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

JOHN R. LUCKER, as CONNECTICUT PROBATE COURT APPOINTED ADMINISTRATOR FOR THE ESTATE OF RUTH B. LUCKER, and BEATRICE WOLIN as representatives of a class consisting of all others similarly situated, Plaintiffs, vs. BAYSIDE CEMETERY, and CONGREGATION SHAARE ZEDEK, Defendants.	Index No. 161848/2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO CPLR 3211

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PRELIMINARY STATEMENT

This is, unfortunately, just the latest in a repetitive series of lawsuits between this putative class and Defendants. Despite the fact that the Appellate Division has already affirmed this Court's dismissal of substantially identical claims in a pair of actions, one of which was brought by the same lead plaintiff as in this case, Plaintiffs have brought yet another case in an attempt to avoid the import of those earlier decisions. That effort is, simply put, futile.

Plaintiff John Lucker's claims in this action border on the frivolous, given the controlling decisions rendered by this Court and the Appellate Division in his prior lawsuit, Lucker v. Bayside Cemetery, Index No. 114818/2009 ("Lucker I"). There are three principal differences between Mr. Lucker's Complaint here and the claims in Lucker I, but none are sufficient to avoid dismissal:

First, in an apparent effort to bolster Mr. Lucker's claims, the Complaint here quotes at length from documents disclosed by Defendants in a parallel lawsuit, Leventhal v. Bayside Cemetery, Index No. 100530/2011. But Mr. Lucker's earlier claims (and all but one of the claims in the parallel Leventhal action) were dismissed for failure to state claims upon which relief could be granted as a matter of law, even assuming the truth of all of the plaintiffs' earlier allegations, not for failure to provide sufficient evidence. It follows, therefore, that because the operative legal theories in this case are unchanged from those in Lucker I and Leventhal, and the additional factual allegations merely provide additional supposed proof of the same alleged wrongdoing, the Lucker claims here must be dismissed.

Second, Mr. Lucker expressly brings this Complaint in his capacity as the personal representative of his grandmother, Ruth Lucker, whereas Lucker I was brought in his personal capacity, purportedly "standing in the shoes" of his grandmother. That difference may be sufficient to avoid dismissal for *res judicata*, but it ignores the clear holding of the Appellate

Division that Mr. Lucker's appointment as personal representative (which he had raised on appeal as an alternative ground for reversing this Court's dismissal order) was "unavailing" because the causes of action that he sought to bring "arose after [his] decedents' deaths." Lucker v. Bayside Cemetery, 114 A.D.3d 162, 172 (App. Div. - 1st Dep't 2013). That holding alone requires the dismissal of his Complaint here, particularly since his grandmother died almost 30 years ago, meaning that any causes of action that arose *prior* to her death are now long since time-barred.

Third, the Complaint joins a new Plaintiff, Beatrice Wolin, who alleges that she purchased annual care for certain graves at Bayside Cemetery from 1949 to 2009. While the Complaint does not distinguish between Mr. Lucker's and Ms. Wolin's factual allegations or claims, and instead simply repeats and elaborates on many of the same allegations as in the earlier actions, it is important to recognize that Ms. Wolin does not even allege that she established a perpetual care trust of the type that Mr. Lucker's grandmother allegedly created (or, indeed, any kind of trust). Her presence in the case thus cannot bolster Mr. Lucker's claim, which must in any event rise or fall on its own merit.

Finally, as to Ms. Wolin, while she was not a party to the earlier actions, and is thus not formally precluded from bringing her claims here, they must nonetheless be dismissed for two reasons: first, her General Business Law claims suffer from the same legal deficiencies as required the dismissal of the virtually identical claims in Leventhal (affirmed by the Appellate Division in Lucker I), and second, all of her claims are in any event barred by applicable statutes of limitation.

For the reasons set forth below, therefore, Defendants[1] respectfully request that the Court dismiss this action in its entirety, with prejudice.

STANDARD OF REVIEW

On a motion pursuant to CPLR 3211 to dismiss for failure to state a claim, the question is whether the plaintiff has alleged facts that are sufficient to state a claim upon which he or she may be granted relief, "accept[ing] as true the factual allegations of the complaint[] and all inferences favorable to plaintiffs that reasonably flow from them," Lucker v. Bayside Cemetery, 114 A.D.3d 162, 168 (App. Div. - 1st Dep't 2013).

Moreover, where, as here, there are multiple plaintiffs whose claims arise from distinct transactions and interactions with the defendants, their claims must be adjudicated separately, and each plaintiff's case must stand or fall on its own merit. Finally, despite the fact that this is a putative class action, the question on a motion to dismiss brought prior to class certification is whether each of the individual named plaintiffs can state a claim, not whether other members of the proposed class might hypothetically be able to state claims. See generally id. (affirming dismissals of various claims due to standing and statute of limitations defenses specific to the named plaintiffs).

[1] This motion is submitted by both named Defendants, Congregation Shaare Zedek and Bayside Cemetery, despite the fact that, contrary to the allegation contained in paragraph 7, Defendant Bayside Cemetery is not a legal entity capable of suing or being sued in its own right. Defendants hereby reserve that defense of lack of capacity and will, if this motion is denied and issue is joined, deny so much of paragraph 7 of the Complaint as alleges that Bayside Cemetery is a separate legal entity.

ARGUMENT

I. EACH OF PLAINTIFFS' CLAIMS IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

A. ANY CLAIM THAT PLAINTIFF JOHN LUCKER HAS STANDING TO BRING AS A PERSONAL REPRESENTATIVE IS NECESSARILY TIME-BARRED

Having had his individual claims dismissed for lack of standing in Lucker I, Plaintiff John Lucker now alleges that he was duly appointed as the administrator of the estate of his grandmother, Ruth B. Lucker, (Compl. ¶ 4),[2] and that he brings this action in his capacity as Mrs. Lucker's personal representative (Compl. at 1). In doing so, he is presumably seeking to invoke the statutory authorization contained in section 11-3.1 of the Estates, Trusts & Powers Law, which provides that "[a]ny action, other than an action for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent."[3]

But the Appellate Division, First Department has clearly held, most recently in Lucker I, that a personal representative's standing to sue extends only to causes of action that arose *prior* to the decedent's death:

> A decedent's personal representative has the authority to bring causes of action that were viable at the time of the decedent's death, not claims that arose after his or her death (EPTL 11-3.1; Estate of Gandolfo, 237 AD2d 115 [1st Dept 1997]). The causes of action here arose after those decedents' deaths. John Lucker's belated application for, and receipt of, appointment in Connecticut to serve as the legal representative of the estate of his grandmother, Ruth Lucker, is therefore unavailing. Nor is there any other legal construct by which an individual may sue by standing in the shoes of a deceased individual.

Lucker I, 114 A.D.3d at 172.

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[2] A copy of the Complaint in this action has been submitted as Exhibit A to the accompanying Affirmation of Russell Steinthal ("Steinthal Aff.").

[3] Defendants note that Mrs. Lucker was domiciled in Connecticut, not New York, at the time of her death. Plaintiff John Lucker is therefore a personal representative of a non-domiciliary decedent within the meaning of Section 13-3.5 of the Estates, Trusts & Powers Law. By filing this motion to dismiss, Defendants do not intend to waive any rights they may have under that section.

In an effort to avoid the controlling authority of the Appellate Division's holding that he lacks standing to bring any cause of action that was not legally viable on or before Mrs. Lucker's death on August 11, 1987, (see Steinthal Aff., Ex. B), Mr. Lucker alleges that "This Complaint is replete with exhibits evidencing that Plaintiffs possessed pre-death injuries upon entering into a contract with a Defendant and was directly injured as a result thereof." (Compl. ¶ 4.) Yet even assuming, for purposes of this motion, that that is the case, it is a concession that such a cause of action is independently barred by the statute of limitation. As the Appellate Division held in Lucker I, the General Business Law claims in this case (Counts I-III) are subject to a three-year statute of limitations, accruing from the date of injury. Lucker I, 114 A.D.3d at 175 (citing CPLR 214[2]; Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 789 (2012)). Breach of contract claims such as that brought in Count IV of the Complaint, meanwhile, must be brought within six years of the date the contract was breached. CPLR 213(2); Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399 (1993).

Any causes of action arising out of injuries suffered by Mrs. Lucker prior to her death in 1987, and thus even potentially viable at the time of her death, were therefore required to have been brought no later than 1990 and 1993, respectively,[4] while Mr. Lucker lacks standing as a matter of law to bring any cause of action that might have theoretically accrued in favor of Mrs. Lucker *within* the relevant limitations period. Each of the Lucker causes of action here must therefore be dismissed, regardless of the precise dates on which they accrued.[5]

[4] The fact that "Plaintiff Beatrice Wolin is still alive and brings suit concerning her annual care purchase from 1949 to 2009," (Compl. ¶ 4), is entirely irrelevant to the question of whether the *Lucker* claims are viable. The question isn't whether *someone* was injured prior to Mrs. Lucker's death or whether there might be some plaintiff who can allege that he or she was injured by purportedly similar conduct. Rather, both the Gandolfo / Lucker rule as to the standing of personal representatives and the statute of limitations apply to each plaintiff's claims individually.

[5] To the extent Mr. Lucker alleges breach of a perpetual care contract, there are likely multiple distinct accrual dates, one for each distinct breach of the contract. The Court need not reach that question, however, since each such accrual date is either before Mrs. Lucker's death (and thus more than six years before the commencement of this

B. PLAINTIFF BEATRICE WOLIN'S STATUTORY CLAIMS ARE TIME-BARRED.

Plaintiff Beatrice Wolin's General Business Law claims (Counts I-III) are similarly time-barred. As discussed above, the statute of limitations for such claims is three years from the date of injury. Lucker I, 114 A.D.3d at 175 (citing CPLR 214[2]; Corsello, 18 N.Y.3d at 789). While there are no specific allegations in the Complaint as to how or when Ms. Wolin herself was injured, the basic gravamen of her GBL claims appears to be that she was induced to pay for annual care at Bayside Cemetery by means of a false advertisement or other unfair business practice. (See Compl. ¶ 81 ("When purchasing these services based upon Defendants' representations and advertisements, Plaintiffs relied on Defendants' statements which were false, misleading and deceptive"); id. ¶ 87 ("Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for the perpetual or annual care for their own plots and/or family member's plots and gate common areas at Bayside Cemetery."); id. ¶ 93 ("Defendants' deceptive conduct caused highly vulnerable individuals, including Plaintiffs' relatives, who paid monies and placed their trust in Defendants to provide perpetual or annual care for their own or family member's plots and gate common areas located at Bayside Cemetery."); id. ¶ 95 ("Defendants' conduct caused individuals aged sixty-five (65) years or older to lose monies for personal or family care in violation of GBL 349-c.")[6].)

As such, Ms. Wolin would have been injured at the latest at the time that she last paid money to a Defendant for annual care. While the Complaint does not allege when Ms. Wolin made her last such payment for annual care, documentary evidence in the Defendants'

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action) or after Mrs. Lucker's death (in which case Mr. Lucker lacks standing to sue on Mrs. Lucker's behalf based on such a breach).

[6] There is no allegation in the Complaint that Ms. Wolin is herself such an "individual[] aged sixty-five (65) years or older," which is an independent ground to dismiss Count III for lack of standing, even assuming that there are any private rights of action to obtain the enhanced civil penalty payable to the "elderly victim fund" in the state treasury as required by General Business Law § 349-c.

possession and produced herewith shows that her payment of $250 for the care of the Weinstein Plot in Gate #59 was received on September 4, 2008, (see Steinthal Aff., Ex. C), which is consistent with her allegation that she purchased annual care "until approximately 2009," (Compl. ¶ 5.). Any General Business Law claim was therefore time-barred no later than 2011, four years before this case was commenced in 2015. Cf. Lucker I, 114 A.D.3d at 175 (holding plaintiff's GBL claims time-barred because "[w]hether the date of injury is the date Leventhal entered into the perpetual care arrangement in 1985, or some time between that date and the date that reports of the cemetery's disrepair began to be publicized in 2004, Leventhal's commencement of this action in January 2011 is time-barred.").

C. PLAINTIFF BEATRICE WOLIN'S BREACH OF CONTRACT CLAIM IS TIME-BARRED.

Ms. Wolin's breach of contract claim (Count IV) is similarly time-barred. The only contracts that she purports to have made with Defendants are contracts for annual care "from 1949 until approximately 2009." (Compl. ¶ 5.) While the Complaint does not provide details as to when the Defendants allegedly breached those contracts, the allegation that Ms. Wolin purchased annual care suggests that each such contract was for the care of one or more specified graves during a given year.

As explained above, documentary evidence demonstrates that Ms. Wolin's payment of $250 for the care of the Weinstein Plot in Gate #59 was received on September 4, 2008. (See Steinthal Aff., Ex. C.) The last possible date on which the contract could have required Defendants' performance, and thus on which a breach could have occurred, is therefore September 4, 2009 (one year from the date that the contract was made).[7]

[7] Aside from the description of the contract as being for "annual" care, that interpretation is also supported by the Statute of Frauds. If the alleged contract were incapable of being fully performed before the one year anniversary of the contract being made, Ms. Wolin's breach of contract claim would be unenforceable under the Statute of Frauds.

Applying the six-year statute of limitations for actions upon a contract, CPLR 213(2), any claim for breach of such a contract would therefore have to have been commenced no later than September 4, 2015. See Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993) ("In New York, a breach of contract action accrues at the time of the breach."). Since this action was not commenced until November 17, 2015, when the Summons and Complaint were filed with the Clerk, (see Steinthal Aff., Ex. A at 1), it is time-barred and must be dismissed.

D. PLAINTIFFS HAVE NOT ALLEGED FACTS SUFFICIENT TO ESTABLISH THAT THE STATUTE OF LIMITATIONS HAS BEEN TOLLED.

In an apparent attempt to preempt the statute of limitations argument set forth above, Paragraph 78 of the Complaint alleges that:

> Any applicable statutes of limitation have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated expressly for perpetual care or annual care at Bayside Cemetery. Such acts of fraudulent concealment include intentionally covering up and refusing to publicly disclose critical documents and information concerning the deliberate invasion of fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery to class members, their families and the general public. Through such acts of fraudulent concealment, Defendants were able to actively conceal from class members and the public for years the truth about their deceptive practices, thereby tolling the running of any applicable statutes of limitation.

Notably, paragraph 78 of the Complaint is identical to paragraph 44 of the Leventhal complaint, which the Appellate Division held was insufficient as a matter of law to show that the statute of limitations was tolled:

Because the Court, on this motion pursuant to CPLR 3211, is required to grant the plaintiff the benefit of all reasonable inferences from the allegations of the Complaint, Defendants have presumed, solely for purposes of this motion, that the contract does *not* require performance that would render it unenforceable. Defendants hereby expressly reserve the right to assert the Statute of Frauds as an affirmative defense, however, if Plaintiff advances a construction of the contract that suggests that it would come within the statute.

> We reject Leventhal's contention that the statute of limitations was tolled. The continuing violation theory is inapplicable, since it pertains to a situation where the injurious condition is intermittent, giving rise to recurring injuries. Equitable estoppel is also inapplicable, since Leventhal provides no basis for a claim that he relied on later acts of deception or concealment to justify estopping defendants from relying upon the statute of limitations. Leventhal fails to explain how defendants' actions kept him from bringing a timely lawsuit.

Lucker I, 114 A.D.3d at 175 (internal citations omitted).

The same is true here. Neither Plaintiff has alleged that he or she (or, in the case of Mr. Lucker, his decedent) relied on any representations made by Defendants to them so as to refrain from filing a timely lawsuit, or that they were in any other way prevented from filing such a suit. Indeed, the supposed "concealment" did not prevent Mr. Lucker from raising substantially the same claims as he raises here as early as 2007, before the various supposedly suppressed facts described in the Complaint were "revealed" to him. And Ms. Wolin could have visited the cemetery itself at any point prior to the expiration of the statute of limitations which would have fully revealed the alleged failure to care for her annual care graves.[8]

Ultimately, paragraph 78 amounts to an argument that the statute of limitations should be tolled because Defendants did not affirmatively disclose their alleged failure to maintain these plots to Plaintiffs or the general public. But as the Court of Appeals has explained, that is simply not how the statute of limitations operates. Rather, equitable estoppel is only available "where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action" and plaintiff reasonably relied on the misrepresentations. Zumpano v. Quinn, 6 N.Y.3d 666, 674 (2006). Merely "intentionally covering up and refusing to publicly disclose critical

[8] While this shows that Ms. Wolin at minimum *could* have learned about Defendants' performance or non-performance of their contractual obligations, such that the statute of limitations should not be tolled, "knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in a contract action." Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 403 (1993) (internal quotation and modifications omitted). Rather, "except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." Id.

documents and information," (Compl. ¶ 78), is wholly insufficient to establish equitable tolling, as "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." Zumpano, 6 N.Y.3d at 675. Rather, to establish that the statute of limitations should be tolled, the plaintiff must show a "specific misrepresentation to them by defendants," id., which Plaintiffs here have entirely failed to do.

II. PLAINTIFFS' GENERAL BUSINESS LAW CLAIMS ARE INSUFFICIENT AS A MATTER OF LAW

Even if the General Business Law claims (Counts I-III) were not barred by the statute of limitations, the Appellate Division's controlling opinion in Lucker I would require that they be dismissed for failure to state a claim as a matter of law. As the First Department explained:

> To establish a 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. Leventhal does not allege any misrepresentations or deception beyond the statement that perpetual care would be provided. **Mere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud.** The conduct of which Leventhal complains is essentially that defendants failed to satisfy their contractual duties, not that they concealed or misrepresented contractual terms.

Lucker I, 114 A.D.3d at 174-75 (internal citations omitted, emphasis added).

The same is true here: Plaintiffs' essential allegation is that Defendants failed to honor a perpetual care contract (Lucker) or annual care contracts (Wolin), not that Defendants "concealed or misrepresented" the terms of those contracts. (See Compl. ¶ 81 ("As more fully described above, Defendants' advertisement and sale of annual and perpetual care contracts and the subsequent refusal to maintain the plots and gate common areas in accordance with those

contracts constitute violations of N.Y. Gen. Bus. Law § 350."); id. ¶ 87 ("Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for the perpetual or annual care for their own plots and/or family member's plots and gate common areas located at Bayside Cemetery. Defendants have failed to abide by these contracts, have abused trust monies entrusted to their care and have allowed the cemetery to fall into a state of shameful disrepair."); id. ¶ 93 ("Defendants' deceptive conduct caused highly vulnerable individuals, including Plaintiffs' relatives, who paid monies and placed their trust in Defendants to provide perpetual or annual care for their own or family member's plots and gate common areas located at Bayside Cemetery. Defendants have failed to abide by these contracts and have allowed the cemetery to fall into a state of shameful disrepair.")) Even assuming, arguendo, that Defendants knew, at the time they entered those perpetual care or annual care contracts, that they did not intend to perform them, and even that they knew that such conduct was illegal, it would not suffice, since "mere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud." Lucker I, 114 A.D.3d at 175 (citing N.Y. Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995)).

Plaintiffs may attempt to distinguish Lucker I's holding by pointing to Defendants' alleged misrepresentations to the Attorney General (see, e.g., Compl. ¶ 88 ("Defendants have also made misrepresentations to the NYAG office in order to improperly gain access to and misuse perpetual care monies."); id. ¶ 96 (same).) But those additional allegations cannot save the General Business Law claims, because, as the Appellate Division explained in the passage from Lucker I quoted above, a claim under Section 349 or 350 of the General Business Law (and, by implication, Section 349-c as well) requires "consumer-oriented conduct which is deceptive or misleading in a material way," i.e. "representations or omissions likely to mislead a reasonable consumer acting reasonably under the circumstances." Lucker I, 114 A.D.3d at 174.

Even if the Defendants misrepresented certain facts in a letter to the Attorney General, neither the facts nor those communications were known to the Plaintiffs or any other member of the public until the Office of the Attorney General "recently" disclosed them in response to a Freedom of Information Law request. (See Compl. ¶ 51.) Such conduct cannot therefore be described as "consumer-oriented" and Plaintiffs cannot (and do not) allege that they relied on them.

III. NEITHER PLAINTIFF ALLEGES THAT HE OR SHE PERSONALLY ESTABLISHED A TRUST.

Finally, despite the pages and pages of discussion in the Complaint about the Defendants' alleged abuse of trust funds, its alleged misrepresentations to the Attorney General as to the extent to which those trust funds were identifiable with specific trusts, etc., it is important to note that neither Plaintiff actually alleges that he or she personally established such a trust.

A. THE PURCHASE OF ANNUAL CARE DOES NOT CREATE A TRUST.

Plaintiff Wolin, for her part, alleges only that "Since 1949, Plaintiff [Wolin] has purchased annual care for the Weinstein plots found within Gate 58 at Bayside Cemetery. Documents produced to the New York State Attorney General's Office by Defendant Congregation Shaare Zedek evidence that Ms. Wolin has purchased annual care from 1949 until approximately 2009." (Compl. ¶ 5.) But, despite the reference later in that paragraph to the Defendants' supposed "refus[al] to conduct a forensic accounting," (id.), the Complaint does not allege that the purchase of annual care services created a trust, nor does it allege facts from which such a relationship could be inferred. Notably, unlike the case with perpetual care, which is evidenced by a Trust Fund Receipt, (see Compl. ¶ 15), the Complaint does not allege that any written contract or other document exists that evidences the intention of the parties to create supposed "annual care trusts."

Rather, an annual care contract is, as the Complaint recognizes, a simple contract to perform services during a given year. (Id. ¶ 13.)[9] The vast majority of the Complaint's allegations are therefore simply irrelevant to Ms. Wolin's claim.

More importantly, in the absence of a trust, there is no allegation that Ms. Wolin was in a confidential or fiduciary relationship with either Defendant, and there is thus no basis for Ms. Wolin to request relief beyond simple breach of contract damages. For example, a mere contractual relationship does not create an entitlement to a constructive trust, (see Compl., Prayer for Relief ¶ G), since "in the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for imposition of a constructive trust against [Defendants]." Evans v. Rosen, 111 A.D.3d 459, 459 (App. Div. – 1st Dep't 2013). Nor does such a contract entitle Ms. Wolin to an injunction restricting the use of funds paid for annual care, since the contractual damages sought in the Complaint constitute an adequate remedy at law and she has not alleged that she is threatened with future injury from conduct that allegedly occurred years ago. See, e.g., Regini v. Board of Managers of Loft Space Condominium, 107 A.D.3d 496, 497 (App. Div. – 1st Dep't 2013). Finally, even assuming the truth of all of her allegations, Ms. Wolin has not alleged facts sufficient to require an accounting of the "annual . . . care monies held in [Defendants'] care, custody, possession or control for Bayside Cemetery since they began selling each service," (Compl., Prayer for Relief ¶ H), since "in the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for an accounting," Saunders v. AOL Time Warner, Inc., 18 A.D.3d 216, 217 (App. Div. – 1st Dep't 2005).

[9] Defendants do not necessarily concede that such contract requires the services listed in paragraph 13 of the Complaint, but the Court can accept that allegation as true for the purposes of this motion and still conclude that no trust was created.

Defendants respectfully request that, should any of Ms. Wolin's substantive causes of action be sustained on this motion to dismiss, the Court nonetheless dismiss so much of her claims as seek relief beyond that which is supported by the allegations of the Complaint.

B. MR. LUCKER DOES NOT ALLEGE THAT HIS DECEDENT PERSONALLY PURCHASED PERPETUAL CARE FROM A DEFENDANT.

Nor does Plaintiff John Lucker sufficiently allege that his grandmother-decedent personally purchased perpetual care from Defendants or had any other direct relationship that would have given her standing to sue, even during her lifetime. Paragraph 4 of the Complaint alleges that, inter alia, "In the 1970s, Ruth B. Lucker purchased perpetual care from a Defendant through the Chebra Shebath Achim Society."

While the Complaint in this action does not further elaborate on the alleged relationship between Mrs. Lucker and the Society, in Lucker I, Mr. Lucker supported a parallel allegation with the further allegation that "Mr. Lucker's grandmother, through her agent the Chebra Shebath Achim Society, purchased perpetual care for the Lucker plots at Bayside Cemetery," (Lucker I, Compl. at 9), and attached as an exhibit to that Complaint a letter dated January 4, 1973 from the then-president of the society, Nathan Lipton, stating that, inter alia, "we purchased perpetual care of the cemetery." (Steinthal Aff., Ex. D.)

Yet when Defendants provided the Court with an earlier letter, dated two weeks earlier, also from Mr. Lipton, that specifically provided that "As you know, the Board of Trustees has purchased perpetual care for our cemetery grounds. *This of course does not include the care of individual graves,*" (Steinthal Aff., Ex. E (emphasis added)), Plaintiff abandoned his claim that his grandparents had purchased care for specific graves. Instead, both on appeal to the First Department in Lucker I and apparently now in this action, he contends that his grandmother "used an agent to purchase the perpetual care contract for the *common areas* of their plots and

others in the burial society." Reply Brief for Plaintiffs-Appellants, Lucker v. Bayside Cemetery, Index No. 114818/09 (App. Div. - 1st Dep't filed Sept. 14, 2012) at 8; see also Compl. ¶¶ 2, 14, 81, 87, 93, 101 (referring to "gate common areas").

Even assuming that the Society purchased care for those gate common areas, however, there is no allegation in the Complaint that it did so as Mrs. Lucker's agent. Nor is it logical to infer that they would have done so—rather, the Lipton letters suggest that the Society did so for its own purposes, on its own initiative. In the absence of any reason to believe that the Society was acting as Mrs. Lucker's agent when it dealt with Defendants, it follows that the Society, and not Mrs. Lucker, would have had standing to sue Defendants for any alleged wrongdoing.[10] And since Mr. Lucker's standing to bring this action as personal representative is entirely dependent on his decedent's ability to bring a cognizable cause of action, the documentary evidence cited above requires that his claims here be dismissed, in their entirety, for want of standing.

CONCLUSION

Whether as a matter of the statute of limitations, standing law or the substantive elements of the Plaintiffs' alleged claims, it is entirely clear that neither Plaintiff can state a claim upon which he or she is entitled to relief. Defendants therefore respectfully request that each of their claims be dismissed in their entirety or, in the alternative, that the Court dismiss so much of each claim as is barred by the relevant statute of limitations or otherwise unsupported in law.

[10] Of course, as was discussed at length in Lucker I, the Attorney General retains concurrent standing to enforce the terms of a perpetual care trust regardless of whether a donor is willing or able to do so.

Dated: New York, New York
December 8, 2015

Respectfully submitted,

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Electronically signed pursuant to State Technology Law § 304(2), Martin v. Portexit Corp., 98 A.D. 3d 63 (1st Dep't 2012).