New York County Clerk's Index No. 114818/09

Court of Appeals

STATE OF NEW YORK

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,

against

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK,

Defendants-Respondents,

and

COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,

Defendant.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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PRELIMINARY STATEMENT

This is, in many ways, a simple case masquerading in a highly fact-specific body. While it arises in the unique and admittedly sympathetic context of a cemetery that had unfortunately fallen into disrepair, the underlying legal questions are quite simple: whether the Plaintiffs-Appellants have standing to sue to enforce charitable trusts created by their deceased relatives for the perpetual care of graves, or more broadly whether they can "stand in the shoes" of their deceased relatives to bring suit to vindicate injuries allegedly caused to those relatives. The lower courts properly recognized that one cannot simply bring suit on behalf of a relative, even a deceased one. To the contrary, in the Estates, Powers & Trusts Law, the Legislature established a precise and comprehensive system for the survival of claims after death.

Plaintiffs-Appellants are obviously dissatisfied with the Appellate Decision order affirming dismissal of their action. But their Motion for Leave to Appeal offers no basis for believing that this action satisfies any of the conditions of Rule 500.22(b)(4). It does not present any issues that are of sufficient novelty or public importance to justify the expenditure of this Court's scarce judicial resources, nor does it pose any conflicts with earlier decisions of this Court or among the departments of the Appellate Division. Leave to appeal should, therefore, be denied.

STATEMENT OF THE CASE

Bayside Cemetery, located in Ozone Park, Queens, is owned and operated by Defendant-Appellee Congregation Shaare Zedek, a religious corporation. This putative class action was brought by relatives of individuals who allegedly purchased perpetual care for graves in the cemetery, alleging that, inter alia, the Defendants-Appellees breached their obligations under those perpetual care contracts.

While Defendants-Appellees strenuously deny that *any* money was misappropriated from perpetual care trusts to pay for synagogue expenses, let alone the $5 million referenced in Plaintiffs-Appellants' brief in support of their motion, (Moving Br. at 1), because this appeal arises out of a CPLR 3211 motion, the lower courts were required to accept all of the allegations of the Complaint as true for purposes of the motion. Moreover, the fact that Bayside Cemetery had, in fact, undergone a multi-year professional cleanup, leaving it in far better physical condition than it had been in at least a decade prior to the filing of the Complaint was outside the scope of the motion. Yet despite that plaintiff-friendly posture, Supreme Court – New York County (Justice Debra James) (the "IAS Court") granted the Defendants' motion to dismiss, holding that the Plaintiffs lacked standing to sue. *Lucker v. Bayside Cemetery*, 33 Misc. 3d 1203 (Sup. Ct. –N.Y. Cty. 2011) ("IAS Op."). The Appellate Division, First Department affirmed.

Lucker v. Bayside Cemetery, 114 A.D.3d 162 (1st Dep't 2013) ("App. Div. Op."). After the Appellate Division denied a motion for reargument and leave to appeal, this motion for leave to appeal followed.

ARGUMENT

I. THE APPELLATE DIVISION APPLIED WELL-ESTABLISHED PRINCIPLES OF NEW YORK LAW TO RESOLVE THIS CASE.

In their moving brief, Plaintiffs-Appellants argue that the "central question on appeal is whether the children and/or grandchildren of deceased individuals . . . possess standing to enforce an abused trust." (Moving Br. at 10.) The Appellate Division unanimously concluded that Plaintiffs-Appellants lack such standing, either in their own right or as representatives of their deceased parents or grandparents. Both holdings are well grounded in New York law and neither presents a novel issue requiring this Court's review.

First, it was common ground between the parties below that this Court's decision in *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458 (1985), sets forth the proper standard for determining whether the Plaintiffs-Appellants have standing in their own right to enforce the terms of the charitable trusts at issue in this case. The Appellate Division applied the test articulated by this Court and held that they did not:

> We hold that the *Lucker* plaintiffs and their class as they define it – indeed, whatever group categorization is used – are neither sufficiently "sharply defined" nor sufficiently "limited in number" to

> be eligible for standing to sue the cemetery as beneficiaries. To the contrary, aside from the use of the vague term "near relatives," plaintiffs can offer no rational limiting principle that would distinguish children from grandchildren – or, indeed, great-grandchildren – or from nieces or nephews or cousins and their children. . . . Even accepting the premise that each of those individuals could be said to have a "special interest" in the upkeep of his or her relative's grave, the number of potential plaintiffs is far too great to permit their class to be characterized as sharply defined or limited in number.

(App. Div. Op. at 10-11.)

While Plaintiffs-Appellants now attempt to avoid that holding by pointing out in a footnote that *they* are merely children and grandchildren (and not nieces, nephews, etc.), and that potentially only some subset of them could be allowed to proceed, (Moving Br. at 19 n.16), that misses the point of this Court's holding in *Alco Gravure*. The plaintiff in any given case can always say that he or she is the only one bringing suit, so the set of plaintiffs is "sharply defined and limited in number." The real question is whether the *class* of similarly-situated beneficiaries that could seek to enforce the trust under plaintiff's theory meets that test. Here, the Appellate Division properly understood that Plaintiffs-Appellants' theory that relatives should have standing would, if accepted, have no logical stopping point. Plaintiffs-Appellants' belated effort to limit their argument to children and

grandchildren, in contrast to the Complaint's reference to "family members or near relatives," (Compl. ¶ 33 at R. 78.), does not require a different result. [1]

Plaintiffs-Appellants also argued below that they should be allowed to "stand in the shoes" of their deceased relatives and bring any claim that their relative could have brought if he or she were alive. Yet both the IAS court and the Appellate Division properly rejected that argument, concluding that it would, in the words of the Appellate Division, "amount to an impermissible extension of the legislative scheme for the survival of actions," (App. Div. Op. at 12), which specifically defines which personal representatives can bring survival actions. As Justice James concluded in her original Decision and Order dismissing this action, "the Legislature is free to amend the statutory scheme to provide an enhanced remedy, but that is not the function of this tribunal." (IAS Op. at 13.)

The Appellate Division's conclusion that Plaintiffs-Appellants lacked standing to sue was proper and well-supported in existing law. It does not conflict with any decisions of this Court, nor is there an intra-Appellate Division conflict as to any of the relevant issues. There is, therefore, no reason for this Court to grant leave to appeal.

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[1] Indeed, Plaintiffs-Appellants' application of their proposed rule in this case demonstrates its malleability. They could have argued for standing limited to children, but that would have excluded the Lucker and Rousseau plaintiffs; instead, the "sharply defined and limited in number" class they propose was extended to include children *and grandchildren*, so as to include all of the current plaintiffs. If there had been additional named plaintiffs who sought to enforce trusts allegedly created by their great-grandparents, aunts or cousins, the class would undoubtedly have expanded once again.

II. THE ALLEGEDLY NOVEL ISSUE OF THE ATTORNEY GENERAL'S "REFUSAL TO PROSECUTE" IS NEITHER RELEVANT NOR WELL PRESENTED.

In their Motion for Leave to Appeal, Plaintiffs-Appellants suggest for the first time that the Attorney General has "closed" its file and is "refusing, in this case, to uphold the law," and that the Plaintiffs-Appellants should be granted standing as a result. (Moving Br. at 14.) Defendants-Appellants have not received any such information from the Attorney General, but even if that were the case, it would not provide a basis for reversing the Appellate Division's decision.

Neither this Court nor the Appellate Division has ever held that the Attorney General's decision not to bring an enforcement action in a particular case affects the standing of private plaintiffs. In *Consumers Union of U.S., Inc. v. State of New York*, 5 N.Y.3d 327 (2005), this Court granted standing to private plaintiffs after concluding that the Attorney General faced an effectively disabling conflict between his obligations to defend a statute validly enacted by the Legislature and to represent the interests of the beneficiaries of a charitable trust allegedly compromised by that statute. Yet the holding in *Consumers Union* is a far cry from Plaintiffs-Appellants' contention here that the decision not to proceed with a particular claim means the Attorney General has abdicated his duties. Such a rule would eliminate the Attorney General's discretion *not* to file suit in appropriate

circumstances and risk the same types of unjustified litigation that the general rule prohibiting private suits was intended to prevent.

And even if the Court were inclined to consider such a rule, this case is a particularly poor vehicle for reaching the question. The Attorney General is not a party to this action and there is no record evidence that he has, in fact, closed his investigation or what the reasons for such a decision might have been. In fact, until this motion, the case has consistently been litigated on the assumption that the Attorney General was investigating and was capable of bringing suit if he deemed it appropriate. Defendants-Appellees have never denied that the Attorney General would have standing to bring the types of claims at issue here.[2] On the contrary, they have answered multiple document requests from the Charities Bureau and the Attorney General's staff took several depositions concerning the subject matter of this litigation. To be sure, Plaintiffs-Appellants have complained that the Attorney General had not filed suit and have consistently argued that they should be afforded concurrent standing to sue, but they never previously suggested that the Attorney General was somehow disabled from doing so. Plaintiffs-Appellants are

[2] Plaintiffs-Appellants cite a 2002 newspaper article saying that "state officials say they are aware of the problems at Bayside but are powerless to do anything about it." (Moving Br. at 15.) In context, it appears the author of that article may have confused two separate sources of regulation. It is true that cemeteries owned by religious corporations are outside the jurisdiction of the New York State Cemetery Board and the Division of Cemeteries. But that is entirely distinct from the Attorney General's supervision of charitable trusts, including perpetual care trusts.

therefore seeking to have this Court reverse the Appellate Division on a ground never presented to it.

Moreover, even the First Department, which has gone further than this Court or any other Department of the Appellate Division and held that charitable donors have concurrent standing with the Attorney General to enforce the terms of charitable gifts and trusts as a general rule, *see Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 281 A.D.2d 127 (1st Dep't 2001), concluded that the Plaintiffs-Appellants here, as relatives of deceased donors, did not fall within the *Smithers* exception and were not entitled to sue. (App. Div. Op. at 11-12.) Given that independent barrier to standing, even if the Court were to conclude that this is a significant issue of state law that needs to be resolved, it may prefer to wait for a subsequent case in which a plaintiff with a direct interest seeks to bring an action and in which the issue was properly presented and preserved in the lower courts.

III. THE SUPPOSED FAILURE TO ADDRESS MR. LUCKER'S STANDING AS AN EXECUTOR DOES NOT WARRANT THIS COURT'S INTERVENTION.

Plaintiff-Appellant John Lucker further contends that the lower courts erred by not considering his appointment in 2010 as executor of his grandmother's estate sufficient to allow him to bring this action. Notably, he concedes that the lower courts correctly stated the law, but contends that the IAS court "failed to properly apply the facts to its statement of the law," (Moving Br. at 22), and that its order

and the Appellate Division's affirmance "must be reversed as a matter of fact and law," (*id.* at 23).

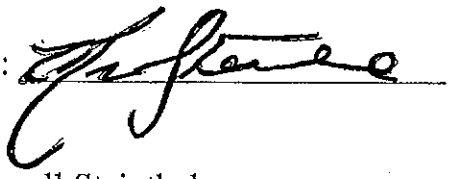
As an initial matter, this Court reviews questions of law, not fact, suggesting that the question presented by Mr. Lucker is a matter best left to the Appellate Division. Indeed, Mr. Lucker compounds the problem by referring to evidence, first submitted to the Appellate Division on a motion for reargument, that he contends demonstrates that the cause of action arose at least as early as 1987. (*Id.* at 23.) That, he argues, undercuts the Appellate Division's conclusion that, because "the causes of action here arose after those decedents' deaths," Mr. Lucker's "belated application for, and receipt of, appointment . . . as the legal representative of his grandmother, Ruth Lucker, is therefore unavailing." (Opp. Div. Op. at 13.)

But even if the question were within this Court's jurisdiction, and even if the Court were of the opinion that the lower courts erred, Mr. Lucker's argument would nonetheless be futile. Any cause of action that arose before Mrs. Lucker's death on August 11, 1987 would have been barred by the six year statute of limitations, *see* CPLR 213, no later than 1993, well before this action was commenced. Given that a remand to the Appellate Division would therefore lead to the same result, there is no cause to grant leave to appeal.

CONCLUSION

Plaintiffs-Appellants have not offered any compelling reason for this Court to allocate scare judicial resources to an appeal in this case. The Appellate Division fully considered their arguments and, applying black-letter law, concluded that they lacked standing to sue. In the absence of any novel and important questions of law or the need to resolve conflicting opinions, we respectfully submit that this Court should deny the instant Motion for Leave to Appeal.

Dated: June 27, 2014
New York, New York

By: 

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