

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,

REPLY AFFIRMATION

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

1. I am a member of the firm of Smith, Finkelstein, Lundberg, Isler and Yakaboski, LLP, the attorneys for the “Caroline Church”¹ defendants. I make this affirmation in reply to the defendant’s opposition papers and in further 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). The Court is respectfully referred to the

¹ 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.

defendants' initial affirmation, supporting affidavit, and exhibits for a full discussion of the merits of the defendants' motion. This reply will be limited to responding to plaintiff's arguments in opposition to the motion, and will not address many of the irrelevant, self-serving purported facts that plaintiff asserts in his affidavit in opposition to the motion.

PLAINTIFF LACKS STANDING TO SUE

2. The Plaintiff believes that he has standing based on a theory that he represents the community at large and must "save that community from the devastating consequences" (Harring Affidavit ¶37) of an act which the Church was authorized to do by its by-laws. This theory has no legal relevancy as to whether the plaintiff has standing. The plaintiff lacks standing because he does not and cannot allege that he created or established the Funds, does not and cannot allege that he is the beneficiary of any of these funds, does not have a special interest in the Funds, and is seeking to vindicate the rights of the "community" and the Church, an action that is derivative in nature.

3. Plaintiff cites to *Entin v. Bronx House*, 135 NYS2d 528 (1954) to support his allegation that he at least has standing with regard to the Churchyard Fund due to his \$500 donation in June 2016 that was never transferred to the Churchyard Fund and was used by the Church without regard to alleged donor imposed conditions. (See Hamburger Affirmation ¶25). However, the court in *Entin* held that donors to a religious corporation are entitled to have the monies donated expended for the corporation's purpose. The donors in that case donated specifically for the religious corporate defendant to build a synagogue and for other religious purposes and the religious corporate defendant entered into a contract to sell to a private corporation. Plaintiff in this case does not and cannot allege that the Caroline Church has expended donated funds for any reason outside of the Caroline Church's corporate purpose.

4. As put forth in the defendants' moving papers, the plaintiff lacks standing because, generally, only the Attorney General has the statutory power to represent the beneficiaries of a charitable fund, and even under the exception that bestows power upon a sharply defined and limited group of people with a special interest to bring a lawsuit, the plaintiff fails to fit that description. "The purpose of this rule is to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations" (*Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 466 (1985)).

5. Plaintiff is not a potential beneficiary of any of the funds. The funds were not established by the Vestry to support the plaintiff. As a former member of the Vestry of the Caroline Church, the plaintiff cannot claim any greater right to the fund's disposition than can current members and communicant's in good standing. See *Hadassah Acad. Coll. V. Hadassah Women's Zionist Org. of Am., Inc.*, 2019 WL 1897668 (SDNY Apr. 29, 2019). The plaintiff fails to assert that he possesses a special interest, that the funds were created for the purpose of supporting the plaintiff, or that the by-laws prohibit the transfer.

6. Additionally, the plaintiff named the Attorney General in his complaint recognizing the fact that the Attorney General was a "potentially necessary party pursuant to EPTL § 8-1.1(f) which designates the Attorney General as the protector of the public interest in charitable gifts, and related statutes." (See Complaint ¶23).

7. Plaintiff cites to NPCL §1507(c) to further his argument that he is within the zone of interest to be protected, however, section 1507 addresses trust funds with relation to Public Cemetery Corporations, which does not apply to the Caroline Church because it is not a Public Cemetery Corporation.

8 Furthermore, the legislative intent of the Not-for-Profit Corporation Law that the plaintiff describes in his opposition papers to “protect those who donate for a restricted purpose” (See Hamburger Affirmation ¶27) is neither violated nor pertinent here. The funds are not permanently restricted. The Caroline Church holds full ownership rights in all of the Funds it established and any transfer of those funds is authorized by the by-laws. The designation of the funds as Organ, Endowment, Churchyard, or Building was imposed by the Church’s Vestry and not by the donor of the fund, a gift instrument, or the plaintiff. In fact, since 2003 the by-laws have put donors on notice that such transfers were permitted.

9. Plaintiff further alleges that “one major donor whose donative intent has also been violated is the famous Ward Melville” (see Hamburger Affirmation ¶31) in an apparent attempt to establish standing, or to distract the Court from the plaintiff’s lack of standing. Clearly, Mr. Melville or his legal representative are not co-plaintiffs or parties to this litigation, and accordingly, Mr. Haring cannot advance the purported claims of Mr. Melville, other donors or beneficiaries.

10. Another way plaintiff evidently attempts to gain standing or establish that he is a “communicant in good standing” of the Church is by attempting to make a \$10 donation to the Caroline Church in August 2019 (see Haring Affidavit ¶31), some three and a half months after he commenced this action. As asserted in the defendants’ moving papers and the affidavit of Canon Visconti, Mr. Haring does not meet the criteria of a “communicant in good standing.” Plaintiff’s attempted \$10 donation in August 2019 is nothing more than a veiled attempt to establish that he is a “communicant in good standing” with the Caroline Church in hopes of establishing that he has standing in this litigation.

PLAINTIFF FAILS TO STATE A CAUSE OF ACTION

11. In addition to the reasons set forth above, plaintiff also fails to sufficiently state a cause of action and his opposition papers fail to address the arguments advanced by the Caroline Church with regard to this argument.

12. In *Hadassah Academic College v. Hadassah Women's Zionist Organization of America, Inc.*, the plaintiff argued, in seeking to maintain that it had standing to challenge the actions of the not-for-profit corporation defendant, that the corporate defendant entered into gift agreements with donors which obligated the defendant to provide the donated funds to the plaintiff. The Court held that the corporate defendant had full discretion as to the utilization of the gift agreements due to the language of the agreement, which stated:

“Notwithstanding anything to [the] contrary in this Agreement, the gift set forth herein is made by Donor solely to Hadassah, and Hadassah shall have full dominion and control over such gift and absolute discretion as to its utilization. While Hadassah intends to respect the wishes of the Donor with respect to the Fund, this Agreement creates no binding legal obligation upon Hadassah to transfer all or any portion of the Fund or the income therefrom to or for the use or benefit of any other entity or organization.”

Hadassah Acad. Coll. v Hadassah Women's Zionist Org. of Am., Inc., 18 CIV. 2446 (AT), 2019 WL 1897668, (SDNY Apr. 29, 2019).

13. Similarly, the plaintiff alleges that the “interested stakeholders” (See *Hamburger Affirmation ¶44*) who donated to the funds were required to be involved in the transfers or that a court application needed to be made in order to transfer the funds. However, the by-laws specifically state and the donors, including the plaintiff, were put on notice since 2003, that unless restricted by the fund itself, annual fund earnings were permitted to be transferred to another fund maintained by the Caroline Church by a majority vote of the Vestry and fund principal could be transferred to meet an important need of the church by 9 votes of the Rector,

Churchwardens, and Vestrypersons. See *Legislative Studies and Reports Comment*, N.Y. Not-for-Profit Corp. Law §513 (annexed hereto as Exhibit D).

14. In an effort to circumvent this clear language in the Church's by-laws, plaintiff contends that NPCL §513 provides that the Vestry must apply all assets "to the purposes specified in the gift instrument" (See *Hamburger Affirmation* ¶41) and therefore the Church cannot transfer the funds without some sort of "pre-approval" of the donors or the Court. However, the plaintiff does not allege that he generated a gift instrument. The designation of the funds was imposed solely by the Church's Vestry and not by the donor of the fund, not by a gift instrument, and not by the plaintiff. The language of the by-laws which gives the authority to the Vestry to establish and maintain the funds contains unambiguous language with regard to the Vestry's authority to transfer funds after a vote of the Vestry. 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 of the defendants' moving papers).

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 of the defendants’ moving papers)

15. Further, NPCL §513(a) states that “a charitable corporation shall hold full ownership rights in any assets consisting of funds...to, any purpose specified in its certificate of incorporation...” Plaintiff does not allege that the Caroline Church has utilized any funds for purposes other than that specified in its certificate of incorporation.

16. The Court of Appeals has held that contract law requires that:

“[w]here the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole ...An agreement is unambiguous ‘if the language it uses has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion’ ”. *Ellington v. EMI Music, Inc.*, 24 NY3d 239 (2014).

17. Here, by the clear and unambiguous language of the by-laws, the defendants were not required to seek pre-approval from the donors or the Court and the by-laws vested the Vestry with the absolute authority to transfer the funds. The by-laws gave the Vestry the authority to establish and maintain the funds, and the authority to transfer the funds after a vote of the Vestry. This authority is expressed in clear and unambiguous terms and the plaintiff is essentially seeking to read new terms into the by-laws, which cannot be done. See *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 150 AD2d 82 (1st Dept 1989). The plaintiff alleges that the funds are purportedly “permanently restricted” in a conclusory fashion. Where a restriction has been placed on a gift to a charitable corporation, the restriction must be clearly expressed. *Lefkowitz v. Cornell Univ.*, 35 AD2d 166, 171 (4th Dept 1970). Here, there was no restriction on transfer placed on the donations. in fact, the opposite is true. The by-laws authorize the Vestry to transfer funds after a vote.

18. 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.

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

STATUTE OF LIMITATIONS

20. Plaintiff argues the relief sought is not precluded by the statute of limitations because he commenced this lawsuit within three years of the challenged transfers occurring in May 2016 and that it does not matter that the by-laws that authorize the Vestry to transfer the funds were adopted in 2003. This argument is without merit. The very act which the plaintiff is challenging is the Vestry's authority to transfer the funds, an authority that was given to it in 2003.

21. Plaintiff fails to dispute the fact 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.

INDIVIDUALLY NAMED DEFENDANTS SHOULD BE DISMISSED

22. The plaintiff does not dispute the fact that the named defendants are unpaid members of the Vestry of the Caroline Church and that as unpaid members they are immune from suit. Additionally plaintiff does not allege any gross negligence or intention to cause harm.

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

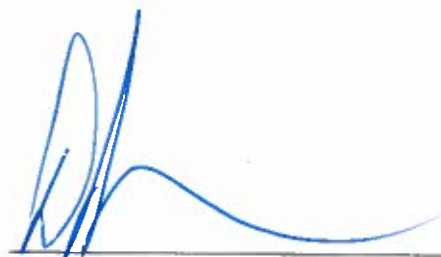
ESTOPPEL

24. Plaintiff acknowledges that he was, in part, responsible for the amendments to the by-laws due to his service on the Vestry at the time the by-laws were amended (See Haring Affidavit ¶25).

25. 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 to which he directed his donation.

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

Dated: Riverhead, New York
December 16, 2019



DANIEL P. BARKER