

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York, on the 12th day of December, 2008.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

THE DIOCESE OF CENTRAL NEW YORK,

Plaintiff,

-vs-

THE RECTOR, CHURCH WARDENS,
AND VESTRYMEN OF THE CHURCH
OF THE GOOD SHEPHERD,

Defendant.

DECISION AND ORDER

Index No. 2008-0980
RJI No. 2008-0637-M

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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FERRIS D. LEBOUS, J.S.C.

Plaintiff, The Diocese of Central New York, moves for summary judgment declaring it is entitled to immediate possession of all of defendant's real and personal property, as well as an accounting relating thereto from defendant. Defendant, The Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd (hereinafter "Good Shepherd"), cross-moves for dismissal of the complaint.

BACKGROUND

This record reflects that Good Shepherd was incorporated to be a parish church of The Diocese of Central New York (hereinafter "the Diocese"), that it existed as a parish church of the Diocese until 2007, and that in 2007 it chose to disaffiliate from the Protestant Episcopal Church in the United States of America (hereinafter "The Episcopal Church") for reasons which are not pertinent to this matter.

By way of background, in July 2006, Good Shepherd adopted a resolution declaring it intended to dissociate itself from The Episcopal Church and the Diocese and "[s]eek affiliation with and submit to full episcopal oversight from an orthodox Anglican province in Communion with the Sea of Canterbury subsequent to adequate communication with members of the congregation" (Affidavit of Bishop Adams, Exhibit R).

On November 8, 2007, Good Shepherd passed another resolution stating that they "[d]issociate and end our affiliation with The Episcopal Church in the United States of America

and the Episcopal Diocese of Central New York and apply for membership within the jurisdiction of the Anglican Church of Kenya" (Affidavit of Bishop Adams, Exhibit S).

Additionally, Good Shepherd's Rector, Matthew Kennedy, renounced his ministry within the Diocese and The Episcopal Church (Affidavit of Bishop Adams, Exhibit T).

In November 2008, the Diocese's Annual Convention passed a resolution that Good Shepherd was no longer a parish in union with the Convention (Affidavit of Bishop Adams, Exhibits W & X).

Thereafter, the Diocese demanded, and Good Shepherd refused, to convey its real and personal property to the Diocese pursuant to Dennis Canon I.7.4 and Diocesan Canon XXIII both of which will be discussed below.

By way of this motion the Diocese seeks summary judgment on its first three causes of action, namely: a declaration that all of Good Shepherd's real and personal property is held in trust for The Episcopal Church and the Diocese; an immediate transfer of said property to the Diocese; and an accounting from Good Shepherd of its property. Good Shepherd opposes the motion arguing that a trust has not been imposed because the subject Dennis Canon was not properly adopted and also cross-moves for dismissal of the fourth cause of action relating to a trust of which Good Shepherd is a beneficiary.

The court heard oral argument from counsel on December 12, 2008.

DISCUSSION

I. DIOCESE'S MOTION FOR SUMMARY JUDGMENT

The starting point of any discussion of the issues presented here must begin with the recently issued decision of the Court of Appeals in *Episcopal Diocese of Rochester v Harnish*, 2008 NY Slip Op 07991, October 23, 2008 (hereinafter "*Harnish*").¹ In *Harnish*, the Court of Appeals affirmed the existence of a trust over the property of a local parish in favor of a Diocese based upon the terms of Dennis Canon I.7.4 and directed the transfer of real and personal property of the parish to the Diocese. More specifically, the Court of Appeals concluded as follows:

[t]he Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church (*see Jones*, 443 US at 606), and that [the parish] agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947.

(*Harnish*, 2008 NY Slip Op 07991, pp 6-7).

The pertinent Dennis Cannon I.7.4 - the same as is at issue here - states as follows:

[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of and subject to, this Church and its Constitution and Canons.

(Affidavit of Paul J. Curtin, Jr., Exhibit E).

¹17 Misc3d 1005A [2006], *affd* 43 AD3d 1406 [4th Dept 2007].

Good Shepherd argues that *Harnish* is distinguishable because the validity of the Dennis Canon was not challenged in *Harnish*. More specifically, Good Shepherd asserts that Dennis Canon I.7.4 was not properly adopted at the 1979 national General Convention based upon a lack of concurrent action by both houses (the House of Deputies and the House of Bishops).

The court finds Good Shepherd's argument must fail. First and foremost, the court finds *Harnish* is indeed controlling. Good Shepherd's attempts to argue that the invalidity of the Dennis Canon was not raised in *Harnish* is without merit. In fact, Good Shepherd's counsel here submitted an amicus brief to the Court of Appeals in *Harnish* on this very issue. Moreover, the Court of Appeals addressed the argument that the Dennis Canon was invalid noting as follows:

"[w]e find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision."

(*Harnish*, 2008 NY Slip Op 07991, p 7).

Likewise here, Good Shepherd has not pointed to one instance, prior to this dispute, when it ever raised questions regarding the validity of Dennis Canon I.7.4 in the preceding twenty plus years.

Additionally, this argument was also raised before the *Harnish* trial court prior to appellate practice. Justice Fisher specifically rejected the parish's attempts to argue the invalidity of the Dennis Canon due to the prohibition of the courts from considering such ecclesiastical

matters stating as follows:

[h]ere...defendants on their motion to renew are asking the court to consider whether the National Protestant Episcopal church properly and legitimately enacted the Dennis Canon in 1979. This the court cannot do as this is purely an internal religious dispute within the National Church, an issue which was never raised until this instant motion to renew.

(17 Misc3d 1105 (A), pp 4-5 [Feb 14, 2007]).

In any event, even without *Harnish* as a controlling precedent, this court is prohibited from reviewing whether The Episcopal Church properly enacted the Dennis Canon in 1979. It is well-settled that this or any court can not intervene in "purely ecclesiastical or religious concerns such as church governance or polity" (*Archdiocese of the Ethiopian Orthodox Church et al v Yesehaq*, 232 AD2d 332, 333 [1st Dept 1996]; *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282, 286 [3rd Dept 1999]). Suffice it to say, if Good Shepherd has an objection to the validity of the Dennis Canon, the remedy is not with the courts, but rather with the General Convention of The Episcopal Church.

As a separate and distinct basis in favor of the Diocese is the fact that the Diocese has its own Canon, which states, in pertinent part, as follows:

[i]n conformity and consistent with the provisions of Title I, Canon 7.4 and 5 of the Canons of the General Convention [footnote omitted], it is hereby explicitly reaffirmed that all real and personal property held by or for the benefit of any parish, mission, chapel, or congregation, located in the Diocese of Central New York is held in trust for the Episcopal Church and the Diocese of Central New York.

(Affidavit of Paul J. Curtin, Jr., Exhibit D).

This Diocesan Canon was adopted in 1987 at a Convention attended by Good Shepherd and clearly establishes an express trust in favor of the Diocese for the same reasons stated by the Court of Appeals in *Harnish* relating to the Dennis Canon.

In view of the foregoing, the court finds that the Diocese is entitled to summary judgment on its first, second, and third causes of action declaring that legal title to all real and personal property of Good Shepherd including the church building and Rectory rests with the Diocese and that the Diocese is entitled to immediate possession thereof; an order directing Good Shepherd to deliver all real and personal property of Good Shepherd to the Diocese; and an order directing Good Shepherd to account to the Diocese for all real and personal property of Good Shepherd.

II. GOOD SHEPHERD'S CROSS-MOTION

The fourth cause of action contained in the Diocese's complaint relates to a trust known as the Branran Trust established under the Last Will and Testament of Robert A. Branran. The Diocese's fourth cause of action alleges that under the terms of the Trust that if Good Shepherd ceases to exist, the beneficiary is to be Christ Episcopal Church of Binghamton. By way of the cross-motion, Good Shepherd seeks to dismiss this fourth cause of action due to the Diocese's failure to name the Branran Trust trustees or Christ Episcopal Church of Binghamton as necessary parties.

It is well-settled that the proper remedy for nonjoinder is not the dismissal of the action, but rather to direct the joinder of the missing necessary parties (*Dime Savings Bank of New York, FSB v Johnes*, 172 AD2d 1082 [4th Dept. 1991]). In view of the foregoing, the court finds that Good Shepherd's cross-motion seeking to dismiss the fourth cause of action must be denied with leave granted to the Diocese to amend the complaint to add the Branan Trust trustees and Christ Church as necessary parties.

Finally, for the record, the court notes that Good Shepherd's motion papers were served outside the technical time limits provided by the CPLR and the Diocese urged this court during oral argument to reject said papers as untimely. The court acknowledges the added burden the lateness of the papers placed upon Diocesan counsel. Nevertheless, this court has accepted Good Shepherd's cross-motion and opposing papers. However, the court expressly does not receive into the record the late exhibit offered by Good Shepherd at oral argument, designated as Exhibit A for purposes of identification only.²

Any and all other motions not specifically addressed are denied.

CONCLUSION

Based upon the foregoing, the court finds as follows:

- 1) Plaintiff's motion for summary judgment is GRANTED in its entirety; and

²A Certificate of Amendment of Church of the Good Shepherd dated December 6, 2008.

- 2) Defendant's cross-motion to dismiss is DENIED with leave granted to the Diocese to amend the complaint to add the Branan Trust trustees and Christ Church as necessary parties.

The foregoing constitutes an order of the court upon which judgment may be entered according to its terms. Plaintiff is granted motion costs.

It is so ordered.

January 8, 2009
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court