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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN R. LUCKER, et al.,

Plaintiff,

-against-

BAYSIDE CEMETERY and
CONGREGATION, et al.,

Defendants.

:
: 07-CV-03823 (RJD)
:
:
: United States Courthouse
: Brooklyn, New York
:
:
: December 19, 2007
: 10:30 a.m.
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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES CHIEF DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: BY: MICHAEL M. BUCHMAN, ESQ.

For the Defendant: AXINN VELTROP & HARKRIDER, LLP
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Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

1 (In open court.)

2 COURTROOM DEPUTY: Gentlemen, please, come forward.

3 THE COURT: Mr. Buchman.

4 MR. BUCHMAN: Yes, Your Honor.

5 THE COURT: If you'll be good enough to come up. I
6 understand you're handling this pro bono.

7 MR. BUCHMAN: Yes, Your Honor.

8 THE COURT: What does that have to do with your
9 business card?

10 We need to know who you are and where to get you.

11 MR. BUCHMAN: Your Honor, I can happily fill out a
12 piece of paper with that information. I just didn't want my
13 firm, who I'm doing this separate and apart from, to be
14 implicated in any form or fashion, Your Honor.

15 THE COURT: Okay. You're a member of our court?

16 MR. BUCHMAN: Yes, Your Honor.

17 THE COURT: Okay. If that's all your concern,
18 that's no problem. You've filed a notice of appearance?

19 MR. BUCHMAN: Yes, Your Honor.

20 THE COURT: Okay.

21 COURTROOM DEPUTY: Okay. We are on this morning for
22 a promotion conference. This is Lucker versus Bayside
23 Cemetery.

24 Can I ask the attorneys, please, to note their
25 appearance, beginning with Counsel for Plaintiff.

1 MR. BUCHMAN: Michael M. Buchman for Plaintiffs John
2 Lucker, et al.

3 MR. AXINN: Stephen Axinn, that's me, Your Honor.
4 And Russell Steinthal of Axinn Veltrop & Harkrider,
5 representing both of the Defendants, Congregation Shaare Zedek
6 and Bayside Cemetery.

7 THE COURT: Okay.

8 Well, this is not the typical case. And I'll give
9 you my reaction just to through the exchange of correspondence
10 and my review quickly of the Exhibits, press releases and so
11 on.

12 And if this sounds like I'm buying one side or the
13 other, I don't mean it to be, but it does strike me as an
14 opportunity for us all to do some good.

15 I can certainly understand the reaction of your
16 clients, to the apparently now too long-standing conditions of
17 these plots in this cemetery. After all, for some, if not all
18 of them, perpetual care was paid for, and it seems somewhat
19 oxymoronic to be speaking in that context of statutes of
20 limitations. Or for that matter, even privacy. Certainly the
21 poor buried souls can't speak for themselves, but I'd rather
22 put the legal stuff aside for a moment, at least -- if we have
23 to, we'll litigate it -- and find out what's been going on.

24 I know the Attorney General's been involved. Is
25 there a way that we can collectively, with or without a

1 mediator, or with or without the Attorney General, and given
2 the fact that this community now is apparently on the upswing,
3 this congregation --

4 MR. STEINTHAL: Slowly, Your Honor.

5 THE COURT: These things do happen slowly, but if
6 New York City is your venue, these days, gentrification is
7 overwhelming all of us. So, I just throw that out. Because
8 here is a need for a remedy, and now I hear, on top of it all,
9 Mr. Buchman is doing this without a fee.

10 So, what can we do before we spend a lot of time and
11 money litigating some of these issues, if anything, to bring
12 about an acceptable result?

13 MR. AXINN: Your Honor, both sides are serving
14 without fee this morning, and our firm is also acting pro
15 bono.

16 THE COURT: For once I'm the highest paid fellow in
17 the room.

18 MR. AXINN: Not this morning, Your Honor.

19 THE COURT: Usually the opposite.

20 MR. AXINN: Not only not this morning, but not for
21 this client, period.

22 I appreciate what Your Honor is suggesting, and I
23 cannot speak for the Attorney General's office.

24 THE COURT: Of course not.

25 MR. AXINN: Nor can I speak for the other Jewish

1 communal organizations who have pitched in to try to remedy a
2 situation which nobody denies requires a remedy, and sooner
3 rather than later.

4 THE COURT: I appreciate that.

5 MR. AXINN: What has happened, and it's an
6 unfortunate and I'm sure unintended consequence of the
7 commencement of this lawsuit, is that it has been made more
8 difficult for everybody involved to do what needs to be done
9 here.

10 This organization which is known by its acronym
11 CAGAC, the Community --

12 MR. STEINTHAL: Association for Jewish At-Risk
13 Cemeteries.

14 THE COURT: Jewish At-Risk Cemeteries?

15 MR. STEINTHAL: Yes.

16 THE COURT: Can I interrupt for a second?

17 Does anybody want a reporter for this informal
18 conference?

19 MR. BUCHMAN: I would like a transcript, Your Honor,
20 only for the benefit of my client, because he's not here
21 today. And he would have liked to have participated.

22 THE COURT: That's fine. You can order the
23 transcript.

24 Go ahead.

25 MR. BUCHMAN: Thank you, Your Honor.

1 MR. AXINN: What we have seen happen here is that
2 the commencement of the lawsuit has, I think, justifiably
3 frightened away people who would otherwise have been
4 forthcoming, either as employees of this CAGAC in a
5 fund-raising capacity, or as donors to CAGAC because they are
6 now dealing with a situation in flux in litigation and they
7 are not happy about that.

8 We've, we have at Congregation Shaare Zedek, and on
9 behalf of them and Bayside Cemetery, we are struggling to come
10 up with the funds to make a significant improvement in the
11 conditions of that cemetery, posthaste.

12 And the presence of the lawsuit, as I say, as I'm
13 sure is an unintended consequence, is intimidating people and
14 scaring them away. Even people who were willing to come and
15 actually provide the machinery and equipment necessary for the
16 restoration of the cemetery, the groundkeeper types, are
17 nervous about being becoming involved as witnesses and so
18 forth.

19 I would propose --

20 THE COURT: How large a plot is this?

21 MR. AXINN: Oh, it's vast. It's 31,000 gravesites,
22 not all of which are filled.

23 MR. BUCHMAN: 34,000.

24 THE COURT: Gravesites?

25 MR. AXINN: Well, we can disagree about that.

1 THE COURT: On the average?

2 MR. AXINN: It's very, very large. And it's
3 surrounded on both sides by other cemeteries. Acacia on one
4 side and a cemetery called Mokom Shalom on the other side.

5 THE COURT: Are they at-risk cemeteries? I'm just
6 curious.

7 MR. AXINN: I can't speak, I don't think Acacia is
8 by any stretch of the imagination. And I can't speak to the
9 conditions at the other cemetery.

10 THE COURT: Okay.

11 MR. AXINN: But there are other Jewish at-risk
12 cemeteries, and they're all victims of the same situation.

13 Cemeteries are covered by the religious corporations
14 law and by the cemetery laws of the State of New York. And a
15 lot of small synagogues over time have gone out of business,
16 and the cemeteries that they were tending have largely been
17 abandoned.

18 This synagogue hasn't gone out of the business. It
19 has declined in membership and in finances very significantly.
20 And then, sometime in the early '90s began turning the corner
21 and coming back to life.

22 But in the meantime, what is unusual about this case
23 is that while this cemetery was created back in the 1800s, at
24 first, they sold off 95 percent of the burial plots in this
25 cemetery --

1 THE COURT: I read your papers on it.

2 MR. AXINN: -- to people other than the congregants
3 of Shaare Zedek. And there's been very little income. Almost
4 no income coming in to maintain this cemetery for a very long
5 time, which is the cause of our problem.

6 So --

7 THE COURT: When a cemetery, just take it out of
8 this one -- sells a plot to a noncongregant, for example, or
9 sells a plot to a congregant, does it undertake as part and
10 parcel of that transaction certain duties, contractual or
11 otherwise?

12 In other words, I'm going to sell you a burial plot.
13 And if you buy it, I'll see to it that it's maintained in an
14 appropriate fashion.

15 Is that part of the transaction?

16 MR. AXINN: Well, it's governed by a contract. And
17 the transactions depend on what contract, in fact, you've
18 entered into.

19 You can buy a plot at our cemetery, or I believe at
20 almost any cemetery, and tend it yourself. You don't pay
21 anybody annual care. You don't pay anybody perpetual care.
22 You get your lawn mower, and get out there and take care of it
23 yourself. Or you can agree with the cemetery for annual care
24 where, for an annual fee, they will take care of those tasks
25 for you.

1 The perpetual care arrangement is a creature of law,
2 and what it provides, and I don't think there's any dispute
3 amongst any of us about this, under New York law, if you have
4 a perpetual care trust fund, and a owner of a grave deposits
5 money with the cemetery, that money is placed in trust. The
6 principle cannot be disturbed. The interest on that sum of
7 money can be used for one purpose only, as I understand it,
8 and that is the maintenance of the grave to which that trust
9 fund pertains. And if you contributed \$100, let's say, to the
10 perpetual care fund for a loved one today, that would generate
11 4 or \$5 in interest. And that 4 or \$5 of interest would be
12 all that is permitted to be touched to care for that grave
13 from this fund.

14 And part of the problem we have in this case, if we
15 ever got to the bottom of who paid perpetual care for what,
16 and that is clearly controverted in the papers here, would
17 prove, I think beyond much doubt, that there was not enough
18 money in the interest that would be accrued on any perpetual
19 care fund for the kind of care that you and I would like to
20 have for our loved ones. That's the problem. Because these
21 monies were deposited a long time ago.

22 THE COURT: Okay.

23 MR. AXINN: And they were very small sums of money.

24 MR. BUCHMAN: To answer Your Honor's question --

25 MR. AXINN: But I would like to answer Your Honor's

1 question, if I may before I shut up.

2 I think that the way for the Court to be helpful
3 here would be if we were to agree with Mr. Buchman that there
4 would be no advantage taken of a time period, an interlude,
5 whereby he would withdraw the complaint without prejudice to
6 renewal, nunc pro tunc, at a time when he was persuaded, that
7 he was not satisfied with the kind of progress that was being
8 made through the good offices of Jewish communal
9 organizations, my client, the Attorney General and all others
10 who play a real here, then I think that by lifting this cloud
11 of this lawsuit, progress could be made to satisfy the
12 reasonable requirements of the class that he claims to
13 represent. And that would be my proposal.

14 THE COURT: Have you all talked about this?

15 MR. AXINN: No, no, we have not.

16 THE COURT: Why not?

17 MR. BUCHMAN: May I please speak?

18 First of all, that's not true.

19 THE COURT: What's not true?

20 MR. BUCHMAN: We have spoken, but not Mr. Axinn and
21 I.

22 MR. AXINN: We've spoken, but not about this
23 subject.

24 MR. BUCHMAN: Correct, not Mr. Axinn.

25 But let me begin at the beginning because that's

1 where we need to start with this issue and why we filed this
2 lawsuit.

3 We, my clients and I, have been seeking to work in a
4 cooperative fashion with Congregation Shaare Zedek regarding
5 this issue. We told them specifically that we wanted to work
6 in a very cooperative fashion. We wanted to participate in
7 meetings with the Attorney General's office, with meetings
8 with Jewish organizations to positively create something new
9 for this cemetery. And they excluded us from meeting after
10 meeting. We learned of these meetings after the fact, and we
11 have been excluded and shut out from this process.

12 They said they want to create a board that will
13 govern this cemetery going forward. We said we would like to
14 participate on that board, but we think what's necessary is
15 for Congregation Shaare Zedek to ensure the success of that
16 board or that new organization by pledging the monies
17 necessary to make sure that it does succeed. And they have
18 refused repeatedly.

19 Now, with regard --

20 THE COURT: Do we have a budget? Does anybody have
21 any idea what we're talking about?

22 MR. AXINN: Yes, we do.

23 MR. STEINTHAL: There's some estimates were taken by
24 the Attorney General's office in consultation with Shaare
25 Zedek a few years ago. And they, you know, called cemetery

1 managers, and tried to get an estimate of what it would cost
2 each year. And the number they came up with was a hundred or
3 so thousand dollars a year in annual expenses. And then they
4 sort of backtracked that to a number of a couple of million
5 dollars of endowment that would be enough to do so.

6 But those estimates are a few years old. And I
7 understand that the Plaintiffs may have some disagreement with
8 the estimate, but that's the best number that people are
9 working with at the moment.

10 MR. BUCHMAN: In addition, Your Honor, we've been
11 speaking with the gentleman by the name of Ethan Klingsberg
12 who is an attorney at Cleary Gottlieb. He has been the
13 contact for Shaare Zedek with us. And we have repeatedly said
14 to him we would like to enter into a tolling agreement.

15 But the Defendants came back and said that the
16 tolling agreement we presented them with was unacceptable. It
17 was very simple. And they said that they wanted to reserve
18 the right to seek sanctions against us if we pursue this case.
19 And we thought that was ridiculous and demonstrated bad faith,
20 and we decided to go forward with this case.

21 THE COURT: It is ridiculous. Let's just put it
22 out, get it off the table here.

23 MR. BUCHMAN: That's the kind of thing, Your Honor,
24 we've been facing with these Defendants, and why we've been
25 forced to --

1 THE COURT: We've got to change that. We do have
2 to -- look, look. We're all trained as lawyers. You thought
3 you had, you wanted to have an ongoing positive working
4 relationship. You weren't satisfied. Fine. You've got their
5 attention now. That's for sure.

6 You take the view that if we could just deal with
7 this lawsuit and put it aside, maybe with that now-added
8 incentive things can move along a little more quickly.

9 My question was, a while ago: How do we effectuate
10 that? What can we do? It makes sense to me that, now that
11 you've fired this round, that it may very well be in your
12 clients', putative clients' best interest to call their cards
13 and let's, can you participate in these meetings? Can you be
14 a player at the table? Is there talk about a pledge, and if
15 so, where are those resources coming from? If there's an
16 oversight board, can you participate?

17 These are very straightforward issues. Why aren't
18 we talking about those? Not necessarily here today, I mean,
19 but I mean, it's crazy. This is crazy. This is an
20 opportunity for lawyers, I include myself, to do something
21 positive.

22 MR. AXINN: Could I just add one thought,
23 Your Honor?

24 This organization CAGAC that we've talked about is,
25 in fact, a Jewish communal organization. It has been set up

1 under the auspices of a number of other Jewish communal
2 organizations such as the Hebrew Free Burial Association, and
3 the UJA Federation of New York.

4 The community is represented very strongly in CAGAC.
5 It is not Congregation Shaare Zedek, anymore. CAGAC is an
6 independent organization, which if it can be funded with two
7 million dollars, which is a number that's been suggested by
8 the Attorney General as a satisfactory endowment, will then
9 acquire title to the Bayside cemetery and other Jewish at-risk
10 cemeteries and operate them in the public interest.

11 I don't know what Mr. Klingsberg and Mr. Buchman
12 discussed. I wasn't privy to those conversations, but what I
13 do understand is that we have taken the view that the Jewish
14 community, as opposed to any private plaintiff who claims that
15 a grandparent may be buried in this cemetery and therefore,
16 that gives them some sort of legal standing, is the
17 appropriate oversight body for Jewish at-risk cemeteries such
18 as this one. And that's why perhaps Mr. Buchman has been
19 disappointed with the way he was treated. And I apologize for
20 any discourtesy to him.

21 But I think that the significant thing for the Court
22 to understand is that Shaare Zedek has put in motion a
23 turnover of this cemetery to the Jewish philanthropic
24 community which is unfortunately, the appropriate place for
25 this problem to be solved now.

1 And what we need is the right atmosphere to raise
2 the necessary monies to satisfy, amongst other people, the
3 Attorney General who has a legitimate concern that no cemetery
4 be turned over to a public body and set adrift without
5 sufficient funding to maintain it.

6 THE COURT: Understood.

7 MR. AXINN: We have to try to raise that money. We
8 have to hire people to do that for us. And then, we have to
9 interest donors. This does take time, and this lawsuit is,
10 unfortunately, interfering with that --

11 MR. BUCHMAN: But.

12 MR. AXINN: -- so, that's why I propose that we put
13 the lawsuit on ice in some form so that we can get on with the
14 serious business of restoring the cemetery.

15 THE COURT: You can agree among yourselves to put it
16 on ice, to stay it as long as this gentleman feels he's
17 getting some meaningful participation in the process. I'm
18 offering myself. Do I get the Attorney General in here? Do I
19 get a representative of Shaare Zedek in here? Do we get
20 Cleary Gottlieb in here? I'll do anything I can, including
21 give it time to see if I can grease the skids here toward a
22 responsible resolution of the problem. That's all I can do.
23 Otherwise I'll just rule on motions.

24 But it seems to me, and this is not a ruling, that
25 the notion of getting rid of this complaint in toto at this

1 stage is far-fetched. I mean, for the very reason you've
2 given me that rather interesting and detailed history, we've
3 got to know a little bit more information before we start
4 sending him packing.

5 Yes, sir?

6 MR. BUCHMAN: Your Honor, I just have one other
7 point with regard to the information that we've been receiving
8 from the Defendants.

9 We have requested repeatedly for them to tell us
10 whether or not these perpetual care accounts were invaded.
11 And we only learned of the invasion this March when we
12 inspected letters that they had submitted to the Attorney
13 General's office.

14 We've been asking --

15 THE COURT: Do you know what I would suggest to you?
16 I would suggest put it to the side, because it's inconsistent
17 with what we're talking about.

18 If you can't get a resolution, if you are
19 unsatisfied and you come out with guns blazing, including
20 discovery as to who put his or her hand into what account and
21 who was authorized, et cetera, et cetera, but that's sort of
22 clouded, and if that sounds critical, I don't mean it to be.
23 That I can understand, Mr. Axinn saying; you've got a thread
24 of accusations of embezzlement and mishandling of trusted
25 funds.

1 That's it. That's my speech, for lack of a better
2 way of putting it. I cut you off. Go ahead, sir.

3 MR. BUCHMAN: The only other thing I was suggesting,
4 Your Honor, is it's important to know what amount of money was
5 improperly taken out of the account so we can then say to
6 Shaare Zedek this is money you should be putting towards this
7 new entity. And they've been saying to us we're not putting a
8 nickel toward new entity. We have no responsibility for the
9 cemetery. We just want to pass it on to someone else.

10 And we don't think that's a responsible way of
11 dealing with this problem. There should be complete
12 disclosure. They have a fiduciary duty to give us this
13 information, and they're refusing to do it over and over
14 again.

15 That's all I have to say.

16 MR. AXINN: Your Honor, we are dealing with the
17 Attorney General's office.

18 THE COURT: What does the Attorney General have to
19 say about this? I mean, your logic is unassailable.

20 What does the Attorney General have to say about
21 this?

22 MR. BUCHMAN: I can't speak for the Attorney
23 General.

24 THE COURT: I suspect he saying let's look
25 prospectively.

1 I want a suggestion. What are we going to do?

2 MR. AXINN: I would adjourn this conference for six
3 months. And during that period of time, stay proceedings.
4 And then I hope that in six months' time or hopefully, much
5 less, Mr. Buchman would find it in his heart to dismiss his
6 complaint, because he's satisfied that the cemetery is being
7 mended appropriately.

8 I don't think that he has any interest other than
9 the same interests that everyone else in this room shares
10 which is to get the cemetery back into usable, decent
11 condition as quickly as possible.

12 This isn't a case about, I hope, about dollars and
13 cents for particular Plaintiffs, for psychic injury. This is
14 about trying to get this cemetery restored. And that's what
15 we want to do.

16 And with respect to the comment that Mr. Buchman
17 just made, the Attorney General is the appropriate body and
18 office to handle questions about misallocation of funds or
19 appropriate --

20 THE COURT: It's certainly the appropriate public
21 body --

22 MR. AXINN: Right.

23 THE COURT: -- but it doesn't impede a private party
24 who feels that he has a standing privity to press the point,
25 as well.

1 MR. AXINN: And Mr. Buchman has, as he said here
2 this morning, has been in touch with the Attorney General, has
3 spoken with them on many occasions. And so have we. And
4 we're working with the Attorney General. And if the Attorney
5 General is not satisfied with the behavior of Congregation
6 Shaare Zedek, it has an arsenal of tools it can employ.

7 And I think this court should not set up a second
8 kind of enforcement mechanism under Mr. Buchman's control and
9 discretion while there's one working very well at 120 Broadway
10 in Manhattan.

11 THE COURT: I'm not in the business of setting
12 anything up, and if I did, Mr. Buchman wouldn't be controlling
13 it. I would.

14 But he's brought a lawsuit. And all I'm simply
15 saying is that we ought to at least create a period of time,
16 and he'll be, you'll be from the Show Me State, and you'll see
17 to what extent you're being brought into this process, to what
18 extent there is meaningful progress being made.

19 And if at the end of that period of time, you feel
20 otherwise, we'll reconvene. I will invite the Attorney
21 General's representative in here, if we have to have motion
22 practice, we'll have motion practice. But just to plunge
23 headlong into it now makes no sense, from my perspective.
24 You're entitled to disagree.

25 MR. BUCHMAN: Your Honor, as a former New York State

1 Attorney General in the antitrust bureau, I know that the
2 resources of that office are very overwhelmed. And this may
3 not be on their radar screen entirely, but we will certainly
4 work with Mr. Axinn.

5 I can convey what Your Honor has said to my client.
6 We would suggest that maybe reconvening the end of March would
7 be better.

8 THE COURT: That's fine. End of March.

9 MR. BUCHMAN: We've been hearing from these
10 Defendants over and over again we're making progress, we're
11 making progress, and there has been no progress, but --

12 THE COURT: End of March. As long as we proceed in
13 good faith, and if there is measurable progress, that we allow
14 that to go forward.

15 I'll see you at the end of March. In the meantime,
16 nothing happens.

17 MR. AXINN: Thank you, Your Honor.

18 THE COURT: Back burner.

19 MR. BUCHMAN: Thank you, Your Honor.

20 THE COURT: Ellie, can we have a date for these
21 gentleman?

22 COURTROOM DEPUTY: Yes, certainly.

23 We'll put it on for Thursday, March 27, at
24 12:00 o'clock.

25 MR. AXINN: We'll be here.

1 COURTROOM DEPUTY: You know what, Friday the 28th at
2 12:00 o'clock. Okay? I'm changing that to Friday the 28th at
3 12.

4 MR. AXINN: Enjoy your holidays, Your Honor.

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7 (WHEREUPON, the proceedings were adjourned to
8 March 28, 2008, at 12:00 p.m.)

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CERTIFICATE OF REPORTER

13

I certify that the foregoing is a correct transcript of
14 the record of proceedings in the above-entitled matter.

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Victoria A. Torres Butler, RPR
17 Official Court Reporter

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