

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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3 JOHN R. LUCKER, ET AL
PLAINTIFFS

4
5 versus 07 CV 3823(RJD)

6 BAYSIDE CEMETERY AND CONGREGATION, ET AL

7 DEFENDANTS. U.S. Courthouse
Brooklyn, New York

8 -----x

9 June 29, 2009

10 TRANSCRIPT OF MOTION

11 Before: HONORABLE RAYMOND J. DEARIE,

12 UNITED STATES DISTRICT JUDGE

13

14 APPEARANCES

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25 Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 THE COURT: Good afternoon.

2 MR. BUCHMAN: Good afternoon, Your Honor.

3 THE CLERK: We're on this afternoon for oral argument.
4 We have three cases, 07 3823, which is Lucker versus Bayside;
5 08 3555, which is Cohen versus Bayside; and 08 3923, which is
6 Goldstein versus Bayside.

7 Can I the ask the attorneys please to note their
8 appearances, beginning with counsel for plaintiff?

9 MR. BUCHMAN: Michael M. Buchman, Your Honor, for the
10 plaintiffs, Lucker, Goldstein and Cohen.

11 THE COURT: Please be seated, folks.

12 MR. AXINN: I'm Steven Axinn, Your Honor, for
13 defendants, Bayside and Shaare Zedek.

14 THE COURT: Welcome back.

15 MR. AXINN: With me is Russell Steinthal, my
16 colleague.

17 THE COURT: Okay. Welcome back. Come up.

18 MR. AXINN: Thank you, Your Honor, before we turn to
19 the subject of the motion to dismiss --

20 THE COURT: Right.

21 MR. AXINN: -- because I know that the Court has such
22 an interest in being kept updated as to the developments
23 affecting Bayside Cemetery itself, I want to take a moment
24 before we get to that motion to dismiss to advise the Court of
25 some important developments that have occurred --

1 THE COURT: All right.

2 MR. AXINN: -- since we were last here, which I think
3 go a long way towards providing a solution to the problem that
4 we all recognize existed at that cemetery.

5 THE COURT: That cemetery, and apparently others, but
6 go ahead.

7 MR. AXINN: That's right.

8 THE COURT: We'll stay with Bayside for a moment.

9 MR. AXINN: As you heard from Mr. Katz when he was
10 here last time -- well, about two months ago, that organization
11 called the Community Association to Assist Jewish At-Risk
12 Cemeteries, CAJAC, by acronym, entered into a contract with a
13 professional landscape contracting company called "M" as in
14 Mike, "C" as in Charlie, Landscaping Group, to restore Bayside
15 Cemetery. And they did this thanks in large part to a grant
16 that they received from the United Jewish Appeal Federation,
17 UJA Federation of New York.

18 Under this contract, the cemetery will be restored
19 at -- excuse me, and will be maintained. Work has been
20 underway since the contract was signed, and that's about six
21 weeks now of work. And there has been substantial progress
22 made in cleaning up the cemetery, and bringing it back -- if I
23 may pun a phrase -- bringing it back to life. And in that
24 connection, I've handed a copy of these photographs to my
25 opponent, Mr. Buchman, and I'd like to hand up to the Court

1 these photographs that were taken within the last ten days that
2 reflect the kinds of conditions that we're restoring now.

3 You can still see in several of these photographs the
4 conditions pre-restoration, but you can also see the
5 substantial progress that's being made, and this is just --
6 we're just getting started. This is a one-year project.

7 As I indicated to the Court on a couple of previous
8 occasions, we were dealing with a very substantially overgrown
9 situation. And this project is going to take a while to clean
10 up. But the good news is that by the time of the Jewish
11 holidays, in mid to late September this year, the graves will
12 be accessible and they will be presentable. And there will be
13 qualified personnel on-site during business hours at Bayside to
14 assist those families and mourners who visit the cemetery and
15 to visit the graves.

16 Now in this regard, Your Honor, Shaare Zedek,
17 Congregation Shaare Zedek, the defendant here, has been working
18 very closely to get these things accomplished, both with CAJAC
19 and with the New York State Attorney General's office.

20 CAJAC has, in fact, embarked on a very ambitious plan
21 to raise a substantial sum of money in an endowment, so that it
22 can demonstrate to the satisfaction of the Attorney General
23 that it has the financial capacity to operate Bayside and other
24 Jewish at-risk cemeteries in the New York area in perpetuity,
25 and Shaare Center is actively assisting CAJAC in this effort to

1 raise the money and to transfer Bayside Cemetery, when CAJAC as
2 finally raised the necessary endowment funds, to get the
3 Attorney General and the Court's approval to transfer control
4 of the cemetery finally into hands that can maintain it and
5 operate it into the indefinite future.

6 Now, Shaare Zedek wants to at least publicly
7 acknowledge to the Court and to the public the very generous
8 and timely support that we have received from the Jewish
9 community, starting with UJA Federation and including
10 organizations like the Hebrew Free Burial Association and CAJAC
11 itself and its organizers, as well as countless volunteers who
12 have shown up on Sundays and occasionally during the week in
13 work clothes and rolled up their sleeves and pitched in to help
14 to clean this cemetery up.

15 I know how bad it was, your Honor knows how bad it
16 was, and the plaintiffs certainly know how bad this cemetery
17 was. The good news is that this cemetery is being fixed. It's
18 being repaired, and I thought that Your Honor would want to
19 know this, you know, as you now delve into the more legal
20 issues, and I would like to ask my colleague, Russell
21 Steinthal, at this point to take the podium and to address the
22 motion to dismiss which is before the Court.

23 THE COURT: All right.

24 MR. BUCHMAN: Your Honor, maybe --

25 THE COURT: Did I understand you to say that there is

1 enough money in place now, by virtue of the UJA grant, to
2 restore and maintain or that's something that is --

3 MR. AXINN: The UJA grant is really in the nature of
4 a seed grant. It was enough to get this process under way.
5 Fundraising is going on now. CAJAC is setting up to operate a
6 drive to raise the kind of money within the Jewish community
7 that will satisfy the Attorney General that they have the
8 wherewithal to operate this cemetery, which Shaare Zedek
9 frankly does not have. And then at that point we would, with
10 approval of the Attorney General, seek the Court's approval,
11 the State Court's approval, to make the transfer of title and
12 once and for all, put Bayside in permanent hands.

13 MR. BUCHMAN: Your Honor, Michael Buchman for the
14 plaintiffs. Just one brief comment before we begin the oral
15 argument on the motion to dismiss.

16 First of all, we were under the impression that we
17 would get a copy of any contract that the defendants entered
18 into regarding the cemetery. In fact, that was one of the
19 conditions that we entered into in order to give them a
20 six-month stay the last time, and we haven't received a copy of
21 this contract.

22 MR. AXINN: It's not a contract the defendants entered
23 into. I don't mean to interrupt Mr. Buchman, but this is a
24 contract between CAJAC and the MC Landscape Group.

25 MR. BUCHMAN: Well, that wasn't made clear during your

1 discussion.

2 MR. AXINN: I thought it was, but I apologize.

3 MR. BUCHMAN: The other point is, Your Honor, we
4 understand from people that are working at the cemetery that
5 this contract may expire at the end of July.

6 And lastly, Your Honor, this picture represents the
7 vast majority of what the cemetery actually looks like today.

8 In fact, opposing counsel, this is in your pamphlet.

9 MR. AXINN: The last picture in here?

10 MR. BUCHMAN: Right.

11 And, in fact, opposing counsel, when we were
12 discussing these pictures before Your Honor took the bench
13 agreed that the pictures that they sent you, with the exception
14 of this one, represent one-tenth of the cemetery.

15 So the vast majority of the cemetery remains in this
16 condition. While we applaud the defendants' efforts to make a
17 dent in the condition of the cemetery, and we're surprised
18 because we've heard from them over and over again before, Your
19 Honor, that there was no way any progress could be made while
20 this litigation was pending, and now they're here today showing
21 one-tenth of progress. We would respectfully submit that the
22 case should proceed, and we'll entertain argument at this time.
23 If you have any questions --

24 MR. AXINN: Your Honor, just to correct --

25 THE COURT: That's why we're here.

1 MR. AXINN: -- Mr. Buchman is incorrect in thinking
2 this contract will expire at the end of July. The initial
3 contract is for one year, and it is renewable, assuming that
4 CAJAC is funded by organizations like UJA or by the public, and
5 we intend to -- it is CAJAC's intention that this landscape
6 group will complete the entire restoration of the cemetery
7 within that year.

8 So yes, it's not done yet -- and we included
9 photographs in your packet to show Your Honor how much there is
10 still to be done. But I don't know whether it's ten percent.
11 I wouldn't hazard a guess.

12 But I know that they're making substantial progress
13 day by day. There is a crew of two or three people out with
14 machinery and equipment, plus, as I said, many, many volunteers
15 who are there every weekend, and as a result, the cemetery is
16 being put back into presentable condition.

17 THE COURT: All right. Thank you. Thank you. It's
18 promising news. It's where this all -- I think we all
19 appreciate where this all has to lead to, and with that, we'll
20 turn our attention to litigation itself.

21 Sir?

22 MR. STEINTHAL: Thank you, Your Honor.

23 As Mr. Axinn alluded to, well, it does, it goes
24 without saying that the plaintiffs before the Court today are
25 concerned about Bayside Cemetery, as we all are, and indeed,

1 they have relatives buried there, and they undoubtedly have a
2 particularly poignant type of concern, which as we said in our
3 papers, most of them are retired doesn't actually bear --
4 because the truth is that there are, if any, only a handful of
5 relatives of current members buried there.

6 The question today, however, is not whether the
7 cemetery should be cleaned up, a process that already is under
8 way, but whether these plaintiffs had a legal right to pursue
9 these actions -- and on that question of law, even the
10 sincerest concern can substitute for the type of particularized
11 individual injury-in-fact that the Supreme Court has described
12 as being part of the irreducible constitutional minimum of
13 standing under Article 3.

14 These plaintiffs in their complaint do not allege that
15 they paid any money to either defendant. They don't allege
16 that they purchased any care or any graves from the defendant.
17 They don't allege that they had any relationship with either
18 defendant even before this litigation, fiduciary or otherwise.
19 And they don't allege that they have any claim, legal or
20 otherwise, to the principal or interest and income of any trust
21 at issue here.

22 Instead, they rely solely on the injury that was
23 allegedly suffered by their relatives, and yet at the same
24 time, they disclaim in their briefs any intent to proceed as
25 executors or administrators of their relatives' estates.

1 THE COURT: What's your position on the latter point?

2 MR. STEINTHAL: I'm sorry?

3 THE COURT: What's your position on the latter point?

4 I wasn't quite sure from your submission. Do you maintain that
5 for all intents and purposes they're -- the plaintiffs are here
6 in a representative capacity?

7 MR. STEINTHAL: No, Your Honor, we don't. We would
8 contend that, respectfully, although they're concerned, they're
9 actually here in -- they purport to be here in their individual
10 capacity, of which they have no standing.

11 The complaints themselves don't mention at any point
12 any estate, any decedent, any executorship, any wills, and in
13 fact, in their response on the jurisdictional question, the
14 plaintiffs' counsel actually specifically said that the current
15 complaints do not allege standing in a representative capacity.

16 They said that on amendment, Mr. Lucker could state
17 such a capacity. But I believe that the plaintiffs' belief
18 that they do not currently stand in that capacity here, and
19 certainly, they have not alleged that they possess any letters
20 of administration or letters testamentary from surrogate's
21 court that would be required for them to proceed in a
22 representative capacity.

23 THE COURT: Well, they do say a number of things.
24 They say they bring the action on their own behalf. Paragraph
25 9 in their brief, they use the term "stand in the shoes of

1 their relatives" and suing in their personal capacity as legal
2 representatives.

3 MR. STEINTHAL: Right. I don't --

4 THE COURT: What does that mean? I know this is
5 perhaps best put to Mr. Buchman, but for the time being, let's
6 put it to you.

7 MR. STEINTHAL: I think what that means is that the
8 plaintiffs rely on a line of cases that they read as saying
9 that any relatives and family members, and even in some cases,
10 close friends of people buried in the cemetery, have some sort
11 of special standing to defend burial rights and
12 cemetery-related claims.

13 And so I believe the plaintiffs are arguing here that
14 outside the framework of an estate, outside the framework of
15 surrogate's court, that they can represent in some sense the
16 injuries that -- the interest of their deceased relatives.

17 Our position is that the complaint has to be read as
18 its -- on its face. And frankly, we thought this was clear
19 before the plaintiffs conceded in briefing, which is that they
20 claim to stand here in their individual capacity.

21 And if you read the Rule 23 purported class definition
22 in the complaint, I think that make that's clear. They say
23 that the class includes not just those who purchased perpetual
24 care, but all relatives of people who purchased perpetual care.
25 And that they believe that the plaintiffs who are the relatives

1 stand in their own capacities. They may be raising arguments
2 before the Court that are ones that they believe that if their
3 relatives were still alive, they could be making.

4 But it's a legal matter, as a constitutional matter
5 and a jurisdictional matter, the Court has to inquire as to
6 whether these plaintiffs have the type of personal injury and
7 the type of personal stake in the remedy that comes from the
8 litigation, support jurisdiction.

9 They -- the reason that we have a mechanism by which
10 the Attorney General represents the beneficiaries of charitable
11 bequests and enforces the Perpetual Care Trust is precisely
12 because the State of New York wanted a mechanism by which
13 claims that arise after death could be vindicated. But not by
14 saying necessarily that anyone who can claim to say, I am
15 related in some way to the person who might have had a claim --
16 could have made the point.

17 I think it's also worth noting that the claims here,
18 that are alleged here arose, as far as we can tell, after the
19 deaths of the decedents, and even an executor under New York
20 law, under the Matter of Gandolfo, which we cited, even an
21 executor can only maintain a representative action as to claims
22 that were viable at the moment of death. And so -- because if
23 they were not viable at the moment of death, they were not
24 attached to the estate and therefore, they are not within the
25 administrator's ability to represent.

1 So we suggest that even if they were to amend their
2 complaints, they would not have valid representative claims,
3 but certainly, they have not done so yet.

4 So as we said, there is a mechanism in New York law,
5 to handle this.

6 THE COURT: Didn't work for them.

7 MR. STEINTHAL: I'm sorry?

8 THE COURT: Didn't work for them. To be more precise,
9 it hasn't worked so far.

10 MR. STEINTHAL: I think the plaintiffs are
11 dissatisfied with -- and they have made clear that they're
12 dissatisfied with the result that they believe they have gotten
13 from the Attorney General's office.

14 THE COURT: I thought that was the one point we all
15 agreed on. We're all dissatisfied with the state of affairs.

16 MR. STEINTHAL: No. I think that we all -- we all
17 agree that we are disappointed in the state of the cemetery,
18 and believe that the cemetery should be restored as promptly as
19 possible to an appropriate condition.

20 The plaintiff's dissatisfaction, as I understand it,
21 is that the Attorney General has not commenced an enforcement
22 action to seek to vindicate the particular retrospective
23 looking-back claims they want to bring here, the conversion and
24 breach of contract claims that they bring here.

25 And the truth is that the Attorney General, as Your

1 Honor knows, is well aware of this action. And it's not just a
2 theoretical matter. We continue to be in discussions and we
3 continue to answer their requests for information. And if the
4 Attorney General were to believe that it was in public interest
5 to proceed in an enforcement action, they could do so.

6 THE COURT: So the only recourse that the family
7 members have is to rely on the Attorney General to bring some
8 sort of enforcement action?

9 MR. STEINTHAL: To the extent their claims --

10 THE COURT: In the context of this sort of thing, are
11 you comfortable with that? That's an unfair question. Should
12 I be comfortable with that?

13 MR. STEINTHAL: I think, Your Honor, that first of all
14 we have to recognize that unfortunately or fortunately,
15 depending on the context, the jurisdictional statutes and
16 Article 3 impose limits on what sorts of actions can proceed in
17 federal court and what sorts of harm can be remedied.

18 And we would all like there to be a perfect world in
19 which the cemetery was clean and restored, and we're working
20 towards that. And I'm comfortable with the fact that Shaare
21 Zedek, in conjunction with the Jewish community that Mr. Axinn
22 mentioned, is working towards restoring the situation.

23 But I am comfortable with the idea that we could have
24 a productive discussion with the Attorney General's office.
25 Their claims would not be released by any judgment that was

1 handed down here. And the Attorney General's in the best
2 position to determine appropriately the balance of the
3 interests of the two charities, essentially, that are involved
4 here.

5 And I think it's worth noting that to the extent
6 there's a claim here, part of this claim amounts to a question
7 about what unfortunately a religious corporation did 35, 40,
8 50, 60 years ago, a hundred years ago.

9 It has to do with questions of what the various
10 societies who were themselves not-for-profit organizations or
11 insurance companies that went defunct and whose claims accrued
12 to the benefit of the estate, what their rights and obligations
13 were here. And this is a complicated question of both -- both
14 law and policy. And we do believe in the confidence of the
15 Attorney General to sort that about the people.

16 And so, I do think that they have a mechanism. They
17 certainly know the phone number of the Attorney General's
18 office. And they have been in talks with them. And that we
19 would respectfully submit that, you know, we don't think we're
20 going to necessarily get a clean bill of health from the
21 Attorney General's office, but we'd like the right to negotiate
22 that in a single forum and not be litigating it in federal
23 court, as well as ultimately in state court with the people.

24 THE COURT: I want to go back to the point made
25 before. If I buy a plot and buy a perpetual care -- enter into

1 a perpetual care contract and die, and sometime thereafter, one
2 would make a judgment that the perpetual care end of the
3 bargain is not being lived up to. Your view of it is based
4 upon the Trusted Estates law that an executor of the estate
5 would not be in a position to enforce that perpetual care
6 contract, and the only conceivable remedy would be an action by
7 the Attorney General. Does that make sense?

8 MR. STEINTHAL: Well, I think that -- I think that
9 this is a --

10 THE COURT: The claim doesn't exist at the time of
11 death you tell me. Under --

12 MR. STEINTHAL: Gandolfo, I believe.

13 THE COURT: Yes, under Gandolfo.

14 MR. STEINTHAL: Your Honor, I think that -- first of
15 all, that's not the case presented here in the sense that we
16 don't have an executor before us.

17 And -- but to the best of my ability to understand the
18 general -- the prevailing New York law that's what Gandolfo
19 says. Gandolfo -- because in some sense, otherwise, it will be
20 a claim without end.

21 It could be the case that -- I mean, that we have
22 people buried in Bayside Cemetery that were buried in Bayside
23 Cemetery in 1850, people who entered into perpetual care
24 contracts in 1912, and the executor -- I mean, essentially what
25 the plaintiffs would be suggesting is not just that an executor

1 could bring the claim, but that even after the estate was wound
2 up, the executor can submit their final accounting, and even
3 after the executor has passed away, 20 years after that, that
4 someone -- that the circuit court should be in the business of
5 appointing another executor to bring -- or special
6 administrator to bring an action to vindicate this claim.

7 And I think that there is -- at some point cemeteries
8 are a little bit too generous. That's true. You can have
9 these sorts of claims. Perpetual care contracts are odd beasts
10 of contract that is obviously meant to be in perpetuity, but I
11 think that the Attorney General is in the best position to do
12 that.

13 I think it's also worth noting, Your Honor, that if
14 Your Honor were to make that a perpetual care contract, we
15 should be clear as to what you'd be contracting for. It would
16 not be to say that we owe -- a cemetery owes a duty to Your
17 Honor or Your Honor's heirs to have the cemetery be clean, or
18 even if necessarily, unfortunately the case, to say that your
19 grave was clean.

20 All the contract says -- and if you look at the
21 contract that's proffered by the plaintiffs -- it says very
22 clearly, is that the cemetery will accept the amount of money
23 that it's given and hold it in trust, and will apply the income
24 each year towards cleaning the grave to the extent possible.

25 We have deposited -- we have perpetual care contracts

1 of \$200. Now, it may be the case that people in all good faith
2 thought in the early 1900s that \$200 would be enough money to
3 generate interest to care for a grave in perpetuity. But at a
4 one percent interest rate, or whatever we're getting on
5 endowment funds these days, \$2 a year is not going to, in
6 today's day and age, clean a grave.

7 And so I think that it's important to recognize that
8 the policy question of how this cemetery looks, sort of the
9 overall how we should maintain the cemetery, is actually in
10 many ways a distinct problem from that of perpetual care
11 contracts.

12 And I give credit to plaintiffs for the ingenuity of
13 trying to get the claim that they have, but the real claim
14 seems to be, they believe that Shaare Zedek was not adequately
15 cleaning the cemetery. That's why we have a conversation about
16 restoring the cemetery in the global sense. And they hitched
17 onto these perpetual care contracts as the way to try to find a
18 bootstrap of standing.

19 There are 32,000 graves at Bayside, give or take. And
20 the plaintiffs are not here saying they represent all of those
21 buried there and all of their relatives. They purport to
22 represent only a class of those who purchased perpetual or
23 annual care. There's no annual care plaintiffs in this
24 complaint, but the class is one or the other.

25 And they have tried to hook that obligation into the

1 obligation of cleaning the cemetery. But I think that in
2 reality, we have a very narrow contractual relationship with
3 these parties. And yes, I think that if it accrued after
4 death, it's best dealt with in the regulatory framework.

5 The case that the -- before the last hearing that Your
6 Honor scheduled, plaintiffs sent some authority of Smithers v.
7 -- I'm sorry. I have the exact name here -- it's Smithers v.
8 St. Luke's Hospital Center, 723 New York Supp 2nd 426, an
9 Appellate Division First Department case, on which they intend
10 to rely, and I think that Smithers actually supports the
11 proposition that we make here today.

12 In Smithers, the First Department recognized, first of
13 all the background rule, that the Attorney General is the
14 statutory enforcer of the rights the beneficiary of charitable
15 trusts. And recognizing that was the long-standing rule in New
16 York State, and frankly, that's the rule that we argued for in
17 our briefing here.

18 The majority in Smithers though, carved out a narrow
19 exception. They said that in their view, a donor of a
20 charitable gift had standing to enforce that gift during his
21 lifetime.

22 So Mr. Smithers donated a charitable gift under
23 certain conditions. He believed that those conditions were
24 not -- were being violated, and that he would have standing
25 during his lifetime to enforce.

1 THE COURT: Uh-hum (affirmative response).

2 MR. STEINTHAL: And they secondly said that
3 Mrs. Smithers, his widow, who was a properly-appointed
4 administrator of his estate, had the standing to continue such
5 an action after his death. And they explicitly note, as I
6 mentioned reference to Gondolfo, to idea that the claim accrued
7 before his death. He was already concerned that St. Luke's was
8 misusing the property.

9 In this case, by contrast, the plaintiffs here do not
10 claim to be donors. None of them claim that they actually made
11 any gift in trust or paid for any perpetual care, nor do they
12 claim to be administrators, even -- whether it's because they
13 don't even purport to be an estate, and they don't purport, as
14 Mrs. Smithers had, to have letters testamentary from surrogates
15 court. And finally, the claim here, again, accrued after
16 death, unlike Smithers.

17 And I think that even though Smithers I think,
18 supports our side, I would point the Court also to the dissent
19 in the Appellate Division, which said frankly, that they --
20 that he believed that -- Judge Freedman believed it was -- he
21 said that he believed that the majority opinion itself was a
22 departure from the governing New York law, and he would have
23 even more closely adhered to the rule of the Attorney General
24 as the sole enforcer of the charitable beneficiary's rights.

25 And if -- Judge Freedman had an interesting point in

1 dissent. I shouldn't quote the wrong judge. I believe it was
2 Freedman, but the dissenting judge had I think an interesting
3 point -- it was Judge Freeman -- in dissent, which was, he
4 noted the fact that the long-standing rule in New York is that
5 when a party makes a -- when a person makes a charitable gift
6 in trust, a charitable gift or a gift in trust, that at that
7 point, they forfeit all of their continuing rights, unless they
8 maintain a reverter, unless they maintain the right to get the
9 property back in some certain circumstance.

10 That gift is absolute or in trust. Their interests
11 are excluded, as are their heirs. It becomes a matter for,
12 like the mini-trust. The separate interests are largely
13 excluded by the trust document, and it's the beneficiaries who
14 would have the right to enforce a trust.

15 In the case of a charitable trust, the beneficiaries
16 are people of the State of New York, and again, it's the
17 Attorney General who can enforce that.

18 And I think it's telling when we look at the cases
19 here that the plaintiffs in our case bring claims that, for
20 example, found in conversion, where one of the elements of the
21 conversion claim would be a present right to the property that
22 is superior to that of the defendant.

23 And yet, these plaintiffs, who are by their own
24 allegations, the children, grandchildren, other relatives of
25 the person -- people who donated the money for charitable --

1 for perpetual care, they don't claim to have any rights to that
2 property.

3 Even if they were to prevail, the remedy would be
4 presumably to be to restore the property to the trust and not
5 to them. Again, demonstrating that they don't have the
6 standing that is necessary to pursue the claims here. They
7 don't purport to be beneficiaries.

8 If we turn off the question of standing to the --
9 closer to the merits of these claims, even if the plaintiffs'
10 relatives could be here before the bar today, if their
11 grandparents were here today, the vast majority of these claims
12 would be barred.

13 As I mentioned in our briefing papers, the statute of
14 limitations bars all breach of contract claim here. We don't
15 for a number of reasons make an argument on a breach of
16 contract on statute limitation grounds. We think there are
17 other reasons why those claims are deficient, as well.

18 But the Statute of Limitations applies here for all
19 other reasons that it was ever enacted by the legislature. The
20 Paramatic (phonetic) case we have here. We have transactions
21 that occurred 20, 30, 40 years ago. We have very few, if any,
22 witnesses who could testify to the circumstances by which the
23 plaintiffs' relatives were induced to make these contracts,
24 what the circumstances were when they made the contracts, what
25 the terms of the contracts were. The documentary record is,

1 unfortunately, quite fragmentary at this point, not because of
2 any spoliation, but just because we're talking about the
3 records of a small synagogue and a small cemetery over a forty-
4 year time frame -- even more if we look back to before the
5 class period goes to 1970. As I said, the cemetery was built
6 in 1850, give or take, and the perpetual care contracts go back
7 to 1912.

8 And so I think there's actually a decent amount of
9 records available, but they're far from what we need to be able
10 to fully defend the case. That's why the legislature has
11 enacted a statute of limitations to place a limit on how far
12 back we can look. And the claims here, we enumerated in our
13 belief, and I would be happy to go through them if Your Honor
14 wants -- but three to six years on each of the claims.

15 And the reality is that the plaintiffs' complaints
16 themselves make clear that the contracts were entered into more
17 than 20, 30 years ago, that the cemetery was in disrepair 20
18 years ago, that the diversions, if they occurred, occurred some
19 time ago, as well.

20 And you know, the fact is, Your Honor, that I know
21 that in an earlier hearing, you expected a little bit of
22 skepticism about the idea of the statute of limitations being
23 pled here, but at some point, the policy --

24 THE COURT: As complete bar?

25 MR. STEINTHAL: As a complete bar. And I think as a

1 limiting factor here, the legislature's policy makes sense to
2 say, we don't look back so far.

3 The Attorney General, it should be noted, has the
4 ability to ask for records going back as far as he wants and to
5 some extent, he can look back.

6 THE COURT: Why aren't you talking about jurisdiction?

7 MR. STEINTHAL: Why am I not talking about
8 jurisdiction?

9 THE COURT: Yes.

10 MR. STEINTHAL: Well, Your Honor, as we noted in our
11 supplemental brief, we believe the standing point, the lack of
12 injury-in-fact is itself jurisdictional.

13 THE COURT: I understand.

14 MR. STEINTHAL: As to the diversity points that Your
15 Honor highlighted in the prior -- in the briefing order before
16 the last hearing, I think our position is a little bit
17 uncertain.

18 As I noted earlier on and as Your Honor asked, in
19 response to Your Honor's question, we read the complaint as
20 standing in a individual capacity and not standing as a
21 representative.

22 So although Your Honor points to (c)(2) as a question
23 of diversity of citizenship jurisdiction, we would suggest that
24 that only would come into play if there would be a (c)(2), and
25 in this case, the plaintiffs themselves -- at least the Lucker

1 plaintiffs -- the Lucker plaintiffs are not New York residents.
2 They allege that they are residents outside New York and we'll
3 give them the credit for the idea that's where their domicile
4 is. They're citizens of states outside of New York.

5 The Cohen and Goldstein plaintiffs are, but purport
6 under the class definition that they say that they're part of a
7 Class Action Fairness Act class, which requires only minimal
8 diversity. The Lucker plaintiffs themselves would create a
9 minimal diversity for Cohen and Goldstein.

10 So if the Class Action Fairness Act applies, then it
11 would seem that they have the diversity of citizenship. And as
12 to why we don't have a Class Action Fairness Act, the problem
13 fundamentally is the (d)(2), (d)(3), and the (d)(4) issues that
14 you had asked us to brief is that the Second Circuit has been
15 clear that the burden of proving the applicability of the
16 exceptions is on the party seeking to avoid jurisdiction.

17 And given the class definition we have here, that the
18 class is all people who have perpetual annual care and all of
19 their relatives, there's simply no way in good faith that we
20 would say we know where the class members in the aggregate are
21 residents, because I can't identify all of the relatives of Mr.
22 Lucker, let alone know their states of residence. And so I
23 could not make a motion to say I know that one-third or
24 two-thirds or any percentage of those members are in state or
25 out of state. And so, we opted to proceed on, we think,

1 equally compelling jurisdictional grounds, without
2 injury-in-fact, and these issues are linked.

3 If you were to look more firmly for plaintiffs who had
4 injury-in-fact, who have actually made the contract that had
5 been breached, then the class definition itself would be much
6 more manageable, and we could actually answer the question
7 about diversity of citizenship.

8 It's the fact that the plaintiffs seek to rely on this
9 very amorphous concept that any relative or friend or family
10 member of someone buried in the cemetery had standing to
11 enforce on the cemetery claims that create the uncertainty as
12 to jurisdiction.

13 THE COURT: All right. We'll turn it over to your
14 colleague here.

15 MR. STEINTHAL: Sure.

16 THE COURT: Thank you.

17 Shall we begin with jurisdiction?

18 MR. BUCHMAN: If you'd like, Your Honor, I'm happy to
19 address any questions that you might have, and I'll start
20 there.

21 We understand that under the Blockbuster case, the
22 Second Circuit said that under the Class Action Fairness Act,
23 we have to prove three things for jurisdiction to exist before
24 the Court.

25 First, that there are more than a hundred members

1 involved in the class action. And if Your Honor would allow me
2 to hand up an exhibit that was produced during jurisdictional
3 discovery, this is a document --

4 THE COURT: I don't think anybody's contesting that
5 point, but go ahead.

6 MR. BUCHMAN: This is a document, entitled,
7 "Mausoleums, Plots and Graves Under Perpetual Care." This
8 document was produced to us in this litigation as a result of
9 Your Honor's order and Magistrate Judge Azrack's order --

10 THE COURT: Uh-hum (affirmative response).

11 MR. BUCHMAN: -- that jurisdictional discovery occur.

12 Now, the number of names and plots on this document
13 indicate that there are over 300 individuals or plots that have
14 perpetual care at this cemetery. So the first prong of the
15 Blockbuster test is satisfied, because we exceed a hundred
16 people.

17 The next issue is whether or not the issue involves
18 more than five million dollars in question. And we have
19 submitted the declaration of Hayden Burrus, who is a
20 well-respected, published actuarial who has indicated in his
21 opinion, based on his understanding of the industry, that this
22 case certainly move involves more than five million dollars.

23 In addition to that --

24 THE COURT: I think what you're really talking about
25 here is the exceptions.

1 MR. BUCHMAN: That's fine, Your Honor. I was just
2 walking through the elements first, but I'm happy to address
3 the exceptions.

4 THE COURT: The D3 and D4 exceptions. I'm not quite
5 sure, given the way you have articulated, given the way you've
6 expressed -- and I alluded to, I think, in response to your
7 colleague's initial argument -- some of phrases you used in
8 your pleading and in your memorandum, and it relates directly
9 to the standing issue -- but who are you?

10 MR. BUCHMAN: I will be happy to address that. Let me
11 just mention the exceptions first, and then I'll go directly to
12 your question about standing.

13 The defendants concede that under the Second Circuit
14 standard, the burden shifts to them once we establish the three
15 primary points of CAFA jurisdiction.

16 THE COURT: That's an interesting question, because in
17 this case, we're not in a remand situation, which is the way
18 most of these things come up.

19 MR. BUCHMAN: We are not.

20 THE COURT: I'm not so sure that your colleague over
21 on the other side of the aisle is looking to avoid
22 jurisdiction. I'm not -- maybe the burden goes to where it is
23 classically, and that is, the party asserting the jurisdiction
24 of the Court has the burden of establishing, and I'm not so
25 sure that that fits here, but your point is well-taken,

1 nonetheless. Go ahead.

2 MR. BUCHMAN: I understand with regard to the
3 exception the point that Your Honor is making, but the
4 Blockbuster test doesn't delineate any difference between
5 remand or some other way that jurisdiction can be raised, such
6 as in the context at present.

7 So I think we're limited to the law as defined by the
8 Second Circuit with Blockbuster, and the burden is on the
9 defendants, and they have conceded that none of the exceptions
10 apply.

11 So now let me address the standing issue, and think
12 that Mr. Steinthal misunderstands our position.

13 THE COURT: I don't know that they have conceded that
14 either of the exceptions apply. They have acknowledged that
15 the state of the record is such that it's not apparent --
16 they'll speak for themselves -- it is not apparent as to
17 whether or not one or both apply.

18 MR. BUCHMAN: I understand that, Your Honor. And let
19 me just explain further about my argument.

20 Mr. Steinthal is saying at this point, they are unable
21 to establish -- they are unable to establish that any of the
22 three exceptions apply. But I would respectfully submit to
23 Your Honor that the vast majority of the documents which will
24 be produced in this litigation are in the defendants'
25 possession. If they're not able to establish it now, what

1 reason do we have to believe that at summary judgment,
2 documents are going to miraculously appear and they're going to
3 be able to prove that there is no jurisdiction?

4 If they have the documents, they should be using them
5 now. They should have produced them pursuant to Magistrate
6 Judge Azrack's order and your order. It's just that simple.

7 So you seem perplexed Your Honor. Do you want me a
8 elaborate further?

9 THE COURT: No. I'm not quite sure what you're
10 saying. You're certainly not accusing them of holding
11 something back.

12 MR. BUCHMAN: Not at all, Your Honor. I say if they
13 had the goods, they'd bring the goods to the table and put them
14 on the table now. They're not going to bring the goods down
15 the road, in violation of a Court Order to produce all
16 documents regarding jurisdiction. It doesn't make sense. So
17 if they can't do it now, they won't be able to do it in the
18 future. That's my belief.

19 THE COURT: And so the great question, the great
20 fundamental question that I am duty-bound to address, namely my
21 authority, my jurisdiction to hear this -- essentially remains
22 unresolved, because we simply can't resolve it at this point.
23 There are too many unknowns.

24 Now you look perplexed.

25 MR. BUCHMAN: Because I'm thinking of it in terms of

1 whether your question is regarding the legal standard under
2 Blockbuster, which I think is clear on its face, that says the
3 burden is on them.

4 But with regard to the factual issues, as to the three
5 exceptions, I don't think that they can prove that any of the
6 exceptions apply. They haven't been able to do it now, and I
7 don't think they'll be able to do it in the future, and the
8 case should proceed because the Court does have jurisdiction
9 under the first three elements that we're required to prove,
10 and the defendants haven't been able to prove now before Your
11 Honor, given facts that are in their possession exclusively,
12 that the exceptions apply.

13 THE COURT: I see what you're saying. All right.
14 Let's go to standing.

15 MR. BUCHMAN: Okay. What I think Mr. Steinthal's
16 misunderstanding is our position on standing. Originally, we
17 --

18 THE COURT: You rehearsed that line, didn't you?

19 MR. BUCHMAN: I did, Your Honor.

20 THE COURT: Standing and misunderstanding. Okay.

21 MR. BUCHMAN: I did, Your Honor.

22 Okay. What we argued in our opposition to the motion
23 to dismiss is the acknowledgment that under Bogert on Trusts,
24 there is a general rule that strangers cannot enforce a trust.
25 That's hornbook law. We acknowledge that. In fact, they

1 acknowledge it in their reply brief. But we say an exception
2 applies.

3 And we say the exception is as follows: A case of
4 somewhat similar type, that is, of a cemetery trust when
5 regarded as charitable, or the lot owners are persons who are
6 entitled to have their dead buried there or have friends or
7 relatives interred in a cemetery, all -- all may be said to
8 have a definite interest in the trust.

9 Other members of the public may also receive benefit
10 through the opportunity to buy lots or otherwise -- but the lot
11 holders and others similarly situated are clearly benefited and
12 interested in the upkeep of the cemetery. Such interest may be
13 regarded as sufficient to enable them to sue to compel
14 execution of the cemetery trust.

15 Now, when we cited this in our brief, on reply, the
16 defendants come back and they say, no, no, no, the EPTL says --
17 the Estates Powers and Trusts Law -- says no, the Attorney
18 General has exclusive authority to enforce charitable trusts.

19 Now, I don't want to get into a debate whether a
20 perpetual care trust is a charitable trust or not. For purposes
21 of this argument, let's assume it is.

22 And they cite, in addition to this section on
23 Bogert's -- on Bogert on Trusts, they cite another case, the
24 Alco Gravure case. That case actually supports plaintiffs. In
25 that case, the plaintiffs were found to have standing to

1 enforce a charitable trust.

2 And what's conspicuously absent from the defendants'
3 reply belief is a case six years after Alco Gravure, which is
4 the Smithers case. They don't even cite it. And the reason
5 they don't cite it is because Smithers makes clear,
6 unequivocally clear that the Attorney General does not have
7 exclusive authority to enforce a trust, as these defendants
8 have stood here today and said to you. It just doesn't make
9 sense. And the reason why it doesn't make sense is because the
10 law recognizes that a donor's interest needs to be enforced.

11 And we think that this case individually establishes
12 that we have standing, whether it's general rule under Bogert's
13 exception we have standing, whether it's under Smithers, we
14 have standing. Those are our two bases for standing in this
15 case: the general Horn Book law and specific New York law in
16 Smithers that says we have standing. It's pretty clear.

17 But I would just add one additional point, Your Honor.
18 If the Court goes back and looks at these briefs, there is not
19 one -- not one case that the defendants cite for the
20 proposition that people like my clients don't have standing.
21 It just doesn't exist in their briefs.

22 THE COURT: Say that again?

23 MR. BUCHMAN: They don't cite a single case in support
24 of their position that my clients lack standing. They don't
25 cite -- there's no decision out there contrary to Smithers --

1 or they cited Alco Gravure. Alco Gravure, the plaintiffs were
2 found to have standing. There's not a single case in their
3 belief brief specifically on point where people like my clients
4 have been denied standing. It's just doesn't exist in their
5 briefing.

6 They have conceded -- they have made a motion asking
7 for remedy, without citing legal authority to Your Honor for
8 Your Honor to give them the relief they've requested.

9 THE COURT: Well, we'll see what he has to say about
10 that. I'll think he'll have something to say about that. All
11 right.

12 MR. BUCHMAN: Moving onto the other issues about
13 standing, Your Honor, so we're basically saying that we have
14 standing under the general rule of Bogert under Smithers and
15 specifically, New York law. And in our briefing, what we also
16 said was even if Your Honor found that that standing was
17 insufficient -- which we don't believe it is. We think it's
18 pretty clear on the law.

19 THE COURT: Uh-hum (affirmative response).

20 MR. BUCHMAN: My clients are all the executrixes --
21 with the exception I believe of Ms. Goldstein -- are all the
22 administrators or executors of the estates of the people on
23 behalf of whom they're suing.

24 Mr. Lucker was the executor of his father's estate,
25 and his father was the executor of his grandmother's estate.

1 So by heritage, Mr. Lucker possesses the ability to represent
2 his grandmother's interest in this litigation. Ms. Cohen is --
3 was the executor of her parents' estate. So if the Court wants
4 us to go back and specifically plead that these are executrix
5 actions, we can go ahead and do that. That's unnecessary under
6 the law.

7 And just looking at the caption of the Smithers case,
8 that case was not brought in an administrative capacity of
9 executor -- executrix. It was just Mrs. Smithers versus the
10 defendants.

11 So we don't think that that's necessary. We think
12 that the law is clear on its face that we have established
13 standing, both on a general basis and specifically under New
14 York law.

15 THE COURT: All right.

16 MR. BUCHMAN: There were two other issues that the
17 defendants raised in their papers, one of which it appears
18 Mr. Steinthal's conceded -- which is the Statute of Frauds --
19 but I don't want him to raise that on reply, so I will address
20 the issue directly right now.

21 They say that the plaintiffs don't plead the existence
22 of a contract in the complaint. That's just not true. In
23 paragraphs 19, 20, and 21, we have specifically say that the
24 relatives purchased a perpetual care contract. We say in
25 additional paragraphs like paragraph six, that these defendants

1 sold perpetual care contracts using standardized forms and
2 created other documents to reflect that contracts were entered
3 into.

4 And we basically provide in paragraphs five and 12
5 what the terms of the contract were. The terms of the contract
6 were for these defendants to keep these plots in presentable
7 condition for the benefit of future generations, and that
8 really is the entire purpose of a perpetual care contract.
9 Someone who has a plot, wants to maintain it, so that future
10 generations will come and honor them and pay tribute to them,
11 and they want to encourage that by making sure that the place
12 is clean and decent and respectable. It's just
13 straightforward. And we have alleged all of these things.

14 Now, the defendants say that Mr. Lucker hasn't
15 provided any evidence or alleged in his complaint that there
16 was a contract that his grandparents entered into.

17 What we have done, Your Honor, is we provided a
18 contemporaneous document from the burial society for
19 Mr. Lucker's grandparents, demonstrating that a contract was
20 entered into.

21 And if you would turn to the first document that I
22 provided, Your Honor, this document entitled --

23 THE COURT: I have that in your letter that you sent
24 to me. I should give you yours back here. Here, I'll give
25 this back. (Handing.) You forwarded that to me in your letter

1 of February 27th.

2 MR. BUCHMAN: Okay. This document on page two, which
3 was produced by the defendants, at the very top, the first line
4 acknowledges that the Chebra Shebath Achim Society purchased
5 perpetual care for the members of that society.

6 And the contemporaneous document that we have provided
7 to the Court demonstrates that the Chebra Shebath was
8 acknowledging to Mrs. Lucker that perpetual care was purchased
9 for her graves.

10 So, there's evidence to suggest that there was a
11 contract for Mr. Lucker, despite these defendants' position
12 that no contract was ever entered into. And I think in our
13 briefing we suggested to the Court that it was unfair that we
14 didn't have this document at the time of that briefing, because
15 we thought we could prove it, and now we have.

16 THE COURT: All right.

17 MR. BUCHMAN: Now, with regard to the -- and one other
18 point on the Statute of Frauds, Your Honor. They say that we
19 didn't provide enough information -- allege enough information
20 about the contract in the complaint to allow this Court to
21 determine whether or not the contract has been breached.

22 That argument's just silly. Mr. Axinn has publicly
23 stated in the press and to Your Honor that these defendants
24 commingled funds and used the funds to fix the synagogue roof. I
25 don't understand how they can make this argument.

1 So putting that aside, the last argument they make is
2 Statute of Frauds. And the Statute of Frauds argument really
3 is an argument best made at summary judgment. And Your Honor
4 and the Supreme Court have held that affirmative defenses like
5 the Statute of Frauds have no business being in a motion to
6 dismiss. And I can give Your Honor the cites for those cases.
7 I'm sure you're aware of them.

8 THE COURT: You have them in your papers.

9 MR. BUCHMAN: Yes. Flash Electronics.

10 THE COURT: I always take note when Dearie is cited.

11 MR. BUCHMAN: Flash Electronics.

12 So there are two other reasons why Statute of Frauds
13 doesn't apply: One, the continuing violation rule. Here, this
14 has been a continuing violation. The defendants never came
15 forward and acknowledged that the monies had been
16 misappropriated until after -- until after we filed this
17 lawsuit.

18 And lastly -- and despite their obligation as a
19 fiduciary, they didn't do that.

20 And also, Your Honor, specifically under New York law,
21 under the Kidd case, the state court has held that when a
22 defendant elects to set up a Statute of Limitations argument
23 previously by deception or any violation of a duty towards
24 plaintiff caused him to subject his claim to the statutory bar,
25 the defendant must be charged with having wrongfully obtained

1 an advantage which the Court must not allowed him to hold.
2 That's Kidd versus Delta Funding. We cite it in our brief,
3 2000 New York Dist. Lexis 29.

4 Those are basically the arguments, Your Honor. I'm
5 happy to entertain any questions you might have at this time.

6 THE COURT: Let me hear briefly from Mr. Steinthal.

7 MR. AXINN: Could I just make a point of personal
8 privilege? There is a quotation, a statement that was just
9 attributed to me, which is false.

10 I never said that funds -- to the press or anyone
11 else -- that Shaare Zedek commingled funds or misappropriated
12 funds -- I'm not responsible for what some reporter may write.
13 But I never said that and it was not true. Thank sir, sir.

14 THE COURT: Mr. Steinthal, you want to --

15 MR. BUCHMAN: If I may just make one point, Your
16 Honor? In the documents that these defendants submitted to the
17 Attorney General's office, they acknowledged that they
18 commingled funds and misappropriated funds, and used them for
19 non-cemetery purposes.

20 Your Honor can check with the AG's Office on this, if
21 he has any interest. Thank you.

22 MR. STEINTHAL: May I proceed -- but you can check.

23 THE COURT: Two minutes.

24 MR. STEINTHAL: Two minutes? I will be brief, Your
25 Honor.

1 THE COURT: Brief, and moderately-paced.

2 MR. STEINTHAL: One of the most important points that
3 Mr. Buchman made, I think, was his claim that we had not cited
4 any cases saying that his clients don't have standing.

5 And I think that the truth here is that admittedly,
6 this case is somewhat unique. And there is no not a case that
7 we that we've cited that says that the grandchildren of people
8 who have perpetual care contracts don't have standing to sue in
9 New York state.

10 But we would suggest, Your Honor, that having cited to
11 Lujan and having cited to Central States Southeast and
12 Southwest, and a long line of cases establishing the principle
13 that federal plaintiffs must, in all cases, regardless of the
14 subject matter, establish personal injury-in-fact, that the
15 burden of showing this extraordinary type of standing is
16 particularly on the plaintiffs. They always the burden of
17 showing their standing -- but in particular, here.

18 And they cite to Bogert, which as we mentioned in our
19 reply brief, simply does not support the proposition they say.
20 It is not a rule that says that all cemetery claims have a
21 special rule of standing.

22 If you read the cases that are cited in Bogert and
23 that -- we discussed this the reply brief that we filed with
24 Your Honor, all those cases involve situations in which the
25 plaintiffs were owners of burial plot in a cemetery or

1 otherwise had burial rights there, and who are allowed to
2 enforce, quote, the cemetery trust, meaning the obligation of
3 the cemetery to treat that property as a cemetery. And so the
4 cases go to the things to enjoin actions that are inconsistent
5 with a cemetery use.

6 So whether that's subsurface mining or whether that's
7 redrawing the plot lines, so someone else is buried in a grave
8 that was already there -- these are cases from states that hold
9 that there is essentially an impressed trust of cemeteriness
10 that is placed on the problem.

11 Bayside Cemetery, Shaare Zedek certainly do not deny
12 that they have a cemetery in Queens. We have not seeking to
13 mine there. We are not seeking to redraw the plot lines. We
14 are not seeking desecrate any graves. It's the plaintiffs who
15 try to extend that rule, to say that --

16 THE COURT: I understand.

17 MR. STEINTHAL: -- perpetual care graves -- Alco
18 Gravure, in fact, the Court of Appeals of New York said, that
19 when you the apply the Bogert exception, the class of
20 beneficiaries must be definite and small, and finely and
21 closely-defined. And in Alco Gravure, they said the plaintiffs
22 were, in fact, sufficiently definite and closely defined.

23 We don't deny that the plaintiffs in Alco Gravure had
24 standing. We simply say the class, as Mr. Buchman's clients
25 suggest here, is far too indefinite to meet that.

1 I've already discussed Smithers --

2 THE COURT: Quoting from your reply brief, "The
3 exception applies only where a particular group of people have
4 special interest in funds held for a charitable purpose as when
5 they're entitled to a preference in the distribution of funds,
6 and so forth."

7 And you point is?

8 MR. STEINTHAL: I believe that first of all, I would
9 suggest that they these plaintiffs don't have an interest in
10 the funds in the way that the Alco Gravure plaintiffs did.
11 They had interest -- they were entitled to be paid money out of
12 the funds.

13 But the other -- I'm sorry. I must not have quoted
14 the full language. I can look it up. I believe it speaks
15 specifically of a limited and well-defined of class of
16 beneficiaries.

17 THE COURT: It goes on to say --

18 MR. STEINTHAL: That has to be there.

19 And I suggest that all plaintiffs -- all relatives
20 and -- all relatives and family members who are buried there
21 simply is not the notion of well-defined. And Bogert actually
22 goes further and says the friends of people who are buried in a
23 cemetery can enforce. That that's contrary to the rule in New
24 York.

25 On Smithers, I would simply point Your Honor to the

1 very first sentence of the opinion, which says the issue before
2 the Court was whether or not the estate of Mr. Smithers had the
3 right to enforce. And so, whether or not the caption was
4 written out as executrix or not I think is irrelevant.

5 And finally, to conclude with on the issue of what
6 these contracts said, I think that Your Honor has in the record
7 an example of perpetual care contracts that was entered into, I
8 believe with Ms cohen. And I think that if you compare what it
9 says to what Mr. Buchman quoted about maintaining things in
10 good repair, you'll see it simply doesn't bear that out.

11 The written terms of the contract govern. And even if
12 Mr. Buchman were to try to say there was an oral agreement to
13 the contrary, that would only prove our point. There is simply
14 no way this Court could, 30 years later, determine whether or
15 not there was understanding that was contrary to the written
16 terms of the agreement.

17 And that the Statute of Limitations should bar these
18 actions, and there is no basis for tolling, as Your Honor,
19 again, in the Dearie opinion spelled out in great depth.

20 The question is whether or not -- for tolling of
21 Statute of Limitations is whether the plaintiffs could have
22 before brought the claim. And unfortunately, there is nothing
23 as unconcealed as Bayside Cemetery. We hope that it's less of
24 an eyesore in the future, but these facts are what they are.
25 Your Honor, thank you.

1 MR. BUCHMAN: Your Honor, one housekeeping matter
2 before we leave today? I've spoken with Mr. Steinthal. The
3 plaintiffs are prepared to file a class certification brief in
4 three weeks, and the defendants would be willing to respond a
5 month thereafter. We would do a reply within three weeks after
6 that. If Your Honor is amenable to that, we're happy to do the
7 work.

8 THE COURT: You're happy to do the work?

9 MR. BUCHMAN: Yes, Your Honor.

10 THE COURT: Well, if nothing happens in the ensuing
11 period, feel free to follow that schedule.

12 MR. BUCHMAN: Thank you, Your Honor.

13 THE COURT: Thank you. You want these photographs?

14 (Proceedings concluded.)
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