

**Sotoloff v Tribeca Assoc., LLC**

2008 NY Slip Op 32346(U)

August 8, 2008

Supreme Court, New York County

Docket Number: 0112931/2007

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PRESENT: Hon. \_\_\_\_\_  
*Justice*

PART 12

SOTOLOFF, Peter

INDEX NO. 112931/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

- v -

TRIBECA ASSOCIATES 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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

AUG 13 2008

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED: 8/8/08

Check one:  FINAL DISPOSITION

**BARBARA R. KAPNICK** J.S.C.  
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
PETER SOTOLOFF,

Plaintiff,

- against -

DECISION/ORDER  
Index No. 112931/07  
Motion Seq. No. 001

TRIBECA ASSOCIATES, LLC, 330 HUDSON  
ASSOCIATES, LLC, WILLIAM D. BRODSKY,  
ELLIOTT S. INGERMAN and "JOHN DOE",  
fictitious name, true name(s) unknown,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

In this action, plaintiff seeks specific performance of his employment agreement, as amended by the first, second and third amendments, and more specifically, the plaintiff's purported rights under said agreement to acquire an equity and ownership interest in the subject property or the partition of the subject property for sale.

The employment agreement dated July 20, 2004, provides, in relevant part, as follows:

4. Equity Participation in Real Estate Transactions:  
You shall be eligible to invest from personal funds up to ten percent (10%) of the total equity invested by the Company (or the Company's subsidiaries or affiliates) in connection with any real estate transaction in which it is engaged. With respect to any such real estate transaction in which you have invested, you shall participate in the profits and/or losses of such transaction in pro rata proportion to your investment, in accordance with the method of calculation determined by the Company in its sole and absolute discretion and as it applies to all other employees and/or partners of the Company who participate in such transaction.

**FILED**

AUG 13 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants now move by Order to Show Cause for an order pursuant to CPLR § 6514 (i) directing the Clerk of New York County to cancel the notice of pendency filed by plaintiff in this action on September 19, 2007 with respect to the subject property, 330 Hudson Street, New York, New York,<sup>1</sup> and (ii) directing plaintiff to pay defendants' costs and expenses incurred in making this motion to cancel, including without limitation, defendants' reasonable attorneys' fees.

Pursuant to CPLR § 6501, "[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,..."

Defendants argue that the one cause of action asserted in the Complaint, i.e., specific performance of the employment agreement, does not affect title to real property because, at most, it would establish plaintiff's right to purchase a membership interest in a limited liability company that itself neither owns nor leases real property, and merely is a partial, indirect owner of a lessee of

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<sup>1</sup> The property is owned by non-party 330 Hudson Owner LLC, an entity wholly-owned by non-party 330 Hudson Mezz LLC. 330 Hudson Mezz LLC is wholly-owned by defendant 330 Hudson Associates LLC. Non-party Tribeca Hudson Holdings LLC is the Managing Member of defendant 330 Hudson Associates, LLC who is the net lessee of the property. The individual defendants are the Managing Members of non-party Tribeca Hudson Principals LLC, which is the Managing Member of non-party Tribeca Hudson Holdings LLC which is a Managing Member of defendant 330 Hudson Associates LLC. Plaintiff is a member of Tribeca Hudson Holdings LLC.

the property. Defendants contend that such an interest constitutes personal property and is, therefore, insufficient to sustain a Notice of Pendency.

Plaintiff, on the other hand, argues that the Court is not required to look beyond the pleadings, in which he claims he is entitled to a direct equity interest in a real estate transaction, in deciding this motion.

The Court of Appeals has held that

[t]o the extent that a motion to cancel the notice of pendency is available (CPLR 6514), the court's scope of review is circumscribed. 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 (citations omitted).

Usually, there is little a court may do to provide relief to the property owner. If the procedures prescribed in article 65 have not been followed or if the action has not been commenced or prosecuted in good faith, the notice must be canceled in the first instance and it may be in the second (citations omitted). If the 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.*, 64 N.Y.2d 313, 320 (1984).

"In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501 (citations omitted)." *5303 Realty Corp. v. O & Y Equity Corp.*, supra at 320. See also, *551*

*West Chelsea Partners LLC v. 556 Holding LLC*, 40 A.D.3d 546 (1<sup>st</sup> Dep't 2007).

However, the Appellate Division, First Department, has held that a notice of pendency was properly cancelled in a special proceeding which "was brought to obtain a portion of the proceeds of the sale of respondent's interest in the marital real property, and as such was not an action that would directly affect title to, or possession, use or enjoyment of the real property in question" within the scope of CPLR § 6501 (*Lunney & Crocco v. Wolfe*, 180 A.D.2d 472 [1<sup>st</sup> Dep't 1992]), and that the filing of a notice of pendency was improper in a case where "[a] review of the complaint demonstrates that the action does not directly affect the title to real property, but instead involves a shareholder's rights in a corporation whose sole asset is the property described in the notice of pendency" (*Piccirillo v. Ravenal*, 161 A.D.2d 253, 254 (1<sup>st</sup> Dep't 1990), *lv. dismiss'd*, 76 N.Y.2d 935 [1990]).

Based on the papers submitted and the oral argument held on the record on April 9, 2008, this Court finds that this action does not directly affect the title to real property within the scope of CPLR § 6501. Accordingly, the filing of the notice of pendency in this case was improper.

Defendants' motion is, therefore, granted. The Clerk is directed to cancel the notice of pendency filed by plaintiff in this action.

CPLR § 6514(c) provides that "[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action."

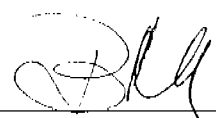
Plaintiff argues that defendants have not established that plaintiff filed the notice of pendency in bad faith, while defendants contend that the notice was filed to achieve an improper ulterior motive, i.e., to hurt defendant Tribeca Associates, LLC and its 85% joint venture partner and threaten the very development project in which Sotoloff claims he wants to invest.

In the exercise of its discretion, this Court grants defendants the costs and expenses it incurred in making this motion which shall be calculated by the Clerk upon the submission by defendants' counsel of a bill of costs.

**FILED**  
AUG 13 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This constitutes the decision and order of this Court.

Dated: August 8, 2008

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J. BARBARA R. KAPNICK  
J.S.C.