be understood as alleging they were injured as a result of being deprived of the benefit for which they bargained in signing their enrollment contracts, this is also insufficient inasmuch as it represents a private contract dispute. Since petitioners have not alleged consumer-oriented

conduct sufficient to assert claims under General Business Law §§ 349 and 350, their third through sixth causes of action are dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion to dismiss the amended petition/complaint is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the petition/complaint in its entirety, with costs and disbursements to respondents as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

HON. CAROL R. EDMEAD J.S.C.

12/28/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE