

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

-----) Index No. 100530/2011
)
STEVEN R. LEVENTHAL as representative of a) Hon. Debra A. James
class consisting of himself and all others similarly)
situated,)
)
Plaintiff,)
)
-against-) **PRE-ARGUMENT STATEMENT**
)
BAYSIDE CEMETERY, CONGREGATION)
SHAARE ZEDEK and COMMUNITY)
ASSOCIATION FOR JEWISH AT-RISK)
CEMETERIES, INC.,)
)
Defendants.)
)
-----)

Defendants Congregation Shaare Zedek and Bayside Cemetery, by and through their attorneys Axinn, Veltrop & Harkrider LLP, submit the following as their pre-argument statement pursuant to Rule 600.17 of the Supreme Court, Appellate Division – First Department, in connection with their cross-appeal in the above-entitled action:

1. Title of the Action: The title of the action is Leventhal v. Bayside Cemetery et al., more fully set forth above.
2. Original Parties to the Action: The original plaintiff in this action is Steven R. Leventhal, as putative representative of a class consisting of himself and all others similarly situated. The original defendants are Congregation Shaare Zedek, a religious corporation organized and existing under the laws of the State of New York; Bayside Cemetery; and Community Association for Jewish At-Risk Cemeteries, Inc., a not-for-profit corporation organized and existing under the laws of the State of New York (“CAJAC”). The only change in parties since the institution of this action occurred on

January 24, 2012, when the County Clerk of New York County entered a judgment dismissing the action as to CAJAC. On this cross-appeal, Congregation Shaare Zedek and Bayside Cemetery are the cross-appellants and Mr. Leventhal is the respondent.

3. Counsel for Cross-Appellants: Stephen M. Axinn and Russell M. Steinthal of Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, New York 10036, are counsel for defendants-cross-appellants Congregation Shaare Zedek and Bayside Cemetery. Their telephone number is (212) 728-2200.

4. Counsel for Cross-Respondent: Michael M. Buchman, c/o Pomerantz Haudek Grossman & Gross LLP, 100 Park Avenue, New York, New York 10017, is counsel for plaintiff-cross-respondent Steven R. Leventhal. Mr. Buchman's telephone number is (212) 661-1100.

5. Court from Which the Appeal Is Taken: This cross-appeal is taken from a decision and order of Supreme Court, New York County (Part 59) [Debra A. James, J.S.C.]. As required by Rule 600.17(a), a true and correct copy of the decision and order appealed from is attached hereto as Exhibit A.

6. Nature and Object of the Action: The action is a putative class action for alleged violations of the General Business Law, breach of contract, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and conversion. In addition to the General Business Law claims, which sound in false advertising and deceptive trade practices, Plaintiff alleges that he placed \$1,200 in trust for the perpetual care of three graves at Bayside Cemetery, and that defendants have breached their obligations under the trust agreement. The complaint seeks damages, declaratory and

injunctive relief, imposition of a constructive trust and an accounting. This cross-appeal concerns only the causes of action for breach of contract and breach of fiduciary duty.

7. Result Below: By decision and order dated January 9, 2012 and entered on January 12, 2012, Supreme Court, New York County (Justice Debra A. James) granted in part and denied in part defendants' motion to dismiss pursuant to CPLR 3211. Specifically, Justice James denied the motion as to plaintiff's fourth cause of action for breach of contract and his sixth cause of action for breach of fiduciary duty, which are the subject of this cross-appeal. Justice James granted defendants' motion as to each of the other causes of action in the complaint.

8. Grounds for Reversal: Cross-appellants respectfully submit that so much of Supreme Court's order as denied the motion to dismiss as to the fourth and sixth causes of action should be reversed for the following reasons. First, plaintiff lacks standing to assert his fourth cause of action for breach of contract because his payment for perpetual care created an express charitable trust, the ultimate charitable beneficiaries of which are the People of the State of New York. The longstanding rule in New York is that the Attorney General, as the representative of the ultimate charitable beneficiaries, and not the settlor, has standing to enforce the terms of a charitable trust. See EPTL § 8-1.1(f). In Smithers v. St. Luke's-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), the Appellate Division established a narrow exception to that rule, but that exception does not apply here. Unlike the donor in Smithers, who the Appellate Division found had reserved to himself certain rights of oversight and remained actively involved in the administration of his gift until his death, and the donors in Associate Alumni v. General Theological Seminary, 163 N.Y. 417 (1900), who reserved

the right to nominate the holder of the professorial chair they endowed, Mr. Leventhal reserved no such rights and does not allege that he was involved in the administration of the perpetual care trust at issue. Plaintiff similarly lacks standing to assert the sixth cause of action for breach of fiduciary duty because, under New York law, a trustee owes a fiduciary duty solely to the beneficiaries, and not the donor or settlor, of a trust. Since the trust at issue is charitable, that duty runs to the People as ultimate charitable beneficiaries, not to Mr. Leventhal. (That rule was not altered by Smithers, which discussed only standing to obtain an order for specific performance of a contract, not to assert a claim for breach of fiduciary duty.) Since the existence of a fiduciary duty owed by defendant to the plaintiff is a necessary element of a claim for breach of fiduciary duty, plaintiff's sixth cause of action fails to state a claim as a matter of law and should have been dismissed.

9. Additional Appeals in this Action: In addition to this cross-appeal, plaintiff filed a notice of appeal to the Appellate Division, First Department from Supreme Court's order dated January 9, 2012, and entered January 12, 2012. The notice of appeal was dated March 5, 2012 and the appeal remains pending. As required by Rule 600.17(b)(8), a true and correct copy of such notice of appeal is attached hereto as Exhibit B.

10. Related Actions: Lucker v. Bayside Cemetery et al., Index No. 114818/2009E, was a related action raising substantially similar allegations as this action. In that action, Supreme Court granted separate motions by defendants Congregation Shaare Zedek and Bayside Cemetery and by CAJAC to dismiss the complaint pursuant to CPLR 3211. Plaintiffs in that action have filed a notice of appeal to the Appellate

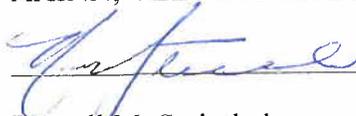
Division, First Department, from the judgments entered in favor of Congregation Shaare Zedek and Bayside Cemetery on October 6, 2011 and in favor CAJAC on October 5, 2011. The consolidated notice of appeal from those judgments was dated October 26, 2011 and the appeals remain pending.

Dated: March 16, 2012
New York, New York

Respectfully submitted,

AXINN, VELTROP & HARKRIDER, LLP

By:



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PART 59

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