

THE HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN JACOBSEN, CONNIE JACOBSEN,
RYAN KILDEA AND ARICA KILDEA,

Plaintiffs,

v.

MARK DRISCOLL AND JOHN SUTTON
TURNER,

Defendants.

No. 16-cv-00298

**DEFENDANT MARK
DRISCOLL'S FED. R. CIV. P.
4(m) MOTION TO DISMISS**

NOTE ON MOTION CALENDAR:
JULY 8, 2016

Pursuant to Fed. R. Civ. P. 4(m), defendant Mark Driscoll requests that this Court dismiss the complaint filed against him in this matter.

On February 29, 2016, plaintiffs Brian Jacobsen, Connie Jacobsen, Ryan Kildea and Arica Kildea filed a complaint against both Driscoll and defendant John Sutton Turner. Fed. R. Civ. P. 4(m) notes that a court "must dismiss the action without prejudice against the defendant or order that service be made within a specified time" if a defendant is not served within 90 days after the complaint is filed. Pursuant to this rule, the plaintiffs were obligated to serve Driscoll with the summons and complaint by May 31, 2016. The plaintiffs have not done so, and this case should be dismissed.

Fed. R. Civ. P. 4(m) requires a court to extend the service deadline when a plaintiff establishes good cause for his or her failure to serve process, but neither the Jacobsens nor the Kildeas can establish good cause in this instance. They simply chose to not prosecute their case

1 and to not serve Driscoll with the summons and complaint. Immediately following the filing of
2 this lawsuit, plaintiffs' counsel made himself available for an interview with the Seattle Times.
3 *See* article attached as Exhibit A to the Declaration of Thomas M. Brennan in Support of Motion
4 to Dismiss at ¶2. In that same news article, it was reported that Driscoll had recently moved to
5 Phoenix, Arizona in order to establish a new church in that community. *Id.* Driscoll's
6 whereabouts have been common knowledge and publicly reported. Yet, the plaintiffs have made
7 no effort to serve Driscoll in Phoenix and therefore cannot establish good cause for the purposes
8 of extending the Fed. R. Civ. P. 4(m) deadline. "[T]ardy efforts to accomplish service" are
9 insufficient to show good cause. *McClain III v. 1st Security Bank of WA.*, 2014 WL 7043474
10 (W.D. Wash. Dec. 11, 2014). The plaintiffs here are not simply tardy; they are absent.

11 Driscoll has neither consented to jurisdiction in this matter nor waived lack of process.
12 And Driscoll has not appeared in this case, whereas defendant Turner filed a notice of
13 appearance on April 7, 2016. *See* Dkt. # 3. It is understood that counsel for Turner made
14 multiple efforts to contact plaintiffs' counsel in order to facilitate acceptance of service of
15 process. *See* Declaration of Aaron D. Bigby in Support of Motion to Dismiss at Dkt. # 5 at p. 2.
16 It is further understood that Turner's counsel never received a response from plaintiffs' counsel.
17 *Id.* Given these facts, it is difficult to discern the good cause affording the plaintiffs an extended
18 service deadline, and it is reasonable to conclude that the plaintiffs have chosen to abandon this
19 case.
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21 Driscoll seeks dismissal of this case under Fed. R. Civ. P. 4(m); whereas Turner seeks
22 dismissal under Fed. R. Civ. P. 4(m) plus sanctions in two forms: dismissal with prejudice and an
23 award of fees and costs. When considering relief under Fed. R. Civ. P. 4(m), a court may
24 consider the following factors: a statute of limitations bar, prejudice to the defendant, actual
25 notice of a lawsuit and eventual service. *See Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir.
26 2007) (quotation omitted). In this instance, dismissal does not prejudice the plaintiffs in the
27 sense that it is not clear that the statute of limitations would bar a renewed complaint at a later
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1 date. The other factors, absent a showing of good cause, weigh in favor of dismissal.

2 Fed. R. Civ. P. 41(b) similarly allows for dismissal of an action when a plaintiff fails to
3 prosecute his or her case. Fed. R. Civ. P. 41(b) dismissal is deemed an adjudication on the
4 merits. Unlike Fed. R. Civ. P. 4(m), Fed. R. Civ. P. 41(b) may be utilized to dismiss a suit with
5 prejudice, although it can be considered a harsh penalty. *See In re Phenylpropanolamine (PPA)*
6 *Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006).

7 Turner's request for dismissal with prejudice, however, is strengthened by the fact that
8 his attorney contacted plaintiffs' counsel on multiple occasions. Arguably, Fed. R. Civ. P. 41(b)
9 dismissal might be an appropriate remedy (adjudication on the merits) given the fact that the
10 plaintiffs ignored Turner's counsel's overtures. Driscoll took a different approach -- to wait for
11 service (which never happened). Nonetheless, if the Court decides to dismiss the civil RICO
12 complaint against Turner with prejudice, it should do the same for the remaining civil RICO
13 defendant, Driscoll. The failure to prosecute applies to both parties. The plaintiffs were put on
14 notice about their obligation to serve process in a general sense when Turner contacted the
15 plaintiffs directly. That notice reminded the plaintiffs that they must serve all plaintiffs, not just
16 one plaintiff.

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18 No good cause exists that could warrant an extension of the Fed. R. Civ. P. 4 service
19 deadline. Indeed, the totality of the facts weigh in favor of dismissal with prejudice as opposed
20 to an extension of the deadline. Accordingly, Driscoll respectfully requests that the Court
21 dismiss the case against him and to do so with prejudice if the Court is inclined to dismiss the
22 case against Turner with prejudice.

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1 DATED June 16, 2016.

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EXHIBIT A

6/15/2016

Racketeering suit claims Mark Driscoll misused Mars Hill donor dollars | The Seattle Times

Racketeering suit claims Mark Driscoll misused Mars Hill donor dollars

Originally published
February 29, 2016 at
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Four former Mars Hill members filed a civil racketeering lawsuit against Mark Driscoll, charging that the once swaggering pastor fraudulently used thousands if not millions of dollars raised by the church. (Greg Gilbert / The Seattle Times, 2011)

Two former Mars Hill Church leaders, including pastor Mark Driscoll, are hit with a racketeering lawsuit, accusing them of fraudulently using thousands if not millions of dollars of donor money.

Mark Driscoll may have moved on to a new city and a new church, but he faces the sharpest demand yet to account for his actions at Mars Hill Church.

On Monday, four former Mars Hill members filed a civil racketeering lawsuit against Driscoll, charging that the once swaggering pastor fraudulently used thousands if not millions of dollars raised by the church, which once boasted 15 branches in five states with 13,000 visitors on Sundays.

The suit, filed in U.S. District Court for Western Washington, also names former Mars Hill executive elder John Sutton Turner as a defendant.

A 42-page complaint accuses the two men of raising money for specific purposes and then using the money for other things, including a “scam” designed to make Driscoll a best-selling author.

The racketeering activity was “so deeply embedded, pervasive and continuous, that it was effectively institutionalized as a business practice,” reads the complaint. “A deadly toxin was injected,” it goes on, “ending in the complete destruction of the church.”

That happened in late 2014, when accusations not only of financial improprieties but misogyny, plagiarism and emotional abusiveness led Driscoll to resign and the once mighty church to implode.

Neither Driscoll nor Turner could be reached for comment Monday.

The lawsuit could set an interesting precedent. Brian Fahling, an attorney representing plaintiffs Brian and Connie Jacobsen and Ryan and Arica Kildea, two married couples, said he knew of only one other lawsuit involving racketeering allegations against religious figures.

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Racketeering suit claims Mark Driscoll misused Mars Hill donor dollars | The Seattle Times

“I think megachurches do have to be careful,” said Warren Throckmorton, a psychology professor at Pennsylvania’s Grove City College and avid blogger about the Mars Hill saga. Other wealthy churches could face similar questions about who, exactly, is benefiting from moneys raised, he said.

A deadly toxin was injected, ending in the complete destruction of the church.” - complaint filed in lawsuit against Mark Driscoll

To prove racketeering, the plaintiffs in the Mars Hill suit need to show an ongoing pattern of wrongful acts during a four-year period specified. Fahling claimed that won’t be a problem. “We’ve got hundred or thousands of activities,” he said, including “every time an email was sent to a donor or something was posted to the website.”

The time period starts in 2011 when, the lawsuit says, Driscoll and Turner used church funds to prop up the pastor’s book “Real Marriage.” The suit cites a contract signed by Turner with a marketing company, which was to arrange for the purchase of 11,000 books so that “Real Marriage” would make the best-seller lists of The New York Times and other newspapers.

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The company was to buy the books at their retail price of between \$18 and \$20, rather than the discounted price, \$7, available to Driscoll. In all, the books cost \$210,000, and the fee to the marketing company another \$25,000, according to the lawsuit.

Around the same time, Mars Hill embarked on a major fundraising effort to support its “global fund,” which was supposed to be used for international missions. By 2014, the fund was taking in \$300,000 a month. Yet only a small percentage of the money raised was used internationally, according to the suit.

The complaint quotes an internal memo outlining the strategy of designating a percentage of the global fund for a few “highly visible” projects overseas. “This percentage should be flexible,” the memo said, “and not communicated to the public.”

In addition to Driscoll and Turner, the suit names several alleged co-conspirators not listed as defendants. These include the Evangelical Council for Financial Accountability (ECFA) and its president, Dan Busby. The Virginia-based group, which accredits Christian groups according to its standards of financial accountability and transparency, gave Mars Hill its blessing, even after questions started surfacing about the global fund.

“ECFA’s accreditation of churches is, at best, a rubber stamp,” the suit alleges. It

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Racketeering suit claims Mark Driscoll misused Mars Hill donor dollars | The Seattle Times

quotes an internal Mars Hill memo showing that Busby had a 2½-hour meeting with church leaders, during which he said that the church's response to questions had "100 percent solved the current issue." (The ECFA referred a reporter to a public-relations representative, who did not return a phone call seeking comment.)

That memo came from Throckmorton, who published portions of it on his blog the morning the suit was filed, showing that new information continues to trickle out despite Mars Hill's well-chronicled downfall.

The complaint asks for unspecified damages, which would be tripled under racketeering law if the plaintiffs are successful. The Jacobsens, former Mars Hill deacons, contributed more than \$90,000 to the church. The Kildeas gave more than \$2,700.

What remains to be seen is how all this will affect Driscoll. On Feb. 1, Driscoll announced that he was starting The Trinity Church in Phoenix. He boasted a high-powered group of religious leaders behind him, despite his past in Seattle. It's a past he refrained from elaborating upon in his announcement video or on his new website, neither of which mention Mars Hill.