

**Naegele v Archdiocese of New York**

2005 NY Slip Op 30228(U)

October 18, 2005

Supreme Court, New York County

Docket Number:

Judge: Joan Madden

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

HON. JOAN A. MADDEN

PRESENT: \_\_\_\_\_  
J.S.C. Justice

PART 11

0110114/2004

NAEGELE, JANET  
VS  
ARCHDIOCESE OF NEW YORK

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

SEQ 1  
DISMISS ACTION

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is resolved in accordance with the amended decision and order.*

FILED

OCT 19 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: October 18, 2005

Check one:  FINAL DISPOSITION

*[Signature]*  
J.S.C.  
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
JANET NAEGELE, As Executor of the Estate  
of ROSE CALE,

Plaintiff,

--against-

Index No.: 110114/04

THE ARCHDIOCESE OF NEW YORK and  
MONSIGNOR JOHN G. WOOLSEY,

Defendants.

-----X

**MADDEN, J.:**

Motion sequence numbers 001 and 002 are consolidate for disposition.

This is an action brought by the Estate of Rose Cale for civil redress of allegedly improper conduct by the pastor of Ms. Cale's Catholic church, defendant Monsignor John G. Woolsey, the recipient of over \$490,000 in inter vivos gifts of cash and stock from Ms. Cale during the last three years of her life. Plaintiff also alleges that Monsignor Woolsey misappropriated for his own personal use a portion of the \$241,500 in charitable donations Ms. Cale made directly to her parish church.

The Archdiocese of New York moves to dismiss the First Amended Complaint, pursuant to CPLR 3211(a)(5) and (7), on the grounds that the claims fail to state a cause of action and/or are time-barred. Plaintiff cross-moves for leave to add St. John the Martyr Church as a defendant, and to further amend her complaint to set forth a cause of action for breach of fiduciary duty and to clarify certain factual allegations. By separate order to show cause (seq. no. 002), the Archdiocese moves, pursuant to CPLR 325(e), to transfer this action to Surrogate's Court. The Archdiocese also moves to strike portions of plaintiff's reply memorandum of law in

support of her cross motion.

### **FACTUAL ALLEGATIONS AND LEGAL CLAIMS**

The following factual allegations as stated in the First Amended Complaint (FAC), for the purposes of this motion, are accepted as true. Plaintiff is the executor of the Estate of Rose Cale. Ms. Cale died testate on January 12, 2003 at the age of 88. Defendant Monsignor John G. Woolsey is an ordained priest of the Roman Catholic Church. He is the pastor of St. John the Martyr Church (St. John's), a parish located within the Archdiocese of New York.

Ms. Cale was a devout Catholic, who attended church almost every day for the twenty-year period prior to her death. Ms. Cale never married, and lived her entire life with her brother Frank Cale and was a parishioner at St. John's from 1997, when she was 82, until the time of her death. Ms. Cale first met Monsignor Woolsey when she became a member of his parish, and saw him thereafter on a regular basis until her death. In addition to administering holy communion and the sacrament of confession to Ms. Cale, Monsignor Woolsey performed the funeral mass for Ms. Cale's brother, Dominic, and gave her "certain privileges within [St. John's] during religious rites." (FAC) ¶ 28. Ms. Cale reposed great trust and confidence in Monsignor Woolsey, and relied upon him for spiritual guidance and advice on the conduct of her day-to-day life. Monsignor Cale saw Ms. Cale in St. John's at least three to four times per week. Over time, Monsignor Woolsey interjected himself into Ms. Cale's daily affairs of both a personal and business nature. He accompanied her to doctor appointments, they dined together, and Monsignor Woolsey signed off on correspondence to Ms. Woolsey with "...Love, Monsignor Woolsey" (FAC ¶ 34).

Plaintiff alleges that in 1999, after Monsignor Woolsey told Ms. Cale about his hopes and

dream to purchase a condominium on the Jersey Shore, Ms. Cale gave him \$100,000 to purchase a condominium. In July of that same year, plaintiff claims Ms. Cale, at Monsignor Woolsey's urging, moved her stock portfolio from her own broker of 20 years, Prudential Securities, to the broker and firm that managed Monsignor Woolsey's personal stock portfolio. It is further alleged that during 1999, Monsignor Woolsey caused Ms. Cale to sign and transfer to him personally various stocks in her portfolio and to transfer certain other stocks into a joint account in both their names with a right of survivorship. From 1999 to 2001, allegedly at Monsignor Woolsey's direction and behest, Ms. Cale either paid on his behalf or gave monies to Monsignor Woolsey for payment of numerous personal expenses incurred by him.

In May 2000, plaintiff alleges that Monsignor Woolsey convinced Ms. Cale to use a lawyer with whom he was acquainted to prepare a last will and testament which was drafted and named Monsignor Woolsey as executor and sole beneficiary. This will was executed at St. John's rectory, and witnessed by other church personnel, including Father Baker, another parish priest. The 2000 will made no provision for Ms. Cale's 84-year old brother Frank, who had no income other than social security, and was significantly hearing impaired. The 2000 will was subsequently revoked by Ms. Cale and superceded by a will executed on December 12, 2002, allegedly when the significant ramifications of Monsignor Woolsey's influence and conduct was brought to Ms. Cale's attention. Unlike the 2000 will, the 2002 will included significant bequests to Ms. Cale's brother Frank.

Plaintiff further alleges that Monsignor Woolsey specifically told Ms. Cale to keep secret from her friends, relatives and advisors the transfers that had been and were being made to him. In all, during the five-year period in which Ms. Cale knew Monsignor Woolsey, he caused her to

transfer to him personally or for his benefit, stock and cash with an aggregate value of at least \$490,000. The total gross value of her estate was \$695,430, exclusive of the money and assets given to Monsignor Woolsey.

Plaintiff alleges that in July 2003, she met with Monsignor Woolsey and requested the return of the stock and cash he had received from Ms. Cale. Monsignor Woolsey refused this request, and stated that he had only received \$80,000 in perfectly valid gifts. The Archdiocese also absolved itself of responsibility, claiming that Monsignor Woolsey was an independent contractor.

Plaintiff further alleges that Ms. Cale made charitable contributions to St. John's from 1998 to 2001 totaling over \$241,500 based on knowingly false representations by Monsignor Woolsey that these contributions would cover certain expenditures or special projects, when in fact Monsignor Woolsey misappropriated a portion of these contributions for his own personal use.

This action was commenced on July 12, 2004. The First Amended Complaint asserts three causes of action as against Monsignor Woolsey for: (1) rescission of the inter vivos gifts based on undue influence; (2) fraud with respect to his alleged misappropriation of a portion of Ms. Cale's charitable contributions to St. John's; and (3) unjust enrichment and imposition of a constructive trust.

The Archdiocese is named as a defendant on a respondeat superior and/or agency theory, and sued directly on a claim of negligent supervision of Monsignor Woolsey. The First Amended Complaint alleges that Monsignor Woolsey was an employee of the Archdiocese and was subject to its supervision and direction. The Archdiocese promulgates the rules which

govern the conduct of pastors and priests in all parishes in New York State, including St. John's, and has the power to appoint and remove pastors and priests. The Archdiocese holds its pastors and priests out as agents of the Archdiocese and the Catholic Church generally, and pastors and priests have apparent authority on behalf of the Archdiocese to conduct campaigns for charitable contributions, including the annual fund raiser on behalf of the Archdiocese known as the "Bishop's Appeal." The Archdiocese instructs its pastors and priests on methods to promote charitable donations by parishioners and sets the compensation level for all pastors and priests. Plaintiff alleges, on information and belief, that "pastors and priests within the Archdiocese have used their positions in their parishes to obtain for their own personal use significant sums of money from parishioners." FAC ¶ 15. "[D]espite the Archdiocese's knowledge that certain pastors and priests have accepted large sums of money individually from parishioners it has taken no steps to regulate, curb or eliminate this practice." Id. ¶ 16.

In her proposed Second Amended Complaint (SAC), plaintiff alleges that the payments Ms. Cale made to and on behalf of Monsignor Woolsey in connection with numerous personal expenses incurred by Monsignor Woolsey were from 1999 to 2002, as opposed to 2001, as originally plead. Compare FAC ¶ 44 to SAC ¶ 51. Plaintiff also makes these additional factual allegations:

--St. John's is an unincorporated association, and/or not-for profit corporation or a religious corporation, that is dominated and controlled by the Archdiocese (SAC ¶ 6);

--priests and pastors within the Archdiocese receive modest remuneration and small pensions, even though the many of them have not taken vows of poverty (id. ¶17);

--it was foreseeable to the Archdiocese, that in seeking donations for the church,

its priests and pastors might well seek funds for their personal use (id. ¶ 18);

--Ms. Cale frequently visited with Monsignor Woolsey in St. John's rectory (id. ¶ 32); and

--on occasion, Monsignor Woolsey requested that Ms. Cale make contributions to St. John's at the same time he solicited money for himself (id. ¶ 52).

The proposed Second Amended Complaint purports to add St. John's as a defendant and add a claim for breach of fiduciary duty against all defendants. Finally, plaintiff alleges that, "[i]n light of Monsignor Woolsey's continuing relationship with Miss Cale until the time of her death, the statute of limitations is tolled until at least January 12, 2003, the day of Miss Cale's death." SAC ¶ 65.

## DISCUSSION

### **Transfer to Surrogate's Court**

The Archdiocese argues that this action should be transferred to the Surrogate's Court of New York County pursuant to CPLR 325 (e), because there is a prior pending proceeding in that court addressing the same issues as is raised in this action. Plaintiff opposes transfer, contending that this action should be retained here in Supreme Court on the grounds that it presents issues beyond the scope of the proceeding brought in Surrogate's Court and that court is better equipped to handle such issues.

CPLR 325 (e) provides that an action pending in the Supreme Court that affects the administration of a decedent's estate, which is within the jurisdiction of the Surrogate's Court, may be removed from the Supreme to the Surrogate's Court upon the prior order of the Surrogate's Court. In October 2004, Monsignor Woolsey filed an order to show cause in Surrogate's Court seeking that court's consent to receive the transfer of this action, pursuant to

SCPA 501(1)(b) and 209(3). It appears that the Surrogate has not yet rendered a decision on this application. Since consent from the Surrogate's Court is not required in order to effect a transfer, despite the language of the CPLR (Birnbaum v Central Trust Co., 156 AD2d 309 [1<sup>st</sup> Dept 1989]; Berger v Ickovicz, 175 Misc 2d 677, 679 [Sup Ct, Kings County 1998]), this court will not delay a decision on this issue.

Neither the limited proceedings to date in Surrogate's Court, nor the nature of the claims asserted in this action require the transfer of this action to Surrogate's Court. Plaintiff's order to show cause in Surrogate's Court sought, pursuant to SCPA 2103, an examination of Monsignor Woolsey and certain document discovery. The Surrogate struck the provision in the order to show cause seeking document production. When the parties appeared on the March 19th return date, counsel for Monsignor Woolsey agreed to produce his client for a deposition. A deposition of Monsignor Woolsey was conducted on May 5, 2004, and the scope of the deposition was limited to his possession of assets of the Estate.

Although the Surrogate's Court has the power to determine ownership and the right to possession of estate property in the hands of a third person (SCPA 2103[1][c]), plaintiff has elected to file the instant action in this Court seeking such relief, apparently, in part due to the nature of the claims against the Archdiocese. This action does not concern the interpretation of the EPTL, nor does it directly affect the execution of a testamentary plan (see, e.g., Hoffman v Sitkoff, 297 AD2d 205 [1st Dept 2002]), nor does it concern competing claims to ownership of a decedent's limited partnership interests, as in Carmel v Shor (250 AD2d 475 [1<sup>st</sup> Dept 1998]). Furthermore, it cannot be said on this record that the Surrogate is familiar with the factual details or history of the plaintiff's claims or uniquely suited to resolve the dispute. This action merely

asserts ordinary contract and tort claims, which may result in additional funds flowing into the Estate from either Monsignor Woolsey, the Archdiocese or St. John's. As such, it presents issues more familiar to the Supreme Court. See, e.g., Berger v Ickovicz, 175 Misc 2d at 680-81; Estate of Passeroff, NYLJ, Oct. 6, 1995, at 32, col 6 (Surr Ct, Nassau County).

### **Amendment of the Complaint**

Amendments of pleadings are freely granted in the absence of surprise or prejudice to the opposing party. CPLR 3025 (b); Edenwald Contracting Co. v City of New York, 60 NY2d 957, 959 (1983); Martin v Briggs, 235 AD2d 192, 199 (1st Dept 1997). “[T]o conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated.” Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354-55 (1st Dept 2005), citing Megaris Furs v Gimbel Bros., 172 AD2d 209 (1st Dept 1991). Accordingly, “a motion for leave to amend a pleading ‘must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.’” Zaid Theatre Corp., *supra*; quoting Nab-Tern Constructors v City of New York, 123 AD2d 571, 572 (1st Dept 1986).

The submissions indicate that no prejudice or surprise is shown, the amendment is made at an early stage of the action, and plaintiff has satisfied the requirement of evidentiary proof to support the amendment with a verification of the new pleading. See Morgan v Prospect Park Assocs. Holdings, L.P., 251 AD2d 306 (2d Dept 1998); Frost v Monter, 202 AD2d 632 (2d Dept 1994). However, leave may not be granted where the amended pleading plainly fails to state a cause of action and, thus, lacks merit. Thomas Crimmins Contracting Co. v City of New York, 74 NY2d 166, 170 (1989); Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590, 591 (1st Dept 1990). As discussed below, plaintiff has failed to state a cause of action against the

Archdiocese for breach of any fiduciary duty to Ms. Cale, and that claim must be disallowed.

### **Breach of Fiduciary Duty**

Plaintiff seeks to amend her complaint to add a new fourth cause of action against Monsignor Woolsey, the Archdiocese and St. John's based on breach of fiduciary duty, and is seeking compensatory and punitive damages. Under New York law, "a fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Mandelblatt v Devon Stores, 132 AD2d 162, 168 (1st Dept 1987), citing Restatement [Second] of Torts § 874, Comment a. However, plaintiff has failed to sufficiently allege any facts that would give rise to a fiduciary relationship between Ms. Cale and the Archdiocese. New York courts have rejected claims that such a duty exists between a catholic diocese and a parishioner solely on the basis of the diocese's status as the religious organization governing the Roman Catholic churches within its jurisdiction. Doe v Holy See (State of Vatican City), 17 AD3d 793, 795 (3d Dept 2005); Doe v Holy See (State of Vatican City), 6 AD3d 1228, 1229 (4th Dept 2004); Mars v Diocese of Rochester, 196 Misc 2d 349, 351-52 (Sup Ct, Monroe County 2003), aff'd 6 AD3d 1120 (4th Dept), lv denied 3 NY3d 608 (2004); see also Doe v Norwich Roman Catholic Diocesan Corp., 268 F Supp 2d 139, 149 (D Conn 2003).

Plaintiff relies on Martinelli v Bridgeport Roman Catholic Diocesan Corp. (196 F3d 409 [2d Cir 1999]), in which the Second Circuit determined that it was possible for the jury in that case to find a fiduciary relationship between the Bridgeport diocese and a parishioner who had been abused by one of its priests as a child. As Judge Goettel noted in Doe v Norwich Roman Catholic Diocesan Corp., supra, the plaintiff Martinelli was connected to the diocese in many

ways, none of which are present in the case at bar.

For example, the diocese ran the high school that Martinelli attended, knew that Martinelli participated with a group of boys in sessions with Father Brett who acted as a mentor and spiritual advisor, encouraged Brett to work with the youth of the church, and received reports from other victims whom Brett had abused. Id. at 429-30. The court determined that through Martinelli's involvement in "particular activities . . . , including those which the [d]iocese sponsored, [he] had a particularly close relationship with the [d]iocese from which a fiduciary duty might arise," and because the diocese had received information about Brett's misconduct, a jury could have determined that the diocese had breached that duty. Id.

268 F Supp 2d at 149. Even actual knowledge by the Archdiocese of prior misconduct of a similar nature by Monsignor Woolsey does not, in and of itself, create a fiduciary relationship between the Archdiocese and Ms. Cale. Mars v Diocese of Rochester, 196 Misc 2d at 351-52.

Accordingly, leave to amend the complaint to add a claim for breach of fiduciary duty against the Archdiocese is denied. The court makes no ruling on the propriety of this claim as against St. John's, which has not been served with process, and which is alleged to be a separate unincorporated association or religious corporation.

### **Negligent Supervision**

The Archdiocese moves to dismiss the plaintiff's other direct claim against the Archdiocese, which is based on a theory of negligent supervision of Mon. Woolsey.<sup>1</sup> The Archdiocese argues that this claim is both time-barred and would violate the Free Exercise of Religion clause of the First Amendment by requiring the court to delve into ecclesiastical matters.

The statute of limitations for this claim is three years. CLPR 214 (4); Green v Emmanuel

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<sup>1</sup>The Archdiocese does not concede that Monsignor Woolsey was an employee of the Archdiocese.

African Methodist Episcopal Church, 278 AD2d 132 (1<sup>st</sup> Dept 2000); Jarvis v Nation of Islam, 251 AD2d 116, 117 (1st Dept 1998); Siagha v Salant-Jerome, Inc., 249 AD2d 11 (1st Dept), lv dismissed 92 NY2d 946 (1998). This action was commenced on July 12, 2004.

The following acts, which occurred in 1999, are time-barred absent some tolling provision: (1) the gift of \$100K to purchase a condominium; (2) the movement of Ms. Cale's stock portfolio to Monsignor Woolsey's broker; (3) the transfer of stocks from her portfolio to his; and (4) the transfer of additional stocks in Ms. Cale's portfolio into a joint account in both their names with a right of survivorship. Plaintiff argues that her claim based on the transfer of stocks to a joint account accrued upon Ms. Cale's death, when the account passed 100% to Monsignor Woolsey. However, it was at the time of transfer that Monsignor Woolsey gained control over those stocks. See Banking Law § 675.

However, this does not end the inquiry, as the proposed Second Amended Complaint alleges, on information and belief, that from 1999 to 2002, at Monsignor Woolsey's direction and behest, Ms. Cale make payments to and on behalf of Monsignor Woolsey to pay for numerous personal expenses incurred by him. It is also alleged that, during 2002, Monsignor Woolsey repeatedly told Ms. Cale that he wished to retire early and needed additional money to supplement his pension to enable him to live the lifestyle to which he had grown accustomed. See SAC ¶¶ 51, 57. While the Archdiocese claims that these allegations were inserted only to avoid the statute of limitations, they are supported by a verification of the pleading (CPLR 3020[a]), and cannot be discounted prior to discovery on a motion pursuant to CPLR 3211. For the foregoing reasons, with the exception of the claims involving transfers of money or property from Ms. Cale to Monsignor Woolsey after July 12, 2001, unless the statute of limitations is

tolled, the bulk of plaintiff's claims against the Archdiocese are time-barred.

Plaintiff's claim that the statute of limitations is tolled until Ms. Cale's death on January 12, 2003 due to her continuing relationship with Monsignor Woolsey is unavailing. There is no toll for religious duress (Doe v Holy See (State of Vatican City), 17 AD3d at 796-97), nor does the continuous treatment doctrine, applicable to malpractice actions delayed by the continuing treatment or representation of a patient or client by professionals such as doctors, lawyers, architects and accountants, apply here. While a "defendant may be estopped to plead the Statute of Limitations where the plaintiff was induced by fraud, misrepresentations or deception from filing a timely action," (Simcuski v Saeli, 44 NY2d 442, 448-49 [1978]), where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing an action within the statute of limitations, the courts have invoked estoppel only where there was a fiduciary relationship which gave defendant an obligation to inform plaintiff of facts underlying the claim. Heffernan v Marine Midland Bank, 283 AD2d 337, 338 (1st Dept 2001). As discussed above, the plaintiff has failed to allege conduct on the part of the Archdiocese that created a fiduciary relationship between it and Ms. Cale, and the plaintiff does not allege that the Archdiocese made any actual misrepresentations that prevented either Ms. Cale or her executor from commencing an action against the Archdiocese within the statute of limitations.

Accordingly, to the extent that plaintiff has alleged that Ms. Cale made payments to and on behalf of Monsignor Woolsey after July 12, 2001 to pay for personal expenses incurred by him and those payments were the result of undue influence or other wrongful conduct on the part of Monsignor Woolsey, the claim for negligent supervision as against the Archdiocese is not time-barred.

In order to prevail on a claim of negligent supervision, a plaintiff must establish that the employer knew or should have known of the employee's propensity to engage in the conduct at issue. Rodriguez v Terence Cardinal Cooke Health Care Center, 4 AD3d 147, 148 (1st Dept 2004), lv denied 4 NY3d 703 (2005); Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 (2d Dept), cert denied 522 US 967, lv dismissed 91 NY2d 848 (1997). To the extent that the plaintiff attempts to satisfy the constructive knowledge requirement of this cause of action by alleging that the Archdiocese knew that priests have used their positions to obtain significant sums from parishioners for their own personal use, and despite, this knowledge, the Archdiocese failed to take steps to regulate or eliminate this practice, it violates the Free Exercise of Religion clause of the First Amendment. This argument necessarily involves delving into the Archdiocese's policies and practices concerning fund raising by its priests, and is akin to a claim for clergy malpractice, would amount to excessive entanglement by government into ecclesiastical matters. Wende C. v United Methodist Church, 4 NY3d 293, cert denied \_\_\_ S Ct \_\_\_, 73 USLW 3727 (2005); Langford v Roman Catholic Diocese of Brooklyn, 271 AD2d 494 (2d Dept 2000); see also Schmidt v Bishop, 779 F Supp 321 (SD NY 1991).

However, "[t]he First Amendment does not grant religious organizations absolute immunity from tort liability." Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d at 165. "Religious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct." Id. In Kenneth R., supra, the Second Department refused to dismiss a claim against the Diocese of Brooklyn for the negligent supervision of a priest who sexually abused a minor parishioner where it was alleged that the Diocese acquired actual or constructive notice of the priest's propensity to sexually abuse

children from statements by the infant plaintiff and the priest himself to other priests. To the extent that Ms. Cale's executor may be able to establish through discovery or otherwise that the Archdiocese had actual or constructive knowledge about Monsignor Woolsey's propensity to exert undue influence over parishioners to obtain gifts of money or property, the plaintiff may have a cause of action sounding in negligent supervision that does not run afoul of the First Amendment. Cf. Paul J.H. v Lum, 291 AD2d 894 (4th Dept 2002).

### **Respondeat Superior/Vicarious Liability**

"[A]n employer may be held vicariously liable under the doctrine of respondeat superior for a tort committed by an employee in the course of the performance of his or her duties, even if such duties are carried out in an irregular fashion or with disregard of instructions." Adams v New York City Transit Auth., 211 AD2d 285, 294 (1st Dept 1995), affd 88 NY2d 116 (1996), citing Riviello v Waldron, 47 NY2d at 302-303; see also N.X. v Cabrini Medical Center, 97 NY2d 247, 251 (2002). However, in order for liability to attach, the tortious act must have in some way been effectuated to advance the employer's interest, and liability will not attach for acts done with a purpose foreign to the interests of the employer. Adams, 211 AD2d at 294; see also Judith M. v Sisters of Charity Hospital, 93 NY2d 932, 933 (1999).

In Riviello v Waldron, 47 NY2d at 302-303, the Court of Appeals ruled that in addition to acts undertaken at an employer's explicit direction, an employer is also responsible for "any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act." Id. at 303 (citation omitted). The Court also stated that because the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury. Id. at 303; see

also Young Bai Choi v D&D Novelities, Inc., 157 AD2d 777, 778 (2d Dept 1990) (application of doctrine is “heavily dependent on factual considerations”). However, the Court identified the following five factors to be weighed in determining whether the conduct of a particular employee falls within the permissible ambit of the employment: (1) the connection between the time, place and occasion for the act; (2) the history of the relationship between the employer and employee as spelled out in actual practice; (3) whether the act is one commonly done by such an employee; (4) the extent of departure from normal methods of performance; and (5) whether the specific act was one that the employer could reasonably have anticipated. Id. at 303-04.

The Archdiocese argues that vicarious liability does not attach as a matter of law, because Monsignor Woolsey’s alleged wrongful conduct in exercising undue influence to solicit gifts from Ms. Cale was neither within the scope of his duties as a Catholic pastor nor related to the furtherance of the interests of the Archdiocese. Plaintiff, on the other hand, argues that a jury conclude that Monsignor Woolsey was acting within the scope of his duties as a priest and a pastor, because one of the functions of any priest is to raise money for his church by way of obtaining donations, and that donation boxes, passing the collection plate, tithing and fundraising are timeless practices of the Catholic Church.

Clearly the relationship between Ms. Cale and Monsignor Woolsey, as alleged in the complaint, was not strictly personal. It initially arose as a result of Monsignor Woolsey’s status as the pastor of Ms. Cale’s new church, developed into one where Monsignor Woolsey offered her spiritual guidance, and eventually evolved into a personal friendship. It may also be the case that the alleged pressure Monsignor Woolsey exerted on Ms. Cale occurred while the two were physically present on Church property, and under circumstances where Monsignor Woolsey was

in a position of spiritual advisor to Ms. Cale, such as when Ms. Cale attended mass or visited with Monsignor Woolsey in the rectory. See SAC ¶¶ 30-32. Furthermore, it was part of Monsignor Woolsey's duties as the pastor of St. John the Martyr to solicit charitable contributions both for St. John's and directly on behalf of the Archdiocese during the annual "Bishop's Appeal." Plaintiff alleges, on information and belief, that Monsignor Woolsey requested that Ms. Cale make contributions to St. John's at the same time he requested money or property for himself. The cases relied upon by the Archdiocese involve sexual assaults of a minor parishioner by a priest and are distinguishable as a sexual assault is an act committed for purely personal motives and represents an obvious departure from the normal duties of a priest (Paul J.H. v Lum, 291 AD2d at 895; Joshua S. v Casey, 206 AD2d 839 [4th Dept 1994]; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d at 161). In the instant case, a jury could conclude that the Monsignor's efforts to develop a personal relationship with Ms. Cale and his solicitation of personal gifts was so intertwined with his solicitation of charitable contributions on behalf of his church and/or the Archdiocese, such that his conduct could not be viewed as a total departure from the Archdiocese's business.

As to the last factor of foreseeability, it may be revealed through discovery that the Archdiocese had actual knowledge of prior instances of overreaching by Monsignor Woolsey. In any event, it is not necessary that the precise type of injury caused by the employee's act be foreseeable, only that the conduct is, in a general sense, reasonably foreseeable. Riviello, 47 NY2d at 304. Plaintiff cites to an article in the Chronicle of Philanthropy, a newspaper devoted to the nonprofit world, in which the claim is made that it is not unusual for wealthy donors to

develop a strong attachment to fund raisers who solicit charitable contributions from them.<sup>2</sup> In addition, plaintiff specifically alleges that pastors and priests within the Archdiocese receive low pay and have, in fact, used their positions in their parishes to obtain for their own personal use significant sums of money from parishioners. As the case law makes clear, respondeat superior liability can arise regardless of whether taking the money was appropriate or permitted by the Archdiocese. Since the court must accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any discernible legal theory (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Sheila C. v Povich, 11 AD3d 120, 122 [1st Dept 2004]), it cannot be said as a matter of law that the misconduct of which Monsignor Woolsey is accused was not generally foreseeable by the Archdiocese.

#### **Apparent Agency**

Plaintiff attempts to hold the Archdiocese responsible for Monsignor Woolsey's alleged misconduct on a theory of apparent agency. However, "[l]iability premised on apparent authority, usually raised in a business or contractual dispute context, arises where a third party reasonably relies upon the misrepresentation of an agent's authority [to act for a principal] through conduct of the principal." N.X. v Cabrini Medical Center, 97 NY2d at 252 n 3. Plaintiff fails to allege any conduct by the Archdiocese that misled Ms. Cale into believing that Monsignor Woolsey was acting on behalf of the Archdiocese when he allegedly solicited money and property for himself, and indeed, such could hardly be the case considering the alleged personal nature of the inter vivos gifts at issue herein. Accordingly, this claim, plead as part of

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<sup>2</sup>No determination is made as to whether the article is competent evidence.

the First Amended Complaint and parsed into a separate sixth cause of action in the proposed Second Amended Complaint, is legally deficient and must be dismissed.

#### **Motion to Strike Plaintiff's Reply Memorandum of Law**

The request to strike the reply memorandum of law purportedly filed in support of plaintiff's cross-motion is denied. The Archdiocese opposed the cross motion to amend by arguing the merits of the proposed amendments, which include new factual allegations that touch upon all of the causes of action asserted against the Archdiocese. Accordingly, it cannot be said that plaintiff's reply brief, is an unauthorized sur-reply to the Archdiocese's motion to dismiss.

#### **CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that the motion of defendant The Archdiocese of New York to dismiss the First Amended Complaint pursuant to CPLR 3211(a)(5) and (7) is granted in part, and denied in part, in accordance with this memorandum decision; and it is further

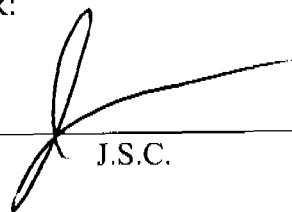
**ORDERED** that plaintiff's cross motion to supplement and amend the First Amended Complaint is granted, with the exception of the proposed fifth cause of action against The Archdiocese of New York based on a breach of fiduciary duty and the proposed sixth cause of action based on agency liability, and plaintiff is directed to file and serve an third amended complaint in accordance with this order within 20 days of the date of this order and to forthwith effect service of a supplemental summons and third amended complaint on St. John the Martyr

Church; and it is further

**ORDERED** that the motion (seq. no. 002) to transfer this action to Surrogate's Court, and to strike plaintiff's reply memorandum of law in support of her cross-motion to amend the complaint, is denied.

Dated: October 18 2005

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
OCT 19 2005  
NEW YORK  
COUNTY CLERK'S OFFICE