

**Deverger v Reaves**

2020 NY Slip Op 33800(U)

November 16, 2020

Supreme Court, Kings County

Docket Number: 517844/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : COMMERCIAL PART 8

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ERNEST L. DEVERGER JR., VAN  
FITZGERALD DEVERGER, and DOLORES  
DEVERGER,

Plaintiffs, Index # 517844/20

- against -

November 16, 2020

JAMES REAVES,

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendant James Reaves has moved seeking to cancel the Notice of Pendency filed and for sanctions. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments, this court now makes the following determination.

According to the Verified Complaint Ernest Deverger Sr. established a trust on July 9, 2013. The trust owns property located at 534 Carlton Avenue in Kings County. Although originally Mr. Deverger's son was the trustee, that was changed on January 29, 2016 when the defendant James Reaves was named trustee. On February 15, 2017 Reaves resigned as the trustee and a successor trustee was never appointed. Mr. Deverger Sr. passed away on April 11, 2020. The Verified Complaint asserts that despite the defendant's resignation he still acted as trustee, collected rents and has entered into a contract to sell the property. The plaintiffs have asserted various causes of action including unjust enrichment, constructive trust, conversion,

fraud and other claims. Further, the plaintiffs filed a Notice of Pendency on the property and the defendant has now moved seeking to cancel that notice on the grounds the relief plaintiffs seek does not involve real property since they only have rights in the trust not the property itself.

#### Conclusions of Law

It is well settled that a notice of pendency provides constructive notice of an action where the judgement may affect the title to real property (Sharestates Investments, LLC v. Hercules, 178 AD3d 1112, 116 NYS3d 299 [2d Dept., 2019]). It is further well settled that causes of action for a constructive trust on real property allows the filing of a notice of pendency over that property (Natasi v. Natasi, 26 AD3d 32, 805 NYS2d 585 [2d Dept., 2005]). That general rule, however, has been refined by the courts and in truth a notice of pendency is permitted to be filed in a constructive trust action only where the plaintiff seeks to impose a trust on the defendant's actual real property. However, where the res of the prospective trust is not real property then a notice of pendency is not available (see, Pizzurro v. Pasquino, 201 AD2d 635, 607 NYS2d 975 [2d Dept., 1994]). Thus, in Yonaty v. Glauber, 40 AD3d 1193, 834 NYS2d 744 [3<sup>rd</sup> Dept., 2009] the court held a constructive trust inapplicable where the res sought were really interests in

various corporations. The defendant argues the Notice of Pendency is improperly filed in this case. The defendant asserts the property is owned by trust of which the plaintiffs are beneficiaries. Thus, the plaintiffs merely have interests in the trust and not any real property.

When reviewing a motion to cancel a notice of pendency on the grounds it does not affect real property the court is limited to the pleadings to determine whether the claims are directly related to property as required pursuant to CPLR §6501. The court may not investigate any of the underlying transactions (5303 Realty Corp., v. O & Y Equity Group, 64 NY2d 313, 486 NYS2d 877 [1984]).

In Kheel v. Kheel, 72 AD3d 1543, 900 NYS2d 800 [4<sup>th</sup> Dept., 2010] the court held that the beneficiaries of a trust that owned an entity that owned real estate could not file a notice of pendency since they did not have any interest in land but rather an interest in a corporation. Again, in Schoepp v. State, 69 AD2d 917, 415 NYS2d 276 [3<sup>rd</sup> Dept., 1979] the court held that a beneficiary of a trust could not file a notice of pendency. The court held that "such trust creates an interest in the proceeds from the sale of the land and does not affect the title to, or possession, use or enjoyment of the property" (id). Similarly, courts uniformly hold that a spouse cannot file a notice of pendency on marital property merely because the residence may be

subject to equitable distribution (see, Fakiris v. Fakiris, 177 AD2d 540, 575 NYS2d 924 [2d Dept., 1991]). These cases demonstrate that unless a party has an actual interest in land it cannot file a notice of pendency even if it has an indirect or eventual right to such land.

The case cited by plaintiffs Roedel v. Roedel, 3 AD2d 623, 158 NYS2d 163 [3<sup>rd</sup> Dept., 1956] does not stand for the proposition that the beneficiary of a trust that owns real property may file a notice of pendency. That case merely held that an action seeking to adjudicate that certain real property is an asset of a partnership is an action for which a notice of pendency may be filed. This was particularly true since the partner was also seeking an accounting. Thus, that case held that a cause of action by one partner to impress a trust upon real property alleged to be partnership assets will authorize the filing of a notice of pendency (Arcaro v. Arcaro, 20 Misc2d 489, 193 NYS2d 493 [Supreme Court Bronx County 1959]). In this case the trust already exists and the plaintiffs ownership does not concern the real property at all. Thus, those cases do not control this lawsuit. Indeed, generally when a partnership owns real property each partner's ownership is deemed personal property which cannot support the filing of a notice of pendency (see, General Property Corp., v. Diamond, 29 AD2d 173, 286 NYS2d 553 [1<sup>st</sup> Dept., 1968], Liffiton v. DiBlasi, 170 AD2d 994, 566

NYS2d 148 [4<sup>th</sup> Dept., 1991]). Thus, the general rule regarding partnerships provides further support the plaintiffs have no right to file a notice of pendency in this case.


Therefore, based on the foregoing, the motion seeking to vacate the notice of pendency filed is granted.

The motion seeking the imposition of sanctions is denied.

So ordered.

ENTER:

Dated: November 16, 2020  
Brooklyn, N.Y.

  
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Hon. Leon Ruchelsman  
JSC