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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L. ROUSSEAU, individually and on behalf of all others similarly situated, Plaintiffs, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 07 Civ. 3823 (RJD) (JMA)
LYNN COHEN, individually and on behalf of all others similarly situated, Plaintiff, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 08 Civ. 3555 (RJD) (JMA)
FRAN GOLDSTEIN, individually and on behalf of all others similarly situated, Plaintiff, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 08 Civ. 3923 (RJD) (JMA)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Everyone agrees that Bayside Cemetery is in poor condition. Plaintiffs throw around accusations of willful neglect, fraud, conversion, and misuse of perpetual care funds, all aimed at a synagogue that has nearly bankrupted itself in an effort to maintain the cemetery after the numerous organizations who originally undertook to maintain the vast bulk of the burial plots there have become defunct and ceased to fulfill their obligations. While Defendants have been working hard with the New York Attorney General and Jewish charitable institutions to solve the problem, we have consistently maintained that litigation is not the appropriate tool for dealing with this difficult situation. In this atmosphere, it is easy to overlook the controlling rules of law. Nevertheless, as this Reply Memorandum demonstrates, these actions are ill-conceived, unsupported by New York law, and should be dismissed. We assure the Court that dismissal of these actions will not cause any diminution in the Defendants' efforts to restore the cemetery.

SUMMARY OF ARGUMENT

In their Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Opp Br."), Plaintiffs concede that the Complaints do not allege any personal, individualized injury to any of the Plaintiffs, and thus that Plaintiffs lack the "injury-in-fact" necessary to give them standing. Instead, Plaintiffs suggest—without any citation to their Complaints—that their claims should be evaluated solely as if they had been brought by their deceased relatives, and that the mere allegation that family members (but not any of the Plaintiffs) made perpetual care agreements with Defendants suffices to give Plaintiffs a valid claim. Under New York law, however, even Plaintiffs' purported representative claims must be dismissed. And despite Plaintiffs' attempted argument to

the contrary, the statute of limitations provides an independent bar to these claims. Defendants' motion to dismiss should, therefore, be granted.[1]

ARGUMENT

I. PLAINTIFFS' SUGGESTION THAT THEY SHOULD BE ALLOWED TO REPRESENT THE INTERESTS OF THEIR DECEASED RELATIVES IS UNSUPPORTED IN NEW YORK LAW.

A. The perpetual care trusts at issue here, like all charitable trusts, are enforceable at the instance of the Attorney General, not private individuals who happen to be related to those buried in the cemetery.

Having conceded that they were not personally injured in any way that would support these actions, Plaintiffs fall back to a claim that, because Plaintiffs' deceased relatives are unable to challenge supposed breaches of trust agreements that they allegedly entered into with Defendants, Plaintiffs should be granted standing to do so instead. Yet Plaintiffs present a false choice. There is no need for the Court to disregard longstanding principles of law to create standing where no New York court has ever before found it, because New York already recognizes a fully effective means of enforcing the type of trust agreements at issue here, even long after the death of the individuals who made them: actions by the Attorney General of the State of New York.[2] Since Plaintiffs have not offered any reason to suggest that the Attorney General is incapable of bringing such an action, or that they have any personal claims against either Defendant, these actions should be dismissed for failure to state a claim upon which relief can be granted.

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[1] Plaintiffs also take issue with certain of the facts described in the background to Defendants' motion, such as the ownership of the real property underlying Bayside Cemetery (see Opp. Br. at 4-5), and the status of the Community Association for Jewish At-Risk Cemeteries (see Opp. Br. at 7). While Defendants stand behind the truth of their representations of the law and facts, the resolution of those disputes is irrelevant to the instant motion to dismiss.

[2] Indeed, Plaintiffs have shared their concerns with the Attorney General, who has conducted his own investigation into these allegations. Dissatisfaction with the Attorney General's conclusions does not entitle Plaintiffs to bring these suits.

The unquestioned rule in New York law is that charitable trusts, which by their definition cannot have individual named beneficiaries, are deemed to be for the ultimate benefit of the people of the state, whose interests are represented by the Attorney General. N.Y. Estates, Powers & Trusts L. § 8-1.1(f).[3] Thus, where a charitable trustee has allegedly breached his or her obligations under the trust agreement, it is the Attorney General, and not a legal stranger, whether or not a relative of the deceased, who possesses standing to sue. Plaintiffs seek to avoid the force of that rule by pointing to a broad, general statement in a hornbook, Bogert, The Law of Trusts and Trustees, that appears to support the grant of standing to individuals who own lots in a cemetery, those who are otherwise entitled to bury people in the cemetery, or friends and relatives of those already buried there. A closer examination of the relevant law, however, shows that neither the quoted treatise language nor the other cases cited in Plaintiffs' brief actually supports Plaintiffs' standing here.

At the outset, it is important to note that the language quoted by Plaintiffs is itself only an exception to the rule relied upon by Defendants. As Bogert writes earlier in the same section of The Law and Trusts and Trustees:

> As a general rule, no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust. The courts usually require that suits for enforcement be brought by the established representative of the charity, the Attorney General, so that the trustees may not be vexed by frequent, ill-considered suits leading to unnecessary litigation. Regardless of whether such suits would be prevalent if generally allowed, courts still use the spectre of their occurrence to deny standing.

Bogert, § 414, at 47-50.

[3] By statute, trusts for the perpetual care of graves and cemetery plots are deemed to be charitable in nature. N.Y. Estates, Powers & Trusts L. § 8-1.5. The alternative, of course, would leave them void for lack of definite beneficiaries and for violation of the rule against perpetuities (since the funds deposited with the trustee are encumbered by the trust restrictions indefinitely).

While § 414 describes a limited exception to that rule for suits by "specially interested beneficiaries," the New York Court of Appeals has applied that exception narrowly. In Alco Gravure, Inc. v. Knapp Foundation, 479 N.E.2d 752 (N.Y. 1985), the court held that the exception applies only where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds, and the class of potential beneficiaries is sharply defined and limited in number." Id. at 755 (citing Bogert, § 414). Unsurprisingly, in light of the Alco Gravure court's insistence on a well-defined and limited class of beneficiaries, Plaintiffs have not cited any New York case in which the § 414 exception was applied to allow a suit such as that at bar, and there is no reason to believe that New York would allow standing for any person who already has friends or relatives interred in the cemetery.

Nor, for that matter, do any of the cases cited in either the treatise or Plaintiffs' brief squarely support the "friends or relatives" language or the section's application to Plaintiffs' claims here. In fact, in almost all of the cited cases, the plaintiffs claimed standing by virtue either of their ownership of burial plots in the cemetery or other assertion of burial rights stemming from ownership or possession of the land. For example, in Mitchell v. Thorne, 32 N.E. 10 (N.Y. 1892), the only New York case cited by Plaintiffs in support of their standing argument, the plaintiffs sued as *heirs* of the grantor of a conveyance that specifically reserved burial rights to the grantor *and his heirs*, and the Court of Appeals recognized their right to seek an injunction against (and possibly damages for) violations of those rights. Similarly, in Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence, 383 S.E.2d 831 (W. Va. 1989), the court recognized that although the defendant corporation held title to the

cemetery lands in fee simple, it held it subject to a dedication for burial purposes. Reasoning from earlier decisions regarding cemetery desecration, it held that *lot owners* had the right to seek an injunction to enforce the implicit cemetery trust against an attempt to conduct subsurface mining in a portion of the cemetery.[4] The same limited principle runs through the other state court cases cited by Plaintiffs: when land is used for burial purposes, its owner becomes a de facto trustee, and *those who have burial rights in the cemetery* (whether by purchase of a burial plot, a reservation of title to the land, or prior unrestricted public use of the cemetery) can compel the owner to recognize their burial rights and can prevent actions inconsistent with burial.[5] They therefore provide no support to Plaintiffs, who do not allege that they own any plots at Bayside Cemetery or that either Defendant has attempted to deny Bayside's status as a cemetery or otherwise desecrate any grave.

Finally, the Attorney General's authority, which arises from the nature of the charitable trust, and not the legal status of the trustee, is not in any way altered by the fact that Defendants are incorporated as a religious corporation. It is true that, since it is owned by a religious corporation, Bayside Cemetery is not subject to the regulatory jurisdiction of the Division of Cemeteries; that may be what the "state officials" quoted in Plaintiffs' brief were referring to, but it does not mean that Defendants are "not subject to governmental regulation" (Opp. Br. at 13). The statutory scheme applicable to religious

[4] Notwithstanding the certified question quoted at page 12 of Plaintiffs' brief, the West Virginia Supreme Court clearly limited its decision to the first two questions presented and the desecration theory. Id. at 833. It neither discussed nor ruled upon the questions of "fraud, outrageous conduct, breaches of contractual duty, and trust duties, and/or violation of public policies" that were emphasized in Plaintiffs' quotation.

[5] Examples of the types of conduct prohibited in the cited cases include the removal of bodies to another cemetery, Smith v. Ladage, 74 N.E.2d 497 (Ill. 1947), the sale of burial plots according to a new plan that overlaps those already in use, Brown v. Hill, 119 N.E. 977 (Ill. 1918), subsurface mining, Concerned Loved Ones; Bennett v. 3 C Coal Co., 379 S.E.2d 388 (W. Va. 1989), and the burial of non-human remains, Hertle v. Riddell, 106 S.W. 282 (Ky. Ct. App. 1907).

corporations is, rather, largely similar to that applicable to not-for-profit corporations in general, see N.Y. Relig. Corp. L. § 2-b (listing specified exceptions to that rule), including in particular the provision regulating perpetual care trusts, which refers explicitly to "every religious corporation having charge and control of a cemetery," N.Y. Not-for-Profit Corp. L. § 1507(c). As Defendants noted in their moving brief, the Attorney General possesses standing to bring each of the claims asserted here, and is indeed the proper party to do so. We believe that the Attorney General shares the view that he has full power to redress any violations of the perpetual care trusts in issue here.

B. Plaintiffs cannot properly bring these claims on behalf of their deceased relatives' estates.

As an alternative ground for denying the motion to dismiss, Plaintiffs argue that "each Plaintiff is the executor or legal representative of the family member who purchased perpetual care or for whom it was purchased. Complaint ¶ 19." (Opp. Br. at 10.) Their brief, but not their respective Complaints, then sets forth a claim that Plaintiffs John Lucker, Fran Goldstein, and Lynn Cohen are the executors of, respectively, their grandmother's, mother's, and mother's estates. (Opp. Br. at 10-11.) Plaintiffs's claimed status as executors cannot, however, sustain these actions for the following reasons.

Initially, of course, it should be noted that despite the citation in Plaintiffs' brief, neither the Lucker Complaint nor any of the others mentions *anything* regarding a will, estate, or any person's status as an executor.[6] Nor do Plaintiffs make any allegations as to their alleged decedents' dates of death, the status of their estates, or any other relevant

[6] Paragraph 19 of the Lucker Complaint reads, in its entirety, "Plaintiff John R. Lucker resides in Simsbury, Connecticut. Mr. Lucker's grandparents are buried as part of the Chebra Shebath Achim Society. In the 1970s, Mr. Lucker's grandparents purchased perpetual care from a Defendant through the Chebra Shebath Achim Society. At times relevant herein, Defendants have failed and refuse to abide by their contract to provide perpetual care pursuant to their contractual obligations. *See* Exhibit B which shows that the Chebra Shebath Achim Society plots are not visible and entirely inaccessible." Paragraphs 20 and 21 of the Lucker Complaint and paragraph 19 of the Cohen and Goldstein Complaints are substantially similar.

information; indeed, none of the Complaints even discloses the name of the deceased relatives whom Plaintiffs claim to represent.[7] It is black-letter law that Plaintiffs may not use their opposition to a motion to dismiss as an opportunity to amend or supplement their Complaints, the sufficiency of which must be judged by the allegations they actually contain. Wright v. Ernst & Young LLP, 152 F.3d 169 (2d Cir. 1998) (collecting cases); see also Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F. Supp. 2d 157, 162 n.30 (S.D.N.Y. 1998) (rejecting attempt to add allegations supporting standing as a third-party beneficiary to a contract); Upper Hudson Planned Parenthood, Inc. v. Doe, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *10-*11 (N.D.N.Y. Sept. 12, 1991) (finding that complaint alleged plaintiff's standing as a health care provider, but not as a membership organization).

Any attempt to demonstrate standing on that ground, moreover, would be futile. First, a personal representative can only bring a survival action as to claims that were viable at the time of the decedents' death, In re Estate of Gandolfo, 655 N.Y.S.2d 341 (N.Y. App. Div. 1997) (executor cannot bring breach of fiduciary duty claim where alleged breach occurred "almost a year after the death of plaintiff's decedent"), and there is no such allegation here. Nor can Plaintiffs rely on those cases that allow an executor to sue in a non-representative capacity to defend the estate's interest in property or to

[7] We note that Plaintiffs have included, as Exhibits K & L to the Declaration of Michael M. Buchman in support of Plaintiffs' opposition to the pending motion, single page excerpts purportedly taken from the wills, of unknown date, of Jerome Lucker, Ruth Lucker, and Ann Levy (see Buchman Decl. ¶¶ 12, 13 & Ex. K & L). Even if such submissions could be considered on a motion to dismiss, in the absence of valid and current letters testamentary naming one or more of the Lucker Plaintiffs or Plaintiff Goldstein, respectively, as executors of their deceased relatives' estates, solitary, undated pages from wills that may or may not have ever been admitted to probate are worthless as evidence. That is an example of the general rule that, under New York law, status as an executor does not, by itself, convey any standing to sue in a representative capacity; rather, a purported personal representative must plead the possession of letters from an appropriate probate court attesting to the representative's due appointment. Schoeps v. Andrew Lloyd Weber Art Found., 851 N.Y.S.2d 74 (N.Y. Sup. Ct. 2007).

recover moneys paid out in their capacity as an executor, since Plaintiffs do not allege that their decedents had any possessory interest in the corpus of the perpetual care trusts at the time of their deaths, and Plaintiffs concede that they have not personally suffered any monetary loss, in their capacity as executors or otherwise. Once again, the rule is clear: when Plaintiffs' relatives allegedly entered into perpetual care agreements with Defendants, they created trusts that they intended to survive in perpetuity and that were charitable in nature. As with any trust, it is the beneficiary to whom the trustee owes a fiduciary duty and, thus, it is the Attorney General, as the representative of the ultimate charitable beneficiaries, who has standing to bring these actions.

II. PLAINTIFFS LACK VALID INDIVIDUAL CONTRACT CLAIMS.

Although Plaintiffs now claim to proceed solely in a representative capacity, they attempt to bolster one recognized ground of individual standing: as intended third-party beneficiaries of their relatives' perpetual care contracts (see Opp. Br. at 8-9, n.20). Their argument, however, amounts to no more than a restatement of the governing law. Plaintiffs point to a passing allegation in the Complaint that perpetual care includes "the prevention and removal of wild foliage growth in order to assure access to interment rights and grave visitation by surviving family, friends, and other interested parties" (Lucker Compl. ¶ 5), and claim that demonstrates the parties' intent to make Plaintiffs third-party beneficiaries of the contract. Even if that language had appeared in the contract—and it does not appear in the one PC contract that Plaintiff has referenced—it would still be insufficient to demonstrate standing. Intent to benefit a third party must be "clear" from the language of the contract. Consol. Edison, Inc. v. Northeast Utils., 426 F.3d 524, 527 (2d Cir. 2005). In the present case, not only is there no language in the contract suggesting the existence or identity of any third party beneficiaries, but the

proposed class of beneficiaries ("surviving family, friends, and other interested parties") is so amorphous as to simply amount to a restatement of the general rule that charitable trusts are for the benefit of the public at large (or a class of the public), rather than identified individuals. In light of the background law of charitable trusts discussed above, therefore, there would have been no "circumstances" suggesting the need for the parties to provide third-party beneficiary status as a matter of contract. Finally, the doctrine of contra proferentum, relied on by Plaintiffs, applies only where the interpretation of the contract is ambiguous, and then only as a last resort of interpretation, Regent Ins. Co. v. Storm King Contracting, Inc., No. 06 Civ. 2879, 2008 U.S. Dist. LEXIS 16513 (S.D.N.Y. Feb. 26, 2008), at n.3; it is not a license to ignore otherwise valid rules of contract interpretation, such as the requirement that an intent to benefit a third party be clear from the face of the contract.[8]

III. THE STATUTE OF LIMITATIONS PROVIDES AN ALTERNATIVE GROUND FOR GRANTING THE MOTION TO DISMISS.

In response to Defendants' statute of limitations arguments, Plaintiffs first suggest that the statute has not yet begun to run because of the "continuing nature" of Defendants' alleged violations, specifically their refusal to take certain actions that Plaintiffs believe are required (Opp. Br. at 19-20). But the cases cited by Plaintiffs do not provide any support for such a theory, since each relied on a repeated series of injuries to the plaintiff (through improper payments) that continued into the limitations period. Plaintiffs allege no such continuous pattern of injuries anywhere in the Complaints. Second, as to their General Business Law claims in particular, Plaintiffs argue that the

[8] Plaintiffs also suggest that the Statute of Frauds can be avoided by reference to a "contemporaneous document memorializing a contract." (Opp. Br. at 17.) Although no such document was properly alleged in the Complaints, even Plaintiffs' brief cites no document from which a jury could conclude that *Defendants* acknowledged the existence of a contract, the clear purpose of the Statute of Frauds.

Defendants' failure to make certain statements in the limitations period justifies retroactive application of the statute, even though the transactions allegedly giving rise to the duty to disclose occurred prior to the 1980 effective date of the private right of action under the GBL. Even assuming the statute would be given such a retroactive effect, the Complaints here make clear that—contrary to the argument in Plaintiffs' brief—the alleged GBL injury was that "Defendants' deceptive conduct caused highly vulnerable individuals . . . to pay monies for perpetual or annual care. . . ." (Compls. ¶ 40.) Finally, Plaintiffs suggest that any otherwise applicable statute of limitations should be tolled for fraudulent concealment. Yet for the reasons stated in Defendants' moving brief, including in particular the Plaintiffs' failure to point to any *change* in Defendants' alleged concealment that permitted the filing of these actions, fraudulent concealment has not been properly alleged and the doctrine should have no effect on this motion to dismiss.[9]

CONCLUSION

We conclude where we began. The applicable rules of law compel dismissal of these Complaints. Abandoning any pretense of personal injury, Plaintiffs ask the Court to ignore longstanding rules of standing to allow them to seek a remedy. In the absence of any allegation that these Plaintiffs' legal rights have been violated, Defendants respectfully request that their motions to dismiss be granted. Then Defendants, working with the Attorney General and the appropriate charitable institutions, will be able to concentrate on the restoration of Bayside Cemetery.

[9] Plaintiffs also attempt to argue that it was Defendants who misconstrued ¶ 11 of the Complaints as alleging that the purported acts of conversion occurred "in the 1980s." Plaintiffs would now have the Court take the first sentence of ¶ 11 as mere superfluage, unrelated to the balance of the paragraph. The argument strains credulity—Defendants did what any reasonable reader of the paragraph would have done, and assumed that not only were the sentences related, but that Plaintiffs' description of the Congregation's financial status was being offered to support their good faith belief that Defendants had, in fact, engaged in the claimed conversion. There certainly is no *other* factual basis for the conversion claims contained in the Complaints.

Dated: December 1, 2008
New York, New York

Respectfully submitted,

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