

**Matter of Judicial Dissolution of Friends for Long
Island's Heritage**

2008 NY Slip Op 33615(U)

November 26, 2008

Supreme Court, Nassau County

Docket Number: 019423/2005

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

In the Matter of

INDEX NO.: 019423/2005

Application for Judicial Dissolution of
Friends for Long Island's Heritage,

Petitioner.

The following papers have been read by the court:

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The primary issue now before the court, in this special proceeding brought for the dissolution of the Friends of Long Island’s Heritage, is whether the settlement proposal of the County of Nassau and the two secured creditors to pay the Friends’ creditors by using the proceeds of two accounts designated for the preservation of Old Bethpage Village and a sale of the Levine Wedgwood collection should be approved. The proposal creates tension between the legal theory that items donated to a historical entity for a particular use cannot be used to pay the expenses of the historical entity, and the statutory authority which states that the court, in the exercise of its discretion, shall authorize the sale of assets of a liquidating non-profit corporation to pay its debts. See Ed L § 220 and N-PCL §§ 1005(a)(3) and 1008. For the reasons that follow, the Court determines to approve the subject Settlement Proposal.

The relationship of Friends with, inter alia, Nassau County began in 1964, and was apparently successful until between 1986 or 2001 when a tendency of being derelict in performance of duties began with the those incidental to the Buten Wedgwood collection. Nassau County terminated a Landmark Agreement to manage its historic properties in December of 2002. Suffolk County terminated its agreement on September 16, 2004 after receipt of an audit showing licenses issued at below market value, failure of upkeep, and improper expenditure of funds. See Order dated November 8, 2007. On December 2, 2005, Friends for Long Island's Heritage filed for dissolution.

From the beginning Friends' mission was to assist in obtaining three dimensional objects and artifacts of cultural and historical and educational value to augment the museums of Nassau County and programs to enrich the heritage of the area. It fits the definition of a historical society as set forth in the Regents Rules, 8 NYCRR §3.30(1), prior to the 1996 amendment. As a municipality, Nassau County cannot solicit donations for its museums nor openly engage in fund-raising for them. Thus, the Friends, a non-profit organization, was formed to act as a conduit for charitable donations to the County's museums which it solicited, received from the public and held in trust for the municipality. Such donations were never given to the Friends for its enjoyment and pleasure.

A similar but not identical symbiosis developed in Suffolk County where the focus was on landmark management and running museum stores. A review of the complete record compiled in this proceeding discloses that Friends did not consistently keep records of their acquisitions, or the terms and conditions upon which they were turned over to Nassau County.

Similarly, Nassau County did not inventory each item or artifact placed in its custody and control, nor did it consistently accession those items. Despite some Administrative Directives passed through the years stating that certain gifts were permanent loans which the County had the right to return to the Friends, there is no record of this ever happening. However, the County does state that at certain times it turned over historical objects, either donated by the Friends or already in its possession for sale but the profit was used for Friends' internal business. It does appear that in the instances of the Cradle of Aviation, and acquisition of the Buten Collection, Nassau County assisted in acquiring the items with money and labor.

Any forethought given to a methodology eventually became a memory. At the time of this decision it has not been ascertained what items, if any, Friends owns as opposed to the entity which has responsibility for them and their control. In fact, Friends' ascertainable assets are greatly exceeded by quantifiable debt and due to this financial circumstance it has played a minor role in concluding this dissolution.

In summary, there is no objective proof which has emerged over the several years during which this proceeding has been pending which would enable petitioner to establish ownership of objects or artifacts now in the possession of Nassau County. It is this circumstance that prompted submission of the record sub judice. The court, before proceeding under the theory that all property which was facilitated by Friends, and which is in the possession of Nassau County is the property of Nassau County, either as a donation or a loan, requested the parties to devise a methodology for determining what the Friends could legitimately lay claim to. Insofar as no party involved had a liking or the financial ability to undertake such a task, the Counties, the Small Business Association and New York Community Bank fashioned a plan to settle their two secured claims and to pay the majority of creditors who filed before the bar date.¹ At a conference and hearing on January 17, 2008, the parties were asked to brief their positions on accepting the proposed settlement, and also the priority of employee claims and the claim of Gerald Kessler for employment related claims.

The debt of the Friends for Long Island's Heritage is comprised of two secured loans in the aggregate sum of \$440,395, claims of multiple vendors filed before the Bar date in the amount of \$335,108.95, compensation claims of employees, and asserted claims by the Counties of Nassau and Suffolk in unliquidated amounts. (Nassau County claims \$832,966.80, Suffolk County claims \$163,000.00.) The latter derives primarily from Landmark Agreements with Suffolk and Nassau Counties to ensure the preservation, use and maintenance of architecturally and historically significant Landmark structures on Long Island and is weighed against petitioner's claim for amortization of capital improvement. The proposed settlement would resolve all financial matters between the two counties, the secured creditors and the unsecured

¹The settlement proposal referenced in this decision is not meant to be a complete statement of its terms.

claimants in amounts dependant upon the selling price of the Levine Wedgwood Collection.

A prior motion by Nassau County, and the Wedgwood Society of New York, for a declaratory judgment that no item or artifact of historical significance could be sold to satisfy the Friends' debts was denied. See Order dated November 8, 2007, Warshawsky, J. This court ruled:

Nassau County's ... first argument is Education Law § 220(4) which pertains to the dissolution of an educational institution by act of the Board of Regents. (Petitioner sought dissolution before the Regents.) It ... does not say, nor should it be understood to state, that a court cannot direct the sale of designated assets of an educational corporation to pay outstanding debts and the cost of dissolution. No authority has been cited for that principal nor does a plain meaning reading of the statute supply any support. Thus, any argument which contends otherwise is rejected.

The principal theme pervading the arguments on this motion is that a museum, or a historical society, or an educational institution, or not-for-profit corporation should not disregard the purpose for which either money or property was entrusted to it. However, where dissolution arises, either under the Not For Profit Law of this State (N-PCL § 1008), or its Education Law § 220), creditors may be paid under judicial scrutiny – considering the purpose(s) of the dissolving entity as nearly as possible. Normal day to day operations of such institutions have ceased in a case of dissolution. Which leads to the alternate provision of law proposed by Nassau County.

Title 8 of the New York Compilation of Codes, Rules and Regulations governs the “Chartering and registration of museums and historical societies with collections.” 8 NYCRR § 3.27 requires that the proceeds of sale of any museum object only be used for the acquisition, preservation, protection or care of collections, not for day to day operations. It is the court's finding that this regulation, which has the force of law, applies to an educational institution authorized by the Regents but does not extend its reach to the dissolution of such groups.

Education Law § 220(4) does not shield the museum's collections from Friends' creditors claims. After deciding that assets of the Friends could be sold to satisfy debts, the petitioner was invited to submit argument and proofs relative to it's ownership of chattel property, and the respondents to submit their opposition. See section 220 of the Education Law (“Whenever ... any educational corporation ... is dissolved ... a petition, duly verified, shall [be submitted to the court] setting forth a complete statement of all the assets, together with their location and an estimate of their value, and also a statement of the ascertainable debts of the corporation.”)

In the interim Nassau County fashioned a settlement proposal, the details of which

require this court to determine whether gifts of restricted items can properly be brought within the ambit of the court's authority pursuant to Ed L § 220(4) notwithstanding N-PCL § 1005.

It bears noting that the sale would not be at the behest of the Friends who has not established ownership rights. However, they have not opposed the settlement.

The focus of the record now before me is what is known as the "Levine Ceramics and Glass Collection." (The proposal includes a provision to use cash in the Campbell and Scudder funds left to support Old Bethpage Village. However, since Nassau County agrees to support Old Bethpage Village, use of those funds is less of a conundrum than sale of the Levine collection.)

In 1997 the executor of the estate owning the collection, and its distributee, Mark Levine, placed the collection on permanent loan status with the Friends; it has been housed by Nassau County, but not displayed. The Agreement between, Mark Levine, and the Friends prevents the latter from selling it in its entirety and mandates that it be held in a permanent collection. During the planned 20 year long accession period the Agreement provided that rejected items could be auctioned, conditioned upon the proceeds of such sale being used for acquisition of other pieces, restoration, funding for a center for ceramic studies or to defer administrative costs vis-a-vis managing the collection. However, there is no evidence that the ceramic items were catalogued, curated and displayed. On the other hand, there is no evidence that the Friends undertook the task of recommending for accession a certain portion of the collection each year.

It is the law that where a non-profit corporation files for dissolution, the assets of such corporation are subject to liquidation to satisfy the creditors before being distributed according to the *cy pres* doctrine. N-PCL 1005(a)(3); see also Alco Gravure v Knapp, 64 N.Y.2d 458 467 (1985)(the Supreme Court is authorized to direct how charitable funds shall be administered when the purpose for which they were originally given or bequeathed becomes 'impracticable or impossible'.) The court has some flexibility in choosing which assets, if any, should be sold to pay creditors. N-PCL § 1008. In so doing the court weighs the donative intent attached to hundreds of museum objects against the expressed intent impressed upon certain assets. The parties who voice opposition to approval of the settlement as proposed argue that the court should adhere strictly to Education Law § 220(4) and 8 NYCRR 3.27. See Ed L § 220(4)(as far

as possible objects of art and historic significance should be transferred to other museums upon an educational corporation's dissolution). However, as often occurs with statutory enactments which reflect a consensus of the populace being regulated, there arises tension between conflicting values for that same populace. The priority is always determined by examining the facts. In this case the equities weigh in favor of approving the proposed settlement. It must be recognized that not only is the Friends in dissolution but also it is for all practical purposes without assets, while the claims of their creditors are valid.

The court too must examine the importance of the Levine Collection in furthering the grand purpose of the collection procured by Friends. And, the relevance of the Collection to the composition of the items displayed in County museums. Together with the relevance to the entire collection, the ability to present it to the public so as to convey its merit is a factor to be considered.

The affidavit of the executor-donor of the Levine Collection does not attest to any guiding principal that resulted in placing the ceramics in Long Island. The main concern was that the collection be kept together as a collection; it happened that Mr. Levine had lived in Nassau County during a period of his life. Just as there was no academic justification for selecting Nassau County, there is no historical connection of the Wedgwood production in the late eighteenth century with Nassau County. Or at any later date.

As far as can be discerned from the record, this diverse collection of ceramics has not been shown to the Long Island or metropolitan area public. The explanation may lie in the fact that it is not readily susceptible of being integrated into an exhibit of examples of local artifacts such as the airplanes from Mitchell Field, or Tecumsha's deed or memorabilia of the Long Island Railroad's development. However, it may also be explained by the practical reality that ceramics require shelving and lighting and space that is not presently available for their display. Support for the latter explanation can be found in the County's lack of housing for another ceramics collection, named after the Butens, which caused it to revert to the Wedgwood Society for proper disposition. If indeed the public does suffer a loss by the removal of the Levine collection it is at a minimum a loss of a treasure it never saw and enjoyed.

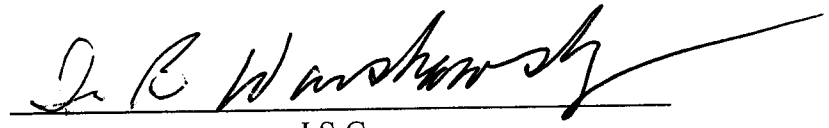
The court holds that N-PCL §1005(a)(3) does not require the court to exclude donor

restricted items from being sold to satisfy creditor claims. What ever restrictions are imposed upon a museum from selling items of the collection to pay operating expenses should not apply to a dissolving institution. See Matter of Hummel, 30 A.D.3d 802, 804 (3d Dept 2006) lv denied. Were the court to hold otherwise it is doubtful that credit would be extended to institutions like Friends of Long Island's Heritage. In the absence of regulatory oversight to protect those doing business with non-profit organizations, there is no reason why such creditors should bear the entire burden of mismanagement more than those who were to benefit from the organization. Both the Education Law and the Not-For-Profit Law are rife with provisions for distributing assets and discharging liabilities. See e.g. N-PCL § 1005(a)(2)(3).

The principal has equal force when applied to a corporation whose liabilities exceed its assets. A settlement which shifts some of the loss to the creditors and sells a desirable collection which has no particular relevance to this locality is eminently sensible. The law does not hold otherwise and common sense - often called fairness and justice - is in its favor.

A conference will be held before the undersigned in this matter on December 5, 2008, at 9:30 A.M.

Dated: September 26, 2008



J.S.C.
ENTERED

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