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IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

KRISTINE PATICO KOUTENTAKOS,
ET AL

Plaintiff

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Case No. 13-C-08-073089 OT

VS.

METROPOLITAN HERMAN, ET AL

Defendant

§

MOTION FOR SUMMARY JUDGMENT

Comes now Defendants, The Diocese of Washington and New York (hereinafter the "Diocese") and The Washington DC Deanery (hereinafter the "Deanery")¹ by and through counsel, Brault Graham LLC and Daniel L. Shea, Esq., and pursuant to Maryland Rule 2-501 move this court for the entry of Summary Judgment on their behalf on the grounds set forth below. In short, there are no genuine issues of material fact, and as a matter of law these Defendants may not be held liable for the alleged tortious actions of Defendant Raymond Velencia.

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BACKGROUND

The Diocese, which is one of several dioceses in the Orthodox Church in America, is comprised of all the parishes within its designated geographical area. It is governed by its Diocesan Bishop. At the time of the events which are the subject of this matter, Metropolitan Herman served as Diocesan Bishop for The Washington and New York Diocese.

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¹ The Deanery and the Diocese may sometimes be referred to herein as "these Defendants."

The Washington Deanery consists primarily of a group of seven separate parish churches which are within the greater Washington metropolitan area.²

Additional information concerning this claim is set forth in the “Background” section of the Motion for Summary Judgment filed on behalf of Metropolitan Herman on November 12, 2008 which is incorporated herein by reference.

As set forth more fully in that motion, there are two fundamental bases upon which the Third Amended Complaint rests in the effort to attempt to impose liability upon several defendants, including the Diocese and the Deanery. The first stems from Mrs. Koumentakos’ termination from her employment at St. Mathew House on February 8, 2006. The second stems from the alleged improper dissemination by Father Velencia of information on November 1, 2007 as a result of his publication in an email of alleged confidential information given by plaintiffs to Father Velencia in confession or during counseling sessions.

I. Claims Involving these Defendants

As set forth in the Third Amended Complaint, the Diocese and the Deanery have each been named specifically in six (6) of the Third Amended Complaint’s twenty-two

² Because the Deanery is not a legally constituted entity, and because the plaintiffs’ claims in this action do not affect the common property rights and liability of the constituent parishes within the Deanery because there are no such common property rights or liabilities, the Deanery is not a proper defendant to this proceeding and it does not have the capacity to be sued. *Courts and Judicial Proceedings Article*, §6-406; Maryland Rule 2-202 Notwithstanding the Deanery’s lack of capacity to be sued in this action, the asserted claims fail for several additional reasons as set forth herein.

(22) counts.³ Six other counts⁴ make non-specific claims for damages against “All Defendants” without naming the Deanery or Diocese specifically in the *ad damnum* clauses.⁵ As demonstrated herein, as a matter of law these Defendants cannot be held liable for the alleged tortious acts of Father Velencia. Accordingly, because the claims against these Defendants fail as a matter of law, they are entitled to the entry of summary judgment.

II. Standard of Review

A trial court properly grants summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.

Southland Corporation v. Griffin, 322 Md. 704, 633 A.2d 84 (1993). As stated by the Court of Appeals, not just any factual dispute will defeat the motion, rather:

In order to prevent the granting of a motion for summary judgment, the objecting party must show more than that there was a question of fact presented. He must, of course, also show that the resolution of that question will somehow affect the outcome of the case, i.e., that it is a material fact.

Parklawn v. Nee, 243 Md. 249, 254, 220 A.2d 563, 566 (1966) (emphasis added). A general allegation that material facts are in dispute will not suffice; contradictory facts must be shown “in detail and with precision . . . to prevent the award of summary

³ Those six counts which specifically name these defendants are as follows: Counts V and VI (negligent hiring of Father Valencia); Counts VII and VIII (negligent retention of Father Valencia); Counts XI and XII (respondeat superior for actions of Father Velencia).

⁴ Counts I, II, IX, X, XIX and XX.

⁵ The remaining counts (Counts III, IV, XIII, XIV, XV, XVI, XVII, XVIII, XXI and XXII) make no direct allegations about these defendants specifically. The *ad damnum* clauses of each of these ten counts identify specific defendants against whom damages are sought, none of whom are these defendants.

judgment.” *Tri-State Properties, Inc. v Middle Man*, 238 Md. 41, 47, 207 A.2d 499, 502 (1965). Where the pleadings, exhibits, and affidavits of the moving party set forth sufficient competent evidence to entitle one to summary judgment, it is incumbent upon the opposing party to present such evidence as will give rise to a triable issue of a material fact. *Krasner v. Fleischmann*, 261 Md. 164, 274 A.2d 339 (1971). The party opposing the motion must show by facts which are admissible in evidence that there is a real dispute between the parties. *Kinsley v. Keller*, 11 Md. App. 269, 273 A.2d 624 (1971). The remaining authorities set forth in the motion for summary judgment are incorporated herein by reference.

As demonstrated herein, there is no genuine issue of material fact as to the dispositive issues raised by this Motion. Accordingly, these Defendants are entitled to the entry of summary judgment as a matter of law.

III. Governing Law

The fundamental factual allegations which are the predicate for the claims against these defendants are at paragraphs 8 and 9 (which allege that these defendants “hired , employed, supervised, directed and evaluated priests” including Defendant Velencia), and paragraph 85 which alleges:

“85. Defendants OCA, Metropolitan Herman, the Diocese, The Deanery, Dean White, OCSM, SMH and the BOD had a duty and obligation to Plaintiffs Mr. and Mrs. Koumentakos to hire and retain priests and spiritual leaders who met appropriate standards of conduct, to investigate complaints with regard to priests and spiritual leaders regarding alleged violations of the appropriate standards of conduct and to remove individuals who violated the code of conduct.”

The theories of the Third Amended Complaint upon which plaintiffs seek to

impose liability upon these defendants concern (a.) the law of agency, as relates to the claim of failure to supervise Father Velencia, and (b.) the law of negligent hiring and/or retention as relates to the employment (eg., hiring, firing, investigation and retention) of Father Velencia as their alleged employee. As outlined below, the effort to impose liability upon these defendants on either theory fails as matter of law.

A.

The Law of Agency

These defendants rely upon the legal authorities set forth in the Motion for Summary Judgment filed on behalf of Metropolitan Herman which are incorporated by reference.

To highlight, the focus of the case law which outlines the limitations which Maryland places upon efforts to impose liability by way of a theory of agency is upon three (3) specific elements. In *Forest v. P& L Real Estate*, 759A2d 1187, 1202, 134 Md. App. 371, 396-97 (2000) those elements are identified as follows:

“In the absence of a written agreement, the following three factors are examined in order to determine if an agency relationship exists: (1) the agent is subject to the principal's right of control; (2) the agent has a duty to act primarily for the benefit of the principal; and (3) the agent holds a power to alter the legal relations of the principal. *Id.* (citing *v. Motel Management Corp.*, 61 Md.App. 670, 687, 487 A.2d 1240 (1985) (citing to *(Second) of Agency* §§ 12- (1982))).”

A party asserting a claim dependent upon an agency *respondeat superior*, bears the burden of producing legally sufficient evidence of the nature and extent of the relationship. *P. Flanigan & Sons, Inc. v. Childs*, 251 Md. 646, 248 A.2d 473 (1968); *Scheer v. Motel Mgmt. Corp. of Am.*, 61 Md. App. 670, 687, 487 A.2d 1240, 1248 (1985)

(granting a directed verdict for the defendant because of insufficient evidence of an agency relationship). Only where sufficient evidence exists to prove the agency relationship can the question of an alleged agency's existence be submitted to the jury. *Green v. H & R Block*, 355 Md. 488, 504, 735 A. 2d 1039, 1048 (1999). Accordingly, where a party fails to produce legally sufficient evidence of an agency relationship, or where there is "no conflict in the evidence relating to the question and but one inference can be drawn therefrom," summary judgment should be granted. *Globe*, 208 Md. at 585; *Green*, 735 A. 2d at 1048; *Scheer*, 61 Md. App. at 687.

In *Scheer, supra*, the plaintiff sought to impose liability upon Holiday Inns, Incorporated by reason of the conduct of its franchisee which was alleged to have failed to take adequate steps to safeguard a hotel guest's property which was stolen. The trial court granted Holiday Inn's motion for a directed verdict. The trial court was affirmed on appeal. The decision centered upon the fact that the "control" element was totally lacking. In particular, the appellate court observed, "Although Holiday retained the right to conduct periodic inspections as a means of insuring adherence to Holiday Inn standards, it took no part in the day-to-day operation of the hotel." 487 A.2d 1249. The court further explained, "...the fact that one of the parties has subsidiary duties to act for the interests of another...does not create an agency relationship..." *Id.*, citing to *Restatement (Second) of Agency*, § 13 comment c (1958). In affirming the trial judge, the *Schaer* court concluded, "The right possessed by Holiday to insure compliance with its franchise standards contributes no more than the right to enforce such a subsidiary duty." *Id.*

In the instant matter, there is no competent evidence that an agency (e.g., master-servant) relationship has ever existed between Fr. Raymond Velencia (as servant) and either of these defendants (as master) with respect to either the alleged operation of SMHD, or with respect to Fr. Velencia's alleged conduct in terms of the allegation relating to maintaining confidence as to counseling sessions or confessions which Fr. Velencia personally heard.

Here, as demonstrated by the supporting affidavits of record, these defendants have never expressly or impliedly consented to a relationship whereby either had a right to control the actions of Fr. Velencia with regard to (a) employment decisions relating to the operation of St. Matthew House, or (b) insofar as defendant Velencia's conduct in maintaining confidence as a counselor or confessor. *Schear, supra; see also, Bowser, 170 Md. App. at 635-36* (holding a father-in-law not liable for his son-in-law's automobile accident even though the purpose of the trip was to obtain medicine for the father-in-law because there was no evidence that either consented to an agency relationship); *Talbott v. Gegenheimer, 245 Md. 186, 225 A.2d 462, 465 (1967)*. Therefore, absent evidence of express or implied consent to a master-servant relationship, these defendants cannot be held individually liable for Fr. Velencia's allegedly tortious conduct.⁶

In the instant matter, the competent evidence of record fails to meet any of the

⁶ By referring to plaintiffs' allegations of tortious conduct such as failing to maintain a confidence insofar as confession is concerned and improper termination of employment, the court should not conclude that this defendant concurs with these allegations. Instead, as pointed out herein, even accepting *arguendo* this allegation as true in ruling on this motion, as a matter of law this defendant may not be held liable for such conduct.

elements necessary to make out a viable claim of liability against these defendants by reason of the conduct of Father Velencia. These defendants took no part in the operation of SMH. They did not control the day-to-day operation of the confessional or counseling sessions which Father Velencia had with parishioners. There is no written agreement between Father Velencia and these defendants. Father Velencia is not subject to these defendants' control insofar as confessions or employment decisions made by Father Velencia pertaining to employees of an independent corporation over which these defendants had no control. There is no evidence that Father Velencia had a duty to act primarily for these defendants. Similarly, there is no evidence that Father Velencia holds any power to alter these defendant's legal relationships with others.

The record is devoid of any evidence of express or implied consent by either Father Raymond Velencia or these defendants as to the existence of a master-servant relationship between them. The record is equally devoid of evidence that these defendants had any right to control Fr. Velencia's actions in relation to his maintaining confidence over confessions he heard, or in regards employment decisions by Fr. Velencia at SMHD. As in *Heckleman, Schear and Dhanraj*, the absence of control by these defendants over Father Raymond Velencia's employment decisions at SMHD, as well as the absence of any control by these defendants over Fr. Velencia's maintaining confidence as to confessions or counseling sessions, demonstrates that a master-servant relationship as to the fundamental allegations which are the bases for plaintiffs' Third Amended Complaint does not exist as a matter of law as between these defendants and Fr. Velencia.

Additionally, the nature of the alleged tortious conduct by Fr. Velencia fails to supply evidence from which the court could infer the existence of a master-servant relationship between these defendants and Father Velencia as to employment decisions at SMHD or as to the maintenance of confidence in regards confessions Fr. Valencia heard. As a matter of law, liability may not be imposed vicariously upon another absent admissible evidence of a master's express control over the alleged improper conduct. This "control" must be express, in the absence of evidence to show that the conduct at issue is "of such vital importance in furthering the master's business that his control over it might reasonably be inferred." *Gallagher*, 209 Md. at 602; *see also, Dhanraj*, 506 A.2d at 228 (finding that traveling to a work training facility was not so vitally important to impose liability under *respondeat superior*).⁷

Moreover, in the two specific counts which seek relief as to these defendants on an agency theory of *respondeat superior* (Counts XI and XII) plaintiffs plead that "at all times relevant" five different defendants were Father Velencia's employer. (Compl. ¶¶ 115, 120) This allegation, of course, is not evidence and there is no evidence of record to support this claim as to four of the five defendants (*viz.*, Metropolitan Herman, Dean White and these two defendants, the Diocese and the Deanery). Notably, the responsive pleading filed on behalf of the defendant Parish does not challenge the existence of an employer/employee or master/servant relationship. To the contrary, that pleading presupposes the existence of such a relationship (*see, e.g.* fn. 2 of that pleading) and raises several defenses as a matter of law which support the absence of subject matter

⁷ These citations are to the complete case citations set forth in the Motion for Summary Judgment filed on behalf of Metropolitan Herman which are incorporated herein by reference.

jurisdiction over this action in this court based upon the doctrine of ecclesiastical abstention as relates to matters of church governance and doctrine. To the extent there is any competent evidence which may give rise to any genuine issue of fact as to the existence of any relationship between these defendants and plaintiffs, then these defendants raise the same authorities in support of abstention as to doctrinal disputes, the absence of a viable claim for clergy malpractice, and the lack of subject matter jurisdiction issues as raised by Orthodox Church of Saint Matthew Parish and The Orthodox Church of America in their responsive pleadings, and those authorities are incorporated herein by reference. (See, generally, *Bourne v. Center on Children, Inc.*, 154 Md. App. 42, 838 A.2d 371 (2003) and *Borchers v. Hrychuk*, 126 Md. App. 10 (1999)).

In summary, there is no competent evidence to demonstrate the existence of any of the elements necessary to sustain a claim of liability upon these defendants by reason of the alleged tortious conduct of Fr. Raymond Velencia. Accordingly, the claim against these defendants based on a claim of agency fails as a matter of law.

B.

Negligent Hiring/ Retention

The fundamental prerequisite to liability based on a theory of negligent hiring /retention is that one must be the *employer* of the alleged tortfeasor. *Horridge v. St. Mary's County Dept. of Social Services*, 382 Md. 170, 180-81, 854 A.2d 1232, 1237-38 (2004); *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978). While the Third Amended Complaint alleges that these defendants were Father Velencia's employer, it also specifically identifies three other defendants as Father Velencia's employer. (Compl. ¶¶

115, 120)⁸ As the affidavits of record demonstrate, these defendants have never been the employer of Father Raymond Velencia. As there is no genuine issue of material fact as to this circumstance, these defendants are entitled as a matter of law to the entry of summary judgment as to the claims of negligent hiring/retention.

C.

Punitive Damages are not Recoverable as to these Defendants

The synopsis of Maryland law regarding the recovery of punitive damages has been set forth in detail in the Motion for Summary Judgment filed on behalf of Metropolitan Herman. It is incorporated herein by reference.

There is no viable claim for punitive damages as to these defendants. No evidence of any element of actual malice--fraud, malice, evil motive, ill will, or intent to injure -- exists in this matter as relates to these defendants. Accordingly, plaintiffs' effort to seek an award of punitive damages against these defendants fails as a matter of law.

III. Conclusion

The record before the court demonstrates that there is no genuine issue of material fact as to the dispositive matters which are the subject of this motion.

There is no legally sufficient evidence of record which supports any contention that Father Raymond Velencia, either in the operation of SMHD or insofar as maintaining confidence in regards confessions he heard or counseling in which he and plaintiffs may

⁸ An allegation, of course, does not make a claim true or serve in any way as grounds to oppose a motion for summary judgment. The breadth of the allegation here, however, is pointed out because pleading in good faith in accordance with the *Maryland Rules* requires the existence of good grounds to support an allegation. Rule 1-311 (b). There is no good faith grounds to support the allegation that these defendants employed Fr. Velencia insofar as his personal encounters with plaintiffs as alleged here, much less insofar as the operation of SMHC, Inc. is concerned.

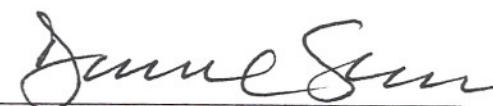
have participated, was acting as the agent for or was subject to the control of Diocese or the Deanery. There is no legally sufficient evidence to support any effort to impose liability upon these defendants. They are not and never have been the employer of Father Raymond Velencia.

Accordingly, as a matter of law, even if the court were to rule that the abstention authorities raised are applicable to the circumstances which are the subject of the Third Amended Complaint, these defendants may not be liable under theories of agency or negligent hiring /retention. For the foregoing reasons, the Diocese and the Deanery are entitled as a matter of law to the entry of summary judgment as to all claims against them.

Respectfully submitted,

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