

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 The Protestant Episcopal Church In The)
 Diocese Of South Carolina; The Trustees of)
 The Protestant Episcopal Church in South)
 Carolina, a South Carolina Corporate Body;)
 et al.,)
)
 PLAINTIFFS,)
)
 v.)
)
 The Episcopal Church (a/k/a, The)
 Protestant Episcopal Church in the)
 United States of America); The Episcopal)
 Church in South Carolina)
)
 DEFENDANTS.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2013-CP-18-00013

**ORDER DENYING TECSC’S MOTION
 TO JOIN ADDITIONAL PARTIES**

FILED-RECORDED

5-20-14 (Signature)
 Cheryl Graham
 Clerk of Court
 Dorchester County

This matter is before the Court on Defendant TECSC’s Motion to Join Additional Parties. For the reasons set forth in this Order, the Court denies the Defendant's Motion.

I. BACKGROUND

This action was commenced on January 4, 2013. Thirty-eight South Carolina non-profit charitable corporations whose business is religious, seek a resolution of their real and personal property rights invoking this Court’s declaratory and injunctive powers primarily arising, out of three state statutes.¹ The Defendants, whose business is also religious, are The Episcopal Church (“TEC”), a New York unincorporated association and The Episcopal Church in South Carolina (“TECSC”), a South Carolina unincorporated association. On March 28, 2013, the Defendants answered, raising 21 affirmative defenses and asserting eight counterclaims.

¹ S.C. Code Ann. §§15-39-10 *et. seq.*, §§39-15-1105 *et. seq.* and §§16-17-310 and 320 (1976).

On April 3, 2013, TECSC removed this action to federal court, and subsequently, Plaintiffs filed a Motion for Remand on April 10, 2013. On June 10, 2013, United States District Judge C. Weston Houck granted Plaintiffs' Motion to Remand this action to the Court of Common Pleas for the First Judicial Circuit. On November 25, 2013, TECSC filed this Motion to Join Additional Parties.

TECSC seeks to allege in a proposed complaint 18 causes of action against four persons – two employed by the Diocese (Mark J. Lawrence and Jim Lewis,) and two volunteers who are former members and presidents of the Board of Directors (Standing Committee) (Paul Fuener and Jeffrey Miller). As in the previous motion filed by TEC seeking to join 23 individuals, this motion is made pursuant to Rules 13(h), 19 and 20, SCRCF.

After reviewing the Defendant's Memorandum in support, the Plaintiffs' Response, and considering the parties' oral arguments on December 30, 2013, this Court DENIES TECSC's Motion to Join Additional Parties.

II. The proposed claims are not counterclaims; they are individual actions

Rule 13(h) SCRCF allows parties to be joined “to a counterclaim or cross claim in accordance with Rule 19 or 20.” Rule 13(h), SCRCF. However, as the plain text of the rule indicates, the counterclaim must already be one asserted against an existing party not one directed solely against the party sought to be joined. “Claims asserted against a party not already in the action are not counterclaims, but independent causes of action.” *Condon v. Best View Cablevision, Inc.*, 292 S.C. 117, 123, 355 S.E.2d 7, 10 (Ct.App. 1987) (Bell, J.); accord *Fed. Deposit Ins. Corp. v. Bathgate*, 27 F.3d 850, 873 (3d Cir. 1994) (Non-party bank directors could be joined as additional parties to a counterclaim because the counterclaim was already before the court); *Johansen v. United States*, 392 F.Supp.2d 56, 59 (D. Mass. 2005) (counterclaim allowed

against a non-party because the same counterclaim was already asserted against the plaintiff); *Sternaman v. Macloskie*, 37 F.R.D. 316, 317 (E.D.S.C. 1965) (cross claim solely against strangers to suit not allowed); *U.S. Agric. Processors Marketing Services, Inc. v. Quinonez Hermanos*, 73 F.R.D. 87, 89-90 (S.D. Fla. 1976) (“Rule 13(b) can only be used to bring in additional parties to an existing cross claim.”); *Baltimore & Ohio R. Co. v. Cent. Ry. Servs., Inc.*, 636 F. Supp. 782, 786 (E.D. Pa. 1986) (Under Rule 13(h), parties may be joined to adjudicate a counterclaim “that already is before the court...This means that a counterclaim ...may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party.”); *see also*, 6 Wright & Miller, Fed. Prac. & Proc. Civ. § 1434 (3d Ed.) (“It should be noted that courts generally have interpreted Rule 13(h) as authorizing the joinder of parties only for the purposes of adjudicating counterclaims or cross-claims that already have been interposed in the action or that are being asserted simultaneously with the motion to add the new parties.”). The proposed causes of action are not presently before the court and therefore cannot be made under Rules 13(h), 19 or 20. They “are not counterclaims, but independent causes of action.” *Condon, supra.* ²

² Since they are asserted solely against these four individuals, they could be brought if at all in this action only by a third party complaint since they are independent causes of action. TECSC has failed to move under Rule 14. However, such a complaint likely would not be allowed for the reasons stated in *Beach v. Hudson*, 298 S.C. 424, 426-27, 380 S.E. 2d 869, 871 (Ct.App. 1989). There the Court of Appeals affirmed the trial court’s order striking a defendant’s third party complaint because the additional claims and parties would complicate the litigation. The court stated:

In our view, the assertion against four additional parties of seven additional causes of action in the third-party complaint, involving as those cause of action do allegations, among other things, of fraud, negligence, recklessness, outrage and unfair trade practices, treble damages, and repeated demands for punitive damages, will unduly complicate the adjudicate of the relatively simple contract action brought by the plaintiffs.

Id. Likewise, the addition of four parties and 15 new causes of action through a third party action likely would unduly complicate this declaratory judgment action.

While three of the fifteen causes of action have the appearance of having been asserted as they bear the same description (declaratory judgment, conversion and civil conspiracy), none of these causes of action allege matters against these four persons that are contained in the counterclaims already before the Court.³

III. The Additional Parties are not Indispensable to the Present Action Because Complete Relief Can Be Had Between the Existing Parties

This Court has already found “that complete relief can be had between the existing parties, and joinder of the additional counterclaim individuals is not necessary under Rule 19, SCRPC.” Or. Denying Defs. Mot. to Join Add. Counterclaim Defs. 4 (Sept. 27, 2013). This finding and order has not been appealed. However, Defendants seek again to add four of the same additional counterclaim individuals already held not to be necessary parties.

IV. The Additional Parties Should Not Be Added Under Rule 20.

Rule 15(a), SCRPC⁴, permits the amendment of a pleading “only by leave of court or by written consent of the adverse party.” The Rule goes on to state that “leave shall be freely given when justice so requires and does not prejudice any other party.” *Id.* When determining whether to grant a motion to join additional parties, a court must “consider both the general principles of amendment provided by Rule 15(a) and also the more specific joinder provisions of Rule 20(a).”

³ The civil conspiracy cause of action presently before the Court alleges a conspiracy between the Diocese and the parishes to conceal the issuance of quitclaim deeds by the Diocese to the parishes, ¶589-590. The proposed civil conspiracy claim TECSC seeks to allege states that the four individuals conspired to cause people to leave The Episcopal Church and the Diocese.

The declaratory judgment allegations in the proposed causes of action seek an order declaring TECSC’s rights to elect and control the officers and directors of the Diocese and declaring TECSC’s entitlement to the Diocese’s property. In the present action, the declaratory judgment claim against the Diocese and the parishes seeks a declaration that the quitclaim deeds are null and void and that a trust exists in favor of TECSC.

Finally, the conversion allegations before the Court allege that the Diocese and parishes have diverted to themselves property that should be held in trust for TECSC and seeks restitution of the real and personal property allegedly diverted. The proposed complaint alleges that the four individuals, for their own personal use, converted the same property.

⁴ The Notes to Rule 15 state: “This Rule 15(a) is substantially the same as the Federal Rule [...]”

Pelczynski v. Orange Lake Country Club, Inc., 4:11-CV-01829-RBH, 2013 WL 504238 (D.S.C. Feb. 8, 2013) (quoting *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 618 (4th Cir. 2001)). Rule 20(a), SCRCP, permits the joinder of parties when “there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” Although leave to amend should generally be “freely given,” the South Carolina Court of Appeals has held that it may be denied where the proposed amendment would be futile. *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012) (citing *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct.App. 1997)).

Here, Defendant TECSC claims that joinder should be permitted under Rule 20, SCRCP, because the questions of fact and law relating to their counterclaims are the same as to the additional parties Defendant TECSC seeks to add as they are to the Plaintiffs. However, TECSC’s proposed complaint seeks to allege claims which do not state causes of action: claims against individuals for corporate action which can only be brought derivatively;⁵ claims which can only be made against the corporation, not against individuals⁶; and claims seeking to have this court find misconduct for violation of ecclesiastical law⁷.

⁵ TECSC’s alleges these four individual directors and officers of the Diocese acted *ultra vires* but does not challenge the Diocese corporation’s actions nor could it unless made derivatively. S.C. Code § 33-31-304(b).

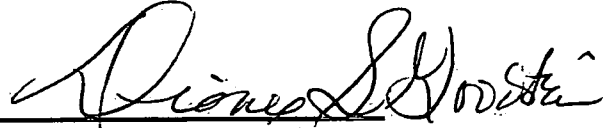
A member of a nonprofit has no right to bring direct attack against a proposed action. The claim may only be brought derivatively. If an action has been accomplished and the member or others in charge have done something wrong, have acted “*ultra vires*,” the members may bring a derivative action against the alleged wrongdoers.

South Carolina Reporters’ Comments to § 33-31-304. The proposed cause of action is not derivatively made. S.C. Code § 33-31-630.

⁶ A number of the causes of action can clearly only be made against the corporation. Against these four persons, the causes of action are futile. Those include fraudulent transfers under S.C. Code Ann. § 27-3-10, et seq. and § 27-23-

The evidence before the court fails to show that the actions taken by the four individuals were taken individually as opposed to being taken in their corporate capacities. These individuals are clearly those in (or who were in) leadership positions within the corporations and their alleged actions are no different from the actions taken by of the corporation. The individual actions may be evidence to support TECSC's legal defenses or counterclaims against Plaintiff corporations, but there is no evidence presented to show these individuals acted outside the corporation. Therefore, the Defendant TECSC's Motion to Join Additional Parties is denied.

AND IT IS SO ORDERED.



Judge Diane S. Goodstein
First Judicial Circuit

5-16, 2014

10, judicial removal of directors under S.C. Code Ann. § 33-31-810, judicial dissolution under S.C. Code Ann. §§ 33-31-1430 and 1431, ultra vires relief under S.C. Code Ann. § 33-31-304. Each of these causes of action are only valid against the corporation, have not been pled in any current counterclaim, and are only alleged against individuals in this motion. TECSC also alleges piercing the corporate veil against four individuals; they have no veil to pierce.

⁷ TECSC proposes to allege breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, promissory estoppel, fraud, and constructive fraud against the four individuals. All require this court to decide if ecclesiastical vows (in TEC's Canons) were broken. Furthermore, TEC's canons prohibit its members from asking civil courts to review and interpret TEC's Constitution and Canons. TEC Canon IV.19.2 ("No member of the Church, whether lay or ordained, may seek to have the Constitution and Canons of the Church interpreted by a secular court, or resort to a secular court to address a dispute arising under the Constitution and Canons"). Those causes of action fail to state a claim since they invite the Court to make a decision on whether vows were broken and since TEC's own rules do not allow it.

Even if this Court could make those determinations, TECSC was not a party to the contracts, was not the party to whom fiduciary duties were owed, or misrepresentations made, or who was defrauded. Either TEC or the Diocese (the Plaintiff in this action) would be the appropriate party. Therefore, TECSC lacks standing to assert these claims even if they were not ecclesiastical in nature.