

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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J. CHRISTOPHER HARING,

Plaintiff,

Index No. 608259/2019

-against-

CAROLINE CHURCH OF BROOKHAVEN, REVEREND  
CANON RICHARD D. VISCONTI, AS RECTOR OF THE  
CAROLINE CHURCH OF BROOKHAVEN, MARK  
LaSORSA, AS SENIOR CHURCHWARDEN, BARBARA  
RUSSELL, AS JUNIOR CHURCHWARDEN, NICK  
AMATO, CAROLYN MARTEZIAN, WILLIAM RHAME,  
MIRJANA ELLIS, WILLIAM HARVEY, MARY WUESTE,  
SUSAN RYDZESKI, JACKIE HULL and FRANK WEILAND,  
AS MEMBERS OF THE VESTRY OF THE CAROLINE  
CHURCH OF BROOKHAVEN, EPISCOPAL DIOCESE OF  
LONG ISLAND, RIGHT REVEREND LAWRENCE C.  
PROVENZANO, AS BISHOP OF THE EPISCOPAL  
DIOCESE OF LONG ISLAND, and LETICIA JAMES, AS  
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

**AFFIRMATION**

Defendants.

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Daniel P. Barker, pursuant to CPLR 2106, affirms as follows:

I. I am a member of the firm of Smith, Finkelstein, Lundberg, Isler and Yakaboski, LLP, the attorneys for the "Caroline Church"<sup>1</sup> defendants. I make this affirmation in support of the Caroline Church defendants' motion to dismiss the complaint herein pursuant to CPLR 3211(a)(1), CPLR 3211(a)(3), 3211(a)(5), CPLR 3211(a)(7) and CPLR 3211(a)(11). A copy of the complaint is annexed hereto as Exhibit A.

<sup>1</sup> For the purposes of these motion papers, the "Caroline Church" defendants shall include: Caroline Church of Brookhaven, Rev. Canon Richard D. Visconti, as Rector of the Caroline Church of Brookhaven, Mark LaSorsa, as Senior Churchwarden, Barbara Russell, as Junior Churchwarden, Nick Amato, Carolyn Martezian, William Rhame, Mirjana Ellis, William Harvey, Mary Wueste, Susan Rydzeski, Jackie Hull and Frank Weiland as members of the Vestry of the Caroline Church of Brookhaven.

2. Plaintiff commenced this action seeking declaratory and injunctive relief challenging the transfer and consolidation of certain monies previously held by defendant Caroline Church of Brookhaven (hereinafter the “Church”) in four allegedly permanently restricted funds to a single account for the Church’s day-to-day operations.

3. As set forth below, plaintiff’s complaint should be dismissed as a matter of law.

**PLAINTIFF LACKS STANDING TO SUE**

4. Plaintiff alleges that he is a member and communicant of the Church in good standing. Even accepting those refuted allegations as true for the purposes of this pre-answer motion to dismiss, he lacks standing to sue the Caroline Church for the relief he requests.

5. Plaintiff seeks to challenge the transfer of moneys from certain Church funds: the Churchyard Endowment Fund, Remembrance Fund, Organ Fund and Building Fund (collectively the “Funds”).

6. Plaintiff does not and cannot allege that he created or established these Funds.

7. Plaintiff does not and cannot allege that he is the beneficiary of any of these Funds.

8. The only individual donation that plaintiff alleges that he made to any of the Funds is a \$500 donation to one Fund, the Churchyard Fund in June 2016. As set forth below and in the annexed affidavit of Rev. Canon Richard D. Visconti, plaintiff made this June 2016 donation some 12 years after the Church’s by-laws were amended in 2003 to allow for the “Inter-fund Transfer” of Fund Earnings and Fund Principal after a vote by the Church’s Vestry.

9. It is undisputed that plaintiff was a member of the Vestry in December 2003, when the by-laws were amended (see Complaint- Ex. A., ¶8(c) and the annexed Rev. Visconti Affidavit).

10. Generally, only, “the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes (EPTL 8-1.1[f], 8-1.4)” *Alco Gravure, Inc. v. Kanpp Foundation*, 64 N.Y.2d 458, 465 (1985) (internal citations omitted).

11. “There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number” (*Id.*). Plaintiff does not allege this exception applies, and indeed he is a single, independent individual former member of the Church Vestry, a Church that currently has 685 communicants in good standing (see Rev. Visconti Affidavit ¶22).

12. Plaintiff in seeking to vindicate the rights of the Church and a judgment purportedly in the Church’s favor, not in his own favor has in fact commenced a derivative action.

13. “Under New York law, a shareholder lacks standing to pursue a direct cause of action to redress wrongs suffered by the corporation; rather such claims must be asserted derivatively, for the benefit of the corporation” *Higgins v. New York Stock Exch., Inc.*, 10 Misc 3d 257, 264 (NY Sup 2005).

14. Pursuant to Not-for-Profit-Corporation Law §720(a) a members’ derivative action may be brought in the right of the corporation to procure a judgment in its favor for the following relief:

“(1) To compel the defendant to account for his official conduct in the following cases:

- (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

- (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.
- (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.
- (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.” (N-PCL §720.)

15. As a member, plaintiff may only seek the relief sought above by a members’ derivative action pursuant to N-PCL §623 (see (N-PCL §720(b)(3)). Section 623 provides that an action may be brought “ by five percent or more of any class of members...”.

16. Notwithstanding the language of N-PCL §720(b)(3) which states that a members derivative action may be maintained by one or more members, plaintiff alone cannot maintain this action alone and must instead be joined by at least 5% of the members. The Appellate Division, First Department has held that the “phrase in N-PCL s 720, ‘one or more members thereof,’ is not mere surplusage. It distinguishes a s 720 action from a s 623 action in that the latter may be brought by either members or capital certificate holders or owners of a beneficial interest in the capital certificates, while the former may be brought only by members. In any event, however, there must be a minimal 5% representation.” *Hoffert v. Dank*, 55 A.D.2d 518 (1976).

17. Plaintiff seeks to vindicate the rights of the Church by seeking a declaration that the challenged transfers were illegal and void and an injunction directing restoration and return of monies back into the four funds.

18. Plaintiff, singlehandedly, does not represent 5% of any class of members. There are 749 baptized members of the Church and 685 communicants in good standing in the Church.

Plaintiff, as a single member constitutes far less than one quarter of one percent of the total members, which is far less than the 5% required to bring a derivative action under Section 623.

19. Likewise, plaintiff's one time \$500 donation to the Churchyard Fund in June of 2016 does not give him individual standing to sue the defendants named herein for amendments to the by-laws affecting multiple Church Funds that were made in December of 2003 (when plaintiff was a member of the Vestry), nor the duly voted on and approved transfer of Church funds that followed, after he had intimate knowledge of the by-laws and potential transfer of funds (see annexed Rev. Visconti Affidavit).

#### **STATUTE OF LIMITATIONS**

20. In addition to plaintiff's lack of standing, Caroline Church defendants move to dismiss the complaint as the relief sought by plaintiff is precluded by the statute of limitations.

21. As set forth above and in the complaint, plaintiff seeks declaratory and injunctive relief challenging the transfer and consolidation of certain monies. The monies were allegedly transferred in May of 2016 in accordance with the Church's by-laws that were amended in December of 2003 to permit the transfers of such monies and funds.

22. It is undisputed that plaintiff was aware of the December 2003 amendments to the Church's by-laws, yet waited until April of 2019 to commence the instant action. Accordingly, the relief sought by the plaintiff is barred by the statute of limitations.

#### **PLAINTIFF FAILS TO STATE A CAUSE OF ACTION**

23. In addition to the reasons set forth above, plaintiff also fails to sufficiently state a cause of action. Plaintiff alleges, in a conclusory fashion and throughout his complaint, that the Funds in question were purportedly "permanently restricted."

24. Section 513(a) of the Not-For-Profit Corporation Law indicates that a “charitable corporation shall hold full ownership rights in any assets consisting of funds or other real or personal property of any kind, that may be given, granted, bequeathed, or devised to or otherwise vested in such corporation in trust for, or with a direction to apply the same to, any purpose specified in its certificate of incorporation, and shall not be deemed a trustee of an express trust of such assets....”

25. While subsection (b) of the same statute limits what the corporation can do with assets received for a specific purpose to the purposes specified in the gift instrument as defined in Section 551....,” plaintiff has not alleged that any of the Funds were established by or granted to by any gift instrument that plaintiff has standing to challenge.

26. To the contrary, plaintiff in his complaint refers to the Church by-laws which indicate that the “Vestry shall establish and maintain” the Funds (see Complaint §25).

27. Accordingly, the Church held full “ownership rights” of these Funds. (N-PCL §513(a))

28. As set forth above, and as alleged in the Complaint the by-laws (since 2003) put donors on notice that unless restricted by the fund itself, annual earnings were permitted to be transferred to another fund maintained by the Church by a majority vote of the Vestry. Donors, including plaintiff, were also put on notice that the Vestry may approve the transfer of monies from one fund to another in order to meet an important need of the church, unless restricted by the document which established the fund.

29. The designation of these funds as Organ, Endowment, Churchyard, or Building, was imposed solely by the Church’s Vestry and not by the donor of the fund, not by a gift instrument and certainly not by the plaintiff.

30. As alleged in the Complaint, the very by-laws that give the authority to the Vestry to establish and maintain funds, also give the Vestry the authority to transfer funds after a vote of the Vestry.

31. Article III, Section 2, Paragraph "C" of the by-laws indicates, with regard to Inter-fund Transfer of Fund Earnings:

"Unless otherwise restricted by the fund itself, annual earnings from funds may, by December 31 of the following fiscal year, be transferred to another fund maintained by the Church. Any transfer must be approved by a majority vote of the Vestry within the time specified in the preceding sentence. After that time, any said earnings of the fund shall be considered and may only be transferred in accordance with paragraph D, below. The term "earnings" includes interest, dividends and appreciation in the market value of the investment." (Ex. B, p. 5)

32. Article II, Section 2, Paragraph "D", Subparagraph (1) of the by-laws indicates, with regard to the Inter-fund transfer of Fund Principal:

"The Vestry may approve the transfer of monies from one fund to another in order to meet an important need of the Church, unless such transfer is prohibited or restricted by the document(s) which established the fund. Any such transfer shall require a total of nine votes of the Rector, Churchwardens and Vestrypersons (affirmative votes to include the Rector and one Churchwarden). Any such transfer shall specify that it is to be considered a transfer without restriction, or a transfer to be carried on the financial records as a liability in favor of the fund from which the monies were transferred, and in the later circumstance the Vestry shall make every effort to raise funds to reimburse the fund within a reasonable time." (Ex. B., p. 5)

33. Plaintiff does not allege that the Caroline Church defendants transferred funds in violation of these by-law provisions, or that any transfer was without the approval of the Vestry.

34. Based upon the foregoing, plaintiff fails to sufficiently state a cause of action.

**INDIVIDUALLY NAMED DEFENDANTS SHOULD BE DISMISSED**

35. Plaintiff names as defendants, in addition to the Caroline Church of Brookhaven,

Rev. Cannon Richard D. Visconti, as Rector of the Caroline Church of Brookhaven, Mark LaSorsa, as Senior Churchwarden, Barbara Russell, as Junior Churchwarden, Nick Amato, Carolyn Martezian, William Rhame, Mirjana Ellis, William Harvey, Mary Wueste, Susan Rydzeski, Jackie Hull and Frank Weiland as members of the Vestry of the Caroline Church of Brookhaven.

36. Unpaid directors are immune from suit under the New York Not-For-Profit Corporation Law (N-PCL) § 720-a and CPLR 3211(a)(11), absent allegations of their gross negligence or intention to cause harm. *Johnson v. Black Equity Alliance*, 26 Misc.3d 1219(A) (2010).

37. It can be undisputed that the individual defendants named as Churchwardens and members of the Vestry are unpaid positions.

38. Further, plaintiff does not allege any gross negligence or intention to cause harm on behalf of any of the individual defendants.

39. For this independent reason, defendants move to dismiss the complaint against the individually named defendants.

### **ESTOPPEL**

40. As set forth in the annexed affidavit of Rev. Canon Richard D. Visconti, plaintiff was a member of the Vestry and the treasurer at the time the amendments to the by-laws were being discussed and considered in 2003 which gave the Vestry the authority to transfer funds after a vote.

41. Rev. Visconti has also indicated that plaintiff, while a member of the Vestry and licensed to practice law in the State of New York, was instrumental in advising the Church's Vestry and the drafting of the amendments to the by-laws in 2003.

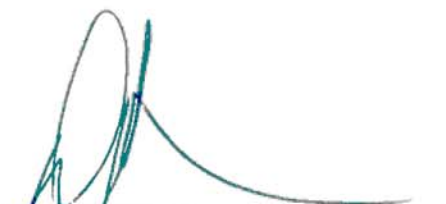


42. According to Rev. Visconti, plaintiff drafted the final version of the 2003 amended by-laws.

43. As plaintiff was instrumental in drafting the by-law amendments, adopting the by-law amendments, and voting for the very by-law amendments that gave the Vestry the authority to transfer funds, he is estopped from now seeking to challenge the by-laws, and estopped from contesting any purported transfer of the single \$500 donation to the Churchyard Fund that he alleges in his complaint. At the time plaintiff made his donation, he had actual notice for at least 12 years that, unless restricted by the document(s) which established the fund, both principal and earnings from any of the Funds could be transferred by vote of the Vestry. Plaintiff does not allege that his \$500 donation was restricted by the document which established the fund that he donated to.

WHEREFORE for the reasons set forth above, the plaintiff's complaint should be dismissed in its entirety.

Dated: Riverhead, New York  
August 12, 2019



DANIEL P. BARKER