

**Sag Harbor Whaling & Historical Museum v
Wamponamon Lodge No. 437 of Free & Accepted
Masons**

2013 NY Slip Op 31703(U)

July 3, 2013

Sup Ct, Suffolk County

Docket Number: 12572/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Sag Harbor Whaling and Historical Museum,

Index No.: 12572/2009

Plaintiff,

Motion Sequence No.: 001; MD

-against-

Motion Date: 11/16/12Submitted: 3/15/13Wamponamon Lodge No. 437 of Free and
Accepted Masons, and Mishannock-Sewanna
Chapter #605 of the Order of the Eastern Star
and Andrew Cuomo, the Attorney General for
the State of New York,Motion Sequence No.: 002; XMDMotion Date: 11/16/12Submitted: 3/15/13Attorney for Plaintiff:

Defendants.

Keegan & Keegan, Ross & Rosner, LLP
315 Westphalia Avenue
Mattituck, NY 11952Clerk of the CourtAttorney for DefendantsWamponamon Lodge No. 437
of Free and Accepted Masons, and
Mishannock-Sewanna Chapter #605
of the Order of the Eastern Star:Anthony K. Modafferi, III & Assoc., PC
647 Ramapo Valley Road
Oakland, NJ 07436Attorney for DefendantAndrew Cuomo, the Attorney General
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Sag Harbor Whaling v. Wamponamon Lodge, et al.

Index No.: 12572/2009

Page 2

Upon the following papers numbered 1 to 46 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 28; Notice of Cross Motion and supporting papers, 29 - 40; Replying Affidavits and supporting papers, 41 - 46; it is

ORDERED that the motion by plaintiff for an order awarding summary judgment in its favor is denied; and it is further

ORDERED that the cross motion by defendant for, inter alia, summary judgment confirming a mortgage extension agreement executed by the parties in April 1958 is denied.

On June 14, 1945, Suffolk County Whaling Museum of Sag Harbor, Long Island (hereinafter the Suffolk Whaling Museum), entered into an agreement with defendant Wamponamon Lodge No. 437, Free and Accepted Masons (hereinafter referred to as Wamponamon Lodge or the Lodge), to purchase the Lodge's real property in Sag Harbor, New York for the sum of \$7,500. Acquired by Wamponamon Lodge in the early 1900s, the property includes a large Greek Revival house built in the mid-1800s by Benjamin Hunting II that had been used by the Lodge as a Masonic temple. It is noted that prior to taking title to the property, the Suffolk Whaling Museum, operating under a charter granted by the Board of Regents of the University of the State of New York, had rented space on the first floor of the home for displaying exhibits. Under the terms of the June 1945 agreement, the purchase price for the property was to be paid by the Suffolk Whaling Museum, upon closing and delivery of the deed, by making a \$1,000 cash payment and by giving a purchaser's bond and a purchase money mortgage for the \$6,500 balance, with such sum payable in five years, without interest. Moreover, as Wamponamon Lodge is a not-for-profit corporation organized under the Benevolent Orders Law, the sale agreement was conditioned upon the Lodge securing any necessary court order for the sale of its property.

As relevant to the instant controversy, the 1945 agreement states that Wamponamon Lodge and Mishannock Chapter No. 605 of the Order of the Eastern Star, "so long as they shall remain in existence, shall have the right, rent free, to the exclusive use and occupancy of the Lodge Room, the kitchen on the second floor, the closets in the preparation room . . . and, subject to the rights of the Museum, as hereinafter provided, said Lodges shall likewise have the right to the exclusive use and occupancy of the balance of the rooms on the second floor, together with the basement and attic of the present building on said premises." It states that it is conditioned upon the Lodge securing any necessary court order for the sale of its property, and that "[i]f at the original maturity of the mortgage, or at the maturity of any extension of time granted on same, payment of the principal of said mortgage is demanded by the Lodge, then, from the date of payment, the Museum shall be entitled to annual rent from the Lodge." The agreement, however, also states that the Lodge shall not be required to pay rent "in the event that the Museum, of its own volition, pays off the mortgage." It further states that all repairs, alterations and improvements to the building shall be at the sole expense of the Suffolk Whaling Museum, which "shall keep the building . . . in good repair and order at all times," and that the Masonic Temple sign and emblem on the building "shall remain in its present position in front of the building." In addition, the agreement states that in the event of a dispute between the parties, a committee comprised of three members of the Lodge and three

Sag Harbor Whaling v. Wamponamon Lodge, et al.**Index No.: 12572/2009****Page 3**

members of the Suffolk Whaling Museum will be appointed to decide the issues and its determination will be binding; in the event a decision cannot be reached by the committee, three "disinterested persons" will be selected and a determination of the disputed issues by a majority of the enlarged committee will be binding on the parties.

Shortly after executing the sale agreement, Wamponamon Lodge filed an application with the Supreme Court for leave to sell and convey its real property to the Suffolk Whaling Museum. The application states, in part, that the proposed sale of the property was consented to and authorized by the Lodge's members and directors, that the building on the property was "sorely in need of extensive repairs, which the [Lodge] cannot afford to make, without fairly well depleting its treasury," and that the sale agreement with the Suffolk Whaling Museum permits the Lodge to continue to use portions of the premises without "the expense and cost of upkeep of the premises." By order issued June 21, 1945, the Supreme Court, Suffolk County, approved the sale of the Lodge's real property to the Suffolk Whaling Museum for the sum of \$7,500, "payable One Thousand (\$1,000.00) Dollars cash, and the balance by purchase money mortgage, for Six Thousand Five Hundred (\$6,500) Dollars, payable five years from the date thereof, without interest." The mortgage, also dated June 21, 1945, was recorded as a lien against the subject property on June 28, 1945.

Subsequently, in April 1958, Wamponamon Lodge, as party of the first part, and the Suffolk County Whaling Museum, as party of the second part, "in consideration of one dollar paid by the party of the second part," entered into an agreement extending the time to pay the \$6,500 indebtedness secured by the bond and mortgage to May 1, 2056. The mortgage extension agreement states that the Suffolk County Whaling Museum, "in consideration of the above extension, does hereby assume, covenant and agree to pay said principal sum and interest as above set forth and not before the maturity thereof as the same is hereby extended." It states at item 3 that no building "shall be altered, removed or demolished" without the consent of the Wamponamon Lodge, and at item 19 that the mortgage "may not be paid off or reduced without the written consent of the Wamponamon Lodge #437 Free and Accepted Masons."

Thereafter, in September 1983, the Board of Regents allegedly amended the charter of the Suffolk Whaling Museum by changing its name to Sag Harbor Whaling and Historical Museum. In 2004, after the Hunting house was declared eligible for designation as a National Historical Landmark, plaintiff Sag Harbor Whaling and Historical Museum (hereinafter the Sag Harbor Museum) submitted an application to the New York State Department of Parks, Recreation and Historical Preservation for a grant to fund a restoration and rehabilitation project at the premises. The Department of Parks, Recreation and Historical Preservation allegedly advised the Sag Harbor Museum that to obtain the grant the Wamponamon Lodge would have to enter into an agreement with New York State that the mortgage given to it by the Suffolk County Whaling Museum is subordinate to a preservation covenant/conservation easement for the benefit of the public. Although initially supportive of the Sag Harbor Museum's grant application, Wamponamon Lodge, concerned about its right to use the premises, refused to subordinate the mortgage to a preservation covenant and submitted a counter proposal. A committee comprised of board members of the Lodge and the Sag Harbor Museum was unable to resolve the dispute. By correspondence dated February 27, 2008,

Sag Harbor Whaling v. Wamponamon Lodge, et al.**Index No.: 12572/2009****Page 4**

the Sag Harbor Museum informed the Lodge that its counter proposal was rejected and demanded that the dispute be submitted for determination to an enlarged committee that includes disinterested persons, as provided in the 1945 sales agreement.

This action was commenced by the Sag Harbor Museum in 2009 after the Lodge allegedly failed to respond to its demand that the dispute over the request to subordinate the mortgage to a preservation covenant be submitted to an enlarged committee for determination. The complaint asserts, among other things, that the April 1958 mortgage extension agreement was not approved by the Court, and that the Sag Harbor Museum is unable to obtain a grant from the State's Department of Parks, Recreation and Historic Preservation due to the Lodge's refusal to execute a subordination of mortgage agreement. The first cause of action alleges the restrictions imposed by the 1945 sale agreement, deed, bond and the 1958 mortgage extension agreement "substantially impede[d] the Museum in furtherance of the educational and public purpose for which the premises are held," and that the Lodge will not be substantially damaged as a result of the extinguishment or modification of such restrictions. It seeks a judgment declaring that the restrictions set forth in the 1945 sale agreement, the deed, the bond and the 1958 mortgage extension agreement, "except as to the Lodge's right to occupy the premises," are invalid, and directing the Lodge to accept payment on the bond and the Suffolk County Clerk to extinguish such agreement, mortgage and mortgage extension agreement from the record. The second cause of action seeks a declaration that the restrictions in the April 1958 mortgage extension agreement, except the Lodge's right to occupy the premises, are invalid on the ground the Supreme Court did not approve such agreement. The third cause alleges the Lodge has refused Sag Harbor Museum's tender of payment of the \$6,500 bond and seeks a judgment declaring the restrictions in the 1958 agreement, other than the Lodge's right to occupancy, are invalid and directing the Lodge to accept payment on the bond. The fourth cause of action seeks a declaration that the restrictions in the 1958 agreement are invalid on the ground no consideration was given, and the fifth cause of action seeks a declaration that the "no prepayment clause" of the 1958 mortgage extension agreement "is in violation of the laws of the State of New York." Additionally, the second, third, fourth and fifth causes of action seek extinguishment of the 1958 mortgage extension agreement from the County Clerk's records.

The Sag Harbor Museum now moves for summary judgment in its favor, arguing the 1958 mortgage extension agreement is invalid, because the Lodge never obtained judicial approval for such agreement. It also argues the mortgage extension agreement cannot be enforced, as "no consideration was given to the Museum in connection for the 98 year extension of the Museum's obligation . . . or [for] the Museum's loss of its right to satisfy its [mortgage] obligation." The Sag Harbor Museum further argues the language in the 1945 agreement that the Lodge will not be required to pay rent "in the event that the Museum, of its own volition, pays off the mortgage," evidences the parties' intent that the Suffolk Whaling Museum had a right to pay off the mortgage obligation, and that the 1958 mortgage extension agreement vitiated that right. In addition, the Sag Harbor Museum asserts the Lodge has refused to comply with the provision in the 1945 sale agreement requiring that disputes be submitted to a committee for resolution, leaving "litigation as the Museum's only alternative," and that the Lodge refused an offer in 2007 to pay the \$6,500 still owed for the 1945 conveyance. The Sag Harbor Museum's submissions in support of the motion

Sag Harbor Whaling v. Wamponamon Lodge, et al.

Index No.: 12572/2009

Page 5

include copies of the pleadings, the 1945 sale agreement, the June 1945 order approving the Lodge's sale of the subject premises, the 1945 bond, the deed transferring ownership of the premises to the Suffolk Whaling Museum, the 1958 mortgage extension agreement, and an affidavit of Zachery Studenroth, a member of the Sag Harbor Museum's Board of Directors. In addition to the arguments discussed above, Studenroth asserts in his affidavit that the instant action is motivated by the Sag Harbor Museum's desire to secure funding from the Department of Parks, Recreation and Historical Preservation so it can repair the Hunting house. He alleges the subordination of the Lodge's mortgage to the preservation covenant "will have no effect on the [parties'] relationship or the Lodge's use of the premises unless the Lodge or the Museum determine to change the exterior of the premises," as the parties' respective rights are set forth in the 1945 sale agreement, and that "[t]here is no downside to the Lodge if the Court grants the relief requested."

Wamponamon Lodge opposes the motion and cross-moves for an order confirming the 1958 mortgage extension agreement. Alternatively, in the event the Court invalidates the parties' 1958 agreement, the Lodge seeks damages from the due date of the bond, with interest. It also seeks the imposition of sanctions against the Sag Harbor Museum for failing to preserve Lodge records in its custody and control.

The Lodge's cross motion for summary judgment is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (see *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Although the statutory 120-day period for making a summary judgment motion in this case expired on October 26, 2012, the Lodge did not make its cross motion until November 12, 2012 (see CPLR 2211). As there is no explanation in the cross-moving papers for the Lodge's delay in seeking summary judgment, its cross motion must be denied as untimely (see *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261; *Bicounty Brokerage Corp. v Burlington Ins. Co.*, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]; *Castillo v Valente*, 85 AD3d 1080, 926 NYS2d 304 [2d Dept 2011]; *Teitelbaum v Crown Hgts. Assn. for the Betterment*, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]).

As to the Sag Harbor Museum's motion, it is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the

sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (*see* CPLR 3001; *Rockland Light & Power Co. v City of New York*, 289 NY 45, 43 NE2d 803 [1942]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], *lv denied* 15 NY3d 703, 906 NYS2d 817 [2010]). “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations” (*James v Alderton Dock Yards*, 256 NY 298, 305, 176 NE 401 [1931]). Thus, in a declaratory judgment action, the court does not direct that a party perform or refrain from performing an act; rather, it “merely declares the prevailing party’s rights with respect to the matter in controversy for the purpose of guiding future conduct” (*Matter of Dandomar Co. LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 89, 924 NYS2d 499 [2d Dept 2011]; *see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 464 NYS2d 392 [1983]). Furthermore, a declaratory judgment action generally is “limited to the resolution of questions of law and the parties’ legal obligations” (*Matter of Dandomar Co. LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 90, 924 NYS2d 499; *see Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206, 11 NE2d 728 [1937]), and a court should not entertain such an action when a conventional form of remedy, such as a breach of contract action, is available (*see Wells Fargo Bank, N.A. v GSRE II, Ltd.*, 92 AD3d 535, 939 NYS2d 348 [1st Dept 2012]; *Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 822 NYS2d 68 [1st Dept 2006]; *Apple Records v Capital Records*, 137 AD2d 50, 529 NYS2d 279 [1st Dept 1988]; *Bartley v Walentas*, 78 AD2d 310, 434 NYS2d 379 [1st Dept 1980]).

Although characterized as an action for declaratory relief, the instant matter, in fact, seeks rescission of the 1958 mortgage extension agreement entered into by the Suffolk Whaling Museum and the Lodge so that the Sag Harbor Museum may obtain a grant from the Department of Parks, Recreation and Historic Preservation that will fund restoration work at the Hunting house. An action for rescission of the 1958 mortgage extension agreement based on the failure to obtain court approval or on the alleged lack of consideration, however, clearly is barred by the Sag Harbor Museum’s ratification of such agreement and by the six-year statute of limitations for such a cause of action (*see Colyer v Colyer*, 26 AD3d 303, 810 NYS2d 155 [1st Dept 2006]; *Bowes & Co. of N.Y. v American Druggists’ Ins. Co.*, 96 AD2d 1023, 467 NYS2d 202 [1st Dept 1983], *affd* 61 NY750, 472 NYS2d 917 [1984]). Further, while a declaratory judgment action may be used to settle disputes as to parties’ contractual rights and obligations, it is inappropriate to seek a declaration of rights when the contract specifies a reasonable means for settling disputes (*Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 731-732, 533 NYS2d 258 [1988]). Here, the Sag Harbor Museum failed to establish a prima facie case that the provision in the 1945 agreement requiring the use of a committee to resolve disputes is an inappropriate means for resolving the existing controversy between the parties (*see Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 533 NYS2d 258; *Main Evaluations v State of New York*, 296 AD2d 852, 745 NYS2d 355 [4th Dept], *appeal dismissed, lv denied* 98 NY2d 762, 751 NYS2d 846 [2002]). It also failed to establish a prima facie case that a breach of contract action may not be brought against the Lodge for its alleged failure to

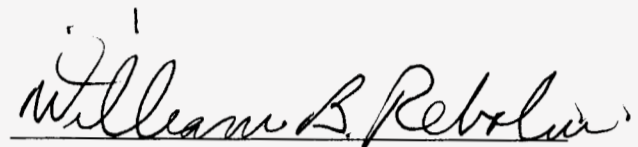
Sag Harbor Whaling v. Wamponamon Lodge, et al.

Index No.: 12572/2009

Page 7

participate in the dispute resolution process set forth in the 1945 agreement (*see Main Evaluations v State of New York*, 296 AD2d 852, 745 NYS2d 355; *see also Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 822 NYS2d 68; *Apple Records v Capital Records*, 137 AD2d 50, 529 NYS2d 279). Finally, the Sag Harbor Museum failed to establish as a matter of law that, under the terms of the agreements at issue, it is entitled at this time to tender payment of the mortgage amount to the Lodge. A court should not permit a party to use a declaratory judgment action to circumvent contractual obligations (*see Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 533 NYS2d 258). Accordingly, the Sag Harbor Museum's motion for summary judgment is denied.

Dated: 7/3/2013


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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION