SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ELIZABETH KONDRATICK,

Plaintiff,

- against -

ORTHODOX CHURCH IN AMERICA,

Defendant.

Index No.: 07-22717

Assigned Justice:
Hon. Daniel Martin

Adjourned Return Date:
March 14, 2008

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT

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PRELIMINARY STATEMENT

The Defendant, The Orthodox Church in America (the "Church"), respectfully submits this Memorandum of Law in opposition to the motion by the Plaintiff, Elizabeth Kondratick ("Mrs. Kondratick"), for summary judgment in lieu of a complaint under CPLR 3213.

Pursuant to this action, Mrs. Kondratick seeks to enforce a purported obligation of the Church to pay $250,000.00 to herself and her husband, Robert Kondratick, a former priest and Chancellor of the Church. Mrs. Kondratick bases her claim against the Church on a "letter agreement" (the "Letter Agreement") purportedly signed on or about April 19, 2002 by the former Metropolitan of the Church and witnessed by former members of the Administrative Committee of the Metropolitan Council of the Church. Pursuant to the Letter Agreement, the Church purportedly agreed to pay $250,000.00 to Mr. and Mrs. Kondratick in full settlement of the cost of the improvements that the Kondraticks allegedly made with their own money and allegedly at the direction of the Church to certain Church-owned property in which they resided while Mr. Kondratick was Chancellor of the Church.

The Church opposes Mrs. Kondratick's motion on the following grounds, each of which is discussed in more detail below:

A. Mrs. Kondratick lacks standing and/or capacity to sue on the purported Letter Agreement.

B. Mrs. Kondratick's motion is not based on admissible evidence.

C. The purported Letter Agreement is not supported by consideration and may have been fraudulently induced.

D. The former Metropolitan and Administrative Committee of the Metropolitan Council lacked authorization to bind the Church to the alleged debt evidenced by the purported

Letter Agreement. Only the Metropolitan Council, one of the three governing bodies of the Church, had the authority to incur the indebtedness evidenced by the purported Letter Agreement on behalf of the Church. The purported Letter Agreement was never submitted to, reviewed, approved, or ratified by the Metropolitan Council, and, in fact, was actively concealed from the Metropolitan Council by Mr. Kondratick.

E. The purported Letter Agreement is void or voidable under New York State Not-for-Profit Corporation Law § 715 because it purports to be an agreement between the Church and one of its officers, and the material terms of the agreement were not disclosed to and approved by the Metropolitan Council.

F. Assuming the Court determines as a matter of law that the Letter Agreement is a valid and binding obligation of the Church, the facts set forth in the opposition affidavits also support the defenses of payment and/or equitable set-off and show that the Church has affirmative claims against the Kondraticks for breach of fiduciary duty, fraud, waste, conversion, accounting, restitution, unjust enrichment, and monies had and received.

G. Plaintiff has no right to the recovery of attorney's fees and expenses.

FACTS IN OPPOSITION TO MOTION

The facts in opposition to Mrs. Kondratick's motion are set forth in the Affirmation of Jon A. Ward, Esq., and the Affidavits of Father Alexander Garklavs ("Garklavs Aff."), Father Vladimir Berzonsky ("Berzonsky Aff."), Father Stavros G. Strikis ("Strkis Aff."), and Stephen Lamos ("Lamos Aff."), submitted herewith, as well as the exhibits annexed thereto. The Court is respectfully referred to these sworn statements and exhibits for a complete statement of the facts. Capitalized terms not defined herein are defined in the sworn statements.

CPLR 3213

Mrs. Kondratick has moved for summary judgment in lieu of complaint under CPLR 3213. CPLR 3213 states as follows:

> When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

Just as in a motion for summary judgment brought under CPLR 3212, "[a] defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact [citation omitted]." Banco Popular North America v. Victory Taxi Management, Inc., 1 N.Y.3d 381 (2004). To defeat a motion for summary judgment in lieu of a complaint under CPLR 3213, a defendant must submit "evidentiary proof demonstrating the existence of a triable issue of fact with respect to a bona fide defense." Coneco Corp. v. Atlantic Energy Services, Inc., 270 A.D.2d 691 (3d Dept. 2000).

Further, upon denying a CPLR 3213 motion a court has several options. In addition to deeming the moving and answering papers as a traditional complaint and answer, the court may, at its own discretion, require formal pleadings, or even grant summary judgment to the defendant. In Schulz v. Barrows, 94 N.Y.2d 624, 628 (2000), the Court of Appeals stated:

> Nothing in the statute, of course, *obliges* a court, upon denial of summary judgment,

> to treat CPLR 3213 motion papers as a complaint and answer, regardless of the circumstances. Although the statute provides that, upon denial of summary judgment, the moving and answering papers shall be deemed a complaint and answer, it also explicitly permits a court to order "otherwise." Acting within that authority courts have, for example, required service of pleadings; they have even awarded summary judgment to the defendant (see, e.g., Weissman v Sinorm Deli, 88 N.Y.2d 437 [1996]). There is thus no merit to plaintiff's contention that conversion is in all instances compelled.

Additionally, when facts may exist to support defenses or claims that are solely in possession of the plaintiff or non-parties, and not presently available to the defendant, CPLR 3212(f) will apply to CPLR 3213 actions. CPLR 3212(f) states, in relevant part,

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

See, Chase Manhattan Bank, N.A. v. Cannon, 81 A.D.2d 558 (1st Dept. 1981) (holding in a CPLR § 3213 action that "[t]he record suggests the possibility that there may be facts within the possession of the plaintiff, and not presently available to the defendants, that would be relevant to defenses interposed by defendants . . . these issues should not be finally determined until after defendant has had an opportunity for discovery.").

Additionally, a court must consider affirmative claims in a CPLR 3213 motion for summary judgment if the transactions upon which the claims are based are inseparable from and may constitute a defense to the main claim. Harris v. Miller, 136 A.D.2d 603 (2d Dept. 1988). For example, in Beninati v. Hanley, 95 A.D.2d 816, 817 (2d Dept.1983), the Court held "[the] [d]efendants' proposed counterclaim, alleging fraud and deceit on the part of the plaintiff, is a viable claim which arose from the underlying transaction and is inseparable from plaintiff's cause of action. Under these circumstances, summary judgment was properly denied."

Pursuant to these legal standards, and for the reasons set forth below, the Church respectfully submits that: (i) Mrs. Kondratick's motion for summary judgment should be denied in its entirety and summary judgment should be granted to the Church on one or more of its defenses; or in the alternative, (ii) Mrs. Kondratick's motion for summary judgment should be denied because there are triable issues of fact with respect to one or more of the defenses raised by the Church; or, in the alternative, (iii) Mrs. Kondratick's motion for summary judgment should be denied because facts essential to justify opposition to the motion may exist but cannot be stated at present because they are within the exclusive knowledge and control of the Kondraticks or third parties, and the Church should be given an opportunity to conduct disclosure regarding them. If Mrs. Kondratick's motion is denied and this action is not dismissed, the Church respectfully requests an order directing Mrs. Kondratick to serve and file a complaint in this action, and directing the Church to serve and file an answer.

ARGUMENT

POINT I

MRS. KONDRATICK LACKS STANDING OR CAPACITY TO SUE ON THE PURPORTED "LETTER AGREEMENT"

Article 3 of the New York State Uniform Commercial Code (the "UCC") sets forth the law governing "negotiable instruments." Under UCC § 3-104(1), in order for an instrument to qualify as a "negotiable instrument," it must:

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

Article 3 of the UCC also applies to a category of instruments known as "non-negotiable instruments." UCC § 3-805 states that "Article [3] applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument." The Official Comment to this section explains that it is intended to cover "non-negotiable instruments," stating, in relevant part, as follows:

> This section covers the "non-negotiable instrument." As it has been used by most courts, this term has been a technical one of art. It does not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this Article and to be treated as a simple contract. <u>It refers to a particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer</u>. The typical example is the check reading merely "Pay John Doe."
>
> * * *
>
> [A] "non-negotiable instrument" is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provisions of any section of . . . Article [3] peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of . . . Article [3].

UCC §3-805 at Official Comment (emphasis added).

Pursuant to this action, Mrs. Kondratick seeks to enforce a purported obligation of the Church to pay $250,000.00 to Mrs. Kondratick and her husband, Robert Kondratick. The obligation of the Church is allegedly set forth in a Letter Agreement dated on or about April 19, 2002. The Letter Agreement purports to state as follows:

> This is to confirm the agreement between the Orthodox Church in America and V. Reverend Robert S. Kondratick and Elizabeth Kondratick concerning reimbursement by the Orthodox Church in America for improvements they have made on behalf of the Orthodox Church in America to the church-owned property located at 216 Martin

> Drive, Syosset, New York from the time of its purchase until the present. All bills and contracts for these improvements are on file in the Treasurer's Office located at the Chancery Office.
>
> Per this agreement, the Orthodox Church in America will reimburse V. Rev. Robert S. Kondratick ***and*** Elizabeth Kondratick the sum of two hundred and fifty thousand dollars ($250,000.00) in full settlement of all costs for the improvements they were directed to make on this property and which were paid from their personal funds. This reimbursement will be made in the form of payments to be made in three annual equal installments, the first week of September 2002, 2003 and 2004. Further, per this agreement, no interest is to be paid on this amount. (Emphasis added).

The Letter Agreement purports to be signed by the former Metropolitan and further states that it was signed and delivered by him in the presence of the members of the Administrative Committee of the Metropolitan Council and it bears their respective signatures. Under the signatures of the members of the Administrative Committee, the purported Letter Agreement contains an affirmation by the Secretary of the Church stating that "the above" was executed before him on April 19, 2002, and it then bears his signature, and a notary stamp of a New Jersey notary public.[1]

The purported Letter Agreement meets all of the requirements as to the form of a negotiable instrument except it is not payable to order or bearer.[2] Specifically, the purported Letter Agreement is: (i) signed by a maker, purportedly Metropolitan Theodosius; (ii) contains an unconditional promise to pay a sum certain in money, $250,000.00, and no other promise, order, obligation or power given by the maker; and (iii) is payable at a definite time, the first week of September in years 2002, 2003 and 2004. The purported Letter Agreement, however, does not state that it is payable "to order or to bearer." Because the purported Letter Agreement meets all of the requirements of a

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[1] Interestingly, even though the Letter Agreement is a purported agreement between the Church and the Kondraticks, neither of them signed the agreement as accepting its terms.

[2] The Church, as the Court will see in Point II, <u>infra</u>, as well as in the Affidavit of Father Alexander Garklavs, submitted herewith, seriously questions the authenticity of the Letter Agreement and reserves all of its rights to challenge any and all of the circumstances arising from the creation and execution of the document.

negotiable instrument except that it is not payable to order or bearer, it is submitted that the purported Letter Agreement qualifies as a "non-negotiable instrument" under UCC § 3-805 and, therefore, is governed by all of the provisions of Article of 3 of the UCC except those that pertain to a holder in due course.

Since all of the provisions of Article 3 of the UCC apply to the purported Letter Agreement except those relating to holders in due course, the Letter Agreement is subject to the provisions of UCC § 3-116. This section states that an instrument payable to two or more persons may only be enforced by all of them together. Specifically, UCC § 3-116 states:

> An instrument payable to the order of two or more persons
>
> (a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;
>
> (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them. UCC § 3-116 (emphasis added).

According to the Official Comment to UCC § 3-116:

> The changes are intended to make clear the distinction between an instrument payable to "A or B" and one payable to "A and B." The first names either A or B as payee, so that either of them who is in possession becomes a holder as that term is defined in Section 1-201 and may negotiate, enforce or discharge the instrument. The second is payable to A and B together, and as provided in the original section both must indorse in order to negotiate the instrument, although one may of course be authorized to sign for the other. Likewise both most join in any action to enforce the instrument, and rights of one are not discharged without his consent by the act of the other. (Emphasis added).

The principles set forth in UCC § 3-116, are a codification of long standing New York common law. For example, in Passut v. Heubner, 81 Misc. 249, 249-50 (App. Term, 1st Dept. 1913), the Court stated that when two parties are joint obligees on a note, that "either cannot in the

lifetime of the other sue thereon without joining the other joint obligee [citation omitted]." Further, in Freedman v. Montague Associates, Inc., 18 Misc.2d 1, 18 (Sup. Ct., Kings Co. 1959), rev'd on other grounds, 9 A.D.2d 936 (2d Dept. 1959), appeal denied, 10 A.D.2d 637 (2d Dept. 1960), the Court, after a thorough review of applicable case law stated "[o]bligees to a joint demand have such a unity of interest therein that none of them may sue separately to recover his interest, but all are required to join as parties in any action brought for the enforcement of the demand."

The language of the purported Letter Agreement states that the alleged debt is payable to "Robert S. Kondratick ***and*** Elizabeth Kondratick." (Emphasis added). As discussed above, the use of the connector "and" creates a joint obligation, payable to all of the obligees, and not payable in the alternative. Therefore, the Kondraticks are joint obligees to the Letter Agreement. Although Mrs. Kondratick claims she is the "owner and holder" of the purported Letter Agreement, she does not allege that she is the only owner and holder of the purported agreement, nor is there any evidence before the Court that Mr. and Mrs. Kondratick, jointly, assigned their interest in the purported Letter Agreement to Mrs. Kondratick, individually. In fact, Mrs. Kondratick knows full well that she is not the only owner and holder of the Letter Agreement. Back in 2006, both she and Mr. Kondratick, jointly, commenced an action on the Letter Agreement under CPLR 3213 and then quickly withdrew it. Garklavs Aff. at ¶ 72 and Exs. K and L thereto. For the foregoing reasons, the Letter Agreement cannot be enforced solely by Mrs. Kondratick. Both Mr. and Mrs. Kondratick are necessary parties in an action to enforce the Letter Agreement. Accordingly, Mrs. Kondratick lacks standing or capacity to enforce the Letter Agreement on her own.

Based on the foregoing, the Church submits that Mrs. Kondratick's motion should be denied, the Church should be granted summary judgment, and this action should be dismissed.

POINT II

MRS. KONDRATICK'S MOTION IS NOT BASED ON ADMISSIBLE EVIDENCE

In Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 311-12 (1972), the Court of Appeals stated that the "[r]ules of evidence should be guardedly and cautiously applied on an application for summary judgment, particularly where there are many exceptions to general rules and where the application of a rule of evidence or the exceptions thereto can best be determined upon evidence offered at a trial [citations omitted]." Accordingly, any evidence a moving party submits in support of summary judgment must be in admissible form. The "best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven [citation omitted]." Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639, 643 (1994). See also, Tray Wrap, Inc. v. Pacific Tomato Growers Ltd., No. 26782/03, 2008 WL 222495, at *3 n.2 (Sup. Ct., Bronx Co. Jan. 25, 2008) (when a document is submitted in inadmissible form, for which no evidentiary foundation is laid, the Court cannot consider it in support of a motion for summary judgment).

Further, "[e]vidence submitted in inadmissible form on a motion for summary judgment cannot be cured by submitting new evidence in a reply paper." KXK Foods Corp. v. Ta-Chiun Chou, 16 Misc.3d 1111(A) (Sup. Ct., Kings Co. 2007). See also, Adler v. Suffolk County Water Authority, 306 A.D.2d 229, 230 (2d Dept. 2003) (holding "the evidence submitted by the [defendant] for the first time in its reply was properly disregarded by the Supreme Court [citations omitted].").

In the case at bar, the Court does not have before it a properly sworn statement of Mrs. Kondratick. Her purported affidavit does not state the State and County in which it was made, and, it does not contain a properly completed jurat. Although the jurat appears to bear the signature of a notary public, it does not indicate the notary's name, the state and/or county of the notary's

licensing, or the expiration date of the notary's commission. As such, the "affidavit" does not constitute a sworn statement before the Court. See Ghee v. Washington Mut. Bank F.A., 11 Misc.3d 1066(A) (Sup. Ct. Kings, Co. 2006)(holding an "affidavit" with an illegible notary signature, and no statement of the notary's authority pursuant to Executive Law § 137, is "inadmissible and a nullity.").

Even if the Court accepts the "affidavit" as a properly sworn statement, the Church has been unable to confirm the authenticity of the Letter Agreement. It does not have an original of the purported agreement on file, and it has uncovered numerous irregularities with respect to the facts and circumstances of its purported execution. Because the Church does not concede the authenticity of the document, it was incumbent on Mrs. Kondratick in her "affidavit" to lay a proper foundation for its admission into evidence. She failed to do so, and, as a result, the Court cannot consider the purported document in connection with her motion.

Because Mrs. Kondratick failed to file a properly sworn statement with the Court, and since she has failed to authenticate the purported Letter Agreement, her motion for summary judgment should be denied.

POINT III

THE PURPORTED LETTER AGREEMENT LACKS CONSIDERATION AND MAY HAVE BEEN FRAUDULENTLY INDUCED BY THE KONDRATICKS

It is elemental that a contract that lacks consideration is unenforceable. 22A N.Y. Jur.2d Contracts, § 374 (2008) ("One of the potential excuses for nonperformance is the want or failure of consideration."); see Beitner v. Becker, 34 A.D.3d 406, 407 (2d Dept. 2006); Wood Realty Trust v. N. Storonske Cooperage Company Inc., 229 A.D.2d 821, 822-23 (3d Dept. 1996). Additionally, lack of consideration is a defense to a motion for summary judgment on an agreement, including a "non-

negotiable instrument." Fopeco, Inc., v. General Coatings Technologies, inc., 107 A.D.2d 609, 609(1st Dept.1985)(holding that lack of consideration is a perfectly viable defense to defeat summary judgment in a CPLR 3213 action based on a non-negotiable promissory note); see Manufacturers Hanover Trust Co. v. L.N. Properties, Inc., 174 A.D.2d 383 (1st Dept. 1991) (in an action to recover on a note, citing Fopeco and stating "[i]f proved, lack of consideration is a 'perfectly viable defense.'"); see also Walden v. Lorcom Technologies, Inc., 05-CV-3600, 2007 WL 608151, at *4 (E.D.N.Y. Feb. 23, 2007) (citing Manufacturers Hanover Trust Co.).

Pursuant to the purported Letter Agreement, the alleged consideration given by the Kondraticks in exchange for the Church's purported promise to pay them $250,000.00 was their having paid for the cost of renovations to the Martin Drive Property, a Church-owned property, solely with their own personal money. The Church, however, has no documents or proof on file indicating that the Kondraticks actually used their own personal money to pay for the improvements (Garklavs Aff. at ¶ 59), and Mrs. Kondratick did not furnish any such proof in connection with her moving papers. Accordingly, because the Church has no evidence of consideration to support the purported Letter Agreement, it is submitted that the Letter Agreement is unenforceable against the Church.

Moreover, because Mr. Kondratick is unable to account for over $1,000,000.00 in cash that was withdrawn from the Church's banking accounts and given to either him or his wife, including, but not limited to, $271,043.00 in Church checks made payable to cash that were cashed by Mrs. Kondratick, it is entirely possible that the Kondraticks used some or all of the unaccounted for cash to pay for the renovations to the Martin Drive Property. See Lamos Aff. at ¶¶ 7-8. Further, since Mr. Kondratick had the Church pay various personal credit card obligations of his and his family

members, it is also possible that he paid for some or all of the renovations to the Martin Drive Property on credit and then ran the bills through the Church. See Strikis Aff. at ¶ 8. If this is true, then, in addition to being unenforceable due to a lack of consideration, the purported Letter Agreement would also be unenforceable because the Kondraticks would have fraudulently induced former Metropolitan Theodosius into signing the agreement based on their false representation that they had used their own personal money to pay for the renovations. See Regal Limousine, Inc. v. Allison Limousine Service, Ltd., 136 A.D.2d 534, 535 (2d Dept. 1988) (holding that "allegations of fraudulent misrepresentations regarding [the] nature [of the consideration] preclude summary judgment").

At the very minimum, whether the Kondraticks used their own personal money to pay for the renovations to the Martin Drive Property is a fact that is in the exclusive possession of the Kondraticks and not presently available to the Church. Thus, pursuant to CPLR 3212(f), Mrs. Kondratick's motion for summary judgment should be denied and the Church should be given the opportunity to conduct disclosure regarding this issue.

POINT IV

THE PURPORTED "LETTER AGREEMENT" IS NOT BINDING ON THE CHURCH BECAUSE IT WAS NOT APPROVED BY THE METROPOLITAN COUNCIL OF THE CHURCH

It is well established that a religious corporation cannot be bound to any financial or contractual obligation entered into without the authority, approval or ratification of its board of trustees, or as otherwise provided for in its internal statutes or bylaws. See, e.g., The People's Bank v. St. Anthony's Roman Catholic Church, 109 N.Y. 512 (1888).

Section 5 of the Religious Corporation Law (the "RCL") governs the powers and duties of

the trustees of a religious corporation, and states in relevant part:

> The trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected; and they shall not use such property or revenues for any other purpose or divert the same from such uses.

The purpose of this section is "to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from the exploitation by those who might divert them from the true beneficiaries of the trust." Saint Nicholas Cathedral of Russian Orthodox Church in North America v. Kedroff, 302 N.Y. 1, 29 (1950), rev'd on other grounds, 344 U.S. 94 (1952).

In People's Bank v. St. Anthony's Roman Catholic Church, 109 N.Y. 512 (1888), the Court of Appeals applied the principles of the Religious Corporation Law and the general laws of agency to a dispute regarding several promissory notes, each allegedly made by St. Anthony's Church. Each note was signed by the President, Secretary, and Treasurer/Pastor of St. Anthony's. Id. at 519. The Court found that there was "no proof of a corporate act, except by the declaration of the officers of the defendant on the face of the instruments, and there is no proof whatever that they were authorized either to make the notes or to make any representations binding upon the defendant." Id. at 523. The Court found that even though the individual board members assumed to act as agents for St. Anthony's, "the only proof of their agency to make the notes [was] their own declaration, and . . . an agency can neither be created nor proved by the acts or declarations of the assumed agent

alone." Id. The Court was unpersuaded by the fact that the "persons who signed the notes were officers of the defendant, and that they constituted a majority of the trustees of the defendant." Id. Accordingly, the Court held in favor of St. Anthony's stating, "[n]o original authority to make the notes was shown, nor any adoption or ratification of the instruments by the corporation. [Therefore,] [t]he plaintiff failed on the vital issue of authority." Id. at 526.

The legal principles set forth in People's Bank were shortly thereafter affirmed by the Court of Appeals in Columbia Bank v. Gospel Tabernacle Church, 127 N.Y. 361 (1891). Here, the Court stated that "[p]roof that a promissory note, purporting to be made by a religious corporation, was signed by its president and secretary, does not show that it is the note of the corporation, without proof that it was made by its authority." Id. at 368. The Court found that the signatures on the note, though "really made by its officers, were made while acting separately, and not at the same time or place, or while assembled by the board of trustees." Id. at 369. Therefore, the Court affirmed the lower court's ruling in favor of Gospel Tabernacle, holding "the plaintiff failed to establish or to give evidence which raised a presumption that the notes in question were the authorized obligations of the defendant."

The principles set forth by the Court of Appeals in People's Bank and Columbia Bank have been precedent in the State of New York for over a century. See e.g., Kelly v. St. Michael's Roman Catholic Church for the Diocese of Brooklyn, 148 A.D.767 (2d Dept. 1912); Malerba v. Friars Minor of the Order of St. Francis, 180 A.D. 441 (1st Dept. 1917); Knapp v. Rochester Dog Protective Services, 235 A.D. 436 (4th Dept. 1932); Bartlett v. Mt. Zion Baptist Church of Port Chester, Inc., 280 A.D. 798 (2d Dept. 1952); Rende and Esposito Consultants, Inc. v. St. Augustine's Roman Catholic Church, 131 A.D.2d 740 (2d Dept. 1987).

In the case at bar, under the Special Act of the New York Legislature, which formally incorporated the Church in 1972 (the "Special Act"), and under its by-laws (which are referred to as its "Statute") that were adopted pursuant to the Special Act, the Metropolitan Council of the Church is the only body of the Church vested with authority to manage its financial affairs, and, as such, is the only body of the Church with authority to incur substantial indebtedness on behalf of the Church as a corporate entity. Garklavs Aff. at ¶¶ 34, 37an 39 and at Ex. B thereto at Article V, § 4. Neither the Metropolitan nor the Administrative Committee have the authority to bind the Church to any substantial indebtedness, such as that purportedly created by the Letter Agreement, without the authority, approval, or ratification of the Metropolitan Council. Id.

Mr. Kondratick, as former Chancellor of the Church, was surely familiar with the provisions of the Special Act and the Statute and the jurisdiction of the Metropolitan Council over the financial affairs of the Church. Rather than submit the purported Letter Agreement to the Metropolitan Council for review and action on it, however, Mr. Kondratick affirmatively concealed its existence from the Council by directing others to alter financial statements and to withhold information from the Metropolitan Council. Garklavs Aff. at ¶¶ 52-53; Strikis Aff. at ¶¶ 11-14. As result of Mr. Kondratick's deceptive conduct, the Metropolitan Council never reviewed, authorized, approved or ratified the purported Letter Agreement nor the obligation that it purports to memorialize. Berzonsky Aff. at ¶ 6.

Pursuant to RCL § 2-b, the aforementioned precedent, and the Special Act and Statute, it is submitted that because the purported Letter Agreement was not authorized, approved or ratified by the Metropolitan Council, it did not create any binding obligation on the part of the Church to pay any monies to the Kondraticks. Therefore, it is submitted that the purported Letter Agreement does

not constitute a binding obligation of the Church. Based on the foregoing, the Church requests that the Court deny Mrs. Kondratick's motion for summary judgment, and grant the Church summary judgment and dismiss this action. Alternatively, the Church submits that a question of fact exists as to whether the purported Letter Agreement is a binding obligation of the Church, and this issue may not be decided summarily. See, Rende and Esposito Consultants, Inc., 131 A.D.2d at 743-44 (holding that conflicting issues of fact regarding the authority of the pastor to bind the church in the transaction, as well as issues regarding ratification and estoppel, mandated that the case could not be decided summarily).

POINT V

THE PURPORTED LETTER AGREEMENT IS VOID OR VOIDABLE BECAUSE IT IS AN INTERESTED OFFICER / DIRECTOR TRANSACTION THAT WAS NEVER APPROVED, AUTHORIZED, OR RATIFIED BY THE METROPOLITAN COUNCIL

The Special Act that created the Church states, among other things, that the Church will be governed by its own internal Statute, as well as the RCL. Garklavs Aff. at Ex. A at §§ 5 and 7. Pursuant to RCL § 2-b, the Not-for-Profit Corporation Law ("N-PCL") applies to all religious corporations, except that if any provision of the N-PLC conflicts with any provisions of the RCL, the latter shall prevail. Accordingly, N-PCL § 715 applies to the Church.

N-PCL § 715 states that all transactions between not-for-profit corporations and their officers are void or voidable if the material facts of such officer's interest in the transaction are not disclosed to the governing board of the corporation, or a committee thereof, which authorizes the transaction.

It is well established that "[d]irectors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally [citations omitted]." Marx v. Akers, 88 N.Y.2d 189, 202 (1996).

Additionally, in Hauben v. Morris, 161 Misc. 174, 183 (Sup. Ct., N.Y. Co. 1936), the Court stated "where the question at issue is one involving conflicting interests of the directors themselves and the corporation[,] [i]n such a case, nothing less than the clearest action of the corporation in a regular manner, free from opportunity for improper influence or manipulation, can meet the obligation of fiduciary responsibility." Moreover, as the Appellate Division, Fourth Department, held in Kreitner v. Burgweger, 174 A.D. 48, 52 (4th Dept. 1916), "our courts have uniformly held that the attempt by directors, in control of a corporation, to contract for such corporation with themselves individually, to their benefit and to the detriment of the corporation, is presumptively fraudulent and in bad faith."

In this case, the purported Letter Agreement is void or voidable under N-PCL § 715 because it purports to be an agreement between the Church and Mr. Kondratick, an officer and director of the Church, in which the Church agreed to pay $250,000.00 to the Kondraticks in full settlement for the cost of improvements that they allegedly paid for and had done to the Martin Drive Property. This agreement conferred a substantial economic benefit on an officer and director of the Church at the expense of the Church. To be an enforceable obligation against the Church, N-PCL § 715, the Special Act, and the Statute require the purported Letter Agreement to be fully disclosed to, reviewed, and approved by the disinterested members of the Metropolitan Council. However, as discussed at length in Point III, supra, the purported Letter Agreement was never disclosed to, reviewed or approved by the disinterested members of the Metropolitan Council. More importantly, and as also discussed in Point III, supra, Mr. Kondratick actively hid the existence of the purported Letter Agreement from the Metropolitan Council. See the Affidavit of Father Stavros Strikis.

POINT VI

THE FACTS ALSO SUPPORT THE DEFENSES OF PAYMENT AND EQUITABLE SET-OFF, AND THEY FURTHER SUPPORT AFFIRMATIVE CLAIMS AGAINST THE KONDRATICKS FOR BREACH OF FIDUCIARY DUTY, FRAUD, FRAUDULENT INDUCEMENT, WASTE, CONVERSION, ACCOUNTING, RESTITUTION, UNJUST ENRICHMENT, MONIES HAD AND RECEIVED, AND CIVIL CONSPIRACY

Mr. Kondratick is a deposed priest of the Church. He was deposed because the Church determined that he committed theft of Church funds, alienated church funds for his personal use, repeatedly refused to cooperate with those who were engaged with giving an accounting of Church funds, actively concealed his actions, and refused to cooperate with a Church court empaneled to hear accusations of serious financial wrongdoing against him. Garklavs Aff. at ¶ 77.

Among other things, Mr. Kondratick has been unable to account for over $1,000,000.00 in cash that was withdrawn from the Church's operating account between 2001 and 2005 and given to him or his wife, including, but not limited to, $271,043.00 in cash that was withdrawn by Mrs. Kondratick. Lamos Aff. at ¶¶ 7-11. Of the more than $1,000,000.00 taken from the Church's account, $575,300.00 was taken from accounts holding special appeals funds, including $176,000.00 from a fund designated for the victims of 9/11. Id. Additionally, Mr. Kondratick owes the Church, at a minimum, reimbursement for $137,000.00 in acknowledged personal credit card debts for himself and his family members that the Church paid on his behalf. Strikis Aff. at ¶ 8. Further, and as discussed above, he actively concealed the purported Letter Agreement and the debt evidenced by it from the Metropolitan Council. Garklavs Aff. at ¶¶ 52-53; Strikis Aff. at ¶¶ 11-14.

It is submitted that these facts support the defenses of partial payment and/or partial equitable set-off, because they show that the Church has paid at least $137,000.00 in acknowledged personal debts of the Kondraticks. See CPLR § 3211(5); Lion Brewery of New York City v. Loughran, 223 A.D. 623, 625 (1st Dept. 1928) (payment is an affirmative defense to an action on a note); see also

General Underwriting Co. of New York v. Stilwell, 139 A.D. 189, 191 (2d Dept. 1910) (partial set-off is a defense to a note).

These facts also support a multitude of affirmative claims that can be asserted against the Kondraticks as defenses to the enforcement of the Letter Agreement, including but not limited to: (i) breach of the fiduciary duty of due care with respect to the management and disposition of corporate assets and of the duty to account for the disposition of corporate assets (see American Baptist Churches of Metropolitan New York v. Galloway, 271 A.D.2d 92 (1st Dept. 2000)); (ii) waste (see N-PCL § 720; see also People v. Equitable Life Assur. Soc. of United States, 124 A.D. 714 (1st Dept. 1908)); (iii) fraud and deceit (see Ajettix Inc. v. Raub, 9 Misc.3d 908 (Sup. Ct. Monroe Co. 2005)); (iv) conversion (see Republic of Haiti v. Duvalier, 211 A.D.2d 379 (1st Dept.1995)); (v) accounting (see N-PCL § 720); (vi) restitution (see Miller v. Schloss, 218 N.Y. 400 (1916)); (vii) unjust enrichment (see Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept.1998)); (viii) monies had and received (see Matter of Witbeck, 245 A.D.2d 848, 850 (3d Dept.1997)); and (ix) civil conspiracy to defraud the Church (see Salvatore v. Kumar, 45 A.D.3d 560, 563-64 (2d Dept. 2007)).

Moreover, additional facts may exist to establish the defenses of complete payment and/or complete equitable set-off if the Church can establish that at least $250,000.00 of the unaccounted for cash was misappropriated by the Kondraticks and used for their own personal purposes, or that at least $250,000.00 in Kondratick personal credit card debt was paid for by the Church. Given the evidence set forth in the affidavits submitted herewith, these additional facts may exist, but if they do, they are in the exclusive possession of Mr. Kondratick. Thus, the Church requires disclosure from him to ascertain these facts. See CPLR § 3212(f).

Finally, and as discussed in Point III, supra, additional facts may exist, but are in the exclusive possession of the Kondraticks, to support a claim of fraudulent inducement against the Kondraticks with respect to the Letter Agreement.

Based on the foregoing, the Church submits that Mrs. Kondratick's motion for summary judgment should be denied in its entirety.

POINT VII

MRS. KONDRATICK HAS NO RIGHT TO RECOVER ATTORNEY'S FEES

It is well settled law in New York that we follow the "American Rule" with regard to attorney's fees. "The American Rule provides that attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule [citations and internal quotations omitted]." Baker v. Health Management Systems, Inc., 98 N.Y.2d 80, 88 (2002).

In the case at bar, there is no statute authorizing attorney's fees, no court rule authorizing attorney's fees, and the purported Letter Agreement does not authorize attorney's fees. Therefore, Mrs. Kondratick is not entitled to recover any attorney's fees from the Church in this action.

Based on the forgoing, the Church respectfully submits that the Court deny Mrs. Kondratick's request for attorney's fees.

CONCLUSION

Based on the foregoing, the Church respectfully submits that: (i) Mrs. Kondratick's motion for summary judgment should be denied in its entirety and summary judgment should be granted to the Church on one or more of its defenses; or in the alternative, (ii) Mrs. Kondratick's motion for summary judgment should be denied because there are triable issues of fact with respect to one or

more of the defenses raised by the Church; or, in the alternative, (iii) Mrs. Kondratick's motion for summary judgment should be denied because facts essential to justify opposition to the motion may exist but cannot be stated at present because they are within the exclusive knowledge and control of the Kondraticks or third parties, and the Church should be given an opportunity to conduct disclosure regarding them. If Mrs. Kondratick's motion is denied and this action is not dismissed, the Church respectfully requests an order directing Mrs. Kondratick to serve and file a complaint in this action, and directing the Church to serve and file an answer.

Dated: Uniondale, New York
February 29, 2008

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