

**Matter of Filipinas-Americas Science & Art Found.,  
Inc.**

2022 NY Slip Op 32201(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 154443/2022

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

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IN THE MATTER OF THE APPLICATION OF  
FILIPINAS-AMERICAS SCIENCE AND ART FOUNDATION,  
INC.,

**INDEX NO.** 154443/2022

**MOTION DATE** 07/01/2022

**MOTION SEQ. NO.** 001

Petitioner,

For Approval to Sell Certain Real  
Property Pursuant to Section 510  
and 511 of the Not-For-Profit  
Corporation Law

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for Court Approval to Sell Property.

The petition for Court approval to sell property owned by petitioner is denied.

**Background**

Petitioner explains that it owns the property located at 1209 Park Avenue in Manhattan. It claims that it was incorporated as a not-for-profit corporation in 1976 and operated a daycare center at the subject property that caters to the Filipino community. Petitioner observes that as the Filipino population in the neighborhood has dwindled, the enrollment in the daycare center has declined to only 2 students and it shut down the daycare. It decided to sell the property and engaged a real estate broker to handle the sale.

Petitioner claims that the initial price of the property was listed at \$5.5 million in April 2019 but, after limited interest, the price was reduced to \$4.995 million in September 2019. Petitioner admits there was a \$4.5 million offer by a developer but the offer was withdrawn during a due diligence period. According to petitioner, issues with air rights led to the offer's withdrawal and the developer later made a reduced offer for \$2.8 million.

Petitioner claims that the property was later listed in May 2020 for \$4.995 million but there was little interest at this price. Petitioner's real estate broker recommended that the property's price be reduced to \$3.495 in January 2021. It insists that in January 2021, it received five offers to buy the property, ranging from \$2.25 million to \$3.2 million. Petitioner maintains that all of these offers, except one, rescinded their offers after finding that the air rights could not be used given the fact that the property is located in the Carnegie Hill Historic District. Petitioner claims that this location means that any changes with respect to the air rights could be challenged.

Eventually, a contract was sent to the remaining purchaser for \$3.2 million. However, that purchaser wanted a 90-day due diligence period, which petitioner viewed as worrisome given that previous offers were rescinded after such due diligence periods. Petitioner alleges that another potential purchaser, David Gold, agreed to buy the property for \$3.2 million without an extended due diligence period and with no contingencies (such as a mortgage). Petitioner contends it formally entered into a contract with an LLC formed by Mr. Gold ("PAD2 LLC"), of which Mr. Gold is the controlling member, for the sale of the property at \$3.2 million.

Petitioner claims it then obtained an appraisal that valued the property at \$3.24 million and then submitted a petition for approval with the Attorney General's Office ("AG"). The AG complained about the appraisal and claimed it did not value the property's air rights. Petitioner

insists it procured an opinion regarding the air rights that insisted these rights were not transferable. It alleges that the AG obtained a second appraisal that valued the property at \$5.8 million. Petitioner argues that this appraisal should be ignored because the appraiser did not enter the property. It points out that the property is configured as a day care rather than a home and so Mr. Gold's desire to turn it into a home will require significant investment. Petitioner claims the property does not have a gas line, needs removal of an oil tank and has multiple child-size bathrooms. It also disagrees with the timeline used to consider comparable properties because it stretched back to Jul 2018, well before the pandemic.

Petitioner observes that Mr. Gold offered to raise the offer to \$3.75 million and a second amended contract of sale was agreed to. Petitioner insists that the price offered is fair and reasonable under the circumstances and the Court should approve this agreement. It claims all three of its board members voted in favor of the contract of sale and the amended second contract. It alleges that none of petitioner's directors, officer or employees have any connection to the sale and that petitioner does not intend to dissolve.

The AG offers an "affirmation of objections" in which it explains why it cannot issue a no objection letter with respect to the sale of this property. It insists the property is not landmarked, but that because it is in a historic district, issues relating to renovation will have to go through the New York City Landmarks Preservation Commission. But the AG observes that there is no blanket prohibition on renovation or expansion of the property. It maintains it sent a list of questions to petitioner's former counsel and did not get satisfactory answers, which prompted the AG to do its own appraisal.

The AG claims that the property was marketed without the proper understanding of how the air rights could be included in a deal. It claims that because the building is transitional,

meaning it is not a traditional rowhouse found in the neighborhood, there could be more leeway given the property with respect to the addition of more floors to the building.

The AG also points out that the relationship between petitioner and Town House International School remains unclear. It observes that this entity is listed on the outside of the property and apparently has a permit to operate a group childcare service.

In reply, petitioner insists it shares the AG's goal of getting the best value for the property but that it has already expended extensive efforts to try and sell the property. Petitioner observes that it got the purported purchaser to up its offer by \$500,000 and that the amount now offered is reasonable. Petitioner argues that it needs to sell the property because it is in financial distress and that the property is deteriorating.

Petitioner maintains that the property was marketed with air rights but the property did not generate multiple offers. It claims that the discussion about air rights by the AG is speculative and should not be dispositive concerning whether petitioner has the right to sell the property for \$3.75 million.

## **Discussion**

When considering as the sale of a property owned by a not-for-profit corporation, the Court must employ a two-prong test under N-PCL 510 and 511 (*Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn*, 76 AD2d 712, 717 [2d Dept 1980], *affd*, 54 NY2d 742 [1981]). “First, the court must determine that the terms and consideration of the transaction were not unwise. In assessing the prudence of the bargain, it is our view that the court should look to the conditions prevailing at the time it was struck . . . [T]he second prong of the

test requires the court to determine that the sale would benefit the corporation or that the best interest of its members would be promoted thereby” (*id.*).

The Court denies the petition. The AG raised numerous issues that compel the Court to reject approval of the proposed sale. As an initial matter, petitioner did not adequately address the presence and role of Town House International School. As the AG points out, the relationship between this entity and petitioner is unclear. Photos included in the appraisal conducted at the behest of the AG includes multiple signs for Town House International School (NYSCEF Doc. No. 22 at 18-20). Curiously, this entity is not mentioned at all in the petition. And, after the AG raised this issue in its response, petitioner only mentions this issue once in reply and states that this entity is a “related non-profit . . . [and] is not in compliance with the Charities Bureau registration; this will be clarified and corrected” (NYSCEF Doc. No. 33, ¶ 28). The Court has no idea what this means. It cannot approve a transaction where petitioner represents that it ran a daycare center at the property but, apparently, some other entity is running a school at the location. Petitioner’s vague response in reply only raises more questions about what, exactly, is happening at the property. The AG also attached a permit for Town House (NYSCEF Doc. No. 30) indicating that it can run a preschool at the property.

Moreover, the fact is that petitioner obtained an appraisal only after it entered into a contract. The AG offers appraisal guidance that specifically states that an appraisal should be obtained “*before* the property is marketed and before a transaction is negotiated with a buyer” (NYSCEF Doc. NO. 26 at 2). Here, petitioner procured an appraisal only after it entered into an agreement for the purchase of the property at \$3.2 million. It is therefore unsurprising that the appraisal cited by petitioner found the property to be worth \$3.24 million.

The AG also pointed out other factors that compel the Court to deny the petition. Petitioner is required, pursuant to the AG's policy, to put the proceeds of any sale into escrow until it has submitted sufficient plans about its operating future. The AG insists that the petition failed to address this issue in its petition and that this is particularly important where the asset to be sold is the not-for-profit's only asset. Petitioner did not address this issue in reply except to say that the escrow issue could be resolved in an approval order. That is not a satisfactory response to an issue highlighted by the AG.

The AG also pointed out that petitioner had not provided a balance sheet or income statement for petitioner, an issue which it raised in its initial comments in July 2021 (NYSCEF Doc. No. 27). Petitioner's reply only claims that it will provide it; but petitioner gives no reason for why this was not already done.

### **Summary**

Petitioner simply did not properly address the AG's reasonable concerns with the sale of the property. The fact is that the AG is tasked with overseeing sales of properties, such as this one, where a not-for-profit is trying to sell its only asset. The AG has a duty to ensure that these transactions are in the best interest of the not-for-profit corporation. Petitioner decided to incorporate as an entity that is exempt (in most instances) from various taxes normally imposed on property-owning entities. Part of that status requires the AG's involvement when such an entity tries to sell property, especially when that property is its only asset.

Here, it seems that petitioner, for whatever reason, ignored the AG's guidelines and did not contact the AG before marketing and trying to sell the property. Instead, petitioner hired a real estate firm to sell the property and now it wants the Court to approve the sale over the AG's

objections. The Court cannot disregard the AG's well-founded objections. Petitioner did not sufficiently explain why the numerous issues raised by the AG should be ignored.

The Court recognizes that the value of any property, particularly during the height of the pandemic, can fluctuate wildly depending on a variety of factors. The AG's insistence that the property is somehow worth nearly \$6 million is belied by the fact that petitioner has not received an offer close to that amount. Moreover, petitioner correctly pointed out that a potential buyer seeking to convert the property to a residential townhome (like the one who wants to buy it now) would have to make a significant investment given the current layout (a daycare center or school).


And petitioner is correct that the discussion of air rights from the AG is quite speculative. As the AG's appraisal observes, it is unclear how a development or renovation might be received by the New York City Landmark Preservation Commission (NYSCEF Doc. No. 22 at 5). It could be that significant alteration, such as including additional floors, might be approved. But to include over a million dollars in unused development rights (for rights that are both likely and unlikely to be used, according to the appraisal) is a stretch given that there would have to be some LPC involvement. Those development rights increased the value of the property from \$4.25 million to \$5.8 million in the AG's appraisal (*id.* at 73).

But the value of the property is not the only issue before this Court. Petitioner attempted to sell the property as if it were a private corporation and then contacted the AG very late in the process. That decision caused a variety of issues and raised many questions, some of which remain unanswered. Although this Court is not troubled by the purchase price (now up to \$3.7 million), it is concerned with the fact that petitioner has not responded to the AG's valid inquiries about petitioner. The AG is entitled to know the financial status of petitioner, its

relationship to a “related” not-for profit operating at the property and information about its operations in the future given that it is selling its only asset. The Court denies the petition under these circumstances.

Accordingly, it is hereby

ORDERED that the petition is denied and this case is dismissed.

<u>7/11/2022</u> DATE			 ARLENE BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE