

Matter of F.C.I.C., LLC v Hatzlucha Houses, LLC
2016 NY Slip Op 32865(U)
March 22, 2016
Supreme Court, Rockland County
Docket Number: 032059/2015
Judge: Margaret Garvey
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of

**AMENDED
DECISION AND ORDER**

F.C.I.C., LLC and SOLOMON KNOPF,

Petitioner,

Index No.: 032059/2015

For the Judicial Dissolution of

(Motion #3)

AKW HOLDING, LLC,

Pursuant to § 702 of the
New York Limited Liability Company Law,

-against-

HATZLUCHA HOUSES, LLC, GAVRIEL ALEXANDER a/k/a
GABE ALEXANDER, JACK WERCBERGER a/k/a JACOB
WERCBERGER, ABRAHAM WERCBERGER a/k/a ABE
WERCBERGER, IZON BUSINESS PRODUCTS, INC.,
DEFINED CONTRIBUTION PLAN, and IZON BUSINESS
PRODUCTS,

Respondents.

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Margaret Garvey, J.

This Amended Decision and Order is issued to change the adjournment date contained in the prior Decision and Order dated March 17, 2016.

The following papers, numbered 1 to 3, were considered in connection with the Notice of Motion for Renewal and Reargument filed by Respondents for reargument and/or reconsideration and renewal of the Respondent's prior motion pursuant to Civil Practice Law and Rules §2221 for the Court's failure to address the issue of cancelling the Notice of Pendency, cancelling the Notice of Pendency pursuant to Civil Practice Law and Rules § 6514, and related relief; and were also considered in connection with the Affirmation in Opposition filed by Respondents seeking Respondent's Motion to Reargue be denied in its entirety, and in the alternative, that Respondent's Motion to Cancel the Notices of Pendency be denied in its entirety, and such other and further relief as this Court may deem just and proper;

PAPERS

NUMBERED

NOTICE OF MOTION/ AFFIRMATION OF BARRY KANTROWITZ, ESQ DATED JANUARY 13, 2016/EXHIBITS (A-G)	1
AFFIRMATION IN OPPOSITION TO RESPONDENT'S MOTION TO REARGUE OF REBECCA A. CRANCE, ESQ DATED FEBRUARY 16, 2016	2
REPLY AFFIRMATION OF DANIEL B. SCHWARTZ, ESQ DATED FEBRUARY 17, 2016/EXHIBITS (A-B)	3

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Petitioners' commenced this action seeking judicial dissolution and appointment of a Receiver (with related relief) with the filing of the Verified Petition and supporting papers through the NYSCEF system on May 7, 2015 and a Notice of Pendency dated May 7, 2015.

On July 13, 2015, Respondents filed a motion seeking dismissal, or alternatively, an Order staying the action until the arbitration pending between the parties is completed. Petitioner opposed that motion and Respondents replied. On January 4, 2016 this Court issued a Decision and Order on the Respondent's motion. The Decision and Order were served with a Notice of Entry dated January 7, 2016.

On January 15, 2016, Respondents filed a Notice of Motion for "Renewal and Reargument" arguing that the Court should grant leave to reargue the prior motion by Plaintiff which resulted in the Decision and Order dated January 4, 2016 on the grounds that the Court did not address the Respondent's fourth prayer for relief, cancellation of a Notice of Pendency and upon reargument cancelling the Notice of Pendency.¹

¹The Court will note that while Attorney Barry S. Kantrowitz labels the motion as a "NOTICE OF MOTION FOR RENEWAL AND REARGUMENT," it is clear from his affirmation that he is solely seeking relief under Civil Practice Law and Rules § 2221(d), which is a motion for leave to reargue.

A motion to reargue is based on no new proof; it just seeks to convince the Judge that the original decision was in error and should be changed [McKinney's Consolidated Laws of New York, *CPLR Rule 2221*, Practice Commentaries - C2221:7]. A motion for reargument is addressed to the sound discretion of the court that decided the prior motion and may be granted only upon a showing that the court overlooked or misapprehended facts or law or for some other reason, mistakenly arrived at its earlier decision. [*Long v. Long*, 675 N.Y.S.2d 557 (2d Dept. 1998)]. The purpose of a motion for leave to reargue is not to allow a party to argue a new theory of law or request relief that was not previously asserted. [*Pryor v. Commonwealth Land Title Ins. Co.*, 767 N.Y.S.2d 256 (2d Dept. 2003); *Frisenda v. X Large Enters.*, 280 A.D.2d 514 (2d Dept. 2001)].

Petitioner argues that the Court overlooked or misapprehended matters of fact or law. Specifically, Respondent argues that the January 4, 2016 Decision and Order of this Court failed to address the fourth prayer of relief, that the Notice of Pendency be cancelled; neither granting the requested relief nor specifically denying it. Unfortunately, it appears that the Court did overlook Respondent's request to cancel the Notice of Pendency in the instant matter. Petitioner argues that this Court's denial of Respondent's Motion to Dismiss and the resultant stay of the proceeding pending arbitration also resulted in a denial of the cancellation of the notices of pendency. Contrary to Petitioner's argument, the Court's failure to address Respondent's fourth prayer for relief was not due to its inclusion in the stay of the proceedings. The Court failed to include a decision regarding the Notice of Pendency as Respondent's had requested specific relief as to that matter. Therefore, the Respondent's Motion for Reargument pursuant to *Civil Practice Law and Rules* § 2221 is granted.

Turning now to whether the Notice of Pendency filed by the Petitioner in this matter should be cancelled. *Civil Practice Law and Rules* § 6501 allows for a notice of pendency to 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, except in a summary proceeding brought to recover the possession of real property.” The purpose of the Notice of Pendency is to prevent a potential transferee or mortgagee of the property from obtaining a purchaser for a certain value while an action is pending. The petitioner’s filing of the notice of pendency ensures that if the Petitioner receives a judgment in their favor it will be enforceable against the Respondent’s property free of any competing claims by persons whose interest in that same land was not recorded until after the filing of the notice of pendency. [*Novastar Mortgage, Inc. V. Mendoza*, 26 AD3d 479 (2d Dept 2006)]. The notice of pendency does not encumber or place a lien on the property. However, it is clear the purpose of the notice of pendency is to place a blemish on the title of the property during the pendency of the court action.

A broad reading of the statute regarding notice of pendency seems to state “use or enjoyment” of real property meaning any use or enjoyment of the property. However, cases in which notice of pendency is considered appropriate are those in which the petitioner claims an interest in the respondent’s land, not an encroachment or wrong perpetrated by the petitioner on respondent’s land. [*Braunston v. Anchorage Woods, Inc.*, 10 NY2d 302, 317-318 (1961)]. It is clear that a notice of pendency should be filed in an action which implicates recording act principles, such as situations in which the petitioner’s right, title or interest in the respondent’s land might be lost as a result of the transfer of the property to a purchaser for value who is unaware of the petitioner’s claim. Therefore, actions that are solely seeking money damages also do not fall within the scope of the statute for notice of pendency.

In considering a motion for cancellation of a notice of pendency on the ground that the action does not fall within the scope of Civil Practice Law and Rules § 6501 the court must limit their review to the face of the complaint filed in the action. [*5303 Realty Corp. V. O & Y Equity Corp.*, 476 NE2d 276 (1984)]. An amended complaint cannot be used to supplement an insufficient complaint and notice of pendency. [*Van Tuyl v. New York Real Estate Security Co.*, 153 AD 409 (1912)]. A complaint that is devoid of any cause of action

seeking judgment which would "affect the title to, or the possession, use or enjoyment of real property" is insufficient to support a filing of a notice of pendency. [*Distinctive Custom Homes Building Corp. v. Esteves*, 12 AD3d 559 (2d Dept. 2004)]. In a shareholder derivative action the courts have held that where property is a corporate asset or is allegedly purchased with funds fraudulently removed from the corporation and the movant requests a judgment that would affect the title, possession or use and enjoyment of that property, then a notice of pendency is appropriate. [*Keen v. Keen*, 140 AD2d 311 (2d Dept. 1988); *Ali v. Ahmad*, 24 AD3d 475, 476 (2d Dept. 2005)]. Additionally, the likelihood of success on the merits is an irrelevant factor in determining the validity of the notice of pendency. [*Interboro Operating Corp. v. Commonwealth Security & Mtg. Corp.*, 198 NE 665 (1935)].

Respondent has argued extensively that the instant action does not fall within the scope of *Civil Practice Law and Rules* § 6501 in that the sole issue in this case concerns shareholder rights in which Petitioner is solely seeking monetary damages. This Court disagrees with the Respondents regarding the nature of the instant action. The action is not one that solely concerns shareholders rights against a corporation whose assets are real property. The Petitioner's action is one that is requesting dissolution of a limited liability company, whose sole asset is real property and they are seeking to assign a receiver to manage the properties owned by the company and sell the same. The Petitioner's request is clearly one that will affect the title to, or possession or use or enjoyment of the real property owned by AKW corporation. A review of the Petition filed in the instant matter demonstrates the appropriateness of the notice of pendency in this matter. Specifically, the first cause of action of the Petition is for dissolution of AKW, LLC and to appoint a receiver for the purpose of managing the properties owned by AKW, LLC and effectuating the sale of same. [Respondent's Petition, page 16, para 85]. Additionally, it is clear that the Petition alleges that AKW, LLC owns several properties in New City, New York and is requesting a judgment that would affect the title to, or the possession, use or enjoyment of those

properties. Albeit this matter is not a shareholder derivative action, but is similar in that the real property of issue in this matter is a corporate asset of AKW, LLC and the Petitioner's and Respondent's rights as shareholders in this company would be affected by any sale, refinance or transfer of title of those properties.

Accordingly, it is hereby

ORDERED that Respondent's Motion for Leave to Reargue is granted; and it is further

ORDERED the Respondent's request to cancel the Petitioner's Notice of Pendency filed May 7, 2015 is denied; and it is further

ORDERED that the matter is stayed pending the arbitration between the parties based on this Court's prior Decision and Order dated January 4, 2016; and it is further

ORDERED that this matter is adjourned to **MONDAY, JUNE 27, 2016 at 9:15 a.m.** for a status update on the arbitration between the parties - counsel for Respondents is directed to notify the Court in writing prior to that date of the status of the arbitration (through NYSCEF); and it is further

The foregoing constitutes the Decision and Order of this Court on Motion #3.

Dated: New City, New York
March 22, 2016



HON. MARGARET GARVEY
Justice of the Supreme Court

To:

by e-filing -

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