

Manning v Lavoie

2013 NY Slip Op 32928(U)

November 12, 2013

Sup Ct, Suffolk County

Docket Number: 42253/2009

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 MARIE MANNING, as Executrix of the Estate
 of FREDERICK VIGLIETTA, Deceased,

Plaintiff,

-against-

ALAIN LAVOIE and STELLA LOUISE
 LAVOIE,

Defendants.

ORIG. RETURN DATE: DECEMBER 13, 2012
FINAL SUBMISSION DATE: FEBRUARY 21, 2013
MTN. SEQ. #: 006
MOTION: MD

ORIG. RETURN DATE: DECEMBER 13, 2012
FINAL SUBMISSION DATE: FEBRUARY 21, 2013
MTN. SEQ. #: 007
CROSS-MOTION: XMG

PLTF'S/PET'S ATTORNEY:
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 631-549-1400

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 516-741-6700

Upon the following papers numbered 1 to 10 read on this motion _____
TO EXTEND LIS PENDENS AND CROSS-MOTION TO CANCEL LIS PENDENS
 Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting
 papers 4-6; Affirmation in Reply/Opposition and supporting papers 7, 8; Reply Affirmation
 in Support of Cross-motion and supporting papers 9, 10; it is,

ORDERED that this motion (seq. #006) by plaintiff, MARIE
 MANNING as Executrix of the Estate of FREDERICK VIGLIETTA, Deceased
 ("plaintiff"), for an Order, pursuant to CPLR 6513, extending the duration of a
 Notice of Pendency *nunc pro tunc* for a period of three years from October 22,
 2012, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by defendants, ALAIN LAVOIE and STELLA LOUISE LAVOIE (collectively “defendants”), for an Order, pursuant to CPLR 6516 (c) and 6514 (b) and (c), cancelling, vacating and directing the Clerk of the County of Suffolk to discharge the Notice of Pendency dated October 19, 2009 and filed in the Office of the Clerk of the County of Suffolk on October 22, 2009, and cancelling, vacating and discharging the Notice of Pendency dated September 4, 2012 and filed in the Office of the Clerk of the County of Suffolk on September 19, 2012, and for an award of costs and expenses in the form of reasonable counsel fees and motion costs, is hereby **GRANTED** to the extent set forth hereinafter.

The decedent, FREDRICK VIGLIETTA, commenced this action pursuant to Real Property Law Article 15 to compel the return of real and personal property allegedly converted by his daughter and her husband, defendants STELLA LAVOIE and ALAIN LAVOIE. The decedent and his wife, Stella Viglietta, held title to the premises commonly known as 5 Jeffrey Lane, Lake Success, New York, as tenants by the entirety until she passed away in May of 2000. Following a hospitalization for illnesses and accident-related injuries, plaintiff allegedly agreed to let defendants live at his residence rent-free if they promised to help take care of him and manage his financial affairs. By his complaint, the decedent alleged, among other things, that defendants forged his signature in connection with a fraudulent sale of his residence; that defendants used the proceeds of the sale and money taken from his bank account and safety deposit box to purchase their current residence and other personal items; that defendants did not include his name on the deed to the new residence; that defendants began to ignore his personal and medical needs shortly after they moved in; that defendants refused to let him back into the residence following an accident that required his hospitalization; and that defendants unlawfully cashed his pension and social security checks while he was in treatment at a rehabilitation facility.

Simultaneous with the commencement of this action on October 22, 2009, the decedent filed a Notice of Pendency (“First Notice of Pendency”) against defendants’ premises commonly known as 50 Annadale Road, Commack, New York (“Premises”), for the sum of \$1,320,000.00. On December 17, 2009, defendants joined issue by filing an answer with counterclaims. Defendants’ counterclaims include a cause of action for an award of punitive

damages based on the decedent's alleged willful and reckless damage to their reputation.

FREDERICK VIGLIETTA died on February 7, 2012. Preliminary Letters Testamentary With Limitations were issued to MARIE MANNING by the Surrogate's Court of Suffolk County dated June 13, 2012, and thereafter Ms. Manning was appointed Executrix of Mr. Viglietta's Estate by Certificate dated September 19, 2012. Also on September 19, 2012, plaintiff filed another Notice of Pendency with the Clerk of the County of Suffolk against defendants' Premises ("Second Notice of Pendency"), prior to the expiration of the First Notice of Pendency. The parties agreed to the substitution of Ms. Manning as Executrix of the Estate in the place and stead of the deceased plaintiff by So-Ordered Stipulation dated November 9, 2012.

By Order dated August 1, 2011, this Court denied a motion by defendants to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and 3212, finding that summary judgment would be premature as further discovery was warranted. Additionally, the Court held therein, among other things, that "as defendants failed to establish that the action was prosecuted in bad faith, discretionary cancellation pursuant to CPLR 6514 (b) is inapplicable." Thus, the portion of defendants' motion requesting cancellation of the First Notice of Pendency was denied.

By Order dated February 27, 2012, this Court, among other things, granted a motion by plaintiff to dismiss defendants' counterclaims, to strike defendants' answer, and to impose sanctions only to the extent that defendants' counterclaims for defamation and an award of punitive damages were dismissed. However, this Order was issued after Mr. Viglietta died, and prior to the substitution of Ms. Manning as plaintiff. The Court notes that plaintiff's counsel first informed the Court of Mr. Viglietta's death by correspondence dated March 14, 2012. "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015 (a). Moreover, any determination rendered without such substitution will generally be deemed a nullity" (*Singer v Riskin*, 32 AD3d 839, 839-840 [2006] [citations omitted]; see *Stancu v Cheon Hyang Oh*, 74 AD3d 1322 [2010]; *Hicks v Jeffrey*, 304 AD2d 618 [2003]; *Gonzalez v Ford Motor Co.*, 295 AD2d 474 [2002]). Accordingly, the Order of February 27, 2012 is hereby deemed a nullity.

Plaintiff has filed the instant application for an Order, pursuant to CPLR 6513, extending the duration of the First Notice of Pendency *nunc pro tunc* for a period of three years from October 22, 2012. Plaintiff argues that the causes of action as set forth in the complaint have survived the passing of the decedent. Plaintiff alleges that defendants have repeatedly ignored discovery requests, thereby unnecessarily prolonging this litigation. Then, as discussed, Mr. Viglietta died on February 7, 2012; Ms. Manning was appointed Executrix on September 19, 2012; plaintiff's counsel filed the Second Notice of Pendency on September 19, 2012; the First Notice of Pendency expired on October 22, 2012; and the parties stipulated to substitute the Estate on November 9, 2012. Plaintiff's counsel alleges that he was unable to act until Ms. Manning was appointed Executrix and retained him as counsel. Plaintiff argues that pursuant to CPLR 1022, plaintiff had until fifteen days after substitution to move for an extension of the duration of the First Notice of Pendency. By way of their cross-motion, defendants seek cancellation of the First Notice of Pendency as having expired on October 22, 2012, as well as the Second Notice of Pendency as violating CPLR 6516 (c).

CPLR 6513, entitled "duration of notice of pendency," provides in its entirety:

A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period

(CPLR 6513). It has been held that a notice of pendency is an "extraordinary privilege" which demands "strict compliance" with applicable statutory requirements (see *In re Sakow*, 97 NY2d 436 [2002]; *Israelson v Bradley*, 308 NY 511 [1955]; *Old World Custom Homes, Inc. v. Crane*, 33 AD3d 600 [2006]). "A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause. The extension, however, must be requested prior to the expiration of the prior notice. This is an exacting rule; a notice of pendency that has expired without extension is a nullity" (*In re Sakow*, 97 NY2d 436, 442). Furthermore, "[f]or practical

purposes, there is no distinction between the effect of an expired or cancelled notice of pendency: both are void. Thus, the no second chance rule for a cancelled notice of pendency applies with equal force to one that has expired. Because CPLR 6513 provides that a notice of pendency terminates automatically on the expiration of the three-year period unless extended, a lapsed notice of pendency may not be revived” (*id.*).

Plaintiff relies upon CPLR 1022, arguing that she had until fifteen days after substitution was made to file an application with the Court to extend the First Notice of Pendency. CPLR 1022, entitled “Substitution: extension of time for taking procedural steps,” provides in its entirety:

Unless the court orders otherwise, if the time for making a motion for a new trial or for taking an appeal or for making a motion for permission to appeal or *for taking any other procedural step in the action has not expired before the occurrence of an event permitting substitution of a party, the period is extended as to all parties until fifteen days after substitution is made, or, in case of dismissal of the action under section 1021, is extended as to all parties until fifteen days after such dismissal*

(CPLR 1022 [emphasis supplied]). CPLR 1022 allows a court, in its discretion, to grant an extension of time for taking any procedural step if the time for doing so has not expired before the event that would allow substitution (*see e.g. Bertucci v Mosey*, 45 AD3d 1385 [2007] [extending time to effectuate service of process]). Plaintiff has not proffered any authority which applies the extension of time provided by CPLR 1022 to an application to extend the duration of a notice of pendency *nunc pro tunc*, and this Court is unaware of any such authority.

It is undisputed that Mr. Viglietta’s death terminated his attorney’s authority to act on his behalf (*see e.g. Horowitz v Griggs*, 2 AD3d 404 [2003]). However, Ms. Manning was appointed Executrix of Mr. Viglietta’s Estate on September 19, 2012, and “immediately” retained counsel to represent her in this action. As discussed, also on September 19, 2012, plaintiff’s counsel filed the Second Notice of Pendency in the name of the deceased plaintiff. At that time, the First Notice of Pendency had yet to expire. This Court is not convinced that a motion to extend the duration of a notice of pendency is merely a “procedural step” which would receive the benefit of CPLR 1022. Moreover, defendants had

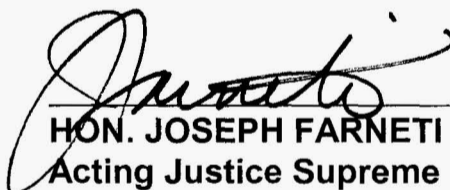
no objection to the substitution of Ms. Manning as plaintiff herein, and indeed stipulated to such substitution. Therefore, under the circumstances presented, the Court finds that plaintiff was able, but failed, to substitute Ms. Manning and move for an Order extending the First Notice of Pendency prior to the expiration of the First Notice of Pendency. In addition, it is undisputed that plaintiff filed the successive Second Notice of Pendency in violation of CPLR 6516 (c), and at a time when plaintiff's counsel did not have the authority to do so.

In view of the foregoing, plaintiff's motion to extend the duration of the First Notice of Pendency is **DENIED**. Defendants' cross-motion to vacate the First Notice of Pendency dated October 19, 2009 and filed in the Office of the Clerk of the County of Suffolk on October 22, 2009, and to vacate the Second Notice of Pendency dated September 4, 2012 and filed in the Office of the Clerk of the County of Suffolk on September 19, 2012, is **GRANTED** to the extent that the First Notice of Pendency, which expired without extension, is hereby cancelled and deemed a nullity (*see In re Sakow*, 97 NY2d 436, *supra*; *Ampul Elec., Inc. v Village of Port Chester*, 96 AD3d 790 [2012]), and the Second Notice of Pendency is hereby vacated and cancelled pursuant to CPLR 6516 (c). The Clerk of the County of Suffolk is hereby directed to mark upon the margin of the aforementioned Notices of Pendency the notation "cancelled" with a reference to this Order.

Notwithstanding this determination, the Court finds that an award of costs and expenses pursuant to CPLR 6514 (c) is inappropriate.

The foregoing constitutes the decision and Order of the Court.

Dated: November 12, 2013


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION