

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
DIVISION OF PROBATE

ARTHUR P. DUECK, *et al.*,) CASE NO. 2012 ADV 179424
)
Plaintiffs,) JUDGE ANTHONY J. RUSSO
)
vs.)
)
THE CLIFTON CLUB COMPANY, *et al.*,) **PLAINTIFFS' REPLY TO THE**
) **CLIFTON CLUB'S MOTION TO**
Defendants.) **STRIKE/BRIEF IN OPPOSITION**
) **TO PLAINTIFFS' MOTION TO**
) **REMOVE THE CLIFTON PARK**
) **TRUSTEES**

INTRODUCTION

The Club's¹ Motion to Strike/Brief in Opposition to Plaintiffs' Motion to Remove the Clifton Park Trustees ignores the Resident Lot Owner Beneficiaries' arguments in favor of removal of the Trustees, engages in name calling and false implications and misrepresents Plaintiffs' claims and the history of non-resident Club member use of the Beach,

The Club's Response labels the Plaintiffs as "six disgruntled subplot owners (out of approximately 250 subplot owners)". The Trustees mirror the Club as they call the Plaintiffs "dissidents" in their Brief in Opposition. *See* Trustees Brief in Opposition at p.7. This name calling shows the level of disdain that the Club, and its allies the current Trustees, have for the Plaintiffs. Aside from the name-calling, the Club's attempt to imply that the Plaintiffs are somehow a small minority of concerned subplot owners² was laid to rest by the filing of letters of support signed by 130 resident lot owners

¹ All capitalized terms herein have the same meaning as used in Plaintiffs' Motion the Clifton Park Trustees ("Plaintiffs' Motion") unless noted otherwise herein.

² The Trustees attempted to make the same implication: "the plaintiffs –who are but six out of two hundred six lot owners in the Clifton Park Allotment". Trustees Brief in Opposition at p. 1.

representing 80 sublots who all support the Plaintiffs' Motion to Remove the Trustees. (See Secondary Parties' Motion to Have Current Clifton Park Trustees Removed filed on December 12, 2014.)

Instead of responding to the Motion to Remove the Trustees, the Club engages in an argument on the merits of the underlying dispute. Not only is this improper in the context of the issues raised by the Motion, the arguments are legally and factually wrong. And the hundred year history of the Trust upon which the Club and the Trustees rely demonstrates that every set of trustees before the current trustees have recognized that the non-resident Club members have no such legal right. See Plaintiffs' 12/24/2014 Reply at pp. 2-3 and the "History of Clifton Park, Clifton Beach and its use by the Clifton Club" which will be filed under seal.

The Motion to Strike should be denied for failing to articulate any reason to strike the Resident Lot Owner Beneficiaries' Exhibits 2 through 10. The Club urges that Exhibits 2 through 10 are "parol evidence" that are not relevant to interpretation of the Trust. But those exhibits are not used as "parol evidence" to interpret the Trust. Instead, Exhibits 2 through 10 demonstrate the Trustees' serious breaches of trust warranting their removal and the appointment of successor trustees.

First, as explained in Plaintiffs' Motion, the Trustees have a duty under Ohio law and uniform trust law to remain impartial in this dispute between the Resident Lot Owner Beneficiaries and the Club regarding the interpretation of the Trust's terms. See, e.g., R.C. § 5808.03 (UTC 803) ("[i]f a trust has two or more beneficiaries, the trustee shall act impartially in . . . managing . . . the trust property, giving due regard to the beneficiaries' respective interests."); Restatement (3d) Trusts, § 79(1)(a), cmt. c (Trustees

must remain neutral in a controversy between beneficiaries regarding the interpretation of trust terms. Exhibits 2 through 7 and the pleadings (including the Trustees' Brief in Opposition to the Motion to Remove) show that the Trustees have violated their duty of impartiality by intervening in this litigation as advocates for the Club's position and publicly advocating against the Resident Lot Owner Beneficiaries.

Second, the Trustees have a duty to provide all relevant information related to Trust administration to allow the Resident Lot Owner Beneficiaries to protect their interests. R.C. § 5808.13(A) (UTC 813); *see also* R.C. 5807.06 (UTC 706), Official Cmt. Again, Exhibits 3 and 8 through 10 demonstrate that the Trustees have failed to adhere to that duty by failing to produce Trust documents for inspection that contain information relevant to interpretation of the Trust and failing to disclose threats of legal action from the Club³ because instead of remaining neutral, the Trustees have inserted themselves into this litigation as advocates for the Club.⁴

Plaintiffs' Exhibits 2 through 10 are not improper "parol evidence". They are properly before this Court as evidence of the Trustees' serious breaches of Trust. Accordingly, Exhibits 2 through 10 should not be stricken from the record. And because

³ The Club states that characterizing Exhibit 3 as a threat of litigation is "patently false." (Club's Br. at 3, n.2) But, a quick review of Exhibit 3 shows that the Club asserted that the Trustees "breached their fiduciary responsibility," made an "implied threat to engage in further discriminatory actions in the future," and gave "preference to the input from a dissident group of Park residents" to the Club's detriment. The Club's denial that this was anything less than a veiled threat of litigation is disingenuous.

⁴ In the Trustees' Brief in Opposition, they argue that they have not taken sides in the dispute, but are defending the manifest purpose of the Trust. The Trustees interpret the manifest purpose of the Trust to include holding the Trust property for the benefit of both the residential sub-lot owners of Clifton Park and the members of the Club. The latter is contrary to the express language of the Trust. (Pls. Mot Ex. 1.) Ironically, the Trustees rely upon an unauthenticated, typed copy of the Club's 1902 Lease to reach this conclusion, *i.e.* clear parol evidence, and it is doubtful that the Club will file a motion to strike the Trustees' Exhibit A. The Trustees also use Exhibits D through P to support their re-interpretation of the Trust. A motion to strike from the Club has not been forthcoming.

the Trustees have engaged in serious breaches of trust, removal is proper under R.C. § 5807.06 and serves the best interests of the beneficiaries.

The Club's Brief is nothing more than an attempt to "grease the wheels" in favor of the Trustees and distract the Court from the issue at hand to return the favor to the Trustees that have sided with the Club in this litigation in violation of their duty to remain neutral and impartial. Notably, the Club does not articulate any reasons for why Plaintiffs' Motion should be denied. This tag-team attack by the Club and the Trustees on the Resident Lot Owner Beneficiaries is the exact reason the Trustees must be removed.

Respectfully submitted,



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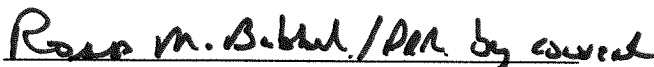
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief to the Clifton Club Motion to Strike/Brief in Opposition to Plaintiffs' Motion to Remove the Clifton Park Trustees* has been served by electronic and/or US mail on December 24, 2014 upon the following:

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