

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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HOLY CHURCH OF THE VIRGIN MARY HOME
FOR THE AGED IN ICARIA, GREECE
Plaintiff(s),

Index No.: 6393/10

Motion Date: 6/6/13

Motion Cal. No.: 47

Motion Seq. No: 7

- against -

ANTHONY KAYAFAS and COLLEEN XENAKIS,
Defendant(s).

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QUEENS COUNTY CLERK
FILED

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The following papers numbered 1 to 10 read on this motion by defendant Anthony Kayafas ("Kayafas") and defendant Colleen Xenakis ("Xenakis") for summary judgment dismissing the complaint against them.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Memorandum of Law-Service.....	1 - 5
Affirmation in Opposition-Exhibits-Service.....	6 - 8
Reply Affirmation-Service.....	9 - 10

Upon the foregoing papers it is ORDERED that the motion is decided as follows:

Plaintiff, Holy Church of the Virgin Mary Home for the Aged (hereinafter "Nursing Home") operates a nursing home in Icaria, Greece. John Souromanis ("Souromanis") executed a Last Will and Testament, dated November 1, 2001 and a Codicil dated April 23, 2003 whereby he bequeathed money to the Pan-Icarian Foundation ("Foundation") for eventual distribution to the plaintiff. Souromanis died on August 11, 2003, and, after the probate of his Will, the Foundation received \$1,005,000 from his estate to be distributed to the plaintiff. The Foundation deposited the money

in a bank located in Pittsburgh, Pennsylvania. However, prior to the transmission of the funds to the Foundation, John H. Howe ("Howe"), the executor of the estate of Souromanis, deceased, issued "guidelines" stating that the purpose of the bequest was to construct an additional wing or a second floor to the nursing home. The guidelines forbade the use of the bequest for the general operating expenses of the nursing home. On or about March 14, 2006, the Foundation sent the plaintiff \$100,000, and the latter has used approximately \$30,000 of that sum to operate the nursing home. A dispute subsequently arose between Howe and Evsevios Pistolis Evangelos, the Archbishop (Metropolitan) with responsibility for the nursing home, concerning the timing and terms of the distribution to be made by the Foundation. The Archbishop took the position that the Will and Codicil thereto, do not restrict the purpose of the bequest to new construction¹. Howe died on April 26, 2008 after allegedly changing his mind about the restrictions he had placed on the use of the bequest.

The plaintiff, Nursing Home, began this action against the Foundation and its officers, among others, by the filing of a summons with notice on or about March 15, 2010. The plaintiff subsequently served a verified complaint alleging, *inter alia*, fraud, conversion, and breach of fiduciary duty. Pursuant to a decision and order dated December 9, 2011 (one paper), this court, *inter alia*, dismissed the plaintiff's first, seventh, eighth, and tenth causes of action. Pursuant to a decision and order dated March 22, 2012 (one paper), this court dismissed the complaint as to the defendant Foundation, defendant Socrates Koutsoutis, defendant Gus Yiakis, and defendant Maria Vassilaros for lack of jurisdiction. Only two defendants (Kayafis and Xenakis) remain in this case, and they remain on only two causes of action (fraud and breach of fiduciary duty). Kayafas served as the President of the Foundation between 2001 and 2007. Xenakis worked in a clerical job for the Foundation until 2000 and never served as an officer or director.

On November 22, 2010, during the discovery phase of this case, the Archbishop and the Chairperson of the Foundation, among others, held a meeting in Greece where, according to an agreement they signed, "[t]hey discussed the subject of the Souromanis bequest and the manner in which it will be used for the benefit of the Church Home for the Elderly ***."

¹ There is a proceeding pending in the Nassau County Surrogate's Court concerning whether the guidelines are void *ab initio*.

The agreement states that the following "decisions" were taken:

- "1. The donation will be used to renovate the building of the Home to satisfy the current legal requirements [for health and safety] and make provisions for future growth to build later [additional floors] in height.
2. Funds from the bequest will be transferred to a Greek bank, gradually depending on the construction progress.
3. Metropolitan Eusebios will undertake to withdraw any judicial intervention, as soon as Directors of the Foundation in the USA decide to send the funds as stated above."

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). Defendant Kayafas and defendant Xenakis successfully carried this burden. The defendants showed *prima facie* that during the discovery phase of this case, the parties reached a settlement agreement. "Because [a] [s]ettlement [a]greement is a contract between the parties, it must be construed according to ordinary contract law" (*Matter of Lyons v. Whitehead*, 291 AD2d 497, 499; *Mancheski v. GGCP, Inc.*, 41 AD3d 790). "The court must 'determine the intention of the parties as derived from the language employed in the contract,' and it 'should strive to give a fair and reasonable meaning to the language used' ***" (*Mancheski v. GGCP, Inc.*, *supra*, 791, quoting *Abiele v. Contr. v. New York City School Constr. Auth.*, 91 NY2d 1, 9-10). In the case at bar, the settlement agreement clearly expresses the parties' intent that the bequest, which is to be "gradually" distributed to the plaintiff, would be used for renovation or work related to new construction. "It is clear that, in those instances in which an executory accord is present, a party can only prevail in an action on the underlying claim if the accord has been breached by the other party" (*Plant City Steel Corp. v. National Machinery Exchange, Inc.*, 23 NY2d 472, 477; see, General Obligations Law §15-501[3]; *Bryer v. CVFF Development Corp.*, 97 AD3d 774). "Before a party is entitled to the relief provided by General Obligations Law (s 15-501, subd. 3), he must show that the other party has breached or repudiated the accord ***" (*Brauer v. Central Trust Co.*, 77 AD2d 239, 246; *Bryer v. CVFF Development Corp.*, *supra*). The defendants submitted proof that the Foundation did not breach the settlement agreement. The Archbishop testified at his deposition that no construction

occurred after November 22, 2010. According to the defendants, "[t]o date no construction has occurred, notwithstanding the fact that Plaintiff has \$75,000 remaining in its bank account from the Pan Icarian's previous transfer of \$100,000." The defendants showed *prima facie* that the settlement agreement, which the Foundation has not breached, bars this action against them.

The burden on this motion shifted to the plaintiff, requiring it to produce evidence showing that there is a genuine issue of fact which must be tried (*See, Alvarez v. Prospect Hospital, supra*). The plaintiff failed to carry this burden. First, whether the executor's issuance of the guidelines was an *ultra vires* act is not an issue that need be determined by this court. The validity of the guidelines is not a matter which affects the validity of the separate settlement agreement entered into by the parties to end the litigation in this court. Second, the plaintiff alleges that during the November 22, 2010 meeting, the Archbishop was told that if he did not sign the agreement, the nursing home would never receive the funds. Stipulations of settlement are favored by the courts and will not be set aside absent a showing that they were the result of fraud, overreaching, mistake, or duress. (*Strang v. Rathbone*, 108 AD3d 565; *Esposito v. Podolsky*, 104 AD3d 903; *Blackstock v. Price*, 51 AD3d 914). In order to prove duress, a party must submit evidence that a wrongful threat precluded the exercise of the party's free will. (*Desantis v. Ariens Co.*, 17 AD3d 311; *Sontag v. Sontag*, 114 AD2d 892). In the case at bar, the plaintiff did not submit evidence sufficient to raise a genuine issue of fact concerning whether the Foundation's threats allegedly made during the period when the agreement was being negotiated deprived the Archbishop of the ability to act in furtherance of his own interests. (*See, Stearns v. Stearns*, 11 AD3d 746; *Mahon v. Moorman*, 234 AD2d 1). The Archbishop had legal representation in this action, and a stipulation of settlement will not be lightly set aside especially where the party seeking to vacate the stipulation was represented by counsel. (*See, Esposito v. Podolsky*, 104 AD3d 903).

Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted. This case is dismissed, in its entirety.

Dated: December 17, 2013


 JANICE A. TAYLOR, J.S.C.

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