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

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,

Plaintiffs-Appellants.

v.

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK AND COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,

Defendants-Respondents.

New York County Index No.
114818/2009E

DEFENDANTS-RESPONDENTS' OPPOSITION TO REARGUMENT AND LEAVE TO APPEAL

RUSSELL M. STEINTHAL, an attorney admitted to practice before the courts of this state, affirms as follows under penalty of perjury pursuant to CPLR 2106:

1. I am a partner in Axinn, Veltrop & Harkrider LLP and am counsel to Defendants-Respondents Congregation Shaare Zedek and Bayside Cemetery in this matter. I am not a party to this action.

2. I similarly represented Congregation Shaare Zedek and Bayside Cemetery in this matter in proceedings before the IAS Court, as well as both below and on appeal in the related matter Leventhal v. Bayside Cemetery et al., Index No. 100530/2011 and in the earlier related federal court actions.

3. I make this declaration in support of Defendants-Respondents' opposition to Plaintiff-Appellants' motion for reargument or, in the alternative, leave to appeal to the Court of

Appeals based on personal knowledge and my familiarity with the record and proceedings both in this Court and in the IAS Court (including, where appropriate, the proceedings in the related actions).

4. Plaintiffs-Appellants' motion does not raise any issue that this Court failed to properly address on appeal that justifies reargument, nor does it raise any issue of law requiring review by the Court of Appeals. Their motion should, therefore, be denied.

A. This Case Has Never Been About "Desecration" and the IAS Court Properly Declined to Follow the Inapplicable Case Law

5. In an effort to try to fit their claims within a line of cases that the IAS Court properly concluded are inapplicable to this case, Plaintiffs-Appellants attempt to recast their claims as relating to the alleged "desecration" of their relatives' graves. (Moving Aff. ¶¶ 9-22.) Their attempt to reformulate their claims should be rejected.

6. The IAS Court properly recognized that Mitchell v. Thorne, 134 N.Y. 536 (1892), Oatka Cemetery Association v. Cazeau, 242 A.D. 415 (4th Dep't 1934), and the other cases cited by Plaintiff-Appellant all concerned rights in cemetery property or burial grounds, not in trusts for the maintenance of the cemetery. As was explained in Defendants-Respondents' brief (Resp. Br. at 20-21), the cited cases stand for the largely unremarkable proposition that individuals who had reserved burial rights when transferring the underlying fee (Mitchell) or who had acquired an easement for burial on a piece of land not belonging to them (Lay) can enforce those rights.

7. Here, there is no allegation that Defendants have done anything to deny the status of Bayside Cemetery as a cemetery, to remove any tombstones or do anything else inconsistent with anyone's burial rights. Nor is there any allegation of intentional "desecration" of graves. Instead, Plaintiffs-Appellants' claims are and always have been limited to the alleged violation of

the terms of the perpetual care trusts. The Court therefore properly judged their standing according to the ordinary rules for the enforcement of charitable trusts.

8. Moreover, even if Plaintiffs-Appellants' claim were judged under the broader standing rule, reargument should nonethless be denied as futile, since the Complaint does not contain any allegations that Plaintiffs are actually the devisees or intestate distributees of any burial rights that their relatives may have possessed.

B. The Court Properly Held That Mr. Lucker Lacks Standing As A Personal Representative.

9. Plaintiff-Appellant John Lucker's request for reargument as to the question of whether his claims arose before or after his grandmother's death is similarly unavailing and should be denied.

10. As an initial matter, a motion for reargument in the Appellate Division is not an appropriate forum for presenting documentary evidence that had not previously been argued below, as Mr. Lucker attempts to do in paragraphs 38-42 and the accomanying exhibit (labelled Exhibit D, although variously referred to in the affirmation as Exhibit C and Exhibit D). But even reviewing the proffered page, it does not actually present any evidence of the supposed comingling—instead, it appears to be a relatively routine bookkeeping statement that happens to show separate balances *both* for a perpetual care account and operating accounts.

11. Mr. Lucker's argument would in any event be futile. Even assuming, arguendo, that the record unambiguously demonstrated that his breach of contract claim arose prior to his grandmother's death in 1987, it would have been barred by the six year statute of limitations, CPLR 213, no later than 1993—well before this action was commenced.

C. Plaintiffs-Appellants' Other Arguments Do Not Warrant Reargument

12. Plaintiffs-Appellants' other arguments essentially repeat arguments made earlier and amount to mere disageement with the Court's holdings, which is not grounds for reargument.

13. The parties amply briefed and argued the public policy questions inherent in whether private parties like the Plaintiffs-Appellants should be granted standing or whether enforcement of these charitable trusts should be left to Attorney General. The Court ultimately decided to apply Smithers v. St-Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127 (1st Dep't 2001), to grant limited standing to the plaintiff-appellant in the related Leventhal action, but declined to extend the Smithers holding to permit him to assert a claim for breach of fiduciary duty. It likewise declined, for good reasons explained in its decision, to grant relatives like Plantiffs-Appellants in this case Smithers-type standing.

14. Similarly, as the Court expressly recognized in its decision, both parties relied on Alco Gravure, Inc. v. Knapp Found., 64 N.Y.2d 458 (1985) in support of their position on standing, but the Court ultimately concluded that the Plaintiffs-Appellants in this action were not the type of "sharply defined and limited number" class that was referenced in Alco Gravure. Nothing presented on the motion for reargument justifies reconsidering or changing that decision, which was entirely correct.

D. Leave to Appeal Should Be Denied

15. Plaintiffs-Appellants do not even attempt to offer any evidence or argument that this case satisfies any of the conditions set forth in Rule 500.22(b)(4) of the Court of Appeals, which sets out the typical grounds for merits review in the Court of Appeals.

16. This case does not present any apparent conflict with a decision of the Court of Appeals or with the decision of any other department. Nor are the issues here, fact-bound and specific as they are, either "novel" or "of public importance."

For the foregoing reasons, Defendants-Respondents respectfully request that the instant motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals be denied.

Dated: February 10, 2014
New York, New York

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By: _____

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