SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated, Plaintiff, - against – BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC., Defendants.	Index No. 100530-2011 ORAL ARGUMENT REQUESTED Motion Sequence #002

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE ACTION IN ITS ENTIRETY PURSUANT TO CPLR 3211(a)

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Perhaps the most important point to come out of Plaintiff's memorandum in opposition to this motion is the clarification that this case is "not entirely about the present, it is about past transgressions," specifically the alleged "theft of perpetual/annual care monies" (Opp. Mem. 3). With that in mind, Plaintiff's repeated statements that Defendants are engaged in a "continuing" wrong, such that the statute of limitations cannot apply, are irrelevant, because the Court of Appeals has specifically held that conversion is *not*, as a matter of law, a continuing wrong, but rather that a single cause of action accrues at the time of the alleged theft, Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488-89, 448 N.E.2d 1324, 1326-27 (1983), regardless of whether the converted property is subsequently misused or exploited on multiple occasions, id., and regardless of whether or not the Plaintiff was then aware of the conversion, Varga v. Credit Suisse, 5 A.D.2d 289, 292, 171 N.Y.S.2d 674, 677 (1st Dep't), aff'd, 5 N.Y.2d 865, 155 N.E.2d 865 (1958). Since the Complaint alleges that "In the 1980's . . . the synagogue made a conscious decision to improperly remove monies originally intended for perpetual or annual care in violation of Defendants' fiduciary duties," (Compl. ¶ 20), Plaintiff's cause of action for conversion accrued no later than 1989, meaning that the applicable three year statute of limitations, see Sporn, expired no later than 1992. "[F]ailing to return stolen monies despite Plaintiffs' demand in the Lucker action and this action," (Opp. Mem. at 6), cannot revive the action.

Nor can the timing of Plaintiff's formal demand for the return of the allegedly converted property save his claim. Demand-and-refusal is a substantive element of a conversion claim only

in two related types of situations: first, cases (such as Baratta v. Kozlowski, 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dep't 1983), cited by Plaintiff) in which there is a bailment for an indefinite period, , and second, cases in which the claim is against a good-faith purchaser for value. In both cases, the cause of action accrues only upon refusal of a demand because there is nothing unlawful about the defendant's possession until that point. By contrast, where there is an actual misappropriation, and the defendant is the "thief," demand is not required. As the First Department explained in Heffernan v. Marine Midland Bank, N.A., 283 A.D.2d 337, 338, 727 N.Y.S.2d 60, 61 (1st Dep't 2001):

> We also reject plaintiffs' argument that their conversion claims did not accrue until they demanded return of the money. Even though plaintiffs entrusted their funds to Helliwell [an employee of the bank], he thereafter committed an overt and positive act of conversion by depositing such funds into his personal accounts, rather than into the fictitious "Trust B" account he had described to plaintiffs, thereby violating plaintiffs' ownership rights and immediately giving them a cause of action for conversion against him.

Id. See also Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 318, 569 N.E.2d 426, 429 (1991) ("Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft, even if the property owner was unaware of the theft at the time that it occurred.") (internal citations omitted). Since the Complaint here clearly alleges that Defendants engaged in an "overt and positive act of conversion," (see Compl. ¶ 20), the statute of limitations began to run, just as in Heffernan, at that point.

Notably, Plaintiff has not even attempted to distinguish Sporn, despite his heavy reliance on the continuing violation doctrine. The same standard applies when the claim is restyled as one for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty, see Gold Sun Shipping v. Ionian Transp., 245 A.D.2d 420, 421, 666 N.Y.S.2d 677, 678 (2d Dep't 1997), as well as breach of contract, although the latter is subject to a six year statute of limitations, CPLR

213(2).[1] Plaintiff does suggest that the statute of limitations is tolled by reason of his fiduciary relationship with Defendants, yet for the reasons discussed below, such a fiduciary relationship could not have been created as a matter of law.

B. The General Business Law Claims Are Time-Barred

As discussed in the moving brief, the statute of limitations for each of Plaintiff's General Business Law claims is three years from the date of accrual, which was no later than February 5, 1985 (when the Congregation acknowledged Plaintiff's payment for perpetual care). Plaintiff offers no response to that argument, apparently conceding the untimeliness of Counts I-III of his Complaint.[2] Nor can subsequent conduct, including subsequent breaches of contract, revive Plaintiff's General Business Law claims, each of which depends on an element of deception or false advertising: the statute and the relevant allegations of the Complaint address the deceptive means by which the contract was entered into, not the fact that it may allegedly have later been breached.

[1] Given the vagueness of Plaintiff's breach of contract claim, it is hard to pin down the precise conduct alleged to be a breach, or the accrual date of such claims. The statute of limitations branch of Defendants' motion, therefore, seeks only to bar "so much of Count IV as alleges injuries accruing more than six years before the date of the Complaint." (Moving Br. at 14.) That, of course, includes any breach caused by the alleged diversion of perpetual care funds in the 1980s, but could also extend to a range of other conduct, including the failure to care for graves more than six years before the filing of the Complaint. At the same time, Defendants do not dispute that a claim that a particular annual care contract entered into one year before the filing of the complaint, for example, was not performed would be timely.

[2] Plaintiff does, however, defend his standing to bring his § 349-c claim. He lacks standing, however, for two independent reasons. First, while § 349(h) provides a private right of action on "any person who has been injured by reason of any violation of this section," § 349-c is not the same section, and no analogous authorization of private suit appears there (see § 349-c(2) (referring to damages or civil penalties imposed pursuant to "section three hundred forty nine ... of this chapter," not "this section")). Second, even if one assumes that there is a private right of action, Plaintiff—who states that he is now 76 years old—was only 50 years old in 1985, when his § 349-c claim allegedly accrued. Therefore, he could not have been an "elderly person" against whom the deceptive conduct could have been perpetrated.

C. Plaintiff Has Not Alleged Facts Sufficient to Establish Fraudulent Concealment or Equitable Tolling

Plaintiff attempts to save his claims from dismissal under the statute of limitations by offering a number of tolling theories. The first two, fraudulent concealment and equitable tolling, both depend on, as Plaintiff admits, a showing that "plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action." (Opp. Br. at 7.) While Plaintiff asserts that it is "undisputed that Defendants did not publicly disclose the theft of these monies until after the federal action was commenced," (Opp. Br. at 8), that in and of itself does not suffice to toll the statute of limitations, since, as explained in Zumpano v. Quinn, 6 N.Y.3d 666, 674, 849 N.E.2d 926, 929 (2006), it is "fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit." Plaintiff has entirely failed to meet that burden. First, the Complaint does not allege any specific actions that affected Plaintiff's ability to bring suit at an earlier point. And second, since Plaintiff himself admits that Defendants' alleged "admission" of theft—which, for the record, Defendants dispute—was not until "after the federal action was commenced," it must be the case that reasonable plaintiffs (such as the Lucker Plaintiffs) were able to obtain the information necessary to bring suit without the supposed admissions of Defendants.

That leaves only Plaintiff's argument that Defendants had an affirmative duty to disclose their supposed defalcations because of their supposed "fiduciary duty to Plaintiff. (See, e.g., Opp. Br. at 20.) Yet for the reasons discussed below, Defendants never owed a fiduciary duty to Plaintiff.

II. DEFENDANTS OWE A FIDUCIARY DUTY TO THE CHARITABLE BENEFICIARIES OF PERPETUAL CARE TRUSTS, NOT THEIR SETTLORS/DONORS

Needless to say, Defendants do not in any way dispute that payments for perpetual care, including that by Plaintiff, create charitable trusts. Yet it is black-letter law that the trustee of a trust owes a fiduciary duty not to the person or entity that created the trust, but rather to the beneficiaries of the trust. See, e.g., In re Matter of Heller, 6 N.Y.3d 649, 655, 849 N.E.2d 403, 266 (2006) ("[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. . . The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.") (citing Restatement (Second) of Trusts § 170)). In the case of charitable trusts (which includes trusts for the perpetual care of graves, EPTL §8-1.5), the ultimate beneficiaries are the People of the State of New York, represented by the Attorney General, and it is to the People that Defendants' duties run. EPTL § 8-1.1.

The fact that the Appellate Division has permitted charitable donors to enforce the terms of their charitable gifts in certain circumstances, Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), does not mean that those donors are owed a fiduciary duty. In fact, the word "fiduciary" appears nowhere in the First Department's decision in Smithers. Rather, Smithers relies on a contract theory, allowing the donor to seek specific performance of his or her agreement with the charity. A mere contract, however, does not create a fiduciary relationship, or any of the duties of candor that Plaintiff relies upon throughout his brief.

Similarly, Plaintiff's argument that he has a present right to the return of "his" allegedly converted funds is, in fact, directly contrary to Associated Alumni, which he cites at page 19 of his brief for the proposition that a plaintiff is "entitled to a return of misappropriated, entrusted monies in order to enforce the donor's intent." In fact, the Court of Appeals in Associated

Alumni explicitly held that the Appellate Division's order to that effect was erroneous, and that the proper remedy was an order to the trustee to perform according to the terms of the trust:

> The judgment appealed from should be modified, so that instead of directing a return of the fund to the plaintiff, it should decree that the defendant hold said fund in trust to apply the same upon the terms and conditions specified in the resolutions of plaintiff's predecessors set forth in the agreed statement of facts; that the defendant in all respects specifically perform the terms, conditions and obligations of said trust; that in case the defendant fail to comply with the conditions of the judgment in these respects within a time to be fixed by the Appellate Division, then it forthwith pay over and surrender the fund, either into said court or to trustees to be appointed by the court for that purpose; and that thereafter the plaintiff may apply to the court for such disposition or application of the fund as may be proper under the circumstances; and that either party may hereafter apply to the Appellate Division for such other and further order or decree to be made at the foot of this judgment as shall be necessary or proper.

Associated Alumni v. General Theological Seminary, 163 N.Y. 417, 422, 57 N.E. 626, 627 (1900). For similar reasons, Plaintiff here has no present right to the return of the trust fund, whether on a conversion or unjust enrichment theory.

CONCLUSION

For the foregoing reasons, and those stated in their moving brief, Defendants respectfully request that their motion to dismiss be granted.

Respectfully submitted,

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