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August 19, 2009

VIA ECF

The Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East - Room 1210S
Brooklyn, NY 11201

Re: *Lucker et al. v. Bayside Cemetery & Congregation Shaare Zedek*,
No. 07 Civ. 3823 (RJD) (JMA)
Cohen v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3555 (RJD) (JMA)
Goldstein v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3923 (RJD) (JMA)

Dear Judge Azrack:

We write as counsel to Defendants in the above-referenced actions to respectfully request that the Court stay further proceedings on the Plaintiffs' Motion for Class Certification Pursuant to Rule 23 of the Federal Rules of Civil Procedure, which they served on July 24, 2009, pending a decision from Chief Judge Dearie on Defendants' pending motion to dismiss.¹

A brief review of the procedural posture of these actions demonstrates that proceeding with class certification at this point would be wasteful and improper. On October 13, 2008, Defendants served a motion to dismiss these actions in their entirety on the grounds that, inter

¹ A copy of the cover letter accompanying Plaintiffs' motion papers is attached hereto as Exhibit A. Although Plaintiffs' counsel sent a copy of that letter to Chief Judge Dearie's chambers, consistent with his practice, we are applying to Your Honor for relief pursuant to Your Honor's stated rule that "[u]nless otherwise specifically ordered, all non-dispositive pretrial motions are to be made to Magistrate Judge Azrack," Individual Rules of Magistrate Judge Joan M. Azrack, ¶ IV(A), which presumably includes both the underlying motion for class certification and this request for scheduling relief. We have also provided a courtesy copy of this letter to Ms. Mulqueen in Chief Judge Dearie's chambers, however, in light of her receipt of Plaintiffs' earlier letter.

alia, the Plaintiffs had failed to allege the type of individual, concrete, and particularized injury-in-fact that the Supreme Court described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1991), as an element of the “irreducible constitutional minimum of standing.” On December 11, 2008, after the parties had completed briefing on the motion to dismiss, Chief Judge Dearie entered an order requesting supplemental briefing on two additional jurisdictional issues relating to diversity jurisdiction, and later ordered the parties to engage in limited jurisdictional discovery, which was completed under Your Honor’s supervision in January and February of 2009.

Prior to oral argument before Chief Judge Dearie on the Defendants’ motion to dismiss, Plaintiffs’ counsel approached the undersigned and sought to agree upon a briefing schedule for an anticipated motion for class certification. Not having any desire to unduly delay these actions, yet consistent with our longstanding belief that the Plaintiffs lack standing to sue, and that, consequently, the Court lacks jurisdiction, Defendants agreed to a briefing schedule that was explicitly contingent on the Defendants’ motion to dismiss being denied. *See* Exhibit B. For similar reasons, we have declined Plaintiffs’ counsel’s request that Defendants limit the issues before the Court by stipulating to certification of a class as to the Plaintiffs’ breach of contract claims.

The parties appeared before Chief Judge Dearie on June 29, 2009 and argued the motion to dismiss at length, including both the injury-in-fact issue initially raised in the Defendants’ motion papers and the Court’s additional jurisdictional questions. Chief Judge Dearie ultimately took the motion under advisement, and it remains pending today. While there was a brief colloquy between Plaintiffs’ counsel and the Court at the end of the hearing as Chief Judge Dearie was leaving the bench regarding a potential motion for class certification, a transcript of which is attached hereto as Exhibit C, Defendants do not understand the Court to have ruled on the question posed by this letter. Regardless, the existence of subject matter jurisdiction, whether under Article III of the U.S. Constitution or the statutes establishing diversity jurisdiction, is a threshold matter that under controlling Supreme Court precedent must be resolved before any other issues. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).²

Even if the Court were to conclude that it would be permissible for it to consider class certification without first resolving the jurisdictional issues, a stay would still be justified by considerations of judicial economy. Although Defendants have not yet sought to take any class certification-related discovery, or even to fully consider all potential arguments in opposition to

² This case is unlike Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), in which the Supreme Court, notwithstanding Steel Co., decided class certification issues that were “logically antecedent” to unresolved doubts as to subject matter jurisdiction, holding that such questions “would not exist but for the class action certification.” Amchem, 521 U.S. at 612. Here, by contrast, because the individual named plaintiffs fail to allege any cognizable injury-in-fact, identical questions of subject matter jurisdiction would exist even if these were not putative class actions.

class certification, it is already clear that resolving the motion for class certification will necessarily require the Court to decide many of the same issues that are currently pending before Chief Judge Dearie. For example, because the Plaintiffs concede that they have never individually been party to any contract with a Defendant, or had any other individual relationship with the Defendants, much of the briefing and argument on the Rule 12(b)(6) motion was directed to the question of whether there is a special rule of standing for cases involving "cemetery trusts" that permits a class of undefined relatives of individuals buried in the cemetery to sue to enforce such trusts. While the parties disagree as to the correctness of that proposition, and its applicability to these cases, it is indisputable that Plaintiffs' claims can only be "typical" of those of the class, as required by Rule 23(a)(3), if New York law confers standing to bring such claims equally on both purchasers of perpetual care and their "relatives."³ Similarly, in support of their motion to dismiss, Defendants have argued that under New York law, the state Attorney General (and not the family or heirs of a deceased settlor) has the authority to enforce the terms of a charitable trust, including one for perpetual care, after the settlor's death. Defendants would expect to make the same argument in opposition to the proposition that these Plaintiffs are appropriate representatives of the class, or that a class action (as opposed to an action by the Attorney General on behalf of the People) is an appropriate mechanism for securing the relief sought in these complaints, let alone that it is "superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

Conversely, a decision by Chief Judge Dearie on the motion to dismiss has the potential to substantially narrow the issues in controversy as to class certification. For example, if the motion for class certification goes forward now, Defendants expect to argue that a class defined to include any and all "relatives" of individuals who allegedly entered into contracts, regardless of their degree of relationship, is hopelessly broad and indeterminate. Yet any decision on the motion to dismiss (regardless of whether it is granted or denied) is likely to indicate how the Court understands the "cemetery trust" cases and which, if any, relatives should be deemed to have standing to sue (and thus to be eligible for inclusion in the class).⁴ Similarly, resolution of the Defendants' statute of limitations arguments could provide guidance as to the appropriate length of the class period.

In light of those considerations, and consistent with Your Honor's scheduling order in the Cohen action dated December 11, 2009, Defendants would respectfully request that further proceedings on the Plaintiffs' motion for class certification in all three above-referenced actions be stayed pending a determination of Defendants' motion to dismiss. If, however,

³ Consistent with their Complaints, Plaintiffs seek to certify a class consisting of "all persons, or relatives of persons, who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns from January 1, 1970 to the present."

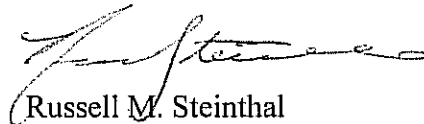
⁴ A more precise definition of the class would also facilitate a proper resolution of the Class Action Fairness Act issue raised by Chief Judge Dearie in his December briefing order, since one of the crucial elements under 28 U.S.C. § 1332(d)(2)-(4) is the percentage of in-state and out-of-state plaintiffs, which the Defendants have conceded is currently incapable of resolution without knowing what degree of "relatives" are actually included as plaintiffs.

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notwithstanding the foregoing, Your Honor decides to permit class certification briefing to proceed over Defendants' jurisdictional objections, we would request that the Court enter a briefing schedule for the instant motion that permits not only adequate time for the preparation of opposition papers, but also for the taking of appropriate discovery (including potentially depositions) from the putative class representatives.

Prior to submitting this request, the undersigned conferred with opposing counsel and asked whether he would be willing to either voluntarily withdraw the instant motion for class certification without prejudice, or otherwise to defer briefing pending a decision on the motion to dismiss. The parties were unable, however, to reach agreement, necessitating this application to the Court.

Respectfully submitted,



Russell M. Steinthal

Attachments

cc: Michael M. Buchman, Esq., Counsel to Plaintiffs
Ellen Mulqueen, Case Manager for the Hon. Raymond J. Dearie