

SUPREME COURT
COUNTY OF BROOME

STATE OF NEW YORK

The Diocese of Central New York,
Plaintiff,

– against –

The Rector, Church Wardens, and
Vestrymen of the Church of the Good
Shepherd,

Defendant.

NOTICE OF MOTION

Index No. 2008-000980

RJI No. 2008-0637-M

MOTION BY: Defendant by its attorney, Raymond J. Dague.

DATE, TIME and PLACE OF HEARING: 12th day of December, 2008, at 9:30 AM at a special term of this court, in the Broome County Courthouse, Binghamton, New York

OBJECT OF MOTION: to dismiss all causes of action, for summary judgement on all causes of action, to compel discovery or be precluded and for presumptions and inferences against the plaintiff by virtue of the failure to furnish discovery, strike note of issue, plus costs and disbursements on the action and motion

SUPPORTING PAPERS: Affirmation of Raymond J. Dague, affidavit of Matt Kennedy, and affidavit of George Conger

GROUND FOR RELIEF: CPLR §§3211, 3212, 3103, 3104

DATED: December 9, 2008

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SUPREME COURT
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The Diocese of Central New York,
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The Rector, Church Wardens, and
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ATTORNEY'S AFFIRMATION

Index No. 2008-000980

Raymond J. Dague, admitted to the practice of law in the State of New York, with an office for the practice of law located at Suite 620 Empire Building, 472 South Salina Street, Syracuse, New York, 13202 hereby makes this affirmation pursuant to CPLR § 2106 under the penalties of perjury.

1. I am the attorney for the defendant herein and am familiar with the facts underlying this action and the pleadings and proceedings to date, and I make this affirmation is in opposition to plaintiff's motions and in support of defendant's cross-motions.

2. This action was commenced by the service of summons and complaint on the defendant on Good Friday, April 15, 2008 and the defendant thereafter interposed an answer on or about July 24, 2008. A copy of the complaint is annexed to a part of plaintiff's moving papers on their motion, to wit, the affidavit of Jonathan B. Fellows sworn to November 20, 2008, as Exhibit "A", and the answer of the defendant is annexed to that same affidavit, as Exhibit "C".

**PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGEMENT ON THE FIRST THREE
CAUSES OF ACTION AND DEFENDANT IS ENTITLED ON THE CROSS-MOTION TO
DISMISS UNDER CPLR §3211 AND FOR SUMMARY JUDGMENT UNDER CPLR §3212**

SUMMARY OF DEFENDANT’S REASONS TO DISMISS AND FOR SUMMARY JUDGEMENT AND TO OPPOSE SUMMARY JUDGEMENT OF PLAINTIFF

3. Plaintiff’s entire claim for the property of the defendant hangs on what has become known as the “Dennis Canon” which is alleged by plaintiffs to be an internal canon (ecclesiastical law) of the Episcopal Church, more formally known as Canon I.7.4 and Canon I.7.5 of the Canons of the General Convention. The recent case from the Court of Appeals rests almost solely on the “Dennis Canon” as the basis for why an Episcopal Diocese can seize the property of a parish which leaves the Episcopal Church pursuant to the “express trust” of as contained in that canon.

4. Notwithstanding the recent decision of the New York State Court of Appeals in *Diocese of Rochester v. Harnish*, there is no Dennis Canon. The so-called Dennis Canon was never adopted by the General Convention of the Episcopal Church in 1979.

5. Canon XXIII of the Canons of the Diocese of Central New York is, by its own words, “in conformity and consistent with” the Dennis Canon. If there is no Dennis Canon, there is nothing for the local diocesan canon to track, and it too lacks validity.

6. The issue of the adoption of the Dennis Canon was not before the Court of Appeals in this recent case. Since the plaintiff is asking this court to assert property rights as against the title of the property of the Church of the Good Shepherd based on this Dennis Canon trust claim of theirs, it is incumbent on the court to determine, *ab initio*, whether the Dennis Canon was in fact a duly adopted canon of the Episcopal Church. Is there a Dennis Canon or not? This is a fact which must be proved by the plaintiff before the court can assess plaintiff’s claims against the defendant.

7. This line of inquiry is not precluded by the recent Court of Appeals case *Episcopal Diocese of Rochester v. Harnish*. That issue was not raised in the pleadings in that case, and was not referenced in any of the three decisions of the Supreme Court, 17

Misc. 3d 1105A (S. Ct. Monroe Co. 2006) (slip opinion not published in the official reporter and annexed hereto as Exhibit "A") , the Appellate Division, 43 App. Div. 3d 1406, 841 N.Y.S.2d 923 (4th Dept. 2007), or the Court of Appeals, (No. 2008-07991 *dec'd* October 23, 2008) (Annexed hereto as Exhibit "B"). A review of the record in the Court of Appeals likewise is devoid of any reference to this issue.

8. In fact, as the unpublished decision by special term in Monroe Supreme Court clearly states, the defendant in that case argued that the Dennis Canon was adopted in 1979, and hence the courts at all levels took the facts as presented to them by the parties. Hence it is not surprising that the Court of Appeals in FN5 of its opinion recites that "the 'Dennis Canons' were adopted in 1979 by the General Convention of the National Church." The Court of Appeals found the facts as provided to them by the litigants in that record, including the defendant's own admission in that case of the Dennis Canon's adoption. In this litigation, however, Church of the Good Shepherd denies that the Dennis Canon was so adopted.

9. Not only was this issue which we are raising in this litigation never addressed by the litigants or by the court at any level of that case in *Episcopal Diocese of Rochester v. Harnish*, but it has not been raised in *any* other case in this state. Since the issue of the non-adoption of the Dennis Canon was not before the court in *Episcopal Diocese of Rochester v. Harnish*, or elsewhere, we may thus assert this defense in the instant proceedings.

10. Defendant has properly raised this issue in ¶5 of the defendant's answer and in ¶6 of its answer when it "DENIES any trust relationship of any kind whatsoever between plaintiff and defendant, or between plaintiff and the Episcopal Church, as alleged in ¶¶ 15, 16 and 17 of plaintiff's complaint." Unless the plaintiff can assert fact refuting the facts brought forth by the Church of the Good Shepherd here, dismissal or summary judgement should be denied to plaintiff and granted to defendant on the first three causes of action.

NEUTRAL PRINCIPLES OF LAW SHOULD BE USED TO DETERMINE WHETHER A
RELIGIOUS BODY ADOPTED A CANON WHICH IS DISPUTED

11. The Court of Appeals in its recent decision *Episcopal Diocese of Rochester v. Harnish* noted that they were “applying the neutral principles of law approach to the case at bar.” This is the legal standard which the United States Supreme Court authorized in *Jones v. Wolf*, 443 U.S. 595 (1979), as opposed to the hierarchical deference approach which preceded that case. Neutral principles of law is the standard to which the Court of Appeals subscribed in *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 63 N.Y.2d 676, 479 N.Y.S.2d 1028 (1984), and this is the legal approach to be taken here by this court in analyzing whether there is an alleged Dennis Canon trust on defendant’s property.

12. The plaintiff alleges in its complaint in ¶15 that there is a Dennis Canon of the Episcopal Church, and in ¶16 that they have a local canon based on the Dennis Canon, and in ¶17 that “the trust relationship between local churches and their diocese has implicitly existed throughout the history of the Episcopal Church.”

13. These are facts which are disputed by the defendant. Paragraph 6 of defendant’s answer to the complaint denies them. See also, the accompanying affidavit of Matt Kennedy. The Court should not merely accept the contention of the plaintiff that this is so, but must test the truth of these allegations at a trial at which time the both parties may seek to prove the facts of the case.

14. To merely take the word of the diocese on these allegations would be to retreat from applying “neutral principles of law” the in favor of a deference to the hierarchy—the very thing which our courts eschew, as most recently articulated by our Court of Appeals in *Episcopal Diocese of Rochester v. Harnish* as recently as October 23,

2008.

PRINCIPLES OF STATUTORY CONSTRUCTION AND THE COMMON LAW OF
PARLIAMENTARY PROCEDURE DETERMINE WHETHER
A LEGISLATIVE BODY HAS ADOPTED A LAW

15. When deliberative assemblies meet and take action, the actions taken by them should be memorized and preserved in a written record which is usually called “minutes” or in the case of legislative bodies, the “journal.” *Roberts Rules of Order Newly Revised*, §48, p.451, lines 22-25 (10th Ed. 2000). The record so generated should contain the “wording in which each motion was adopted” as well as all amendments and secondary motions considered as the motion was considered and either passed or defeated. *Id.* at §48, p.452, line 24, *et seq.*

16. The Episcopal Church’s triennial convention is mandated by its own canons to maintain an official record of the actions of its General Conventions in a Journal. Canon I.1.5(f) of the General Convention. See, FN2, *infra*, for the text of this canon. The church’s official publishing house published under the authority of the 1979 General Convention its official Journal which consists of a 2½” thick yellow paperback book. This Journal purports to set forth what motions and resolutions were considered and acted upon by the two houses of the convention in September of 1979.

17. In order to ascertain whether a deliberative assembly took any alleged action, the courts look to the official documents of the deliberative assembly, and sometimes to the underlying records of original notes and minutes which went into generating those official documents.

18. The General Convention of the Episcopal Church is a bicameral legislature,

but with no executive necessary for legislation to be passed.¹ Legislation is adopted by the General Convention by both houses of that legislature, the House of Bishops and the House of Deputies, passing an identical resolution. If so adopted and authenticated, legislation changing or adopting a canon is said to have passed the convention and thus become part of church canon law.

19. There is a wide variety of practice among legislative bodies through custom, legislative rule, and legal provision as to what constitutes the official pronouncement that a law has been enacted by that legislative body, and these rules differ from jurisdiction to jurisdiction. In most all governmental legislative bodies, the process is for the production of an enrolled or engrossed bill as evidence of proper adoption by the two houses of a bicameral legislature, and such process is accomplished when it bears the certifying signature of the presiding officer of the two houses which adopted it. Such certification in some jurisdictions is conclusive evidence that the procedural requirements for passage has been met, but some jurisdictions have looked behind a enrolled bill with its certification to determine proper adoption to permit the enrolled bill's certification to be impeached. The official Journals of the legislative body, and sometimes the underlying documents such as original minutes, and sometimes other extrinsic sources, have been examined by courts to determine whether an enrolled bill had become law. See, N. Singer, *Sutherland Statutes and Statutory Construction*, §15 (6th Ed. 2002), E. Crawford, *The Construction of Statutes*, §35-46 (1940).

20. When the respective houses of a legislative body pass what purports to be the same bill and the contents differ substantially, the enrollment of the bill as finally passed is not conclusive, and the bill does not become law. *Sutherland Statutes and*

¹ Article I, §1 of the Constitution of the Protestant Episcopal Church of the United States of America, reads as follows: There shall be a General Convention of this Church, consisting of the House of Bishops and the House of Deputies, which Houses shall sit and deliberate separately; and in all deliberations freedom of debate shall be allowed. Either House may originate and propose legislation, and *all acts of the Convention shall be adopted and be authenticated by both Houses.* (emphasis supplied)

Statutory Construction, §15:16. A resort to the Journal is the manner in which a court may settle the matter. *Id.*, at §15:17.

21. The Episcopal Church has no such thing as the creation of an enrolled bill with its certifications to proclaim the adoption of a canon by both of its legislative houses, and its canons contain only the most cursory instructions as to the generation of documents by the secretaries and registrars of the General Convention.²

² See, Canon I.1 which describes the duties of the secretaries and registrars of the General Convention as follows:

1(d) The Secretary shall keep full minutes of the proceedings of the House; record them, with all reports, in a book provided for that purpose; preserve the Journals and Records of the House; deliver them to the Registrar, as hereinafter provided; and perform such other duties as may be directed by the House. The Secretary may, with the approval of the House, appoint Assistant Secretaries, and the Secretary and Assistant Secretaries shall continue in office until the organization of the next General Convention, and until their successors be chosen.

2(j) At every regular meeting of the General Convention, the Secretary elected by the House of Deputies shall, by concurrent action of the two Houses of the General Convention, also be made the Secretary of the General Convention, who shall have responsibility for assembling and printing of the Journal of the General Convention, and for other matters specifically referred to the Secretary.

5 (a) The House of Deputies, upon the nomination of the House of Bishops, shall elect a Presbyter, to be known as the Registrar of the General Convention, whose duty it shall be to receive all Journals, files, papers, reports, and other documents or articles that are, or shall become, the property of either House of the General Convention, and to transmit the same to the Archives of the Church as prescribed by the Archivist.

(b) It shall also be the duty of the said Registrar to maintain suitable records of the ordinations and consecrations of all the Bishops of this Church, designating accurately the time and place of the same, with the names of the consecrating Bishops, and of others present and assisting; to have the same authenticated in the fullest manner practicable; and to take care for the similar record and authentication of all future ordinations and consecrations of Bishops in this Church. Due notice of the time and place of such ordinations and consecrations shall be given by the Presiding Bishop to the Registrar; and thereupon it shall be the duty of the Registrar to attend such ordinations and consecrations, either in person or by deputy.

(c) The Registrar shall prepare, in such form as the House of Bishops shall prescribe, the Letters of Ordination and Consecration in duplicate, shall have the same immediately signed and sealed by the ordaining and consecrating Bishops, and by such other Bishops

assisting as may be practicable, shall deliver to the newly consecrated Bishop one of the said Letters, shall carefully file and retain the other, and shall make a minute thereof in the official records.

(d) The Registrar shall also be Historiographer, unless in any case the House of Bishops shall make a separate nomination; and in this event the House of Deputies shall confirm the nomination.

(e) The necessary expenses incurred under this Section shall be paid by the Treasurer of the General Convention.

(f) It shall be the duty of the secretaries of both Houses, within thirty days after the adjournment of the General Convention, to deliver to the Registrar the manuscript minutes of both Houses, together with the Journals, files, papers, reports, and all other documents of either House. The manuscript minutes of both Houses shall remain filed until after the adjournment of the second Convention following that at which such minutes shall have been taken; Provided, however, that any part of such minutes, for any reason unpublished in the Journal, shall remain filed in the Archives. The Secretary of the House of Deputies shall also deliver to the Registrar, when not otherwise expressly directed, all the Journals, files, papers, reports, and other documents specified in Canon I.6. The Secretaries shall require the Registrar to give them

22. Given the lack of an enrollment process in the Church, how would one determine whether a particular piece of legislation has passed both houses of the General Convention in identical format so as to constitute an authenticated action to adopt a canon of the church? The closest analogue to enrollment is the list of Concurrent Actions as set forth in the Journal which is generated after the conclusion of each convention. This is a listing of the actions which purport to have been adopted by both houses in identical format.

23. The importance of Journal entries has been pointed out by one commentator who noted that in jurisdictions where adherence to a constitutional requirements is essential to the validity of a statute, the failure to make the prescribed entry in the journal will invalidate the law. *Id.*, *The Construction of Statutes*, §46, p. 76, FN141.

24. The Episcopal Church has an Archive which is mandated to keep the records of the church including the original records of each General Convention. Canon I.5 of the Canons of the General Convention. It was this resource which George Conger consulted in connection with his accompanying affidavit in this matter.

25. Hence in seeking to determine whether the Episcopal Church adopted the Dennis Canon by “neutral principles of law” the court should consider the pertinent entries in the Journal, and the underlying archival records of the convention.

THE OFFICIAL JOURNAL OF THE GENERAL CONVENTION
DOES NOT SUPPORT THE PLAINTIFF’S CONTENTION THAT THE EPISCOPAL
CHURCH HAS A DENNIS CANON

26. The question as to whether the Dennis Canon was adopted was not generally noticed until 2005 (apart from a passing reference in the official commentary on

receipts for the Journals and other papers.

the canons discussed, *infra*). An internet columnist by the name of David Virtue pointed out the defect in 2005, and then canon lawyers in the Episcopal Church began to note the problem.

27. The so-called Dennis Canon was purported to have been adopted at the General Convention of the Episcopal Church which met in September of 1979, as alleged by the plaintiff in their moving papers. The text of the Dennis Canon is as follows:

Canon I.7:

Sec. 4. All 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.

Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

28. This "Dennis Canon" is found in the printed edition of the Constitution and Canons of the Episcopal Church as Canon I.7.4 and Canon I.7.5.

29. In order to ascertain whether the Dennis Canon trust provisions were adopted in 1979, one must review the Journal of the General Convention 1979.

30. Since the Dennis Canon is alleged to have been adopted at the General Convention of 1979, an examination of that Journal is necessary to establish the record of what that General Convention did, or did not adopt.

31. The 1979 Journal is a 2½" thick book which contains several parts and an index, and appendices. Part B of the 1979 Journal contains the proceedings of the House of Bishops. Part C of the 1979 Journal contains the Concurrent Actions adopted by both Houses. Part D of the 1979 Journal contains the proceedings of the House of Deputies. A copy of the title page of the 1979 Journal of the General Convention and all pages cited in this or in any of the other accompanying affidavits, or any other part of defendant's motion

papers, are annexed hereto as Exhibit "C"

32. In the index to the 1979 Journal at I-17 under "Parish" there is a subcategory denominated "Property," where the following references are found: "B-33, B-60, B-61, B-63, C-150, D-154".

33. At the beginning of the index at I-1 the capital letter abbreviations which precede these numbers are explained as follows:

"Section B contains the Roster and Minutes of the House of Bishops,..."; and

"Section C contains the Concurrences—the development of legislation which was enacted in both houses, arranged topically," and

"Section D contains the Roster and Minutes of the House of Deputies."

34. The first place where this matter is found is, B-33, which mentions the House of Bishops proceedings of September 11, 1979. According to the reference at B-33 of the Journal a vote on Resolution D-24 was deferred to allow the "Bishops time to counsel with their respective diocesan chancellors where litigation is currently in process." Resolution D-24 is neither quoted nor summarized at B-33 of the Journal.

35. The second place where the Dennis Canon is mentioned is B-60, which continues on the top of B-61. The entry here reflects the adoption of Resolution D-24 by the House of Bishops. This resolution, if followed by adoption in the House of Deputies, would amend Title I, Canon 6 by adding new sections 4 and 5. Resolution D-24 is quoted in full at this point in the proceedings of the House of Bishops in the Journal minutes of that house. The adoption by the House of Bishops of Resolution D-24 was designated "HB Message #76". According to the Journal this happened on Sept. 13, 1979. See, date at the top of B-61. The text of this canon change is identical to that which now appears in the published Canons, and as cited, *supra*, and has become what we call the Dennis Canon. This is the only place in the entire Journal where the text of the Dennis Canon is to be found.

36. The third place where parish property is mentioned is, B-61, reflects the adoption by the House of Bishops on September 13, 1979, of "Resolution, Report #13 (D-24)" to amend Title II, Canon 7. This resolution, if followed by adoption in the House of Deputies, would add a new section 3 to Title II, Canon 7, and it is quoted verbatim at the top of B-61. The adoption of this resolution, as distinct from "HB Message #76" discussed in the previous paragraph and which preceded it in the Journal, was designated "HB Message #75".

37. HB Message #75 found at B-61 is not the Dennis Canon itself. The Dennis Canon is contained only in HB Message #76. HB Message #75 pertains to a canon which, if adopted, will refer to the Dennis Canon. This canon, as can be seen from its text at B-61, deals with "any dedicated and consecrated Church or Chapel" and declares them to be subject to the Dennis Canon which the House of Bishops passed in HB Message #75 to be sent on to the House of Deputies for their consideration.

38. The fourth place in the Journal dealing with church property is at B-63, which really begins at the bottom of B-62. Here is found "Resolution D- 101" which sought to amend Title II, Canon 7, by restoring a section relating to consecrated church property that had apparently inadvertently been deleted from that Canon in the 1973 General Convention. Significantly, this amendment *does not create any trust interest in parish property*. The adoption of this third resolution was designated "HB Message #78".

39. The fifth reference to this matter is C-150. This is the portion of the 1979 Journal, entitled "Concurrent Actions." This part of the Journal is supposed to reflect action which was taken by both houses of the General Convention, and thus in accordance with Article I, §1 of the Constitution, becomes the action of the General Convention. Since the particular legislation cited as C-150 is a canon amendment, this canon thus becomes a canon of the General Convention.

40. C-150 does *not* contain the Dennis Canon. Instead it contains what is set

forth as HB Message #78. This is a report of concurrent approval of the technical correction amendment to Title II, Canon 7, *i.e.*, the amendment that restored the section that had been inadvertently deleted by the 1973 Convention.

41. There is no reference on page C-150 to the Dennis Canon, nor does the text of the Dennis Canon appear there. The text of the correction amendment for Title II, Canon 7 does appear there. For that matter, on none of the 173 pages of Concurrent Actions, neither on page C-150, nor on any other page of the Concurrent Actions, is there so much as a hint of concurrent approval of any amendments to Title I, Canon 6, the so-called Dennis Canon placing a trust on parish property.

42. The sixth and final reference in the index to parish property is found at D-154. The D portion of the Journal refers to actions of the House of Deputies. This entry is for the September 19, 1979 proceedings in the House of Deputies. The entry on this page of the journal of the House of Deputies proceedings (D-154) reads in its entirety as follows:

Retention of Parish Property

The Committee on Canons presented its Report #32 on Resolution D-24, and recommended concurrence with House of Bishops Messages #75 and #76.

The House concurred
(See pg. C-150)

43. This entry, when compared with C-150, the place it references, creates a problem as noted, *supra*: the Dennis Canon is nowhere to be found! The above-quoted entry does not contain the text of what they adopted in the House of Deputies on that date. Were amendments made? Did one or more committees alter the text of the resolution from the House of Bishops? What was the text of the resolutions from the House of Bishops? Was the language identical to what the House of Bishops adopted? What in fact did they adopt that day, if anything? The record is silent on these points. With no text of the resolution set forth in these printed minutes of the House of Deputies, and no summary of the resolution, all of these questions are left open, and we can only

speculate as to the answers. But one thing is indisputable: when we look at the reference cited at D-154 "(See pg. C-150)" we find no Dennis Canon, but rather something quite different.

44. The quoted reference in parentheses to C-150 (the citation to the report of concurrent actions of both Houses) as indicated, *supra*, shows concurrent action only as to the technical correction amendment (HB # 78) which contains no trust provision, as mentioned. Only HB # 76 and HB# 75 had any reference to the trust provision of the Dennis Canon, and that is absent from the "concurrent actions" recorded at C-150 of the 1979 Journal.

45. The Dennis Canon placing a trust on church property is, for that matter, set forth nowhere else in the 1979 Journal except in the verbatim recitation of B-60.

46. Given the cross reference to the adoption of a wholly different amendment and the fact that the actual language before the House of Deputies is not quoted in the journal of the House of Deputies proceedings at D-154 or anywhere else, the official record of the General Convention of 1979 supports the conclusion that the House of Deputies never adopted the Dennis Canon.

47. An official record cannot prove the negative. Indeed one can never prove the negative. It is impossible to ever prove that something did *not* happen, but we can state with certainty that the evidence of this canon passing both houses of the General Convention is *not* contained in the Journal of that General Convention.

48. This apparent defect in the convention Journal is noted in passing in a brief comment in the Annotated Canons of the Church published by the official publishing house of the church. I White & Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America*, p. 296 (1981) comments on this problem that, "The account of this legislation [the Dennis Canon] does not appear under "Concurrent Actions." The reference in the index is to a related

action.”

49. How does one decide whether this canon was properly adopted? The official Journal of the convention is the authoritative source of what happened there. The fact that the “Dennis Canon” is in the latest published copy of the canons says nothing about its validity. If it never was adopted by both Houses, it is not a canon of the church. The official Journal of the convention’s proceedings does not show it as having been adopted as a concurrent action of both Houses. Hence, the conclusion to draw is that the published book of the canons contains two proposed canons, which were never adopted according to the official Journal of the convention.

THE RECORDS OF THE 1979 GENERAL CONVENTION
AS CONTAINED IN ARCHIVES OF THE CHURCH
GIVE NO EVIDENCE OF THE ADOPTION OF THE DENNIS CANON

50. Fr. George Conger in his affidavit made a part of this motion delved into the documents of the 1979 General Convention contained in the Episcopal Church archives to investigate the controversy over the disputed adoption of the Dennis Canon.

51. According to his affidavit, he visited the Archives on August 1, 2007 and did his research.

52. After an exhaustive search, he discovered no original records to support the concurrent adoption of the Dennis Canon by the House of Deputies. As he notes in his affidavit, many minutes are simply missing from the archives, including all of the minutes of the House of Deputies, the house whose summary of the minutes in the Journal refer to a different canon in Concurrent Actions, and not to the Dennis Canon.

53. Not only are the minutes of both houses of the General Convention missing, the resolutions which these houses adopted are likewise not in the Archives, as indicated

by Fr. Conger.

54. The documents which he found and which formed the basis of his affidavit were a part of a committee report that dealt with the Dennis Canon, and even the actions of the House of Bishops in adopting the Dennis Canon cannot be demonstrated from the original records in the archives, since those original minutes, like the original minutes of the House of Deputies, are missing.

55. The documents which he did locate do not give any additional information to support the view that the House of Deputies adopted the resolution.

56. His findings would seem to support the statement of the Journal which speaks by way of omission. Absent a positive statement in the official record showing that it was adopted, the official archival record of the Episcopal Church appears to buttress the silence of the Journal indicating a lack of concurrent adoption of this disputed Dennis Canon.

DEFENDANT HAS RAISED A FACTUAL QUESTION, WHICH IS UNREFUTED BY THE
PLAINTIFF, THAT THE EPISCOPAL CHURCH NEVER ADOPTED THE DENNIS
CANON AND THUS HAS NO TRUST ON DEFENDANT'S PROPERTY

57. The plaintiff asserts the Dennis Canon as the basis for their claim that when Church of the Good Shepherd left the Episcopal Church that they may seize its property from the parish. The Church of the Good Shepherd denies that there is such a Dennis Canon. Defendant has made a factual showing that there is no such canon; plaintiff has not made any factual showing that there is such a thing. The Plaintiff has the burden of doing so on a motion for summary judgement.

58. Fr. Matt Kennedy in his accompanying affidavit denies that the church is subject to a trust and denies that the Dennis Canon was adopted.

59. Absent a factual refutation of these facts, the motion of the Diocese for summary judgement must fail. Summary judgement should be granted to the Church of the Good Shepherd on the first three causes of action of plaintiff's complaint, unless the plaintiff can in reply allege something by way of facts which we have overlooked to demonstrate the due and proper adoption of the Dennis Canon, and so as to raise a triable question of fact.

60. It will not be sufficient to defeat our cross-motion to dismiss and for summary judgement by bald conclusions and assertions that they have a Dennis Canon as they have asserted in their complaint and in their motion papers, or that the Court of Appeals has previously referred to the Dennis Canon in litigation where its existence was not controverted. It matters not whether those asserting the existence of the Dennis Canon are bishops, chancellors, or seminary professors of the Episcopal Church. Absent facts, such assertions from supposed experts are mere puffery, and will not defeat summary judgement.

61. In the alternative to dismissal or a grant of summary judgement to the Church of the Good Shepherd as to the first three causes of action in Plaintiff's complaint, the court should deny their motion for summary judgement.

62. At best, the Episcopal Church in 1979 claims that it adopted this church law on which the claim of the diocese to the parish property turns, and this is a factual question. Did the Episcopal Church adopt the Dennis Canon or not? This is not a question of law, but of fact. Since as Fr. Kennedy in his affidavit notes that there are no courts of any kind in the Episcopal Church to determine or adjudicate this question, only this court can do so.

63. Hence plaintiff's motion for summary judgement should be denied.

**CROSS-MOTION TO DISMISS UNDER CPLR §3211 AND FOR SUMMARY JUDGMENT
UNDER CPLR §3212 ON PLAINTIFF'S 4TH CAUSE OF ACTION**

64. The plaintiff in its moving papers here indicated that they will bring a motion at some later date with respect to the 4th Cause of Action, apparently ignoring the scheduling order of the court. See, ¶2 of Fellow's affidavit, whereby plaintiff says that "the fourth cause of action relates to a trust of which defendant is a beneficiary, and will be the subject of a *separation* motion." (*emphasis supplied*) It appears that the word "separation" here is a typographical error for "separate." If that be so, apparently plaintiff intends to make some other dispositive motion concerning this cause of action at a later date.

65. Irrespective of plaintiff's intentions, the plaintiff in its 4th cause of action is asking this court to direct that the income from this estate be paid to the plaintiff, or in the alternative be paid to Christ Church Binghamton. However in doing so plaintiff has neglected to name the executor of the estate, the trustee of the trust, and Christ Church Binghamton as necessary parties to this litigation. See, the affidavit of Fr. Matt Kennedy.

66. Plaintiff in its 4th cause of action is asking that the court direct the trustee of the trust established by Mr. Branan's will (the trustee neither being named nor served in this proceeding) to direct the moneys of that trust to go to Christ Church Binghamton (also not a party to this proceeding). A copy of the Will of Robert A. Branan is annexed to the affidavit of Matt Kennedy as Exhibit "E"

67. Plaintiff on the face of these pleading shows no legal interest in this estate for itself, and shows no reason why plaintiff should be permitted to litigate this matter on behalf of Christ Church Binghamton . Upon information and belief, Christ Church Binghamton is still a going concern and fully capable of asserting its own legal interest, if any, with respect to this trust.

68. The 4th Cause of Action should be dismissed under CPLR §3211(3) because

the plaintiff is “the party asserting the cause of action [which] has not legal capacity to sue” on behalf of Christ Church Binghamton.

69. The 4th Cause of Action should also be dismissed under CPLR §3211(7) because it is unclear under any theory of law that plaintiff can make out any cause of action against defendant and thus the plaintiff’s 4th Cause of Action “fails to state a cause of action.”

70. And the 4th Cause of Action should also be dismissed under CPLR §3211(10) because “the court should not proceed in the absence of a person who should be a party,” to wit, the executor of the estate, the trustee of the trust, and Christ Church Binghamton.

71. Further, the Branam Estate was probated in surrogate’s court, and that is the appropriate forum in which to bring any action or motion with respect to the disposition of the income of the estate, the construction of the will, or any directions to the trustee with respect to the trust which is established in the will.

72. As the accompanying affidavit of Matthew Kennedy sets forth in greater detail, the Branam will was for the benefit of the defendant, and no other party, and hence, in addition to the grounds for dismissal under CPLR §3211, summary judgement is appropriate under CPLR §3212 pursuant to the affirmative defenses EIGHTH through TWELFTH inclusive.

MOTION FOR PRECLUSION AND REMEDIES FOR FAILURE TO PRODUCE

73. The court in a letter by way of a scheduling order dated July 15, 2008 directed the parties to complete depositions on or before October 31, 2008 and for the plaintiff to file a trial not of issue on or before November 17, 2008. A copy of the letter of the court dated July 15, 2008 is annexed to a part of plaintiff’s moving papers on their

motion, to wit, the affidavit of Jonathan B. Fellows sworn to November 20, 2008, as Exhibit "B".

74. The discovery is not complete in this action due in no fault to the defendant. The plaintiff was, according to the court's scheduling order, to have filed a trial note of issue by November 17, 2008. The plaintiff admits that discovery is not finished when Mr. Fellows says in his affidavit in ¶19 states that "it is quite possible that the Diocese will need a deposition of a representative of Good Shepherd familiar with its finances in connection with the cause of action for an accounting."

75. The plaintiff has not complied with the discovery demands of the defendant and the plaintiff did not object to any of these demands.

76. Plaintiff also in response to these demands produced a box containing 2602 Bates numbered pages. Much of that material is not responsive to our demand. Like the fat 4" thick stack of diocesan journals attached to Bishop Adams moving papers as their the two volume Exhibit "G" most of this material adds nothing to this case.

77. In the plaintiff's answer to our demand for these records, the plaintiff said in its answer to the request in ¶13 that "defendant will produce documents of its bodies, located after a reasonable search of its records, related to the assertion of an ownership interest by the Diocese in properties of parishes of the Diocese." Likewise in answer to Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49 the plaintiff similarly indicates that they will produce materials in the future. This has not been done to date.

78. In a chambers conference on November 26, 2008 at which we requested more time for additional discovery, plaintiff's counsel told the court that 2602 Bates numbered pages in a box delivered to us is their answer to this request. This does not appear to be so. The transmittal letter with these 2602 Bates numbered pages in a box did not so indicate that it was in response to our Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49, and a review of the documents reveals these to be not

responsive. Plaintiff has attached numerous letters between the lawyers as exhibits in this motion, for little apparent purpose, but none of this correspondence tells the court or the defendant what if any response the plaintiff has to Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49.

79. Much of the 2602 pages are copies of pages of financial data or copies material from the diocesan journal, much like the two volume 4" thick Exhibit "G" which accompanies the affidavit of Gladstone Adams. This bulk of extraneous exhibits attached to plaintiff's motion papers add nothing to this case other than to increase the size of the record, and of course the legal cost and time needed to deal with this material.

80. Depending on the court's ruling with respect to summary judgment on the Dennis Canon as to whether there is a question of fact as to its adoption constituting a complete or partial defense to this action by plaintiff, the defendant will need additional discovery of church records and persons who will claim on plaintiff's behalf that the Dennis Canon was adopted.

81. This additional discovery was requested with respect to the depositions of church officials, specifically Katherine Jefferts-Schori, (Presiding Bishop of the Episcopal Church), David Booth Beers, Esq. (Chancellor to the Presiding Bishop of the Episcopal Church), and Stacy Sauls (Chairman of the Property Task Force of the Episcopal Church) which were requested when defendant served its discovery demand for EBTs, and in the Demand to Produce for which the plaintiff indicates that they will produce materials in the future, as set forth, *supra*, and in the discovery demand for the plaintiff's expert witnesses. None of this relevant discovery has been furnished to the defendant.

MOTION TO STRIKE THE TRIAL NOTE OF ISSUE

82. The plaintiff on December 4, 2008 signed a statement of readiness and filed

with the court a trial note of issue, albeit past the court's scheduling order deadline of November 17, 2008.

83. If one party files the trial note of issue prematurely when discovery is not complete and the case is not ready for trial, the other party may move to strike that note of issue within 20 days of the service of the note of issue. Siegel, *New York Practice*, (4th Ed. 2005) p. 616.

84. For the reasons set forth in the preceding part of these motion papers for preclusion and remedies for failure to produce, we request the court vacate the note of issue until such time as discovery is complete.

WHEREFORE, your deponent respectfully requests that this Court grant an Order to deny plaintiff's motion for summary judgement as to the first three causes of action, to dismiss all of plaintiff's causes of action, for summary judgement on all of plaintiff's causes of action, to compel discovery or be precluded and for presumptions and inferences against the plaintiff by virtue of the failure to furnish discovery, to strike the note of issue, plus costs and disbursements on the action and motion together, and for any and all such further relief as this Court deems just and proper.

Dated: December 9, 2008

RAYMOND J. DAGUE