

STATE OF NEW YORK
SUPREME COURT COUNTY OF MADISON

DELTA KAPPA EPSILON ALUMNI CORPORATION,
MU of DKE FOUNDATION, and SAM HIGGINS,
President, on behalf of the student members of Mu
of Delta Kappa Epsilon, who reside in Madison County,

Petitioners

vs.

COLGATE UNIVERSITY, REBECCA CHOPP, Colgate's
President, JOHN A. GOLDEN, Colgate Trustees Chairperson,
and ADAM WEINBERG, Colgate's Dean of the College,

Respondents.

DECISION AND JUDGMENT

Index No. 2005-1762

RJI No. 2005-0426-M

APPEARANCES OF COUNSEL

Brouse McDowell, LPA (Thomas J. Wiencek, Esq., of counsel) and Mackenzie Hughes, LLP (W. Bradley Hunt, Esq., of counsel) for the Petitioners;

Bond, Schoeneck & King, PLLC (Edward R. Conan, Esq., of counsel) for the Respondents.

OPINION OF THE COURT

Dennis K. McDermott, J.

On October 28, 2005, petitioners commenced this hybrid Article 78 proceeding and plenary action against Colgate University and various individuals who are part of the university's administration seeking, *inter alia*, the annulment of Colgate's withdrawal of recognition of the local chapter of the Delta Kappa Epsilon fraternity ("DKE"). Respondents have moved for dismissal under CPLR 3211 (a) (4), (5) and (7).

Background

DKE is a national fraternity that has, for many years, maintained a local chapter at Colgate University. The fraternity's alumni corporation ("DKE Corporation") owns what had been the DKE fraternity house located on Broad Street adjoining the campus, and MU of DKE Foundation ("DKE Foundation") holds a mortgage interest in the property. Respondent Sam Higgins is alleged to be an undergraduate student at Colgate and the current president of the local chapter of DKE who purports to act in the name of all current members of the local chapter. Colgate is a duly-chartered private university with its campus located in the village of Hamilton in Madison County.

In July, 2003, Colgate announced its "new residential education program" which had been unanimously adopted by its Board of Trustees. Under the terms of the program, all but 250 seniors would be required to live in university-owned housing effective at the start of the 2005-06 academic year. Those fraternities and sororities whose affiliated alumni corporations owned their houses would be required to transfer ownership of those houses to Colgate by November 30, 2004. The university indicated that it would negotiate purchase prices and other terms of transfer.

In June, 2004, the Chair of Colgate's Board of Trustees released a written statement to the general university community in which he announced:

While Colgate hopes to acquire all of the chapter houses, the decision to sell rests with the house alumni/ae corporations. Because our new residential education plan requires that all students live in university-owned housing by the fall of 2005 (with the exception of approximately 250 senior students who are historically granted permission to live off campus), *only those Greek-letter organizations that choose to sell to the university will continue to be recognized by the university and house undergraduate members in their traditional houses* (emphasis added).

That announcement stated the university's intent to continue to recognize those fraternities and sororities that chose to participate in the new residential education plan and made assurances that

the members of recognized fraternities and sororities would be housed in their traditional houses so long as minimum occupancy numbers were met.

Later that month, on June 22, 2004, Colgate's Financial Vice President and Treasurer, David Hale, wrote to the president of DKE Corporation to inform him that

... Colgate University will only recognize fraternities and sororities that are residential organizations beginning in the fall of 2005. Organizations that choose to retain ownership (of their houses) will no longer be residential and accordingly will not be recognized by Colgate after June 2005.

On September 4, 2004, with the approach of the November 30 deadline for transfer of fraternity and sorority houses, Colgate's Dean issued a memorandum to the student body on the topic of joining Greek-letter organizations during a "transition year". Therein, he noted that DKE was the only fraternity that had not yet entered into negotiations with the university for the sale of its house. "Any Greek-letter organization that opts not to sell its house to the university will ... forfeit university recognition as of July 1, 2005."

Again, on December 9, 2004, the Chair of Colgate's Board of Trustees wrote in a memorandum addressed to all Colgate students and employees, "Fraternities that have chosen to retain ownership of their properties will not be allowed to house students next fall, and the university will withdraw recognition of their undergraduate chapters in summer 2005"

On February 25, 2005, the petitioners herein commenced litigation in United States District Court for the Northern District of New York seeking both declaratory and injunctive relief seeking to prevent Colgate from withdrawing its recognition of DKE. The complaint contained allegations making it clear that the petitioners were aware of the situation, including a specific allegation wherein petitioners acknowledged that if the DKE fraternity house was not transferred to Colgate,

“ ... Colgate will withdraw recognition (of DKE) in the summer of 2005.”

By letter dated June 16, 2005, Colgate’s Dean informed both the president of the local chapter of DKE and the president of DKE Corporation that the university was withdrawing its recognition of DKE effective July 1. Both addressees deny ever having received this letter. Instead, the petitioners allege that they were not informed of the official withdrawal of recognition until a letter was sent to the undergraduate members of DKE on July 7 informing them of that development.

Legal Issues

A. Failure to State a Cause of Action.

Petitioners recite three causes of action: (1) that, pursuant to New York CPLR Article 78, Colgate’s decision to withdraw recognition of the local DKE chapter was arbitrary and capricious on several grounds; (2) promissory estoppel, alleging that Colgate made a promise that members of unrecognized societies “would not be stopped from associating or gathering” and would be “recognized as brothers and sisters” and would be “treated the same way as any other student”; and (3) breach of implied contract, claiming that they performed all duties required of them under the new residential education program and student handbook and did not perform any acts of misconduct which would warrant withdrawal of recognition.

It is a well-settled principle of New York law that judicial review of an educational institution’s academic and administrative decisions is extremely limited. *Matter of Olsson vs. Board of Higher Ed.*, 49 NY2d 408 (1980); *Matter of Tedeschi v. Wagner College*, 49 NY2d 652 (1980). Underlying this rule is the recognition that such decisions involve the subjective professional judgment of educators and administrators with far greater experience in evaluating such matters than

is possessed by courts. *Matter of Olsson v. Board of Higher Ed.*, *supra* at 413. As such, review of such decisions is limited to whether the institution acted in good faith or its action was arbitrary and irrational. *Matter of Chusid v. Albany Medical College*, 157 AD2d 1019 (3d Dept 1990), *affd.* 75 NY2d 711 (1990).

The nature and quality of student housing is part of the academic environment of any college campus. A college's Board of Trustees has the authority to adopt resolutions and implement policies as it deems necessary to supervise and control its institution. This has been held to include a determination requiring students to live in university-owned housing (*Pyeatte v. Board of Regents of University of Oklahoma*, 102 F.Supp. 407 [W.D. Okla. 1951], *affd.* 342 U.S. 936 [1952]) as well as a policy excluding national fraternities (*Beta Sigma Rho, Inc. v. Moore*, 46 Misc.2d 1030, *affd.* 25 AD2d 719 [4th Dept 1966], *citing Waugh v. Mississippi University*, 237 U.S. 589 [1915]).

Here, a critical aspect of Colgate's new residential education program is the university's ownership of student housing. Ownership allows the university to assure the quality of student housing and to regulate activities therein. Without such ownership, the university would be unable to effectively implement and supervise its policy. Thus, allowing fraternities and sororities to retain their recognized status on campus on the condition that title to their houses be transferred to Colgate was a lawful exercise of the Board of Trustees' authority. Similarly, the determination to withdraw recognition of DKE when the DKE Corporation declined to transfer title of the fraternity house was likewise within the Board's authority.

Petitioners allege that Colgate acted arbitrarily by continuing to recognize certain fraternities that did not transfer homes to the school. The petitioners' argument misses the point. The fact is that those other fraternities cited by the petitioners owned no homes and, consequently, had none to

transfer. Colgate did not demand the transfer of a house in return for continued recognition. It required that the Greek-letter organizations divest themselves of residential ownership. For fraternities that never owned houses, such divestiture was unnecessary.

The Court also rejects the petitioners' claim that Colgate breached an "implied contract" with the student members of DKE. New York courts have recognized that the relationship between a private university and its students is not precisely contractual in nature "because the essentially fictional nature of the contract results in its generally being assumed rather than proved, because of the difficulty of its application, and because it forecloses inquiry into, and a balancing of, the countervailing interests of the student on the one hand and the institution on the other." *Tedeschi v. Wagner College, supra*, at 658. The concept of an "implied contract" between a university and its students has been limited to simply requiring that the university act in good faith in its dealings with its students. *Matter of Olsson v. Board of Higher Ed., supra*, at 414. In the exercise of its authority, a university's Board of Trustees may implement or change policies without having to consult or negotiate with the student body. The Board of Trustees has the inherent authority to do so. *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969), cert. den. 398 U.S. 965 (1970). A change – even a drastic change – in a college's rules and regulations will not constitute a breach of its implied contract with its students so long as the change does not constitute an abuse of discretion. *Jones v. Vassar College*, 59 Misc.2d 296 (Sup Ct, Dutchess County 1969). Here, none of the facts alleged by the petitioners, all assumed to be true for purposes of deciding this motion, would lead to the conclusion that the respondents acted illegally, arbitrarily, capriciously or otherwise in bad faith.

Petitioners' attempts to cast Colgate's derecognition of the local DKE chapter as a

disciplinary decision must also be rejected. Colgate's actions were not based on any allegation of misconduct by DKE or any of its members (*see, for example, Mu Chapter of Delta Kappa Epsilon v. Colgate University*, 176 AD2d 11 [3d Dept 1992]). Instead, Colgate's new residential education program was a restatement of the university's policy for continued recognition of the fraternities and sororities on campus. When DKE no longer met the university's requirements, its recognition was terminated.

For these reasons, the petition should be dismissed.

B. Timeliness of the Proceeding.

The foregoing decision to dismiss renders academic the issue of whether this special proceeding under CPLR Article 78 was timely commenced. Nonetheless, dismissal of the claim would be warranted on that basis as well.

CPLR 217 (1) provides a four-month time limit for the commencement of an Article 78 proceeding. Petitioners do not dispute that CPLR 217 is applicable, but they argue that the statute did not start to run until Colgate's Dean sent his July 7, 2005 letter to the undergraduate members of the local DKE chapter informing them that the university had withdrawn its recognition of the fraternity.

The recent case, *Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30 (2005), is controlling on this issue. There, petitioner Best Payphones, Inc. had applied for a franchise to install pay telephones at various locations in New York City. The City, acting through its Department of Information Technology and Telecommunications (DOITT) issued a preliminary approval on August 19, 1999 subject to certain conditions to be met later. On January

13, 2000, DOITT notified Best Payphones that it had failed to meet the conditions attached to its preliminary approval and that the franchise would be revoked if those conditions were not met within the next sixty days. On June 19, DOITT notified Best Payphones that its franchise had been revoked, and Best Payphones commenced its Article 78 proceeding on July 11. The Court of Appeals ruled that DOITT's action became final and binding, thus triggering the four-month statute of limitations, on January 13. At that point, DOITT had "left no doubt" that its determination was final and binding and that it had held out no hope of amelioration by further administrative proceedings.

Using that same analysis here, Colgate's statement issued in July, 2003 left no doubt that it had formulated a definite policy and that, if petitioners failed to meet Colgate's requirements, an "actual, concrete injury" would befall them. Statements and announcements subsequently issued by Colgate did not signal any retreat from that position nor did they offer any hope that further administrative actions might be availing. The petitioners' injury was actual and concrete well before July 1, 2005 and certainly well before July 7. It could be persuasively argued that the statute of limitations began to run in July, 2003, but in any event there is no doubt that it had begun to run by December 9, 2004 at the latest. Thus, petitioners' claim became time-barred at least by April 9, 2005.

Petitioners cannot escape the consequences of the four-month statute of limitations by asserting their claims in the guise of a plenary action. *Maas v. Cornell University*, 94 NY2d 87 (1999).

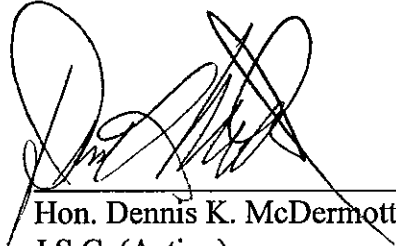
Conclusion.

The Court has found that the petitioners have failed to state a cause of action and that, in any

event, their claim is time-barred. There is no need to consider the other arguments raised.

This Decision constitutes the Order and Judgment of the Court.

Dated: March 7, 2006.



Hon. Dennis K. McDermott
J.S.C. (Acting)

ENTER

The following papers are herewith filed in the office of the Madison County Clerk:

Decision and Judgment (March 7, 2006)
Reply Memorandum of Law (February 2, 2006)
Memorandum of Law (January 26, 2006)
Affidavit of Bradley W. Hunt, Esq. (January 26, 2006)
Affidavit of Barry Ridings (January 25, 2006)
Affidavit of Thomas P. Halley (January 25, 2006)
Affidavit of Sean Fitzmichael Devlin (January 25, 2006)
Affidavit of Phillip J. Wolfenden (January 25, 2006)
Affidavit of Thomas J. Wiencek, Esq. (January 25, 2006)
Affidavit of Samuel Higgins (January 25, 2006)
Affidavit of Kim Waldron (January 18, 2006)
Affidavit of Adam Weinberg (January 18, 2006)
Affidavit of Edward R. Conan, Esq. (January 18, 2006)
Memorandum of Law (January 18, 2006)
Notice of Motion (January 18, 2006)
Notice of Petition/Summons (November 9, 2005)
Memorandum of Law (October 28, 2005)
Petition (October 28, 2005)