SUPREME COURT OF THE STATE OF NEW YORK
COUNTY 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, - against – BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC., Defendants.	Index No. 114818-2009 E DEBRA A. JAMES, J.S.C. Part 59 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE ACTION IN ITS ENTIRETY PURSUANT TO CPLR 3211(a)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New York Statutes

Secondary Authorities

PRELIMINARY STATEMENT

In their Complaint, Plaintiffs dwell at length on the physical condition of Bayside Cemetery, portraying themselves as the cemetery's last hope. The Complaint conveniently omits mention of the fact that Defendants, working in concert with UJA-Federation of New York and the broader New York Jewish community, have begun and made substantial progress towards completing the large-scale, professional cleanup that the cemetery desperately needed. Indeed, in one of the few changes to the Complaint from that dismissed by the U.S. District Court for the Eastern District of New York, Plaintiffs have *sued* the Community Association for Jewish At-Risk Cemeteries ("CAJAC"), a public charity incorporated for the purpose of helping the Jewish community resolve the recurring problem of historic cemeteries like Bayside. Despite Plaintiffs' transparent attempt to color their Complaint with simplistic and false emotional appeals, their claims are fundamentally flawed, both factually and legally.

Plaintiffs cannot demonstrate any entitlement to either legal or equitable relief from this Court. At its core, Plaintiffs' Complaint relates to Defendant Shaare Zedek's management of certain charitable trusts allegedly established for the perpetual care of specific graves at Bayside. Aside from the fact that those trusts are unconnected to Plaintiffs' allegations as to the overall physical condition of Bayside, Plaintiffs do not even *allege* that they personally paid any money for perpetual care or that they possess the legal prerequisites for a proper representative action on behalf of their deceased relatives who allegedly did. Instead, Plaintiffs suggest that they are, somehow, the beneficiaries of the trusts, ignoring the fact that New York law clearly declares perpetual care trusts to be charitable trusts, the supervision and enforcement of which is vested in

the New York State Attorney General (the "Attorney General"), as the statutory representative of the trusts' ultimate charitable beneficiaries. Finally, the statute of limitations would bar most of these claims, even if they had been brought by a proper Plaintiff.

In sum, after three long years in federal court, Plaintiffs still cannot state a claim upon which relief can properly be granted to them. This action should be dismissed so that Defendants can continue their work towards the full restoration and long-term maintenance of Bayside Cemetery without the distraction of vexatious litigation.

BACKGROUND

Defendant Congregation Shaare Zedek ("Shaare Zedek"), one of the oldest synagogues in New York City, purchased the approximately 6.7 acres of land that became Bayside Cemetery ("Bayside") in the early 1850s. Over the ensuing decades, as New York's Jewish population surged as a result of waves of immigration, Shaare Zedek transferred all but approximately 5% of the land at Bayside to more than 100 different synagogues and communal burial societies, ranging from Orthodox congregations to secular fraternal societies and groups of immigrants from numerous towns and villages across Europe. Each organization acquired the right to establish a private burial ground at Bayside (many walled and gated), in which it would have the sole right to convey burial rights to its members, in exchange for the organization's agreement to maintain and care for its "sub-cemetery."

Over the course of the 20th century, however, the New York Jewish community experienced massive demographic changes, and all but a handful of the organizations that had earlier established burial grounds at Bayside ceased to exist. No later than the early

1970s, conditions at Bayside began to deteriorate as more and more of these burial societies shut down and ceased to maintain their burial plots. Shaare Zedek itself almost disappeared as its membership dwindled and aged, surviving into the 1990s thanks only to a generous bequest from a congregant that sustained the synagogue until a new generation of younger Jews returned to the Upper West Side and revitalized the congregation, in spirit if not in finances. Despite its own financial distress, however, Shaare Zedek continued to employ caretakers and staff at Bayside at its own expense, and it continues to do so today.

The problem faced by Bayside, meanwhile, is far from unique. Older Jewish communities across the United States have faced similar issues as Jewish populations have moved and synagogues and other cemetery operators have come and gone. In 2006, CAJAC was created as a vehicle for dealing first and foremost with Bayside (believed to be the largest and most urgent at-risk cemetery in New York), but also with other similarly imperiled Jewish cemeteries throughout the state. In recognizing the maintenance of such cemeteries as a communal obligation, rather than one belonging to particular synagogues, CAJAC followed a model pioneered in Massachusetts, as well as elsewhere in the United States. To date, CAJAC's efforts have received widespread support and approval from the New York Jewish community at large, the Hebrew Free Burial Society, the Jewish Community Relations Council of New York, and UJA-Federation of New York. In fact, earlier this year, UJA-Federation of New York released a long-promised grant of $145,000, and CAJAC entered into a contract with a professional landscaping company to perform the much-needed restoration of Bayside.

Restoration efforts are ongoing and the condition of Bayside Cemetery is changing for the better.

At the same time, at least since 2004, Shaare Zedek has been working with the Attorney General's office to find a sustainable solution for the permanent maintenance of Bayside. Shaare Zedek has long recognized that the Attorney General must be fully satisfied as to not only the adequacy of the long-term plan for Bayside, but also as to Shaare Zedek's stewardship of the cemetery and, in particular, of the funds it holds in trust for the perpetual care of graves there. It has, therefore, provided the Attorney General with access to all relevant documents related to its management of the cemetery, as well as to its offices. Regardless of the disposition of this action, Shaare Zedek will continue to cooperate fully with the Attorney General as it seeks a permanent solution that appropriately respects both the needs of Bayside and those buried there and the cemetery's unique legal history.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE THESE CLAIMS IN THEIR INDIVIDUAL CAPACITIES.

A. The General Business Law Confers A Private Right of Action Solely on Individuals Who Allege That They Were Personally "Injured by Reason of" An Alleged Violation of The Statute Occurring after June 19, 1980, Which Plaintiffs Cannot Allege.

1. Plaintiffs have not alleged the personal and direct injury required under the statute.

Counts I-III of the Complaint attempt to state claims under the General Business Law for, respectively, false advertising, General Business Law § 350, deceptive trade practices, id. § 349, and to recover an enhanced civil penalty for deceptive trade practices directed at individuals aged 65 or over, id § 349-c. Although the precise elements of each

of those causes of action differ, they are similar in one crucial aspect: in each case, the statute confers a private right of action only on a "person who has been injured by reason of" a violation of the statute. Id § 349(h), § 350-e(3).

As the Court of Appeals emphasized in its opinion in Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris USA, Inc., 3 N.Y.3d 200, 818 N.E.2d 1140 (2004), the General Business Law did not abrogate the common law rule against recovery for derivative injuries, and thus only plaintiffs who have been actually, personally, and directly injured can recover under the statute, a standard that none of the Plaintiffs here can satisfy. As the court wrote, "it is beyond dispute that section 349(h) permits an actually (nonderivatively) injured party to sue a tortfeasor. We hold simply that what was required is that the party actually injured be the one to bring suit." Id at 208, 818 N.E.2d at 1145.

Yet Plaintiffs' Complaint expressly states that none of these Plaintiffs actually had any dealings with Shaare Zedek; instead, it was their *relatives*, and not Plaintiffs themselves, who were purportedly wrongfully induced into purchasing perpetual care by Defendants' alleged false advertising and unfair business practices. (See, e.g., Compl. ¶ 43 ("When purchasing those services based upon Defendants' representations and advertisements, *Plaintiffs' relatives* relied on Defendants' statements), ¶ 54 (referring to "highly vulnerable individuals, including *Plaintiffs' relatives*") (emphasis added).) These Plaintiffs never paid any money for perpetual or annual care, as a result of Defendants' alleged violations of the General Business Law or otherwise. They have, therefore, suffered even less of an injury than did the insurer in Blue Cross, which the Court of Appeals found lacked standing despite the fact that it had "actually paid the costs

incurred by its subscribers" as a result of the defendants' deceptive practices. Blue Cross, 3 N.Y.3d at 207, 818 N.E.2d at 1145.[1]

2. The alleged violations that form the basis of Plaintiffs' claims predate the existence of a private right of action under the statute.

Even if Plaintiffs could meet the direct injury requirement, all but perhaps one would still lack standing to bring their General Business Law claims because the alleged violations of which they complain predate the June 19, 1980 effective date of the amendments to the statute providing a private right of action. Although the Complaint does not set forth the precise dates of any of Defendants' alleged violations of the General Business Law, Plaintiffs have clearly alleged that their relatives were injured when they were wrongfully induced to purchase perpetual care (see Compl. ¶ 43, 49, 54), which as to the Lucker Plaintiffs and Ms. Goldstein occurred before 1980.[2] Since the statutory amendments permitting persons "injured by reason of" violations of § 349 and § 350 to bring private enforcement actions did not go into effect until June 19, 1980, 1980 N.Y. Laws ch. 346, § 1, and were not retroactive, Burns v. Volkswagen of Am., Inc., 97 A.D. 977, 468 N.Y.S.2d 1017, 1018 (4th Dep't 1983), only the Attorney General has or had capacity or standing to challenge those violations.

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[1] While the Court of Appeals' decision in Blue Cross involved only § 349, there is no reason to believe that standing under § 350 is any broader. Indeed, in addition to the use of identical language to create the private right of action, the courts have construed § 350 to require proof that the plaintiff actually relied on the false advertisement. Colbert v. Rank Am., Inc., 295 A.D.2d 300, 301, 743 N.Y.S.2d 150, 151 (2d Dep't. 2002); Gershon v. Hertz Corp., 215 A.D.2d 202, 203, 626 N.Y.S.2d 80, 81 (1st Dep't 1995). Consistent with their general theory of the case, Plaintiffs have alleged only that their relatives relied on the allegedly false advertisements (Compl. ¶ 43), and thus only their relatives would have standing to allege a § 350 violation. Blue Cross logically applies also to § 349-c, which incorporates the substantive elements of § 349, assuming that there is even a private right of action to recover the supplemental civil penalty provided for in § 349-c, all of which must, by statute, be paid into a restricted fund in the state treasury. See General Business Law § 349-c(3).

[2] The Complaint is explicit that the Lucker Plaintiffs' grandparents purchased perpetual care "in the 1970s" (Compl. ¶¶ 9-11) and that Ms. Goldstein's relatives purchased in 1967 (Compl. ¶ 13 & Compl., Ex. D.) The Complaint does not set forth either the names of Ms. Cohen's relatives who purchased perpetual care (or for whose graves perpetual care was purchased) or the dates of such purchases.

B. Plaintiffs Lack Standing To Bring A Breach of Contract Claim Founded upon Contracts Allegedly Entered into by Their Relatives.

1. Plaintiffs are neither parties to, nor intended third-party beneficiaries of, the perpetual and annual care contracts that they seek to enforce.

Count IV of the Complaint sounds in breach of contract, alleging that Defendants breached perpetual care contracts entered into with Plaintiffs' relatives. It is well-established that plaintiffs asserting a breach of contract claim under New York law must be either parties to, or intended beneficiaries of, the agreement they seek to enforce. Equitable Life Assurance Soc'y of the United States v. Nico Constr. Co., 235 A.D.2d 222, 223, 652 N.Y.S.2d 269, 270 (1st Dep't 1997) (corporation that is "neither a party to th[e] contract nor a third-party beneficiary thereof lacks standing to enforce any rights thereunder"). Plaintiffs concede that they never personally entered into any contract with either Defendant, but allege in conclusory fashion that they nonetheless possess standing as third-party beneficiaries of their relatives' contracts. (Compl. ¶ 62.) That allegation is contradicted, however, by both the clear language of the contracts and the context in which they were entered into.

The general presumption is that contracts are to be enforced by the parties that made them, and the case law establishes a high bar for Plaintiffs seeking to establish standing as a third-party beneficiary. In particular, a third party seeking to enforce a contract must show that it is an "intended," and not merely an "incidental" beneficiary of the agreement. Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44-45, 485 N.E.2d 208, 211-212 (1985) (adopting the rule of the Restatement (Second) of Contracts). Moreover, "even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract. Absent

clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent." LaSalle Nat'l Bank v. Ernst & Young L.L.P., 285 A.D.2d 101, 108-109, 729 N.Y.S.2d 671, 676 (1st Dep't 2001) (reversing denial of motion to dismiss pursuant to CPLR 3211).

Plaintiffs do not and, in light of the numerous perpetual care contracts attached as exhibits to the Complaint cannot, allege that they were specifically identified either by name or relationship in any of the contracts signed by their relatives. Nor do they point to any other contractual *language* that supports the conclusion that they were intended beneficiaries. Instead, they base their claims of standing solely on allegations that the purpose for providing for perpetual care was to facilitate visits by "family members and future generations," that Defendants "intended to give these Plaintiffs the benefit of the promised performance," and that the parties intended to allow Plaintiffs to be able to enforce the contracts. (Compl. ¶ 62.) None of those allegations, however, are supported by the text of the contracts, nor have Plaintiffs alleged any specific circumstances about *these* contracts that they could prove at trial to suggest that, decades ago, the parties to these contracts intended to benefit them.

Moreover, Plaintiffs' allegations appear to reflect a fundamental misunderstanding of the nature of perpetual care under New York law. Most importantly, nothing in the text of the contracts or the governing statutes suggests that, by accepting funds for perpetual care, a cemetery obligates itself to "keep one or more plots . . . in a presentable condition at all relevant times," (Compl. ¶ 19), or otherwise to "assure access to interment rights and grave visitation by surviving family, friends, and other interested parties" (id.). To the contrary, under governing New York law and the

language of the specific perpetual care contracts attached to the Complaint, Shaare Zedek was obligated only to hold the tendered funds in perpetual trust in an income-generating account and to utilize the "the interest or income realized from the fund . . . toward the perpetual care and upkeep of [specified] lots, plots, or graves . . . located in said Bayside Cemetery, *limited, however, to the extent for which such interest or income derived therefrom will permit and pay.*" (Emphasis added.) Given that limitation, Plaintiffs cannot suggest that the parties to the contract intended to provide any performance whatsoever for the specific benefit of Plaintiffs or any other group of individuals at an indeterminate time in the future.

When the perpetual care contracts are properly understood for what they are—agreements to establish a specific type of statutory charitable trust—Plaintiffs' argument that they are intended third-party beneficiaries falls away even further. As is discussed in more detail below, it is well-established that charitable trusts are not created for the benefit of particular individuals. Rather, they are created for the benefit of the People of the State of New York in general (even if only a minority of the public may actually be concerned with a particular trust's operation), and the right to require the trustee to provide those benefits is vested in the Attorney General, as the People's statutory representative. Estates, Powers & Trusts Law ("EPTL") § 8-1.1(f).

In short, there is neither language in the contracts from which to infer the existence of third-party beneficiaries, nor a need to draw such an inference to accomplish the contracts' objectives. Plaintiffs, therefore, have not even approached the type of clear

showing required to allow a third party, even one related to a party to the contract, to sue for breach of contract.[3]

2. Plaintiffs have not alleged that they personally suffered any cognizable injury from the alleged contractual breaches.

Even if Plaintiffs are intended beneficiaries of the contracts at issue, the absence of any cognizable injury to them as a result of Defendants' alleged breach provides an independent ground for dismissing their contract claims. While the Complaint alleges that "Defendants' refusal to honor perpetual or annual care contracts have caused injury by allowing plots subject to such contracts to fall into complete disrepair," it does not connect that injury in any way to any of the named Plaintiffs. Particularized personal injury to the plaintiff is a necessary element of a breach of contract claim under New York law, Spherenomics Global Contact Ctrs. v. vCustomer Corp., 427 F. Supp. 2d 236, 247 (E.D.N.Y. 2006), and the absence of such an allegation requires dismissal.[4]

C. Plaintiffs Have Not Alleged Any Personal Interest in The Funds by Which Defendants Were Allegedly Unjustly Enriched or That Defendants Allegedly Converted.

Counts V and VIII of the Complaint, alleging unjust enrichment and conversion, respectively, share a fundamental legal defect: each assumes, without any supporting allegations and contrary to Plaintiffs' theory of the case, that Plaintiffs have some legal right to repayment of the money allegedly paid for perpetual care by their relatives. Since they cannot demonstrate such a legal entitlement, both claims must fail.

[3] To the extent that Count IV discusses annual care contracts, it suffices to note that nowhere in the Complaint do Plaintiffs even allege that they or any of their relatives purchased annual care for any graves. They therefore lack any standing whatsoever to allege violations of such contracts, whether as parties or third party beneficiaries.

[4] Plaintiffs have not alleged, and their counsel has in the earlier federal proceeding explicitly disclaimed, any claim based on psychic injury or emotional distress.

The elements of a proper unjust enrichment claim are simple: "To prevail on a claim of unjust enrichment, a plaintiff must establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution." Whitman Realty Group, Inc. v. Galano, 41 A.D.2d 590, 592-93, 838 N.Y.S.2d 585, 587 (2d Dep't 2007). In this case, however, Plaintiffs have failed to make any allegation that *they* ever provided anything of value to any Defendant, or that the payments allegedly made by their relatives were "at their expense." Their unjust enrichment claim, therefore, must fail. Id. at 593, 838 N.Y.S.2d at 588.

Likewise, to demonstrate a valid claim for conversion, Plaintiffs "must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the [Plaintiffs'] rights." Fiorenti v. Cent. Emergency Physicians, PLLC, 305 A.D.2d 453, 454-455, 762 N.Y.S.2d 402, 403 (2d Dep't 2003). Plaintiffs, however, allege only that *their relatives* and other "members of the Class" had such an ownership right or superior right of possession (Compl. ¶ 78.), and thus implicitly concede that they personally lack a personal interest in the allegedly converted funds. They therefore lack standing to pursue their claims for conversion in their individual capacities.[5]

D. Plaintiffs Have Not Alleged that Defendants Owed Them Any Fiduciary Duty Whatsoever.

Counts VI and VII of the Complaint allege, respectively, breach of fiduciary duty and aiding and abetting breaches of fiduciary duties. The existence of a fiduciary

[5] Given that Plaintiffs' theory is that their relatives deposited the funds pursuant to a valid trust agreement without a right of reversion, it may be that they too would lack the necessary present ownership or possessory right to the funds, title to which would have vested in the trust prior to the alleged conversion. The Court need not, however, reach that question to determine that *Plaintiffs* lack such standing.

relationship is a necessary element of both claims. See, e.g., Atlantis Info. Tech. v. CA, Inc., 484 F. Supp. 2d 224, 231 (E.D.N.Y. 2007) (identifying "(1) the existence of a fiduciary relationship between the parties; and (2) a breach of the fiduciary duty" as the two elements of a simple breach of fiduciary duty claim); Sharp Int'l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005) (listing "a breach by a fiduciary of obligations to another of which the aider and abettor had actual knowledge" as the first element of an aiding and abetting claim).

The Complaint does not, however, allege that any of the Defendants owed any duty to any of Plaintiffs, let alone that of a fiduciary. Rather, it makes the tortured claim that "Defendants owed a fiduciary duty to Plaintiffs' relatives and to family members and future generations to whom the benefit of the perpetual or annual care contracts run." (Compl. ¶ 69.) Even assuming, *arguendo*, that Plaintiffs were intended third-party beneficiaries as a matter of contract law, the mere existence of a contract would not create a fiduciary relationship. Such a relationship would exist only to the extent the contract were understood to create a trust, yet as a matter of law, the trustee of a charitable trust (which includes one for the perpetual care of a cemetery plot, see EPTL § 8-1.5), owes a fiduciary duty to the trust's ultimate charitable beneficiary (i.e. the People), not to the settlor of the trust or to the settlor's heirs or assigns. See Restatement (Second) of Trusts §§ 379, 391.

Since Plaintiffs cannot establish that any of the Defendants owed them any type of fiduciary duty, both Counts VI and VII of the Complaint must be dismissed as insufficient as a matter of law.

II. PLAINTIFFS LACK STANDING TO PURSUE THESE CLAIMS, IN A REPRESENTATIVE CAPACITY OR OTHERWISE, AS THE "LEGAL REPRESENTATIVES" OF THEIR DECEASED RELATIVES.

A. Plaintiffs Have Not Alleged Facts Sufficient To Establish Their Capacity To Sue As Executors or Other Legal Representatives of Their Deceased Relatives.

In the introductory paragraph of their Complaint, Plaintiffs purport to bring this action as "family members or near relatives, executors, trustees, [or] legal representatives" of certain relatives who allegedly made perpetual care contracts with one or more of the Defendants. Yet the capacity to bring a representative claim or survival action on behalf of a decedent is not a mere matter of *ipse dixit*. Since Plaintiffs have failed even to allege the necessary prerequisites to such a claim, each cause of action in the Complaint purportedly brought in such capacity must be dismissed.

As an initial matter, it is well-settled that even being named as an executor in a will is insufficient to confer standing to sue on behalf of one's decedent. Rather, a purported personal representative must, at the time of the Complaint, show that he or she possesses current letters testamentary or of administration from the appropriate probate court attesting to the representative's due appointment. Schoeps v. Andrew Lloyd Weber Art Found., 17 Misc. 3d 1128(A), 851 N.Y.S.2d 74 (Sup. Ct. – N.Y. Cty. 2007), aff'd, 66 A.D.3d 137, 884 N.Y.S.2d 396 (1st Dep't 2009). None of the Plaintiffs make any such allegation in the Complaint, nor do any even specifically allege that their relatives' estates have not long since been wound up.[6]

[6] Plaintiff John Lucker's claim to be the executor of his grandmother's estate suffers from additional defects. First, § 11-3.4 of the EPTL specifically prohibits the "personal representative of a personal representative," as Mr. Lucker claims to be (see Compl. ¶ 9), from acting on behalf of his decedent's decedent. Moreover, Mr. Lucker has previously represented in the federal action that his grandmother was a resident of Connecticut at the time of her death, yet there is no indication in the Complaint that he has complied with the provisions of EPTL § 13-3.5, which governs the right of the personal representative of a

Further, any attempt to demonstrate to standing as a personal representative would be futile. As the Appellate Division has held, a personal representative can bring a survival action solely as to claims that were viable at the time of the decedent's death. In re Estate of Gandolfo, 237 A.D.2d 115, 655 N.Y.S.2d 341 (1st Dep't 1997) (executor cannot bring breach of fiduciary duty claim where the alleged breach occurred "almost a year after the death of plaintiff's decedent"). No such allegation has, of course, been made here. Nor can Plaintiffs rely on those cases that allow an executor to sue in a non-representative capacity to defend the estate's interest in property (since Plaintiffs do not allege that their decedents had any possessory interest in the corpus of the perpetual care trusts at the time of their deaths that could have vested in the estate) or to recover moneys paid out in their capacity as executor (since Plaintiffs do not claim to have personally suffered any monetary loss, as executors or otherwise).

B. Failing To Qualify As Proper Legal Representatives of Their Deceased Relatives' Estates, Plaintiffs Lack Any Other Capacity To Enforce The Charitable Trusts at Issue.

Perhaps recognizing that they could not properly sue as executors or personal representatives, Plaintiffs have sought both in this Complaint and in the earlier federal action to proceed on the basis of some alternative notion of capacity as "family members," "near relatives," or "legal representatives."[7] Neither the Complaint nor New York law, however, supports any such theory.

As a general matter, the existence of specific provisions in the Estates, Powers & Trusts Law regulating the means by which a personal representative (defined as "a person who has received letters to administer the estate of a decedent," EPTL § 1-2.13), may sue

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non-domiciliary defendant to sue in the New York courts.

[7] Distinguished, apparently, from the term "personal representative" as defined by the EPTL.

or be sued on behalf of his or her decedent's estate, see id. §§ 11-3.1 et seq., strongly suggests that the Legislature did not intend to permit others, not possessing the qualifications of a personal representative, to sue merely by virtue of being "family members" or "near relatives" of the deceased. With respect to Counts IV – VIII of the Complaint, meanwhile, which allege violations by Defendants of their obligations as trustee of perpetual care trusts—cast variously as a breach of the trust agreement and the fiduciary duties created thereby, unjust enrichment at the trust's expense, and conversion of the trust funds—Plaintiffs' claimed standing is even more tenuous.

While Plaintiffs allege that they have a "special interest" in the trusts (see Compl. ¶ 7) and are the individuals whom their relatives intended to benefit by creating the trusts (see Compl. ¶ 62), the unquestioned rule is that charitable trusts, including perpetual care trusts,[8] cannot have individual named beneficiaries and are deemed to be for the ultimate benefit of the People, whose interests are represented by the Attorney General. EPTL § 8-1.1(f). Thus, where a charitable trustee has allegedly breached his or her obligations under the trust agreement, it is the Attorney General, and not a legal stranger—whether or not a relative of the settlor—who possesses standing to sue.

As the Court of Appeals explained in Alco Gravure, Inc. v. Knapp Foundation, 64 N.Y.2d 458, 479 N.E.2d 752 (1985):

> The 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

[8] By statute, trusts for the perpetual care of graves and cemetery plots are deemed to be charitable in nature. EPTL § 8-1.5. The alternative, of course, would leave them void for lack of definite beneficiaries and for violation of the rule against perpetuities (since the funds deposited with the trustee are encumbered by the trust restrictions indefinitely).

> 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.

Id. at 465, 479 N.E.2d at 755. Plaintiffs seek to avoid the import of that restrictive standing rule by pointing to Smithers v. St. Luke's Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), a divided decision of the Appellate Division that, they suggest, recognizes the right of those with a "special interest" in a charitable trust to sue to enforce it. (Compl. ¶ 7.) Properly understood, however, Smithers only further demonstrates the defects in Plaintiffs' Complaint.

In Smithers, the widow of a charitable donor, acting in her capacity as a duly-appointed special administrator of her late husband's estate, sued the defendant hospital to compel it to observe the terms of a restricted charitable gift that the husband had made during his lifetime. The trial court dismissed the action for lack of standing, but the Appellate Division reversed. The Appellate Division first recognized the continued vitality of the Alco Gravure rule, yet distinguished it on the ground that "[n]either the donor nor his estate was before the court in any of the cases urged on us in opposition to donor standing," including Alco Gravure, and "[t]he courts in [those] cases were not addressing the situation in which the donor was still living or his estate still existed." Smithers, 281 A.D.2d at 139-40, 723 N.Y.S.2d at 435. As the Smithers court emphasized, its holding rests on the rights of the donor and the fact that the plaintiff had met the ordinary requirements for a survival action on behalf of his estate, not on any theory of beneficiary standing (even the limited exception created by Alco Gravure): "Mrs. Smithers did not bring this action on her own behalf or on behalf of beneficiaries of the Smithers Center. She brought it as the court-appointed special administratrix of

the estate of her late husband to enforce his rights under the agreement with the Hospital through specific performance of that agreement." Smithers, 281 A.D.2d at 138, 723 N.Y.S.2d at 434. Moreover, as required by, for instance, Estate of Gandalfo, the hospital's "unauthorized deviation from the terms of the completed Gift commenced during Smithers's lifetime and was discovered shortly after he died." Smithers, 281 A.D.2d at 139, 723 N.Y.S.2d at 435.

In this case, of course, none of the Plaintiffs can meet any of those requirements: the perpetual care purchasers in question are long-since deceased; there is no allegation or evidence that their estates are still in existence; none of the Plaintiffs have presented any indication that they possess valid letters of administration; and the claims at issue did not arise until after the deaths of the decedents. Thus even assuming, arguendo, that the Smithers majority, and not Justice Friedman in dissent, correctly stated the rule as to donors, the decision can provide no help to Plaintiffs' claim that they have standing solely by virtue of their "special interest" in the trusts.

Nor can Plaintiffs point to any other case supporting their standing to sue solely as "family members" or "near relatives," having no pecuniary or property interest in either the trust fund or its distributions. In addition, such a group is at best vague and certainly far from meeting the requirement, articulated by the Court of Appeals in Alco Gravure, that the class of supposedly-specially-interested beneficiaries be "sharply defined and limited in number." Alco Gravure, 64 N.Y.2d at 465, 479 N.E.2d at 755. At bottom, Plaintiffs' principal argument for their standing to sue appears to be their disagreement with the way the Attorney General has proceeded in this case. Yet that cannot, by itself, be grounds for allowing a private suit where the Attorney General is aware of the

allegations and is fully competent to bring each of the claims alleged in the Complaint if he concludes that they are supportable and in the public interest. To hold otherwise would be to open the door to the very "vexatious litigation" that the Court of Appeals has recognized as the rationale for limiting standing to the Attorney General in the first place. See id. at 466, 479 N.E.2d at 756.[9]

III. THE LUCKER PLAINTIFFS' CLAIMS LIE, IF AT ALL, AGAINST THE BURIAL SOCIETY OF WHICH THEIR GRANDPARENTS WERE MEMBERS, NOT AGAINST DEFENDANTS.

In contrast to Plaintiffs Goldstein and Cohen, the Lucker Plaintiffs do not allege that their relatives entered into perpetual care contracts directly with any of the Defendants. Rather, they allege that their grandmother, "through her agent the Chebra Shebath Achim Society, purchased perpetual care for the Lucker plots at Bayside Cemetery." (Compl. ¶¶ 9-11.) Those allegations, in turn, each cite Exhibit C to the Complaint, a letter from Nathan Lipton, the president of the society, to Mrs. Lucker (the Lucker Plaintiffs' grandmother), stating that "The Chebra is still alive, and will continue so until the last member passes away. After that, who knows what will be. That is why we purchased perpetual care of the cemetery." Notably, however, nothing in Exhibit C suggests that the society made that purchase as Mrs. Lucker's agent: indeed, the context suggests that Mr. Lipton was *informing* her of the purchase after the fact, which would be

[9] Plaintiffs appear to suggest, citing a newspaper article, that "State officials . . . are powerless to do anything" about the situation at Bayside Cemetery. (Compl. ¶ 7.) That assertion appears to confuse two separate heads of regulatory authority. While it is true that, in general, the provisions of Article 15 of the Not-for-Profit Corporation Law and the regulatory authority of the Division of Cemeteries extend only to separately incorporated cemetery corporations, and not to cemeteries operated by religious corporations (such as Bayside), section 1507(c) of the NPCL, governing the treatment of perpetual care trust funds, explicitly applies to "every religious corporation having charge and control of a cemetery." Moreover, the Attorney General's authority to sue to enforce charitable trusts applies with equal force to trust funds held by religious corporations as to those held by any other form of trustee.

an unusual way for an agent to communicate with his or her principal. Nor is there any indication that any of Mrs. Lucker's funds were paid to any of the Defendants.

Therefore, even if Plaintiffs Cohen or Goldstein were able to establish standing to sue, despite the arguments described elsewhere in this motion, the Lucker Plaintiffs would still lack standing to sue, since there is no allegation that Mrs. Lucker suffered any loss as a result of or was even aware of Defendants' allegedly deceptive conduct (Counts I-III), that Defendants were enriched at Mrs. Lucker's expense (Count V), or that Mrs. Lucker ever deposited any funds with any Defendant establishing a fiduciary relationship (Counts VI-VII) or a trust (Count VIII). The Lucker Plaintiffs' breach of contract claims (Count IV), meanwhile, necessarily fail for lack of privity — if the society contracted with a Defendant, it is the society (and not its members or their descendents) that would have standing to sue in the event of a breach. The Lucker Plaintiffs have not, and could not, plead those facts, which is fatal to their claims.[10]

If Mrs. Lucker was unfortunately misled into believing that perpetual care had, in fact, been purchased on her behalf, her claim would have been against the society, not these Defendants.

IV. THE STATUTE OF LIMITATIONS BARS PLAINTIFFS' CLAIMS.

A. Plaintiffs' Claims Accrued Decades Ago, Long Before The Earliest Date Permitted by the CPLR.

Although specific dates are few and far between in the Complaint, it is largely undisputed that the events that are the basis of these actions took place (if at all) decades

[10] Plaintiffs face a particularly high standard for pleading their breach of contract claims, given the applicability of the Statute of Frauds (since a perpetual care contract cannot, by definition, be performed within one year, General Obligation Law § 5-701(1).

ago. Given that the statutes of limitations for the various claims brought here are three and six years, the relevant claims accrued long before the earliest allowable date.

For purposes of claim accrual, Plaintiffs' claims can be divided into two categories: the General Business Law claims, which accrued as of the date that Plaintiffs' relatives allegedly purchased their perpetual care contracts, and the claims that arise from Defendants' alleged diversion of funds from the perpetual care trusts (primarily the conversion and fiduciary duty claims, as well as those aspects of the breach of contract claims that relate to the maintenance of the trust accounts). For reasons discussed below, the unjust enrichment claims can potentially be classified in either category.

1. Claims accruing upon contract formation

Reduced to their essence, Plaintiffs' General Business Law claims appear to be that Defendants' deceptive trade practices and false advertising induced Plaintiffs' relatives to purchase perpetual care contracts, when Defendants allegedly knew that they did not intend to perform; put differently, they are statutory "fraud in the inducement" claims. Although the Complaint does not specify when the asserted deceptive practices or false advertising occurred, it is clear that the violations would have been complete as to each Plaintiff at the time their relatives executed a perpetual care contract (and were thus injured by the supposedly deceptive conduct).

The statute of limitations for "liabilities imposed by statute" is three years. CPLR 214(2). Since General Business Law §§ 349 and 350 are not merely codifications of the common law, they are covered by the three-year statute of limitations. Thus, given the allegation that the Lucker Plaintiffs' grandparents made their purchase "in the 1970s" (Compl. ¶¶ 9-11), even construing the Complaint in the manner most favorable to

Plaintiffs, they would have accrued a cause of action under the General Business Law no later than December 31, 1979; Ms. Goldstein, meanwhile, would have accrued her cause of action no later than July 16, 1967 (the date of the contract her relative made with the Congregation). Each of their General Business Law claims is, therefore, unambiguously time-barred, since they did not commence any litigation until September 2007. Ms. Cohen does not specify all of the possibly multiple relative(s) who allegedly purchased perpetual care, or when they purchased such care, but given that paragraph 12 of the Complaint cites to Exhibit C, and the latest contract contained therein is dated in 2001, Ms. Cohen's claim is time-barred as well.

2. Claims accruing upon the alleged diversion of funds

For Plaintiffs' conversion and fiduciary duty claims, Plaintiffs would have accrued their cause of action at the time the funds were allegedly diverted from the perpetual care trusts in which they were originally deposited. (See Compl. ¶¶ 67, 79.) Again, Plaintiffs do not fix a precise date for the alleged conversion, but paragraph 25 of the Complaint alleges that Defendants "improperly removed monies originally intended for perpetual or annual care" at some time "in the 1980s," when Shaare Zedek "suffered from a faltering budget."

The statute of limitations for conversion is three years from the date of the alleged conversion. Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488-89, 448 N.E.2d 1324, 1326-27 (1983). Moreover, conversion is not a continuing wrong, and a single cause of action accrues at the point the property is converted, not upon each successive misuse or refusal to return the property. Id. A timely claim for conversion, therefore, would have

had to have been filed no later than 1992, meaning that Plaintiffs' conversion claims (Count VIII)in this action are time-barred.

As to the fiduciary duty claims (Counts VI & VII), the applicable statute of limitations depends on the type of relief primarily sought. As the Court of Appeals has recently held, where, as here, the plaintiff "primarily seeks damages . . . and the equitable relief it seeks, including the disgorgement of profits, is incidental to that relief," a three year limitations period applies. IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139, 907 N.E.2d 268, 272 (2009). Given that the alleged breach consists of, in essence, removing the funds from the trust without authorization, the cause of action accrued upon diversion, and the analysis is thus identical to that for conversion (which has an identical three-year limitations period).

3. Unjust enrichment

The statute of limitations for unjust enrichment under New York law is six years, running from the "occurrence of the wrongful act giving rise to the duty of restitution." Elliot v. Qwest Comm'ns Corp., 25 A.D.3d 897, 898, 808 N.Y.S.2d 443, 444-45 (3d Dep't 2006). One could argue that the right to restitution arose at the time Plaintiffs initially paid for perpetual care that, allegedly, Defendants knew they did not intend to provide, at the first time that neglect of perpetual care plots was seen, or when Defendants allegedly diverted funds from the perpetual care trust. The Court need not determine the accrual date, however, for purposes of this motion, because under any possible understanding, the claim would have accrued at least six years prior to the institution of litigation.

B. Plaintiffs Have Failed To Allege Facts Sufficient To Toll The Statute of Limitations for Fraudulent Concelment.

Plaintiffs allege, however, that notwithstanding those apparent time bars, their claims should be allowed to proceed, because "[a]ny applicable statutes of limitation have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery." (Compl. ¶ 40.) As the Court of Appeals has held, equitable estoppel is available "where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action," and plaintiff reasonably relied on the misrepresentations. Zumpano v. Quinn, 6 N.Y.3d 666, 674, 849 N.E.2d 926, 929 (2006). The only such acts alleged in the Complaint, however, are "intentionally covering up and refusing to publicly disclose critical documents and information" concerning the alleged violations "to class members, their families, and the general public." (Compl. ¶ 40.) Those allegations are wholly insufficient to establish equitable tolling, as "a wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." Zumpano, 6 N.Y.3d at 675, 849 N.E.2d at 930. Rather, the plaintiff must show a "specific misrepresentation to them by defendants." Id. at 675, 849 N.E.2d at 930.

Not only have Plaintiffs failed to allege specific misrepresentations, they have not alleged any change in Defendants' alleged concealment that allowed them to finally file the federal action in November 2007. If they were able to bring such an action in 2007 without new information, then they could have brought such an action years earlier as well. Indeed, the physical condition of Bayside Cemetery was anything but a secret: the

Complaint itself alleges that it was the subject of multiple news reports as early as 2002 and 2003, and Plaintiffs or anyone else certainly could have visited the cemetery at any point before then and immediately seen the condition of the cemetery.

CONCLUSION

Regardless of whether the Court views Plaintiffs' claims as having been brought in their individual capacities, representative capacities, or something in between, Plaintiffs have simply not alleged any claim upon which relief can be granted to them, or that they even have standing to present to the Court. Defendants respectfully request, therefore, that their motion pursuant to CPLR 3211(a) be granted, and that this action be dismissed in its entirety, so that they can continue to work toward a stable, well-maintained future for Bayside Cemetery free of overhanging litigation.

Respectfully submitted,

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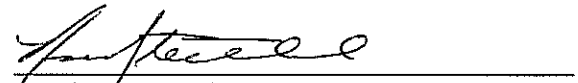
By: 

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