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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

STANLEY HOM AND WANDA HOM,

Plaintiff(s),

-against-

KENNETH KAPLAN, LOIS KAPLAN, ET AL.

Defendant(s).

MOTION DATE: 3/17/08
INDEX No.:855/05
MOTION SEQUENCE NO:4

CAL. NO.:2007H3168

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-7
Answering Affidavits.....	8-10
Replying Affidavits.....	11,12
Briefs:	13-14a

Upon the foregoing papers, it is ordered that this motion by defendants Kenneth and Lois Kaplan for an order pursuant to CPLR §3212 granting summary judgment and dismissing the plaintiffs' complaint is granted.

On or about July 5, 2001, the plaintiffs in the within action, entered into a contract of sale with Marnell Building and Development Corporation [hereinafter Marnell] for the purchase of land and the construction thereon of a single family dwelling. The contract price was set at $320,000 with a scheduled closing date of August 1, 2001. Thereafter Marnell defaulted on the contract, and on or about January 29, 2002 the plaintiff's commenced an action bearing Index# 1528/02 .

On April 14, 2004, a judgment was awarded in favor of the plaintiffs and against defendant Marnell in the amount of $100,465, which was ultimately recorded on January 24, 2005. Prior to procuring the judgment, but shortly after commencement of that earlier action, on February 25, 2002 the plaintiffs filed a *lis pendens* with the Office of the Nassau County Clerk under section 50, block V-2, lot 2. However, the accurate lot description for the subject parcel is 62.

In the *interim*, on or about July 12, 2002, Marnell transferred its interest in the subject parcel to defendants Kenneth and Lois Kaplan. The deed to said premises was recorded in the Office of the Nassau County Clerk on or about July 17, 2002.

On or about January 19, 2005 the plaintiffs commenced the instant action demanding the following: [1] entry of judgment setting aside the fraudulent conveyance of the subject property from Marnell to defendants Kenneth and Lois Kaplan; [2] entry of a temporary restraining order enjoining both defendant Marnell and defendants Kenneth Kaplan and Lois Kaplan, as well as their agents from transferring, assigning or encumbering the subject premises and any and all assets [3] and entry of an order authorizing the sale of the subject premises to satisfy the order entered in favor of the plaintiffs on April 14, 2004.

The Kaplan defendants herein move pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs' complaint. In support of the within application, the central contention posited by defendants' counsel is that they are *bona fide* purchasers for value who were not on notice of the plaintiffs' interest in the subject property. Specifically attacking the *lis pendens* filed by the plaintiffs, movants argue that the notice of pendency was incorrectly filed against lot number 2, as opposed to the correct lot number of 62, and as a result it was insufficient to constitute notice to the Kaplans pursuant to the provisions of both CPLR §6511 and the Nassau County Administrative Code (hereinafter NCAC) §§19-14.0, 19-16.0 and 19-18.0.

Annexed to the moving papers are that the affidavits of Kenneth and Lois Kaplan. Both defendants state that they are the owners of the subject property currently located at "1781 Jerusalem Avenue, North Merrick, New York, also known as Section 50, Block V-2, lot 62 on the tax map . . ." and that the deed to this parcel was recorded on July 17, 2002). The defendants further states that "The title commitment of the premises did not reveal any notice of pendency filed against Our Home through the time title was transferred to us." They state that they were only made aware of the Notice of Pendency when they were ". . . served with the summons and complaint filed by the Plaintiffs." The defendants further aver that a title search conducted in November of 2005 and which searched the ten year period previous thereto did not " reveal any judgments" which were filed against the subject premises located at Section 50, Block V-2, Lot 62.

Moving defendants also submit the affidavits of John Hensler and James Pedowitz, both of whom have extensive experience as professional title examiners. Upon review of their individual affidavits, both experts state that it is standard custom and

practice in Nassau County to conduct a title search by employing the section block and lot index maintained by the county clerk.

In opposing the defendants' instant application, the plaintiffs set forth the following contentions: the defendants were in fact on notice of the plaintiffs' interest as a result of the properly filed *lis pendens* under the name index maintained by the Nassau County Clerk; the defendant's title company should have undertaken a search of both the block index, as well as the name index; and the conflicting expert affidavits require a plenary trial to resolve existing questions of fact.

Initially, and by way of factual background, plaintiffs assert that at the time the plaintiffs originally contracted to purchase the subject lot with Marnell, there was only one lot number assigned which encompassed the entirety of a parcel which had yet to be subdivided. Thereafter, when the lot was subdivided for purposes of development and sale to individual buyers, the Nassau County Planning Commission assigned the lot number of 62 to that particular piece of property the plaintiffs had contracted to purchase. It is plaintiff's contention that they were never apprised of this new lot assignment and thus when the *lis pendens* was recorded on February 25, 2002, it was done so in the block index, under the only lot number of which the plaintiffs were aware, to wit: lot 2

While conceding that the *lis pendens* was filed under the lot number 2, plaintiffs state it was nonetheless duly and properly filed under the name index, which the Nassau County Clerk is legally under a duty to maintain pursuant to Real Property Law §316 (hereinafter RPL), and the defendants were therefore on notice of the plaintiff's interest. It is RPL §316 and the provisions therein contained, that plaintiffs assert as the legal predicate upon which they base their second contention: that it was incumbent upon the defendant's title company to conduct a search of both the block and name indices maintained by the county clerk and that their failure to do so gives rise to the plaintiff's claims as asserted in the complaint.

In further support of this particular position, plaintiffs also rely upon the annexed affidavit of Theodore Sherris, an attorney admitted to practice law who states that he has worked within the area of title insurance since 1962 and presently owns his own title company known as T.P.S. Abstract Corporation. Mr. Sherris asserts that since 1946 both the name and the block indices have been maintained by the Nassau County Clerk and that in operating his business it is his custom and practice to search both indices. He further states that the provisions of the NCAC upon which the defendant's rely have not overruled RPL §316 and it was therefore

improper for the defendant's title company to search only the block index.

Relevant to the instant matter are several provisions embodied in both the CPLR and the NCAC, which are relied upon by the parties and which are integral to the resolution of the within action.

CPLR §6511[b] provides the following:

> "(b) Content; designation of index. A notice of pendency shall state the names of the parties to the action, the object of the action and a description of the property affected. **A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice.** Except in an action for partition a notice of pendency filed with a clerk who does not maintain a block index shall contain a designation of the names of each defendant against whom the notice is directed to be indexed. "[emphasis added]

In addition to the provisions of the CPLR, the following portions of the Nassau County Administrative Code are applicable.

NCAC §19-14.0 entitled **Block indices of Liens; public records** provides in relevant part:

> "a. There shall be a block indices in the office of the county clerk
> for the purpose of indexing all liens or statutory notices of liens or claims on land except mortgages and the satisfaction or cancellation thereof.
>
> b. Such books shall be suitably designated as block indices of liens, the designation specifying the kind of liens designated therein. "

NCAC §19-16.0 entitled **Designation of section and block numbers** provides in pertinent part:

> "a. Every instrument which is presented for recording which is required to be indexed pursuant to the title **must have endorsed thereon**, to be recorded therewith, before it shall be accepted by the county clerk, **a designation of the number of each section and the number each block in such section on the county land and tax map in which the land affected by the instrument lies.** [emphasis added]

b. The record of such instruments **shall not be notice to bona fide purchasers or incumbrancers in respect to any land situated in any block not so endorsed**, except as hereinafter provided in section 9-18-0 of the code." [emphasis added]

§19-18.0 entitled **Erroneous Block Designations; how corrected; fees.** provides the following:

"c. Where an instrument has been improperly indexed the record of such index shall not be noticed to a bona fide purchaser until such instrument has been properly re-indexed pursuant to this section. "

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d; *Bhatti v Roche*, 140 AD2d 660). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Alvarez v Prospect Hospital*, 68 NY2d 320). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Giuffrida v Citibank Corp.*, 100 NY2d 72). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513). Conclusory allegations are insufficient and to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631).

In the instant matter the defendants have demonstrated their entitlement to judgment as a matter of law by the introduction of evidence proving that they were bona fide purchasers of the subject parcel without proper notice of the plaintiffs' claim (*Sillman v Twentieth Century Fox, supra; Alvarez v Prospect Hospital, supra*). Particularly, the defendants have demonstrated that they recorded the deed to the subject parcel on July 17, 2002 under section 50, block V-2, lot 62, and at which time, as conceded by the plaintiffs, the notice of pendency on file was indexed against lot 2. Thus the burden shifts to the plaintiffs to come forth competent evidence to demonstrate the existence of triable issues of fact (*Zuckerman v*

City of New York, 49 NY2d 557).

Having reviewed the record and construing the evidence in a light most favorable to the non-moving party, the court finds that the plaintiffs' have failed to raise a triable issue fact. Initially, the court is not persuaded by plaintiffs' argument that the conflicting expert affidavits proffered by both parties raise triable issues of fact, the existence of which requires a plenary trial. The resolution of the instant matter is one of statutory interpretation. The responsibility of such interpretation resides not with the trier of fact but rather is within the purview of the Court (*Colon v Rent-A-Center, Inc.*, 276 AD2d 58). When interpreting a statute, it is a well settled principle that the Court should implement the legislative intent (*Matter of Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577; *Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205). "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning" (*Matter of Majewski v Broadalbin-Perth Cent. School Dist., supra,* quoting *Tompkins v Hunter*, 149 NY 117). Applying these precepts of statutory construction to RPL§316, the court finds plaintiffs' reliance thereon as misplaced. As noted above, it is upon this statute that the plaintiffs rely as support for the position that defendants' title company should have searched both the name and block indices. Reviewing the statute, RPL §316 provides the following, in pertinent part:

> "Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the records in his office. . . . Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors and assignors followed by the names of their grantees, mortgagees or assignees, and the other list consisting of the names of the grantors or mortgagors and assignors followed by the names of their grantees, mortgagees or assignees, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record. This section, so far as relates to the preparation of new indexes, shall not apply to a county where the recording officer now has general numerical indexes."

As an initial matter, this court agrees with the plaintiff that NCAC does not overrule the provisions of RPL §316. However, while the language of RPL§316 legally requires the Nassau County Clerk to

maintain a name index, nowhere contained in the statute is the command to search both indexes. In the matter *sub judice*, plaintiffs would seek to transform the requirement to maintain the index into a duty imposed upon the title companies to search the name index. A plain reading of the statute does not permit such a conclusion.

With particular regard to the nature of a notice of pendency, such is deemed to be "an extraordinary privilege" bestowed upon a litigant to an action empowering such a party to ". . . retard the alienability of real property without any prior judicial review" (*Israelson v Bradley*, 308 NY 511). What is uniquely different about the *lis pendens* from other provisional remedies available to a litigant during the pendency of an action, is that there is no requirement that a party demonstrate the likelihood of success on the merits of the underlying cause of action (*Ir re Sakow*, 97 NY2d 436). Recognizing the nature of this remedy and the relative ease by which a litigant may interfere with a property owner's ability to transfer his or her interest to another, the courts have required strict compliance with the provisions as embodied in Article 65 of the CPLR (*5303 Realty Corp. v O & Y Equity Corp.* , 64 NY2d 313; *Israelson v Bradley*, *supra*).

In the instant matter, by operation of the express terms of CPLR §6511, inasmuch as Nassau County does maintain a block index, it was incumbent upon the plaintiffs to file the *lis pendens* with " . . . a designation of the number of each block on the land map of the county which is affected by the notice." Here, the plaintiffs failed to do so. Even fully crediting as true, the plaintiffs' contention that they were unaware of the new lot number assigned after the entire parcel was subdivided, they were cognizant at the time the contract was signed that they were not purchasing the entirety of the then undivided parcel designated as lot number 2. However, notwithstanding this knowledge, no attempt was made to correct the *lis pendens* as mandated by the provisions of NCAC §19-18.0.

The court is not unaware of or unsympathetic to the unfortunate circumstances which have befallen the plaintiffs. In reaching its conclusion herein, the court was guided not by the custom and practice in the title industry as expounded upon in the expert affidavits proffered by both parties. Rather the court was guided by the statutory authority as embodied in Article 65 of the CPLR as complimented by the NCAC, the provisions of which this court cannot summarily disregard. The court notes that notwithstanding its decision herein, the plaintiffs are not bereft of a remedy and remain free to enforce their judgment against defendant Marnell.

Based upon the foregoing, the motion by defendants Kenneth and

Lois Kaplan for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing the plaintiffs' complaint is hereby granted.

Dated: MAY 02 2008

J.S.C.

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