SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

ANTHONY HENRY THOMAS STEVENS,

Plaintiff,

-against-

METROPOLITAN NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA-a domestic corporation, PAUL T. EGENSTEINER, CHRISTOPHER S. MIETLOWSKI, GAYLE RUEGE, and ANDREW M. L. DIETSCHE,

Defendants.

Index No.: 51706/2023

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

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Defendants Metropolitan New York Synod Of The Evangelical Lutheran Church In America, Bishop Paul T. Egensteiner, Rev. Christopher S. Mietlowski, and Gayle Ruege, (hereinafter collectively "Defendants") submit this Memorandum of Law in support of their motion to dismiss the Complaint filed by plaintiff Anthony Henry Thomas Stephens ("Plaintiff") pursuant to CPLR 3211(a)(1), (a)(2), and (a)(7), in addition to such other and further relief as this Court deems just and proper.

INTRODUCTION

This case arises from ecclesiastical decisions made by defendant Metropolitan New York Synod of the Evangelical Lutheran Church in America (the "MNY Synod") as it concerns the denial of Plaintiff's request to be "On Leave from Call" based on Plaintiff engaging in infidelity which thereby resulted in his removal from the roster of Ministers of Word and Sacrament of the Evangelical Lutheran Church in America ("ELCA"), effective April 22, 2023, following a determination by the Bishop and MNY Synod that Plaintiff's infidelity was a clear violation of the ELCA Constitution. Plaintiff, in response to this ecclesiastical decision, now improperly attempts to assert putative tort and common law claims against the MNY Synod, its Bishop, Rev. Paul T. Egensteiner (the "Bishop"), as well as Rev. Christopher S. Mietlowski ("Rev. Mietlowski"), Assistant to the Bishop, and Gayle Ruege ("Ruege"), the Executive Assistant to the Bishop.

Plaintiff's putative claims fail and warrant dismissal pursuant to CPLR 3211(a)(2), (a)(1), and (a)(7). The Complaint must be dismissed as this Court lacks subject matter jurisdiction as Plaintiff's putative claims are ecclesiastical in nature and therefore nonjusticiable. Plaintiff's claims also warrant dismissal based on ecclesiastical documentary evidence encompassed by the

ELCA Constitution and Bylaws. The Complaint otherwise fails to legitimately state a cause of action against Defendants.

THE ALLEGATIONS AND FACTUAL BACKGROUND

The ELCA is the successor by merger in 1988 of the Lutheran Church in America, the American Lutheran Church and the Association of Evangelical Lutheran Churches. The ELCA is one of the largest Christian denominations in the United States which has ecclesiastic jurisdiction and provides religious and mission services to over three million American Lutherans. It is divided into 65 synods in the United States and Caribbean, which coordinate the work of the Church's 8,900 worshipping communities. (www.elca.org/About); (www.mnys.org/about/what-is-a-synod/). (Schoepflin Aff. ¶ 1).[1]

The ecclesiastical rules and principles of the ELCA are set forth in the Constitution, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America, available at the ELCA website, www.elca.org, (ELCA Constitution). (Schoepflin Aff. ¶ 2 and Ex. A). Pursuant to the ELCA Constitution, each synod in assembly elects a bishop. The bishop, as the synod's pastor, oversees and administers the work of the synod, provides pastoral care and leadership for the synod, its congregations and its ordained ministers, is responsible for seeing that the constitution and bylaws of the ELCA and synod are duly observed, and that the actions of the synod and its congregations are in conformity therewith. (Schoepflin Aff. ¶ 3); (ELCA Constitution § S8.10). The bishop solely and exclusively exercises the Church's power to ordain approved candidates of ordained ministry. (Schoepflin Aff. ¶ 4); (ELCA Constitution § S8.12).

[1] References designated ("Schoepfin Aff.") are to the Affidavit of Rev. Robert P. Schoepflin, sworn to on September 12, 2023 and the exhibits attached thereto.

The MNY Synod bears responsibility for the ecclesiastical oversight of the life and mission of more than 180 Lutheran churches in New York City, Long Island and Westchester, Putnam, Dutchess, Rockland, Orange, Sullivan, and Ulster Counties. (Schoepflin Aff. ¶ 6).

In his Verified Complaint, Plaintiff purports to assert putative tort and common law claims against the MNY Synod, its Bishop, as well as Rev. Mietlowski and Ms. Ruege, flowing from the ecclesiastical decision made by the Bishop and MNY Synod Council on April 22, 2023 that denied Plaintiff's request for "On Leave from Call" status as a Minister.

As demonstrated below, Plaintiff cannot legitimately state any of his common law and tort-based claims based on the MNY Synod Council's ecclesiastical decision to effectively remove Plaintiff from the roster of ELCA Ministers, done in accordance with the ecclesiastical rules of the ELCA and MNY Synod.

Between March 2002 and July 2016, Plaintiff was on the ELCA Roster of Ministers of Word and Sacrament and member of the MNY Synod, serving as pastor at Our Savior Lutheran Church located in Croton-on-Hudson, New York, a congregation within the MNY Synod. (NYSCEF 1 ⁋ 8, "Complaint"); (Schoepflin Aff. ¶ 12).

Following Plaintiff's departure as pastor of that congregation, Plaintiff served as a chaplain for the New York National Guard from September 1, 2016 through June 2022. (Schoepflin Aff. ¶ 13). On March 20, 2023, Plaintiff informed the MNY Synod that he was "honorably discharged" from that National Guard chaplaincy which was "fully processed last month." (Schoepflin Aff. ¶ 14 and Ex. C).

Pursuant to ELCA Constitution, given that following the conclusion of Plaintiff's chaplaincy he had no "regularly issued letter of call," Plaintiff could only be "retained on the Roster of Ministers of Word and Sacrament of this church, upon endorsement by the synod

bishop, by action of the Synod Council in the synod of which the Minister of Word and Sacrament is a member, under policy developed by the appropriate churchwide unit, reviewed by the Conference of Bishops, and adopted by the Church Council." (Schoepflin Aff. ¶ 15); (ELCA Constitution § 7.31.07). This is defined as "On Leave from Call." (*Id.*)

The Roster Policies, referenced in ELCA Constitution § 7.31.07, are available at the ELCA website, www.elca.org, (Roster Policies). (Schoepflin Aff. ¶ 16 and Ex. D). Pursuant to the ELCA Roster Policies: "On-leave-from-call status is not automatically granted. Action granting or denying leave from call is to be taken by the Synod Council [ELCA Constitution provision 20.17, bylaw 7.31.07, and S8.12.i.9 in the Constitution for Synods] upon endorsement by the synod bishop." (Schoepflin Aff. ¶ 17); (ELCA Roster Policies, Part One, § III.B., pg. 32).

By his March 20, 2023 correspondence to the MNY Synod, Plaintiff requested "On Leave from Call" status. (Schoepflin Aff. ¶ 18 and Ex. C). By its decision issued at the April 22, 2023 MNY Synod Council Meeting, the MNY Synod Council denied, upon endorsement of the Bishop, Plaintiff's request for "On Leave from Call" status. That decision is recorded in the Minutes of the April 22, 2023 MNY Synod Council Meeting, available at the MNY Synod website, (MNY Synod Council Minutes). (Schoepflin Aff. ¶ 19 and Ex. E).

By letter issued from the Bishop to Plaintiff on May 2, 2023, Plaintiff was advised that his request for "On Leave from Call" status was denied by the MNY Synod Council, upon endorsement of the Bishop, and that as a result of that denial, his name was removed from the ELCA Roster of Ministers of Word and Sacrament, effective April 22, 2023. (Schoepflin Aff. ¶ 20 and Ex. F). As set forth in the May 2, 2023 letter, the Synod Council took the action to deny Plaintiff's request for "On Leave from Call" status "in response to a confirmed report of [his] misconduct as an ELCA Minister of Word and Sacrament."

The subject misconduct was a complaint received by the Bishop of the MNY Synod that Plaintiff allegedly engaged in an extramarital affair with a former congregant of the Our Savior Lutheran Church located in Croton-on-Hudson, New York. (Schoepflin Aff. ¶¶ 21, 22 and Ex. F). Plaintiff's pleading in this lawsuit refers to this former congregant as the "Complainant." (Complaint ¶¶ 66-75).

Significantly, Plaintiff's pleading does not deny that he engaged in infidelity with this former congregant, but instead pleads that at the time, she was "not a minor," was a "person of suitable age and discretion, and not lacking in capacity." (Complaint ¶ 74). That this former congregant was an adult female at the time of the infidelity, and according to Plaintiff, consented to it, did not in any way minimize the ecclesiastical misconduct committed by Plaintiff under the ecclesiastical rules of the ELCA. (Schoepflin Aff. ¶ 25).

The ELCA Church Council, pursuant to ELCA Constitution § 20.21, adopted on November 12, 2021, published written Definitions and Guidelines for Discipline for ministers, available at the ELCA website, www.elca.org, (Guidelines for Discipline). (Schoepflin Aff. ¶ 26 and Ex. G). These ELCA Guidelines for Discipline expressly prohibit a rostered minister from engaging in infidelity or adultery, which the ELCA defines as "a romantic or sexual relationship with someone other than one's spouse or partner," and "voluntary sexual intercourse between a married person and someone other than that person's current spouse," respectively. (Schoepflin Aff. ¶ 27); (Guidelines for Discipline, pg. 5). These ELCA Guidelines for Discipline also expressly provide that "Rostered ministers who abuse the trust placed in them by engaging in infidelity, adultery, promiscuity, or sexual abuse of another are engaging in conduct incompatible with the character of the ministerial office." (Schoepflin Aff. ¶ 28); (Guidelines for Discipline, pg. 8 ¶ 5).

On November 7, 2022, the Bishop was first advised of the allegation regarding Plaintiff's infidelity with a former congregant and commenced an investigation. (Schoepflin Aff. ¶ 29). During this investigation, Plaintiff did not deny the infidelity. Rather, Plaintiff's January 27, 2023 letter to the Bishop confirmed that he engaged "an intimate relationship" with the former congregant who otherwise consented to that relationship. Plaintiff further admitted to the Bishop: "I do not deny the immorality and poor judgment of a certain brief period of time, very much lament the pain and suffering experienced by others, and certainly accept reprimand, reproach and even censure. I am also not seeking to avoid accountability." (Schoepflin Aff. ¶¶ 30, 31 and Ex. H).

Although Plaintiff's January 27, 2023 letter and Complaint allege that Plaintiff made other statements to Rev. Mietlowski during a telephone call on November 14, 2022 that was purportedly subject to alleged "confessional confidentiality," there was no such "confessional confidentiality" that applied to that November 14, 2022 phone call. Indeed, the investigation into the alleged infidelity had commenced before that phone call and Plaintiff has never denied the infidelity, and otherwise confirmed it independent of the November 14, 2022 phone call. (Schoepflin Aff. ¶ 32). In any event, the undisputed infidelity Plaintiff engaged in with the woman his Complaint now labels as the "Complainant" constituted clear ecclesiastical misconduct under the definitions and guidelines of the ELCA, and was the basis for the MNY Synod Council's decision, upon endorsement of the Bishop, to deny Plaintiff's request for "On Leave from Call" status. (Schoepflin Aff. ¶ 33).

As a result of that MNY Synod Council decision, Plaintiff was automatically removed from the ELCA Roster of Ministers of Word and Sacrament. Pursuant to the ELCA Roster Policies: "If the call of a minister of Work and Sacrament comes to an end and the minister does

not have another call and either does not apply for, or is not granted, on-leave-from-call status, retired status or disability status, then the minister is no longer on the roster." (Schoepflin Aff. ¶ 34); (ELCA Roster Policies, Part One, § IV.A.3, pg. 38).

Notwithstanding the ELCA ecclesiastical rules and policies that the MNY Synod followed resulting in the removal of Plaintiff from the ELCA roster of Ministers, Plaintiff now improperly seeks to assert common law claims against the MNY Synod, its Bishop and two of the Bishop's assistants for alleged violation of those ELCA ecclesiastical rules and procedures.

Plaintiff improperly seeks to have this Court render equitable relief to him, demanding that the Court order the MNY Synod to "restore" Plaintiff to the ELCA roster of ministers. (Complaint ¶ 87). Even more outrageous, Plaintiff seeks to have this Court entangle itself into the religious and ecclesiastical rules and affairs of the ELCA and MNY Synod, and "expunge" his admitted infidelity with his former congregant from the "records of the MNY Synod and ELCA" under the guise that he was allegedly not afforded "canonical due process" and that some of his statements made during the investigation of the extramarital affair were purportedly subject to what he unilaterally now labels as "confessional confidentiality." (Complaint ¶¶ 25, 45, 86).

Plaintiff otherwise seeks what he calls "legal damages" against the MNY Synod, its Bishop and two of the Bishop's ecclesiastical Assistants, for alleged "pain and suffering," "loss of income," and "punitive damages" resulting from the MNY Synod Counsel's ecclesiastical decision to deny Plaintiff's request for "Leave from Call" status. (Complaint ¶ 90).

What Plaintiff purports to seek in this lawsuit is absolutely barred by the United States Constitution which "prohibits the courts from resolving controversies over religious doctrine and

practice." *Kelley v. Goruda*, 36 A.D.3d 593, 595 (2d Dep't 2007). His Complaint should be dismissed as a matter of law.

ARGUMENT

I. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED PURSUANT TO CPLR 3211(a)(2)

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…" U.S. Const. Amend I. Commonly known as the establishment clause, all U.S. courts have been careful to establish frameworks in order to rule on issues where the clause is not violated. Indeed, the United States Supreme Court has established a firm policy protecting First Amendment rights and prohibiting civil inquiry into ecclesiastical decisions of a church. "Religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721-722 (1976), *quoting Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952); *see also Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 31 A.D.3d 541, 542, 820 N.Y.S.2d 62 (2d Dept., 2006)("The First Amendment prohibits a civil court from conducting an inquiry into religious law, beliefs, or internal hierarchy, resolving disputes over a religious group's membership requirements.")(citations omitted).

Here, action was taken by Defendants, the appropriate ecclesiastical body, on an issue of clergy qualification and ecclesiastical discipline. Accordingly, this action involves "a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 US 696, 709 (1976); *see also Eltingville Lutheran Church v. Rimbo*, 174 A.D.3d 856, 859 (2d Dep't 2019)(For cases that "involve

questions of discipline, or of faith, or ecclesiastical rule" the Courts should "renounce jurisdiction and leave the matter for determination to the church judicatory, whose decision, in such matters, would be accepted by any court in the land as final.").

Thus, even if Plaintiff were able to submit legitimate causes of action (which he cannot as detailed in the discussion below), Plaintiff improperly attempts to entangle this Court in an ecclesiastical matter. Religious bodies are to be left free to decide church matters for themselves, uninhibited by state interference. *See Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich,* 426 U.S. 696, 722 (1976); *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d 110, 116–117 (1984). Civil disputes involving religious parties or institutions may only be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution. S*ee First Presbyt. Church of Schenectady, supra*. The "neutral principles of law" approach requires the court to apply objective, well-established principles of secular law to the issues. *First Presbyt. Church, supra*, at 119–120. Yet the instant matter cannot be one where neutral principles of secular law apply.

Indeed, the core of the matter before this Court concerns ecclesiastical issues involving clergy qualification and ecclesiastical discipline. Plaintiff himself makes this clear in citing to "canonical due process" and religious principles (Complaint ¶ 45, and generally), which this court is prohibited from interfering with. *Kelley,* 36 A.D.3d at 595 (Courts are "prohibit[ed] from resolving controversies over religious doctrine and practice").

In fact, every claim made by Plaintiff implicates ecclesiastical issues thereby making them nonjusticiable and rendering them outside this Court's jurisdiction. All of Plaintiff's claims are predicated on the ecclesiastical determinations of clergy qualification and ecclesiastical discipline rendered by the MNY Synod upon endorsement of the Bishop pursuant to

ecclesiastical protocols. Definitionally, such issues implicate religious and ecclesiastical considerations. *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 288 (2007)("It is well settled that membership issues such as those that are at the core of this case are an ecclesiastical matter.").

Further, Plaintiff's specific allegations and putative causes of action are directly refuted by case law showing that any justiciable consideration of them would be improper and constitute impermissible excessive entanglement with religion. To be sure, Plaintiff's attempt to recast defendants' ecclesiastical duties of clergy discipline into putative common law "fiduciary" duties that can be redressed by this court is fundamentally groundless, would violate the First Amendment, and constitute improper judicial entanglement with religion. *See Langford v. Roman Catholic Diocese* 271 A.D.2d 494 (2d Dep't 2000) (recognition of a cause of action to recover damages for breach of fiduciary duty (and negligent infliction of emotional distress) would require courts to "venture into forbidden ecclesiastical terrain").

Additionally, resolution of the claims related to defamation, slander and libel in this religious context necessarily involves an impermissible inquiry into religious doctrine and a determination as to whether Plaintiff violated religious law. *Mandel v. Silber,* 304 A.D.2d 538 (2d Dep't 2003). The case, *Jackson v. Presbytery of Susquehanna Valley*, 265 A.D.2d 253 (1st Dep't 1999) is instructive. There, like here, a Minster claimed to be defamed by statements made by other ministers reflecting adversely upon his fitness to continue serving in the community. The Court held that inasmuch as statements concerned plaintiff's ministerial qualifications, however, adjudication of dispute would impermissibly involve court in matters left by constitutional design for ecclesiastic resolution.

Ultimately, on a motion to dismiss on jurisdictional grounds due to the First Amendment, the court must assess the totality of the circumstances related to the action to determine if jurisdiction exists. *Smith v. Clark*, 185 Misc 2d 1, 2 (Sup. Ct., Monroe Co. 2000), *aff'd,* 286 A.D.3d 800 (4th Dep't 2001). Here, the MNY Synod, the appropriate ecclesiastical body, upon endorsement of the Bishop, acted within the ecclesiastical scope and guidance of its religious Constitutions and Bylaws. Any objection Plaintiff may have to the ecclesiastical decisions by the MNY Synod and endorsed by the Bishop is outside the jurisdiction of this or any other court of law. This Court should not engage in this impermissible foray into religious territory.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED PURSUANT TO CPLR 3211(A)(1)

Similarly, and in conjunction with arguments of subject matter jurisdiction, the Complaint must also be dismissed pursuant to CPLR 3211(a)(1), which is a "defense founded on documentary evidence."

A. Legal Standard for CPLR 3211(a)(1)

Under CPLR 3211(a)(1), a defendant is entitled to dismissal of a complaint if a "defense is founded on documentary evidence." CPLR 3211(a)(1). "[T]he rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence." *SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 331 (2d Dep't 1987); *accord Zito v. New York City Off. of Payroll Admin*., 2015 NY Slip Op 06274 (3d Dep't 2015) ("However, we will not accept as true factual allegations and legal conclusions that are inherently incredible or flatly contradicted by documentary evidence.").

Moreover, when extrinsic evidence is utilized on a motion to dismiss under CPLR 3211(a)(1), the allegations of the complaint are *not* presumed to be true, and the "motion should be granted where the essential facts have been negated beyond substantial question" by the materials submitted. *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81, (1st Dep't 1999), *aff'd*, 94 N.Y.2d 665 (2000).

Indeed, when such motion "is supported by evidence extrinsic to the [complaint], the inquiry becomes whether the [plaintiff] indeed has a cause of action, not simply whether he or she has stated one in the [complaint], and the [plaintiff] no longer can rely only on the unsupported factual allegations of the pleading but must submit evidence demonstrating the existence of a cause of action." *Matter of La Barbera v. Town of Woodstock*, 29 A.D.3d 1054, 1054, 814 N.Y.S.2d 376 (3d Dep't 2006).

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Ruffino v. New York City Tr. Auth.*, 55 A.D.3d 817 (2d Dep't 2008); *see also Morris v. Morris*, 306 A.D.2d 449 (2d Dep't 2003).

B. The Church Constitution and Ecclesiastical Rules Mandate Dismissal of Plaintiff's Claims

The ELCA Constitution and its accompanying bylaws and disciplinary rules (Schoepflin Exs. A, B, D. G) serve as a complete defense as to Plaintiff's claims in the Complaint. These documents vest sole authority and power on the MNY Synod Council, upon endorsement of the Bishop, to make ecclesiastical clergy roster decisions, including the denial of Plaintiff's request to be "On Leave from Call" status which thereby resulted in his removal from the roster of Ministers of Word and Sacrament of the ELCA, effective April 22, 2023.

Pursuant to the ELCA Constitution, given that following the conclusion of Plaintiff's chaplaincy he had no "regularly issued letter of call," Plaintiff could only be "retained on the Roster of Ministers of Word and Sacrament of this church, upon endorsement by the synod bishop, by action of the Synod Council in the synod of which the Minister of Word and Sacrament is a member, under policy developed by the appropriate churchwide unit, reviewed by the Conference of Bishops, and adopted by the Church Council." (ELCA Constitution § 7.31.07). This is defined as "On Leave from Call." (Schoepflin Aff. ¶ 15).

Pursuant to the ELCA Roster Policies: "On-leave-from-call status is not automatically granted. Action granting or denying leave from call is to be taken by the Synod Council [ELCA Constitution provision 20.17, bylaw 7.31.07, and S8.12.i.9 in the Constitution for Synods] upon endorsement by the synod bishop." (ELCA Roster Policies, Part One, § III.B., pg. 32); (Schoepflin Aff. ¶ 17).

By its decision issued at the April 22, 2023 MNY Synod Council Meeting, the MNY Synod Council denied Plaintiff's request for "On Leave from Call" status. (Schoepflin Aff. ¶ 19, Ex. E). As set forth in the Bishop's May 2, 2023 letter, the MNY Synod Council took the action to deny Plaintiff's request for "On Leave from Call" status "in response to a confirmed report of [his] misconduct as an ELCA Minister of Word and Sacrament." (Schoepflin Aff. ¶ 21).

The decision was rendered due to the ecclesiastical misconduct committed by Plaintiff in regard to his admitted and undisputed infidelity. The ELCA Guidelines for Discipline expressly prohibit a rostered minister from engaging in adultery or infidelity. (Schoepflin Aff. Ex. G, pg. 8 ¶ 5). Indeed, the ELCA Guidelines for Discipline expressly provide that "Rostered ministers who abuse the trust placed in them by engaging in infidelity, adultery, promiscuity, or sexual abuse of another are engaging in conduct incompatible with the character of the ministerial office." (*Id.*)

The ELCA documentary evidence indisputably establishes that Defendants followed the ELCA Constitution, by-laws and disciplinary rules and were fully empowered to take the ecclesiastic actions they did. Plaintiff may not now challenge those ecclesiastical determinations in this Court under the guise of putative tort and civil law claims. *See Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 284 (2007)(a congregation expelled an individual from membership utilizing the congregation's by laws and finding such decision was ecclesiastical in nature); *see also Matter of Thompson v. Bruce*, 65 A.D.3d 1245 (2d Dep't 2009)(Court correctly dismissed petition where it was established that pastor was removed from office pursuant to the governing principles of the congregation, including the Constitution and bylaws).

Accordingly, the documentary evidence disproved an essential allegation of the Complaint and conclusively established a defense as a matter of law.

III. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED WITH PREJUDICE PURSUANT TO CPLR 3211(A)(7)

In addition to the above stated reasons, the Complaint must also be dismissed pursuant to CPLR 3211(a)(7), as the pleading fails to legitimately state a cause of action and is facially defective.

A. Legal Standard for CPLR 3211(a)(7)

The allegations in a complaint must be sufficiently particular to provide the court and parties with notice of the transactions or occurrences to be proved, and to enable the parties to determine the nature of the plaintiff's grievances and the relief which the plaintiff seeks in consequence of the alleged wrongs. CPLR § 3013. Accordingly, even under the liberal notice pleading requirements of the CPLR, a complaint must still allege "the material elements of each cause of action asserted." *E. Hampton Union Free Sch. Dist. V. Sandpebble Builders, Inc.,* 66 A.D.3d 122, 127 (2d Dep't 2009).

"[A] complaint which contains bare legal conclusions . . . should be dismissed pursuant to CPLR 3211(a)(7)." *Kenneth R. v. Roman Catholic Diocese*, 229 A.D.2d 159, 162 (2d Dep't 1997); *see also Thomas v. Dinkes & Schwitzer, P.C.*, 29 Misc. 3d 1202(A) (N.Y. Sup. Sept. 23, 2010) ("Under this section, a complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations."); *see also SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 331 (2d Dep't 1987)("The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence."); *see also Ullman v. Norma Kamali, Inc.*, 207 A.D.2d 691, 692 (1st Dep't 1994)("Although on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference, where, as here, the allegations consist of bare legal conclusions . . . they are not entitled to such consideration.").

Here, the Complaint fails to legitimately plead the putative tort and civil law claims Plaintiff improperly asserts based upon the ecclesiastical decision made by the MNY Synod Council with the endorsement of the Bishop.

B. Plaintiff Fails to Legitimately Plead a Breach of Fiduciary Duty

The requisite elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship or duty between the relationship of the parties; (2) misconduct on part of the fiduciary; and (3) damages directly caused by the fiduciary's misconduct. *Rut v. Young Adult Inst., Inc.,* 74 A.D.3d 776, 777 (2d Dep't 2010). Claims based upon breach of fiduciary must be alleged with specificity. *See Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc.,* 28 A.D.3d

595, 596 (2d Dep't 2006). Plaintiff fails to sufficiently plead this cause of action on the first requirement alone.

Plaintiff asserts that the relationship between two clergymen, himself and Rev. Mietlowski, within a "confessional" environment, somehow gives rise to a civil law tort based fiduciary relationship. This is false and insufficiently pleaded.

New York courts have refused to find the existence of fiduciary relationships within a religious environment. This is primarily because an effort by the courts to define a duty of care that is owed by a clergy member would foster excessive government entanglement with religion, requiring courts to "venture into forbidden ecclesiastical terrain" and thus violate the First Amendment establishment clause. *Langford v. Roman Catholic Diocese*, 271 A.D.2d 494 (2d Dep't, 2000).

Moreover, Plaintiff's self-serving and conclusory allegation that statements he made to Rev. Mietlowski were afforded some ecclesiastical privilege cannot be bootstrapped into a civil tort claim labeled as a putative breach of fiduciary duty. Indeed, the Court of Appeals has expressly determined that an alleged violation of clergy confidentiality "does not give rise to a cause of action for breach of a fiduciary duty involving the disclosure of oral communications between a congregant and a cleric." *Lightman v. Flaum,* 97 N.Y.2d 128, 137 (2001).

C. Plaintiff Fails to Legitimately Plead a Claim for "Emotional Distress"

To the extent that the Complaint alleges negligent infliction of emotional distress, albeit unclearly, this cause of action should also be dismissed as insufficiently pleaded. The elements for a claim of negligent infliction of emotional distress are: (1) a breach of duty owed to Plaintiff; (2) the duty exposes Plaintiff to an unreasonable risk of bodily injury or death; and (3) extreme and outrageous conduct. *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984); *see also Lau v. S&M*

Enters., 72 A.D.3d 497 (1st Dep't, 2010); *Goldstein v. Massachusetts Mut. Life Ins. Co.*, 60 A.D.3d 506 (1st Dep't 2009). While physical injury is not necessary to sufficiently plead negligent infliction of emotional distress, Plaintiff must show that Defendants' conduct was "beyond all possible bounds of decency and utterly intolerable in a civilized community." *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993).

Here, the action Plaintiff is alleging that caused this "emotional distress" was Rev. Mietlowski's alleged disclosure of Plaintiff's admission of his infidelity, which is a matter of clergy ecclesiastical misconduct and the subject of a complaint that had been previously raised with the Bishop. Indeed, on November 7, 2022, the Bishop was first advised of the allegation regarding Plaintiff's infidelity with a former congregant and commenced an investigation. (Schoepflin Aff. ¶ 29). During this investigation, Plaintiff did not deny the infidelity. Rather, Plaintiff's January 27, 2023 letter to the Bishop confirmed that he engaged in "an intimate relationship" with the former congregant who otherwise consented to that relationship. Plaintiff further admitted to the Bishop: "I do not deny the immorality and poor judgment of a certain brief period of time, very much lament the pain and suffering experienced by others, and certainly accept reprimand, reproach and even censure. I am also not seeking to avoid accountability." (Schoepflin Aff. ¶¶ 30, 31 and Ex. H).

Although Plaintiff's January 27, 2023 letter and Complaint allege that Plaintiff made other statements to Rev. Mietlowski during a telephone call on November 14, 2022 that was purportedly subject to alleged "confessional confidentiality," there was no such "confessional confidentiality" applicable to that November 14, 2022 phone call. Indeed, the investigation into the alleged infidelity had commenced before that phone call and Plaintiff has never denied the infidelity, and otherwise confirmed it independent of the November 14, 2022 phone call.

(Schoepflin Aff. ¶ 32). In any event, the undisputed infidelity Plaintiff engaged in with the woman his Complaint now labels as the "Complainant" constituted clear ecclesiastical misconduct under the definitions and guidelines of the ELCA, and was the basis for the MNY Synod Council's decision, upon endorsement of the Bishop, to deny Plaintiff's request for "On Leave from Call" status. (Schoepflin Aff. ¶ 33).

D. Plaintiff Fails to Legitimately Plead a Claim for "Violation of Civil Rights"

Plaintiff's cause of action alleging violation of civil rights should be dismissed because the Complaint merely alleges legal conclusions of the violations and fails to reference any statutory authority for the alleged violations. New York courts have found that the bare legal conclusion that Defendants violated unspecified civil rights laws is insufficient to sustain a civil rights violation. *Asgahar v. Tringali Realty Inc.*, 18 A.D.3d 408 (2d Dep't 2005); *see generally Meyer v. Guinta*, 262 A.D.2d 463 (2d Dep't 1999).

Here, without mentioning a specific statute that has been violated, Plaintiff claims he was treated disparately in comparison to females, LGBTQ+, and persons of color "in analogous predicaments." (Complaint ¶ 51). Further, Plaintiff does not elaborate on these statements or give examples of people in those groups who have been treated differently by the MNY Synod. Plaintiff also claims he was denied the opportunity to resign, experienced discrimination because of his inferior rank in the church, and that all Defendants acted to provide disparate and discriminatory treatment to Plaintiff. Despite the deference and liberal construction awarded to Plaintiff's pleadings on motions to dismiss, Plaintiff's allegations only offer baseless claims based on legal conclusions of an existence of a civil rights violation without citing any specific applicable statute.

E. Plaintiff Fails to Legitimately Plead a Claim for Defamation

The Complaint's cause of action of defamation, libel, and slander are similarly deficient and must be dismissed. Defamation, which can occur by either written expression (libel) or oral expression (slander), has long been recognized as "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996). "Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth." *Rinaldi v. Holt, Rinehart*, 42 N.Y.2d 369, 380 (1977).

The law of this State requires that in an action for defamation, "the particular words complained of shall be set forth in the complaint." New York Civil Practice Law and Rules 3016(a). "The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999).

Here, the Complaint fails to plead what words were used to allegedly defame Plaintiff. (Complaint ¶¶ 57-75). Indeed, other than multiple conclusory allegations that Plaintiff has simply been "defamed" there is only a vague reference to correspondence of May 2, 2023 which is characterized as having a "cruel and heartless tone" that referred to a "confirmed report of [his] misconduct as an ELCA Minister (Complaint ¶¶ 63-64). From there, the allegations veer from defamation and instead address the alleged ecclesiastical misconduct and investigation.

First, such allegations that there were "inconsistent" stories, that Plaintiff's spouse was threatened, or that the Bishop "allegedly selectively focused" on the information provided by the congregant who brought the affair to the Bishop's attention (Complaint ¶¶ 68, 69, 72) are

irrelevant to a defamation claim. Indeed, these allegations cannot be twisted into a putative claim for defamation against the MNYS, its Bishop and his Assistants.

Further, truth or substantial trust of the alleged defamatory statement is an absolute defense. *Konrady v. Brown*, 91 A.D.3d 545 (1st Dep't 2012). While the defamatory statement is not specified, we nonetheless know it centers around the undisputed extramarital affair Plaintiff admittedly engaged in. Indeed, he confirmed such not only in his non-confidential discussion with the Bishop, but also his letter of January 27, 2023. (Schoepflin Aff. Exhibit H).

F. Plaintiff Fails to Plead a Claim for "Hostile Work Environment"

Plaintiff's cause of action labeled "hostile work environment" purports to claim that the MNY Synod Council's decision to deny Plaintiff's request for "Leave from Call" status based upon the ecclesiastical rules of the ELCA Constitution and MNYS Constitution somehow "create[d] a hostile work environment in violation of Title VII USC, 42 U.S.C. § 2000e-3(a), New York State Human Rights Law, N.Y. Exec. Law § 296, [and] N.Y.C. Admin. Code § 8-107 et seq." (Complaint ¶ 79). This cause of action must also fail.

As an initial matter, in both state and federal court, a Title VII claimant may only file suit if they have filed a timely complaint with the United States Equal Employment Opportunity Commission ("EEOC") and obtained a "right-to-sue" letter. *See* 42 U.S.C. § § 2000e-5(e)-(f); see *Romney v. N.Y. City Transit Auth.*, 294 A.D.2d 481 (2d Dep't 2002); *see Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994). A plaintiff must then commence a Title VII action within 90 days of receipt of a "right to sue" letter. *See Romney*, 294 A.D.2d at 481. A complaint must demonstrate both that the plaintiff has exhausted their administrative remedies prior to commencing a Title VII action, and that the plaintiff commenced the action within 90 days of receipt of the right-to-sue letter. *See id.* The Court lacks jurisdiction to hear cases brought under

Title VII without a right to sue letter from EEOC. *See D'Amico v. Arnold Chevrolet*, 2011 N.Y. Misc. LEXIS 1180 (Sup. Ct. Suffolk Co. 2011).

Here, Plaintiff fails to allege that he filed a timely complaint with the EEOC, that he obtained a right-to-sue letter, and that he has commenced the present action within 90 days of receipt of the right to sue letter. Thus, any claims under Title VII must be dismissed.

The cause of action must also be dismissed for basic pleading deficiencies. Substantively, "[t]he standard for a hostile work environment claim is demanding, and the plaintiff must prove that the conduct was offensive, pervasive, and continuous enough to amount to a constructive discharge." *Davis-Bell v. Columbia Univ.,* 851 F. Supp. 2d 650, 672 (S.D.N.Y. 2012).

Plaintiff's hostile work environment claim should be dismissed at the pleading stage where, as here, Plaintiff's "factual allegations... alleging the creation of a hostile work environment, even when viewed as true, f[a]ll short of establishing that the workplace [was] permeated with discriminatory intimidation, ridicule, and insult... that [was] sufficiently severe or pervasive to alter the conditions of the [Plaintiff's] employment and create an abusive working environment.'" *Kamen v. Berkeley Coop. Towers Section II Corp.,* 98 A.D.3d 1086, 1087 (2d Dep't 2012); *Schenkman v. New York Coll. of Health Professionals,* 29 A.D.3d 671, 673 (2d Dep't 2006) (same). Furthermore, "as a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Alfano v. Costello,* 294 F.3d 365, 374 (2d Cir. 2002). Finally, and most importantly in this case, the hostility must arise *because of* a plaintiff's membership in a protected class. *Heba v. N.Y. State Div. of Parole,* 537 F. Supp. 2d 457, 467 (E.D.N.Y. 2007).

Further, "to determine whether an actionable hostile work environment claim exists, the court must examine the totality of the circumstances including the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Montano v Department of Educ. of City of N.Y.*, 2012 N.Y. Misc. LEXIS 4288, *5-6 (Sup. Ct. N.Y. Co. 2012).

Here, Plaintiff's conclusory allegations in the Complaint fail any objective pleading standard for this cause of action. First, Plaintiff has not delineated what protected class he is in, if any. Further, the Complaint only provides by way of examples of a hostile work environment isolated instances wherein the Bishop's office obstructed a call to a church in Westchester County and "tepid" support of Plaintiff's deployment with the US Army to Afghanistan in 2013. (Complaint ¶ 78). All other allegations relate to the ecclesiastical decision made by the MNY Synod. (*Id*. ¶¶ 78-79). Such claims on their face do not meet the threshold level of severity or pervasiveness to be actionable. *Samide v. Roman Catholic Diocese of Brooklyn*, 194 Misc.2d 561, 572 (N.Y. Sup. 2003)(A claim for hostile work environment must demonstrate that the harassing conduct must be sufficiently "severe" or "pervasive" that it changes the condition of the victim's employment). Unless the alleged conduct is extraordinarily severe, isolated remarks or occasional episodes of harassment will not merit relief. *See San Juan v. Leach*, 278 A.D.2d 299, 300 (2d Dep't 2000). Accordingly, plaintiff's claim based on a hostile work environment must fail.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request this Court grant the motion to dismiss and enter an Order pursuant to CPLR 3211(a)(1), (a)(2) and (a)(7) dismissing all Plaintiff's causes of action as against defendants Metropolitan New York Synod of the

Evangelical Lutheran Church in America, Mietlowski, Egensteiner, and Ruege, with prejudice.

Defendants also request such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 15, 2023

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WORD COUNT CERTIFICATION

The following statement is made in accordance with N.Y.C.R.R. §202.8-b(c). The preceding memorandum of law in support of Defendants' motion was prepared using Microsoft Word processing software. Relying on the word count feature contained within the software, the total number of words is 6,647.

Dated: New York, New York
September 15, 2023

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