

**Mattone Group LLC v Telesector Resources Group,
Inc.**

2008 NY Slip Op 30374(U)

January 30, 2008

Supreme Court, Queens County

Docket Number: 0027280/2007

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

MATTONE GROUP LLC, et al.

x

-against-

TELESECTOR RESOURCES GROUP, INC.,
et al.

x

INDEX NO. 27280/07

MOTION SEQ. NO. 1

MOTION DATE: DECEMBER 5, 2007

MOTION CAL. NO. 34

BY: KITZES, J.

DATED: JANUARY 30, 2008

Defendant Telesector Resources Group, Inc, defendant Verizon Communications Inc., and defendant Verizon New York Inc. (the Verizon defendants) have moved for an order pursuant to CPLR 6515 directing the Clerk of the County of Queens to cancel a notice of pendency filed by the plaintiffs upon the furnishing of an undertaking by the Verizon defendants unless the plaintiffs furnish their own undertaking.

The facts of this case are more fully given in this court's decision dated January 29, 2008 disposing of a CPLR 3211(a) motion made by the Verizon defendants. Briefly, defendant Telesector Resources Group, Inc. d/b/a Verizon Services Group owns a 9.8 acre parcel of real property known as both 135-02 Springfield Boulevard, Springfield Gardens, New York and 184-04 Merrick Boulevard, Springfield Gardens, New York. In 2007, defendant Telesector notified the public through defendant Newmark & Company Real Estate, Inc., a real estate broker, that the property was for

sale. The plaintiffs allege that although no formal contract was signed, they reached an agreement with the Verizon defendants, evidenced by a series of e-mails, whereby the former would purchase the property at a price of \$21,250,000. According to the plaintiffs, the Verizon defendants breached the contract by agreeing to sell the property instead to defendant United Parcel Service, Inc. (UPS) at a price of \$25,750,000.

On or about November 1, 2007, the plaintiffs commenced this action for, inter alia, breach of contract, specific performance, and promissory estoppel, and they also filed a notice of pendency against the property. The Verizon defendants allege that the notice of pendency has interfered with their attempt to sell the property to defendant UPS.

CPLR 6515 provides in relevant part: "[With exceptions not relevant here], the court, upon motion of any person aggrieved***, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if: 1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or 2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not

cancelled.” (See, 5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313.) Where a notice of pendency is valid, “the court may, in its discretion, cancel the notice, but the moving party will generally have to post an undertaking (CPLR 6515).” (5303 Realty Corp. v O & Y Equity Corp., supra, 320.) “If the motion is brought pursuant to CPLR 6515(1), the movant should establish that an undertaking will provide the plaintiff with ‘adequate relief.’” (13 Weinstein-Korn-Miller ¶ 6515.07.) Where, as in the case at bar, the motion is brought pursuant to CPLR 6515(2), a showing of “adequate relief” is not required. (See, 13 Weinstein-Korn-Miller ¶ 6515.07.) “Even if an undertaking would not be adequate to protect the plaintiff, the court can still cancel the lis pendens if the defendant offers an undertaking and the plaintiff does not respond with the plaintiff’s own undertaking to protect the defendant.” (See, Siegel, NY Prac § 336.) “[T]he preferred course in a claim for specific performance is the utilization of subdivision 2 by cancelling the notice of pendency upon an undertaking by the defendant seller unless plaintiff buyer posts an undertaking which will indemnify defendant***.” (Andesco, Inc. v Page, 137 AD2d 349, 357; see, Purchase Real Estate Group, Inc. v Jones, 489 F Supp 2d 345.) A defendant’s offer to post an undertaking will not warrant the cancellation of a notice of pendency in an action for specific performance if the plaintiff offers to post an adequate undertaking to keep the notice of

pendency in effect. (See, Weiss v Alard, L.L.C., 150 F Supp 2d 577, affd 91 Fed Appx 181.) The amounts fixed for the undertakings should be proportionate to the damages the parties may suffer as a result of the continuance or cancellation of the notice of pendency. (See, Ansonia Realty Co. v Ansonia Associates, 117 AD2d 527; Weiss v Alard, L.L.C., supra.)

In the case at bar, the motion by the Verizon defendants brought pursuant to CPLR 6515(2) has merit, and the "double-bonding" procedure will be followed. The amount of the undertaking to be given by the Verizon defendants is \$4,500,000, representing the difference in sales price between the UPS contract and the alleged Mattone contract. A breach of contract by the Verizon defendants, if any, cost the plaintiffs an opportunity to re-sell the property themselves at a profit. The amount of the undertaking to be given by the plaintiffs is also fixed at \$4,500,000, representing the loss to the Verizon defendants if the formers' actions cause the cancellation of the UPS contract.

Accordingly, the motion by the Verizon defendants is granted, and the amounts of the undertakings of the Verizon defendants and of the plaintiffs are fixed at \$4,500,000.

Settle order.

J.S.C.