

**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,

Plaintiffs,

-against-

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

Defendants.

) Index No.: 100530/11-E

) PART 59

) Justice Debra A. James

) **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff Steven R. Leventhal, by and through his attorney, appeals to the Supreme Court of the State of New York, Appellate Division, First Department, from the decision and order dated January 9, 2012 granting, in part, Defendants Congregation Shaare Zedek and Bayside Cemetery's motion to dismiss entered and filed February 16, 2012 in the office of the Clerk of the County of New York. A copy of the decision is annexed hereto.

Dated: March 5, 2012
New York, New York

Respectfully submitted,

By: /s/Michael M. Buchman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

STEVEN R. LEVENTHAL as representative of a class consisting of themselves and all others similarly situated,
Plaintiffs,

Index No.: 100538/11

Motion Date: 09/20/11

Motion Seq. No.: 02

- v -

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

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	No (s) .	<u>1</u>
Answering Affidavits - Exhibits _____	No (s) .	<u>2, 3</u>
Replying Affidavits - Exhibits _____	No (s) .	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

Defendants Bayside Cemetery and Congregation Shaare Zedek move to dismiss the putative class action complaint pursuant to CPLR 3211. The complaint in this action raises the same causes of action against the same defendants as in the related action Lucker v Bayside Cemetery, Index No.: 114818/09 (Sup Ct, NY County, James, J.) wherein the defendants made a similar motion to dismiss plaintiffs' claims. Defendants' motion to dismiss this action, however, must be considered on its own merits as the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART
 OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST REFERENCE

plaintiff's claims here are personal rather than representative.

As set forth in the complaint, plaintiff Steven Leventhal entered into a perpetual care services contract dated February 11, 1985 for the resting places of three relatives. The complaint alleges that defendants have failed to maintain the graves as promised and have misused the funds placed in trust with them to provide for such care.

The court shall grant dismissal of the claims asserted under the General Business Law consumer protection provisions. "As none of plaintiff's allegations disclose a deceptive act or practice under General Business Law § 349 or false advertising under General Business Law § 350, the General Business Law claims are insufficient on their face and are dismissed. In light of this determination, it is unnecessary for us to decide whether the General Business Law claims are barred by the Statute of Limitations." St. Patrick's Home for Aged and Infirm v Laticrete Intern., Inc., 264 AD2d 652, 656 (1st Dept 1999). The complaint here fails to identify any deceptive act or practice by the defendants in entering into the perpetual care contracts. The acts of which plaintiff complains are related to defendants' alleged non-performance of their contractual duties, not to any concealment or misrepresentation of the contractual terms.

Plaintiff's fifth cause of action for unjust enrichment must also be dismissed because the parties' obligations are set forth

in an express contract. Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 572 (2005) ("there was no unjust enrichment because the matter is controlled by contract"). Plaintiff's eighth cause of action for conversion shall also be dismissed because "in order to assert a cause of action for conversion, which is the unauthorized assumption and exercise of the right of ownership of goods belonging to another, to the exclusion of the owner's rights, a plaintiff must have exercised ownership, possession or control of the property in the first place. Plaintiff never had such ownership, possession or control of the funds [he] alleges were converted." Soviero v Carroll Group Intern., Inc., 27 AD3d 276, 277 (1st Dept 2006). Plaintiff's conversion claim fails because although plaintiff alleges that the funds paid for the perpetual care contract were only to be used for that purpose, there is no allegation, nor documentary evidence, that the funds remained in the custody and control of the plaintiff. Contrast Meese v Miller, 79 AD2d 237, 244 (4th Dept 1981). Finally, plaintiff's seventh cause of action for aiding and abetting breaches of fiduciary duty shall also be dismissed against the movants as it is duplicative of the sixth cause of action for breach of fiduciary duty.

The court shall however sustain the remaining claims for breach of contract and breach of fiduciary duty based upon the specific allegations in the complaint. Plaintiff alleges that he

entered into a contract for the perpetual care of gravesites and that the movants failed to execute their contractual duties of maintenance. The relationship between the parties is cognizable as a breach of contract and the allegations here sufficiently set forth such a claim. See French v Kensico Cemetery, 291 NY 77, 80 (1943) (an agreement or a trust for the perpetual care of a burial plot is valid and enforceable); Yochim v Mount Hope Cemetery Ass'n, 163 Misc 2d 1054, 1057 (Yonkers City Ct, 1994) ("defendant breached its agreement with plaintiff by failing or refusing to deliver the perpetual lawn care promised and contracted for. The defendant is liable for all appropriate damages arising from its breach of contract").

Furthermore as this court stated in Lucker,

The court holds that the perpetual care contract created a trust relationship between the parties to the contract. "It was the common-law rule that a bequest in trust for the perpetual care of a cemetery plot violated the Rule Against Perpetuities as not being for a charitable purpose. This was changed by section 114-a of the Real Property Law and section 13-a of the Personal Property Law (now EPTL 8-1.5)." In re Getman's Will, 30 AD2d 257, 262 (4th Dept 1968) (citation omitted). The perpetual care contract here explicitly recognizes its statutory reliance upon the provisions of the Membership Corporation Law which are now codified in Section 1507 (b) - (d) of the Not-For-Profit Corporation Law (N-PCL). It has been long held that such a contract creates a charitable trust. See Driscoll v Hewlett, 198 NY 297, 298 -299 (1910) ("A recent act has authorized trusts for the care of cemetery lots and has classified them with charitable and benevolent uses"); In re Saalberg's Estate, 190 Misc 966, 967 (Surrogate's Court, New York County, 1947) ("gift in trust for the upkeep and care of graves is a charitable trust").

Lucker v Bayside Cemetery, 33 Misc 3d 1203(A), 2011 NY Slip Op 51771(U) (2011). Similarly, the Court has held that donor of a charitable trust and the donor's successor in interest have standing to maintain an action to enforce the terms of the trust. See Associate Alumni of the General Theological Seminary of the Protestant Episcopal Church in the United States of America v General Theological Seminary of the Protestant Episcopal Church in the United States, 163 NY 417, 420-421 (1900). Therefore, where it is alleged that the defendants as fiduciaries failed to properly apply the monies entrusted to them to maintain the burial plots set forth in the perpetual care agreement, a claim for breach of fiduciary duty is properly pled. See Yochim, 163 Misc 2d at 1058.

Defendants fail to establish based upon the facts currently in the record that plaintiff's claims for breach of contract and breach of fiduciary duty are untimely. Issues of fact as to the accrual of plaintiff's claims, and any applicable equitable tolling, exist based upon the allegations in the complaint and as those allegations are taken as true and viewed in the light most favorable to the plaintiff on a motion to dismiss defendants application must be denied. See Nick v Greenfield, 299 AD2d 172, 173 (1st Dept 2002) ("triable issue of fact as to whether the doctrine of equitable estoppel should apply to toll the statute of limitations").

Accordingly, it is

ORDERED that the motion of defendants Bayside Cemetery and Congregation Shaare Zedek to dismiss is DENIED as to plaintiff's fourth cause of action for breach of contract and sixth cause of action for breach of fiduciary duty; and it is further

ORDERED that the motion to dismiss the other claims in the complaint is GRANTED; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a preliminary conference on February 7, 2012 at 9:30 A.M.

This is the decision and order of the court.

Dated: January 9, 2012

ENTER:

/s/ _____
J.S.C.