

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 himself and all others similarly situated,

Plaintiff,

Index No.: 100530/11

Motion Date: 09/20/11

Motion Seq. No.: 01

- v -

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

Defendants.

The following papers, numbered 1 to 6 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1, 2
Answering Affidavits - Exhibits	No (s) .	3, 4
Replying Affidavits - Exhibits	No (s) .	5, 6

Cross-Motion: Yes No

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

Defendant Community Association for Jewish At-Risk Cemeteries, Inc., (CAJAC) moves to dismiss the complaint pursuant to CPLR 3211. This motion raises issues is similar to those presented on Motion Sequence No. 2 in the related matter Lucker v Bayside Cemetery (Index No.: 114818/2009).

For the reasons stated in decision resolving the motion in Lucker, the court shall grant the motion here.

Plaintiff argues that CAJAC should be held liable for

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART
- OTHER 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

breaching a 1985 perpetual care contract between plaintiff and Congregation Shaare Zedek for care of three graves.

Plaintiff points to the overlapping ties between CAJAC and the Congregation including a shared address and the fact that the President of CAJAC is a member of the Congregation. Plaintiff asserts in the complaint that these overlapping ties are evidence of the fact that "CAJAC was intentionally created by Congregation Shaare Zedek members, who happen to be lawyers, as an under-capitalized, not-for-profit corporation in order to transfer Congregation Shaare Zedek's assets and liabilities concerning Bayside Cemetery. . . . CAJAC was created as a shell corporation to absolve Congregation Shaare Zedek of any liability or responsibility for its wrongdoing in connection with Bayside Cemetery."

For the reasons stated in Lucker, plaintiff's allegations fail to state a cause of action against CAJAC. Most importantly, there is no dispute that at the time plaintiffs contracted for perpetual care CAJAC did not exist (having only been incorporated in 2006) at the time plaintiff entered into the perpetual care contract in 1984. Absent some assumption by CAJAC of the Congregation's obligations and liabilities through contract or purchase, there is no legal basis to hold it liable for a breach of agreement with plaintiff when the entity was not alleged to be

a signatory to the agreement and did not even exist when it was consummated.

Plaintiff's attempt to use the equitable doctrine of piercing the corporate veil as a basis of liability for the claims against CAJAC must also fail because the allegations in the complaint do not allege facts sufficient to support such liability. In Paragraph 16 of the Class Action Complaint plaintiff alleges "[t]here are additional overlapping ties between Congregation Shaare Zedek and CAJAC which suggest that CAJAC is an arm of Defendant Congregation Shaare Zedek which has been designed as a straw person upon which to unload all of Shaare Zedek's legal and other responsibility for Bayside Cemetery." Plaintiff's allegations, if assumed to be true, would only provide a basis for piercing the corporate veil of CAJAC in order to impose liability upon the Congregation because the Congregation so dominated CAJAC that the Congregation should be held liable for the acts of CAJAC. See Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135, 141 (1993) ("complete domination [by the owners] of the corporation is the key to piercing the corporate veil").

As stated by the Court

The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. The concept is equitable in nature and assumes that the corporation

itself is liable for the obligation sought to be imposed. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.

Id. (citations omitted). Therefore, the allegations in the complaint at the most would provide a basis for holding the Congregation liable for the alleged independent wrongs of CAJAC. The doctrine of piercing the corporate veil cannot constitute a separate cause of action against CAJAC and it is not asserted that CAJAC owns or dominates the Congregation. Rather plaintiff alleges that the Congregation dominated CAJAC. Therefore plaintiff's reliance upon the doctrine is misplaced.

Having failed to allege any privity or other direct basis for the imposition of liability against CAJAC or that CAJAC dominated Congregation, plaintiff's claims against CAJAC are not cognizable and must be dismissed.

To the extent that plaintiff's seventh cause of action alleges that CAJAC aided and abetted defendants' breach of fiduciary duty, the court finds that plaintiff fails to state a cause of action. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Kaufman v Cohen, 307 AD2d 113, 125 (1st Dept 2003). Furthermore

A person knowingly participates in a breach of fiduciary duty only when he or she provides "substantial assistance" to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.

Id. at 126 (citations omitted). In this case, there is no allegation that CAJAC owes any duty to the plaintiff as it was not in existence at the time the contract was established nor was it assigned any of the duties undertaken by the cemetery or congregation.

Accordingly, it is

ORDERED that the motion of Community Association for Jewish At-Risk Cemeteries, Inc., to dismiss the action against it pursuant to CPLR 3211 is GRANTED and the Clerk is directed to enter judgment SEVERING and DISMISSING the action as against Community Association for Jewish At-Risk Cemeteries, Inc.

This is the decision and order of the court.

Dated: January 9, 2012

ENTER:

/s/

J.S.C.