

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

-----X

MARIA UNGUREANU,
Plaintiffs,

Index No.:25452/03
Motion Date: 1/7/04
Motion Cal. No.: 40

-against-

ROCCO BATTAGLIA,
Defendant.

-----X

The following papers numbered 1 to 9 read on this application by defendant for an order cancelling the Notice of Pendency filed by plaintiff against the property 53-19 70th Street, Maspeth, New York and awarding defendant costs and disbursements.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1-3
Affidavit of Service.....	4
Affirmation in Opposition-Exhibits.....	5-6
Reply Affirmation.....	7-9

Upon the foregoing papers it is ordered that the application by defendant for an order cancelling the Notice of Pendency filed by plaintiff against the property 53-19 70th Street, Maspeth, New York and awarding defendant costs and disbursements is denied, for the following reasons:

The instant action stems from plaintiff’s claim that defendant has built a fence that encroaches upon plaintiff’s property. As a result, Plaintiff commenced the instant action, claiming causes of action in trespass and nuisance and seeking the removal of the fence to the extent that it intrudes upon his property and money damages. In addition to filing the summons and complaint, plaintiff also filed a Notice of Pendency against defendant’s property.

Defendant has now moved by order to show cause for an order cancelling the notice of pendency due to the complaint not establishing any basis in the judgment demanded which would affect title to, or the possession, use or enjoyment of the property of defendant and plaintiff’s failure to serve a summons upon all of the owners of the property. Plaintiff opposes this application.

CPLR 6501 permits a party to effectively retard the alienability of real property

without any prior judicial review “in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property. CPLR 6514 provides for the limited circumstances where cancellation of a notice of pendency is available. Under (a), the court must cancel a notice of pendency, “if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated.” Under (b), the court may cancel a notice of pendency, “if the plaintiff has not commenced or prosecuted the action in good faith.” Under either section, the court's scope of review is circumscribed. 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313 (1984.) “One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency.” *Id.* at 320. There is little a court may do to provide relief to the property owner if the procedures prescribed in article 65 have been followed or if the action has been commenced or prosecuted in good faith.

In the instant matter, defendant’s claim regarding the insufficiency of plaintiff’s claims, as pleaded, to support the filing of the Notice of Pendency, is not one of the grounds listed under CPLR 6514 that requires either mandatory or discretionary cancellation is required. However, it has been held that a court may cancel a Notice of Pendency if the plaintiffs claim no right, title or interest in or to the real property against which the notice of pendency was filed. Braunston v Woods, 10 NY2d 302 (1951); Raimonda v Cahn, 26 AD2d (1966). This was recently reiterated by the court in Rose v Montt Assets, Inc., 250 AD2d 451 (1st Dept. 1998), which noted that “the statutory bases for relief from the filing of a notice of pendency (CPLR 6514) presume that filing was valid in the first instance. It is axiomatic that a court possesses the inherent power to grant relief to an aggrieved party from any action taken in violation of the procedural rules.”

Upon review, this court finds that the essence of plaintiff’s complaint involves a claim to possession of defendant’s premises and is not, as claimed by defendant, merely an encroachment or wrong perpetrated by defendant upon plaintiff’s property that cannot form the basis for the filing of a notice of pendency. *See*, Braunston v Woods, supra. Plaintiff’s claim involves defendant’s impermissible use of plaintiff’s property by erecting a fence upon land plaintiff claims is hers. Defendant’s application indicates that he claims that the fence was built upon his land. Consequently, the nature of this dispute involves plaintiff seeking to protect his right, title or interest in property that defendant claims to possess. Clearly, if the plaintiff is correct, the boundary lines of defendant’s property would be changed and defendant’s use or enjoyment would be affected. This interest in the disputed property might be lost in the transfer of defendant’s property to a buyer for value without notice of the claim. *Compare*, Rose v Montt Assets, Inc., supra. As such, plaintiff was entitled to file the instant Notice of Pendency. *See*, Lafayette Forwarding Company, Inc., v Rothbart Garage Operators,

205 AD 247 (1st Dept 1923.) (An action to force defendant to remove a wall and return possession to plaintiff's premises was one brought to recover a judgment affecting the possession, use, or enjoyment of real property that justified filing a notice of pendency.) *See, also, Weinstein, Korn, & Miller*, 1 NY Civil Practice, CPLR P6501.06.

The cases referred to by defendant do not hold differently since they do not involve a plaintiff claiming a right to possess or enjoy the defendant's property. In McManus v Weinstein, 108 Ad2d 301 (1st Dept 1905), the court found that plaintiff's action to remove a portion of defendant's wall that was built upon defendant's land but had bulged out and was encroaching upon plaintiff's land was not a sufficient basis to file a lis pendens. In that case the plaintiff claimed that the encroachment prevented the plaintiff from disposing of his property, and at the same time was dangerous to plaintiff and the members of his family, and the judgment demanded was that the defendants be required to remove that portion of the brick house and wall which is upon and over the plaintiff's said premises. The court found that no possible judgment in the action would in any way "affect the title of the defendants to their property or their right to its possession, use or enjoyment." In Braunston v Woods, supra, plaintiffs filed a notice of pendency against a tract of land owned and being developed by defendants based upon defendants creating a nuisance to the detriment of plaintiff's land by collecting and dumping surface water on it. The court vacated the notice of pendency since plaintiffs claimed no interest in defendants' land and were merely seeking to prevent defendant from committing a wrongful act against plaintiffs. Similarly, in 5303 Realty Corp. v. O & Y Equity Corp., supra, the court found that plaintiff's action was one to enforce a contract to sell stock and not transfer title to the property and did not support the notice of pendency. A review of these cases indicates that their respective notices of pendency were vacated since the actions did not involve a claim of right, title or interest by a plaintiff in the lands of a defendant.

Defendant's reliance upon Hailey v Ano, 136 NY 569 (1893), for the proposition that a trespass action seeking money damages only did not justify the filing of a Notice of Pendency is also misplaced. In Hailey, the parties alleged ownership of the land from which defendant, the alleged trespasser, had cut and carried away hay. At trial, evidence was given in support of each party's claim as to the true location of the boundary line between the parties' properties. While the court did find that plaintiff's action for trespass was not a proper basis for placing a lis pendens upon defendant's land, it noted that the ruling was " certainly reasonable in a case like this that there is nothing in the pleading to put a party on inquiry. " *Id.* In the instant case, plaintiff's pleadings clearly identify the property and would be ascertainable to any person reviewing the records. Any language in the "Hailey" decision that finds an action for trespass that sufficiently identifies the property is not appropriate for a

notice of pendency is not law since it does not relate to the facts before the court. Moreover, this court does not feel compelled to be guided by this language since the “Hailey” court acknowledged that an action for trespass may or may not affect the title or possession of the disputed property. This court’s understanding of the current state of the law is that such a possibility is sufficient to justify the filing of a notice of pendency. Lafayette Forwarding Company, Inc., v Rothbart Garage Operators, supra, (citing Moeller v Wolkenberg, 67 AD 487.)

Based upon the above analysis, the claim by defendant that the notice of pendency must be cancelled since the pleadings do not satisfy CPLR 6501 is denied. The court finds that plaintiff’s action for trespass is a sufficient to justify the filing of the notice of pendency.

Defendant also claims that the Notice of Pendency should be dismissed because plaintiff failed to comply with the filing requirements of CPLR 6512. According to defendant, plaintiff failed to serve the complaint upon all of the property’s record owners and CPLR 6512 requires service upon all record owners. This claim is opposed by plaintiff. Defendant acknowledges an ownership interest in the property and that he was properly served. As such, service upon only one defendant with an ownership interest in the subject property and against which the notice of pendency was filed is sufficient to satisfy CPLR 6512. Weiner v MKVII-Westchester, LLC, 292 AD2d 597 (2d Dept 2002.)

Similarly defendant’s allegation that plaintiff does not have a survey to verify that the fence is encroaching upon her property concerns the lack of validity of the underlying action. This is not a basis to cancel the notice of pendency. 5303 Realty Corp. v. O & Y Equity Corp., supra. Finally, any claim by defendant that the notice of pendency was filed in bad faith due to plaintiff not taking any action until defendant was ready to sell his house is not a sufficient basis to cancel the notice of pendency. This claim is speculative at best and is supported merely by the existence of the action and the notice of pendency. Accordingly, the application by defendant for an order cancelling the Lis Pendens filed by plaintiffs is denied.

Dated: January 9, 2004

.....

ORIN R. KITZES, J.S.C.