

NO. 141-237105-09

THE EPISCOPAL CHURCH, et al.

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IN THE DISTRICT COURT

v.

TARRANT COUNTY, TEXAS

FRANKLIN SALAZAR, et al.

141ST JUDICIAL DISTRICT

**MOTION TO ENFORCE APPELLATE MANDATE
AND STRIKE AMENDED PLEADINGS**

TO THIS HONORABLE COURT:

The Episcopal Diocese of Fort Worth and The Corporation of The Episcopal Diocese of Fort Worth (“Movants”) file this motion to strike Plaintiffs’ Second and Third Amended Petitions (“the petitions”) and Third-Party Defendants’ Counterclaims (“the counterclaims”)¹ for violating orders of this Court and the Fort Worth Court of Appeals.

Issue

Should the Court strike those causes of action in the amended pleadings that this Court and the Court of Appeals barred Plaintiffs’ counsel from filing?

Introduction

The Second Court of Appeals ordered the Plaintiffs’ pleadings stricken and barred Plaintiffs’ counsel from appearing as attorneys for The Episcopal Diocese of Fort Worth or The Corporation of the Episcopal Diocese of Fort Worth. Yet within two months of the appellate ruling, they have filed **four** amended pleadings violating that order — re-asserting causes of

Specifically, the pleadings challenged are Plaintiffs’ Second Amended Petition, Plaintiffs’ Third Amended Petition, the Amended Answer and Counterclaims filed against The Episcopal Diocese of Fort Worth, and the Amended Answer and Counterclaims filed against The Corporation of The Episcopal Diocese of Fort Worth.

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action that belong **only** to either the Diocese or Diocesan Corporation. “[T]he appellate court’s judgment must be enforced.” TEX. R. APP. P. 51.1(b).

Movants intend to move promptly for summary judgment on all the Plaintiffs’ claims and the counterclaim against movant Diocesan Corporation. But, they should not have to file a motion on claims that Plaintiffs’ counsel *have been ordered not to file*. Movants respectfully request enforcement of the orders of this Court and the Court of Appeals, which Plaintiffs’ counsel have violated in the following respects.

1. The Conversion claim belongs to the Diocese, so Plaintiffs’ counsel cannot assert it.

In all four pleadings, Plaintiffs’ counsel assert that “[t]he Diocese owns” a long list of real and personal property, and that the Defendants and Intervenors have allegedly converted.² But, if the Diocese or Diocesan Corporation owns the property, only they can sue for its conversion. *See Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008). Plaintiffs’ counsel cannot sue for conversion of property that belongs to entities they do not represent.

2. The Trade-Name claims belong to the Diocese and Diocesan Corporation, so Plaintiffs’ counsel cannot assert them.

Counsel for Plaintiffs assert that the Diocese and the Diocesan Corporation have been using the names “Episcopal Diocese of Fort Worth” and “The Corporation of the Episcopal Diocese of Fort Worth” since 1983 and that movants and Intervenors have been using those

² Second Amd. Petition ¶¶ 64-67; Third Amd. Petition ¶¶ 78-83; Amd. Counterclaim against Diocese ¶¶ 88-92; Amd. Counterclaim against Corporation ¶¶ 87-91.

names wrongfully.³ But, if the names belong to the Diocese and the Diocesan Corporation as alleged, only they can sue for misuse. *See Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex. App.—Dallas 2001, no pet.). Plaintiffs' counsel cannot bring such a claim as they do not represent either entity.

3. The Fiduciary Duty claims belong to the Diocese and Diocesan Corporation, so Plaintiffs' counsel cannot assert them.

Counsel for Plaintiffs assert that individual Defendants “owe fiduciary duties to the Diocese, its Diocesan Corporation, and Church” which they have breached.⁴ Again, any breach of duty owed to the Diocese or Diocesan Corporation would have to be brought by or on behalf of those entities. *See* TEX. REV. CIV. STAT. Art. 1396–2.28; Art. 1396–70.01, § 7(a). Plaintiffs' counsel cannot sue by or on behalf of entities they do cannot represent.

4. The Title claims belong to the Corporation, so Plaintiffs' counsel cannot assert them.

In all four pleadings, Plaintiffs' counsel plead that title to all real estate at issue here is held by the Diocesan Corporation.⁵ Trespass-to-try-title and quiet-title claims must be brought by the entity that owns title. *See Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004); *In re*

³ Second Amd. Petition ¶¶ 68-70; Third Amd. Petition ¶¶ 84-88; Amd. Counterclaim against Diocese ¶¶ 93-96; Amd. Counterclaim against Corporation ¶¶ 92-95.

⁴ Third Amd. Petition ¶¶ 89-92; Amd. Counterclaim against Diocese ¶¶ 97-100; Amd. Counterclaim against Corporation ¶¶ 96-99.

⁵ Second Amd. Petition ¶ 40; Third Amd. Petition ¶ 45; Amd. Counterclaim against Diocese ¶ 56; Amd. Counterclaim against Corporation ¶ 55.

Slusser, 136 S.W.3d 245, 248 (Tex. App.—San Antonio 2004, no pet.). Plaintiffs’ counsel cannot assert title claims they admit are held by the Diocesan Corporation.

5. Plaintiffs’ counsel cannot avoid the appellate mandate by asserting a “representative capacity” claim for the Corporation.

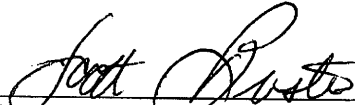
In three of their pleadings, Plaintiffs’ counsel assert that their individual clients appear in representative capacities on behalf of the Diocesan Corporation.⁶ But, a corporation can appear only by attorney, not by any other representative. *Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996). Plaintiffs’ counsel cannot appear for the Corporation by order of the Court of Appeals, nor can their individual clients do so as non-attorney “representatives.”

Conclusion

This motion should not have been necessary, as the orders of the Court of Appeals and this Court could not have been clearer. Defendant Diocese and Intervenor Diocesan Corporation request that the Plaintiffs’ barred claims be stricken from the amended pleadings, and Plaintiffs ordered to replead without them.

⁶ Second Amd. Petition ¶ 5; Third Amd. Petition ¶¶ 3-4; Amd. Counterclaim against Corporation ¶ 17.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2010, a true and correct copy of the foregoing *Motion to Enforce Appellate Mandate and Strike Amended Pleadings* was forwarded to all counsel of record by facsimile.

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