

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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JOHN R. LUCKER, ELIZABETH A. LUCKER,  
NANCY L. ROUSSEAU, LYNN COHEN AND  
FRAN GOLDSTEIN, as representatives of a class  
consisting of themselves and all others similarly  
situated,

Index No. 14818/09

**REPLY FOR REARGUMENT  
OR LEAVE TO APPEAL TO  
THE COURT OF APPEALS**

Plaintiffs,

-against-

BAYSIDE CEMETERY, CONGREGATION  
SHAARE ZEDEK,

Defendants-Respondents

and

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

Defendant.  
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MICHAEL M. BUCHMAN, an attorney admitted to practice in the courts of this state,  
affirms the following under penalties of perjury pursuant to CPLR 2106:

1. I am a member of Motley Rice LLC and *pro-bono* counsel for Plaintiffs-  
Appellants in the above-captioned action. I am familiar with the facts and proceedings had  
herein. I make this reply affirmation in support of Plaintiffs-Appellants' motion for reargument  
or, in the alternative, motion for leave to appeal to the Court of Appeals.

2. Defendants-Respondents have failed to address and, therefore, concede the  
following three arguments: (i) the public policy arguments are inapplicable in this case (pp. 8-10  
of opening papers); (ii) Plaintiffs-Appellants possess standing because they can be sharply

defined in accordance with E.P.T.L. 4-1-1 (pp. 10-12);<sup>1</sup> and (iii) Plaintiffs-Appellants should be granted standing because the New York State Attorney General has failed to commence suit or compel the return of stolen monies in over eight years – private individuals are granted standing in such situations to further the public interest of protecting charitable trusts (pp. 12-14). Accordingly, reargument should be entertained or leave to appeal granted.

**A. Plaintiffs-Appellants Possess Standing To Prevent Further Desecration**

3. With regard to Plaintiffs-Appellants arguments that they should have been granted standing to pursue the breach of contract claim in order to prevent further desecration to their family member's plots, Defendants-Respondents contend as follows: (i) the lower court addressed the issue; (ii) the complaint does not allege claims for desecration; and (iii) Defendants have done nothing to desecrate plots at Bayside Cemetery.

4. *First*, while the lower court may have addressed the argument/case law cited by Plaintiffs,<sup>2</sup> this Court *did not* address this issue or these cases in its decision as an alternative ground for standing. Indeed, Defendants-Respondents take no issue with the fact that this Court did not address the issue or case law. At a minimum, reargument should be granted on this alternative ground for standing.

5. *Second*, Defendants-Respondents suggestion that the Complaint does not allege desecration is intellectually dishonest. For example, in paragraph 32 of the Complaint Plaintiffs-Appellants allege that "Defendants' deliberate false statements and fraudulent conduct has resulted in the desecration of thousands of plots at the cemetery in violation of New York and

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<sup>1</sup> The Complaint alleges that Plaintiffs are the children or grandchildren of those who purchased perpetual care contracts. (R 70-71). As a matter of New York law, they possess the right to protect the plots in questions. *Saulia v. Saulia*, 25 N.Y.2d 80, 302 N.Y.S.2d 775 (1969) (It is well settled in New York that the rights in a burial plot generally descend to the heirs as intestate property.).

<sup>2</sup> *Mitchell v. Thorne*, 134 N.Y. 536, 32 N.E. 10 (1892); *Lay v. Carter*, 151 N.Y. Sup. 1081 (1915); *Chace v. Leising*, 72 N.Y.S.2d 741 (Sup. Ct. 1947); *Oatka Cemetery Ass'n v. Cazeau*, 242 AD 415, 417 (4th Dept. 1934).

Jewish law.” (R78.) Moreover, attached to the Complaint are a number of pictures evidencing the six to eight foot high weeds preventing access to the Lucker plots at Bayside Cemetery. (R 94-96.)

6. *Third*, Defendants-Respondents engage in semantics by suggesting they have affirmatively done nothing to desecrate Bayside perpetual care graves. Notably, their refusal to honor perpetual care contracts and their willingness to allow the cemetery to become what newspapers articles refer to as a jungle constitutes willful and wanton desecration. (R 91-96)

**B. There Is No Basis For This Court To Deny John Lucker Standing**

7. This Court erroneously held John Lucker’s grandmother’s cause of action arose after her death. (Order at 13.)

8. There was no citation to any evidence in or out of the record in reaching this conclusion.

9. Indeed, the evidence in this proceeding suggests the claim arose *at the time* the contract was entered. (*See* Opening papers at pp. 7-8 and Exhibits D and E thereto.)

10. Defendants-Respondents offering nothing material to refute the documentary evidence proffered by Plaintiffs-Appellants and merely speculate that “it appears to be a relatively routine bookkeeping statement.” (Def. Opp’n at ¶ 10.)

11. They further contend the claim is barred by the statute of limitations.

12. The claim is unquestionably *not* barred by the statute of limitations. *Gen. Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337 (1966).

13. Defendants concealed their theft of perpetual care monies for decades. Defendants had an affirmative duty to publicly disclose this information to the NYAG and failed to do so until in or around 2005. This case was commenced in federal court in 2007 –well within


the limitations period after disclosure. And it was immediately refiled in state court when the federal court determined it lacked jurisdiction. Thus, the claims were timely pursued.

14. Even if this Court were to determine they were not timely pursued, equitable principles require the tolling of the statute of limitations given Defendants' secretive, unlawful conduct.

15. The Court of Appeals specifically held in *General Stencils* that the statute of limitations is inapplicable when the wrongdoer conceals information, thereby preventing Plaintiff from timely pursuing the action. 18 N.Y.2d at 128. The statute of limitation clearly does not apply here under *General Stencils* and basic equitable principles which recognize "no man may take advantage of his own wrong." *Erbe v. Lincoln Rochester Trust Co.*, 24 N.Y.S.2d 849 (4th Dept. 1961). And that's what this whole case is about and why standing should be granted to Plaintiffs-Appellants – to prevent this corrupt synagogue from retaining monies they stole, which were entrusted to their care, so that they cannot profit from their admitted wrong doing.

Dated: February 11, 2014  
New York, New York

**MOTLEY RICE LLC**

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