

**John Doe 1 v St. Bernard's Sch.**

2020 NY Slip Op 31992(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 100418/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM

Justice

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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

INDEX NO. 100418/2020
MOTION DATE 06/05/2020
MOTION SEQ. NO. 003

Petitioners,

- v -

DECISION + ORDER ON MOTION

ST. BERNARD'S SCHOOL, THE EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES, BY ITS PRESIDENT,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 16, 17, 18, 19, 20, 21, 23, 26

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is

ORDERED that Petitioners' motion for leave of the Court pursuant to CPLR 401 to add (a) Jane Doe 3 and Student C as Petitioners (Proposed Additional Petitioners), and (b) the Board of Trustees of St. Bernard's School, by its President, the 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, and Investment Committee Member 2 (Proposed Additional Respondents) as Respondents is granted; and it is further

ORDERED that Petitioner's motion for leave of the Court pursuant to CPLR 3025 to add new causes of action and allegations is granted, and this Article 78 proceeding is hereby converted to a hybrid action pursuant to CPLR 103(c); and it is further

ORDERED that Petitioners shall serve the amended petition upon Respondents and the additional Respondents within 15 days pursuant to CPLR 306(b), and it is further

ORDERED that counsel for Petitioners shall serve a copy of this decision, along with notice of entry, on all parties and the Trial Support Office (Room 158) within 10 days of entry; and it is further

ORDERED that the Court is directing and ordering further submissions in support of and in opposition to Respondents' Motion to Dismiss (Motion Seq. 002) that incorporate all additional parties and claims granted in this motion. Respondents shall submit a supplemental memorandum of law within 45 days of the date Petitioners effect service of this Decision and Order. Petitioners shall submit an opposition within 45 days of Respondents' submission, and Respondents shall submit reply papers 30 days thereafter. It is further

ORDERED that the Clerk shall amend the caption to read as follows:

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In the Matter of the Application of:

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 behalf of themselves and all others similarly situated,

Petitioners,

-against-

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.

-----X

NON FINAL DISPOSITION

**MEMORANDUM DECISION**

In this Article 78 proceeding, Petitioners seek an order pursuant to CPLR 401 granting leave to add (a) Jane Doe 3 and Student C as Petitioners (Proposed Additional Petitioners), and (b) the Board of Trustees of St. Bernard's School, by its President, the 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, and Investment Committee Member 2 (Proposed Additional Respondents) as Respondents and to amend the caption as such, as well as leave pursuant to CPLR 3025 to add new causes of action and allegations (Motion Seq. 003)<sup>1</sup>.

### BACKGROUND

On March 16, 2020, Petitioners filed their initial Verified Petition seeking redress for Respondents' alleged forced removal of the St. Bernard's School (the "School") Headmaster, Stuart Johnson III ("Johnson"). Respondents shortly thereafter filed a pre-answer Motion to Dismiss, arguing, in part, that Petitioners failed to state a claim as they did not name the full Board of Trustees of St. Bernard's School (the "Board of Trustees") as a Respondent (NYSCEF doc No. 17 at 3). Petitioners now seek leave to file an Amended Petition.

The School is a prestigious all-male private School on the Upper East Side in Manhattan. Petitioners allege that after 35 years of service, Johnson was wrongfully removed from his position when the School's Executive Committee, led by the President of the Board of Trustees, initiated a *coup* to replace Johnson by threatening him with immediate termination if he refused

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<sup>1</sup> Although not included in their initial Notice of Motion, Petitioners requested that this Article 78 proceeding be converted to a hybrid action in their submission papers, which is discussed *infra*.

to negotiate resignation (*id.* at 4). Petitioners claim that the Executive Committee acted without approval or knowledge of the full Board of Trustees, in violation of the School's by-laws.

Johnson executed an employment agreement providing for his resignation at the end of the 2020-2021 School year, a move that Petitioners argue was directly inapposite to Johnson's expressed intentions to remain in his position (*id.*).

Petitioners maintain that the forced removal of Johnson is merely the proverbial tip of the iceberg of the numerous improper, self-dealing actions taken by the Board of Trustees.

According to Petitioners, the Board's Investment Committee prioritizes Trustees' self-interest at the expense of the School, letting personal relationships sway decision making and seeking favorable treatment of their friends' children in admissions decisions (*id.* at 4-5). Petitioners allege that the Board's Development, Executive and Investment Committees have caused substantial damage to St. Bernard's by wasting the School's resources to hire high-priced consultants and lawyers and causing discord by firing Johnson during the already difficult, chaotic time for the School presented by the COVID-19 crisis (*id.* at 5). Petitioners therefore seek leave from this Court to add members of Executive, Development and Investment Committees as respondents, as well as the President and individual Trustees. Petitioners also seek the Court's permission to add a parent, Jane Doe 3, and her son, Student C as additional Petitioners.

Petitioners also seek to amend their Article 78 petition to include claims under General Business Laws (GBL) §§ 349 and 350 prohibiting deceptive acts and false advertising. Petitioners argue that Respondents solicited donations and had conversations with parents and students while deliberately withholding the information that Johnson would not continue as

Headmaster (*id.* at 6). Certain Trustees also allegedly failed to disclose that charitable contributions would benefit Trustees in violation of their fiduciary duty to the School, and falsely advertised that the charitable contributions would go to educational and diversity-focused programming (*id.*). Petitioners thus seek to add members of the various committees as respondents in connection with the GBL claims, and to add the President and certain Trustees as respondents to the Article 78 causes of action.<sup>2</sup>

In opposition, Respondents argue that Petitioner's additional claims and parties do not cure the various flaws in the original petition; namely, Petitioners lacked standing to bring the petition in the first place as they have no cognizable injury (NYSCEF doc No. 23 at 6). Respondents thus claim that the addition of a new student and parent as petitioners is futile as the new parties also lack standing (*id.*). Respondents argue that the Proposed Additional Respondents "further exacerbate" the flaws in the original petition as Johnson himself is a Trustee of the School and would thus be a named respondent in a petition ostensibly brought on his behalf (*id.* at 9). Regarding Petitioners' additional GBL claims, Respondents argue leave should not be granted as no justification was given for their addition, and statutory GBL claims are improper within an Article 78 proceeding (*id.* at 11-12). Respondents further claim that the GBL causes of action are legally insufficient.

## DISCUSSION

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<sup>2</sup> By letter to the Court, Petitioners have since also accused Respondents of engaging in "retaliation" by taking steps to remove Petitioners' children from the School (NYSCEF doc No. 24). Respondents deny these allegations (NYSCEF doc No. 25). However, the Court notes that these allegations are not germane to the issues at hand in this motion.

*Proposed Additional Parties*

Pursuant to CPLR 401, leave of court is required to add new parties to a special proceeding. CPLR 1003 provides that “parties may be added at any stage of the action by leave of court . . .” (*Nonjoinder and Misjoinder of Parties*, 1996 Sess. Law News of N.Y. Ch. 39 [A. 7539] [approved and effective Apr. 2, 1996] [McKinney’s]). Leave to add parties is generally liberally given (*See Fulgum v. Town of Cortlandt Manor*, 19 AD3d 444, 445 [2<sup>nd</sup> Dept 2005] [affirming lower court’s order granting motion to amend complaint to name an additional party plaintiff pursuant to CPLR §§ 1002 and 3025]; *Lewis by Lewis v Wascomat, Inc*, 125 AD2d 194 [1<sup>st</sup> Dept 1986] [affirming lower court’s order granting plaintiff leave to amend to add a defendant]; Siegel, N.Y. Prac. § 237 [6th ed. Dec. 2019 Update] [describing adding or changing parties as “permissible by mere amendment”]).

Here, Petitioners contend that leave to add parties should be granted as this proceeding is in its earliest stage, and any delay to this case has been solely due to the COVID-19 pandemic and not this motion (NYSCEF doc No. 16 at 9). Petitioners do not concede that the full Board of Trustees is a necessary party but are merely adding them due to Respondents’ claim that they should be joined in the pre-answer Motion to Dismiss (*id.*, n. 6). Respondents thus cannot be surprised or prejudiced by the addition of the full Board of Trustees. Furthermore, the Board is already aware and involved in this proceeding given that it is the governing body of the School, an original Respondent, and is represented by the same counsel as the School and the Executive Committee (*id.* at 10).

The Court notes that rather than attempting to establish that the Proposed Additional Parties cause undue surprise or prejudice, Respondents’ opposition focuses on attacking the legal

merits of the petition, which is improper under this motion, given that Respondents' motion to dismiss the original petition (Mot. Seq. 002) is currently not yet fully submitted due to the COVID-19 pandemic (NYSCEF doc No. 26 at 2). Respondents argue that leave to add parties should be denied because the additions do not cure the defects in the petition. Respondents also contend that the petition's claims under Article 78 are moot because Johnson has made clear that he willingly entered the employment agreement and does not want to stay beyond 2021, and Petitioners lack standing to pursue these claims because they have suffered no particularized and concrete injury; thus the petition fails with or without adding Johnson and other Trustees as Respondents (NYSCEF doc No 23 at 7).

However, these claims all speak to the underlying merits of the petition and are improper here. Crucially, Respondents do not argue that that they would be unfairly surprised or prejudiced by the addition of new parties. (*Leff v Benihana of Tokyo*, 304 AD2d 350, 351 [1st Dept 2003]; *Adams v Resseguie*, 73 AD2d 737, 737-38 [3rd Dept 1979] [leave to add parties "should be freely given in the absence of demonstrated prejudice"]). Regarding Respondents' contention that the addition of new parties would be "futile," the Court notes that the matter of futility is irrelevant when considering a motion to add parties. On the question of adding new parties, the paramount consideration is whether there would be undue surprise or delay. (*See, e.g., Leff*, 304 AD2d at 351 [granting leave to add parties without considering the merits of the claims]). Respondents cite to no caselaw where futility was considered when leave was sought solely to add parties and not claims (*see Leszczynski v Kelly & McGlynn*, 281 AD2d 519 [2d Dept 2001]). Respondents rely on this case but it is inapplicable to the circumstances here, as *Leszczynski* involved petitioners seeking to add not just new parties but two new claims against a

new defendant four years after the complaint was filed, one of which was time barred and one of which was completely disconnected from the context of the original complaint).

The Court finds that leave to add additional parties should be granted as Respondents have not demonstrated any prejudice or surprise resulting from the delay. As discussed above, the Board of Trustees is named as an additional Respondent due to an argument advanced by Respondents in their pre-answer Motion to Dismiss. Respondents also cannot be prejudiced by the addition of the School Committee members named only in connection with the GBL claims as those claims are just being pled now and thus Respondents' ability to defend has not been determinately affected. Respondents point out that as Johnson is a Trustee, he is now named as a respondent which makes the petition even more "confused and implausible" (NYSCEF doc No. 23 at 8). However, as Petitioners note, this is an entirely permissible procedure as a respondent may be a nominal one of whom petitioners or make no requests for affirmative relief. (*See, e.g., Fed. Ins. Co. v 1030 Fifth Ave. Corp.*, 262 AD2d 142, 143 [1st Dep't 1999]). There is also no prejudice in adding the additional student and his parent as petitioners as their addition does not alter the causes of action against Respondents. Given that the claims of this parent and son are the same as the existing claims, their addition is "proper since such an amendment, by its nature, d[oes] not result in surprise or prejudice to the [Respondents], who ha[ve] prior knowledge of the claim and an opportunity to prepare a proper defense." (*Fulgum*, 19 AD3d at 446). Respondents claim the added petitioners are an exercise in futility, but as with the Proposed Additional Respondents, that argument is of no moment.

Therefore, this Court finds that leave should be freely granted to add both Proposed Additional Petitioners and Respondents, and the caption shall be amended as such. The Court now turns to the additional claims Petitioners seek to add to this proceeding.

*Proposed Additional Claims*

CPLR § 3025(b) explicitly provides that “[a] party may amend his pleading at any time by leave of court” and that “[l]eave shall be freely given upon such terms as may be just”. It “is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party” (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 NYS2d 612 [2008]). “Mere delay is insufficient to defeat a motion for leave to amend” (*Kocourek citing Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [2001]). “Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position’” (*Kocourek citing Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 1981 ). “[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted” (*Megarix Furs, Inc. v Gimble Bros., Inc.*, 172 AD2d 209 [1st Dept 1991]). “[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgement” (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]).

The party “opposing a motion to amend a pleading must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the

moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Here, Petitioners seek to amend their petition to add causes of action against Respondents for alleged GBL violations. As an initial matter, the parties dispute whether Petitioners are entitled to amend their complaint to add the GBL claims as a matter of right pursuant to CPLR 3025. While CPLR 3025(a) provides that parties may amend pleadings once without leave within a specified time frame, section (b) provides that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” (CPLR 3025[b]). Respondents argue that the GBL claims are supplemental pleadings, not mere amendments, and thus require leave. “An amendment is something that makes any change at all in a pleading, including the addition of facts and claims that were even in existence at the time of the original pleading. A ‘supplement’ seeks to add to the pleading a claim or matter that only came into being, or into the pleader’s knowledge, after the original pleading was served” (Connors, McKinney’s Practice Commentaries, C3025:9. Supplemental Pleading.) The Court is inclined to agree with Respondents’ assessment that these GBL claims are supplemental pleadings, as Petitioners warranted that they added the claims after “additional facts [came] to light” subsequent to the filing of the original petition (NYSCEF doc No. 17 at 1-2). Thus, leave of the Court is required.

Respondents contend that leave of the Court should not be granted as GBL claims are improper within an Article 78 proceeding.<sup>3</sup> Avenues of relief that may be sought in an Article 78 petition are limited those specifically enumerated in Article 78 itself, i.e. requests for “[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition’ (CPLR §§ 7801, 7803). An Article 78 petition cannot contain common-law or statutory claims because “[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized” (CPLR § 103[b]). Furthermore, Respondents argue that the GBL claims cannot plausibly coexist with Petitioners’ Article 78 causes of action, because the “extraordinary” remedies of prohibition and mandamus set out in the Petition are unavailable when there is an adequate remedy at law. (*See Town of Huntington v N.Y.S. Div. of Human Rights*, 82 NY2d 783, 786 [1993] [“The extraordinary writ of prohibition . . . will not lie where its proponent has access to another adequate legal remedy . . .”]). Therefore, Petitioners cannot seek overlapping relief through both Article 78 and statutory GBL claims<sup>4</sup>.

The Court finds that Respondents are correct that the GBL claims are improper within the context of an Article 78 special proceeding; however, the claims are not dismissed at this juncture as the Court has the discretion to convert this matter to a hybrid action. When an Article 78 proceeding includes a claim outside the scope of section 7803, the proceeding may be converted to incorporate the different reliefs sought with the proceeding in a hybrid form. (CPLR

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<sup>3</sup> As with the additional parties, Respondents have also presented several arguments deeming the additional claims legally insufficient to overcome the problems in the original petition. Petitioners argue that Petitioners’ proposed GBL claims are insufficient for at least three reasons: (1) the Amended Petition identifies no “consumer-oriented conduct”; (2) Petitioners have not identified any alleged misrepresentation that was “materially misleading”; and (3) the claims cannot be brought against unpaid Board members, who are immune. (NYSCEF doc No. 23 at 13). These arguments, which have been refuted by Petitioners in their reply papers, are proper in Respondents’ motion to dismiss but are beyond the scope of this present motion.

<sup>4</sup> Petitioners dispute this characterization of the relief sought in the petition, noting that the Article 78 and GBL claims seek to vindicate completely different rights (and also provide different relief), and, accordingly, it is not the case that the GBL claims present an alternate adequate remedy at law to the Article 78 claims.

103 [c]; *see also Eidlisz v New York Univ.*, 15 NY3d 730, 731-732 [2010]; *O'Neill v New York Univ.*, 97 AD3d 199, 201 [1st Dept 2012]). Petitioners are seeking discrete relief under the GBL claims, but the Article 78 and GBL claims obviously involve overlapping circumstances and discovery for both sets of claims will similar in scope. The Court sees no reason to direct Petitioners to commence a separate action under the circumstances.

Therefore, the Court finds that leave should be granted to add the GBL claims, and this Article 78 proceeding shall be converted to a hybrid action.

The Court is cognizant of the fact that this decision directly impacts Respondents' pending pre-answer motion to dismiss (Motion Seq. 002), which is not yet fully submitted. If, as Respondents argue, the parents and students who filed the petition cannot allege they have suffered a particularized and concrete harm, they lack standing and the petition is completely deficient on its face (NYSCEF doc No. 23 at 3). However, as has been discussed throughout the present decision, Respondents' claims regarding the legal sufficiency of the petition have no bearing on the analysis that must be employed to determine whether Petitioners are entitled to add additional parties and claims. The Court thus finds that the most prudent path here is to invite further submissions on Respondents' motion to dismiss that incorporate and address all parties and claims that have now been added. The Court asks that the parties comply with the scheduling order below so that all claims and allegations in the petition, as well as Respondents' arguments for its dismissal, may be comprehensively addressed and resolved.

CONCLUSION

It is hereby

ORDERED that Petitioners' motion for leave of the Court pursuant to CPLR 401 to add (a) Jane Doe 3 and Student C as Petitioners (Proposed Additional Petitioners), and (b) the Board of Trustees of St. Bernard's School, by its President, the 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, and Investment Committee Member 2 (Proposed Additional Respondents) as Respondents is granted; and it is further

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Respondents.

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6/24/2020  
DATE

*Carol R. Edmead*  
HON. CAROL R. EDMOAD, J.S.C.  
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
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