Lucker v Bayside Cemetery
2017 NY Slip Op 31018(U)
May 12, 2017
Supreme Court, New York County
Docket Number: 161848/15
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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JOHN R. LUCKER, as CONNECTICUT PROBATE COURT APPOINTED ADMINISTRATOR FOR THE ESTATE OF RUTH B. LUCKER, and BEATRICE WOLIN as representative of a class consisting of all others similarly situated,

Plaintiffs,

-against- Index No. 161848/15

BAYSIDE CEMETERY, and CONGREGATION SHAARE ZEDEK,

Defendants.

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DEBRA A. JAMES, J:

Defendants Bayside Cemetery (Cemetery) and Congregation Shaare Zedek (the Congregation) move, pursuant to CPLR 3211 (a) (5), for an order dismissing this action.

The complaint alleges that the Congregation, which owns the Cemetery, has failed to maintain it and has used trust fund receipts earmarked for the Cemetery for the Congregation's own needs. These claims were first raised in Lucker v Bayside Cemetery, 262 FRD 185 (ED NY 2009) (the federal action), which was dismissed for lack of subject matter jurisdiction, and then in Lucker v Bayside Cemetery, 114 AD3d 162 (1st Dept 2013) (Lucker1).

The court will first discuss plaintiff John R. Lucker's claims, and then those of plaintiff Beatrice Wolin.

In Lucker1, the Court affirmed the dismissal of Lucker's complaint for lack of standing. Lucker's complaint in this action differs from his complaint in Lucker1, in that the earlier action names Lucker in his individual capacity, while in this action he is named as the court-appointed administrator of his mother's estate.

Estate, Powers and Trusts Law (EPTL) § 11-3.1 captioned "Actions" states

> Any action, other than an action for injury to person or property may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent.

Attached to the Complaint is a copy of the Fiduciary's Probate Certificate in which Lucker was appointed as administrator of the estate of his mother on February 10, 2010 by the State of Connecticut Court of Probate. Also attached is the Certificate of Death of Lucker's mother, which states that she died on August 11, 1987.

Lucker's representative capacity does not aid him, however, because a personal representative has no standing to litigate claims that arose after the death of his or her decedent. Lucker1, 114 AD3d at 172; Matter of Gandolfo, 237 AD2d 115 (1st Dept 1997). As for any injury suffered by Mrs. Lucker prior to her death in 1987, plaintiff's claims are time-barred. The claims pursuant to General Business Law §§ 349 and 350 (the first

three causes of action alleged in the complaint) would have had to be brought no later than three years after Mrs. Lucker suffered any injury cognizable under those statutes (CPLR 214 [2]; Corsello v Verizon N.Y., Inc., 18 NY3d 777, 789 [2012]), that is no later than 1990, three years after her death. Any claim based on an injury that Mrs. Lucker may have suffered as a result of a breach of contract (the fourth cause of action) would have had to be brought, at the latest, within six years of her death (CPLR 213 [2]); Ullmann-Schneider v Lacher & Lovell-Taylor, P.C., 121 AD3d 415 [1st Dept 2014]), that is, no later than 1993.

Wolin's claims, too, are time-barred. The complaint alleges that Wolin entered into a series of contracts for the annual care of certain grave sites "from 1949 until approximately 2009." This claim is consistent with the invoice for $250 marked "Pd illegible 9/4/08, which defendants attach to their opposition papers, as evidence that Wolin's last payment was received on September 4, 2008. Even assuming the latest time that Wolin could have suffered an injury cognizable by GBL §§ 349-350 was on December 31, 2009, Wolin's GBL claims had to brought no later than three years thereafter. The last date on which the last contract for annual care could have been breached was one year after it was purchased, that is, on December 31, 2010. This action was commenced more than four years thereafter.

Wolin argues, however, that her claims are viable because

the applicable statutes of limitations were tolled. First, she argues that defendants should be estopped from relying upon the statutes of limitation, because, she alleges, they made deceptive statements to the Office of the Attorney General and:

> intentionally cover[ed] up and refus[ed] to publicly disclose . . . information concerning the deliberate invasion of fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery to class members, their families and the general public.

However, "A wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." Zumpano v Quinn, 6 NY3d 666, 675 (2006). "Equitable estoppel defeats an otherwise valid statute of limitations defense only where the party invoking the doctrine has reasonably relied on the deceptive conduct alleged to have given rise to the estoppel." K-Bay Plaza, LLC v Kmart Corp., 132 AD3d 584, 589 (1st Dept 2015), citing Zumpano, 6 NY3d, at674; see also Simcuski v Saeli, 44 NY2d 442, 448-449 (1978). Wolin does not allege upon what "deceptive acts or practices" of defendants she relied, reasonably or otherwise, much less that she refrained from commencing suit earlier in reliance upon misrepresentations made to her.

Secondly, Wolin argues that the statutes of limitations were tolled by the doctrine first stated in American Pipe & Constr. Co. v Utah (414 US 538, 554 [1974] ["the commencement of a class

action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"]). In American Pipe, the issue was whether a putative class member, whose individual claim would have been untimely, could intervene in the pending class action. Subsequently, in Crown, Cork & Seal Co., Inc. v Parker (462 US 345, 354 [1983]), the Court held that the same reasoning applied to a putative class member who, rather than intervening in the initial class action, commences his or her own individual action. New York courts have followed American Pipe and Crown, Cork for reasons of policy. See Desrosiers v Perry Ellis Menswear, LLC, 139 AD3d 473, 474 (1st Dept 2016); Paru v Mutual Life of Am. Ins. Co., 52 AD3d 346, 348 (1st Dept 2008). Plaintiffs argue, accordingly, that Ms. Wolin's claims are timely by virtue of having been tolled by the filing of the federal court action, Lucker1, and the Leventhal action (decided together with Lucker 1). However, the federal courts have held that the "'pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class.'" Griffin v Singletary, 17 F3d 356, 359 (11th Cir 1994), quoting Salazar-Calderon v Presidio Valley Farmers Assn., 765 F2d 1334, 1351 (5th Cir 1985) see also Andrews v Orr, 851 F2d 146, 149 (6th Cir 1988); Korwek v Hunt, 827 F2d 874, 878-879 (2d Cir 1987). A

contrary result could lead to "'a potentially endless succession of class actions, each tolling the [applicable limitations period] for its successor.'" Korwek, 827 F2d at 878, quoting Smith v Flagship Intl., 609 F Supp 58, 64 (ND TX. 1985). The same reasoning is applicable here, and accordingly, Wolin's class action is untimely.

Nor can Wolin rescue her untimely individual case. Having personally entered into yearly contracts for annual care, she would not have been a member of the putative class of either the federal case, or Luckerl, both of which were brought on behalf of a class consisting of relatives of persons who purchased either a perpetual care or an annual care contract.

While Leventhal was brought on behalf of a class consisting of "[a]ll persons . . . who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns" (Leventhal v Bayside Cemetery, NY County Index No. 1000530/13, Leventhal had purchased a perpetual care contract, thereby becoming the donor of a charitable trust fund subject to Not-For-Profit Law § 1507 and EPTL 8-1.5. See Lucker 1, 114 AD3d at 172-173. In any event, Leventhal's case was dismissed, both on the merits and as untimely, except for his claim to enforce the terms of the trust. Wolin does not allege that her yearly purchases of annual care created a trust, and she cannot rescue her untimely action by pegging it to Leventhal's untimely claims.

Accordingly, it is hereby

ORDERED that the motion of defendants Bayside Cemetery and Congregation Shaare Zedek to dismiss the action is granted with costs and disbursements as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 12, 2017

ENTER:

J.S.C.
DEBRA A. JAMES