



the 1970s. Bayside Cemetery, founded in 1842, is located in Queens, New York and is owned by Congregation Shaare Zedek, a Jewish Congregation in Manhattan. Community Association For Jewish At-Risk Cemeteries, Inc., is not-for-profit corporation alleged to provide services to the cemetery.

Plaintiffs assert that defendants sold their relatives perpetual care contracts pursuant to which defendants were obligated "to keep one or more plots at [the] cemetery property in presentable condition at all relevant times including, but not limited to: (I) the cutting of grass at reasonable intervals; (ii) raking, cleaning, filling, seeding, and/or sodding of graves; (iii) replacement, pruning, or removal of shrubs and trees; and (iv) prevention and removal of wild foliage growth in order to assure access to interment rights and grave visitation by surviving family, friends, and other interested parties. This is in addition to general cemetery grounds maintenance which includes maintenance of fencing, signage, roadways and walkways, lighting, buildings, water, power and sanitary sewage,...." Plaintiffs allege that not only have defendants failed to maintain the cemetery adequately, but that defendants misused funds from the trust account set up to finance the operation of the cemetery. The plaintiffs further contend that any applicable statute of limitations is subject to equitable tolling because of the acts of the defendants in concealing the fact that monies

were allegedly missing from the perpetual care accounts due to defendants' diversion.

The complaint sets forth eight causes of action. The first three causes of action arise under General Business Law (GBL) 350, 349 and 349-c, respectively. The fourth cause of action is for breach of contract while the fifth cause of action is for unjust enrichment. The sixth cause of action alleges breach of fiduciary duty while the seventh cause of action alleges the defendants aided and abetted each other in their breach of fiduciary duty. The eighth cause of action asserts the defendants improperly converted funds.

Defendants Bayside Cemetery and Congregation Shaare Zedek move to dismiss asserting that the plaintiffs lack standing to bring these claims individually, including as class members, or in a representative capacity. Defendants also assert that any claims the plaintiffs may have lie only against a non-party burial society and not them. Defendants also argue that plaintiffs claims are time-barred.

GBL 350 provides that "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." GBL 349 provides in pertinent part that "(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared

unlawful. . . [and] (h) . . . any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." GBL 349-c imposes a civil penalty where the prohibited conduct is against a person sixty-five years of age or older.

With respect to the first, second and causes of action, the court shall grant defendants' application. Although "the scope of the statute is intentionally broad, applying to virtually all economic activity," the Court has held that "what is required is that the party actually injured be the one to bring suit." Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., 3 NY3d 200, 205, 208 (2004). The Court continued that it "will not presume an intent to include recovery for derivative injuries within the scope of the statute "In the absence of a clear indication of such intent from the Legislature." Id. at 207. In this case, there is no evidence that plaintiffs were directly injured by the claimed wrongs. To the extent that the defendants engaged in any deceptive practices or acts, such actions had to have occurred at the time that plaintiffs' relatives entered into the perpetual care contracts. That is, viewing plaintiffs' allegations as true as the court must on a motion to dismiss, the deception consisted of causing the plaintiffs' relatives to enter

into perpetual care contracts while knowing that perpetual care services would not be provided in the future. Plaintiffs' alleged injuries here are clearly derivative as the alleged lack of maintenance by the cemetery would constitute a violation of personal rights contracted for by plaintiffs' deceased relatives. "An injury is indirect or derivative when the loss arises solely as a result of injuries sustained by another party." Id.

Therefore, the court shall dismiss the first three causes of action under consumer fraud provisions of the General Business Law as plaintiffs do not have standing under the statute to pursue these claims.

With respect to the remaining common law causes of action, the court agrees with the defendants that plaintiffs also lack standing.

Analysis of plaintiffs' claims requires consideration of the nature of the relationship between the defendants and the purchasers of the perpetual care contracts whom the plaintiffs assert they "stand in the shoes of." The language of the contracts as set forth in the "Trust Fund Receipt" is as follows in pertinent part

CONGREGATION SHAARE ZEDEK, hereinafter called "CONGREGATION", a domestic religious corporation . . . and owner of Bayside Cemetery . . . hereby acknowledges the receipt of the sum . . . hereinafter called "FUND" from [payor] for the following uses and purposes;

Pursuant to Section 92 of the Membership Corporation law of New York, said sum shall be held as part of the Special Fund of the "CONGREGATION", maintained by it for

the perpetual care of lots, plots or graves in Bayside Cemetery, and deposited by the "CONGREGATION" in its name in any State or Federal Savings Bank or Association paying interest thereon, or invested or re-invested by it for the purchase in its name of any Federal, State, Municipal or other Government certificates or bonds, or of other securities authorized by law for investment of Trust Funds.

The interest or income realized from the "FUND" shall be used toward the perpetual care and upkeep of the following lots, plots or graves [designated by payor] located in said Bayside Cemetery, limited, however to the extent for which such interest or income derived therefrom will permit and pay, as provided for in Section 91 of the aforesaid Membership Corporation law, and without applying any part of the principal "FUND" for that purpose. PROVIDED, however, that the "CONGREGATION" will not allow, pay or apply in any year or be in any way responsible for a higher rate of interest on the principal sum of the aforesaid "FUND" than the average rate of interest it may receive in such year from its total perpetual care funds.

The "CONGREGATION" shall not be held responsible for any loss, depletion or depreciation of the principal of said "FUND", or the value of any investment made therewith after it makes such deposit or investment.

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 (4<sup>th</sup> 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").

Having determined the nature of the parties' relationship, the question is whether plaintiffs have standing to enforce the rights established by the perpetual care contracts. 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). With respect to deceased donors, the court-appointed representative of the estate also has standing to bring an action for a defendants' breach of duty to the trust grantor. Smithers v St. Luke's-Roosevelt Hosp. Center, 281 AD2d 127, 138 -141 (1<sup>st</sup> Dept 2001) (plaintiff as court appointed special administratrix of estate of her late husband has standing to enforce his rights against the donee under the gift terms).

The plaintiffs, not coming within the ambit of the aforementioned categories, assert that they are beneficiaries of the trust funds and should be accorded standing on that basis. The Court has held that "[t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes. There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number." Alco Gravure, Inc. v Knapp Foundation, 64 NY2d 458, 465 (1985). Plaintiffs here urge the court to extend the rule of Alco Gravure to the relatives of interred decedents arguing that they are a limited class of potential beneficiaries with a special interest in the application of the perpetual care trust funds. This court declines to stretch the exception in the manner urged by plaintiffs.

The Court in Alco Gravure set forth a very specific justification for allowing an exception to the common law rule on beneficiary standing stating "the policy reasons for limiting



standing in this area are not applicable in this case. Normally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General in order to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations. However, the present action concerns not the ongoing administration of a charitable corporation, but the dissolution of that corporation and the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds originally donated." Id. at 466 (emphasis added, citation omitted). The crucial distinction between the relief sought here and Alco Gravure is that in the latter case the trust was being terminated and therefore there was no possibility of any conflict of interest among the beneficiaries with regards to the disposition or operation of the trust and its assets. Although the plaintiffs in this action argue that they "stand in the shoes" of the decedents, there is the distinct possibility that individual members of the purported class may have differing interests as to the claims of mismanagement. Thus two of the very concerns raised by the Court in Alco Gravure (1) that the need to resolve individual class member differences would increase the cost and complexity of litigation, and (2) that the very cost of litigation would interfere with the trust's charitable purpose, are present here

and argue against expansion of the beneficiary exception. Plaintiffs' citation to authorities in other jurisdictions is not persuasive given the unique statutory construct and common law development attendant to the recognition of charitable trusts in New York.<sup>1</sup>

The plaintiffs further misplace reliance upon cases concerning intentional torts against gravesites. As cited by the plaintiffs, the Court long ago stated

It has been decided many times, and frequently asserted by text writers, that the heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who without right, threatens to injure or remove it, and this though the title to the ground wherein the grave is, be not in the plaintiff but in another.

Mitchell v Thorne, 134 NY 536, 539 (1892) (citations omitted).

The Court further stated that

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<sup>1</sup> Contrast Mills v Davison, 54 NJ Eq 659, 662, 35 A 1072, 1073 (NJ Err & App 1896) (charitable trusts recognized at common law unlike New York); Terwilliger v Graceland Memorial Park Ass'n, 35 NJ 259, 268, 173 A2d 33, 38 (NJ 1961) (New Jersey has broad common law standing rule based upon general public interest in the operation of cemeteries so that even a competitor may bring suit but the Attorney General must be joined); Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v Pence, 181 W.Va. 649, 654, 383 SE2d 831, 836 (W Va 1989) (plaintiffs have a cause of action sounding in trespass and intentional tort to recover damages related to cemetery desecration but there is no issue of cemetery maintenance); German Evangelical St. Marcus Congregation of St. Louis v Archambault, 404 SW2d 705, 707 (Mo 1966) (unlike New York, under Missouri common law "beneficiaries in a charitable trust have a right to maintain suit to enforce the trust or prevent diversion of its funds").

All of the rights of the heirs of the grantors in this yard are not individual ones, enjoyable and enforceable by each solely for his own benefit, but many of them are held in common by all of the heirs, and among them those so held are the right of way and the right to maintain the yard for the purpose for which it was laid out and to protect it from destruction. Any one or more of the persons interested in these rights held in common may maintain an action to prevent, by an injunction, the destruction or interruption of such rights.

It is not necessary that such an action be brought by one nor by all of the persons interested. The damages sustained by each of the plaintiffs, if any, cannot be recovered in this action, but if it shall appear on the trial that all of the heirs are parties plaintiff, any damages arising from an injury to their common interests may be recovered.

Id. at 542 (citations omitted).

At issue in Mitchell was the property rights of the plaintiffs in a family burial ground that had been conveyed out of the family but whose deed contained a reservation of a "right of internment" for the grantor's family in a certain portion of the property. Id. at 538. Thus the rights at issue in Mitchell were rights in property, the cemetery, rather than rights in a trust to maintain the cemetery. This distinction is crucial in understanding the differing standing rules applied to the different rights. Contrary to plaintiffs' argument, heirs, loosely defined, had the right under common law to bring suit to prevent injury to cemetery property that was in the nature of the intentional tort of trespass. That standing was limited to a form of quasi-injury to property separate and apart from the

maintenance of a cemetery. The Court in Mitchell recognized this very distinction stating

The rights of the heirs of the grantors to protect the graves and monuments in the ground reserved, are not to be solely ascertained and limited by the rules defining the rights of heirs of persons buried in churchyards and incorporated cemeteries, but must be ascertained from the words of the clause in the deed, aided by the general rules relating to burial places.

Id. at 540 (emphasis added).

The expanded standing rules that plaintiff seeks to apply here have only been recognized in the context of trespass actions against cemeteries and gravemarkers. As stated by the Court

The cause of action, if one exists, lies in those who erected the original tombstones, if such persons be living, and if dead, in the heirs at law of those in whose honor and memory the monuments were raised, rather than in the cemetery association, which never erected or paid for these stones, and which never had any pecuniary interest therein.

While the purchaser of a cemetery lot does not acquire a title thereto in fee simple, he becomes possessed of a property right therein which the law protects from invasion. He has an easement for burial purposes therein, in accordance with the usual custom prevailing in the locality, and this privilege carries with it the right to erect tombstones and monuments in memory of the deceased, and to protect them from injury and spoliation.

Oatka Cemetery Ass'n v Cazeau, 242 AD 415, 417 (4<sup>th</sup> Dept 1934); see also Lay v Carter, 151 NYS 1081, 1082 (Sup Ct, Seneca County, 1915) (Any member of the family who were interested in any rights the family had acquired in the cemetery could undoubtedly maintain an action to restrain any interference with their rights in said property).

Plaintiffs argue that without an expanded standing rule they are without any means to remedy the defendants' alleged failure to maintain the cemetery. Such an assertion is incorrect. First, the Attorney General has standing to bring the claims at issue here, has already begun an investigation, and is overseeing negotiations to find a sustainable solution to the maintenance of Bayside Cemetery.

In addition, plaintiff Cohen and Goldstein allege that they were but no longer are executors of estates of each of their mothers, who were purchasers under the perpetual care contracts. At the time of their appointments, each such plaintiff had standing as a representative appointed by the court to prosecute their relatives' claims of interests in the trust that accrued prior to their demise as occurred in Smithers v St. Luke's-Roosevelt Hosp. Center (supra). Such a procedure insures the soundness and finality of the litigation and the enforceability of any judgment or settlement that may result.

Of course, the Legislature is free to amend the statutory scheme to provide an enhanced remedy, but that is not the function of this tribunal.

Accordingly, it is

