

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----x

4 JOHN R. LUCKER, ELIZABETH A. LUCKER,  
5 NANCY L. ROUSSEAU, Individually and  
6 on Behalf of All Others Similarly  
7 Situated,

8 Plaintiffs,

9 versus

07 CV 3823

10 BAYSIDE CEMETERY and CONGREGATION  
11 SHAARE ZEDEK,

12 Defendants.

U.S. Courthouse  
Brooklyn, New York

13 -----x

March 28, 2008  
12:14 p.m.

14 Transcript of Civil Cause for Pre Motion Conference

15 Before: HONORABLE RAYMOND J. DEARIE,  
16 District Court Chief Judge

17 APPEARANCES

18 Attorneys for Plaintiffs:  
19 POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS, LLP  
20 100 Park Avenue, 26th Floor  
21 New York, New York 10017  
22 BY: MICHAEL M. BUCHMAN, ESQ.

23 Attorney for Defendants:  
24 AXINN, VELTROP & HARKRIDER, LLP  
25 114 West 47th Street  
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BY: STEPHEN AXINN, ESQ.  
RUSSELL M. STEINTHAL, ESQ.

1 Appearances (continued):

2 Court Reporter:

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9 Proceedings recorded by mechanical stenography. Transcript  
10 produced by computer-aided transcription.

11 (In open court.)

12 THE CLERK: We are on this afternoon for a pre-motion  
13 conference. This is Lucker versus Bayside Cemetery, docket  
14 number civil 07-3823.

15 Can I ask the attorneys, please, to note their  
16 appearance, beginning with counsel for plaintiff; and,  
17 gentlemen, I'm going to ask you please to step up to the  
18 podium.

19 MR. BUCHMAN: Good morning, your Honor. Michael  
20 Buchman for the Lucker plaintiffs.

21 And with me here today, your Honor, is Mr. John  
22 Lucker, and in the gallery are additional interested parties  
23 that have family members or relatives buried at Bayside  
24 Cemetery.

25 THE COURT: Nice to have you here, folks.

MR. AXINN: Good afternoon, your Honor. My name is  
Stephen Axinn, and with me is Russell Steinthal, and we are of  
the firm of Axinn, Veltrop & Harkrider, and we represent the  
defendants.

1 THE COURT: Yes. Nice to see you again.

2 I take it that your presence here, of course, means  
3 that the controversy persists.

4 MR. BUCHMAN: It does indeed, your Honor.

5 Pursuant to your order at the last conference, we met  
6 with Mr. Axinn and Mr. Steinthal to discuss the plan that they  
7 had presented to the Court, and we learned more information  
8 with that plan. They actually gave us a copy of the plan. If  
9 your Honor is interested, I have a copy with me and can hand it  
10 up.

11 THE COURT: Sure. Why not, if counsel has no  
12 objection.

13 MR. STEINTHAL: I'm not sure it's a complete plan, but  
14 it's a document.

15 MR. BUCHMAN: The proposal, your Honor, is dated  
16 June 8 of 2005, and notably, your Honor, this plan requires as  
17 a condition precedent that real work be done at the cemetery,  
18 before any real work can be done to the foliage at the cemetery  
19 and the other additional work that's mentioned in this  
20 proposal.

21 So we believe that Mr. Axinn's plan really is no plan  
22 at all, because it hasn't been implemented in 2005, it hasn't  
23 been implemented in 2006, it hasn't been implemented in 2008.  
24 And there are requirements, there are basic requirements that  
25 haven't been satisfied for this plan to even take effect. And

1 the defendants here today are suggesting that the plaintiffs  
2 are at fault for preventing this plan from going forward, but  
3 this plan has been around for years and nothing has been done.  
4 So I fail to see how we are responsible for the inactivity of  
5 the defendants.

6 THE COURT: Let's just table the -- acrimony may be  
7 too strong a word.

8 MR. AXINN: Your Honor, the document that plaintiffs'  
9 counsel has handed up to you is irrelevant and has nothing to  
10 do with what your Honor asked of us back in December.

11 So if I might just take a moment, you asked us in  
12 December to see if we could work with Mr. Buchman in order to  
13 come up with a way to avoid having to deal with this case in  
14 court -- that was what I understood -- and that we would --

15 THE COURT: The way I put it is by the time you spend  
16 the money for lawyers and court, you could be doing some good  
17 work in cemeteries. Not that I'm against paying lawyers, but.

18 MR. AXINN: Well, the lawyers aren't being paid on  
19 either side of this. But you are quite right and correct.

20 First thing we did was on February 6 we met with  
21 Mr. Buchman and with Mr. Lucker in our office, as he suggested,  
22 and at that time we were aware that we were being offered on a  
23 voluntary basis the assistance of one of the leading owners of  
24 Jewish cemeteries in the City of New York, who volunteered that  
25 he would put his personnel and his equipment into Bayside

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1 Cemetery to begin the cleanup of this very, very large project.  
2 Not that he would finish it, but that he would get -- he would  
3 make a major dent in the situation there.

4 But he told us, and Mr. Buchman was well aware, and I  
5 believe I may have said this to your Honor back in December,  
6 but he would not set foot in the cemetery or take any steps to  
7 assist us so long as this litigation was pending, because he  
8 feared that he would somehow be brought into the case, either  
9 as a witness or as an additional defendant. And he was just  
10 absolutely unwilling to even meet with us as long as this was  
11 the situation.

12 And I explained that to Mr. Lucker and to Mr. Buchman,  
13 and asked them to enter into a tolling agreement with us for  
14 six months, which would involve dismissing the action without  
15 prejudice to it coming back before your Honor, if your Honor  
16 would take it back and would have it back. And during that  
17 six-month time if you would assure this cemetery owner that he  
18 would not be involved in the litigation in any way, because the  
19 litigation had been dismissed on a voluntary basis pursuant to  
20 the tolling agreement, then I thought we could get this fellow  
21 to come in and take the step which all of us desperately want  
22 him to take.

23 We have a grant from the United Jewish Appeal to cover  
24 the out-of-pocket costs of this, and this man is going to  
25 volunteer the labor and the equipment, and we were going to

1 really be able to go forward. We made a date. This man would  
2 only meet with us in his attorney's office. We made a date for  
3 March 11 at 10:00 a.m. --

4 MR. STEINTHAL: 10:30.

5 MR. AXINN: I beg your pardon, 10:30.

6 -- and he showed up and he was -- the gentlemen was  
7 there, his lawyers were there, and Mr. Buchman failed to  
8 appear. And this caused this individual to become much more  
9 nervous about what was really going on.

10 He picked himself up and he left, and he said he was  
11 not interested in becoming involved with us as long as the  
12 litigation was pending, and that he didn't want to meet with  
13 Mr. Buchman again. He didn't want to waste his time or his  
14 lawyer's time and money sitting in a room like that, waiting  
15 for 30 minutes or whatever it was, and then getting up angrily  
16 and leaving.

17 I would like to renew my request right now with the  
18 Court that if we are serious here about trying to make progress  
19 in getting this cemetery back into the proper condition, the  
20 only way I know of that this can be done is if those people who  
21 have the resources to repair cemeteries are willing to assist  
22 us. We don't have the money to pay whatever it would cost to  
23 do a complete cleanup of this cemetery, but we have this  
24 \$140,000 from UJA, which will cover the costs of the gasoline,  
25 the costs of whatever trucking and so forth is required.

1           And if we can persuade this individual, who owns a  
2 number of cemeteries in New York and who has crews of people  
3 who maintain those cemeteries and equipment to maintain them,  
4 to come in and at least make a significant dent in this  
5 problem, then I think we could come back to this Court and both  
6 sides could say we have accomplished something important here.

7           We may still have a litigation, and that's up to  
8 Mr. Buchman, but we can do something about the condition, but  
9 only if -- and there are two conditions now that must be met:  
10 One, the action must be dismissed without prejudice while he is  
11 doing his work; and, two, both Mr. Buchman and my client need  
12 to ensure in writing to this man's lawyer that he will not  
13 become involved in this litigation, either as a defendant or as  
14 a witness. Those are the -- that's not an unreasonable  
15 condition to ask of this guy. He is a volunteer and he is  
16 doing this entirely out of his love of the Jewish  
17 responsibilities for maintaining cemeteries. I think it's a  
18 reasonable proposal, and I don't see what the downside to it  
19 is.

20           Mr. Buchman's case is by its nature is not going to go  
21 away, and if in six months time there has been no progress, he  
22 can come back here and say there has been no progress and we  
23 can get on with the litigation.

24           THE COURT: What you propose is that the action be  
25 dismissed without prejudice and without jeopardizing any --

1 MR. AXINN: And that his claims be tolled so that  
2 there is no statute of limitations issue. And I would prefer,  
3 frankly, if jurisdiction were retained or at least we agree  
4 that we would both recommend -- you might not prefer this --  
5 but we would prefer if it be brought back before this very  
6 Court.

7 THE COURT: Why would I not prefer it? I would like  
8 to have a hand in doing something good rather than spending  
9 time sending people to jail.

10 MR. AXINN: I think you can do something good, but we  
11 have no way while the litigation is pending to make progress on  
12 restoring the cemetery.

13 Six weeks from now will be the Jewish high holidays,  
14 when people of our faith go to cemeteries to pay respects to  
15 their deceased relatives. I want them to be able to get into  
16 this cemetery, find the graves, and to be able to do what is  
17 necessary religiously. And I don't know if I can promise that  
18 that will happen, because now it depends upon the good will of  
19 this individual who has already been stood up once.

20 THE COURT: All right. Let me ask you a question.  
21 Has any thought been given to -- let's assume you hit a grand  
22 slam home run and the cemetery is brought back to an  
23 appropriate condition. Has any thought been given to how that  
24 condition is going to be maintained?

25 MR. AXINN: Yes. Oh, indeed, your Honor. We have

1 been working with the New York Attorney General, who has  
2 jurisdiction over this cemetery, and at his direction or  
3 certainly at his recommendation a corporation, a nonprofit  
4 corporation, which we call CAJAC, C-A-J-A-C, has been set up,  
5 which is the Community Association for Jewish At-Risk  
6 Cemeteries, and which are now hiring a fundraiser to provide  
7 the funding that the Attorney General is requiring as a  
8 condition precedent to the transfer of the deed of this  
9 cemetery from this congregation to CAJAC, and then CAJAC would,  
10 with the moneys that the Attorney General is insisting be in  
11 its treasury, would be able to maintain the cemetery. That is  
12 also being impeded by our inability to hire a fundraiser,  
13 because the fundraisers are not interested in becoming  
14 embroiled in this litigation either.

15           So -- but my basic concern right now is to try to get  
16 the cemetery into better condition. I cannot promise that it  
17 will be in perfect condition, but I can say that what this man  
18 has offered to do would make a very significant dent and  
19 improvement in the cemetery's condition; and then when the  
20 cemetery's condition is somewhat improved, it's much easier to  
21 raise money for its maintenance and continued improvement.

22           MR. BUCHMAN: Your Honor, may I add two points  
23 quickly?

24           THE COURT: Sure.

25           MR. BUCHMAN: One, your Honor, with regard to this

1 meeting, it was my understanding that the meeting was scheduled  
2 at 1 o'clock, and I actually showed up at Mr. Haas' attorney's  
3 offices at 12:30. So I didn't skip the meeting. It was an  
4 inadvertent scheduling error.

5 Second, your Honor, you hit the nail on the head. The  
6 point here is this is a one-time cleanup which is being  
7 proposed by Mr. Axinn, and the real question is what happens  
8 thereafter, and why should we spend -- because Mr. Haas is  
9 asking for over a hundred thousand dollars in this proposal --  
10 why spend this money on a one-time cleanup when in September  
11 all of this growth will start back again? And it seems to be a  
12 waste of money without any one-time cleanup and a continued  
13 plan, and that's the problem that my clients have with what  
14 Mr. Axinn is suggesting, that this is just a Band-Aid to the  
15 problem and not a solution to the problem, long-term.

16 MR. AXINN: Just one point of reply to that. Let's  
17 assume Mr. Buchman is right, for the moment. If you are going  
18 to have this Band-Aid, he calls it, which is a very significant  
19 contribution of labor and materials to try to get this cemetery  
20 back in reasonable condition, if at the end of this six-month  
21 period Mr. Buchman is not satisfied after this cleanup has been  
22 done, hopefully, and he wants to reinstate this lawsuit, I'm  
23 prepared to see him do it. I'm not objecting to that.

24 What I'm saying is if we want to get this cleanup,  
25 this one-time cleanup done -- and I wouldn't have used his name

1 in open court because he did not want his name used.

2 MR. BUCHMAN: I apologize. I didn't realize that.

3 MR. AXINN: But if we want to get this cleanup done,  
4 this is the condition under which we can do it. Otherwise, we  
5 will be right where we are today six months from now.

6 MR. BUCHMAN: Your Honor, I don't understand why we  
7 can't do this on a dual-track basis, why the litigation can't  
8 proceed and Mr. Axinn at the same time can go forward with  
9 these plans that he has been suggesting.

10 I will consult with my clients now and see if I can  
11 get permission to engineer the letter that Mr. Axinn wants to  
12 so that Mr. Haas can go forward, but we think we should be  
13 using this time effectively and that the litigation should  
14 proceed.

15 MR. AXINN: This individual, he will not allow  
16 himself --

17 THE COURT: I think the point is, and I'm -- please,  
18 don't anybody misunderstand, I know the lawyers won't, but  
19 people here who have such an interest -- I'm not picking sides  
20 here. I think the point is to create an environment of good  
21 will, if you will.

22 I totally agree with you. The issue is going to be --  
23 ultimately is going to be how do we maintain the condition,  
24 assuming we get it improved.

25 But if you are not satisfied at the end of a six-month

1 period -- if you are willing to do this; I can't impose this on  
2 you -- then by simple letter to the Court the case will be  
3 reopened, returned to the calendar. I will take it, if you  
4 want, and I won't take it, if you want. That doesn't matter to  
5 me.

6 And then we will put it on an expedited basis. That  
7 would be my salvo back to you, because I understand your point.  
8 You don't want to sit in neutral without any real assurance  
9 that not only is the cleanup not going to happen, but the real  
10 problem, the continued maintenance, has not been provided for.  
11 So I understand your hesitation.

12 But if we find ourselves back in that environment six  
13 months from now, if you and your clients are willing to  
14 consider this, I will put it on an expedited discovery basis,  
15 motion schedule, trial basis, whatever it takes to get you back  
16 those six months. That's my offer to you, and I will do it  
17 personally.

18 I don't want you to commit now. Consult.

19 MR. BUCHMAN: I will consult with my clients, and we  
20 will respond.

21 THE COURT: If the answer is no, I think we originally  
22 came here on a motion.

23 MR. AXINN: Yes, your Honor, and we will be back.

24 THE COURT: You don't have to come back. Call us up,  
25 and we will give you a motion schedule.

1 MR. AXINN: Thank you.

2 (End of proceedings.)

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