

To be Argued by:  
MICHAEL M. BUCHMAN

New York County Clerk's Index No. 100530/11

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# New York Supreme Court

## Appellate Division—First Department

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STEVEN R. LEVENTHAL as representative of a class consisting  
of himself and all others similarly situated,

*Plaintiff-Appellant-Cross-Respondent,*

– against –

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK,

*Defendants-Respondents-Cross-Appellants,*

– and –

COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,

*Defendant.*

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### **BRIEF FOR PLAINTIFF-APPELLANT-CROSS-RESPONDENT**

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**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

    A.    Bayside Cemetery and Defendants’ Sale of Perpetual Care  
          Contracts.....4

    B.    The Federal and State Court Actions .....6

    C.    The Motion To Dismiss Decision .....8

    D.    Facts Pertaining Directly to the *Leventhal* Action .....8

ARGUMENT .....10

    POINT ONE-A: PLAINTIFF PLED THE PAYMENT OF MONIES  
    TO DEFENDANTS TO MAKE OUT A CLAIM FOR  
    CONVERSION.....10

    POINT ONE-B: PLAINTIFF ALLEGED AND ATTACHED  
    DOCUMENTS EVIDENCING THE PAYMENT OF MONIES TO  
    DEFENDANTS TO MAKE OUT A CLAIM FOR CONVERSION .....12

    POINT ONE-C: PLAINTIFF ATTACHED TRANSACTION  
    DOCUMENTS EVIDENCING THE PAYMENT OF TRUST  
    MONIES TO DEFENDANTS .....13

    POINT TWO: THE COMPLAINT ALLEGES DECEPTION IN  
    CONNECTION WITH THE GENERAL BUSINESS LAW CLAIMS .....16

CONCLUSION .....18

**TABLE OF AUTHORITIES**

**CASES**

*Dutton v. Greenwood Cemetery Co.*,  
80 N.Y.S.780, 1903 N.Y. App. Div. LEXIS 573 (2nd Dept. 1903).....4

*The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*,  
404 S.W.2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) .....8

*Lucker v. Bayside Cemetery*,  
262 F.R.D. 185 (E.D.N.Y. 2009) .....6

*Meese v. Miller*,  
79 A.D.2d 237 (4th Dept 1981) .....*passim*

*Nieves v. Home Box Office*,  
815 N.Y.S.2d 495 (N.Y. Sup. Ct. N.Y 2006) .....10

*Smither v. St. Lukes-Roosevelt Hospital Center*,  
281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. LEXIS 3368 (1st Dept 2001) .....14

*Socket v. Degel Yehudo Cemetery Corp.*,  
49 N.Y.S.2d 176, 268 A.D. 207 (1st Dept. 1944) .....4

*Soviero v. Carroll Group Intern., Inc.*,  
27 A.D. 3d 267 (1st Dept. 2006).....10, 12

*WIT Holding Corp., v. Klein*,  
282 A.D.2d 527, 724 N.Y.S.2d 66 (2nd Dep't 2001) .....5

*Yochim v. Mount Hope Cemetery Association*,  
163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994) .....5

**OTHER AUTHORITIES**

Civil Practice Law and Rules  
§ 3211.....1

## **PRELIMINARY STATEMENT**

This is an appeal by Plaintiff Steven R. Leventhal of a Decision and Order of the Supreme Court of New York, New York County (James, J.), pursuant to CPLR §3211 in *Leventhal v. Bayside Cemetery*, Case No. 100530/11, granting Defendants Bayside Cemetery and Congregation Shaare Zedek's motion to dismiss the following claims: (i) General Business Law ("GBL") § 349; (ii) General Business Law § 349(c); (iii) General Business Law § 350; (iv) conversion; (v) aiding and abetting breach of fiduciary duty; and (vi) unjust enrichment ("Order"). Plaintiff is not seeking an appeal from the decision concerning the aiding and abetting breach of fiduciary duty and unjust enrichment claims. The only claims Plaintiff seeks appeal of are the GBL claims and the conversion claim. Plaintiff's breach of contract and breach of fiduciary duty claims were sustained.

The case on appeal arises from Defendants' admission to the New York State Attorney General's Office ("NYAG") in 2005 and in 2007 newspaper stories covering this litigation that they commingled cemetery perpetual care trust fund monies with general operating funds. Defendants publicly admitted they improperly used these monies, in contravention of the trust agreements, to make repairs to the synagogue.<sup>1</sup> This admission makes liability as to Plaintiff's breach of

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<sup>1</sup> Additional facts concerning this appeal can be found in the *Lucker et. al. v. Bayside Cemetery*, Case No. 114818/09.

contract, breach of fiduciary duty, and conversion claims uncommonly straightforward and patently clear. For the reasons set forth below, the lower court's decision concerning the conversion and GBL claims should be overturned and the matter should be remanded to the Commercial Division.

### **QUESTIONS PRESENTED**

1. Whether Plaintiff pled he paid monies to Defendants in order to make out a legally cognizable claim for conversion?
  - A. Yes, Plaintiff Steven R. Leventhal alleged in paragraph 8 of his Complaint that he “paid Defendant Congregation Shaare Zedek \$1,200 to place in trust in order to provide perpetual care services for three graves at Bayside Cemetery.”
2. Whether Plaintiff attached “documentary evidence” he paid monies to Defendants in order to make out a legally cognizable claim for conversion?
  - A. Yes, as alleged in the Complaint “[a] copy of the “Trust Fund Receipt and correspondence between Plaintiff and Defendant Congregation Shaare Zedek evidencing this transaction” was annexed as Exhibit A to the Complaint.
3. Whether Plaintiff, in his Complaint, alleged deceptive acts or practices in accordance with General Business Law §§ 349, 350?

A. Yes, Plaintiff alleged in paragraphs 20 and 22 of his Complaint that Defendants sold perpetual care and annual care contracts *knowing* that perpetual and annual care contracts were not being and would not honored. Plaintiff further alleged that Defendants, at the time contracts were entered, had no intention of honoring the contracts. Instead, Defendants intended to use the monies for other purposes *without disclosing* this information prior to taking monies. Had Defendants *disclosed* this information Plaintiff would not have entered into the contract.

### **STATEMENT OF THE CASE**

The following statement of the case is largely taken from the *Lucker* appeal. The section below entitled “Facts Pertaining Directly to the *Leventhal* Action” are directed toward and highly relevant to this appeal.

This is a class action seeking damages concerning Defendants’ invasion of perpetual and annual care trusts established to maintain plots and common areas at Bayside Cemetery in Ozone Park, Queens. In or around 2005, Defendants admitted to the NYAG that they “commingled” trust funds with general operating funds at the synagogue in violation of their fiduciary duties. Over three administrations, the NYAG has been conducting an “on-going investigation” which is continuing today. Although the cemetery has been the subject of recent

news stories concerning its deplorable conditions, the NYAG investigation has no end in sight.<sup>2</sup>

**A. Bayside Cemetery and Defendants’ Sale of Perpetual Care Contracts**

Bayside Cemetery, a fourteen acre tract of land with over 34,000 graves, was opened as a cemetery in 1842 by its owner Defendant Congregation Shaare Zedek. Defendants Congregation Shaare Zedek and Bayside Cemetery sold burial rights to individuals and burial societies for the interment of human remains in certain cemetery plots. Upon the completion of these burial interment sales, Congregation Shaare Zedek, under New York law, retained and continues to own all the land at Bayside Cemetery.<sup>3</sup> Defendants also sold annual and perpetual care for the plots and common areas at Bayside Cemetery.

Defendants sold perpetual care contracts to individuals and burial societies by entering into standard form contracts entitled “Trust Fund Receipt.” (A 51-52).

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<sup>2</sup> See [Baysidecemeterylitigation.com](http://Baysidecemeterylitigation.com).

<sup>3</sup> See *Sockel v. Degel Yehudo Cemetery Corp.*, 49 N.Y.S.2d 176, 268 A.D. 207 (1<sup>st</sup> Dept. 1944) (“The purchaser of a burial plot does not acquire a title in fee simple but ordinarily is regarded as acquiring only an easement or license to make internments in the lot purchased so long as the lot remains a cemetery.”); *Dutton v. Greenwood Cemetery Co.*, 80 N.Y.S.780, 1903 N.Y. App. Div. LEXIS 573 (2<sup>nd</sup> Dept. 1903) (“the Defendant is the absolute owner of the property in full possession and control of it, those to whom receipts for lots have been given having no estate or interest in the land as such, but merely a right to use it for burial purposes, subject to the rules, regulations and general control of the defendant.”).

Perpetual care is an additional service to maintain the plot in a respectable, dignified physical condition in perpetuity so that family members can safely visit a plot in order to pay respect to the deceased. The “Trust Fund Receipts” prepared by Defendants incorporated by reference New York Membership Corporation Law § 92 which required that funds be invested only in securities authorized by law for the investment of trust funds, and the income arising therefrom shall be used solely for the perpetual care maintenance of the lot or lots for which such monies were originally provided as identified in the contract. (A 51). Moreover, the officers of the corporation shall keep accurate accounts of such funds separate and apart from its other funds. *Id*; *see also* (A29-30, ¶ 21). The title of the document and the reference to New York Membership Corporation Law created a fiduciary relationship<sup>4</sup> by operation of law.<sup>5</sup> It is well recognized that perpetual care is traditionally purchased for the benefit of “surviving family, friends and other interested parties” who visit the cemetery to pay respects and for purposes of personal remembrance and religious observance. (A 27, ¶14). Plaintiff directly

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<sup>4</sup> Under New York law, a fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the others expertise or knowledge. *WIT Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2nd Dep’t 2001).

<sup>5</sup> *See Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994) (*citing DiMaio v. State of New York*, 135 Misc. 2d 1021, 1025 (N.Y.Ct. Cl. 1987)).

entered into the perpetual care trust agreements with Defendants in 1985. (A 51-52).

## **B. The Federal and State Court Actions**

This class action was initially filed in the United States District Court for the Eastern District of New York. The case was twice temporarily suspended, per Chief Judge Dearie's request, in order to give the Defendants a chance to remedy the problem at the cemetery. In exchange for the stays, Chief Judge Dearie promised to place the case on an expedited track if the Defendants did not endeavor to clean-up the cemetery during the administrative suspension. When Defendants squandered those opportunities, Chief Judge Dearie restored the case to the docket and *sua sponte* dismissed the action on jurisdictional grounds. *Lucker v. Bayside Cemetery*, 262 F.R.D. 185 (E.D.N.Y. 2009).

The case was immediately refiled in the Supreme Court of New York, New York County and designated for the Commercial Division in accordance with The Uniform Rules For The New York State Trial Courts, Part 202.70 which requires that all class actions and breach of contract and fiduciary duty actions be entertained by the Commercial Division regardless of the amount in question. (A 20-46). It was assigned out of the Commercial Division to Justice James because on December 4, 2009, Justice Bernard J. Fried, assigned the related *Lucker* action to Justice James. The decision to transfer this matter out of the Commercial

Division was effectuated absent a formal written opinion outlining the reasoning for the removal of this case which presumptively fit within two of the Commercial Division's mandatory guidelines. The Uniform Rules For The New York State Trial Courts, Part 202.70.

Shortly after commencement of the federal action, Defendants, for the first time, publicly admitted in the press that monies were "commingled" and used to repair the roof and/or make other capital repairs at the synagogue. Whether characterized as commingling accounts, absconding with monies, embezzlement or even theft, the sad reality is that the cemetery is in deplorable condition - a disrespectful condition which Defendants have acknowledged publicly. Indeed, in the news stories covering the cemetery reporters called the conditions very distressing.

The only way to resolve the problem concerning the disgraceful condition of the cemetery is this lawsuit. Bayside is not subject to the enforcement of N.Y. State Cemetery Law. *Id.* Moreover, it is registered as a "religious group" not a foreign or domestic "not for profit" corporation and, therefore, beyond governmental regulation. Notably, state officials say that they are aware of the problems at Bayside, but are powerless to do anything about it.

Over the past seven years, the NYAG has done very little to force these Defendants to remediate the problem and return the stolen monies. The NYAG,

which has not intervened to stay this proceeding, has expressed to Plaintiffs and Chief Judge Dearie of the Eastern District of New York in the former federal proceeding that it has neither the power nor the inclination to become entangled in what is a purely private contractual dispute.<sup>6</sup>

### **C. The Motion To Dismiss Decision**

On January 9, 2012, Justice Debra A. James issued a six page decision granting Defendants' motion to dismiss the GBL §§ 349, 350 claims, the conversion claim, the unjust enrichment claim and the aiding and abetting breach of fiduciary duty claim. (A14-190). The breach of contract and breach of fiduciary duty claims were sustained. *Id.* Plaintiff appeals the ruling as to the GBL §§ 349, 350 claims and the conversion claim.

### **D. Facts Pertaining Directly to the *Leventhal* Action**

Unlike Plaintiffs in the *Lucker* action, Plaintiff Steven R. Leventhal directly purchased a perpetual care contract directly from Defendants. With regard to the conversion claim, Plaintiff alleged in the Complaint as follows:

8. In 1985, Plaintiff paid Defendant Congregation *Shaare Zedek* \$1,200 to place in trust in order to perpetual care services for three graves at Bayside

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<sup>6</sup> See *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) (“[the Attorney General] does not, however, represent each and every member of the public, particularly where private interests exist, in which case “those with a special interest may enforce a trust, or a localized or group charity may be enforced by a class suit. . .”).

Cemetery. A copy of the “Trust Fund Receipt” and correspondence between the Plaintiff and Defendant Congregation Shaare Zedek *evidencing this transaction* is annexed as Exhibit A. (emphasis added).

(A 25, ¶ 8).<sup>7</sup>

With regard to the General Business Law §§ 349, 350 claims, Plaintiff alleged in the Complaint as follows:

20. In the 1980s, Defendant Shaare Zedek was essentially defunct and suffered from a faltering budget. Statements made recently of the behalf of Defendants to the New York State Attorney General’s Office make clear the synagogue made a conscious decision to improperly remove monies originally intended for perpetual or annual care in violation of Defendant’s fiduciary duties. It appears these monies were improperly taken from the perpetual/annual care account for the purpose of making significant structural repairs to the synagogue building, thereby using the money for the living and not the deceased as initially promised, represented and intended.
22. For years, Defendants have marketed, sold and collected monies from consumers for perpetual or annual care knowing that perpetual and annual care contracts were not being honored and that they had no intention or inadequate resources to honor new perpetual care contracts. They did not disclose material facts to consumers concerning the perpetual/annual care fund’s financial strength, or lack thereof, at the time consumers purchased contracts. Moreover, when accepting monies Defendants left consumers to believe that perpetual

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<sup>7</sup> See also (¶¶ 79-84).

care or annual care would be provided when, in fact, Defendants had not been nor would be providing such services. For example, in 2001 the Chechonover Society paid annual care monies for seasonal care which Defendants accepted. Defendants, however, refused to provide contractual services in whole or in part. See The Jewish Week dated October 18, 2002 entitled The Cemetery Nobody Wants. Defendants continued to accept perpetual care and annual care monies from individuals without supplying perpetual care services. Defendants accept this money and use it to fund their failing synagogue rather than pay for its own expenses.<sup>8</sup>

### **ARGUMENT**

For the reasons demonstrated below, the lower court's decision should be reversed and this case should be remanded to the Commercial Division.<sup>9</sup>

### **POINT ONE-A**

#### **PLAINTIFF PLED THE PAYMENT OF MONIES TO DEFENDANTS TO MAKE OUT A CLAIM FOR CONVERSION**

The lower court's decision overlooks allegations contained in the Complaint.

In the Order, the lower court, citing two cases,<sup>10</sup> mistakenly dismissed the conversion claim on the ground Plaintiff did not plead that he had "ownership,

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<sup>8</sup> (A 29-30, ¶¶ 20, 22; *see also* ¶¶ 45-61).

<sup>9</sup> On a motion to dismiss for failure to state a cause of action every fact alleged must be assumed to be true and the complaint liberally construed in Plaintiff's favor. *Nieves v. Home Box Office*, 815 N.Y.S.2d 495 (N.Y. Sup. Ct. N.Y 2006) (James, J.).

<sup>10</sup> *Soviero v. Carroll Group Intern., Inc.*, 27 A.D.3d 267, 277 (1<sup>st</sup> Dept. 2006); *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981)

possession or control of the property [\$1,200] in the first place.” (A 16).

Moreover, the lower court incorrectly concluded “[p]laintiff never had such ownership possession or control of the funds he alleges were converted.” *Id.* In paragraph 8 of the Complaint Plaintiff specifically alleged that he paid monies directly to Defendants as follows:

8. In 1985, *Plaintiff paid Defendant Congregation Shaare Zedek \$1,200 to place in trust in order to perpetual care services for three graves at Bayside Cemetery. A copy of the “Trust Fund Receipt” and correspondence between the Plaintiff and Defendant Congregation Shaare Zedek evidencing this transaction is annexed as Exhibit A. (emphasis added).*

(A 25, ¶ 8).<sup>11</sup>

There is simply no basis for the lower court to have dismissed the conversion claim on the ground that plaintiff did not exercise “ownership, possession or control of the property in the first place.” (A 16) A more clear error cannot be imagined as the Complaint *specifically* alleged *Plaintiff paid Defendants \$1,200 to place in trust*. Accordingly, the lower court’s decision concerning the conversion claim should be overturned and the case should be remanded to the Commercial Division.

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<sup>11</sup> See also (¶¶ 79-84).

## POINT ONE-B

### **PLAINTIFF ALLEGED AND ATTACHED DOCUMENTS EVIDENCING THE PAYMENT OF MONIES TO DEFENDANTS TO MAKE OUT A CLAIM FOR CONVERSION**

The lower court's decision utterly ignores allegations and "documentary evidence" establishing Plaintiff's claim. In the Order, the lower court, citing two cases,<sup>12</sup> mistakenly dismissed the conversion claim on the ground Plaintiff did not attach "documentary evidence"<sup>13</sup> to the Complaint demonstrating that he had "ownership, possession or control of the property in the first place." *Id.* In paragraph 8 of the Complaint, Plaintiff *specifically alleged and referenced documents establishing he had "ownership, possession or control in the first place" of the monies* by stating as follows:

8. A copy of the "Trust Fund Receipt" and correspondence between the Plaintiff and Defendant Congregation Shaare Zedek *evidencing this transaction* is annexed as Exhibit A.

There is simply no basis for the lower court to have dismissed the conversion claim on the ground that plaintiff did not attach documentary evidence that he exercised "ownership, possession or control of the property in the first place." A more clear

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<sup>12</sup> *Soviero v. Carroll Group Intern., Inc.*, 27 A.D.3d 267, 277 (1<sup>st</sup> Dept. 2006); *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981).

<sup>13</sup> Plaintiff need not prove his claim on a motion to dismiss and the allegation contained in the Complaint was sufficient to sustain the claim. The lower court in the *Lucker* matter similarly applied the wrong standard on a motion to dismiss and also *completely ignored* a document in the record central to the issue of standing.

error cannot be imagined as Exhibit A to the Complaint is an actual Congregation Shaare Zedek Receipt No. 1810 *acknowledging with sincere appreciation the receipt of \$1,200 from Plaintiff for perpetual care.* (A 49). Accordingly, the lower court's decision concerning the conversion claim should be overturned and the case should be remanded to the Commercial Division.

### POINT ONE-C

#### **PLAINTIFF ATTACHED TRANSACTION DOCUMENTS EVIDENCING THE PAYMENT OF TRUST MONIES TO DEFENDANTS**

The lower court incorrectly concluded Plaintiff's conversion claim fails because there is no allegation, nor documentary evidence, *that the [trust] funds remained in the custody and control of plaintiff.* (A 16) (emphasis added). In support of its faulty conclusion, the lower court cited *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981). The lower court's decision is patently wrong for two reasons.

*First*, throughout the Complaint Plaintiff alleged that he paid monies to Defendant to place in a "perpetual care trust." (A 22-46) A trust by its very definition creates a fiduciary relationship.<sup>14</sup> It is well recognized law that when a principal turns over property to a trustee or agent, the principal retains a superior possessory right in the trust and the trustee or agent owes a fiduciary duty to the

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<sup>14</sup> See n. 4 & 5.

principal concerning the *corpus* of the trust. *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981). Misuse of the *corpus* constitutes a conversion under New York law. *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981); *see also Smither v. St. Lukes-Roosevelt Hospital Center*, 281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. Lexis 3368 (1<sup>st</sup> Dept 2001). Under these basic principles of law, Plaintiff had a property or ownership interest in the monies placed into trust *at all times. Id.*

*Second*, the *Meese* case, which the lower court relied upon when dismissing the Complaint, is virtually identical to the facts alleged in the Complaint. In *Meese v. Miller*, 79 A.D.2d 237, 244 (4th Dept 1981) a conversion claim *was sustained* because plaintiff alleged he “entrusted” \$2,873 to defendant toward the purchase of electronic equipment that was never ordered nor received. The *Meese* court held:

to establish conversion the plaintiff ‘must demonstrate legal ownership or an immediate superior right of possession to a specified identifiable thing and that the defendant exercised an unauthorized dominion over that property beyond the authority which can be specific money, to the exclusion of the plaintiff’s rights. Any use of such property beyond the authority which an owner confers upon a user in violation of instructions given is a conversion. The test for conversion is whether a party exercises dominion or actually interferes with the property to the exclusion or in defiance of the plaintiff’s rights. (citation omitted).

The *Meese* court held with respect to the “entrusted monies” that Plaintiff had properly alleged a conversion claim because he demonstrated that Defendants

wrongfully retained the monies and had converted them by failing to timely provide the electronic equipment or return the monies. In this case, Plaintiff properly alleged a claim for conversion. As in *Meese*, Plaintiff here has alleged he paid Defendants monies to be placed in trust. (A 25, ¶ 8). The *corpus* was to be invested, never invaded and the income was to only be used to maintain three designated plots at the cemetery. (A 51-52, 29-32). Rather than follow the express language of the perpetual care contract and Membership Corporation Law § 92, Plaintiff alleges that Defendants stole the monies and used them in a manner entirely inconsistent with the terms of the trust. *Id.* Indeed, Plaintiff further alleged that Defendant admitted, on at least two separate occasions, that they stole the monies and on one occasion admitted they used the monies to repair the synagogue roof. (A 23, ¶ 2). As alleged in the Complaint, Defendants have refused to return the stolen monies or to conduct an accounting. (A 29, ¶ 21, A 32 ¶ 27). Thus, *the facts in this case are on all fours with Meese where the conversion claim was sustained.* To cite *Meese* as a basis for dismissing this case involving entrusted monies demonstrates a fundamental misunderstanding of the facts and law. Accordingly, the lower court's decision concerning the conversion claim should be overturned and the case should be remanded to the Commercial Division.

## POINT TWO

### **THE COMPLAINT ALLEGES DECEPTION IN CONNECTION WITH THE GENERAL BUSINESS LAW CLAIMS**

The lower court erroneously held that Plaintiff's GBL §§ 349, 350 claims did not allege a deceptive act or practice. (A 15). The Complaint specifically alleges that Defendants routinely advertised and offered to the general public the sale of annual and perpetual care services for plots at the cemetery. (A 27 ¶ 14, A 28 ¶ 15). Despite receiving hundreds of thousands of dollars to provide perpetual and annual care there came a time when Defendants elected to invade perpetual care trusts in order to use the money for the failing synagogue. (A 28 ¶ 16). Indeed, discovery in this matter and the *Lucker* action will pinpoint in time when this decision was made and how the Defendants *continued to sell* annual and perpetual care contracts *knowing* they would not honor such agreements and would instead convert the monies immediately in order to fund their failing synagogue. (A 29-30). This is precisely the sort of deceptive act or practice GBL §§ 349 and 350 prohibit because it involves false advertising and deception. The Complaint makes out such claims as follows:

20. In the 1980s, Defendant Shaare Zedek was essentially defunct and suffered from a faltering budget. Statements made recently of the behalf of Defendants to the New York State Attorney General's Office make clear the synagogue made a conscious decision to improperly remove monies originally intended for perpetual or annual care in

violation of Defendant's fiduciary duties. It appears these monies were improperly taken from the perpetual/annual care account for the purpose of making significant structural repairs to the synagogue building, thereby using the money for the living and not the deceased as initially promised, represented and intended.

22. For years, Defendants have marketed, sold and collected monies from consumers for perpetual or annual care knowing that perpetual and annual care contracts were not being honored and that they had no intention or inadequate resources to honor new perpetual care contracts. *They did not disclose material facts to consumers concerning the perpetual/annual care fund's financial strength, or lack thereof, at the time consumers purchased contracts. Moreover, when accepting monies Defendants led consumers to believe that perpetual care or annual care would be provided when, in fact, Defendants had not been nor would be providing such services.* For example, in 2001 the Chechonover Society paid annual care monies for seasonal care which Defendants accepted. Defendants, however, refused to provide contractual services in whole or in part. *See The Jewish Week* dated October 18, 2002 entitled *The Cemetery Nobody Wants*. Defendants continued to accept perpetual care and annual care monies from individuals without supplying perpetual care services. Defendants accept this money and use it to fund their failing synagogue rather than pay for its own expenses. (Emphasis added).

(A 29-30, ¶¶ 20, 22).

Simply put, these allegations that Defendant deceived consumers and took their monies under the false pretense that they would be providing perpetual care

services when the Defendants had no such intention of ever honoring the contract unquestionably makes out a claim under GBL §§ 349, 350.

In conclusion, the issues presented on the motions to dismiss in the *Lucker* and *Leventhal* actions were quite simple. Yet, the totality of the mistakes made concerning these extremely simple issues bespeak a genuine need to remand this case to the Commercial Division which has significant experience handling class action cases and more complex issues. Thus, Plaintiff respectfully requests this matter and the *Lucker* action be remanded to the Commercial Division in light of these most basic errors.

### **CONCLUSION**

For the foregoing reasons, this Court should reverse the lower court's dismissal of the conversion and GBL §§ 349, 350 claims and remand this case back to the Commercial Division for pretrial discovery.

Respectfully submitted,

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**APPELLATE DIVISION – FIRST DEPARTMENT  
PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word 2010.

*Type.* A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 4,462.

Dated: New York, New York  
January 29, 2013

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**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,

Plaintiffs,

-against-

BAYSIDE CEMETERY, CONGREGATION  
SHAARE ZEDEK and COMMUNITY  
ASSOCIATION FOR JEWISH AT-RISK  
CEMETERIES, INC.,

Defendants.

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) Index No.: 100530/11-E  
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) PART 59  
)

) Justice Debra A. James  
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) **PREARGUMENT STATEMENT**  
) **PURSUANT TO § 600.17 OF THE**  
) **FIRST DEPARTMENT RULES**  
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)  
)

1. The title of the action is as set forth above.
2. The full names of the original parties are set forth above.
3. Counsel for the Plaintiffs-Appellants: Michael M. Buchman c/o Pomerantz

Haudek Grossman & Gross LLP, 100 Park Avenue, New York, New York 10017,  
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47th Street, New York, New York 10036 (212) 728-2200.

5. Order appealed from: This appeal is taken from the decision and order dated  
January 9, 2012 granting, in part, Defendants Bayside Cemetery, and Congregation Shaare  
Zedek's motion to dismiss entered and filed February 16, 2012 in the office of the Clerk of the  
County of New York. There is no additional appeal pending in this action, but there is an appeal  
pending in *Lucker et al. v. Bayside Cemetery et. al.*, 114818/2009-E.

6. Nature of the action: Plaintiff has asserted claims of false advertising under General Business Law §350, unfair and deceptive trade practices under General Business Law §349 and 349(c), breach of contract, breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, conversion, and unjust enrichment. Defendants Bayside Cemetery and Congregation Shaare Zedek have admitted that they “misappropriated” and improperly commingled perpetual care funds concerning plots at Bayside Cemetery.

7. The Complaint alleges that Defendants Bayside Cemetery and Congregation Shaare Zedek breached their fiduciary duties, breached trust agreements, and converted monies by “commingling” perpetual care trust monies. The Complaint alleges that Defendant Bayside Cemetery and Congregation Shaare Zedek diverted these funds to maintain their economically struggling synagogue and to make capital improvements to the synagogue building as well as for other purpose inconsistent with the perpetual care trust agreement. The Complaint further alleges that Defendants sold perpetual care contracts with no intention of ever honoring such agreements. Defendants sold perpetual care contracts under false pretenses - that they would honor such agreements when they had no intention of honoring such agreements.

8. Result reached in the court below: The trial court granted Defendant Bayside Cemetery and Congregation Shaare Zedek’s motion to dismiss on the grounds that the General Business Law §§349, 350 claims did not allege deceptive acts or practices. The court also dismissed Plaintiff’s aiding and abetting breaches of fiduciary duty, conversion, and unjust enrichment claims.

9. Grounds for seeking reversal: The decision and order concerning Defendants Bayside Cemetery and Congregation Shaare Zedek should be overturned on appeal for four (4) reasons.

*First*, with respect to the GBL § 349 claims, the court incorrectly concluded the Complaint failed to allege a deceptive act or practice. Defendants sold perpetual care contracts knowing they: (i) had not honored such agreements in the past; (ii) would not honor such agreements in the future; (iii) were entering into the agreements in order to obtain monies to fund their failing synagogue.

*Second*, with regard the unjust enrichment and aiding and abetting claims the decision fails to recognize that pleading alternative grounds is permissible.

*Third*, with respect to the conversion claim the decision fails to appreciate that Plaintiff paid perpetual care monies to Defendants and has a superior right to the monies which Defendants unlawfully converted and used in an unauthorized manner.

*Fourth*, the decision was not made by a Justice from the Commercial Division as required by the Uniform Rules for New York State Trial Courts §202.70(5).

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New York, New York

Respectfully submitted,

By:           /s/Michael M. Buchman            
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