

**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
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) PART 59
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) Justice Debra A. James
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) **Oral Argument Requested**
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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT COMMUNITY ASSOCIATION FOR
JEWISH AT-RISK CEMETERIES, INC.'S MOTION TO DISMISS**

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Plaintiffs John Lucker, Elizabeth Lucker, Nancy Rousseau, Lynn Cohen and Fran Goldstein, by and through their *pro bono* attorney, respectfully submit this memorandum of law in opposition to Defendant Community for Jewish At-Risk Cemeteries, Inc. (“CAJAC”) motion to dismiss. For the reasons set forth below, Defendant’s motion to dismiss should be denied in its entirety or denied with leave to replead as a motion for summary judgment after the close of discovery.

I.

INTRODUCTION

Defendant CAJAC would have this Court mistakenly believe that it is an independent charitable organization with absolutely no connection or ties with Defendant Congregation Shaare Zedek. That, quite simply, is untrue.

As alleged in the Complaint, CAJAC was originally known as “Friends of Bayside Cemetery” (“FOBC”). FOBC was created by members and officers of Defendant Congregation Shaare Zedek. CAJAC maintained its principal place of business at 212 West 93rd Street in Manhattan which is where Defendant Congregation Shaare Zedek is headquartered.¹ Compl., ¶16. Ethan Klingsberg² and Gary Katz, both of whom are lawyers, were members of Congregation Shaare Zedek when they created FOBC. And Messrs. Katz (President) and Klingsberg (Secretary) became officers of FOBC.³

¹ See Affidavit of Michael M. Buchman dated February 1, 2010 (“Buchman Aff.”), Ex. A, Restated Certificate of Incorporation of Friends of Bayside Cemetery, Inc.

² Ethan Klingsberg, Esq., is a partner at Cleary Gottlieb Stein & Hamilton in New York. His practice focuses on corporate matters. See <http://www.cgsh.com/ru/eklingsberg>.

³ *Id.*, p. 3.

FOBC formally changed its name to CAJAC on April 13, 2007. It continued to maintain its headquarters at Congregation Shaare Zedek until approximately September 25, 2008 when it changed its address to Mr. Katz's office in White Plains, New York.⁴

The listed Officers of CAJAC are Gary Katz (President), Ethan Klingsberg, David Billet (Vice President and Secretary) and Barry Yood (Treasurer).⁵ Mr. Klingsberg was at all relevant times until approximately June 15, 2009 the Cemetery Chairman and on the Board of Trustees at Congregation Shaare Zedek.⁶ Thus, two of CAJAC's officers have strong ties to Congregation Shaare Zedek.⁷

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. Indeed, there is no indication that Congregation Shaare Zedek, which has admitted it misappropriated and mis-used perpetual care monies, has given monies sufficient to cover any liability concerning its misconduct and this lawsuit. In other words, CAJAC was created as a shell corporation to absolve Congregation Shaare Zedek of any liability or responsibility for its wrongdoing in

⁴ Buchman Aff., Ex. B., New York State Department of State, Division of Corporations filing for Community Association for Jewish At-Risk Cemeteries.

⁵ Buchman Aff., C., By-Laws of Community Organization for Jewish At-Risk Cemeteries adopted December 2, 2008.

⁶ On May 14, 2009, Congregation Shaare Zedek honored Gary Katz for his "extreme devotion to Shaare Zedek over the years" and for his "passion[] about the success of our synagogue community." The following was taken from a historical search of the Congregation Shaare Zedek website - Please save the date - Thursday, May 14, 2009 - as Shaare Zedek honors and recognizes Gary and Diane Katz and Phyllis Gold Gluck. Our extraordinary honorees have shown extreme devotion to Shaare Zedek over the years and are passionate about the future success of our synagogue community. This will definitely be a festive occasion, with lots of food and drinks, schmoozing, entertainment and more! Further details to follow. See also <http://www.szny.org/recognition>

⁷ Buchman Aff., Ex D. documents obtained from the Congregation Shaare Zedek website.

connection with Bayside Cemetery.⁸ Congregation Shaare Zedek's refusal to honor contracts at the cemetery or do anything to maintain the cemetery in a respectable condition bespeaks its desire to "wash its hands" of Bayside Cemetery. And CAJAC is the vehicle to effectuate this desire.

There can be little doubt about Congregation Shaare Zedek's intention to unload Bayside Cemetery on CAJAC since opposing counsel informed Chief Judge Dearie of this desire in the prior federal proceeding. *Id.* Moreover, it is Plaintiffs understanding based upon communications with a high ranking official within the NYAG's Office that Defendant Congregation Shaare Zedek's is required and has attempted to obtain permission from the NYAG to effectuate this transfer. The present status of the transfer is unclear at this time, but the commencement of the prior federal lawsuit has apparently caused the NYAG to defer approval of the transfer.

It is also interesting that a large grant from UJA Federation of New York to Congregation Shaare Zedek for restoration work at the cemetery was "redesignated" to CAJAC.⁹

It is also noteworthy that in addition to previously sharing office space with FOBC, Congregation Shaare Zedek is now sharing the property at Bayside Cemetery and its employees with CAJAC. Congregation Shaare Zedek has given *de facto* control of Bayside Cemetery while maintaining formal ownership of the property. For example and as alleged in the Complaint, CAJAC has taken control of and assumed responsibility for Bayside Cemetery by executing one

⁸ See Buchman Aff., Ex. E, letter from Stephen Axinn to the Hon. Raymond J. Dearie dated August 22, 2008, p. 2. (CAJAC was "created with the knowledge of the New York State Attorney General to assume title to and control of Bayside once it is adequately funded by charitable contributions.")

⁹ Buchman Aff., Ex. F letter from Stephen Axinn to Michael M. Buchman dated August 15, 2008, p 2 acknowledging UJA Federation \$145,000 grant and the 2005 tax return of United Jewish Appeal – Federation of Jewish Philanthropies of New York, Inc. reflecting on page 27 the grant in the name of Congregation Shaare Zedek. These monies earmarked for Bayside Cemetery by UJA were unquestionably "redesignated" by Congregation Shaare Zedek to CAJAC.

or more contracts with a landscaper to perform restoration work at the cemetery. How CAJAC could have entered into this contract concerning property it does not own and granted legal access to the premises while Congregation Shaare Zedek remains the owner of the proper is one of many facts which support the conclusion that CAJAC is Congregation Shaare Zedek, thereby necessitating CAJAC's participation in this lawsuit.

In sum, there are numerous facts which establish domination sufficient to maintain this action against CAJAC, including: (i) overlapping officers (Klingsberg and Katz); (ii) inadequate capitalization (failure to capitalize to cover stolen perpetual care monies); (iii) overlap in use and control of Congregation Shaare Zedek owned property at Bayside Cemetery and personnel working at the cemetery; (iv) the "redesignation" or sharing of monies for Congregation Shaare Zedek to CAJAC; and (v) the guarantee of debts of Congregation Shaare Zedek with respect to the contract for restoration at Bayside Cemetery. There can be little doubt that CAJAC was created to avoid responsibility and liability for an admitted wrong perpetrated by Congregation Shaare Zedek concerning the misappropriation perpetual care monies for the cemetery. The effort undertaken to create CAJAC by Congregation Shaare Zedek members and to attempt or intend to seek approval of a formal transfer of the property to CAJAC is an additional violation of Congregation Shaare Zedek's fiduciary duties to the Class and act of fraud.

There is also a practical reason to maintain CAJAC as a Defendant in this proceeding. Defendant Congregation Shaare Zedek has made its intention to transfer Bayside Cemetery to CAJAC patently clear. If all assets and liabilities concerning the cemetery are transferred to CAJAC during the course of this proceeding, Plaintiff will be required to commence an entirely new action against CAJAC or amend the existing action to bring CAJAC into the case. It is more convenient and efficient to include this Defendant now. CAJAC cannot maintain that its

participation in this on-going litigation is prejudicial since it is being well represented by a prominent law firm on a *pro bono* basis.

Accordingly, these facts, along with other facts which will be obtained through formal discovery in this proceeding, lead to the inescapable conclusion that Defendant Congregation Shaare Zedek is CAJAC.

II.

ARGUMENT

Under New York Civil Practice Law and Rules, a pleading is afforded liberal construction and the facts in the complaint are to be accepted as true. In assessing a motion to dismiss under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v. Orofino Realty Co.*, 40 N.Y. 2d 633, 634 (1976).

A. Congregation Shaare Zedek is CAJAC

It is well settled that equity will intervene to pierce the corporate veil in order to avoid fraud and injustice. *Daiminos Realty Group, LLC v. Fracchia*, 825 N.Y.S.2d 274 (2006). Courts will disregard the corporate form to pierce the veil whenever necessary to prevent fraud or achieve equity. *International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 292 (1948). “Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing varying circumstances when the power may be exercised.” *Morris v. NYSTF*, 603 N.Y.S.2d 807, 811 (1993) (citing *Presser, Piercing the Corporate Veil*, § 2.33[1], at 2-291-2-293). Piercing the corporate veil, generally, requires a showing that the defendant (i) exercised dominion and control over the corporation, and (ii) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury. *Id.*

Factors courts consider when determining dominion or control include the following: (i) inadequate capitalization; (ii) personal use of corporate funds; (iii) commingling of personal funds; (iv) overlap in officers, directors and personnel; (v) common office space and addresses; (vi) property which was used by the other as though it were its own; (vii) payments or guarantee of debts among the two corporations. See *Simplicity Pattern Co., Inc. v. Miami Tru Color Off-Set Serv., Inc.*, 1994 N.Y. App. Div. Lexis 11830 (1st Dept); *Lockett v. Tuff City Records*, 214 N.Y.L.J. 107 (Sup. N.Y. May 19, 2009).

In *Simplicity Pattern Co.*, the First Department held that a trial court properly pierced the corporate veil on facts which were virtually the same as here. The First Department stated that “inadequate capitalization; an overlap in ownership, officer, director and personnel; common addresses and telephone numbers, payments of debts and use by Miami Tru-Color of Tru-Color’s property” were sufficient to find the two companies were one in the same. In addition, the shifting of funds concerning these two companies was also a factor to uphold the trial court’s decision to pierce the veil. All of those facts exist here. In this case, Congregation Shaare Zedek and CAJAC are so intertwined so that they should be considered one in the same for the following reasons:

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| <i>Inadequate Capitalization:</i> | CAJAC has not been adequately capitalized to be able to satisfy a judgment concerning the misappropriation of perpetual care monies Congregation Shaare Zedek has publicly admitted it mis-used to fix the synagogue’s roof; |
| <i>Overlap in Corporate Officers:</i> | Ethan Klingsberg and Gary Katz; |
| <i>Common Office Space:</i> | FOBC/CAJAC were headquartered at Congregation Shaare Zedek; |
| <i>Use of Property:</i> | Congregation Shaare Zedek has given CAJAC <i>de facto</i> control of Bayside Cemetery and its employees; |

Shifting of Funds:

Congregation Shaare Zedek has made arrangements with UJA Federation of New York to “re designate” monies dedicated to Congregation Shaare Zedek for use to restore Bayside Cemetery directly to CAJAC; and

Guarantee of Debts:

CAJAC has executed a contract to perform restoration work at Bayside Cemetery – property which Congregation Shaare Zedek owns, thereby CAJAC has undertaken a debt obligation concerning property it does not own.

Defendant’s motion to dismiss is also inconsistent with case law cited in its brief. *In Frigid Food Prods, Inc. v. City of Detroit*, 187 N.W. 2d 916, 31 Mich. App. 402 (Mich. Ct. App. 1971). In *Frigid Food*, the Michigan Court of Appeals held that an overlap in the officers and directors was evidence of “affiliation or relationship” between the two companies sufficient to find they were one in the same. Under these facts and circumstances, Plaintiffs have adequately alleged domination and that such domination was and is designed to perpetrate a fraud on Plaintiffs in order to avoid liability for “misappropriated” perpetual care monies by Congregation Shaare Zedek. Accordingly, Plaintiffs respectfully request that Defendant’s motion to dismiss be denied in its entirety.

B. Plaintiffs’ Request For Discovery

If the Court is not inclined to deny the motion to dismiss in its entirety, Plaintiffs, in the alternative, respectfully request that the motion be denied with leave to replead as a motion for summary judgment after the close of discovery. Plaintiffs request formal discovery since the theory of piercing the corporate veil involves a fact laden inquiry that is not well suited for resolution on a pre-answer, pre-discovery motion to dismiss. *Kralic v. Hemsley*, 743 N.Y.S.2d 15 (1st Dept 2002); *First Bank of Ams. v. Motor Car Funding*, 690 N.Y.S.2d 17 (1st Dep’t 1999). Before a motion to dismiss can be granted, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil. *USA Holdings, Inc. v. TSE-PEO*,

Inc., 886 N.Y.S.2d 69 (Kings Cty Sup. 2009). Accordingly, Plaintiffs respectfully request discovery concerning these issues and have already prepared and served document requests on Defendant.

C. This Suit is Not In Contravention of Any Court Order

Defendant CAJAC's suggestion that the Complaint naming it as a defendant in this action violates a court Order in the federal proceeding and warrants an award of fees is absurd for three reasons.

First, Congregation Shaare Zedek is CAJAC and the facts presented on this motion, at a minimum, create more than a good faith basis for naming it as a Defendant.

Second, Defendant's "affiliation" argument is belied by its own case law.¹⁰ *See In Frigid Food Prods, Inc. v. City of Detroit*, 187 N.W. 2d 916, 31 Mich. App. 402 (Mich. Ct. App. 1971). In *Frigid Food*, the Michigan Court of Appeals held that evidence of overlapping officers, directors or stockholders was evidence of "affiliation or relationship" between the companies in question. Indeed, the facts here present much more evidence.

Third, CAJAC's attorneys' request for fees concerning this motion is misplaced. To make such a request, CAJAC was required to bring this motion under CPLR § 8303-a which is referenced nowhere in its brief. Furthermore, CAJAC is being represented by Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") on a *pro bono* basis. Skadden is a prominent national law firm which has made a conscious decision to handle this case on a *pro bono* basis for its former associate, Gary Katz, and former partner Stephen Axinn who is representing Congregation Shaare Zedek also on a *pro bono* basis. To request fees *after* agreeing to proceed

¹⁰ The other "affiliation" cases cited by Defendant are not only non-binding,, but also largely involve use of the word pursuant to a specific federal statute not applicable here. In sum, the argument is strained. Defendant asks the Court to ignore the common sense definition which is, in fact, referenced in footnote 7 of Defendant's brief. Plaintiffs have adequately alleged domination sufficient to satisfy the basic Webster's Dictionary definition.

at no cost or expense does a disservice to *pro bono* litigation – a service purportedly deeply engrained in Skadden’s firm culture. See <http://www.skadden.com/Index.cfm?contentID=8>.¹¹

III.

CONCLUSION

For the foregoing reasons, Defendant’s motion to dismiss should be denied in its entirety or with leave to replead as a motion for summary judgment after the close of discovery.¹²

Dated: February 1, 2010
New York, New York

Respectfully submitted,

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Pro Bono Counsel for Plaintiffs

¹¹ As additional support for the deep tradition of *pro bono* work performed by Skadden, defendant CAJAC’s attorney filed the court documents for their motion to dismiss and listed the attorney’s email address with a domain of “probonolaw.com”.

¹² To the extent this Court grants any portion of Defendant’s motion to dismiss, Plaintiffs respectfully request leave to replead.