

**Elizabeth Street, Inc. v 217 Elizabeth Street Corp.**

2001 NY Slip Op 30015(U)

October 30, 2001

Supreme Court, New York County

Docket Number: 0602408/4081

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 19

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ELIZABETH STREET, INC.,

Plaintiff,

INDEX NO.  
602408/1998

- against -

217 ELIZABETH STREET CORP., CYRIL HERMILE,  
GRACE LaROSA, G. LaROSA & SONS, INC., NINFA  
MASON, and JOHN DOE, being the party claimed to  
have placed a bid on certain real estate already  
committed to sale to plaintiffs, the identity of whom is  
presently unknown,

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Defendants.

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**EDWARD H. LEHNER, J.:**

Before me is a motion by plaintiff to extend the duration of a notice of pendency and a cross-motion by defendant to vacate the notice.

A notice of pendency was filed in this action on May 15, 1998. Plaintiffs motion seeking an extension of the notice was served on August 15, 2001. CPLR 65 13 provides that a notice of pendency is effective for a period of three years, but that "before" the expiration of such period the court "for good cause shown" may extend the period.

In light of the requirement that the extension application be made before the expiration of the three year period, it has been held that, absent a timely application, it is not only improper to grant an extension nunc pro tunc, but also a court may not

grant permission for the filing of a new prospective notice.

In *Matter of Sakow*, 182 Misc.2d 775 (Surr. Ct., Bx. Co. 1999), the court, recognizing the impropriety of granting a nunc pro tunc extension of an expired notice, allowed the parties to file new notices that would "protect them prospectively from the date that the new order is filed, recorded, and indexed". However, this permission was overturned on appeal [280 A.D.2d 678 (2001)], the First Department ruling that since the notices expired without the affected parties having sought an extension, "they should not have been permitted to file new notices with respect to those properties" (p. 379). In support of such holding, the court cited the Second Department decision in *Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208 (1989), where it was held that absent a timely extension, "successive notices may not be filed for the purposes of CPLR article 65 and the plaintiff loses the special privilege afforded by that article" (p. 212). See also, *Chuang v. Arguello*, 143 Misc.2d 861 (Sup. Ct., Kings Co. 1989). Thus, the motion of plaintiff for an extension is denied.

Since the notice of pendency has expired, it is appropriate to now direct that it be canceled. See, *Praver v. Remsen Associates*, 181 A.D.2d 723 (2<sup>nd</sup> Dept. 1992); *Modular Steel Systems, Inc. v. Avlis Contracting Corp.*, 89 A.D.2d 891 (2<sup>nd</sup> Dept. 1982). Accordingly, defendant's motion for a cancellation of the notice is granted.

In the case at bar, the Appellate Division has upheld my finding that a triable issue of fact exists as to whether there is an enforceable contract (276 A.D.2d 295). In light of said appeal, which was decided in October 2000, and subsequent motion practice, this action is still not on the trial calendar. With the cancellation of the notice, a success of plaintiff in establishing the right to purchase the subject property can be rendered ineffective if the defendant subsequently sells the property to a bona fide purchaser. This would be unjust.

It is noted that in *Gallo Brothers Construction, Inc. v. Pecolo*, 281 A.D.2d 811 (2001), the Third Department implied, based on the discretion provided in CPLR 2004, that if good cause were shown for the failure to seek a timely extension, such relief may be granted. However, there the plaintiff failed to offer any excuse for its inaction. Similarly here, if the court possessed discretion to grant an extension for good cause shown, plaintiff's motion would still be denied as it offered no explanation for its failure to timely move.

In view of the foregoing, I would recommend an amendment to CPLR 65.13 to authorize a court for good cause shown to retroactively extend the period of an expired notice of pendency, or at least be empowered to permit the filing of a new notice that would be prospective only, as was ruled by the lower court in *Matter of Sakow*, supra. Absent such a change, a purchaser from a defendant against whose

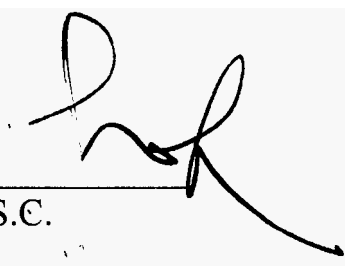
property a notice expired may end up in litigation as to whether the buyer had notice of claims of the plaintiff and was in fact a bona fide purchaser.

The motion of defendant to dismiss plaintiffs claims for monetary damages is granted as plaintiff did not comply with the order dated June 18,2001 requiring that a bill of particulars be served with respect to its claim for reliance damages within 20 days of service of such order, which order apparently was served on June 27,2001. The bill of particulars apparently prepared and sent to the court after oral argument on October 19, without permission, was not considered.

Lastly, the application of plaintiff to reargue the motion seeking to add Allan Reiver as a party plaintiff is denied as i) it is untimely [CPLR 2221 (d) 3] and ii) presents no argument that were not previously considered.

Settle order.

Dated: October 30,2001



J.S.C.