

**Coast to Coast Props., Inc. v Vella**

2007 NY Slip Op 33689(U)

November 2, 2007

Supreme Court, New York County

Docket Number: 0603058/2007

Judge: Herman Cahn

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: Cahn  
Justice

PART 19m

Coast to Coast Properties, Inc  
Et al

INDEX NO. 603088/07

MOTION DATE 10/12/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Zach Vella et al

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED  
**FILED**  
NOV 09 2007

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11 2 07 [Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X

COAST TO COAST PROPERTIES, INC. a/k/a  
COAST TO COAST PROPERTIES, LTD. and  
ERIC KRAVITZ,

Plaintiffs,

-against-

ZACH VELLA, JOEY EDERY, MORRIS MISSRY  
EASTERN PROPERTIES ASSOCIATES, LLC and  
TRISTATE EQUITY GROUP LLC,

Defendants.

-----X

Index No. 603058/2007

**FILED**  
NOV 09 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

**CAHN, J.**

Defendants move to vacate a *lis pendens*, filed by plaintiffs, CPLR § 6514, and for sanctions.

**Background:**

Plaintiff Coast To Coast Properties, Inc. ("Coast to Coast") is a real estate brokerage firm, at which plaintiff Eric Kravitz is a broker. Defendants are individuals and entities engaged in real estate development. Mot Br at 2.

In this action, Plaintiffs seek damages stemming from the breach of an alleged commission agreement.

Plaintiffs allege that they entered into an agreement with defendant Zach Vella, pursuant to which they would provide real estate brokerage services for a four percent (4%) commission, of the purchase price of the property at issue. They further assert that they are entitled to

brokerage fees for introducing Vella to the other defendants, with whom Vella entered into a series of real estate transactions. Plaintiffs seek commissions of \$2,175,000.

On September 12, 2007, Plaintiffs filed a notice of pendency (“the Notice of Pendency”), regarding five parcels of realty.<sup>1</sup> Defendants argue that the filing is unlawful and threatens to delay, if not derail, the consummation of a complex real estate transaction relating to these parcels. They move to vacate the *lis pendens* and for sanctions against Plaintiffs for frivolous conduct.

**Discussion:**

A “notice of pendency, commonly known as a ‘*lis pendens*,’ can be a potent shield to litigants claiming an interest in real property.” *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 315 (1984). A notice of pendency

may be filed 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*, except in a summary proceeding brought to recover the possession of the real property.

CPLR § 6501 (emphasis added). This serves to retain for the court “its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit.” *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d at 319.

Vacatur

A motion for cancellation of a notice of pendency may be made, *inter alia*, based upon

---

<sup>1</sup> The properties at issue are the premises at 571, 573-575, 577, 579 and 581 9<sup>th</sup> Avenue, New York, New York. Matalon Aff, Exh A, Notice of Pendency; *see also* Opp Aff, ¶ 8.

[\* 4 ]

Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith.

CPLR § 6514 (b).

Here, Defendants contend that the language Plaintiffs used in the Notice of Pendency, to describe the action, is blatantly false. In particular, they point to Plaintiffs' statement that "an action has been commenced and is now pending in this Court, upon the Complaint of the Plaintiff against the Defendant, for breach of contract . . . *for a constructive trust, and for an equitable lien of the premises at [issue]; and for other equitable relief and monetary damages.*" Matalon Aff, Exh A, Notice of Pendency (emphasis added). Defendants argue that the complaint neither seeks equitable relief, nor seeks to affect the title, use or possession of the premises. They contend that Plaintiffs solely seek money damages on account of a claimed breach of contract and that, accordingly, the *lis pendens* should be vacated.

Plaintiffs counter that Kravitz was entitled to a four percent (4%) commission on the sale of the property which "could rightfully be equated to a 4% interest in the property and/or the equivalent in money damages." Opp Br at 4. They contend that "it is clear that since Plaintiff was instrumental in bringing about said sale by introducing the purchaser to the above mentioned Defendants; . . . he has obtained a lien on said property if and when the sale is consummated." Opp Br at 7. They further argue that a "broker who has contributed his time and effort in procuring said property for the Defendant/Purchaser is entitled to place a lien on said property to ensure the payment for his services since he has an interest in the ownership of the property." Opp Br at 8.

While these arguments may hold some philosophical attraction, they do not comply with the law. Unless otherwise specifically agreed between the parties, a real estate broker's commissions are in the nature of monies earned or due under contract; they do not represent an interest in the property acquired or in the sales price received on a sale. In short, a commission agreement does not normally make the real estate broker a party to or partner in the underlying transaction.

Plaintiffs are incorrect in asserting that they have alleged an equitable claim on the real estate properties at issue or an actionable claim for equitable relief. Where only money damages are sought in a complaint and the facts alleged are insufficient to support an equitable lien, a notice of pendency will be cancelled.

[A] lis pendens will be cancelled where the facts alleged in the complaint are insufficient in law to support an equitable lien. In the case at hand, the complaint requested only money damages, and not equitable relief. Where the case of action asserts money damages arising out of a breach of contract, the complaint will be insufficient to justify a lis pendens.

*Borrero v East Harlem Counsel for Human Serv., Inc.*, 165 AD2d 807, 808 (1st Dep't 1990) (internal citations omitted).

In the context of a dispute over a brokerage commission, the courts have found that, without more in the complaint, "the plaintiff is not interested in 'title to, or the possession, use or enjoyment' of the real property owned by the defendants. . . . The prayer for relief does not make the action an equitable one unless there are facts stated in the complaint to justify equitable relief." *Topper v Kane*, 138 NYS2d 323, 324 (Sup Ct Nassau County 1955) (internal citations omitted).

6 ]

Plaintiffs rely upon *Talk of the Millenium Realty Inc., et al. v Sierra, et al.*, 819 NYS2d 213 (Civ Ct Richmond County 2006), for the proposition that a *lis pendens* may be filed by a real estate broker seeking a commission where the transaction at issue is the sale of a commercial property. However, this case, rather than analyzing its applicability in commercial property disputes, simply confirms that a *lis pendens* is not proper in an action to recover a real estate broker's commission on the sale of residential real estate. Moreover, even if a notice of pendency might be applicable in transactions for commercial real estate, nothing in this case purports to change the essential requirements for a *lis pendens*, including the requirement that the facts alleged in the complaint support an equitable lien.

In addition, said case relies upon Lien Law § 2, which is not applicable in the instant matter. This section provides, in pertinent part:

§ 2. Definitions . . .

4. Improvement. The term 'improvement,' when used in this chapter, . . . shall also include the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes *pursuant to a written contract of brokerage employment or compensation.*

NY CLS § 2 (emphasis added). In the instant case, there was no written contract. In fact, Plaintiffs concede that “[n]otwithstanding the best efforts of Plaintiff and Defendant VELLA said contract was never entered into.” Am Comp, ¶ 20.<sup>2</sup> Thus, even if Plaintiffs would otherwise be

---

<sup>2</sup> Plaintiffs do allege that they “entered into a Buyer’s Agreement wherein Plaintiff’s [sic] would receive a four (4) percent commission in the event Defendant VELLA purchased” the property known as 136 Church Street (a/k/a 37-39 Warren Street), New York, New York. Am Comp, ¶ 20. However, the property referenced in this agreement is not one of the properties at issue in this action. Rather, the allegation relates to a brokerage agreement for an entirely different real estate deal involving different property.

able to obtain a lien, stemming from their claim that the brokerage fees were due and owing on a commercial real estate transaction, they cannot do so here as there was no "written contract of brokerage employment or compensation."

Therefore, the *lis pendens* is cancelled.

At oral argument, counsel for Defendant's complained of mis dating and pre and post dating of various documents. The accusations were not clear, and the conduct complained of seems to have been explained. Plaintiffs counsel stated:

MR. OMANSKY: Sure. With regard to the verification when I notarized the verification and everything, it was for the October date.

But then, from the computer printout, I hadn't looked up. It said September 11 on the top part of it. It was an accident on my part. The date it was a notarization and signed was the date that it was filed. As far as stamps goes, there was never anything where there was a miss stamp with a different date. I would like to see those papers.

10/12/07 Oral Arg. Transcript, p. 8, line 17.

If that explanation satisfies Defendants' counsel, then the matter can be laid to rest. If it does not, the issue of the dating of the documents, and how it came about, is respectfully referred to a Special Referee to hear and report.

#### Sanctions

Defendants argue that the *lis pendens* was frivolous, that Plaintiffs should have consented to vacate it upon request and that Plaintiffs intentionally misrepresented the nature of this action to the County Clerk in order to obtain the *lis pendens*. Their counsel contacted Plaintiffs' counsel by letter, to note that the Complaint seeks only monetary damages and that as a result,

8 ]  
the *lis pendens* was improper. They also communicated, at that time, that the *lis pendens* was causing Defendants substantial harm. Accordingly, they seek sanctions.

22 NYCRR § 130-1.1 states that:

For purposes of this part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

22 NYCRR § 130-1.1 continues, in pertinent part, to specify that:

In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal and factual basis for the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

*Id.* Here, the *lis pendens* certainly included material factual statements that are false. In addition, its lack of factual or legal foundation should have been apparent and was brought to the attention of Plaintiffs' counsel. These factors support an award of sanctions against Plaintiffs.

However, in determining if sanctions are appropriate, the court must look at the broad pattern of conduct by the offending attorneys or parties. *Levy v Carol Management Corp.*, 260 AD2d 27, 33 (1st Dep't 1999). Further, "22 NYCRR 130-1.1 allows us to exercise our discretion to impose costs and sanctions on an errant party . . . [s]anctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large." *Id.* at 34.

[\* 9 ]

That noted, the Defendants have not established that the *lis pendens* was sought to delay the action and/or harass the Defendants. Nor can the Court make a determination as to Plaintiffs' pattern of conduct at this, early, stage of the action. Thus, Plaintiffs will not be sanctioned at this time.

Accordingly, it is

ORDERED that the portion of the motion seeking to vacate the *lis pendens* is granted;  
and it is further

ORDERED that the portion of the motion seeking sanctions against Plaintiffs is denied;  
and it is further

ORDERED that the clerk of the Court enter judgment accordingly.

Dated: November 2, 2007

ENTER:



J.S.C.

**FILED**  
NOV 09 2007  
COUNTY CLERK'S OFFICE  
NEW YORK