SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK **PART 17**
COUNTY OF QUEENS **HON. ORIN R. KITZES**

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GERMAN DEL POZO,

Plaintiffs,

-against-

Index No. 5345/04
Motion Date: 9/22/10
Motion No. 23 & 24

IMPRESSIVE HOMES, CORONA GARDENS, INC., KFIR GROUP LLC, CAMBRIDGE FUNDING GROUP LLC, AND REMARK DEVELOPMENT CORP., MERCI ASTUDILLO, BOLIVAR ASTUDILLO, BANK OF AMERICA, N.A. and NATIONAL CITY CORPORATION, a/k/a NATIONAL CITY BANK,

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendant **NATIONAL CITY CORPORATION, a/k/a NATIONAL CITY BANK** ("National") and motion defendants **MERCI ASTUDILLO** and **BOLIVAR ASTUDILLO** ("Astudillos") for an Order pursuant to CPLR §3212 for summary judgment in their its favor and dismissing the complaint, as against the Astudillos and National. For purposes of disposition, the motions under calendar 23 and 24 have been consolidated.

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Upon the foregoing papers it is ordered that this motions by defendants Astudillos and National for Orders pursuant to CPLR §3212 for summary judgment in their favor and dismissing the complaint, as against the Astudillos and National, are granted for the following reasons:

Based on the second amended complaint and the undisputed evidence, this action involves plaintiff, as the prospective purchaser, seeking specific performance of a contract, dated, June 7, 2002, for the purchase of a three-family house to be build upon real property located at 35-15 101st Street, Corona, New York, for alleged breach of contract. Plaintiff and defendant Impressive Homes entered into the contract of sale, whereby Impressive Homes agreed to sell

the property to plaintiff for the purchase price of $610,000 and Plaintiff made a down payment of $10,000.00. The contract also provided that it was contingent on the buyers obtaining a mortgage of $579,500.00 within 30 days of the contract, and a closing date of June 18, 2002 was provided in the contract. Plaintiff claims that the closing did not take place on that or any other date and Impressive Homes never sent any time of the essence notice to the Plaintiff, demanding closing title with an unequivocal date to close title. Subsequently, on February 2, 2004, Impressive Homes, through its attorney sent a letter together with a check in the amount of $10,000.00 to the plaintiff's attorney, thereby canceling the contract.

Thereafter, plaintiff commenced the underlying action against Impressive seeking, among other things, specific performance of a purported Contract of Sale, and/or damages for breach of contract. On or about March 5, 2004, Plaintiff purportedly filed a Notice of Pendency against the property "known as Block 1742, Lot 49 (part of old lot 49) and also known as 35-15 101st Street, Corona, New York (the "Notice of Pendency"). However, as evidenced from the remarks in the County Clerk's Judgment Docket and Lien Book System, dated April 30, 2007, the "Notice of Pendency filed on 3/5/04" was "not entered in lien system on same date due to clerical oversight."

By Deed dated December 1, 2005, Impressive conveyed title to the Lot 49, which was identified in the metes and bounds description as 35-11 101st Street, Corona, New York, to Corona Gardens Inc. At that time, plaintiff's Notice of Pendency had not been entered in the lien system by the Queens County Clerk. By Deed dated April 27, 2006, and recorded in the Office of the City Register at CRFN 2006000338480, Corona conveyed title to Lot 49, which was identified as 35-11 101st Street, Corona, New York, to defendant KFIR Group LLC ("KFIR"). At that time, plaintiff's Notice of Pendency had "not [been] entered in [the] lien system." In connection with the same, and in order to finance certain construction on Lots 46 and 49, KFIR, as owner, made two mortgages to Cambridge, the first mortgage, in the principal sum of $900,000.00, and the second, in the principal sum of $600,000.00. The Cambridge Mortgages, were duly recorded in the Office of the City Register on June 15, 2006. At the time plaintiff's Notice of Pendency had not been entered and Cambridge claims it had no knowledge that one had been filed by plaintiff. A few months later, on August 3, 2006, KFIR made a mortgage to Remark, in the principal sum of $400,000.00, which was duly recorded in the Office of the City Register on August 29, 2006. That mortgage was also secured against Lot 46 and Lot 49 and at the time Remark encumbered the property with its mortgage, plaintiff's Notice of Pendency had not been entered and Remark claims it had no knowledge that one had been filed by Plaintiff.

By deed dated December 15, 2006, KFIR conveyed the parcels it previously acquired to Merci R. Astudillo and Bolivar Astudillo ("Astudillos") . In or around December of

2006, KFIR repaid the Cambridge Mortgages in full. As such, on December 15, 2006, Cambridge executed two satisfactions of mortgage certifying payment in full of the Cambridge Mortgages, and further consenting to the discharge of the same of record, which were duly recorded in the Office of the City Register on or about January 17, 2007. In or around December of 2006, KFIR also paid the Remark Mortgage in full. As a result, Remark executed a satisfaction of mortgage certifying payment in full of the Remark Mortgage, and further consenting to the discharge of the same, which was duly recorded in the Office of the City Register on or about January 17, 2007. National provided part of the financing to the Astudillos to purchase the property from KFIR and the Astudillos granted National a credit line purchase money mortgage in the amount of $299,950.00 on the Property ("Mortgage"). National's Mortgage in the property was recorded on or about January 17, 2007.

In December 2007, Plaintiff filed a second amended complaint wherein he seeks specific performance of the contract of sale with Impressive Homes, Inc. and setting aside all subsequent conveyances and vacate all subsequence encumbrances against property Block 1742, Lot 49 (part of old lot 49). Defendants Astudillos and National now move for summary judgment in their favor and dismissing the complaint as against the Astudillos and National. The Astudillos claim that they are bona fide purchasers of the subject property without notice of the Plaintiff's claims and the Plaintiff did not record the contract. National claims that none of the documents or information it received in processing the Astudillos' mortgage application indicated Plaintiff's claims. In particular, the Astudillos and National point out that Plaintiff's *lis pendens* was not properly indexed against the subject property at the time the Astudillos purchased the property and recorded their deed and when National was granted the Mortgage. The Astudillos and National also claim that they were never contacted by Plaintiff regarding his claim to ownership of the property and the Astudillos and National had no actual or constructive knowledge of the Plaintiff's claim when the property was purchased and when National opened the Astudillos' credit line. Furthermore, the Astudillos and National claim that Plaintiff has not shown the Astudillos or National made any misrepresentations of fact or acted negligently in their actions regarding the filing of the Deed or Mortgage on the subject property.

Finally, the Astudillos and National point to the Order of this Court, dated May 4, 2010, wherein this Court granted defendants Cambridge and Remark's motion for summary judgment and dismissed the cause of action for encumbering the property with knowledge of the Notice Of Pendency. The Court found that Defendant had established and Plaintiff had conceded that, Plaintiff's Notice of Pendency was not properly indexed against the property when Plaintiff commenced his action, and, in fact was not indexed until April 30, 2007, more than three years after Plaintiff had commenced his action. Accordingly, at the time the Property was encumbered

by Defendants' mortgages, there was no way for them to know that Plaintiff claimed an interest in the property, and they cannot be deemed to have had any knowledge of Plaintiff's action for specific performance. According to National, the May 4 Order established the law of the case that the liens and interests in the Property recorded before April 30, 2007, when the County Clerk indexed Plaintiff's Notice of Pendency, are held without constructive notice of Plaintiff's claim.

Plaintiff opposes these motions claiming that the notice of pendency became operative in favor of the Plaintiff in the action from the time it was filed, without reference to whether the clerk performed his duty to index; and, if so, the subsequent mortgage and any other encumbrances National has on the subject property should be vacated. According to Plaintiff, that the purchaser lacks actual knowledge of the filing of the Notice of Pendency is irrelevant since merely filing a notice of pendency, puts the world on notice of the plaintiff's potential rights in the action and warning all comers that if they then buy the realty or otherwise rely on defendant's right, they do so subject to whatever the action may establish as the Plaintiff's right. Plaintiff notes that the notice of pendency was filed on March 5, 2004 and the County Clerk did not index the notice of pendency until April 30, 2007. Since the Defendants claims of ownership and encumbrances were subsequent to the filing of the notice of pendency, those claims and encumbrances will be subject to the Plaintiff's right in the action. In essence, Plaintiff claims the mere filing of the Notice of Pendency, despite it not being indexed, put Defendants on constructive notice of the Notice of Pendency.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v. March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The facts set forth above have been shown by Defendants' evidence and have also been acknowledged by Plaintiff. The Court notes that the determination made in its May 4, 2010 Order is the law of the case and resolves the issue regarding whether the Notice of Pendency that was not indexed did not put the Astudillos or National on constructive notice of the instant action. Moreover, NY CLS §919(1)(j), states that in " cases where an instrument shall have been filed with an erroneous designation, such county clerk on presentation of proper proof thereof

shall enter such instrument in the proper index under the proper block number of every block, the designation of which shall have been erroneously stated. . . and the record of such instrument shall be constructive notice as to the property in any block not duly designated at the time of such filing only from the time when the same shall be properly indexed." Accordingly, the Notice of Pendency in the instant case was constructive notice of the action when the County Clerk properly indexed the Notice of Pendency on April 30, 2007. In any event, this Court shall consider these facts as they apply to the law concerning the causes of action and Notices of Pendency.

The cause of action for encumbering the property with knowledge of the Notice Of Pendency is dismissed as against the Astudillos and National. Plaintiff seeks an award of money damages against defendants on the grounds that they allegedly encumbered the property with "constructive" knowledge of the Notice of Pendency. Defendants have established and Plaintiff concedes that, Plaintiff's Notice of Pendency was not properly indexed against the property when he commenced his action, and, in fact was not indexed until April 30, 2007, more than three years after Plaintiff commenced his action. Accordingly, at the time the Astudillos recorded their Deed and the Property was encumbered by National's Mortgage, on January 17, 2007, there was no way for either of these defendants to know that Plaintiff claimed an interest in the property, and the Astudillos and National cannot be deemed to have had any knowledge of Plaintiff's action for specific performance. The Court notes that while the Astudillos are defendants in another action wherein a Notice of Pendency was filed on the subject property, such can only give them notice of the other action, not the instant action.

Contrary to Plaintiff's assertions, only the filing and indexing of the Notice of Pendency can apprise a prospective purchaser or encumbrancer of the pendency of an action. CPLR §6501. ("The pendency of such an action is constructive notice, from the time of the filing of the notice, only, to a purchaser from, or encumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated. . . ") The cases cited by Plaintiff are not dispositive on this issue since the case of Thelma Sander & Associates, Inc., v Hague Development Corp., 131 AD2d 462, (2d Dept 1987), involved the failure of the County Clerk to properly index and extension to the Notice of Pendency. In such circumstance, the existence of a properly filed and indexed Notice of Pendency was capable of acting as constructive notice of the pending action to any purchaser or encumbrancer. Here, Plaintiff's original Notice of Pendency was never filed and indexed properly, thus there was nothing to constructively notify others of the pending action. Moreover, The case of Goldstein v Gold, 106 AD2d 100 (2d Dept 1984) does not involve a mis-recorded or mis-indexed Notice of Pendency. It dealt with reliance by a title company on an unfiled and

fraudulently obtained satisfaction of the mortgage that it was shown at the closing of the property. The Court held that the purchaser bought the property subject to the mortgage that was properly filed, but purported to be satisfied. The other case relied upon by Plaintiff, Hartwell v Riley, 47 AD 154 (3rd Dept 1900) predates current applicable law and refers to sections of law that no longer exist. In particular, it is no longer good law since the current RPL § 316 provides that indexes "shall form a part of the record of each instrument hereafter recorded." As such, the cases relied upon by Plaintiff are inapposite to the instant circumstances. Accordingly, the Court finds that the Astudillos and National did not have actual or constructive notice of the pendency of the instant action and to the extent the causes of action against them depend upon such notice, they are dismissed.

Furthermore, the mere filing of a notice of pendency does not create a substantive right, but rather, it merely preserves an existing right. Avila v. Arsada Corp., 34 A.D.3d 609 (2d Dep't 2006) This is so because the purpose of a lis pendens is a notice of a claim made in respect to property which is the subject of a pending suit, but it does not of itself create an encumbrance upon the property. Simon v Vanderveer, 155 N.Y. 377, 382 (1898). The purpose of a notice of pendency is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit. Mechanics Exchange Savings Bank v Chesterfield, 34 A.D.2d 111 (3rd Dept 1970). Its purpose is to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Solow Bldg. Corp., 52 A.D.2d 533 (1st Dep't 1976.) Finally, the mere filing of a notice of pendency does not preclude a party from conveying or otherwise encumbering real property. Accordingly, to the extent Plaintiff seeks to recover damages against Defendant for its encumbrance of the subject property with knowledge of the notice of pendency, such are dismissed.

Furthermore, to the extent that Plaintiff's causes of action depend upon fraud, the Astudillos and National's motion seeking dismissal of such causes of action is granted. To prevail on a claim for fraud, a plaintiff has the burden to establish: (1) a representation of material fact; (2) the falsity of that representation; (3) knowledge by the party who made the representation that it was false; (4) justifiable reliance by the plaintiff; and (5) resulting injury. Lama Holding Co. v Smith Barney, 88 N.Y.2d 413 (1996.) The evidence shows that Plaintiff had absolutely no communications with the Astudillos and National. Moreover, in this Court's May Order, the Court found that Plaintiff had admitted that he had " no personal knowledge of any fraudulent scheme between Remark or Cambridge, and any of the other defendants in this action." Accordingly, Plaintiff cannot establish a representation of material fact by the

Astudillos and National to Plaintiff, or reliance upon such representations and any cause of action against defendants Astudillos and National sounding in fraud, are dismissed.

Similarly, to the extent the third cause of action sounds in negligence, it is dismissed as against the Astudillos and National. Plaintiff claims that the Astudillos and National were "negligent" in encumbering the property where they allegedly "knew" Plaintiff had filed a notice of pendency. The essential elements of a negligence claim are: (1) a duty owed by defendant to plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury. Ingrassia v. Lividikos, 54 A.D.3d 721, 723(2d Dept. 2008.) The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280 (2001.)

Plaintiff has not alleged, and cannot establish, that the Astudillos and National owed him an independent legal duty. The Astudillos were purchasers of the property from an entity that had no dealings with Plaintiff and National was the lender who provided construction financing to the Astudillos, who were the record owner of the property at the time it was encumbered. Plaintiff did not have any communication with the Astudillos or National and had no dealings them. Consequently, neither the Astudillos nor National owed a duty of care toward Plaintiff. Finally, there is no claim that the Astudillos or National acted in a negligent manner. Accordingly, the cause of action against the Astudillos and National sounding in negligence are dismissed.

For the reasons set forth above, the motions by the Astudillos and National for an Order pursuant to CPLR §3212 for summary judgment in the Astudillos and National's favor and dismissing the complaint, as against the Astudillos and National, are granted.

Dated: September 28, 2010 .....

ORIN R. KITZES, J.S.C.