

<b>Metropolitan N.Y. Synod of the Evangelical Lutheran Church in Am. v Emanuel</b>
2019 NY Slip Op 30680(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 154771/2017
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM**

*Justice*

-----X	<b>INDEX NO.</b>	<u>154771/2017</u>
METROPOLITAN NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,	<b>MOTION DATE</b>	<u>11/08/2018, 11/08/2018</u>
Petitioner,	<b>MOTION SEQ. NO.</b>	<u>001 002</u>

- v -

CATHERINE EMANUEL, DENISE MINGO, RACHEL HARPER,  
ASHANTI HARPER, BARBARA CURTIS, SHIRLENE LITTLE,  
THELMA SCOTT, ROBERT WALTON

**DECISION, ORDER AND  
JUDGMENT**

Respondent.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 48

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Petitioner Metropolitan New York Synod of the Evangelical Church of America (“NY Synod”) is the synod, or organization unit, which coordinates the work of the Evangelical Lutheran Church in American (“ELCA” or “Church”) with respect to member church congregations in New York City, including Bronx County. Verified Petition, ¶¶ 1, 2, 4. On May 23, 2017, petitioner NY Synod brought this petition seeking an an order confirming that title to the property of one of its member congregations, The Evangelical Lutheran Church of St. Peter’s-In-The-Bronx (St. Peter’s), has passed from the congregation to the NY Synod by virtue of synodical administration and Religious Corporations Law § 12. Petitioner NY Synod also seeks an injunction prohibiting respondents, who are members of St. Peter’s council, from possessing the personal property of St. Peter’s or holding themselves out as officers or agents of St. Peter’s.

In response to the petition, respondents did not file an answer but instead filed an “Affirmation in Opposition to Petition” and an “Affidavit in Opposition to Petition”, dated September 27, 2017. The petition was adjourned by the court to allow petitioner to supplement its submissions by filing a motion for summary judgment. In responding to the motion for summary judgment, respondents belatedly filed a verified answer, asserting counterclaims for attorneys’ fees and civil harassment as a result of the filing of the petition. Respondents provided no justification for their default or the belated filing of the answer over one year after it was due.

Under CPLR 3018, respondents’ failure to timely file a verified answer to the petition and deny the factual allegations therein serves as an admission. Nevertheless, in the interest of

resolving these issues on the merits, the court will consider the general denial asserted by respondents in their untimely answer. However, given respondents' failure to provide any justification for their delay in filing an answer, respondents' counterclaims will not be considered and must be dismissed.

Turning to the merits of the petition, it is undisputed that St. Peter's is the owner of the real property and other assets at issue. However, the constitutional documents of St. Peter's, as well as the NY Synod, provide that, if the membership of a congregation or its financial strength so decreases that it becomes impracticable to protect its assets from waste and deterioration, the NY Synod has the right to take charge and control of all property of the congregation and to hold, manage or dispose of such property. Affidavit of Rev. Robert Shoepflin sworn to June 29, 2018, Exh. A (NY Synod Constitution, § 13.24). Section 17-c of the Religious Corporation Law likewise authorizes the NY Synod to take control of a congregation's property in order to protect the property from waste and deterioration. RCL § 17-c(2)(a)(iii).

Here, due to the ongoing deterioration of the properties, as well as the lack of evangelical outreach and pastoral leadership at St. Peter's, on April 24, 2010, the NY Synod Council adopted a resolution pursuant to section 13.24 of the NY Synod's constitution to take charge and control the property. Verified Petition, ¶¶ 29-31 & Exh. D. The NY Synod formally notified St. Peter's of its decision by letters dated April 27 and September 27, 2010. Verified Petition, ¶ 33. Although St. Peter's had a right to appeal the decision to the Synod Assembly, it never did so and thus the NY Synod's decision is final, binding and not reviewable by a court. Verified Petition, ¶ 34; Affidavit of Rev. Robert Shoepflin sworn to June 29, 2018, Exh. A (NY Synod Constitution, § 13.24); *Metropolitan New York Synod of the Evangelical Lutheran Church of America v. David*, 95 A.D.419, 419 (1st Dep't 2012). Thus, the NY Synod has satisfied its prima facie burden of showing that, pursuant to section 13.24 of the NY Synod's constitution and Religious Corporation Law § 17-c(2)(a)(iii), it is entitled to possession of St. Peter's property. *See Upstate N. Y. Synod of the Evangelical Lutheran Church in Am. v. Christ Lutheran Church of Buffalo*, 185 A.D.2d 693 (4th Dep't 1992).

In opposition, respondents argue that St. Peter's is a separate, free-standing congregation which is not a member of and which is not affiliated with the NY Synod. Verified Answer, ¶¶ 2, 4; Affirmation of Frank J. Loverro dated September 27, 2017, ¶ 7; Affidavit of Catherine Emanuel sworn to on September 27, 2017, ¶ 3. However, respondents admit in their opposition to the motion for summary judgment that St. Peter's has been affiliated with ELCA since its inception. Affirmation of Frank J. Loverro dated October 24, 2018, ¶ 2. Implicit in their association with ECLA is St. Peter's pledge to adopt and be governed by the Model Constitution for Congregations of the Evangelical Lutheran Church in America, which states, among other things, that "[t]his congregation shall be an interdependent part of [ELCA] . . . and of [NY Synod]" and that "[t]his congregation is subject to the discipline of [ELCA]." Affidavit of Joseph Milano sworn to on August 30, 2018, Exh. C (Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America, §§ 9.25, C6.01). Thus, contrary to respondents' assertions, St. Peter's is an interdependent part of ELCA and the NY Synod and thereby governed by the tenets of their constitutions, as well as the model constitution for congregations as set forth in ELCA's constitution.

Respondents also attempt to raise an issue of fact by arguing, in a conclusory manner, that the NY Synod's assertions regarding the ongoing deterioration of St. Peter's properties, its diminished membership and its lack of governance are entirely false and that St. Peter's remains solvent and does not have a dwindling and declining membership. Affidavit of Catherine Emanuel sworn to October 24, 2018, ¶¶ 4-5. However, respondents cannot challenge the NY Synod's decision to impose synodical administration before this court. Pursuant to section 13.24 of the NY Synod's constitution, respondents' remedy was to appeal the NY Synod's decision to impose synodical administration to the Synod Assembly, which they failed to do. Verified Petition, ¶ 34; Shoepflin Aff., Exh. A (NY Synod Constitution, § 13.24). Moreover, petitioner's decision to impose synodical administration to St. Peter's is a nonjusticiable religious determination. *Metropolitan New York Synod of the Evangelical Lutheran Church of America v. David*, 95 A.D.419, 419 (1st Dep't 2012) (holding that synod's determination that the congregation had become so diminished and scattered that it could no longer function is a nonjusticiable religious determination). Thus, the NY Synod's decision is final and binding, and cannot be reviewed by this court.

Respondents also cite to various provisions in the constitutions of the Church and the NY Synod, which provide that title to the property shall reside in the congregation. However, respondents fail to provide any context for these provisions, which are inapplicable here. Respondents first cite to section 7.02 (misstating it as 7.03) of the Church's model constitution for congregations which provides, in full, that "[i]f this congregation is removed from membership in the Evangelical Lutheran Church in America according to its procedure for discipline, title to property shall continue to reside in this congregation." Affidavit of Joseph Milano sworn to on August 30, 2018, Exh. C (Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America, § C7.02). There is no evidence in the record to show that St. Peter's was removed for the Church for discipline. Rather, the eventual termination of the relationship occurred as part of the synodical administration. Shoepflin Aff., ¶ 18 and Exh. E (June 25, 2015 letter notifying St. Peter's of NY Synod's decision to close the congregation due to its inability to call a pastor, provide audited financial statements, maintain its property and secure adequate insurance). Respondents also cite to section C 5.03 of the Church's model constitution for congregations which authorizes the congregations to terminate their relationship from the ELCA. Milano Aff., Exh. C (Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America, § C5.03). However, according to this section, the congregation may only terminate this relationship in accordance with the procedure outlined in section C6.05 of the model constitution for congregations and there is no evidence that this has occurred.

Respondents cite to section 9.71(a) of the Church's constitution and section 17-c(2)(c)(i) of the Religious Corporation Law, which provide that, as a general matter, title to property shall reside in the congregation. Milano Aff., Exh. C (Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America, § 9.71(a)); Religious Corporation Law § 17-c(2)(c)(i). However, as discussed previously, the NY Synod's decision to impose synodical administration pursuant to section 9.61(e) of the ELCA's constitution and section 13.24 of the NY Synod's constitution entitle the NY Synod to take charge and control of all property of the congregation and to hold, manage or dispose of such property. Affidavit of Joseph Milano sworn to on August 30, 2018, Exh. C (Constitutions, Bylaws, and Continuing

Resolutions of the Evangelical Lutheran Church in America, § 9.61(e)); Affidavit of Rev. Robert Shoepflin sworn to June 29, 2018, Exh. A (NY Synod Constitution, § 13.24). Likewise, respondents' citation to section Religious Corporation Law 17-c(2)(c)(iii) is inapplicable because St. Peter's was not removed from the ELCA as a result of discipline.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and petitioner, the Metropolitan New York Synod of the Evangelical Lutheran Church in America, is entitled to ownership and possession of all of the property of The Evangelical Lutheran Church of St. Peter's-in-the-Bronx, including the real property located at 427 East 140 Street and 435 East 140 Street, Bronx, New York (Block 2285, Lots 75 and 72 in Bronx County); and it is further

ORDERED that any officers of the Metropolitan New York Synod of the Evangelical Lutheran Church in America, acting individually and on behalf of Metropolitan New York Synod of the Evangelical Lutheran Church in America and The Evangelical Lutheran Church of St. Peter's-in-the-Bronx, are authorized to execute, acknowledge and deliver any documents required to transfer or otherwise confirm ownership of the property of The Evangelical Lutheran Church of St. Peter's-in-the-Bronx; and it is further

ORDERED and ADJUDGED that respondents are enjoined from possessing the property of The Evangelical Lutheran Church of St. Peter's-in-the-Bronx, including all of its books and records, or money, and from holding themselves out as officers, agents or clergy of the church; and it is further

ORDERED and ADJUDGED that the counterclaims are dismissed.

3/18/2019

DATE



PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE