

DISTRICT COURT, EL PASO COUNTY, COLORADO
270 South Tejon Street
Colorado Springs, CO 80903
(719) 448-7700

Plaintiff and Counterclaim Defendant:
GRACE CHURCH & ST. STEPHEN'S, a Colorado
nonprofit corporation,

Defendant and Counterclaimant:
THE BISHOP AND DIOCESE OF COLORADO, a
Colorado nonprofit corporation,

Third Party Counterclaimants:
THE DIOCESE OF COLORADO IN THE EPISCOPAL
CHURCH; GRACE AND ST. STEPHEN'S EPISCOPAL
CHURCH; and GRACE CHURCH AND ST.
STEPHEN'S, a Colorado religious society and
corporation

Counterclaim Defendants:
REV. DONALD ARMSTRONG, III; CHARLES C.
BROWN; DARELEEN SCHAFFER; JON
WROBLEWSKI; MARGE GOSS; CRAIG WHITNEY;
ROBERT C. BALINK; CHAD FRIESE; MICHAEL
BARBER; KEITH STAMPHER; JASON HUNTLEY;
EMILY KLINE; RIP HOLLISTER; JACK GLORIOD;
EDWIN J. MONTGOMERY, JR; KEVIN DIBBLE;
SUSAN SPENCER; ALAN CRIPPEN II; and ST.
STEPHEN'S CLASSICAL ACADEMY;

Additional Counterclaim Defendant:
ROBERT J. O'NEILL

Attorney for Other Counterclaim Defendants
Bruce M. Wright, #5347
Flynn Wright & Fredman, LLC
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COURT USE ONLY

Case No. 2007CV1971

DIV. COM-5

**INDIVIDUAL DEFENDANTS' MOTION TO DISMISS,
COUNTERCLAIM, AND THIRD PARTY COMPLAINT**

Those individual counterclaim defendants listed on Exhibit A hereto (the "Individual Defendants"), through their undersigned attorneys, hereby move to dismiss the Third Party Complaint against them pursuant to C.R.C.P. 12(b) and assert their Counterclaim against The Diocese of Colorado In the Episcopal Church (the "Diocese") and Third Party Complaint against Robert J. O'Neill ("O'Neill") as follows:

Motion to Dismiss

The Counterclaim Plaintiffs (as that term is used in the Second Amended Answer, Counterclaims, Third Party Complaint In Intervention and Jury Demand) fail to state a claim upon which relief can be granted. All the Individual Defendants are, or at times pertinent hereto, have been, officers, Vestry members or trustees of Grace Church & St. Stephen's (the "Church"), a Colorado non-profit corporation in good standing (see Joint Affidavit attached hereto as Exhibit B, hereafter "Affidavit"). All but two have served without compensation (Affidavit). As such, they are immune from civil liability from any act or omission while acting within the scope of their official functions and duties pursuant to the provisions of either or both C.R.S. §13-21-115.7 and C.R.S. § 13-21-116(b)(I) unless their actions were willful or wanton. The actions of the Individual Defendants forming the basis of Counterclaim Plaintiff's claims against them were all taken within the scope of their official functions and duties as officers, Vestry members (the equivalent of the board of directors for the Church) or trustees of the Church, and were taken in good faith in what the Individual Defendants believe was in the best interests of the Church. All their actions were subsequently ratified by over ninety-percent of the Church's voting membership (see Affidavit). Thus, no factual basis exists for Counterclaim Plaintiff's allegations that Individual Defendants' actions were wonton or willful.

Where, as here, a motion to dismiss presents matters outside the pleadings, it is to be treated as a motion for summary judgment under C.R.C.P. 56 (C.R.C.P. 16(b)). “The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail.” *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Once the moving party for summary judgment has made a convincing showing that there are no genuine issues of material fact, “the opposing party must demonstrate with relevant and specific facts that a real controversy exists.” *Sender v. Powell*, 902 P.2d 947, 950 (Colo. App. 1995). “Thus, the opposing party may not rest upon mere allegations or denials in its pleadings, but must provide specific facts demonstrating the existence of a genuine issue for trial.” *Id.* As the Colorado Supreme Court explained in *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987):

In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party’s case Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

(Citations and footnote omitted).

Here, the Affidavit clearly establishes the actions of the Individual Defendants were taken in good faith, in the belief that they were in the best interests of the Church while the Individual Defendants were acting within the scope of their official and statutory duties to the Church. The Individual Defendants’ actions were then overwhelmingly ratified by over ninety-percent of the voting membership of the Church. Thus, there is no evidence upon which to base any claim that the Individual Defendants’ actions were willful or wanton. Consequently, all the Counterclaim Plaintiff’s claims against the Individual Defendants must be dismissed, with prejudice.

Counterclaim and Third Party Complaint

The Individual Defendants hereby assert the following Counterclaim against the Diocese and Third Party Complaint against O'Neill as follows:

1. At all times pertinent hereto, the Individual Defendants were officers or directors (the equivalent of Vestry members) of Grace Church & St. Stephens, a Colorado non-profit corporation in good standing in Colorado (the "Church").

2. The Church, as stated in its Articles of Incorporation, is organized as "a non-profit organization whose members desire to know, to serve, and to worship God."

3. As officers and directors of the Church, the Individual Defendants are required by Colorado law to carry out their duties "in good faith ... with the care of an ordinarily prudent person in a like position would exercise under similar circumstances ... [and] in a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation."

4. When the Vestry determined to disassociate the Church from the Diocese for reasons stated in the Affidavit, the Individual Defendants reasonably believed it was in the best interest of the Church and its membership for the Church to continue to own and utilize the Church's real and personal property so its members could continue to use that property in furtherance of the Church's mission and purpose "to know and to serve God." Given this, Colorado law required the Individual Defendants to carry out their duties as officers and directors of the Church in such a way as to preserve the Church's property for use by the Church and its members to accomplish the mission and purpose of the Church as stated in its Articles of Incorporation.

5. On or about November 19, 2007, O'Neill, purporting to act as Bishop of the Diocese, signed and mailed to each of the Individual Defendants a letter substantially in the form of Exhibit C (hereafter the "Letter").

6. The Letter expressly threatens each of the Individual Defendants with a civil damage lawsuit unless they act to, among other things, “give up the occupation of the property.”

7. As noted in Paragraph 5 above, Colorado law required the Individual Defendants to discharge their official duties to the Church in such a way as to preserve the Church’s property, not “give it up.”

8. Thus, the Letter is a blatant attempt by O’Neill and through him, the Diocese, to extort the Individual Defendants into violating their fiduciary and statutory duties to preserve the Church’s property, by threatening them with a civil lawsuit for damages if they did not agree to violate these duties.

9. This extortion attempt by O’Neill is undeniably willful and wanton misconduct.

10. The Diocese and O’Neill bringing a third party complaint against the Individual Defendants is an abuse of process under Colorado law in that:

a. The Third Party Complaint was brought for the express ulterior purpose of inducing the Individual Defendants to violate their fiduciary and statutory duty to the Church, and particularly, to violate their duty to preserve the Church’s property for the use by its members in order to further and accomplish the mission of the Church;

b. The willful filing of civil claims against the Individual Defendants to extort them into violating their fiduciary and statutory duties to the Church is using a legal proceeding in an improper manner to accomplish a coercive goal which is not the intended legal purpose of the process; and

c. The Individual Defendants have, and will continue to, suffer damages as a result of the Diocese and O'Neill's abuse of process by incurring legal costs defending themselves, by virtue of having to make financial disclosures of potential contingent liabilities as a result of the claims and otherwise.

WHEREFORE, the Individual Defendants pray for monetary damages, for costs, interest, expert witness fees, and attorneys' fees against the Diocese and O'Neill, jointly and severally, and for such other remedies as this Court may deem just and proper in the circumstance.

Jury Demand

Individual Defendants demand a trial by jury, and the requisite fee therefore has been paid.

Dated this 21st day of January, 2008.

FLYNN WRIGHT & FREDMAN

/s/ Bruce M. Wright
Attorney for Individual Defendants

CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2008, a true and correct copy of this document was sent via Justice Link to the following:

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/s/ Gail Deal _____
Gail Deal, Legal Assistant

In accordance with C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.