

**Sagtikos Manor Historical Society, Inc. v Robert
David Lion Gardiner Found., Inc.**

2013 NY Slip Op 30598(U)

March 20, 2013

Supreme Court, Suffolk County

Docket Number: 16632/2012

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

COPY

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:****WILLIAM B. REBOLINI**
Justice

Sagtikos Manor Historical Society, Inc.,

Plaintiff,

-against-

The Robert David Lion Gardiner Foundation, Inc.,
Joseph R. Attonito, James H. Mahoney and
Robert Watkins, individually and as Trustees
of the Robert David Lion Gardiner Foundation,
Inc., The County of Suffolk and The New York
State Attorney General,

Defendants.

Attorney for The County of Suffolk:Dennis M. Cohen
Suffolk County Attorney
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788Motion Sequence No.: 001; MDMotion Date: 9/21/12Submitted: 11/14/12Index No.: 16632/2012Attorney for Plaintiff:Lawrence Donohue, Esq.
170 Anchorage Drive
West Islip, NY 11795Attorney for DefendantsThe Robert David Lion
Gardiner Foundation, Inc.,Joseph R. Attonito, James H. Mahoney
and Robert Watkins, individually and as
Trustees of the Robert David Lion
Gardiner Foundation, Inc.:Wilkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, NY 10019-6099Clerk of the Court

Upon the following papers numbered 1 to 63 read upon this motion to dismiss: Notice of Motion and supporting papers, 1 - 21; Answering Affidavits and supporting papers, 22 - 23; 24 - 29; Replying Affidavits and supporting papers, 30 - 31; Other, Memorandum of Law, 32 - 33; Affidavits, 34 - 37; Plaintiff's list of exhibits, 38 - 57; Supplemental Affirmation in Opposition and supporting papers, 58 - 63; it is

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ORDERED that the motion by defendants for an order pursuant to CPLR 3211 dismissing the complaint against them is denied; and it is further

ORDERED that the parties are directed to appear before this Court on **Wednesday, May 8, 2013 at 9:30 a.m.** for a traverse hearing.

Plaintiff Sagtikos Manor Historical Society, Inc., commenced this action against defendants The Robert David Lion Gardiner Foundation, Inc., Joseph Attonito, James Mahoney and Robert Watkins, individually and as trustees of the Robert David Lion Gardiner Foundation, Inc. (hereinafter collectively referred to as The Foundation defendants), seeking a judgment declaring the intent of the grantor of the Foundation with respect to its charitable purposes and its beneficiaries. Plaintiff also seeks a judgment enjoining the trustees of the Foundation from removing any assets from the jurisdiction of this Court, removing the non-domiciliary trustees and Attonito as trustees of the Foundation, requiring an accounting of the testamentary trust, and a judgment against the Foundation defendants in the amount of \$81,293,622.

In 1935, Robert David Lion Gardiner acquired title to Sagtikos Manor, a 10-acre parcel of real property located in West Bay Shore, New York, which is listed on the federal registry of historic places. In 1985, Gardiner signed a deed conveying Sagtikos Manor to the Islip Local Traditions Association, Inc. On January 28, 1987, a certificate of amendment of the certificate of incorporation of Islip Traditions was filed, changing the name of the corporation to The Robert David Lion Gardiner Foundation, Inc. The certificate of amendment states that the purposes for which the corporation is formed are:

To educate and inform the general public in the State of New York, particularly in the area of the Town of Islip and more generally in Suffolk County, concerning the culture, art and tradition of the locality;

To cultivate, foster, and promote interest in, and understanding and appreciation of, the societal heritage of areas of the State of New York, especially of the Town of Islip, particularly during the nineteenth century;

To encourage and sponsor the creation and perpetuation by existing and future historical societies of collections and repositories for the deposit, collection and examination of documents and artifacts of various kinds relevant to such heritage and traditions;

To sponsor and encourage the preservation, restoration and exhibition by existing and future historical societies of at least one facility appropriate to such purposes. Nothing herein shall authorize the corporation to operate and maintain a library, museum or historical society.

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The complaint alleges that the Foundation was granted exempted 501(c)(3) status by the Internal Revenue Service (IRS) and real property tax exemption for nonprofit organizations by the Town of Islip, based on applications stating that the Foundation was formed to maintain and preserve Sagtikos Manor and to educate the public about the historical significance of the site. It alleges that in 2003, Attonito exerted undue influence on Gardiner, who was no longer able to act independently, and ordered the sale of Sagtikos Manor by the Foundation to Suffolk County for \$1,500,000.

The complaint alleges that upon Gardiner's death in August 2004, his last will and testaments included a distribution of two-thirds of his residuary estate to a testamentary trust for the life of his wife, Eunice Gardiner. Upon the death of his wife, the remainder held in trust was payable to the Foundation. The complaint alleges that plaintiff and Suffolk County are the sole principal beneficiaries of the Foundation as the only organizations providing historical services at Sagtikos Manor, and that the actions of the Foundations' trustees have denied financial support to them. It further alleges that the trustees have violated their fiduciary duties by not seeking a remedy in accordance to Gardiner's plan to preserve Sagtikos Manor. Specifically, the complaint alleges that after the death of Eunice Gardiner in July 2011, the Foundation defendants failed to distribute from the Gardiner estate to the Foundation the amount of \$81,293,622.

The Foundation defendants now move pursuant to CPLR 3211 to dismiss plaintiff's complaint, on the ground that plaintiff lacks standing to state any claim against them. More specifically, the Foundation defendants argue that an action for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer. They also argue that plaintiff is unable to identify any special interest that would accord it standing to bring claims against them. In support of their motion, the Foundation defendants submit, among other things, copies of the pleadings, the certificate of Incorporation of Islip Local Traditions Associations, Inc., the certificate of amendment, the last will and testament of Gardiner, IRS Form 990-PF Return of Private Foundation from 2006 to 2011 and Form 1023 Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, and affidavits of Denis McElligott and Joseph Attonito.

Plaintiff opposes the motion, arguing that it has a unique, special and vested interest in the Foundation that entitles it to sue the Foundation defendants. Plaintiff contends that the charitable purpose of the Foundation is to preserve Sagtikos Manor and to promote its history to the public. In opposition to the motion, plaintiff submits, among other things, copies of its Absolute Charter and amendment, its custodial agreement with the County of Suffolk, an application for real property tax exemption for nonprofit organizations submitted by the Robert David Lion Gardiner Foundation, and copies of IRS Form 990-PF Return of Private Foundation. Plaintiff also submits copies of the Letters of Administration for Eunice Joyce Gardiner, and the deeds conveying the subject property from Gardiner to Islip Local Traditions Association and from the foundation to the County of Suffolk.

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Defendant County of Suffolk also opposes the motion, arguing that plaintiff has a special interest in funds held by the Foundation defendants for a charitable purpose and, thus, has standing to bring this action. In opposition, the County of Suffolk submits, among other things, copies of the deed conveying Sagtikos Manor from the Foundation to the County of Suffolk, the custodial agreement for Sagtikos Manor between plaintiff and the County of Suffolk, IRS Form 1023 Application for Recognition of Exemption, and the Foundation's certificate of amendment.

Under CPLR 3211 (a)(3), a party may move to dismiss claims on the grounds that the party asserting the cause of action has not legal capacity to sue. "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (*Hoston v New York State Department of Health*, 203 AD2d 826, 827, 611 NYS2d 61 [3d Dept 1994], citing *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769, 570 NYS2d 778 [1991]). In determining standing, "[t]he existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution' " (*Society of Plastic Indus. v County of Suffolk*, *supra*, quoting *Schlesinger v Reservists Comm. to Stop the War*, 418 US 208, 220-221 [1974]).

The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust (*Alco Gravure v Knapp Found.*, 64 NY2d 458, 465, 490 NYS2d 116 [1985]; see *Board of Educ. of Mamaroneck Union Free School Dist. v Attorney General of State of N.Y.*, 25 AD3d 637, 811 NYS2d 685 [2d Dept 2006]; *Smithers v St. Luke's-Roosevelt Hosp. Ctr.*, 281 AD2d 127, 723 NYS2d 426 [1st Dept 2001]). Instead, the Attorney General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes (EPTL 8-1.1 [f]; 8-1.4; *Lefkowitz v Lebensfeld*, 68 AD2d 488, 495, 417 NYS2d 715 [1st Dept 1979] *affd* 51 NY2d 442, 434 NYS2d 929 [1980]; see *Matter of Rosenthal*, 99 AD3d 573, 952 NYS2d 194 [1st Dept 2012]). However, there is an exception to the general rule when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number (see *Alco Gravure v Knapp Found.*, *supra*; Restatement 2d Trusts, §391 Comment c).

While the Foundation defendants are correct in their assertion that plaintiff is not specifically listed as a beneficiary in the certificate of incorporation or certificate of amendment, plaintiff has established a special or definite interest in the Foundation, giving it standing to bring the instant action (see *Alco Gravure v Knapp Found.*, *supra*; see generally *Smithers v St. Luke's-Roosevelt Hosp. Ctr.*, *supra*). Significantly, in the Foundation's application for real property tax exemption based on its status as a nonprofit organization, it states that its purpose is to educate the public "about the historical significance of the property consisting of Sagtikos Manor." Similarly, in the Foundation's application to the IRS for recognition of exemption, it states that the Foundation was "formed to maintain and preserve the Manor and its surrounding ten acres, and to educate the public

about the historical significance of this site, one of the few buildings in Suffolk County that is in the Federal Register of historic places.” The application further states that the Foundation, “in cooperation with The Sagtikos Manor Historical Society . . . educates the public about the historical significance of Sagtikos Manor. The Foundation allows the Historical Society free use of the Manor. The Historical Society conducts guided lecture tours of The Manor” In addition, the Foundation’s 1999 tax return states in a section entitled “Summary of Direct Charitable Activities” that its activities consist of educating the public about the historical significance of Sagtikos Manor. Accordingly, the branch of the Foundation’s motion to dismiss the complaint for lack of standing is denied.

As to the Foundation defendants’ contention that plaintiff’s claims are time barred, a defendant seeking to dismiss the complaint insofar as asserted against it as time-barred pursuant to CPLR 3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Lessoff v 26 Court Street Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2d Dept 2009]; *Savarese v Shatz*, 273 AD2d 219, 220, 708 NYS2d 642 [2d Dept 2000]). In an action for breach of a fiduciary relationship, the applicable statutory period is six years, which period does not begin to run until the fiduciary has openly repudiated his or her obligations or the relationship has been otherwise terminated (*see In re Estate of Barabash*, 31 NY2d 76, 334 NYS2d 890 [1972]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 691 NYS2d 502 [1st Dept 1999]).

Here, the Foundation defendants did not submit documentary evidence establishing that they repudiated their obligations to plaintiff or that their relationship with plaintiff terminated (*see Knobel v Shaw*, 90 AD3d 493, 936 NYS2d 2 [1st Dept 2011]; *In re Estate of Meyer*, 303 AD2d 682, 757 NYS2d 98 [2d Dept 2003]). Moreover, the complaint alleges that the breach of fiduciary relationship occurred when the Foundation defendants failed to distribute the \$81,293,622 after the death of Eunice Gardiner in 2011. Furthermore, as to the portion of plaintiff’s complaint seeking a declaratory judgment, even where a justiciable controversy may already be in existence, the limitation period on commencement should not begin until the right to bring an action for coercive relief accrues (*see Vigilant Ins. Co. of Am. v Hous. Auth.*, 87 NY2d 36 [1995]; *Charney v North Jersey Trading Corp.*, 172 AD2d 390, 568 NYS2d 769 [1st Dept 1991]). The Foundation defendants have failed to establish that plaintiff did not act with reasonable promptness after it became clear that a legal dispute had crystalized and judicial resolution would be required. Thus, the Foundation defendants’ motion to dismiss plaintiff’s claims as time barred is denied.

With regard to the Foundation defendants’ assertion that plaintiff failed to serve James Mahoney and Robert Watkins as trustees of the Foundation and individually, it is well established that CPLR 308(2) requires strict compliance and that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made (*see Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 931 NYS2d 675 [2d Dept 2011]; *Kearney v Neurosurgeons of N.Y.*, 31 AD3d 390, 31 AD3d 390, 817 NYS2d 502 [2d Dept 2006]). Although an affidavit of a process server constitutes prima facie evidence of proper service under CPLR 308(2) (*see Wells Fargo*

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Bank, NA v Chaplin, 65 AD3d 588, 884 NYS2d 254; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009]; *NYCTL 1997-1 Trust v Nillas*, 288 AD2d 279, 732 NYS2d 872 [2d Dept 2001]), a defendant's sworn denial of service with detailed facts rebutting the process server's affidavit raises an issue of fact as to whether service was properly effected (see *Wells Fargo Bank, NA v Chaplin*, *supra*; *Delgado v Velecela*, 56 AD3d 515, 867 NYS2d 521 [2d Dept 2008]; cf. *425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 845, 858 NYS2d 188 [2d Dept 2008]). The plaintiff, then, must establish personal jurisdiction over the defendant by a preponderance of the evidence adduced at a hearing (see *DeStaso v Bottiglieri*, 52 AD3d 453, 861 NYS2d 676 [2d Dept 2008]; *Wern v D'Alessandro*, 219 AD2d 646, 631 NYS2d 425 [2d Dept 1995]; *Frankel v Schilling*, 149 AD2d 657, 540 NYS2d 469 [2d Dept 1989]). The Court notes that notice of an action "received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court" (*Feinstein v Bergner*, 48 NY2d 234, 241, 422 NYS2d 356 [1979]; see *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]).

Here, affidavits of service submitted by plaintiff's process server state that copies of the summons and complaint were delivered to Attonito, co-trustee, and that a copy of same was mailed to defendants Watkins and Mahoney's last known residence. The affidavit of Watkins states that he has never been physically present at the Robert David Lion Gardiner Foundation in Hampton Bays, New York, and that, while he received the summons and verified complaint by mail, it was not addressed to his residential address. The affidavit of Mahoney states that he did not receive the summons and verified complaint, and that he has not lived at the address where the summons and complaint were sent for eight years. Thus, the affidavits of Watkins and Mahoney are sufficient to create a factual issue as to whether the purported service on them by mailing the summons and complaint to their last known address complied with the mandates of CPLR 308 (2) (see *Wells Fargo Bank, NA v Chaplin*, *supra*; *Zion v Peters*, 50 AD3d 894, 854 NYS2d 670 [2d Dept 2008]). Accordingly, a traverse hearing shall be held on whether service of process was properly effectuated upon Mahoney and Watkins.

Dated: 3/20/2013


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION