

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,

Plaintiff,

-against-

BAYSIDE CEMETERY AND ,
CONGREGATION SHAARE ZEDEK

Defendants.

Index No.: 100530/2011E

Hon. Debra A. James

Ethan Klingsberg, an attorney admitted to practice in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following is true:

1. I understand that in the above captioned case Plaintiff has alleged that Defendant Congregation Shaare Zedek (the "Congregation") made fraudulent misrepresentations to the Charities Bureau of the New York Attorney General's Office in a letter, dated November 1, 2004, from the Congregation to the Charities Bureau of the New York State Attorney General relating to Bayside Cemetery. Exhibit A. Cleary Gottlieb Steen & Hamilton LLP, where I have been a partner since 2001, was *pro bono* counsel to the Congregation in connection with dealings with the Charities Bureau at the time of this letter and, as one of the lawyers on the team representing the Congregation, I know that there were no such fraudulent misrepresentations. Rather, as I have testified under oath before the staff of the Charities Bureau, this letter was provided in good faith and, at the direction of the Charities Bureau, was based on a limited review and for a limited purpose. As soon as the Congregation became aware of additional facts not reflected in this letter (which was during the 2007-2008 time period), these additional facts and relevant documentation were provided by the Congregation to the Charities Bureau and, at the direction of the Charities Bureau, a remedy was implemented by the Congregation at that time. After all of this transpired and only after the Charities Bureau had concluded its investigation of these matters, the Charities Bureau first provided a copy of the November 1, 2004 letter to the Plaintiff and his counsel in response to a Freedom of Information Law request, as well as information that indicated the additional facts not reflected in this November 1, 2004 letter. Thus, neither Plaintiff nor his counsel could have ever relied on this November 1, 2004 letter in any way.

2. A copy of my entire sworn testimony to the Charities Bureau in connection with its now-completed investigation of this matter is attached to this Affirmation as Exhibit B.

3. There is no necessity for the in-camera inspection of the over 500 documents, which Plaintiff claims are subject to the crime-fraud exception, to reach the conclusion that there is no probable cause for Plaintiff's claim of fraud and that such a claim has in any event no relevance to the claims that are currently before this Court.

4. During the latter part of 1997, I joined the Congregation, a synagogue located in the Upper West Side of Manhattan.

5. As a result of my membership at the Congregation, I came to learn that the synagogue financially supported and managed Bayside Cemetery. I understood, from financial data provided to the membership, that a significant portion of the Congregation's revenue was spent each year on Bayside Cemetery upkeep. The Congregation was interested in coming up with a responsible, lawful, sustainable and long-term solution for Bayside Cemetery's care. I was eager to help.

6. After speaking with the Congregation's president, Daniel Werlin, I began investigating possible solutions. Approximately a year later, I joined the board of the Congregation and continued to work with governmental and community actors to design a long-term solution to the maintenance of Bayside Cemetery. Although I had a role in trying to structure and create a solution for Bayside and was occasionally asked questions about the Cemetery, I had no involvement in the day-to-day operation of Bayside Cemetery which was handled directly by the Congregation's officers and staff. My focus was on how to design a better future for Bayside.

7. In the fall of 2003, the Congregation engaged the law firm at which I am a partner, Cleary Gottlieb Steen & Hamilton LLP, to assist in resolving the Bayside issue as *pro bono* counsel. I was the supervising partner for this engagement.

8. As part of Cleary Gottlieb's work to help solve the Bayside issue, we worked with the New York State Attorney General's office. I met with various individuals, including then-Attorney General Eliot Spitzer and Bob Pigott and Bob Molic of the Charities Bureau, to explore ideas for a path forward. These conversations came to focus on an action plan for creating a self-sustaining organization that would be responsible for maintaining and eventually running Bayside. The action plan called for the creation of an entity, separate from the Congregation, with the funding, focus, community support and skills to maintain and care for Bayside Cemetery.

9. In parallel with these constructive discussions with the Charities Bureau in which we designed the action plan, the Congregation was suffering severe financial distress. During a call between Joel Shaiman, the President of the Congregation, and Messrs. Pigott and Molic of the Charities Bureau, in which I participated, Mr. Shaiman explained that the Congregation's financial situation was of such a dire nature that the Congregation might have to curtail almost entirely or even cease all further operation of Bayside Cemetery.

10. Soon after this call, Bob Pigott and Bob Molic called me to explain that, while they and we continued to work on the action plan, they very much wanted, in parallel, to explore ways for the barely solvent Congregation to continue to operate and maintain the

Cemetery. They added that, toward this end, they wanted to explore with the Congregation whether the Congregation may be in possession of money that the Congregation may be able to use for the operation of Bayside Cemetery. During the call, they discussed how they understood that the Congregation had approximately \$400,000 to \$550,000 of cash and Israeli bonds in accounts that had been designated "Cemetery," but that the Congregation was not comfortable spending any of this money based on the concern that it may contain the proceeds of the purchase price of perpetual care contracts. Under New York law, cemeteries that sell perpetual care contracts may spend only the interest earned on the purchase price of that contract and must not spend the purchase price. Messrs. Pigott and Molic asked whether there would be a way of getting better visibility on whether this money was the purchase price of identifiable perpetual care contracts. The three of us discussed how Bayside Cemetery had been in existence since the mid-19th century, how the records were in very poor condition and how a forensic legal or accounting review was beyond the capacity of the Congregation and its supporters and advisors.

11. Either during that call or a follow-up call to me, Mr. Pigott proposed that the Congregation should see how many actual names of purchasers or specific deceased individuals could be associated with specific perpetual care sales with specific purchase price amounts. We again discussed how a forensic legal or accounting inquiry was not practicable. We discussed how we could ask the Congregation to look around at readily available information, but that there were lots of old ledger books and documents and paging through all those comprehensively would not be practicable.

12. I conveyed the Charities Bureau's request to the Congregation and, at the Congregation's request, an associate and a summer associate from Cleary Gottlieb went to the offices of the Congregation to look around for any records of perpetual care contracts. They spent two days searching for evidence of perpetual care contracts. During this time, they asked the office manager, whose first name was Lolita, to direct them to all materials relating to Bayside Cemetery. As the Charities Bureau was informed in writing on two occasions (see Exhibits D and I to Plaintiff's letter motion), this search was not a full scale internal investigation or forensic examination and we and the Charities Bureau were aware that we had not necessarily located or reviewed all the evidence that at one time must have existed identifying the amount spent to purchase particular perpetual care contracts.

13. The Cleary Gottlieb associate and summer associate found two contracts as well as 21 references to amounts attributed to particular perpetual care contracts in financial statements for the Congregation that went back to the 1960s. The amount of perpetual care purchased under these contracts aggregated to approximately \$29,400. We reported this to the Charities Bureau.

14. Thereafter, Bob Pigott and Bob Molic instructed us to write a letter to the Charities Bureau detailing this search and its results. We wrote a draft which the Charities Bureau reviewed. The draft set forth expressly that this was not a forensic legal or accounting review. The Charities Bureau made comments on the drafts of the letter, but never objected to or commented on these qualifications. After its review, the Bureau told the Congregation that the Bureau would write a letter that would give permission to the Congregation to spend money, from the accounts designated "Cemetery," on the general upkeep and operation of the Cemetery so long as \$100,000 remained in this account. The Bureau explained that it had arrived at this

figure by taking the \$29,400 figure, which represented the amount of the perpetual care contracts that had been found, and adding a cushion of \$70,600. They explained that the cushion was being added because the Charities Bureau understood that the \$29,400 was not the entire amount of perpetual care purchased and that, in its judgment, the extra \$70,600 was sufficient to address the margin of error. After the letter was sent, and a responsive go-ahead received from the Charities Bureau, some funds from the accounts designated "Cemetery" were spent on general upkeep of the cemetery.

15. As the Congregation spent money from the account on taking care of the cemetery, the Congregation would, in response to requests from Messrs. Pigott and Molic, periodically update them on the amount that remained in the accounts designated "Cemetery."

16. A federal suit that was a predecessor to this instant litigation was commenced in September 2007. The Congregation was represented in that litigation, on a *pro bono* basis, by the law firm which now represents it in this litigation. At the outset of that litigation, Russell Steinthal of that firm searched the offices of the Congregation for documentation relating to Bayside Cemetery. During this search, he became aware of documentation indicating that the \$29,400 figure had, in fact, been an understatement of the amount of perpetual care that had been purchased. Attached hereto as Exhibit C are two letters I am informed that Mr. Steinthal's partner, Steven Axinn, sent to the Charities Bureau on October 18, 2007 regarding the further analysis of financial ledgers and on February 26, 2008 regarding the location of further responsive documents tying particular amounts to particular graves. I am also informed that all these financial ledgers and documents were produced to Plaintiff's counsel by February 2009. My understanding is that when the Congregation discovered the additional evidence of specific amounts paid for particular perpetual care contracts, the Congregation not only provided the documentation to the New York Attorney General and the Charities Bureau, but met with the Charities Bureau and, at the request of the Charities Bureau, promptly replenished the accounts designated "Cemetery" with an amount of cash that both included all amounts that had been spent pursuant to the November 1, 2004 letter and caused these accounts to equal at least the amount of all perpetual care funds specified in the documentation provided by Mr. Steinthal's firm. I attended a meeting at the Charities Bureau to discuss this new documentation discovered by Mr. Steinthal and it was conveyed that, when this new documentation was found, the office manager (Lolita) was asked why she had not directed the Cleary Gottlieb lawyers to these documents and that her response was that she had forgotten to do so. There was never any discussion that Lolita had ever been acting other than in good faith.

17. Plaintiff purports to raise questions about a conversation I had with Mr. Steinthal, and – obliquely – suggests that there is some improper explanation for why my colleagues failed in 2004 to unearth all of the references to the specific perpetual care contracts that Mr. Steinthal was eventually able to locate as detailed in Exhibits C. There is no basis for that charge. Indeed, as noted, I have testified at length to the New York Attorney General about this very issue. Plaintiff does not even acknowledge that testimony (although he has had a copy of the transcript since 2014), much less address its contents.

18. There is also no basis for suggesting that my colleagues did anything but a reasonable search to discover any relevant documents they could find. And, no suggestion that the Congregation purposely hid relevant documents from them. That additional information was

found years later does not impugn the good faith of the search that my colleagues did.

19. Moreover, there is no conceivable way that the Plaintiff or his counsel could have ever relied upon this November 1, 2004 letter in any way.

20. The Court does not need to examine the over 500 documents that the Plaintiff claims were wrongfully designated as privileged to find a lack of probable cause to invoke the crime/fraud exception to the attorney-client privilege.

I affirm under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
August 14, 2015


Ethan Klingsberg