SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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J. CHRISTOPHER HARING,

Plaintiff,

- 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,

Defendants,

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AFFIRMATION IN OPPOSITION TO MOTION TO DISMISS COMPLAINT PURSUANT TO CPLR 3211(a)

Index No.: 608259/2019

Assigned Justice:
HON. GEORGE NOLAN

RICHARD HAMBURGER, an attorney at law, duly licensed to practice in the State of New York, affirms under penalties of perjury as follows:

INTRODUCTION

1. I am a member of the firm of Hamburger Maxson, Yaffe & McNally, LLP, attorneys for plaintiff J. Christopher Haring. I submit this affirmation, together with

the accompanying affidavit of the plaintiff, in opposition to the motion of defendant Caroline Church of Brookhaven, defendant Reverend Canon Richard D. Visconti, and the individual Vestry Member Defendants (the "Caroline Church Defendants") to dismiss this action pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), (a)(7) and (a)(11).

NATURE OF ACTION

2. This is an action for declaratory and injunctive relief which challenges the transfer and consolidation of certain monies previously held by Caroline Church as permanently restricted funds — the Remembrance Fund, Churchyard Fund, the Building Fund and Organ Fund — into a single consolidated operating fund. Plaintiff Haring seeks a declaration that these challenged transfers were illegal and void, and an injunction directing the defendant Rector and defendant members of the Church Board of Directors (known as the "Vestry") to restore, return and transfer the monies back into separate permanently restricted accounts.

3. No relief is sought against any of the defendants in their individual capacities. No claims are made that Church funds have been converted for non-Church use. The issue is simple: Are the subject funds *permanently* restricted funds requiring the approval of the New York State Attorney General and the Supreme Court before the Church eliminates those restrictions and uses those funds for general Church purposes?

4. The amount in issue is not insignificant. As alleged in the complaint, the total amount unlawfully transferred to the consolidated fund exceeds $2.8 million (*see* Complaint, Exh. "A" to affirmation of Daniel P. Barker in support of Caroline Church Defendants' motion to dismiss, dated August 12, 2019 ['Barker Aff."], ¶ 75).

PROCEDURAL HISTORY

5. This action was commenced on April 29, 2019. Non of the defendants has answered.

6. On September 4, 2019, the Caroline Church Defendants noticed plaintiff of on an application for a temporary restraining order ("TRO"), to be brought on by order to show cause, to take down plaintiff's informational website, which was established to keep parishioners informed about the issues involved and the status of this lawsuit, or alternatively, to remove from the website 70-year old Vestry meeting minutes, as well as 30-year old Church audits and financial statements. *See* www.savethechurchyard.org.

7. That application was opposed on multiple grounds, including that if granted, it would constitute an improper prior restraint on plaintiff's First Amendment rights of free speech.

8. After an appearance before Justice George Nolan on September 10, 2019, for a hearing on the TRO request, the Court refused to issue a TRO, or even

entertain the preliminary injunction application, and returned the proposed Order to Show Cause to the Caroline Defendants unsigned. *See* Unsigned Order to Show Cause attached as Exhibit "A."

9. This motion to dismiss reflects yet another attempt to silence plaintiff by securing a non-merits dismissal of the action that will avoid a judicial resolution of the substantial issues that plaintiff has raised which affect the future of this nearly 300-year old congregation.

10. Defendant Leticia James, as Attorney General of the State of New York, named as 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 — has appeared in the action (taking no position on the take-down of plaintif's website) but has neither answered nor moved to dismiss the complaint, despite plaintiff's request that it do so.

11. Defendants Episcopal Diocese of Long Island and defendant Right Reverend Lawrence C. Provenzano (the "Diocese Defendants") were named as potentially necessary parties pursuant to CPLR § 1001(a). Although plaintiff has agreed to stipulate to a discontinuance without prejudice as against the Diocese Defendants, as of this writing, counsel for the Caroline Church Defendants has not executed the implementing stipulation. *See* Exhibit "B" annexed hereto.

LEGAL STANDARD

12. On a motion to dismiss pursuant to CPLR § 3211, the court must accept all the facts alleged in the complaint motion papers submitted by the plaintiff as true, accord the plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001). *See*, Carlson v. Am. Intl. Group, Inc., 30 N.Y.3d 288, 297–98 (2017); Mtr. of Oddone v. Suffolk Cty. Police Dept. 96 A.D.3d 758–760, 946 N.Y.S.2d 580 (2d Dept. 2012).

13. Whether the plaintiff can ultimately establish its allegations at trial is not part of the "calculus in determining a motion to dismiss." Carlson, at 298 (*citing* E.C., I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005); *cf.*, Cabrera v. City of N.Y., 2014 N.Y. Slip. op. 30533(U), 2014 WL 894434, at *2 (Sup. Ct., Bronx Co. 2014)(a complaint may not be dismissed unless it appears "beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief").

THE COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO CPLR 3211(a)(1) (Documentary Evidence)

14. Dismissal of the complaint is first sought pursuant to CPLR 3211(a)(1) on the basis of documentary evidence. On a motion to dismiss based on documentary evidence, a complaint may be dismissed only if the documentary evidence submitted utterly

refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law. *See*, Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v Martinez, 84 N.Y.2d 83, 88(1994); *and* Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (3d Dept.), *leave to appeal denied*, 97 N.Y.2d 605 (2001) ("To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim.").

15. The documentary evidence relied upon by the Caroline Church Defendants is attached as Exhibit "A" to the Barker Aff. and is comprised of three By-Law provisions adopted by Vestry in 2003. We will address each of these 2003 amendments in turn. However, we note as a threshold matter the applicability of CPLR 3211(d) requiring denial of a Section 3211 motion based on documentary evidence where facts are unavailable to the opposing party to fully refute such evidence. Here, without discovery into Caroline Church archives, plaintiff does not have a fair opportunity to fully document his allegations that donations to the four funds in issue were *permanently* restricted by the donors, by the representations and promises made when the gifts were solicited, or by the conditions imposed when the funds were initially established.

16. Turning to By-Law Article III, § 2(C), that paragraph authorizes the transfer of annual earnings *(i.e.,* interest, dividends and market appreciation*) only*. Yet, here, the *full balances* of the permanently restricted funds are alleged to have been

transferred into the consolidated account, not just the "annual earnings." *See* Complaint, Exh. "A" to Barker Aff.,¶¶ 50, 53, 63 and 70). Accordingly, By-Law Article III, § 2(C) does not establish a defense based on documentary evidence.

17. Next, By-Law Article III, § 2(D)(1) authorizes the transfer of principal of a restricted fund "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*" (emphasis added). Yet, here, that is exactly what is alleged — *i.e.*, that the Remembrance Fund, the Building Fund, the Organ Fund and the Churchyard Fund "were established as, and have always been, *permanently* restricted funds and accounts" (emphasis in original). *See* Complaint, Exh. "A" to Barker Aff.,¶ 36. The allegation that each of these funds is permanently restricted is specifically repeated with respect to each of the four funds. *See* Complaint, Exh. "A" to Barker Aff.,¶ 43 (Remembrance Fund), ¶ 52 (Building Fund), ¶ 56 (Organ Fund) and ¶ 65 (Churchyard Fund).

18. In addition, the complaint alleges that "*permanent* restrictions have also been expressly imposed by donors who restricted the purposes for which the funds could be used, or they arise from the representations made by the Church when it solicited the funds for a particular purpose" (*see* Complaint, Exh. "A" to Barker Aff.,¶ 37) (emphasis added) and that despite annual audits that historically identified the funds as *permanently* restricted, "outside professional auditors erroneously recharacterized the *permanently*

restricted funds as temporarily restricted funds" (Complaint, Exh. "A" to Barker Aff.,¶ 40) (emphasis added).

19. Accordingly, By Law Article III, § 2(D)(1) does not establish a defense based on documentary evidence.

20. Finally, By Law Article III § 2, ¶ D(2) authorizes the "short term transfer" of funds, *to be repaid within three months* "where such transfer avoids the liquidation of securities at a time that, in the opinion of the Investment Committee, would not be in the financial interests of the Church" (emphasis added). Yet, here, the Complaint alleges that the challenged transfers have never been repaid as "all such transferred monies have been commingled, without differentiation regarding their origin or purpose, and are expended by Defendant Rector and the Vestry Defendants for day-to-day Church operations and for whatever Church expenses may arise" (Complaint, Exh. "A" to Barker Aff.,¶ 78).

21. Accordingly, By Law Article III, § 2 ¶ D(2) does not establish a defense based on documentary evidence.

THE COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO CPLR 3211(a)(3)
(Standing)

22. Dismissal of the Complaint is also sought pursuant to CPLR 3211(a)(3) on the basis that plaintiff lacks standing.

23. Standing requires "an inquiry into whether a litigant has 'an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request."' Nager v. Goodman, 70 A.D.3d 951, 952 (2d Dept. 2010) (*quoting* Montano v. Cty. Legislature of Cnty. of Suffolk, 70 A.D.3d 203 (2d Dept. 2009)). On a motion to dismiss, pursuant to CPLR 3211(a)(3) the burden is on the moving defendant to establish, prima facie, the *12 Plaintiff's lack of standing as a matter of law. U.S. Bank Nat. Ass'n v. Guy, 125 A.D.3d 845, 847 (2d Dept. 2015). "To defeat [the] defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing." Deutsche Bank Trust Co. Ams. v. Vitellas, 131 A.D.3d 52, 59-60 (2015) (emphasis added).

24. At this early stage of the litigation, this branch of the motion to dismiss the complaint upon standing grounds must be denied for at least two reasons.

25. First, the Complaint alleges that in or about June 2016, plaintiff made a $500 donation to the Churchyard Fund that was never, in fact, credited or transferred to the Churchyard Fund and was used by the Church without regard to the donor imposed condition (*see* Complaint, Exh. "A" to Barker Aff.,¶¶ 88-89). This establishes plaintiff's standing, at least with regard to the Churchyard Fund. *See, e.g.*, Entin v. Bronx House, Inc., 135 N.Y.S.2d 528 (Sup Ct. Bx Co. 1954) ("A cause of action for injunctive relief is properly pleaded in this complaint. Donors of funds to a religious corporation are entitled

prima facie to have the moneys expended for the purposes for which the corporation was formed and are entitled to enjoin the diversion of those funds for any other purposes, however laudable.").

26. Indeed, Canon Visconti acknowledges that plaintiff made this $500 donation to the Churchyard Fund in June 2016 (Visconti Aff., ¶ 18), but challenges plaintiff's standing with the claim that plaintiff had constructive notice, in view of the 2003 By-Law amendments, that his $500 donation could be transferred to "another Church fund" *(id.)*. But that is not the case, inasmuch *permanently* restricted funds cannot be so transferred. *See* ¶¶ 17-21, *supra,* and ¶¶ 41-45, *infra.*

27. Second, plaintiff has standing because his extraordinary dedication, support, and close personal involvement in Caroline Church governance over the past 25 years, including fiscal oversight, facilities management, operations, religious instruction and information technology, coupled with his donations, have demonstrated that plaintiff is within the zone of interest to be protected by Sections 513(b), 555(c), 555(e) and 1507(c) of the Not-for-Profit Corporation Law ("NPCL"). *See,* 41-45, *infra,* and Affidavit of plaintiff J. Christopher Haring in opposition to motion to dismiss, sworn to November 20, 2019 ["Haring. Aff."], 2-14). That is, the statutory scheme reflected in these related statutes shows a legislative intent to protect those who donate for a restricted purpose, *and the institutions receiving those donations,* by requiring permanently restricted funds be spent for that restricted purpose *only,* especially a religious corporation receiving donations for

cemetery maintenance, unless judicial authorization is obtained to modify or eliminate the restriction. *See* Dairylea Cooperative, Inc., v. Walkley, 38 N.Y.2d 6 (1975) (holding that licensed milk dealer had standing to challenge award to competitor of license to sell milk in same geographic area serviced by petitioner where licensing statute incorporated statutory objective of preventing destructive competition); *cf.* Kemp's Bus Service, Inc. v. Livingston-Wyoming Chapter of NYSARC, Inc., 267 A.D.2d 1085 (4th Dept. 1999) (holding plaintiff bus company did not have standing to enjoin defendant non-profit corporation from operating for profit transportation contracts alleged to violate NPCL requirement that such profits be applied to support non-profit corporate purposes on basis, in part, that plaintiff was not within the zone of interest, *citing* Dairylea, as the NPCL was "enacted to protect defendant and its members, not plaintiff."); *accord,* Pellegrini v. Rockland Community Action Council, Inc., 190 A.D.2d 881 (3rd Dept. 1993) (holding Town Supervisor did not have standing to challenge lease between non-profit corporation and federal government of property to be used as homeless shelter, alleged to be in violation of NPCL and non-profit corporate charter, because Supervisor, citing Dairylea, was not within zone of interest to be statutorily protected, "as the Not-For-Profit Corporation Law was enacted to protect defendant and its members, not plaintiff.").

28. The Church has been a vital part of plaintiff's life. *See* Haring Aff., ¶¶ 2-14. In bringing this lawsuit, plaintiff has expended his own personal funds to stop the Church from taking the path of fiscal irresponsibility — consolidating all of its permanently

restricted funds into a single operating fund. He firmly believes that any short-term benefit of consolidation is likely to be overtaken, in the long run, by the financial collapse of the congregation. He views the consolidation of the funds as a one-time financial gimmick that does not address the need to bring Church revenues in line with Church expenses. Worse, plaintiff is concerned that breaking faith with donors who gave to the Church on the understanding that their donations would be applied to a specific purpose will disincentivise future donors and accelerate the rate of members leaving the congregation. *See* Haring Affidavit, ¶¶ 15-18, 38-40.

29. As noted in his affidavit, plaintiff attempted to initiate a dialogue with Church leadership about these issues and took legal action against the Caroline Church Defendants only as a last resort. *See* Haring Affidavit, ¶¶ 19-20.

30. Plaintiff's extensive voluntary labor on behalf of Caroline Church is recited in the Complaint (Exh. "A" to Barker Aff.,¶ 8(a)-(h)), and is amplified in his accompanying affidavit (*see* Haring Aff., ¶¶ 2-14).

31. One major donor whose donative intent has also been violated is the famous Ward Melville. He was a historic community leader in the Three Village area, with the high school named after him. He donated the land for SUNY Stony Brook. The documents on plaintiff's website show that Ward Melville donated to both the Churchyard and Remembrance Funds for those specific purposes. His donations comprise the main

source of the Churchyard Endowment Fund and a major portion of the Remembrance Fund. Now those funds have been raided.

32. Rather than honor the wishes and meet the expectations of the numerous individual donors, like plaintiff and Ward Melville, who contributed to the permanently restricted funds and who presumed to know what their donation would be used for, the Caroline Church Defendants have broken faith with those donors by arguing, for example, that Sunday worship service donors were on notice, by way of the 2003 By-Law amendments, that their donations could be used by Caroline Church for any purpose deemed appropriate by Vestry (*see* Barker Aff., ¶ 28).

33. Respectfully, parishioners who did not serve on Vestry cannot reasonably be expected to have detailed knowledge of the governance documents of Caroline Church that would permit a donation given, for example, to the Remembrance Fund to commemorate the anniversary of the death of a loved one, could be used instead to pay for the electric utility bill. In any event, the 2003 By-Law amendments did not authorize the elimination of *permanently* restricted funds. *See,* ¶¶ 17-21, *supra.*

34. Moreover, the Complaint specifically alleges:

> [P]rior to October 2016, no donor who was solicited to donate to the Remembrance Fund, the Building Fund, the Organ Fund or the Churchyard Fund, or who donated without being solicited, was advised that he or she had agreed to relinquish control of the use or purpose to which such donation would be put.

> To the contrary, prior to 2017, all donations to the Remembrance Fund, the Building f/und, the Organ Fund and the Churchyard Fund were restricted to the particular use or purpose for which the Funds had been established.

(Complaint, Exh. "A" to Barker Aff.,¶¶ 84-85).

Indeed, the Complaint also alleges a specific recent solicitation for a specific purpose — roof repair — which the Caroline Church Defendants subsequently dishonored. *See* Complaint, Exh. "A" to Barker Aff.,¶¶ 87-88.

THE COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO CPLR 3211(a)(5)
(Statute of Limitations)

35. The Caroline Church Defendants seek dismissal pursuant to CPLR 3211(a)(7) on the basis that the action may not be maintained because of the statute of limitations.

36. As admitted by counsel for Caroline Church, plaintiff is seeking declaratory and injunctive relief regarding the transfers and consolidation of monies in or after May 2016 (*see* Barker Aff., ¶ 20; *see also,* Complaint, Exh. "A" to Barker Aff., ¶¶ 47-49 (alleging that $1,503,466 was transferred from the Remembrance Fund to the Church operating account or used to cover the Church's deficit from in or about May 2016 to early 2017); ¶ 53 (alleging a transfer of $408,347 from the Building Fund to the Church operating account in or about May 2016); ¶ 61 (alleging a transfer of $69,932 from the Organ Fund to the Church operating account in or about May 2016); and ¶ 70 (alleging

a transfer of $835,935 from the Churchyard Fund to the Church operating account in or about May 2016).

37. The challenged transfers occurred in May 2016, which is within three years of the commencement of this lawsuit on April 29, 2019. Pursuant to CPLR § 214(2), the statute of limitations for "an action to recover upon a liability, penalty or forfeiture created by statute" is three years. Here, as demonstrated in paragraphs 41-45, *infra,* the Caroline Church Defendants are here liable to restore, return and transfer the monies back into separate permanently restricted accounts pursuant to NPCL §§ 513(b), 555 and 1507(c)(1).

38. Nor does it matter that the By-Law amendments relied upon by the Caroline Church Defendants to unlawfully transfer permanently restricted funds into a single consolidated operating account were adopted in 2003, as those By-Law amendments do not, in fact, authorize the transfer of *permanently* restricted funds. *See* ¶¶ 17-21, *supra.*

THE COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO CPLR 3211(a)(7)
(Failure to State Cause of Action)

39. The Caroline Church Defendants seek dismissal pursuant to CPLR 3211(a)(7) on the basis that the pleading fails to state a cause of action.

40. CPLR § 3001 authorizes the commencement of a declaratory judgment action and CPLR Article 63 authorizes the commencement of an action to secure injunctive relief.

41. As demonstrated in paragraphs 91 through 103 the Complaint, pertinent sections of the NPCL are made applicable to the Caroline Church Defendants through the Religious Corporations Law ("RCL"), and pursuant to Section 513(b) of the NPCL, Vestry must apply all assets "to the purposes specified in the gift instrument," which includes an "institutional solicitation," after payment of reasonable and proper administrative expenses, and shall hold assets "separate and apart from the accounts of other assets of the corporation."

42. In addition, in a separately stated third cause of action, paragraph 114 of the Complaint alleges a violation of Section 1507(c)(1) of the NPCL (found in Article 15 entitled "Public Cemetery Corporations") which provides in pertinent part:

> Every cemetery corporation and *every religious corporation* having charge and control of a cemetery which heretofore has been or which hereafter may be used for burials, *shall keep separate and apart from its other funds*, all moneys and property received by it, whether by contract, trust, or otherwise for the perpetual care and maintenance of any lot, plot or part thereof in its cemetery and all such moneys so received by any such corporation are hereby declared to be, and shall be held by the corporation as trust funds.

(Emphasis added.)

43. Pursuant to NPCL §§ 555(c), and 555(e), only upon approval of the court after application on notice, may such restrictions on the use of institutional funds be modified "in a manner consistent with the purposes expressed in the gift instrument" on the basis that such restrictions are "unlawful, impracticable, impossible to achieve, or wasteful."

44. Here, it may well be that such a judicial application by the Caroline Church Defendants to this Court for such relief would be successful, *in part*, and would authorize a relaxation of *some* restrictions on *some* portion of some of the permanently restricted funds in issue. But this would happen only after input from all the interested stakeholders that would necessarily result in the establishment of limits or conditions on such transfers — perhaps as part of a 5-year or 10-year recovery plan. Here, by contrast, the wholesale transfer of all the permanently restricted funds into a single consolidated operating account has been unilaterally effected, without the input of anyone outside of Vestry, and it assures the opposite — namely, that there are no longer any safeguards whatsoever on the use of permanently dedicated funds for their intended purposes. Put another way, not a single dollar of restricted monies need ever be again expended on restricted purposes.

45. Having alleged what is essentially not disputed — that the Caroline Church Defendants have eliminated the permanent restrictions that prohibited consolidation of the subject funds into a single consolidated operating account without

judicial approval in violation, *inter alia*, of NPCL §§ 513(b), 555 and 1507(c)(1) — plaintiff has stated causes of action to declare those transfers illegal and void and to seek an injunction directing defendant Canon Visconti and defendant members of Caroline Church Vestry to restore, return and transfer the monies back into separate permanently restricted accounts.

THE COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO CPLR 3211(a)(11)
(Personal Immunity)

46. The Caroline Church Defendants seek dismissal pursuant to CPLR 3211(a)(11) as against the individual defendants pursuant to NPCL § 720-a which immunizes individual board members of a not-for-profit corporation from damages absent gross negligence or intention to cause harm.

47. In this action, however, no personal liability is sought to be imposed on any Vestry member.

48. On plaintiff's first cause of action, the relief sought is a declaration that the Remembrance Fund, the Building Fund, the Organ Fund and the Church Yard Fund are permanently restricted funds, and that Paragraphs D(1) and D(2) of By-Law Article III, Section 2, do not authorize the transfer of monies from these funds into a single consolidated operating account. *See* Complaint, Exh. "A" to Barker Aff., pp. 25-26.

49. On plaintiff's second cause of action, the relief sought is a permanent injunction directing Defendant Rector and the Vestry Defendants to reverse all transfers of funds from the Remembrance Fund, the Building Fund, the Organ Fund and the Churchyard Fund to the new "consolidated" Operating Account, or to any other funds to which such transfers were made, and to return and restore such funds to the particular permanent fund from which it was transferred. *See* Complaint, Exh. "A" to Barker Aff., p. 26.

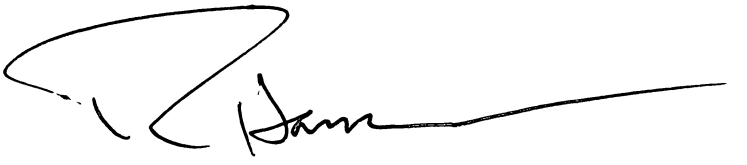
50. On plaintiff's third cause of action, brought under Section 1507(c)(1) of the NPCL with specific reference to the Churchyard Fund, plaintiff seeks additional relief declaring that portion of Article III, Section 1, Paragraph "C" of the By-Laws that ostensibly permits the Churchyard Fund to also be expended for maintenance of the non-cemetery grounds of the Church and on the Church's part of the Village Green, is *ultra vires*, void, and of no further force and effect, and to enjoin and restore such expenditures. *See* Complaint, Exh. "A" to Barker Aff., p. 26.

51. In short, NPCL § 720-a is irrelevant because no damages are being sought from any of the individual defendants. To the contrary, the individual Caroline Church Defendants (Canon Visconti, Wardens LaSorsa and Russell, and members of Vestry) are named only to afford plaintiff complete relief — a binding declaration and a judicial order affirmatively enjoining the reversal of the challenged transfers so as to restore separate permanently restricted funds.

CONCLUSION

52. The motion of the Caroline Church Defendants to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), (a)(7) and (a)(11) should be denied.[1]

Dated: Melville, New York
November 20, 2019



RICHARD HAMBURGER

[1]The Caroline Defendants also seek dismissal on an *equitable* estoppel theory — specifically, that plaintiff's alleged participation in the adoption of the 2003 By-Law amendments equitably estops him from commencing this lawsuit (*see* Barker Aff.¶¶ 40-43). Equitable estoppel, however, is not an enumerated basis for a CPLR 3211 motion. In contrast, *collateral* estoppel is such an enumerated ground. *See* CPLR 3211(a)(5). Moreover, the 2003 By-Law amendments did not authorize the elimination of *permanently* restricted funds. *See,* ¶¶ 17-21, *supra.* Finally, plaintiff was erroneously advised that transfers from the Remembrance Fund, Building Fund, Organ Fund and Churchyard Fund would be legal, only discovering later, based on his own independent research, that the truth was to the contrary. Therefore, it would not be equitable — certainly not on a motion to dismiss — to estop him from seeking to halt and reverse the challenged transfers as illegal and void. *See* Haring Aff., ¶ 25.

EXHIBIT "A"

WHAC / Special Term / TRO

E-FILE

At a Special Term, Part ____ of the Supreme Court of the State of New York, Suffolk County, Riverhead, New York on the _____ day of September, 2019.

PRESENT: not signed
J.S.C.

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J. CHRISTOPHER HARING,

Index No. 608259/2019

Plaintiff,

-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,

ORDER TO SHOW CAUSE

Defendants.

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Upon reading and filing the annexed affidavit of Reverend Canon Richard D. Visconti sworn to on September 4, 2019, the affirmation of Daniel P. Barker, dated September 5, 2019, and the exhibits annexed hereto, and upon all the papers and proceedings heretofore had herein;

Let the plaintiff show cause at an IAS Part of this Court, to be held at the Courthouse, located at 1 Court Street, Riverhead, New York, at 9:30 o'clock in the forenoon, on the _____ day of _____, 2019, or as soon thereafter as counsel can be heard, why an Order

should not be issued granting the following defendants: 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, the following relief:

Granting a preliminary injunction enjoining and restraining the plaintiff, his agents, and all persons acting on his behalf, pending determination of this proceeding, (1) from maintaining his website http://www.savethechurchyard.org, containing confidential information and documentation of the Caroline Church of Brookhaven, while this litigation is pending; (2) to immediately remove all of the Caroline Church of Brookhaven's confidential information and documentation from the website; and (3) from revealing any other confidential information and documents obtained by plaintiff while a fiduciary of the Caroline Church of Brookhaven; and why the aforementioned defendants should not have such other and further relief as may be just, proper, and equitable.

NOW, on motion of Smith, Finkelstein, Lundberg, Isler & Yakaboski, LLP, attorneys for the petitioners, it is,

ORDERED, that pending the return date of this motion, the plaintiff, his agents, and all persons acing on his behalf are hereby enjoined and restrained (1) from maintaining his website http://www.savethechurchyard.org, containing confidential information and documentation of the Caroline Church of Brookhaven, while this litigation is pending; (2) to immediately remove

all of the Caroline Church of Brookhaven's confidential information and documentation from the website; and (3) from revealing any other confidential information and documents obtained by plaintiff while a fiduciary of the Caroline Church of Brookhaven;

FURTHER ORDERED that service of a copy of this Order, and the papers on which it was granted, shall be made via the New York State Courts Electronic Filing system, on or before the _____ day of September, 2019 and that such electronic filing shall be good and sufficient service thereof.

ENTER:

not signed 9/10/19

JUSTICE OF THE SUPREME COURT

EXHIBIT "B"

Richard Hamburger

From: McLaughlin, Jennifer <JMcLaughlin@CullenandDykman.com>
Sent: Tuesday, October 29, 2019 8:57 AM
To: Daniel Barker; Richard Hamburger
Subject: RE: Haring v. Caroline Church - stipulation of discontinuance as against Diocese

Hi Daniel,
Just following up on the below.
Thanks,
Jen

Jennifer A. McLaughlin
Partner
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From: Daniel Barker <dBarker@sfliy.com>
Sent: Thursday, October 24, 2019 6:23 PM
To: Richard Hamburger <rhamburger@hmylaw.com>
Cc: McLaughlin, Jennifer <JMcLaughlin@CullenandDykman.com>
Subject: [EXTERNAL] Re: Haring v. Caroline Church - stipulation of discontinuance as against Diocese

I am in receipt of the email and stip. I expect to speak to my client tomorrow and send back an executed copy.

Regards,
Dan Barker

On Oct 24, 2019, at 4:50 PM, Richard Hamburger <rhamburger@hmylaw.com> wrote:

> Dan,
>
> Jennifer McLaughlin and I have agreed to stip out defendants Diocese and Bishop Provenzano without prejudice pursuant to the attached stipulation, which I have signed. If acceptable, please sign and forward to me and Jennifer. Thanks.
>
> Richard Hamburger, Esq.
> Hamburger, Maxson, Yaffe & McNally, LLP

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<Stipulation of Discontinuance - PARTIALLY EXECUTED.PDF>