

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: AUGUST 31, 2021
CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [21-20922](#)-A-13 **IN RE: KYLE ASH**
[21-2044](#)

STATUS CONFERENCE RE: COMPLAINT
6-23-2021 [\[1\]](#)

ASH V. CHIGBU & CO., LLP ET AL
JOSEPH ROSENBLIT/ATTY. FOR PL.
ADVERSARY PROCEEDING DISMISSED: 8/6/2021

Final Ruling

The Adversary case having been dismissed the Status Conference is concluded.

2. [20-23726](#)-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
[21-2005](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-14-2021 [\[1\]](#)

AME ZION CHURCH OF PALO ALTO,
INC. V. AME ZION WESTERN
EDWARD JOHNSON/ATTY. FOR PL.

No Ruling

3. [20-23726](#)-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
[21-2016](#) [MB-2](#)

MOTION TO DISMISS AMENDED COUNTERCLAIM
7-22-2021 [\[76\]](#)

AFRICAN METHODIST EPISCOPAL
ZION CHURCH ET AL V. AME ZION
HAGOP BEDOYAN/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Matter: African Methodist Zion Church ("the Denomination") and The African Methodist Episcopal Zion Church ("First AME Zion Church of Los Angeles" or the "Local Church") Motion to Dismiss the Amended Counterclaim (Fourth and Fifth Counts Only) ECF No. 46

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted with leave to amend in part and denied in part

Order: Civil minute order

Counter-defendant the African Methodist Zion Church (the Denomination) and The African Methodist Episcopal Zion Church ("First AME Zion Church of Los Angeles" or the "Local Church") move to dismiss the fourth (negligent retention) and fifth count

(negligent supervision) of the Amended Counterclaim, ECF No. 46. Mot. to Dismiss, July 22, 2021, ECF No. 76. Counterclaimants filed opposition. Opp'n., August 17, 2021, ECF No. 97. Counter-defendants have replied. Reply, August 24, 2021, ECF No. 99.

FACTS

This is an adversary proceeding arising out of the actions of Staccato Powell, a Bishop with the African Methodist Zion Church. A summary of the background giving rise to this dispute, and similar disputes with other AME Zion congregations, relating to Bishop Powell's conduct is set forth in the court's ruling in a related adversary proceeding. Mem. 2:10-8:20, *AME Zion Church of Palo Alto, Inc. v. AME Zion Western Episcopal District*, No. 21-2005 (Bankr. E.D. Cal. May 3, 2021), ECF No. 104.

This adversary proceeding differs somewhat from the Palo Alto church's adversary proceeding in that it involved the First AME Zion Church of Los Angeles and that church's property, which is located at 1449 W. Adam Blvd. Los Angeles. Unlike the AME Zion Church of Palo Alto, title to the First AME Zion Church of Los Angeles real property did contain the "in trust" verbiage in the chain of title restricting transfer and putting downstream transferees on notice of the denomination's interest in the property. Compl. 13:3-12, March 10, 2021, ECF No. 1. It also differs with respect to the manner in which the debtor acquired the Local Church's property; rather than pressuring its pastor in to sign the offending deed, in the case of First AME Zion Church of Los Angeles Bishop Powell signed it himself, even though he held no office in that local church.

In fact, however, the Debtor [AME Zion Western Episcopal District] never acquired any ownership interest in [1449 W. Adams Blvd., Los Angeles, California] and had no authority to pledge that property as collateral for any loan.

On the contrary, First AME Zion acquired legal title to [1449 W. Adams Blvd., Los Angeles, California] in 1972; has remained in continuous possession and control of the [c]hurch [p]roperty ever since; and has never transferred the [c]hurch [p]roperty or any interest therein to the Debtor or to anyone else.

In fact, the only instrument that purported to transfer the [c]hurch [p]roperty to the Debtor was not signed by any officer, director, trustee, or member of First AME Zion, but solely by the Debtor's own Chief Executive Officer, Staccato Powell. Specifically, in late December 2017, Powell signed a "Grant Deed" that purported to transfer First AME Zion's property to the Debtor....The 2017 Grant Deed is dated December 20, 2017, but the acknowledgement at the bottom of the 2017 Grant Deed states that Powell actually appeared before a notary in Cobb County, Georgia, on December 26, 2017 to sign the 2017 Grant Deed. The 2017 Grant Deed was recorded with

the Los Angeles County Recorder's Office on December 28, 2017....

Compl. 2:19-3:4, March 10, 2021, ECF No. 1 (emphasis added).

Using 1449 W. Adam Blvd. Los Angeles as collateral, the debtor obtained two hard money loans: December 20, 2017, in the amount of \$1.2 million and April 5, 2020, in the amount of \$ 1.5 million. The defendants herein are the Hard Money Lenders for the 2017 and 2020 loans.

First AME Zion Church of Los Angeles only became aware of the problem in March 2020, when the Hard Money Lenders commenced foreclosure proceedings.

Thereafter, the AME Zion Western Episcopal District filed for Chapter 11 protection. The Hard Money Lenders have filed two secured Proof of Claims in the amounts of \$1.5 million and \$1.6 million, respectively. Proof of Claims 3-1, 4-1.

Jeffrey Golden was appointed, and remains, the Chapter 11 trustee.

PROCEDURE

African Methodist Zion Church (the Denomination) and First AME Zion Church of Los Angeles filed this adversary against AME Zion Western Episcopal District (the debtor) and against Jeffrey Scott Bleecker as trustee for The Bleecker Family Trust, Lance Evic, and Lisa Motes (the Hard Money Lenders).

The defendants Hard Money Lenders answered the Complaint and filed a counterclaim for quiet title, equitable lien, judicial foreclosure, negligence retention, negligent supervision, and fraud. The negligence retention and negligent supervision are aimed at the Denomination and Local Church and contending that those parties were, or should have been, aware of Bishop Powell's rogue behavior with respect to local churches' real property and failed to address those problems in a timely and appropriate manner.

This motion to dismiss the negligent retention and negligence supervision causes of action of the Counterclaim followed.

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); see also General Order No 182 of the Eastern District of California. The crux of the adversary proceeding is core. 28 U.S.C. § 157(b) (2) (A), (O). The central issues are: (1) whether the debtor received good and defensible title to 1449 W. Adams Blvd., Los Angeles, California, by a 2017 grant deed purportedly from the First AME Zion Church of Los Angeles; and (2) if not, the priority of secured claims filed by defendants/counterclaimants vis-à-vis the purported grantor, the First AME Zion Church of Los Angeles. Fed. R. Bankr. P. 7001(2); Proofs of Claim No. 3-1, 4-1. This is a Chapter 11 case; a plan has not been proposed. These two issues go to the very heart of the restructuring process and, as a result, are

core proceedings. *Stokes v. Duncan (In re Stokes)*, 2013 WL 5313412 * 4, 8 (9th Cir. BAP 2013); *Watson v. Kincaid*, 96 B.R. 1014, 1017 (9th Cir. BAP 1989), *rev'd on other grounds*, 917 F.2d 1162 (9th Cir. 1990); *In re Washington Coast I, LLC*, 485 B.R. 393, 402-407 (9th Cir. BAP 2012) (adjudicating validity of liens); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481-482 (1940) (bankruptcy court have summary jurisdiction to adjudicate ownership of property over which debtor had possession on the date of the bankruptcy petition); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426 (1924); *Mueller v. Nugent*, 184 U.S. 1 (1902).

Moreover, the bankruptcy court has supplemental jurisdiction over the negligent retention and negligent supervision claims presented by thee Amended Counterclaim. Bankruptcy courts may exercise supplemental jurisdiction over other claims "that are so related to claims" that are within the court's original jurisdiction "that they form part of the same case or controversy." 28 U.S.C. § 1367. Section 1367 has been applied to both core and non-core proceedings. *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 n. 5 (9th Cir. 1997). Where the claims arise out of a "common nucleus of operative facts" and "would ordinarily be expected to be resolved in one judicial proceeding" supplemental jurisdiction exists. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir. 2005). As a are result, this court has non-core jurisdiction over the negligence claims. 11 U.S.C. § 157(c)(1). Plaintiff/Counterclaimants consent to entry of final orders and judgments by this court, Compl. 7:19-20, March 10, 2021, ECF No. 1; the Defendants/Counterclaimants do not consent to the entry of final orders and judgments by this court. Amended Answer 5:20-21, July 2, 2021, ECF No. 46.

LAW

The standards by which Rule 12(b)(6) are well-known. As this court summarized Rule 12(b)(6) in a recent decision:

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by Fed. R. Bankr. P. 7012(b)*. "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). See generally, *Wagstaff Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

Plausibility means that the plaintiff's entitlement to relief is more than possible. *Twombly*, 550 U.S. at 570 (the facts plead "must cross the line from conceivable to plausible"); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11 Cir. 2017). Allegations that are "merely consistent" with liability are insufficient. *Iqbal*, 556 U.S. at 662; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, *Wagstaff*, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

In re Jorgensen, No. 18-14586-A-13, 2019 WL 6720418, at *4 (Bankr. E.D. Cal. Dec. 10, 2019).

DISCUSSION

The Denomination and the Local Church make three arguments for dismissal: (1) absence of a duty to third parties, e.g., the Hard Money Lenders, or that the scope of that duty does not include civil, i.e., real property transfers, as distinct from ecclesiastical matters; (2) failure to plead facts from which a plausible breach of duty may be inferred; and (3) speculative nature of any damages sustained.

California recognizes a cause of action for negligent retention and for negligent supervision. *Federico v. Superior Ct. (Jenry G.)*, 59 Cal.App.4th 1207, 1210-11 as modified on denial of reh'g (Dec. 8, 1997). Its elements are the same as those applicable to a general negligence claim: (1) a duty to use due care; (2) breach; (3) proximate cause; and (4) damages. *Wattenbarger v. Cincinnati Reds, Inc.*, 28 Cal.App.4th 746, 751 (1994).

Duty

As to the Local Church

The Counter-defendants argue that the First AME Zion Church of Los Angeles, as opposed to the Denomination, did not stand in a master-servant relationship to Bishop Powell and, therefore, cannot be held accountable for his actions under the theory of respondeat superior. Reply 4:17-21, August 24, 2021, ECF No. 99.

This argument was not raised, or at least was not argued, in the Counter-defendants' motion. A Rule 12(b)(6) motion, not the ancillary papers, must "state with particularity the grounds therefor." Fed. R. Bankr. P. 9013. Here, the motion describes the grounds thusly: "The Amended Counterclaims state hypothetical causes of action for negligent retention and negligent supervision. However, Lenders fail to plausibly allege the existence of a duty owed by Plaintiff to Lenders, fail to plausibly allege a breach of that duty, and fail to plausibly allege damages." Mot. 2:10-13, July 22, 2021, ECF No. 76. That does not satisfy the particularity standards of Rule 9013. Moreover, the accompanying memorandum of points and authorities does not clearly articulate that argument. Mem. P. & A. 3:25-6:8, July 22, 2021, ECF No. 78.

But for the sake of a full hearing on the merits, the court will consider the argument. In ruling on a Rule 12(b)(6) motion the court may consider only limited matters. In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); accord *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes

extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted). Here, the allegations regarding church hierarchy reside in the complaint, but not the counterclaim. Reply 4:22-5:13, August 24, 2021, ECF No. 99. But the allegations of the Complaint are sufficiently incorporated by reference in the Counterclaim that the court may consider those facts.

The pleadings clearly demonstrate facts from which a master-servant relationship between the Denomination and Bishop Powell may be inferred. Compl. 8:16-11:4, 13:25-26, March 10, 2021, ECF No. 1. But just the opposition is true with respect to the relationship between the Local Church and Bishop Powell. In that relationship the Local Church held an inferior position of power. And for that reason, the court will grant First AME Zion Church of Los Angeles' motion to dismiss with respect to the fourth and fifth counts of the Amended Counterclaim, ECF No. 46.

As to the Denomination

Counter-defendants African Methodist Zion Church advances two arguments for the lack of duty to the Hard Money Lenders. First, the Denomination argues that it had no duty to "monitor public records in order to detect and correct, a fraudulent" deeds or other wrongful title documents. *WFG Nat. Title Ins. Co. v. Wells Fargo Bank, N.A.*, 51 Cal.App.5th 881, 893 (2020). From that it concludes that neither a negligent retention, nor a negligent supervision, cause of action will lie against it.

The court disagrees. The Hard Money Lender's negligence claims have a far broader factual basis than the denomination and congregation acknowledge. The Denomination and the Local Church apparently believe that the Hard Money Lender's claim is rooted solely in the failure to monitor and correct the public record. Not so. The Counterclaimants pled: "As early as 2017, Plaintiffs/Counter-defendants were aware that Debtor's principal, Bishop Powell, was allegedly engaging in unauthorized real estate transactions related to Plaintiff/Counter-defendant's properties." Compl. 28:13-15, 29:10-12, July 2, 2021, ECF No. 46. The Hard Money Lenders amplify the facts from which an inference of plausibility may be made:

In the [Denomination's] [s]tatement, [it] admit that 'beginning in 2017' it was aware that Bishop Powell/Third-party-defendant 'was taking action inconsistent with the AME Zion Church [*The Book of Discipline*]. These actions included, but were not limited to[,] the demand that pastors amend church deeds so that the Western Episcopal District, Inc. be named as title holder...

Despite having received complaints as early as 2017[,] that Bishop Powell/Third-party-defendant was allegedly engage in unauthorized transactions related to the [Denomination] and local denominations' properties, as of August 7, 2020, Bishop Powell/Third-party-defendant still

was not removed and 'remained an active member of the Board of Bishops.'

Amended Answer and Counterclaim 22:19-22, 23:4-7, July 2, 2021, ECF No. 46.

The Denomination is correct; as a rule, a property owner have no duty to monitor and correct fraudulent and/or erroneously recorded deeds pertaining to their real property. *WFG Nat. Title Ins. Co. v. Wells Fargo Bank, N.A.*, 51 Cal.App.5th 881, 893 (2020). But that is not the only theory that may be plausibly inferred from the facts of the Hard Money Lenders' claims. The Hard Money Lenders argue that prior to the 2017 Grant Deed signed by Bishop Powell transferring 1449 W. Adam Blvd, Los Angeles, from First AME Zion Church of Los Angeles, the Denomination had actual knowledge of Powell's propensity to act and failed to intervene. That is sufficient to support an inference of duty.

Second, the Counter-defendant African Methodist Zion Church second argue that it gave Bishop Powell no authority, actual or apparent, to transfer church property and, therefore, it cannot be held to answer for Powell's misdeeds with respect to church property. Mem. P. & A. 5:7-6:9, July 22, 2021, ECF No. 78.

Ordinarily, apparent authority is broader than actual authority. The Restatement once again provides guidance with respect to the outer edges of apparent authority:

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, *apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.*

Restatement (Second) of Agency § 27 (1958) (emphasis added).

The question of the existence and scope of a duty is a question for the court, not a jury. "Foreseeability is a "crucial factor" in determining the existence and scope of a legal duty." *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 237 (2005). In some instances, granting an individual a title may support a finding of apparent authority. *American Anchor & Chain Corp. v. United States*, 331 F.2d 860, 861, 862; *Lowell Housing Authority v. PSC Intern., Inc.*, 692 F.Supp.2d 180, 191; *Meyer v. Ford Motor Co.*, 275 Cal.App.2d 90, 100-102 (1969). As the *Meyer* decision teaches us:

[W]here ... an agent is by his principal put in charge of a business as the apparent manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of such business at that place, and third persons, acting in good faith, and without notice of or reason to suspect any limitations on his authority, are entitled to rely on such appearance.

..." "The theory of ostensible agency is that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him."

Id. (internal citations omitted) (emphasis added).

Here, the Denomination bestowed the title of "Bishop" on Staccato Powell. The precise authority, ecclesiastical and/or civil, that goes with that position is known only to those persons within that Denomination. An outsider, that is one not cognizant of the particulars of *The Book of Discipline*, but mindful of Staccato Powell's title might reasonably conclude that his authority extended to real property transactions for property held "in trust" for the Denomination (as existed here). Moreover, it was foreseeable to the national church that a Bishop acting beyond the authority delineated in *The Book of Discipline* might engage in unauthorized real estate transactions with local churches and also with third parties, i.e., the Hard Money Lenders.

For these reasons, the court will grant First AME Zion Church of Los Angeles' motion to dismiss the fourth and fifth counts of the Amended Counterclaim, ECF No. 46, and will deny the African Methodist Zion Church's motion to dismiss the fourth and fifth counts of the Amended Counterclaim, ECF No. 46.

Breach of Duty

Counter-defendant African Methodist Zion Church argues that the Hard Money Lenders have not plead facts from which this court may infer breach of any duty owed.

This court disagrees. The scope of a principal's duty is well-known. That duty includes avoidance of the employment of improper persons, the duty to supervise, and the duty to prevent tortious conduct by instrumentalities under the principal's control.

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

- (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
- (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[; or]
- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not

his servants or agents, upon premises or with instrumentalities under his control.

Rest.2d Agency § 213, cited with approval by *Federico*, 59 Cal.App.4th at 1213.

As Comment d states:

Liability results under the rule stated in this Section, not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.

Restatement (Second) of Agency § 213 com. d (1958) (emphasis added).

That is precisely what the Hard Money Lenders now claim. As early as 2017, the Denomination was aware of Bishop Powell's demand that local churches deed their property to the Western Episcopal District. Amended Answer and Counterclaim 22:19-26. On December 20, 2017, Bishop Powell signed a Grant Deed transferring the church property his new entity, even though he held no office or position with the First AME Zion Church of Los Angeles. *Id.* at 18:9-15. The Denomination did not act to rein in Bishop Powell until two months after that transfer. *Id.* at 22:27-23:3. This harm is of the quality that the Denomination had notice.

Moreover, a principal is liable "in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control." Rest.2d 213(d). As the comments state:

The master or other principal may be negligent because he has failed to use care with regard to the instrumentality furnished to a servant or other agent. See the Restatement of Torts, § 307. The statements in Comment d apply. It is immaterial whether it is the servant or the instrumentality used by him which is defective. One who engages in an enterprise must take care to see that all the instrumentalities, human or mechanical, which he uses are such as are not likely to cause harm to third persons.

Rest.2d § 213, com. (e) (emphasis added).

As of 2017, the Denomination was aware of Bishop Powell's willingness to violate church law with respect to locally-owned church properties. An inference exists that they failed to act on that knowledge until February 2018, Amended Answer and Counterclaim

22:27-23:3. This gives rise to an inference of breach of the duty of due care.

The African Methodist Episcopal Zion Church's motion to dismiss for failure to plead facts from which a plausible breach of duty exists will be denied.

Speculative Damages

Finally, counter-defendants African Methodist Zion Church argues that the Counterclaimants have not plead a plausible claim of damages, since liability is predicated on the plaintiff's prevailing on their claims to the property—which may, or may not, occur. Mem. P. & A. 7:17-13.

This court disagrees. Unquestionably, damages are an element of the Counterclaimants' case. *Wattenbarger v. Cincinnati Reds, Inc.*, 28 Cal.App.4th 746, 751 (1994). Here, Denomination and the Local Church assume that damages are predicted on the Denomination and the Local Church prevailing against the Hard Money lenders. But that is not true.

Any attempt to dismiss the Hard Money Lenders' claim because the damages are, in the words of the Counter-defendants, "speculative" fails for two reasons. First, hypothetical pleadings are, generally, allowed. Fed. R. Civ. P. 8(d)(2), *incorporated by*, Fed. R. Bankr. P. 7008. Rule 8(d)(2) contemplates the precise scenario now before this court.

Second, and more importantly, the negligent retention and negligence supervision cause of action may well be compulsory claim.

Compulsory counterclaims: A responding party (e.g., defendant) must plead as a counterclaim any claim which at the time of responding it has against the opposing party (e.g., plaintiff), if that claim: [1] "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" (emphasis added); and [2] "does not require adding another party over whom the court cannot acquire jurisdiction." [FRCP 13(a)(1)(A), (B); *In re Marshall* (9th Cir. 2010) 600 F3d 1037, 1057; *Adam v. Jacobs* (2nd Cir. 1991) 950 F2d 89, 92; *McDaniel v. Anheuser-Busch, Inc.* (5th Cir. 1993) 987 F2d 298, 304]

Phillips & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial*, Calif. & 9th Cir. Edit., Pleadings, Counterclaims § 8:1119 (Rutter Group April 2021).

It is sometimes difficult to apply the same transaction or occurrence test.

There is no single test to determine whether a claim arises out of the same transaction or occurrence.

Instead, courts look to a number of factors, including: [1] whether the issues of fact and law are largely the same for both claim and counterclaim; [2] whether res judicata would bar a subsequent suit on defendant's claim; [3] whether the same evidence will support or refute both the claim and counterclaim; and [4] whether there is a logical relationship between the claim and counterclaim.

Id. at 8:1120 (internal citation omitted).

Here, it appears that the Counterclaimants rights arise out of the same transaction or occurrence. The more difficult point is that the compulsory joinder rule applies only to matured claims, *Id.* at 8:1165; *Pace v. Timmermann's Ranch & Saddle Shop Inc.*, 795 F.3d 748, 757 (7th Cir. 2015); *Kuschner v. Nationwide Credit, Inc.*, 256 FRD 684, 689 (ED Cal. 2009), and the parties do not yet know whether the Hard Money Lenders will lose the priority fight with the Local Church.

As a rule, a negligence cause of action does not accrue until damage occurs. Counterclaims have plead damage, albeit it in a somewhat conclusory fashion. Cf., *Iqbal, Twombly*. Amended Answer and Counterclaim 29:2-4, 30:2-3. Counter-defendants African Methodist Zion Church and First AME Zion Church of Los Angeles assume that the only species of damages that would ripen the negligence claim is the Hard Money Lenders' loss of priority vis-à-vis the Denomination and/or congregation. But that is not necessarily true. In some instances, payments of attorney's fees to protect the aggrieved party's interests and mitigate losses (as the Hard Money Lenders now do to defend their priority within the chain of title) are damages that support a negligence claim. *Budd v. Nixen*, 6 Cal.3d 195 (1971), superseded by statute, as recognized *Laird v. Blacker*, 279 Cal. Rptr. 700, 706 (Ct. App.), review granted and opinion superseded, 813 P.2d 652 (Cal. 1991), and aff'd, 2 Cal. 4th 606, 828 P.2d 691 (1992), as modified on denial of reh'g (July 16, 1992). At least for pleading purposes this provides a plausible inference of damages now.

For each of these reasons The African Methodist Episcopal Zion Church's motion to dismiss based on speculative damages will be denied.

LEAVE TO AMEND

"Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." In determining whether to grant leave to amend the court should consider five factors: bad faith, undue delay, prejudice, futility, and previous amendments. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). "Futility alone can justify" denying leave to amend. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004)." *In re Jorgensen*, No. 18-14586-A-13, 2019 WL 6720418, at *9 (Bankr. E.D. Cal. Dec. 10, 2019).

Given the allegations of the Plaintiff/Counter-defendants' Complaint regarding church hierarchy, it seems unlikely that the Hard Money

Lenders will be able to state a claim against First AME Zion Church of Los Angeles for negligence. And it is true that this is the Hard Money Lenders' effort to plead a counterclaim. But because the specific arguments on which the Local Church prevailed were not raised until the church filed its Reply, ECF No. 99, the court will grant the Hard Money Lenders leave to file a Second Amended Counterclaim.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

African Methodist Zion Church (the Denomination) and The African Methodist Episcopal Zion Church (dba First AME Zion Church of Los Angeles)'s motion has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that The African Methodist Episcopal Zion Church (dba First AME Zion Church of Los Angeles) motion to dismiss is granted with leave to amend as to as to both the fourth and fifth counts of the Amended Counterclaim, ECF No. 46; leave is only granted to file a Second Amended Counterclaim with respect to the fourth and fifth counts (negligent retention and negligent supervision), and no other count;

IT IS ORDERED that African Methodist Zion Church (the Denomination) and The African Methodist Episcopal Zion Church (dba First AME Zion Church of Los Angeles) motion to dismiss is otherwise denied;

IT IS FURTHER ORDERED that if the Hard Money Lenders elect to file a Second Amended Counterclaim, they shall file a Second Amended Counterclaim and a redline copy not later than September 21, 2021, and that not later than October 12, 2021, the First AME Zion Church of Los Angeles may file a further Rule 12(b) motion or an answer and The African Methodist Episcopal Church shall file an answer to the Second Amended Complaint;

IT IS FURTHER ORDERED that if the Hard Money Lenders do not elect to file a Second Amended Counterclaim, then the First AME Zion Church of Los Angeles and the African Methodist Episcopal Church shall file an answer to the Amended Counterclaim, ECF No. 46, not later than October 12, 2021.

IT IS FURTHER ORDERED that the parties shall not enlarge time to file the Second Amended Counterclaim or any motion or answer responsive thereto, or to file an answer to the Amended Counterclaim, ECF No. 46, without leave of court.

4. [19-23452](#)-A-7 **IN RE: CIAO RESTAURANTS, LLC**
[20-2110](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-2-2020 [[1](#)]

HUSTED V. OLD REPUBLIC TITLE
COMPANY
NICHOLAS KOHLMAYER/ATTY. FOR PL.

Final Ruling

The Judgment having been entered on August 2, 2021, ECF No.109, the status conference is concluded.

5. [11-17165](#)-A-11 **IN RE: OAKHURST LODGE, INC., A CALIFORNIA**
CORPORATION

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
6-22-2011 [[1](#)]

DONNA STANDARD/ATTY. FOR DBT.

Final Ruling

This Status Conference is continued to September 13, 2021, at 1:30 p.m.

6. [20-23487](#)-A-7 **IN RE: MARCIE OKPAKPOR**
[20-2164](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
10-14-2020 [[1](#)]

OKPAKPOR V. OKPAKPOR
FRED IHEJIRIKA/ATTY. FOR PL.

No Ruling