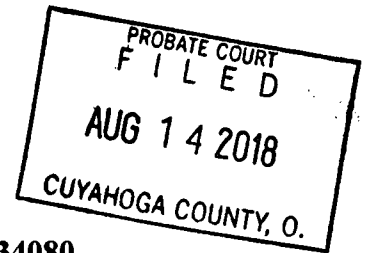


IN THE COURT OF COMMON PLEAS  
PROBATE DIVISION  
CUYAHOGA COUNTY, OHIO



ARTHUR P. DUECK, et al.

Plaintiffs,

vs.

JOSEPH KERRIGAN, TRUSTEE,  
CLIFTON PARK TRUST, et al.,

Defendants.

) CASE NO. 2018 ADV 234080

)

) JUDGE ANTHONY J. RUSSO

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) JUDGMENT ENTRY

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This matter came on before the Honorable Judge Anthony J. Russo, Presiding Judge of the Probate Division of the Court of Common Pleas, upon a **Motion to Dismiss** filed by Attorneys William D. Closs, Jr. and John R. Conley on behalf of Defendant Trustees on May 15, 2018. Pursuant to a Notice of Substitution of Counsel filed on June 14, 2018, Defendant Trustees are now represented by Attorneys Karen McQueen and Terry J. Evans.

This Court finds, upon review of the file in its entirety, that the **Motion to Dismiss** filed by Attorneys William D. Closs, Jr. and John R. Conley on behalf of Defendant Trustees should be granted in part and denied in part.

This Court further finds that the doctrine of *res judicata* encompasses the two concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Id.* Further, the doctrine of issue preclusion precludes the relitigation of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. *Ft. Frve Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*

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(1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140. Issue preclusion holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. *Stacy v. Batavia Local School Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 2002-Ohio-6322, 779 N.E.2d 216, ¶ 16 (2002).

As a result of Plaintiffs' formerly litigated Complaint filed with this Court in June of 2012, the Eighth District Court of Appeals held that Plaintiffs sought a declaration seeking that the Club Members are not lot owners; Plaintiffs requested that the Court hold Club Members are not Beneficiaries of the Trust and do not have the same legal rights as the lot owner Beneficiaries to access the Beach. *Dueck v. Clifton Club Co.*, 8th Dist. No. 103868, 2017-Ohio-7161, 95 N.E.3d 1032, ¶ 3, *appeal not allowed*, 152 Ohio St.3d 1409, 2018-Ohio-723, 92 N.E.3d 879, ¶ 3 (2018.) Further, the Eighth District Court of Appeals found, "while the Clifton Club's membership is comprised of both resident lot owners and nonresidents, the focus of this case is whether Club Members, due to their status as Club Members, are Beneficiaries under the Trust and entitled to Beach access." *Id.* at ¶ 2.

Pursuant to Count I of Plaintiffs' Second Amended Complaint filed with this Court on May 2, 2018, Plaintiffs now seek relief due to an alleged breach of fiduciary duty by the Defendant Trustees for permitting Clifton Club Members a permissive right to use the Beach and Beach Property equal to the rights of the Trust beneficiaries without the unanimous consent of the Clifton Park lot owners. Although Plaintiffs allege a breach of fiduciary duty by the Defendant Trustees, the alleged breach in Count I of the Complaint is based on the assertion that

Clifton Club Members do not have the right to access the Beach and Beach Property without unanimous consent of the Clifton Park lot owners.

Plaintiffs make such an allegation despite the conclusion of the Eighth District Court of Appeals in the prior litigated case that, “the Club Members are not equal or direct Beneficiaries of the Trust. The Club Members’ [sic] have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed.” *Id.* at ¶ 126. The matter of whether Clifton Club Members are permitted access to the Beach and Beach Property was directly at issue in the Plaintiffs’ prior complaint and decided by the Eighth District Court of Appeals which held that there is a “historical understanding by the Trustees and Clifton Club that the Club Members’ right to access the Beach is permissive, and that the Trustees have full authority to regulate Beach access.” *Id.* at ¶ 66.

In support of Count I of Plaintiffs’ Second Amended Complaint, Plaintiffs maintain in allegation number eighteen (18) that unanimous consent of lot owners is required to permit Clifton Club Members access to the Beach and Beach Property. Plaintiffs quote the Trust Deed asserting that “[n]o part of said land shall be sold, conveyed or dedicated to public use without the unanimous consent of all the lot owners in said allotment.” Upon review, this Court finds Plaintiffs’ claim that unanimous consent of lot owners is required for Clifton Club Members to be permitted access to the Beach and Beach Property is without merit. Clifton Club is a lot owner and is therefore a direct beneficiary under the Trust. Further, as the Eighth District Court of Appeals previously held, the Clifton Club Members have a permissive right to access the Beach and Beach Property. *Id.* at ¶ 126. Because the Clifton Club is a direct beneficiary to the Trust and Club Members have a permissive right to access the Beach and Beach Property, Plaintiffs have failed to establish how the access granted to the Clifton Club Members constitutes a public use;

because the access to the Beach and Beach Property permitted and regulated by Defendant Trustees to the Club Members does not qualify as a public use, unanimous consent of the lot owners is therefore not required.

This Court therefore finds that Count I of the Plaintiffs' Second Amended Complaint filed on May 2, 2018, is dismissed with prejudice. The doctrine of *res judicata* bars Plaintiffs from relitigating whether the Clifton Club Members have a permissive right to access the Beach and Beach Property. Further, Clifton Club Members have a permissive right to access the Beach and Beach Property, and as such, the access permitted by the Trustees' regulation does not qualify as public use which would require unanimous consent of the lot owners. Therefore, Defendant Trustees' Motion to Dismiss is well-taken in part and should be granted in part as to Count I of the Plaintiffs' Second Amended Complaint.

This Court further finds that Clifton Park Allotment subplot owners are necessary parties to this action and must be joined pursuant to Civ.R.19(A). Civ.R. 19(A) provides for joinder of persons if feasible. Civ.R. 19(A)(2) provides that a person is required to be joined if:

(2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest, or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest he claims an interest in the subject matter which in his absence his interest may be impaired either legally or practically, for those who are already parties may be subjected to a substantial risk of incurring multiple or inconsistent obligations by reason of his claimed interest.

Plaintiffs allege that the Defendant Trustees have breached their fiduciary duties owed to the beneficiaries of the Clifton Park Trust. Plaintiffs have failed to join all Clifton Park Allotment subplot owners despite alleging a breach of fiduciary duty which would directly affect

all beneficiaries and their interest in the claim. In order to prevent multiple claims and to protect the interest of the beneficiaries as well as the Defendant Trustees, this Court finds all Clifton Park Allotment subplot owners are necessary parties and must be joined.

This Court further finds that dismissal is unwarranted since Ohio courts have a preference for avoiding the harsh result of dismissing a case and would rather order the indispensable party be joined pursuant to Civ.R.19(A); dismissal for failure to join a necessary party is warranted only when the defect cannot be cured. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 81, 537 N.E.2d 641, 645 (1989.) Therefore, Plaintiffs shall be given ninety (90) days from the Order of this Court in which to join all beneficiaries consisting of all Clifton Park Allotment subplot owners as necessary parties. Failure to join these necessary parties will result in dismissal of Plaintiffs' Complaint.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that **Defendant Trustees' Motion to Dismiss** is hereby **GRANTED IN PART AND DENIED IN PART**.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Trustees' Motion to Dismiss is granted to the extent that Count I of Plaintiffs' Second Amended Complaint is **DISMISSED WITH PREJUDICE**. Plaintiffs shall be permitted leave to amend the complaint but may not allege that Clifton Club Members do not have a permissive right to access the Beach and Beach Property. Such a claim that Clifton Club Members may not access the Beach and Beach Property is barred by the doctrine of *res judicata*. Further, because the access permitted by Defendant Trustees to Clifton Club Members does not qualify as a public use, unanimous consent of the lot owners is not required.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Trustees' Motion to Dismiss is denied to the extent that Count II and Count III of Plaintiffs'

Second Amended Complaint remain before this Court to determine whether the nature and extent of access that the Clifton Club Members are permitted to the Beach and Beach Property constitutes a breach of fiduciary duty owed by the Defendant Trustees. Further, Count IV remains before this Court as to whether the Defendant Trustees have breached their fiduciary duty to provide information and documents to the Trust beneficiaries relating to the administration of the Trust.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Trustee's Motion to Dismiss is denied to the extent that Plaintiffs' Second Amended Complaint is not dismissed pursuant to Ohio Civ.R. 12(B)(7) for failure to join necessary and indispensable parties.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiffs shall have leave to file an Amended Complaint within ninety (90) days from the date of this Order to join all Clifton Park Allotment subplot owners as necessary parties.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Clerk of Court serve upon all parties notice of this Judgment Entry pursuant to Civil Rule 58(B).

**IT IS SO ORDERED.**



**JUDGE ANTHONY J. RUSSO**

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