

**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
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) PART 59
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) Justice Debra A. James
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) **PREARGUMENT STATEMENT**
) **PURSUANT TO § 600.17 OF THE**
) **FIRST DEPARTMENT RULES**
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1. The title of the action is as set forth above.
2. The full names of the original parties are set forth above.
3. Counsel for the Plaintiffs-Appellants: Michael M. Buchman c/o Pomerantz

Haudek Grossman & Gross LLP, 100 Park Avenue, New York, New York 10017,
(212) 661-1100.

4. Counsel for Defendants-Respondents Congregation Shaare Zedek and Bayside
Cemetery: Stephen M. Axinn, Russell M. Steinthal, Axinn Veltrop & Harkrider LLP, 114 West
47th Street, New York, New York 10036 (212) 728-2200.

5. Order appealed from: This appeal is taken from the decision and order dated
January 9, 2012 granting, in part, Defendants Bayside Cemetery, and Congregation Shaare
Zedek's motion to dismiss entered and filed February 16, 2012 in the office of the Clerk of the
County of New York. There is no additional appeal pending in this action, but there is an appeal
pending in *Lucker et al. v. Bayside Cemetery et. al.*, 114818/2009-E.

6. Nature of the action: Plaintiff has asserted claims of false advertising under General Business Law §350, unfair and deceptive trade practices under General Business Law §349 and 349(c), breach of contract, breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, conversion, and unjust enrichment. Defendants Bayside Cemetery and Congregation Shaare Zedek have admitted that they “misappropriated” and improperly commingled perpetual care funds concerning plots at Bayside Cemetery.

7. The Complaint alleges that Defendants Bayside Cemetery and Congregation Shaare Zedek breached their fiduciary duties, breached trust agreements, and converted monies by “commingling” perpetual care trust monies. The Complaint alleges that Defendant Bayside Cemetery and Congregation Shaare Zedek diverted these funds to maintain their economically struggling synagogue and to make capital improvements to the synagogue building as well as for other purpose inconsistent with the perpetual care trust agreement. The Complaint further alleges that Defendants sold perpetual care contracts with no intention of ever honoring such agreements. Defendants sold perpetual care contracts under false pretenses - that they would honor such agreements when they had no intention of honoring such agreements.

8. Result reached in the court below: The trial court granted Defendant Bayside Cemetery and Congregation Shaare Zedek’s motion to dismiss on the grounds that the General Business Law §§349, 350 claims did not allege deceptive acts or practices. The court also dismissed Plaintiff’s aiding and abetting breaches of fiduciary duty, conversion, and unjust enrichment claims.

9. Grounds for seeking reversal: The decision and order concerning Defendants Bayside Cemetery and Congregation Shaare Zedek should be overturned on appeal for four (4) reasons.

First, with respect to the GBL § 349 claims, the court incorrectly concluded the Complaint failed to allege a deceptive act or practice. Defendants sold perpetual care contracts knowing they: (i) had not honored such agreements in the past; (ii) would not honor such agreements in the future; (iii) were entering into the agreements in order to obtain monies to fund their failing synagogue.

Second, with regard the unjust enrichment and aiding and abetting claims the decision fails to recognize that pleading alternative grounds is permissible.

Third, with respect to the conversion claim the decision fails to appreciate that Plaintiff paid perpetual care monies to Defendants and has a superior right to the monies which Defendants unlawfully converted and used in an unauthorized manner.

Fourth, the decision was not made by a Justice from the Commercial Division as required by the Uniform Rules for New York State Trial Courts §202.70(5).

Dated: March 5, 2012
New York, New York

Respectfully submitted,

By: /s/Michael M. Buchman
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