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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 59

-----X

JOHN R. LUCKER,

Plaintiff,

-against-

BAYSIDE CEMETERY,

Defendant.

-----X

Index # 114818/2009
PROCEEDINGS

60 Centre Street
New York, New York 10007
June 3, 2010

B E F O R E:

HONORABLE DEBRA JAMES,
Justice.

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THE COURT: The Court will base its decision and order on the records before her. So, the first order of business will be to confirm that the Court has the complete set of papers.

On Motion Sequence Number 1, there is a notice of motion brought by defendants, Congregation Shaare Zedek. I'm not sure if I'm pronouncing that correctly, and Bayside Cemetery, with accompanying memorandum of law, complaint and proof of service of the papers. In support of the motion is an affirmation of Mr. Steinthal.

Opposing the motion is by declaration of a Michael Buchman, attorney for the plaintiffs; with accompanying exhibits, the memorandum of law in opposition to defendant's motion to dismiss; and finally, a reply memorandum in support of defendant's motion to dismiss. That is what the Court has as her record, which has been designated as Motion Sequence Number 001 by the clerk.

MR. STEINTHAL: Your Honor, just for clarification, I think my affidavit was one of those replies that you had sequenced after --

THE COURT: Oh. Thank you for pointing that out. So, I will put it in the proper order. It's dated February 15th.

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MR. STEINTHAL: Which is the reply date.

THE COURT: I thought I put it in sequence order, but, yes, I did overlook the dates here, so you are absolutely right.

The papers that have been designated as Sequence Number 002 by the clerk are as follows: Defendant, Community Association for Jewish At Risk Cemeteries, Inc.; notice of motion to dismiss; accompanying affirmations and exhibits; a memorandum of law in support of the nonprofit's motion to dismiss; the affidavit of Mr. Buchman in opposition to defendant nonprofit's motion to dismiss; plaintiffs' memorandum of law in opposition to the defendant nonprofit's motion to dismiss. If you don't mind, I'm going to hand back the courtesy copy so that I will not be confused.

MR. BUCHMAN: Thank you, Your Honor.

THE COURT: Then, there is an affirmation of attorney Katz in reply of the memorandum of defendant's nonprofit, and finally -- well, there is another affirmation.

MR. SELMAN: That's correct, Your Honor.

THE COURT: Of Douglas Smith.

MR. SELMAN: That's correct.

THE COURT: And finally, a reply memorandum

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in further support of defendant nonprofit's motion to dismiss.

Are there any further papers on Motion Sequence Number 002?

MR. SELMAN: Your Honor, just to clarify, the affirmation of Douglas Smith is an affidavit to the reply brief of the Community Association For Jewish At Risk Cemeteries.

THE COURT: As is the affirmation of Eric Katz.

All right, brief argument. This is on matters in which the Court will have to deliberate, so really succinct argument. And it would be helpful if you could point out in the record what the Court should particularly pay attention to. So, let start then with the attorney for the movant on Motion Sequence Number 001, which would be Mr. Steinthal.

MR. STEINTHAL: Thank you, Your Honor. I will attempt to be brief.

Before launching into the legal argument, I do want to take one moment to assure Your Honor that the factual situation that underlies the case is, obviously, of some concern, and that the plaintiffs, obviously, are legitimately concerned with the condition of the cemetery graves. And although I think

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2 we firmly believe this motion can and should be
3 determined solely on the law, I just want to take a
4 moment to address the facts, just to put the Court's
5 mind at ease at the start.

6 First, several years, now many years at this
7 point, Congregation Shaare Zedek, which is one of the
8 oldest synagogues in New York City is now a fairly
9 small congregation on the upper west side. It's about
10 100 to 200 members, had been, obviously, very concerned
11 of the condition of Bayside Cemetery.

12 We have devoted increasing percentages of the
13 modest budget of the congregation over the years to the
14 maintenance of it, including employing people, have
15 employees, but all along, the Congregation have been
16 trying to raise awareness of the fact that this problem
17 is larger than any one synagogue could ever be expected
18 to deal with.

19 This is not a problem unique to Shaare Zedek. In
20 fact, across the country where there were older Jewish
21 cemeteries and communities moved and changed over the
22 years, frequently the cemeteries were left behind by
23 communities that had founded them.

24 THE COURT: Just by the way of context, is
25 there an affidavit that addresses this?

26 MR. STEINTHAL: It's spelled out in the

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2 statement of fact. These are, I don't believe,
3 material facts to the motion, but I think there is some
4 backgrounds.

5 THE COURT: I understand, but, again, I just
6 remind everyone that the Court will rely on what's on
7 the record, unless there is some stipulation otherwise.

8 MR. STEINTHAL: That's fine. I will try to
9 wrap up quickly, since it's not on the record.

10 The basic fact that matters here is that the
11 Congregation was very pleased that a year or so ago the
12 Community Association For Jewish At Risk Cemeteries,
13 our codefendants now, were founded and were able to
14 secure funding for professional cleanup of the
15 cemetery. It began about, I think about a year ago
16 now. We make no representation that it is done. And
17 so, I believe that the plaintiffs have pictures of
18 areas that are not done, and we don't dispute that.
19 It's probably about 50, 70 percent complete, and we are
20 sort of making progress. And we look forward to a
21 speedy completion.

22 But all that being said, the legal issue here,
23 which is spelled out in defendant's briefs, is very
24 simple. It is whether or not -- the principal legal
25 issue is whether or not these plaintiffs, who do not
26 purport to have ever purchased any perpetual care

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2 contract from the Congregation, don't claim it had any
3 relation with the Congregation or any defendant before
4 the institution of the lawsuit, and has claimed only to
5 be the relatives of people, grandchildren, children of
6 people who made contracts, who allegedly made contracts
7 with the Congregation 20, 30, 40 years ago, whether
8 they have standing to bring a suit here to allege the
9 breach of these trusts.

10 And it's telling, we believe, that although this
11 nearly identical motion was fully briefed and fully
12 argued in Federal Court, and is now being fully briefed
13 again before Your Honor, the plaintiffs have yet
14 produced a single case which supports their theory that
15 they should be allowed to both stand in the shoes of
16 their deceased relatives.

17 THE COURT: Has the District Court --

18 MR. STEINTHAL: The District Court dismissed
19 for lack of jurisdiction in Federal Court.

20 THE COURT: Where is that?

21 MR. STEINTHAL: I don't believe that decision
22 is in the record.

23 THE COURT: Why not?

24 MR. STEINTHAL: The Court dismissed for
25 Federal grounds, lack of diversity of citizenship. So
26 it's --

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2 THE COURT: It's not a res judicata effect?

3 MR. STEINTHAL: That's correct.

4 But this is, in some ways, a reprieve of the
5 motion argument. And throughout all that briefing,
6 there hadn't been a case produced to support the
7 plaintiffs' theory of standing here. And that's
8 unsurprising, because when the legislature adopted the
9 EBTL, it created a comprehensive scheme for directing
10 the question of how the claim of decedent individuals
11 should be brought, who should be allowed to bring them
12 as legal representatives, when they should be
13 commenced, which ones should survive, and which should
14 not.

15 And as the Court of Appeals determined just a few
16 months ago, right before the reply was filed in, I
17 believe it was Heslin v County of Green, the
18 legislature adopt the policy of repose. And the mere
19 fact that a claim for a decedent individual, you know,
20 arose after that person had passed away doesn't obviate
21 changing the policy of the EPTL.

22 In this case, we are not claiming impunity here.
23 There is no dispute that the Attorney General, State of
24 New York has power to enforce any charitable trust.
25 And in fact, the Attorney General served subpoenas on
26 my client. They have taken depositions. They have

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2 served subpoenas duces tecum, and they are actually
3 investigating the question of the alleged breach of
4 these trusts. And so, the fact is that the law
5 establishes the presumption that even if you believe,
6 and we are not sure that it's a correct statement at
7 all, the First Department has held that a donor of a
8 charitable trust, in Smithers, that, of course, or an
9 ultimate donor could bring suit, and that the legal
10 representative of a donor, when it actually acts as an
11 executrix, could bring suit on behalf of that donor for
12 a claim that arose during the donor's life. That's not
13 the case here.

14 None of these plaintiffs allege at the time of
15 complaint that either one of their clients obtained
16 subsequent appointment from the Probate Court in
17 Connecticut as the executor 30 years after the decedent
18 died for purposes of bringing this action. But the
19 simple fact is that this is not a case where donors
20 arise. And so, Smithers, which I believe the
21 plaintiffs intend to rely on or relied on previous in
22 their briefing, simply does not support their argument.
23 And in fact, it's just the alternative, that only a
24 donor or maybe his representative would have standing.
25 They are not present here. The Attorney General is the
26 right party to bring this suit, if any.

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2 THE COURT: Mr. Steinthal, I know you have
3 other grounds --

4 MR. STEINTHAL: But I think those are the
5 principal grounds, but the rest you can rest on our
6 briefs.

7 THE COURT: The Court will thoroughly review
8 all the papers, but I wanted to give you an opportunity
9 to verbally offer salient points.

10 MR. STEINTHAL: I appreciate that, Your
11 Honor.

12 THE COURT: So, let's move on to Mr. Buchman.
13 What is your response?

14 MR. BUCHMAN: Thank you, Your Honor.

15 First of all, I would like to clear up a couple of
16 points. One thing that Your Honor raised was about
17 jurisdiction and why won't Federal Court hear --

18 THE COURT: Well, I didn't raise that. I
19 asked what the Federal Court had done.

20 MR. BUCHMAN: Well, I can briefly explain,
21 that there is something known as the Class Action
22 Fairness Act that required all class actions to be
23 filed in the Federal Court after 2005. So, we filed
24 our case in 2007 in Federal Court. And Judge Thiery
25 found that an exception to the Class Action Fairness
26 Act applied. He found that this case involved New York

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2 primarily and not a nationwide issue and, therefore,
3 this case belonged in state court.

4 THE COURT: That decision I don't have before
5 me, right?

6 MR. BUCHMAN: We can happily provide it.
7 It's a published opinion on Lexis.

8 THE COURT: The Court will take a look at it
9 on its own.

10 MR. BUCHMAN: Second all, Mr. Steinthal has
11 characterized this as not a unique situation, claiming
12 that a lot of cemeteries across the country is
13 abandoned, but this is a very unique cemetery. And
14 what was missing from his presentation was an
15 admission, Your Honor, an admission that this cemetery
16 and the synagogue absconded with these perpetual care
17 monies. This is an admission --

18 THE COURT: Well, I just want to say that the
19 purpose of oral argument, I understand each of you want
20 to set your own context, but I really need to know
21 what's in the papers.

22 MR. BUCHMAN: It is in the papers. It's the
23 first paragraph of our introduction.

24 THE COURT: Of the complaint?

25 MR. BUCHMAN: Of the complaint -- it's in
26 their complaint as well, that they have admitted to the

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2 New York State Attorney General that they commingled
3 funds. And whether you want to call it commingling
4 funds or absconding with monies or thefts, these were
5 perpetual care trusts that were created by my client's
6 grandparents and parents. The money was to stay in
7 perpetuity in a trust account and never invaded, and
8 only the income used to maintain the plots or common
9 areas of the cemetery.

10 THE COURT: I understand each position is
11 that the equities are such that are favorable, I guess,
12 to your clients. But really, what's the response, your
13 argument?

14 MR. BUCHMAN: The legal argument, their
15 primary basis for their motion to dismiss is standing.
16 And they claim that we had no legal authority cited in
17 our briefs or our brief regarding standing that
18 supports our position. That just clearly is not true.

19 If you turn to Page 8 of our brief, there is a
20 quote from Bogert on Trust and Trustees that,
21 essentially, said that plaintiffs just like us have
22 standing. And the last sentence says: "Such interest
23 may be regarded as sufficient to enable them to sue to
24 compel execution of the cemetery trust."

25 This is basic Hornbook law that we are talking
26 about. Now, Your Honor may say, yes, Mr. Buchman, but

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2 what about New York law? But New York law follows this
3 Hornbook law. And we have cited --

4 THE COURT: Bogert is what case?

5 MR. BUCHMAN: Bogert is a Hornbook treaties
6 on trusts and trustees. In the Hornbook law, they say
7 that clients just like ours, mine, have standing to
8 sue.

9 THE COURT: All right.

10 MR. BUCHMAN: That's Hornbook law. Now, Your
11 Honor may say, yes, but what's the law in New York?
12 The law in New York is consistent. In fact, we cited
13 in our brief, and I was going to hand up to Your Honor
14 two particular cases. One is the Mitchell case.

15 THE COURT: I will take cases, but that's
16 all. That's the only thing I will take in terms your
17 argument that's before the Court, although the Court
18 can look them up herself.

19 MR. BUCHMAN: We have provided these copies
20 to opposing counsel before argument.

21 THE COURT: If it's a decision that's
22 published, the Court will take a courtesy copy.

23 MR. BUCHMAN: This is a Court of Appeals
24 decision in 1892. And in it, it says that this issue
25 has been decided many times. It's on -- I don't know
26 if Your Honor has Page 3 or 4. We have highlighted it

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2 for Your Honor.

3 "The issue has been decided many times before,
4 that the heirs of a decedent have standing to pursue
5 these types of claims."

6 THE COURT: All right, but, of course, his
7 argument is that the EPTL supplants whatever the common
8 law was, right, that include the codification
9 promulgated by the legislature is what controls here.
10 Isn't that his argument?

11 MR. BUCHMAN: That is his argument. But if
12 you read the commentary to the EPTL, it says it
13 incorporates by reference earlier sections that
14 control. And these decisions are based on that
15 particular time period. And these are controlling.
16 These are Court of Appeals decisions that, basically,
17 say that my clients have standing. There is another
18 case --

19 THE COURT: I'm not sure what you are saying.
20 Are you saying that -- I mean, are you arguing that the
21 EPTL applies, but is not inconsistent with the common
22 law, is that your argument?

23 MR. BUCHMAN: What I'm saying is that the
24 sections of the EPTL that were amended adopted earlier
25 EPTL provisions of earlier codified sections. And
26 therefore, these decisions are consistent with the

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2 EPTL.

3 But more importantly, Your Honor, what they are
4 saying is that in this situation where a contract takes
5 effect after a person's death that no one could ever
6 bring suit. That's illogical.

7 THE COURT: That's not the argument. I think
8 he is arguing it has to be the personal representatives
9 that were appointed or designated, I guess, in the
10 estate plan, appointed by the Surrogate's Court. I
11 think that's his argument.

12 MR. BUCHMAN: That may be one of his
13 arguments, but we have three grounds for standing under
14 New York law. The first is this law, this Hornbook
15 law.

16 THE COURT: Well, I'm just asking. In other
17 words, you are saying no one could ever bring suit, but
18 that's not his argument. His argument is particular
19 people could bring suit.

20 MR. BUCHMAN: But these cases say our client
21 can bring suit. So, it's Hornbook law. It's also the
22 Oatka Cemetery Association case, which we highlighted
23 on Page 3. This is a long-standing rule. This is an
24 English common law rule, Page 3 of the decision. It's
25 the Oatka case. It's highlighted. There are two
26 highlighted sections. And it has long been the rule of

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2 common law that, "if a tombstone at the grave of a
3 deceased person has been defaced or removed, he who
4 originally erected it has cause of action against the
5 guilty party. After his death the right to maintain
6 such an action passes to the heirs at law of him in
7 whose honor and memory the monument was erected."
8 Again, basic English common law that New York State
9 recognizes.

10 THE COURT: Again, I'm still a little
11 unclear. Is it your position that the EPTL applies but
12 is consistent with these persons of 1892 and 1934, or
13 is it something else?

14 MR. BUCHMAN: We don't think that the EPTL
15 applies to the situation. As titled, it's a survival
16 statute. And it basically says that somebody who has a
17 cause of action shortly before they die have a cause of
18 action after they died. And what Mr. Steinthal is
19 saying, if I understand him correctly, is because these
20 claims arose after the death of the individual, no
21 claim could ever be brought. And that's just not the
22 law in New York. There is no case authority that he
23 cites for that position.

24 THE COURT: No claim could have been brought
25 by --

26 MR. BUCHMAN: By anyone.

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2 THE COURT: Non-person representatives. I'm
3 not understanding that's his argument that the
4 representative would have no claim.

5 MR. BUCHMAN: In his papers, he basically
6 says, if the claim arises after someone's death, then
7 no one can sue on behalf of the deceased person.

8 THE COURT: I will ask him for clarification.
9 I don't understand that to be his argument, perhaps it
10 is. All right, continue.

11 MR. BUCHMAN: So, we are saying that these
12 cases and Hornbook law, and, in addition, we are also
13 saying that the Smithers case supports us.

14 And in Smithers, the First Department -- this is a
15 2001 decision, which we cite in our brief. The First
16 Department says that a donor's intent is always to be
17 effectuated. And we have seen no New York case in
18 which a donor attempting to enforce the terms of this
19 charitable trust was denied standing to do so.

20 And in the Smithers case, the wife of the decedent
21 was found to have standing to pursue the claims
22 involved in that case.

23 THE COURT: There is no inquiry there whether
24 she was the executrix under will?

25 MR. BUCHMAN: She was the executrix. She did
26 get letters of administration from the court. But the

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2 case law that we have demonstrates that she didn't need
3 to do that. And we don't believe that we need to do it
4 either. But with regard to Mr. Lucker, we did do that,
5 just in case. But we also think there is another
6 ground for standing in this case, and that is
7 third-party beneficiary law.

8 And basically, what the Court of Appeals said in
9 the First Ocean case is that if a party can foresee
10 that it intends to perform with regard to someone in
11 the future, that that person has standing to bring a
12 claim. It's basically that the circumstances indicate
13 that the promisee intends to give the beneficiary the
14 benefit of the promise performance. That exactly what
15 happened here.

16 When the plaintiffs' relatives entered into these
17 contracts, Congregation Shaare Zedek happily took the
18 money and promised to maintain those plots and those
19 common areas in perpetuity. And the whole reason that
20 perpetual care is purchased is so that relatives and
21 future generations can come and pay honor and respect
22 in a safe environment. Congregation Shaare Zedek knew
23 that my client, essentially, would be receiving the
24 benefits of that promise and, therefore, have
25 third-party beneficiary standing. So, we don't
26 understanding how the standing argument holds water at

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2 all. It makes no sense.

3 And this EPTL claim is besides the point. He
4 cites no case law for the position. None. No case law
5 for the position that if a claim arises after death
6 that no one can bring that claim, no natural person.
7 And that isn't the law, and it can't be the law. And
8 it would make no sense that if a person signs a
9 perpetual care contract with a monument company or with
10 anyone to care for the grave after their death that no
11 one that's an heir of theirs can sue to enforce the
12 contract.

13 And it says here in the old English case law and
14 in New York: Heirs have standing. 1892, 1934, 2001.
15 It is consistent.

16 THE COURT: All right.

17 MR. BUCHMAN: There are other arguments I'm
18 happy to address if you wish.

19 THE COURT: In the interest of time, let's
20 hear from the codefendant.

21 MR. SELMAN: Good morning, Your Honor.

22 THE COURT: Actually, let me, again, hear
23 from Mr. Steinthal.

24 Is it your position that there is no remedy?

25 MR. STEINTHAL: I think that I'm in a
26 position of having to agree with Mr. Buchman partially

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2 and disagree partially as well.

3 The argument that we did make was that EPTL sets
4 forth the following rule: If a cause of action existed
5 prior to the death of the decedent, then the personal
6 representative of that decedent have the exclusive
7 right to pursue it.

8 And it is our position and, in fact, it's not our
9 position, it's the position of the First Department, In
10 Re Estate of Gandolfo, which is a 1997 opinion
11 affirming the decision of the Supreme Court, New York
12 County, which held that a claim which arises after
13 death could not have passed into the estate. It did
14 not exist it at the time of the passing of the estate
15 and, therefore, the executor does not have standing.

16 And the Court held, quote: "The alleged breach of
17 confidential and fiduciary duty occurred almost a year
18 after the death of plaintiff decedent. Accordingly,
19 the plaintiffs' causes of action did not yet exist in
20 decedent's favor as of his death, and plaintiff cannot
21 press a cause of action that was not viable during
22 decedent's life."

23 So, we do agree with the -- and that case we can
24 pass up to the court reporter if you want, but that
25 case is cited in the briefs.

26 And so, our position is that the EPTL says,

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2 basically, that if it happens after death, it didn't
3 affect the estate of the -- it couldn't have passed
4 into the estate. Now, that does not create a rule for
5 impunity. That's precisely because the contract at
6 issue here and, in fact, most of the contract in this
7 situation could have arisen, perpetual care contract
8 being the particular case, exist to create charitable
9 trust. And the EPTL specifically says that a trust for
10 maintenance of grave in perpetuity in a charitable
11 trust, which the court says would otherwise be void
12 against the rule of perpetuity if it otherwise were not
13 charitable. And so, the Attorney General, on behalf of
14 People of the State of New York, is empowered and
15 charged with enforcing the terms of charitable trust.
16 And a point of fact, the Attorney General made that
17 very clear to us, their subpoenas are in the record
18 here attached to my affidavit that they have served on
19 us, purporting to say that they are investigating an
20 alleged violation of perpetual care trust, the Bayside
21 Cemetery. They cite statutory authority. They served
22 subpoenas; we have answered them. And we recognize
23 that at the appropriate point if the Attorney General
24 decides to bring suit, we will deal with that, but that
25 doesn't create standing for these plaintiffs.

26 Let me briefly deal with the other points that

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2 were made, Michelle v Thorne, which plaintiffs' counsel
3 passed up, I will simply point out what is factually
4 distinguished in our brief I believe at Page 8. Again,
5 basically, the heirs there sued under a conveyance.
6 The cemetery was created by a conveyance that says it
7 is reserved to the grantor and his heirs a right of
8 access to the cemetery.

9 And so, the Court of Appeals said, fairly
10 uncontroversially, the heirs can sue to enforce their
11 easement to get to the cemetery. And that's spelled
12 out in the briefing papers.

13 And lastly, I will just address Smithers to say
14 that contrary to the statement of plaintiffs' counsel,
15 the First Department clearly relied on the proposition
16 that Mrs. Smithers was the appointed executrix. And in
17 fact, the Court says - reversing this court, not Your
18 Honor, the Supreme Court. "Supreme Court incorrectly
19 characterized Mrs. Smithers as one who positions
20 herself as the champion and representative of the
21 possible beneficiaries of the gift." Let me skip a
22 little bit.

23 THE COURT: Just slow down.

24 MR. STEINTHAL: "Mrs. Smithers did not bring
25 this action on her own behalf or on behalf of the
26 beneficiaries of the Smithers Center. She brought it

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2 as the court-appointed special administratrix of the
3 estate of her late husband to enforce his rights under
4 his agreement with the hospital through specific
5 performance of that agreement. Therefore, the general
6 rule barring beneficiaries from suing charitable
7 corporations has no application to Mrs. Smithers."

8 I would also point out that at a separate point,
9 the First Department clearly noted that Mr. Smithers'
10 claim arose before his death. So, it applies the exact
11 same rule of saying that the estate can only sue if it
12 happened before death.

13 So, I will simply say that our position here is
14 that these plaintiffs lack standing for bringing these
15 claims. And our argument for impunity, we believe the
16 brief spelled out as much.

17 MR. BUCHMAN: Your Honor, one procedural
18 point?

19 THE COURT: Sure.

20 MR. BUCHMAN: Just so the record is clear, we
21 filed an affidavit showing that Mr. Lucker has letters
22 of administration from the court in Connecticut
23 appointing him as the administrator of his
24 grandmother's --

25 THE COURT: He agreed with that.

26 MR. BUCHMAN: And it wasn't mentioned in the

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2 papers that you referenced earlier when you were going
3 through the motion papers.

4 THE COURT: I didn't go through each paper
5 separately. I don't have time. I did say, though, I
6 will review each of the papers that have been submitted
7 on the motion, but there is no time to do that on oral
8 argument, but I certainly will.

9 MR. BUCHMAN: Just for the record --

10 THE COURT: I understand stood that.

11 Again, I have heard argument. I am going to
12 direct that you order the transcript. I will review
13 the transcript once again, but only as preliminary to
14 going painstakingly through the papers. So, I assure
15 you I will review the entire record, not just what was
16 referred to during oral argument.

17 MR. BUCHMAN: Thank you, Your Honor.

18 THE COURT: Oral argument is not to amplify
19 the record. It's only to help me a little bit in
20 review of the record.

21 So, let's move on to the argument of the
22 codefendant, Mr. Selman.

23 MR. SELMAN: Yes.

24 Good morning, Your Honor. My name is Ari Selman,
25 and I am pro bono counsel for the defendant, Community
26 Association For Jewish At-Risk Cemeteries.

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2 THE COURT: And if you could focus on maybe
3 an argument that's particular to your client.

4 MR. SELMAN: Sure.

5 So, the issue before the Court is whether CAJAC
6 should be liable for breach of the annual and perpetual
7 care contract to which CAJAC was not a party, which do
8 not mention much less purport to bind CAJAC, and
9 virtually all of which predate CAJAC's existence by
10 years and in some cases decades.

11 The obvious response to that question under be it
12 the contract law principle, CAJAC is not liable for
13 breach of the contracts for which it was not a
14 signatory.

15 THE COURT: And this is a matter of predates,
16 right?

17 MR. SELMAN: Exactly.

18 So, in order to circumvent very basic contract law
19 principle that would preclude holding CAJAC liable for
20 contracts that it never entered into, plaintiffs plead
21 a veil piercing theory, a theory that you should pierce
22 the corporate veil as to CAJAC and hold us liable for
23 contracts entered into by a separate entity; namely,
24 Congregation Shaare Zedek.

25 This Court has been very clear about the
26 requirements that need to be pled in order to pierce

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2 the corporate veil.

3 First, the Court has noted its extraordinary
4 remedy. It says that it requires disregarding the
5 corporate forum. And in fact, the Court has noted that
6 plaintiffs trying to pierce the corporate veil bear a
7 heavy burden. And it can only discharge that burden
8 through particularized allegation.

9 So, what do the plaintiffs need to show? Two
10 things.

11 THE COURT: You agree it's alleged, right?

12 MR. SELMAN: Alleged, exactly, Your Honor.

13 They need to allege particularized facts showing,
14 (1) that the Congregation exercised absolute dominion
15 over CAJAC with respect to the transaction challenge;
16 and (2) plaintiffs have to show that that dominion was
17 used to perpetrate or commit a fraud or wrong that has
18 resulted in an injury.

19 Now, I would like to take these two requirements
20 in turn, Your Honor. And starting, actually, with the
21 second requirement, the fraud or wrong which resulted
22 in an injury. And I am using that because the two
23 controlling decisions of the New York Court of Appeals,
24 Morris versus New York and TNS Holdings versus MKI
25 Securities, the Court dismissed the complaint solely on
26 the failure to plead a fraud or wrong that has resulted

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2 in an injury without getting to dominion. And we would
3 urge the Court do that here.

4 So, addressing the second prong of fraud or wrong,
5 in order to pierce the corporate veil, plaintiffs must
6 show that the dominion was used to perpetrate a fraud
7 or wrong resulting in present injury.

8 So, what does the present injury allege? Well,
9 the present injury cannot be merely the breach of the
10 annual and perpetual care contract. Because by
11 definition, the Congregation's domination of CAJAC
12 could not have been used to breach contract that
13 themselves predated CAJAC's very formation.

14 The exercise of domination over CAJAC to breach
15 contract that all uniformly antedated CAJAC would be a
16 logical impossibility. So, that's not their theory.
17 Instead, they claim the injury they could suffer is in
18 the future. And this is mentioned in two places.
19 First, on Paragraph 15 of their complaint, the last
20 sentence, they say:

21 "CAJAC is an arm of defendant Congregation Shaare
22 Zedek which has been designed as a straw person upon
23 which to unload all of Shaare Zedek's legal and other
24 responsibility.

25 In other word, the injury they are pleading is
26 that at some future point, the Congregation may

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2 transfer its liabilities to an insolvent entity. And
3 plaintiffs would be injured thereby, because that
4 insolvent entity would be incapable of covering their
5 obligation.

6 There is a very critical point here. Both in the
7 complaint and the response brief, plaintiffs conceded
8 that not one annual or perpetual care contract has been
9 transferred to date. In fact, they argue on Page 3 of
10 the response brief that the New York Attorney General
11 had physically deferred its response. Further, at four
12 different points in their response brief, they
13 specifically note there is merely an intent to
14 transfer, and that there has not been an actual
15 assumption of any of the Congregation's liabilities to
16 date. Why is that significant, Your Honor? It is
17 significant because if there has not been a transfer of
18 obligation, the Congregation is still on the hook for
19 them. So where is the present injury? That Morris
20 versus New York, that TNS Holdings versus MKI, and two
21 of plaintiffs' only cases, Morris is one of them, and
22 the other case is United U.S.A. Holdings versus
23 TSE-PEO, all of which require a present injury.

24 Second of all, Your Honor, even if your were
25 comfortable overturning the Court of Appeals
26 controlling precedent that say you need a present

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2 injury, and even if you are prepared to conclude that a
3 future injury that is premised on a transfer of
4 liability to CAJAC, and even if you are willing to
5 indulge the assumption that on the date of that
6 transfer, CAJAC lacked adequate asset to cover those
7 liabilities, and even if you are willing to indulge the
8 assumption further that they argue that the New York
9 Attorney General, once receiving that application,
10 would approve them and the court would approve it,
11 notwithstanding the fact that CAJAC has allegedly been
12 deliberately undercapitalized, so assuming all of those
13 contingencies, even then, where would the injury be?
14 Because on Page 3 of their response brief, they concede
15 the New York Attorney General is very heavily involved
16 in this case. That's their own allegation.

17 Further, there is no argument that CAJAC and the
18 Congregation will not follow New York law, which
19 requires judicial approval of any transfer. So my
20 point is this, where is the injury? Where is the
21 threat of undercapitalization if the New York Attorney
22 General is heavily involved, and they concede that the
23 New York Attorney General needs to approve the
24 transfer, where they concede that the New York Court
25 would have to approve the transfer, where they concede
26 that there is no argument that CAJAC or the

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2 Congregation would ever circumvent those requirements?

3 In fact, they specifically note that the New York
4 Attorney General, after receiving the application, has
5 deferred approval. So, we have an adequate remedy, the
6 chief legal officer. But more than all of those
7 things, there is something very counterintuitive.
8 Piercing the corporate veil is reserved for instances
9 of extraordinary fraud.

10 Plaintiffs' own allegation on Page 3 is that CAJAC
11 and the Congregation had approached the chief legal
12 officer, the New York Attorney General for approval.
13 How is it possible if CAJAC were bent and the
14 Congregation were bent on a fraud? Why consult the New
15 York Attorney General?

16 So, the extraordinary anticipatory relief that
17 plaintiffs seek, they want a judgment now based on
18 hypothetical acts that may or may not come to pass in
19 the future. Why is it necessary? If it comes to pass
20 in the future that CAJAC or the Congregation are
21 underfunded, or if it comes to pass that the New York
22 Attorney General or the Court inadvertently and
23 incorrectly approved a transfer to an insolvent entity,
24 file a suit then. There would be no reason they
25 couldn't. In fact, we have not even done discovery, so
26 there wouldn't be a burden. That's the fraud or wrong.

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2 Would you like me to address the second
3 requirement?

4 THE COURT: No. That's it for my purposes
5 today.

6 So, Mr. Buchman, what's your reply?

7 MR. BUCHMAN: First of all, Your Honor, with
8 regard to the first prong that opposing counsel
9 mentioned, CAJAC was formally known as Friends of
10 Bayside Cemetery. It was started by Ethan Klingsberg,
11 who was on the board of trustees at Congregation Shaare
12 Zedek and Gary Katz. They kept offices at Congregation
13 Shaare Zedek. They changed their name two years ago.
14 They maintained an office at Congregation Shaare Zedek
15 for a period of time and then changed it to Mr. Katz's
16 office. But more importantly, in response to opposing
17 counsel's argument, he seems to misunderstand what we
18 are alleging here and what we are saying. And we say
19 it clearly in our brief. We agree that the transfer
20 legally has not taken effect. But what has happened
21 here, Your Honor, is Congregation Shaare Zedek in an
22 attempt to wash its hands of this cemetery has said to
23 CAJAC, this entity that it helped create, take control
24 of the cemetery, take de facto control. We say it on
25 Page 6 of our brief. And Congregation Shaare Zedek had
26 taken de facto control. In fact, not only have they

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2 taken physical de facto control, but CAJAC had entered
3 into contracts with landscapers to perform services at
4 a cemetery that they don't legally own but are
5 controlling.

6 So why is CAJAC assuming no legal and financial
7 responsibility for Congregation Shaare Zedek? It makes
8 no sense. They are doing it because they are one in
9 the same. Because the whole purpose is, Mr. Axon said
10 in Federal Court many times was for Congregation Shaare
11 Zedek to transfer all the assets and liabilities of the
12 cemetery to CAJAC. And we point out on Page 6 all of
13 the factors as to why we satisfy this piercing the
14 corporate veil theory. We talk about inadequate
15 capitalization. We talk about the overlapping of
16 corporate officers. We talk about the shared common
17 space. We talk about CAJAC taking over de facto
18 control of Bayside Cemetery. We talk about the
19 shifting of funds from the UJA Federation to CAJAC.
20 Money that was supposed to have been dedicated for
21 Congregation Shaare Zedek was given to CAJAC instead.

22 THE COURT: Where in the complaint do I look?

23 MR. BUCHMAN: It's on Page 6.

24 THE COURT: It's got to be in the complaint
25 initially, right?

26 MR. BUCHMAN: We say in our section on CAJAC,

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2 we talk about is how they have taken de facto control
3 of the cemetery.

4 THE COURT: Where do I look?

5 MR. BUCHMAN: It's in the party section, and
6 we specifically mention by name "CAJAC."

7 THE COURT: That's what I'm going to be
8 looking at, the allegation of the complaint to make
9 sure that the allegations are sufficient, correct? So
10 that's why I wanted you to point out what I should be
11 looking at.

12 MR. BUCHMAN: And I understand that, but some
13 of this information has only recently come to light.
14 And second of all, we have had no discovery. We can
15 only plead, in fairness, what we know. And we have
16 respectfully request discovery on this issue. I don't
17 see why there is any prejudice to CAJAC in re-raising
18 these arguments through a summary judgment motion after
19 the conclusion of discovery. We can present a more
20 complete record.

21 THE COURT: The problem is the Court has to
22 make a ruling on whether or not the pleadings are
23 sufficient to set forth a viable cause of action.

24 MR. BUCHMAN: We have requested information
25 from Congregation Shaare Zedek which owes a fiduciary
26 duty to us. And they have refused time and again to

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2 give us information. We can only plead what we know.

3 THE COURT: But where do I look?

4 MR. BUCHMAN: In the party section of the
5 complaint.

6 THE COURT: Help me.

7 MR. SELMAN: Paragraph 16 contains all of the
8 allegations regarding CAJAC.

9 THE COURT: It's a problem, is it not, that
10 there may be overlapping officers or directors to make
11 out a claim seeking to pierce the corporate veil?
12 Perhaps, the complaint should probably be amended, but
13 I don't know that it states --

14 MR. BUCHMAN: Then we would respectfully
15 request leave to replead as to CAJAC.

16 THE COURT: Well, it probably should have
17 been done by way of cross-motion.

18 MR. BUCHMAN: We put in our papers in the
19 last footnote of our brief, to the extent that the
20 Court grants any motion, we would respectfully request
21 leave to replead.

22 THE COURT: Actually, is there a specific
23 claim for seeking to pierce the corporate veil?

24 MR. BUCHMAN: There is a practical reason
25 here, Your Honor.

26 THE COURT: I'm just wondering. I'm trying

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2 to parse through the complaint.

3 MR. BUCHMAN: There is no claim specifically
4 as to relief from CAJAC. We are only including CAJAC
5 in this lawsuit because they told us they intend to
6 transfer the property. And what we want to avoid, from
7 a practical perspective, is litigating this case
8 against Congregation Shaare Zedek for another three,
9 and then having the transfer legally effectuated and
10 then have to bring in CAJAC and start all over again.
11 We have already been litigating for three years. We
12 don't want to reinvent the wheel. And we think we have
13 alleged what's enough to pierce the corporate veil and
14 include CAJAC. And there is no prejudice to CAJAC,
15 because they are being represented well by pro bono
16 counsel. It's not costing them a nickle. And there
17 are practical reasons for having them involved in this
18 case now.

19 THE COURT: All right, so the last question
20 posed is to Mr. Selman.

21 Would it not be inefficient to dismiss the
22 complaint as to your client?

23 MR. SELMAN: Would it be --

24 THE COURT: Inefficient, assuming that the
25 codefendant is not successful on Motion Sequence Number
26 001?

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2 MR. SELMAN: The most inefficient result
3 would be to keep CAJAC in this lawsuit.

4 First, the continued presence of this lawsuit has
5 a major stigmatic effect, which makes it difficult for
6 CAJAC to raise funds, because the organization that's
7 donating never knows whether it's going to get dragged
8 into this litigation.

9 The second point, there is no burden to plaintiffs
10 if this case were dismissed, and if there was a future
11 fraud ensuing at that point. No discover has occurred
12 with respect to CAJAC. And moreover, Your Honor, not
13 only has no discovery taken place to date, but their
14 claim would be very easy if we were to circumvent the
15 New York Attorney General and the Court. But I have
16 one last point, Your Honor.

17 All of plaintiffs' allegations are contained in a
18 single paragraph. It doesn't mention veil piercing.
19 It doesn't mention overlapping officers and directors.
20 It doesn't mention de facto control. Why is it all of
21 a sudden coming up in the response brief?

22 THE COURT: It does mention overlapping
23 officers. My question is, is that enough to pierce the
24 corporate veil?

25 MR. SELMAN: Your Honor, I need to address
26 that point. There are zero overlapping officers,

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directors or personnel. Zero.

THE COURT: Here is the problem. On a motion to dismiss, the Court is limited to review the pleadings, right?

MR. SELMAN: But they had access to the board registry. They have, in fact, cited it and include it as an attachment. So, why didn't they plead it?

THE COURT: All right, the Court will take a look at all of this, and directs all attorneys to order a copy of their oral argument, which would be very helpful in the Court's preparation to thoroughly review the record on Motion Sequences 001 and 002.


We are now recessed. Thank you. The Court reserves decisions, obviously.

MR. SELMAN: Thank you, Your Honor.

MR. BUCHMAN: Thank you, Your Honor.

* * * * *

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.


ALDORINE WALKER, RPR
Official Court Reporter