



Expert Analysis

Half-Sisters Lose Bid To Sue Church Over Affairs With Pastor

BY MARK FASS

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A BROOKLYN appellate panel has thrown out a breach of fiduciary duty claim filed against a church by two sisters who were having affairs with the same pastor.

A unanimous Appellate Division, Second Department, panel ruled that the sisters, who were each married and unaware of the other's affair, failed to establish "de facto control and dominance" by the pastor, as required by the New York Court of Appeals.

"A relationship is marked by de facto control and dominance where the congregant is 'uniquely vulnerable and incapable of self-protection,'" the panel held in its unsigned decision, *Spielman v. Carrino*, 2009-08738. "Although both sisters allege facts which they contend made them uniquely vulnerable and incapable of selfprotection, that contention is belied by their acknowledgments in the complaint that they both promptly ended their relationships with [the pastor] once they learned he was having affairs with both of them."

The panel reversed the order of Suffolk County Supreme Court Justice Thomas F. Whelan denying defendant Grace Gospel Church's motion to dismiss.

Several causes of action, including claims for negligent supervision and intentional infliction of emotional distress, remain ongoing against the pastor, Lawrence Carrino, and the district and national organizations of the church, the Evangelical Free Church of America. In August, Justice Whelan rejected the denomination's personal jurisdiction claim (NYLJ, Sept. 7).

Half-sisters Valerie Spielman and Cindy Gallo filed the present action in 2008, alleging that Mr. Carrino manipulated them into carrying on secret sexual affairs between 2004 and 2008. Mr. Carrino took advantage of their emotional weakness, they alleged, convincing them that it was "god's will" that they have sex.

Mr. Carrino was dismissed by Grace Gospel Church in Patchogue soon after the allegations were made. According to news reports, he has since relocated to Minnesota.

In a decision last week, the Second Department dismissed the sisters breach of fiduciary claim against Grace Gospel Church.

"[S]ince the complaint fails to state a cause of action to recover damages for breach of fiduciary duty, the church cannot be held vicariously liable under the doctrine of respondeat superior on that basis," the panel held.

Justices Fred T. Santucci, Ruth C. Balkin, Ariel E. Belen and Cheryl E. Chambers sat on the panel.

The dismissal marks the latest twist in a 75-year legal battle over the rights of aggrieved lovers.

Since 1935, when the New York Legislature banned "heart balm" lawsuits alleging "alienation of affections, criminal conversation, seduction and breach of contract to marry" the brokenhearted and romantically wronged have sought alternative routes to legal recourse.

The single recognized exception to the categorical ban on "heart balm" lawsuits legal actions intended to serve as balm for a wounded hearthas been breach of fiduciary duty claims, according to Philip G. Spellane, a partner at Harris Beach who served as lead counsel in one of the issue's seminal cases, *Doe v. Roman Catholic Diocese of*

Rochester, 12 NY3d 764.

The fiduciary duty exception, however, is a narrow one, which still has yet to be met, said Mr. Spellane, who was not involved in the Second Department case.

"As the *Doe* case and its predecessor [*Marmelstein v. Kehillat New Hempstead*, 11 NY3d 15] made clear, you have to plead with some specificity facts that establish a true fiduciary relationship," Mr. Spellane said. "I'm not aware of a case yet where the court has sustained a finding of true fiduciary duty."

In the present case, Grace Gospel Church was represented by Leonard Lesser of Simon Lesser.

"The church is pleased that the Second Department accepted our position that all of the plaintiffs' claims were barred by the antiheart balm statute, embodied in New York Civil Rights Law."

John Ray of John Ray and Associates in Suffolk County represents the sisters. Mr. Ray said his clients intend to seek leave to appeal.

"The court contends that the two plaintiffs were never vulnerable or capable of self-protection because they ended the relationship when they found out about Carrino's other dalliances. That's a non-sequitur on its face," Mr. Ray said. "The fact that so far nobody has found a case that fits into the *Marmelstein* standard suggests that they don't want to find a case, that they've created an ethereal cause of action."

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