*To Be Argued By*:
RUSSELL M. STEINTHAL

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

# New York Supreme Court

**APPELLATE DIVISION—FIRST DEPARTMENT**

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.*

## BRIEF FOR DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiff, the settlor of a valid charitable trust, has a sufficient ownership interest in the corpus of such trust to support a claim for conversion that allegedly occurred years after the trust was created?

   *Answer of the lower court:* No, Plaintiff's claim for conversion was insufficient because "there is no allegation, nor documentary evidence, that the funds remained in the custody or control of the plaintiff" after the creation of the trust.

2. Whether conclusory allegations that Defendants lacked the intent to perform a contract, and failed to disclose as much, allege material deceptive conduct sufficient to convert a breach of contract claim into a violation of General Business Law §§ 349, 350?

   *Answer of the lower court:* No, the Complaint "fails to identify any deceptive act or practice," because the Plaintiff's complaint was "related to defendants' alleged non-performance of their contractual duties, not to any concealment or misrepresentation of the contractual terms."

3. Whether Plaintiff's General Business Law claims, which accrued no later than 1985, are barred by the Statute of Limitations?

   *Answer of the lower court:* Because the lower court determined that Plaintiff had failed to allege sufficient deception to sustain the General

Business Law claims, it did not rule on whether the claims were barred by the statute of limitations.

4. Whether the settlor of a charitable trust, who neither reserved nor exercised any oversight of the administration of the trust, nonetheless has standing to enforce the trust pursuant to the limited exception created in this Court's decision in *Smithers v. St. Luke's-Roosevelt Hospital Corp.*, 281 A.D.2d 127 (1st Dep't 2001)?

   *Answer of the lower court:* Yes. Relying on its decision in the related *Lucker* case, which in turn cited *Smithers*, the lower court adopted the categorical rule that "the donor of a charitable trust and the donor's successor in interest have standing to maintain an action to enforce the terms of the trust."

5. Whether this Court's decision in *Smithers* alters the longstanding rule that a charitable trustee owes a fiduciary duty to the beneficiaries of the trust, but not its settlor?

   *Answer of the lower court:* Yes. The court below held that Plaintiff's claim for breach of fiduciary duty was "properly pled," and therefore implicitly held that Defendants owed him a fiduciary duty.

## COUNTER-STATEMENT OF THE CASE

This appeal, like the related appeal in *Lucker et al. v. Bayside Cemetery et al.*, New York County Index No. 114818/09, arises out of a dispute over the perpetual care of graves at Bayside Cemetery, a large Jewish cemetery in Ozone Park, Queens owned by Defendant-Respondent-Cross-Appellant Congregation Shaare Zedek ("Shaare Zedek").[1]

Despite the litany of allegations contained in the Complaint concerning the condition of Bayside Cemetery—allegations that have remained largely unchanged from those in the first *Lucker* action filed in federal court in September 2007, ignoring the dramatic improvement of the physical condition of the cemetery in the intervening years—the material facts are actually quite simple. It is undisputed that Plaintiff-Appellant-Cross-Respondent Steven R. Leventhal ("Plaintiff") paid $1,200 to Shaare Zedek in 1985 to establish a trust for the perpetual care of three graves at Bayside Cemetery. (Joint Appx. ("J.A.") at A-51.) The terms of the trust require that the interest on that sum be applied toward the perpetual care and

[1] Congregation Shaare Zedek is a New York religious corporation. Shaare Zedek owns and operates Bayside Cemetery which, despite being named as a Defendant below and a Defendant-Respondent-Cross-Appellant here, is not a separately incorporated legal entity. The third defendant below, Community Association for Jewish At-Risk Cemeteries ("CAJAC") is an independent not-for-profit corporation organized and existing under New York law. As Plaintiff-Appellant did not appeal from the lower court's grant of CAJAC's separate motion to dismiss, CAJAC is not a party to this appeal. Therefore, as used in this brief, "Defendants" refers solely to Defendants-Respondents-Cross-Appellants Congregation Shaare Zedek and Bayside Cemetery.

upkeep of the specified graves, "limited, however, to the extent for which such interest or income derived therefrom will permit and pay." (*Id.*)

Neither the condition of Bayside Cemetery, nor the broader questions of Shaare Zedek's historic stewardship of the cemetery, are at issue in this case or on this appeal. What is in dispute, however, is whether Plaintiff's $1,200 payment for perpetual care allows him to usurp the traditional function of the Attorney General and compel Defendants to account for *all* of their cemetery trust funds, regardless of source.

Indeed, the scope of the putative class action complaint here is vast. Plaintiff purports to represent a class of "all persons or entities, or any one with authority to act on their behalf, who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns" (J.A. at A-15), a class that is apparently unbounded in time. The Complaint, meanwhile, also alleges that "Defendant Congregation Shaare Zedek has received in excess of $5 million in perpetual and annual care monies since 1846" (Compl. ¶ 9, J.A. at A-26.), an amount more than *four thousand* times larger than the amount that Plaintiff alleges he deposited. While the propriety of class certification is not before the Court on this appeal—and will undoubtedly be contested vigorously in the lower court if this case proceeds—the breadth of Plaintiff's putative claim is nonetheless

illustrative of the danger posed by a mechanical extension of this Court's *Smithers* opinion to the facts of this case.

*Procedural History*

Plaintiff commenced this putative class action with the filing of a Summons and Complaint dated January 11, 2011 and received in the New York County Clerk's office on January 13, 2011. (J.A. at A-20, A-22.) The Complaint alleges eight causes of action on behalf of Plaintiff and the putative class described above.

Plaintiff's first three causes of action arise under the General Business Law for false advertising, Gen. Bus. L. § 350, (J.A. at A-38), deceptive trade practices, Gen. Bus. L. § 349, (J.A. at A-39), and deceptive trade practices aimed at an individual over the age of 65, Gen. Bus. L. § 349-c, (J.A. at A-40). Plaintiff's fourth cause of action alleges breach of perpetual and annual care contracts (J.A. at A-41) (despite the fact that Plaintiff does not allege that he ever purchased annual care, let alone during the six year limitations period). The fifth cause of action sounds in unjust enrichment. (J.A. at A-42), while the sixth and seventh causes of action allege that Defendants breached a fiduciary duty they owed to Plaintiff (by failing to honor the terms of the perpetual care trusts) and aided and abetted the other Defendants' breach of such duty, respectively. Finally, the eighth cause of action alleges that Defendants unlawfully converted the perpetual or annual care trust funds. (J.A. at A-44.)

On February 7, 2011, Defendant CAJAC filed a Request for Judicial Intervention seeking assignment of this action to Part 59 (Debra A. James, J.S.C.), on the grounds that Justice James was then hearing the related *Lucker* action, which alleges virtually identical facts (other than those facts specific to Plaintiff's purchase of perpetual care). On March 24, 2011, Defendants filed a motion to dismiss the action pursuant to CPLR 3211.

On January 9, 2012, Justice James issued a Decision and Order (J.A. at A-14) granting in part and denying in part Defendants' motion to dismiss. The lower court dismissed Plaintiff's claims under the General Business Law (Counts I-III), as well as his claims for unjust enrichment (Count V), aiding and abetting a breach of fiduciary duty (Count VII) and conversion (Count VIII). Justice James denied the motion to dismiss Plaintiff's claims for breach of contract (Count IV) and breach of fiduciary duty (Count VI).

The Decision and Order was filed in the office of the Clerk of the County of New York on February 16, 2012, and Plaintiff filed a timely Notice of Appeal to this Court on March 5, 2012 (J.A. at A-5). Plaintiff does not appeal the dismissal of Counts V or VII. Defendants filed a timely Notice of Cross-Appeal on March 16, 2012, appealing from so much of Justice James' order as denied their motion to dismiss.

On January 10, 2013, a panel of this Court (Tom, J.P., Andrias, Freedman, Roman, Gische, JJ.) extended the time to perfect this appeal to on or before February 9, 2013, and directed the Clerk of the Court to calendar this appeal for hearing, together with the related appeal in *Lucker*, during the May 2013 Term.

The parties have stipulated to stay all proceedings below, including discovery, pending determination of the pending appeals in *Lucker* and in this case.

## ARGUMENT

### POINT ONE:
### THE COURT BELOW PROPERLY HELD THAT PLAINTIFF LACKED THE REQUISITE POSSESSORY INTEREST TO MAINTAIN A CLAIM FOR CONVERSION.

Plaintiff's initial point on appeal, that the lower court ignored the allegation in the 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," (App. Br. 11 (quoting Compl. ¶ 8, J.A. at 25)) misunderstands the entirely proper holding of the court below. There is no dispute that Plaintiff conveyed that money in 1985: Plaintiff's allegation to that effect must be taken to be true for purposes of this motion to dismiss, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), and, should their motion to dismiss be denied, Defendants will admit receipt of those funds from Plaintiff. Yet as the lower court recognized, possession of the funds in 1985 is entirely insufficient to demonstrate the "legal ownership or immediate superior right of possession" that was necessary to sustain a claim for

conversion in 2011, when this case was commenced, because "there is no allegation, nor documentary evidence, that the funds *remained* in the custody and control of the Plaintiff" (Op. 3, J.A. at A-16) (emphasis added).[2]

Plaintiff admits that his 1985 payment created an express charitable trust (App. Br. at 13)[3] and he does not allege that he reserved any right of revocation or reversionary interest in the funds. Nor do his letter transmitting payment (J.A. at A-48) or the "Perpetual Care Receipt" setting forth the terms under which Shaare Zedek accepted the payment (J.A. at A-51) evince any such retained interest. Therefore, as a matter of law, the legal title in the trust funds vested entirely and irrevocably in Shaare Zedek as the trustee of the trust at the time of payment. *See* Estates, Powers & Trusts L. § 7-2.1. As this Court has explained, "[i]t is well settled that when a valid charitable trust is created, without provision for a reversion, the interest of the donor is permanently excluded. In the absence of such a provision the title to the property does not revert to the donor or his representatives." *Stewart v. Franchetti*, 167 A.D. 541, 547 (1st Dep't 1915).

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[2] The quoted language from the decision below also makes clear that, contrary to Plaintiff's suggestion, the court did not require him to "prove his claim on a motion to dismiss." (App. Br. at 12.) Rather, the court below concluded that in the absence of *either* an allegation of the necessary facts in the Complaint or the proffer of documentary evidence establishing them (a proper means of opposing a motion to dismiss), Plaintiff's cause of action for conversion had to be dismissed.

[3] Plaintiff's brief does not refer to the charitable nature of the trust, but it is undisputed that the purpose of the trust is the perpetual care of graves at Bayside Cemetery. Such trusts are, as a matter of law, charitable in nature. *See* Estates, Trusts & Powers L. § 8-1.5.

Plaintiff then alleges that Defendants unlawfully converted the $1,200 in trust funds at some *subsequent* point after 1985.[4] By that point, however, Plaintiff no longer had any interest (legal or beneficial) in the corpus of the trust.

As the lower court correctly understood, *Meese v. Miller*, 79 A.D.2d 237 (4th Dep't 1981), which Plaintiff suggests is "on all fours with" this case, is therefore distinguishable. In *Meese*, the plaintiff allegedly provided a $2,873 check to a defendant, a computer dealer, together with an offer to purchase a computer, to be ordered by the dealer from the manufacturer and costing that same amount. Even assuming such an ordinary commercial transaction created a trust, the *Meese* plaintiff was—unlike the Plaintiff here—the sole beneficiary of the putative trust and was entitled to receive either the requested computer or, failing that, a refund of his money. The plaintiff in *Meese* specifically alleged as much, claiming in the complaint that he retained an ownership interest in the funds at all times, an allegation that the Fourth Department expressly relied on in sustaining the conversion claim:

> Since plaintiff also claims that "said funds were entrusted to [defendants'] custody only for a particular purpose, and remained the property and possession of plaintiff," he has alleged a claim of possession sufficient to state a cause of action in conversion.

*Id.* at 244.

[4] If Plaintiff had alleged that the conversion occurred in 1985 or earlier, it would have self-evidently been barred by the statute of limitations, which is three years from the date of the alleged conversion. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 488-89 (1983).

By contrast, the Plaintiff in this case can make no such claim of ownership or possession subsequent to 1985. Although he makes a cursory statement in his appellate brief that "Plaintiff had a property or ownership interest in the monies placed into trust *at all times*" (App. Br. at 14), no such allegation appears in the Complaint or the record below. Such an allegation would, in fact, have been in direct conflict with Plaintiff's assertion that he created a charitable trust, since—unlike the alleged trust in *Meese*—a charitable trust, by definition, does not have any individual beneficiaries. *See* Estates, Powers & Trusts L. § 8-1.1 (a) (affirming the validity of charitable trusts despite "the indefiniteness or uncertainty of the persons designated as beneficiaries.")

Indeed, a simple hypothetical illustrates the defect in Plaintiff's argument that he retained an ownership or possessory interest in the trust funds. Consider what would have happened had Plaintiff, at some point between 1985 and the commencement of this suit, demanded the return of his $1,200. Shaare Zedek, as the charitable trustee, would have been required to refuse the request, since the trust instrument (and the Not-for-Profit Corporation Law) specifically requires that the entrusted funds be held in perpetuity in "the Special Fund of the 'CONGREGATION,' maintained by it for the perpetual care of lots, plots or graves in Bayside Cemetery" (J.A. at A-51). Nor would any attempt by Plaintiff to alter or revoke the terms of the trust to permit him to reclaim the funds have been

valid, since a settlor lacks the power to alter or revoke the terms of a valid charitable trust once it has been created. *See generally* Estates, Powers & Trusts L. § 7-1.9 (describing settlor's right to revoke or amend the terms of express trusts). Rather, the Legislature has vested the power to alter or terminate a charitable trust in the Supreme Court, on notice to the Attorney General as the representative of the ultimate charitable beneficiaries, and specifically prescribed that the proceeds of any terminated trust be distributed for charitable purposes. *Id.* §§ 7-1.9(c), 8-1.1(c)(2).

Because Plaintiff's ownership and possessory interests in the allegedly converted trust funds ceased in 1985, his claim for conversion was properly dismissed. S*ee also Associated Alumni v. General Theological Seminary*, 163 N.Y. 417, 422 (1900) (holding that, even where this Court properly held that the trustees of a charitable trust had violated the terms of the trust, it was error to order the return of the fund to the donor); *Modjeska v. Greer*, 233 A.D.2d 589, 590 (App. Div. – 3d Dep't 1996) (holding that plaintiffs' conversion claim failed because "they acknowledge in their brief that the trust is still extant, and thus, as the apparent owner of the shares in question, it would be the only entity entitled to pursue this cause of action.")

## POINT TWO:
## THE DISMISSAL OF PLAINTIFF'S CLAIMS UNDER THE GENERAL BUSINESS LAW SHOULD BE AFFIRMED.

A. Plaintiff's allegations sound in breach of contract, not deception.

Plaintiff's first, second and third causes of action alleged claims for false advertising, unfair or deceptive business practices, and unfair and deceptive business practices directed at individuals over the age of 65. Gen. Bus. L. §§ 350, 349, 349-c. After reviewing the Complaint in its entirety, the lower court dismissed Plaintiff's General Business Law claims, concluding that:

> The complaint here fails to identify any deceptive act or practice by defendants in entering into perpetual care contracts. The acts of which plaintiff complains are related to defendants' alleged non-performance of their contractual duties, not to any concealment of the contractual terms.

(Op. 2, J.A. at A-15.)

As this Court explained in *St. Patrick's Home for the Aged & Infirm v. Laticrete Int'l.*, 264 A.D.2d 652 (1st Dep't 1999):

> To establish prima facie violation of General Business Law § 349, a plaintiff must demonstrate that the defendant is engaged in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it. Deceptive acts or practices may be defined as representations or omissions "likely to mislead a reasonable consumer acting reasonably under the circumstances." A similar showing is required under General Business Law § 350, which prohibits false advertising.

*Id.* at 655 (internal citations omitted).

Even after the lower court dismissed the GBL claims for essentially rehashing Plaintiff's breach of contract claim, Plaintiff's appellate brief still focuses on Defendants' alleged failure to honor the perpetual care contacts and alleged misappropriation of funds, rather than any specific alleged misrepresentations or deception. (App. Br. at 16-17.) Nonetheless, Plaintiff attempts to convert that into deceptive conduct by alleging that "Defendants continued to sell annual and perpetual care contracts knowing that they would not honor such agreements and would instead convert the monies immediately in order to fund their failing synagogue." (App. Br. at 16, citing J.A. at A-30.)

It is well-established, however, that "[g]eneral allegations that [a] defendant entered into a contract while lacking the intent to perform it are insufficient" to state a misrepresentation or material omission for purposes of a fraud claim, *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995), and "[a] contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation," *Cotomark, Inc. v. Satellite Comm'ns Network, Inc.*, 116 A.D.2d 499, 500 (1st Dep't 1986); *see also Oxbow Calcining U.S.A. Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 650 (1st Dep't 2012).

While the elements of a deceptive business practices or false advertising claim under the General Business Law differ from those of common law fraud (for

example, the statutory claims do not require *scienter***,** *see, e.g.*, *Lincoln Life & Annuity Co. of New York v. Bernstein*, 24 Misc.3d 1221 (A) at *6 (N. Y. Sup. Ct. 2009)), the purpose of the statute was not to convert simple breach of contract claims into statutory torts. The motion court therefore properly applied the principles this Court explained in, for example, *Cotomark*: the mere allegation that Defendants entered into perpetual care contracts without disclosing their lack of intent to perform is insufficient, at least in the absence of any other, collateral misrepresentations, to establish the deceptive conduct or false advertising required to sustain Plaintiffs' claims under the General Business Law. *See also Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 149 (2d Dep't 1995) (affirming summary judgment for defendant where "plaintiff has failed to adduce any relevant proof, or to even advance any cogent arguments, why her causes of action to recover damages for consumer fraud should be treated any differently from her causes of action to recover damages for general fraud," which had been dismissed because "the only fraud charged relates to a breach of contract").

The only other alleged deception that Plaintiff points to in support of his General Business Law claims is that Defendants allegedly "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." (App. Br. 17, quoting J.A. at A-30.) Yet even assuming, *arguendo*, that Defendants failed to

make such a disclosure, the "financial strength" of those funds is immaterial as a matter of law, since each perpetual care contract establishes its *own* statutory trust, whether or not the funds are held in a common fund. As the Perpetual Care Receipt and section 1507 of the Not-for-Profit Corporation Law, upon which it is based, make clear:

> The interest or income realized from the "FUND" [meaning the specific $1,200 payment made by Plaintiff] shall be used toward the perpetual care and upkeep of the following lots, plots or graves:
>
> 1. Ethel Leventhal
> Benjamin Stoloff
> Emma Stoloff
>
> located in said Bayside Cemetery, *limited, however, to the extent for which such interest or income derived therefrom will permit and pay . . .and without applying any part of the principal 'FUND' for that purpose."*

(J.A. at A-51) (emphasis added).

Because the care that any particular graves receive is tied exclusively to the income derived from the particular trust funds deposited for such graves—and any surplus income is similarly reserved for the future needs of those graves—the number of other graves under perpetual care, the total value of the cemetery's other perpetual care trusts or anything else related to the "the perpetual/annual care fund's[5] financial strength" have no effect on the cemetery's ability to perform

[5] The Complaint makes multiple references to annual care, but Plaintiff does not allege that he purchased annual care. He therefore lacks standing to assert any annual care-related claims, a proposition that does not appear to be contested on this appeal.

under the perpetual care contracts. Faced with the question of whether or not to enter a perpetual care contract, therefore, a "reasonable consumer acting reasonably under the circumstances" would not rely on such general information. The failure to make such disclosures is thus not "deceptive" for purposes of the General Business Law. *See St. Patrick's Home for the Aged & Infirm*, 264 A.D.2d at 655 (requiring that defendant's conduct be "deceptive or misleading in a material way").

B. The statute of limitations provides an alternative basis for affirming dismissal of Plaintiff's GBL claims.

Even if Plaintiff's conclusory allegations of misrepresentation are deemed sufficient deceptive conduct to sustain his General Business Law claims, the statute of limitations provides an entirely independent alternative basis for affirming the judgment below as to those claims.[6]

CPLR 214(2) establishes a three year limitations period for actions "to recover upon a liability . . . created or imposed by statute," including both deceptive trade practice claims under Section 349 of the General Business Law and false advertising claims under Section 350. *See Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777,789 (2012) (applying CPLR 214(2) to claims under § 349);

[6] A prevailing party is entitled to "advance an alternate ground for affirmance, i.e. obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground." *Nieves v. Martinez*, 285 A.D.2d 410, 411 (1st Dep't 2001) (affirming dismissal based on statute of limitations ground not decided by the lower court).

*Denenberg v. Rosen*, 71 A.D.3d 187, 194 (1st Dep't 2010) ("The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section 349."). The statute of limitations, moreover, "runs from the time when the plaintiff was injured," *Corsello*, 18 N.Y.3d at 790, which in this case was indisputably more than three years before this suit was commenced.

Plaintiff's theory of injury is quite simple: "Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for perpetual or annual care for their own or family member's plots located at the cemetery." (Compl. ¶¶ 53, 58, J.A. at A-39-A-41.) Plaintiff's claims under the General Business Law therefore accrued no later than February 5, 1985, when Shaare Zedek acknowledged Plaintiff's $1,200 payment for perpetual care. (J.A. at A-51-A-52.) Since that is easily more than three years before this case was commenced, Plaintiff's claims are time-barred.[7]

In response to Defendants' statute of limitations argument below, Plaintiff did not challenge when his claim accrued or the length of the applicable statute of limitations. Instead, he suggested that (i) Defendants were engaged in "continuing violations," such that the statute of limitations has not yet run, and (ii) that

[7] Even giving Plaintiff the benefit of tolling from September 12, 2007, when the *Lucker* plaintiffs commenced the first of the federal class actions regarding what are largely the same operative facts, the result is the same.

defendants are equitably estopped from asserting the statute of limitations due to fraudulent concealment or equitable estoppel. Neither of those doctrines, however, bars application of the statute of limitations here.

First, this Court has explained that continuing violations are those cases in which "one unlawfully produces some condition which is not necessarily of a permanent character, and which results in intermittent and recurring injuries to another." *1050 Tenants Corp. v. Lapidus*, 289 A.D.2d 145, 146 (1st Dep't 2001). In such cases, "a cause of action accrues anew every day, and for each injury." *Id.* In the present case, by contrast, Plaintiff was allegedly injured (and indeed could have been injured) only once by Defendants' alleged deceptive business practices or false advertising: when he made his $1,200 payment for perpetual care in 1985. Whatever impact subsequent allegedly deceptive practices or false advertisements might have had on other members of the putative class, they did not cause any new injury to Plaintiff and cannot help him escape the time bar of CPLR 214(2).

The Court of Appeals' recent decision in *Corsello*, meanwhile, is dispositive of the question of equitable estoppel or fraudulent concealment. In *Corsello*, the Court held that equitable estoppel was only available where:

> the complaints alleged both the tort that was the basis of the action and later acts of deception by which the defendants concealed their wrongdoing. . . . By contrast, in cases where the alleged concealment consisted of nothing but defendants' failure to disclose the wrongs they had committed, we have held that the defendants were not estopped from pleading a statute of limitations defense.

18 N.Y.3d at 789. Because the plaintiffs in *Corsello* did not "allege an act of deception, separate from the ones for which they sue, on which an equitable estoppel could be based," the Court ordered their General Business Law claims dismissed as untimely. The same applies here.

Similarly, the Court of Appeals emphasized in *Zumpano v. Quinn*, 6 N.Y.3d 666 (2006), that 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." *Id.* at 674. As the Court explained:

> A wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations. Plaintiffs do not allege any specific misrepresentation to them by defendants, or any deceptive conduct sufficient to constitute a basis for equitable estoppel. Nor is there any indication that further discovery would yield such information. No new separate and subsequent acts of wrongdoing beyond the sexually abusive acts themselves are alleged, and equitable estoppel is therefore inapplicable to these cases.

*Id.* at 675.

Plaintiff here cannot hope to satisfy *Zumpano*'s high standard for equitable estoppel. Entirely apart from Plaintiff's failure to identify any "specific misrepresentation to them by defendants, or any deceptive conduct sufficient to constitute a basis for equitable estoppel," *id.*, there was nothing private or hidden about Defendants' alleged failure to maintain Bayside Cemetery (including, allegedly, its failure to honor Plaintiff's perpetual care contract). Plaintiff's

Complaint cites multiple news reports discussing the situation (Compl. ¶ 6, J.A. at A-24; Compl. ¶¶ 22. 23, J.A. at A-30), and Plaintiff himself could have visited the cemetery at any point after 1985. At minimum, any of those events would have given Plaintiff reason to "investigate whether a basis for [an] action[] existed." *Zumpano*, 6 N.Y.3d at 674.

Because it is clear from the face of the Complaint that any injury that Plaintiff suffered as a result of the alleged violations of the General Business Law occurred no later than 1985, decades before this action was brought, those claims were properly dismissed.

## POINT THREE:
## PLAINTIFF'S BREACH OF CONTRACT CLAIM SHOULD HAVE BEEN DISMISSED FOR LACK OF STANDING

Until recently, the longstanding and unchallenged rule in New York was that, "[n]ormally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney General." *Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 466 (1985). That restriction was consistent with the general rule (applicable to all trusts) that "[n]o one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin redress for a breach of trust," Restatement (Second) of Trusts § 200 (1959); *see also Cashman v. Petrie*, 14 N.Y.2d 426, 430 (1964) ("A person who might incidentally benefit from the performance of a trust but is not a beneficiary thereof

cannot maintain a suit to enforce the trust or to enjoin a breach"), and the statutory designation of the Attorney General as the legal representative of the beneficiaries of charitable trusts. Estates, Trusts & Powers L. § 8-1.1(f).

This Court carved out a limited exception to that rule in *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127 (1st Dep't 2001), allowing the personal representative of the donor of a charitable gift to sue to enforce its terms. The Court reasoned that "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent." *Id.* at 139. Relying on a number of factors demonstrating that Mr. Smithers (the donor) had remained personally involved in the administration of his gift during his lifetime, the Court reasoned that his personal representative had standing to sue "to enforce his rights under his agreement with the Hospital through specific performance of that agreement." *Id.* at 138.

Whatever the merits of that rule in a case like *Smithers*, the facts alleged in the Complaint here are distinguishable. In *Smithers*, the Court relied on the fact that the donor had explicitly "reserved to himself the right to veto the Hospital's project plans and staff appointments for the Smithers Center" (which was created by his gift), *id.* at 139, and that "he and Mrs. Smithers remained actively involved in the affair of the Smithers Center until his death, and she thereafter," *id.* Just as importantly, the entire dispute in *Smithers* was about the interpretation of the

donor's intent for the gift, which the Court concluded placed him "in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent." *Id.* Finally, the *Smithers* court held that the donor's "desire to perpetuate his name as a benefactor of a particular charitable institution and humankind" was a "profound concern of his or her estate," *id.* at 140, and therefore further supported his personal representative's standing to sue.

None of those factors, however, are present here. Unlike *Smithers*, this case is not about the interpretation of the Plaintiff's intent in making a gift to Defendants, as the terms of the trust are essentially set by statute. Unlike the donor in *Smithers*, the Plaintiff here did not reserve any ongoing right of oversight, nor was he "involved in the affairs" of Bayside Cemetery prior to commencing this lawsuit. Instead, Plaintiff, who admittedly paid $1,200 for the perpetual care of three graves (Compl. ¶ 8, J.A. at A-25; J.A. at A-51), claims the right—without any factual or legal support—to force Defendants to account for at least $5 million in perpetual care funds allegedly received by the Defendants from numerous, unidentified third parties since 1846 (Compl. ¶ 9, J.A. at A-26).

It is just that type of situation that justifies the traditional right of the Attorney General not only to seek to enforce the terms of charitable trusts—a right that he has utilized here to seek broad discovery from Shaare Zedek as to all matters related to perpetual and annual care at Bayside Cemetery—but also to

exercise prosecutorial discretion in how and when to use those powers. Whatever Plaintiff's individual motives in bringing this lawsuit—and Defendants do not dispute his good intentions—the Court of Appeals has explained that one of the reasons for the traditional rule limiting standing to challenge the actions of charitable trustees to the Attorney General is "to prevent vexatious litigation." *Alco Gravure,* 64 N.Y.2d at 466.

In *Smithers*, this Court balanced that interest with the unique interests of a donor who, with the consent of the charity, had previously exercised continuing oversight of the administration of his gift and allowed the donor's suit for specific performance to proceed. The lower court's ruling, however, extends *Smithers* and effectively infers such a right of oversight for every donor to a charitable institution or charitable trust, thereby undermining both the Attorney General's statutory oversight powers and potentially risking the very "vexatious litigation" that the Court of Appeals discussed in *Alco Gravure*. It should, therefore, be reversed and the breach of contract claim dismissed for lack of standing.

## POINT FOUR:
## PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM SHOULD HAVE BEEN DISMISSED BECAUSE A TRUSTEE OWES A FIDUCIARY DUTY TO THE BENEFICIARIES OF A TRUST, NOT ITS CREATOR.

The lower court denied Defendants' motion to dismiss Plaintiff's sixth cause of action, for breach of fiduciary duty, reasoning that "where it is alleged that the

defendants as fiduciaries failed to properly apply the monies entrusted to them to maintain the burial plots as set forth in the perpetual care agreement, a claim for breach of fiduciary duty is properly pled." (Op. 5, J.A. at A-18). Yet an essential element of a claim for breach of fiduciary duty is that the defendant owed a fiduciary duty to the plaintiff, *See People ex rel. Spitzer v. Grasso,* 50 A.D.3d 535, 545 (1st Dep't 2008), which is missing here as a matter of law.

As discussed above, Defendants do not dispute that Plaintiff paid $1,200 for the perpetual care of three graves at Bayside Cemetery or that that transaction created a valid charitable trust. Yet it is black-letter law that the trustee of any express trust—charitable or otherwise—owes a fiduciary duty not to the person or entity that created the trust, but rather to the trust's beneficiaries. *See, e.g., Matter of Heller*, 6 N.Y.3d 649, 655 (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.") (internal citations and quotations omitted). In the case of charitable trusts, the ultimate charitable beneficiaries are the People of the State of New York, represented by the Attorney General. Estates Trusts and Powers L. §8-1.1.

This Court's decision in *Smithers*, which recognized the right of a charitable donor to seek an order of specific performance to enforce the terms of a gift (in appropriate circumstances), did not change that rule. The Court in *Smithers* never

suggested that the hospital owed a fiduciary duty to Mr. Smithers (or his estate), and the word "fiduciary" in fact does not even *appear* in the Court's decision. *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127 (1st Dep't 2001). In fact, the Court explicitly rejected the argument that the plaintiff's suit in *Smithers* was either "on her own behalf or on behalf of the beneficiaries of the gift." *Id.* at 138. Instead, the Court's decision was entirely based on a contractual theory of specific performance, but a contract does not create a fiduciary relationship.

Therefore, even if the lower court was correct in allowing Plaintiff to sue to enforce the terms of the perpetual care trust he created, it erred in denying Defendants' motion to dismiss the tort claim for breach of fiduciary duty.

## CONCLUSION

The lower court correctly dismissed Plaintiff's claims under the General Business Law, which both failed to allege the necessary element of material deception and are indisputably barred by the Statute of Limitations. Similarly, the court correctly dismissed Plaintiff's conversion claim in the absence of any allegation or evidence that he retained any ownership interest in the corpus of the allegedly converted trust funds at the time of the alleged conversion. Those portions of the Decision and Order of Supreme Court should be affirmed.

The lower court erred, however, in interpreting this Court's *Smithers* opinion as permitting a Plaintiff who made a one-time purchase of perpetual care, but

neither reserved nor exercised any continuing oversight over the gift, to bring this broad putative class action to enforce Defendants' numerous perpetual care trusts. Similarly, the court below erred in concluding that simply because *Smithers* permits some charitable donors to sue for the specific performance of charitable trusts, the trustees of such trust owe the donors a fiduciary duty. Defendants respectfully request, therefore, that those portions of the Decision and Order below that denied their motion to dismiss be reversed and that this action be dismissed in its entirety.

Respectfully submitted,

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