

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shirley Werner Kornreich
Justice

PART 54

Index Number : 115002/2005

VIONE, JOSEPH

INDEX NO. _____

vs
TEWELL, THOMAS K., DR.

MOTION DATE 3/9/06

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

1 on this motion to/for dismiss

*Considered papers 1-2 plus papers on
Motion sequences 002 and 003*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

FILED

MAY 25 2006

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 5/19/06

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
JOSEPH VIONE,

Plaintiff,

-against-

DR. THOMAS K. TEWELL, FIFTH AVENUE
PRESBYTERIAN CHURCH, and THE
PRESBYTERY OF NEW YORK CITY,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.

**DECISION
and
ORDER**

Index No.: 115002/05

FILED
MAY 25 2006
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequences 001, 002 and 003 are hereby consolidated for disposition.

This is an action by a parishioner against his former minister and marriage counselor, defendant Dr. Thomas K. Tewell ("Tewell"), of the Fifth Avenue Presbyterian Church ("Church"), an alleged affiliate of the Presbytery of New York City ("Presbytery"). The action seeks damages for breach of fiduciary duty, intentional infliction of emotional distress, and negligent retention and supervision. Defendants move, prior to answering, to dismiss the complaint on the ground that plaintiff has failed to allege a cause of action. Defendants posit their motion on the following theories: 1) there is no cause of action for clergy malpractice in New York; 2) a claim of breach of fiduciary duty by a member of the clergy is indistinguishable from a claim for clergy malpractice; 3) recognizing a breach of fiduciary duty claim by a member of the clergy violates the first amendment because it would involve the courts in evaluations of ecclesiastical doctrine and religious practices; 4) plaintiff's intentional infliction of emotional distress claim is essentially a "heart balm" action that is not cognizable in New York; and 5) the Church and Presbytery (collectively "Church defendants") cannot be held liable for negligent

supervision or retention because there is no underlying theory of liability and because Tewell's actions were outside the scope of his employment.

The facts alleged are contained in the amended complaint.¹ On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273, 275 (1st Dept. 2005).

The following facts are plead in the amended complaint. In the course of Tewell's employment by the Church defendants, he had an affair with plaintiff's wife, while simultaneously acting as the couple's marriage counselor. In addition to serving as a marriage counselor, Tewell presided over Church-sponsored functions, including weekend "marriage retreats," which plaintiff and his wife attended with Tewell's encouragement, both before and after the affair surfaced in 2002. Plaintiff alleges that in May of 2002, while Tewell was counseling plaintiff and his wife, Tewell asked the couple to come to his home and told them that three members of the Church had told the Clerk of the Church ("Clerk") that Tewell was having an affair with plaintiff's wife. Plaintiff's wife and Tewell assured plaintiff that the accusations were false. Plaintiff then asked the Church to investigate and was advised that the proper procedure was to file a grievance. Prior to filing the grievance, plaintiff and his wife met with the Clerk, who is alleged in the complaint to be "an agent, servant and/or employee" of the Church

¹Plaintiff served the amended complaint while the motion was pending. The briefs submitted by the Church defendants state that they do not object to the Court deciding the motion on the basis of the amended complaint. The defendants addressed the new allegations and causes of action in their reply papers. Accordingly, the Court's decision is addressed to the amended complaint, which the Court finds meritorious, as will be discussed below, and the Court hereby grants plaintiff leave to amend *nunc pro tunc*.

defendants, “who urged plaintiff not to file a grievance that would cause an investigation and negative publicity for the defendants and would ultimately result in no findings because the accusations were false.” Plaintiff claims that the Clerk caused him to forbear from filing the grievance. Tewell continued to act as the couple’s marriage counselor until January of 2005, when plaintiff’s wife admitted that Tewell was in love with her and that Tewell had said that plaintiff did not treat her well. In March 2005, plaintiff confronted Tewell who did not deny the affair. The amended complaint also alleges that the Church defendants received information from other congregants that Tewell was preying on other women to whom he was providing marital counseling. *See*, Amended Complaint, ¶¶ 34 and 38(e). Plaintiff alleges, on information and belief, that subsequently Tewell was removed as a minister following a hearing and investigation conducted by the Church defendants, during which Tewell and plaintiff’s wife admitted they had an affair.

The first cause of action for breach of fiduciary duty alleges that Tewell abused a relationship of trust and confidence that plaintiff had in all three defendants causing severe emotional harm. The second cause of action is for negligent retention and supervision. It alleges that the Church defendants knew, or should have known, about the affair in May of 2002, failed or refused to investigate, or take any action against Tewell or to stop him from counseling plaintiff and his wife about their marriage, and dissuaded plaintiff from filing a grievance, all of which caused and aggravated plaintiff’s emotional distress. The third cause of action is for intentional infliction of emotional distress.

The threshold issue is whether the Court would impinge on ecclesiastical issues in violation of the first amendment if it were to allow the claims to go forward. The first amendment permits courts to decide secular disputes involving religious institutions so long as

they can be decided on neutral legal principles, rather than religious doctrine, policy or practice. *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983)(enforcing Ketubah, Jewish marital contract, in which husband agreed to appear before Beth Din, a religious tribunal); *Park Slope Jewish Ctr. v. Congregation B'Nai Jacob*, 90 N.Y.2d 517, 521 (1997)(deciding property dispute between religious sects); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 348 (2d Dept. 2003)(defamation). *See also, Sieger v. Union of Orthodox Rabbis of the United States & Can., Inc.*, 1 A.D.3d 180, 182 (1st Dept. 2003)(to extent plaintiff has alleged defamatory statements which can be evaluated solely by application of neutral principles of law and do not implicate matters of religious doctrine and practice, they are not barred by Establishment Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)(“...to have the protection of the Religion Clauses, the claims must be rooted in religious belief...”).

In this case, the claims alleged in the amended complaint can be decided in accordance with neutral principles of law without resort to religious tenets, policies or procedures. Breach of fiduciary duty, negligent hiring and retention, and intentional infliction of emotional distress are well-defined bodies of civil law. Consequently, the first amendment is not implicated.

A. Breach of Fiduciary Duty

Whether a claim of breach of fiduciary duty against a clergyman who provides secular counseling will lie is an open question of law in New York State. Defendants' motions are principally based on the case of *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 1050 (4th Dept. 2004), in which the plaintiffs, a married couple, sued their pastor because he breached “the sacred trust between counselor and careseeker in the course of the ministerial relationship” when he had an affair with the wife while counseling the couple. *Id.* The Fourth Department dismissed the complaint, holding that New York State does not recognize a cause of action for clergy

malpractice because it would impermissibly interfere in ecclesiastical matters and “insofar as [the claim] may be construed to allege a breach of fiduciary duty,” it was essentially the same as an action for clergy malpractice. *Id.*

However, when the case reached the Court of Appeals, it held that the plaintiffs had not plead a cause of action for breach of fiduciary duty and explicitly left for another day whether such a cause of action could be brought by a parishioner against a member of the clergy. *Wende C. v. United Methodist Church*, 4 N.Y.3d 293, 299 (2005). In *Wende C.*, the Court of Appeals held that the language of the complaint sounded in clergy malpractice, which would impermissibly require the Court to examine ecclesiastical doctrine to determine the standard of due care owed to parishioners undergoing spiritual counseling. *Id.* *Langford v. Roman Catholic Diocese of Brooklyn*, 271 A.D.2d 494 (2d Dept. 2000), also relied upon by defendants, is distinguishable because the priest acted only as the plaintiff’s spiritual counselor, while the plaintiff received secular counseling from a psychiatrist. Hence, whether under New York law a minister who provides secular marital counseling can be sued for breach of fiduciary duty is a case of first impression.

Some states have upheld claims of breach of fiduciary duty against members of the clergy who engage in secular counseling while carrying on a sexual relationship with the counselee or the counselee’s spouse; some agree with the reasoning of the Fourth Department that breach of fiduciary duty and clergy malpractice are indistinguishable; while some allow a claim for emotional distress instead of, or in addition to, breach of fiduciary. *See F.G. v. MacDonell*, 150 N.J. 550 (1997)(allowing breach of fiduciary duty and negligent infliction of emotional distress against rector/counselor); *Doe v. Evans*, 814 So.2d 370 (2002); 2002 Fla. Lexis 436 (allowing claim for breach of fiduciary duty against marriage counselor/clergy); *Amato v. Greenquist*, 287

Ill. App.3d 921 (1st Dist., 3d Div., 1997)(rejecting breach of fiduciary duty claim, but allowing claim for intentional infliction of emotional distress against pastor/marriage counselor); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988)(allowing claims for breach of fiduciary duty and emotional distress); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1176 (D. Tex. 1995)(upholding breach of fiduciary duty claim under Texas Law).

Breach of fiduciary duty is a tort that arises from a violation of a relationship of trust and confidence, such as that of an agent to his principal or a lawyer to his client. *Rich v. New York C. & H. R. R. Co.*, 87 N.Y. 382, 390 (1882). It is well settled that a fiduciary has a duty to act with the utmost honesty and loyalty:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty....

Meinhard v. Salmon, 249 N.Y. 458, 464 (1928). It is a breach of the duty for the fiduciary to injure or act contrary to the interests of the person to whom the duty of loyalty is owed.

Mandelblatt v. Devon Stores, 132 A.D.2d 162, 168 (2d Dept.1987). In New York, a fiduciary relationship requires a showing of a relation between two persons "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Emotional and psychological damages are recoverable on a claim for breach of fiduciary duty. *Tighe v. Ginsberg*, 146 A.D.2d 268, 272 (4th Dept. 1989).

Applying these principles to the case before this Court, Tewell's undertaking to act as marriage counselor made him a fiduciary. It put him in a position of trust, in which he had a duty

to act honestly and advise plaintiff in furtherance of plaintiff's interest in preserving his marriage, which was the object of the relationship. The amended complaint alleges acts of disloyalty and injurious conduct by Tewell. This is not just a case where a minister engaged in a consensual sexual relationship while acting as a spiritual adviser. Plaintiff's allegations, if proven, are sufficient to sustain a claim of breach of fiduciary duty against Tewell, for deceiving plaintiff and undermining his marriage, while continuing to act as his marriage counselor.

However, the Church defendants are correct that if Tewell was having a sexual relationship with plaintiff's wife, he was acting outside the scope of his duties, negating vicarious liability for breach of fiduciary duty. Accordingly, the first cause of action is dismissed as against the Church defendants.

B. Negligent Supervision and Retention

Where an employer cannot be held to be vicariously liable under a theory of *respondeat superior*, a claim for negligent supervision or retention may still lie. *Sheila C. v. Povich*, 11 A.D.3d 120, 129 (1st Dept. 2004). A claim for negligent supervision or retention arises when an employer places an employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee. *Id.*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159 (2d Dept. 1997)(negligent retention of priest where Church alleged to have notice that he was molesting children). An essential element of these causes of action are that the employer knew or should have known of the employee's propensity for the conduct that caused the injury. *Id.*

Plaintiff has stated a valid claim for negligent retention and supervision against the Church defendants. A fair reading of the complaint is that Tewell engaged in marriage

counseling and conducted church-sponsored marriage retreats on their behalf. Assuming that the Church defendants knew, or should have known, that Tewell was having sexual relations with plaintiff's wife, then they could be held liable for negligent supervision and/or retention in light of the allegations that: 1) the Clerk received accusations from three parishioners about the affair, 2) the plaintiff's wife was not an isolated case, 3) the Clerk dissuaded plaintiff from filing a grievance which would have resulted in an investigation, and 4) the Clerk represented that the accusations were false when he knew, or should have known, otherwise. Plaintiff alleges that the Clerk was told that Tewell was having an affair with plaintiff's wife and for two and a half years, the Church defendants permitted the marital counseling to continue, while actively discouraging plaintiff from initiating an investigation. Thus, accepting plaintiff's version of the facts, the Church defendants knew, or should have known, of Tewell's propensity to engage in harmful conduct, but decided to look the other way.

C. Intentional Infliction of Emotional Distress

Plaintiff's claim for intentional infliction of emotional distress should be dismissed. Such a claim must allege four elements -- outrageous conduct that exceeds the bounds of decency tolerable in civilized society; intent to cause severe emotional distress; a causal connection between the conduct and injury; and severe emotional distress. *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993); *Fischer v. Maloney*, 43 N.Y.2d 553, 558 (1978). Since intentional infliction of emotional distress may encompass otherwise lawful conduct, it is a theory of liability that is to be invoked only as a last resort. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.* 256 A.D.2d 269, 270 (1st Dept.1998). When the complained-of conduct is embraced by a traditional tort which provides for emotional damages, the cause of action for infliction of emotional distress should be dismissed. *Id.*; *Demas v. Levitsky*, 291 A.D.2d 653 (3d

Dept. 2002), *app. den.*, 98 N.Y.2d 728 (2002). Such is the case here where viable claims for the traditional torts of breach of fiduciary duty and negligent supervision and/or retention, exist. Moreover, the Appellate Division in *Wende C., supra* at 1049, spoke to this issue and determined that conduct similar to that alleged here is not so extreme and outrageous as to give rise to a claim for intentional infliction of emotional distress. The Court of Appeals left undisturbed the dismissal of the emotional distress claim in *Wende C., supra*. Accordingly, the claim for intentional infliction of emotional distress must be dismissed.

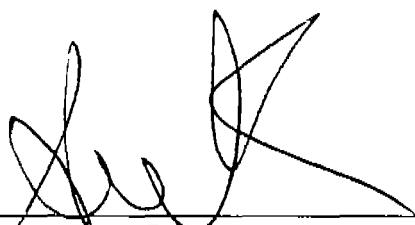
Accordingly, it is

ORDERED that the defendants' motions to dismiss are granted solely to the extent that:

1) the first cause of action for breach of fiduciary duty is dismissed as against defendants Fifth Avenue Presbyterian Church and the Presbytery of New York City; and 2) the third cause of action for intentional infliction of emotional distressed is dismissed against all defendants; and in all other respects the motions are denied.

Dated: May 19, 2006

ENTER:



J.S.C.

FILED
MAY 25 2006
NEW YORK
COUNTY CLERK'S OFFICE