

<b>Platovsky v Bernstein</b>
2020 NY Slip Op 35349(U)
July 2, 2020
Supreme Court, Bronx County
Docket Number: Index No. 25292/2017E
Judge: Eddie J. McShan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-32

DANIEL PLATOVSKY and 2235 BASSFORD AVE.  
CORP.,

*Plaintiffs,*

-against-

ARI BERNSTEIN, STEPHEN FRIEDMAN, ESQ.,  
2235 BASSFORD PARTNERS LLC, "John Doe"  
BERNSTEIN and John Does 1-10, the latter parties  
being purported members, officers or manager of  
2235 BASSFORD PARTNERS LLC other than  
Plaintiff Daniel Platovsky, Defendant Ari Bernstein  
or Defendant Stephen Friedman, Esq.,

*Defendants.*

**DECISION AND ORDER**  
Index No. 25292/2017E

**Present:**  
**HON. EDDIE J. MCSHAN**

ARI BERNSTEIN, MICHALE BERNSTEIN,  
2235 BASSFORD PARTNERS, LLC.,

Counterclaim-Plaintiffs,

-against-

DANIEL PLATOVSKY, 2235 BASSFORD AVE. CORP.,  
And NBR REALTY CORP.,

The following Papers Numbered: 1 to 30 were read on this Order to Show Cause seeking to extend the notice of  
pendency and Cross-Motion:

No	on Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause-Exhibits and Affirmation Annexed -----		1 - 3
Answering Affidavit, Amended Cross-Motion and Exhibits- (Oral Argument and Exhibit) -----		4 - 19
Replying Affidavit and Exhibits -----		20 - 30
Other -----		

Upon the foregoing cited papers, the Decision and Order on this Order to Show Cause and  
Notice of Cross-Motion is as follows:

Before this Court is Plaintiffs' Order to Show Cause seeking to extend the notice of  
pendency filed on June 16, 2017 for an additional three years pursuant to CPLR 6513.  
Defendants/Counterclaim Plaintiffs Ari Bernstein, Michael Bernstein, and 2235 Bassford Partners  
LLC (Defendants) vehemently opposes Plaintiffs' application, and cross moves for an order (1)

enforcing the Conditional Order of Preclusion entered on March 6, 2020; and (2) granting summary judgment pursuant to CPLR § 3212 dismissing Plaintiffs' Amended Complaint against Defendants/Counterclaim Plaintiffs Ari Bernstein, Michael Bernstein, and 2235 Bassford Partners LLC based on Plaintiffs' preclusion and inability to prove their case. Defendant Friedman did not submit any opposition papers.

Initially, the Court notes that it established a briefing schedule in Plaintiff's Order to Show Cause signed on June 18, 2020. Due to the urgency as it pertained to the application seeking extension of the Plaintiff's notice of pendency, the Court set short deadlines: opposition was due on or before June 26, 2020, and reply was due on or before June 30, 2020. The matter was scheduled for oral arguments on June 30, 2020 at 10:00 a.m. The Court notified the parties on June 29, 2020 that it could not hold the oral arguments on the return date. Oral arguments were rescheduled for and held on July 1, 2020 at 9:00 a.m.

The Court further notes that Defendants e-filed a Notice of Cross-Motion and all exhibits on June 26, 2020 but failed to include with the e-file the Affirmation of Hyman L. Schaffer in opposition to the Order to Show Cause and in support of their Notice of Cross-Motion. Defendants e-filed the affirmation on June 29, 2020 and emailed the Court indicating their inadvertent office failure. Plaintiffs immediately e-filed a Notice of Rejection that same day. Nevertheless, Plaintiffs e-filed their reply on June 30, 2020 opposing Defendants' Notice of Cross-Motion. The Court finds that Plaintiffs were not prejudiced by the Defendants' untimely submission of the affirmation as evidenced by Plaintiffs' reply to the Notice of Cross-Motion. As such, the Court considers all the papers submitted on the parties' respective applications in reaching its decision below.

#### Notice of Pendency

Plaintiffs seek to extend the duration of the notice of pendency from June 15, 2020 to June 15, 2023. Plaintiffs argue that the statutory protections will be removed which may frustrate plaintiffs' rights against the subject property if the notice of pendency is permitted to expire. Plaintiffs contend that they have complied with Defendants' discovery demands but indicate that Defendants disputes the sufficiency of their compliance. Plaintiffs' attorney suggests that he is

waiting for an appropriate and safe time to meet with Plaintiff Platovsky to determine what additional documents he can produce. Plaintiffs assert that this matter has a history of heavily disputed discovery issues and note that they have filed two discovery related motions against Defendants which are presently pending. Plaintiffs insists that “this vigorously contested action will continue well into the foreseeable future” and that extension of their notice of pendency is warranted.

Defendants vehemently oppose Plaintiffs’ application asserting that the latter have engaged in dilatory tactics by ignoring deadlines, stipulations and orders without providing an excuse. Defendants argue that granting Plaintiffs’ application to extend the notice of pendency would reward Plaintiffs despite their attempts seeking to “relentlessly ... game and delay the litigation process”. Defendants emphasize that the Honorable Laura Douglas issued a Conditional Preclusion Order entered on March 6, 2020 against the Plaintiffs stating that:

Daniel Platovsky, 2235 Brassford Ave. Corp., and NBR Realty Corp. are precluded from offering any evidence at the trial of this action or counterclaim unless they provide all of the items requested in Bernstein’s discovery notices dated October 4, 2017 and objected to or not furnished in Platovsky’s responses of May 28, 2019, including any items to be public record and any items claimed to be in the possession of Platovsky’s prior attorney, no later than 20 days following service of a copy of this Order with notice of entry.

Defendants argue that the COVID-19 pandemic may be an excuse for the last few days of the Plaintiffs’ failure to comply with the deadline imposed by Justice Douglas’ conditional preclusion order but not their inactivity for the past three years. Defendants note that COVID crisis occurred a few days prior to the expiration of Justice Douglas’ 20-day production deadline. Relying on *Matter of Sakow*, Defendants argue that the Plaintiffs have abused their privilege by failing to comply with discovery over the course of three years (97 NY2d 436 [2002]). Also relying on *Petervary v Bubnis*, Defendants insist that Plaintiffs have failed to provide discovery in accordance with court orders and, therefore, lack the good cause necessary to extend the notice of pendency (30 AD3d 498 [2d Dept 2006]). Defendants asserts that the notice of pendency is a highly potent tool which may be misused by litigants like the Plaintiffs intent on delaying the litigation.

Defendants emphasize that Plaintiffs completely ignored their Notices of Discovery and Inspection served on October 4, 2017 despite their subsequent correspondence seeking Plaintiffs' compliance. Defendants indicate that they filed a motion to compel discovery on April 12, 2018 which Plaintiffs tried to render "moot" by filing inadequate responses and unauthorized opposition papers based upon their self-granted extended deadline immediately before oral arguments on the motion on June 26, 2018. Defendants insist that Plaintiffs made no effort to explain or excuse their defaults. Defendants note that Justice Douglas held in her Decision and Order dated October 19, 2018, that Plaintiffs waived any objections other than palpable impropriety based on their failure to timely reply, and that many of their objections were inappropriate. Plaintiffs were directed to fully comply with Defendants' Notice of Discovery and Inspection served on October 4, 2017 within 30 days following service of a copy of Justice Douglas' Decision and Order with notice of entry, or November 23, 2018.

Defendants asserts that they filed a sanctions motion on April 22, 2019 when Plaintiffs failed to make any effort to comply with Justice Douglas' October 19, 2018 Decision and Order. Defendants indicate that Plaintiffs attempted to justify their delay and noncompliance by claiming that they had "great difficulty in gathering the extensive information" during oral arguments. Defendant notes that Plaintiffs only provided 16 email chains and a defective HIPAA form, as well as publicly available documents from the Court's e-file docket and some document from the Secretary of State's website. Defendants suggest that Plaintiffs have done everything in their power, including their failure to provide valid HIPAA forms, to avoid proving Plaintiff Platovsky's putative deficient mental capacity which is key to their rescission claim. Defendants contend that the Court rejected Plaintiffs' maneuvers as evidenced by its Conditional Preclusion Order entered on March 4, 2020.

It is well-settled that a "notice of pendency is an 'extraordinary' privilege because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property . . . 'without any prior judicial review' [and without a] showing of the likelihood of success on the merits of the cause of action" (*see In re Sakow*, 97 NY2d 436 [2002] *quoting Israelson v Bradley*,

308 NY511 [1955]; *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313 [1984]). A notice of pendency is valid for three years from the date of its filing and may be extended for an additional three years pursuant to CPLR § 6513 provided that it is “filed, recorded and indexed before the expiration of the prior period.” In order to be successful in an order to show cause seeking the extension of an existing notice of pendency, the plaintiff must demonstrate “good cause” for such extension (*In re Sakow*, 97 NY2d 436).

The Court finds that the Plaintiffs failed to establish good cause warranting the extension of their existing notice of pendency filed on June 16, 2017. Plaintiffs failed to establish on this record that their need for the extension is not the result of their own delay in prosecution this action (*see Rahman v Rahman*, 2020 WL 345737 (1<sup>st</sup> Dept 2020) *citing Petervary v Bubnis*, 30 AD3d 498 [2d Dept 2006]). The Court does not find persuasive Plaintiffs’ suggestion that further discovery will be needed depending on the deposition and documents to be produced by Defendant Ari Bernstein as good cause to extend the notice of pendency. Although Plaintiffs notes that they filed two discovery motions in this action which are still pending, they provide no explanation on this record the motions are necessary nearly three years after the commencement of this action. Plaintiffs provide no details regarding when they sought discovery from the Defendants nor the nature of the Defendants’ lack of compliance.

More importantly, Plaintiffs failed to sufficiently explain the reason(s) for their noncompliance with the Defendant’s discovery demands that ultimately resulted in conditional discovery sanctions against them. The Court notes that the Plaintiffs have yet to comply with Defendants’ discovery demands as evidenced by the Justice Douglas’ decisions and orders compelling Plaintiff’s compliance dated October 19, 2018 and the conditional order of preclusion dated March 4, 2020. It is well-settled that a “plaintiff’s failure to submit records to the defendants in discovery in defiance of a court order [which] was the cause of the delay that necessitated an extension of the notice of pendency” has been deemed sufficient to deny a plaintiff’s application for an extension of the notice of pendency (*see for example Petervary v Bubnis*, 30 AD3d 498 [2d Dept 2006]). This record clearly reflects that Defendants were required to seek discovery sanctions

against the Plaintiffs based upon their failure to comply with Justice Douglas' Decision and Order dated October 19, 2018.

In addition, the Court finds that Justice Douglas' conditional order of preclusion is indicative of the Plaintiffs failure or inability to sufficiently explain that their need for the extension is not the result of their own delay in the prosecution of this action (*Rahman*, 2020 WL 345737). Plaintiffs have yet to provide the required discovery despite the urgency of the conditional order of preclusion. This Court is sensitive to the issues created by the COVID-19 pandemic. However, the recent issues created by the pandemic do not excuse the Plaintiffs from explaining the prior three-years of noncompliance with the discovery demands or their inactivity. Accordingly, the Court finds that the Plaintiffs' conduct during the course of this three-year litigation does not evidence the "good cause" necessary to warrant the extension of their notice of pendency.

#### Preclusion

Defendants seek enforcement of Justice Douglas' conditional order of preclusion dated March 4, 2020 based upon Plaintiffs' noncompliance. Defendants indicate that they served a copy of the conditional order of preclusion on the Plaintiffs with a notice of entry on March 6, 2020. Defendants assert that Plaintiffs were required to produce their documents within 20 days of the notice of entry per the March 4, 2020 Order, or March 26, 2020. Defendants argue that contrary to Plaintiffs' assertions, COVID-19 does not provide them with refuge for their "obfuscation, contumacious conduct and utter disregard for the litigation process" during the course of three years or why they have done nothing to comply with the March 4, 2020 Order.

Plaintiffs vehemently oppose Defendants' application insisting that they would have complied with the March 4, 2020 Order but for "intervening events and various emergency and COVID-19 Emergency Executive Orders issued by Governor Cuomo." Plaintiffs annex Governor Cuomo's various executive orders and emphasize that on March 20, 2020 Governor Cuomo issued Executive Order 202.8 tolling all CPLR deadlines through April 19, 2020 and closed all New York

non-essential businesses including offices. Plaintiffs also emphasize that Governor Cuomo extended Executive Order 202.8 until July 6, 2020 in accordance with its Executive Order 202.38 dated June 6, 2020. Plaintiffs argue that Defendants' application is frivolous in light of the executive orders. Plaintiffs requests that they be permitted to provide the discovery in accordance with the March 4, 2020 by July 31, 2020. Plaintiffs' attorney states that he has limited staffing because "my office has not fully reopened under New York City's Phase II reopening and (b) Plaintiff Daniel Platovsky and I have underlying health conditions that will, under the continuing COVID 19 emergency, require us to take more time to produce those documents." Plaintiffs' attorney indicates that he has suspended meeting with clients in his office due to the pandemic but suggests that will be able to comply with the conditional order of preclusion by July 31, 2020.

The Court finds that the Defendant's application seeking to preclude Plaintiffs based upon the Justice Douglas' conditional order dated March 4, 2020 premature in light of COVID-19 pandemic and Governor Cuomo's Executive Orders 202.8 and 202.38. As noted above, the Court is sensitive to the issues created by the pandemic, particularly, the ability to meet deadlines. Accordingly, the Court extends the Plaintiffs' time to comply with the conditional order of preclusion until July 31, 2020 based upon Plaintiffs' assurance of compliance. Plaintiffs shall fully comply with Justice Douglas' conditional order of preclusion dated March 4, 2020 on or before July 31, 2020. Plaintiffs failure to comply with the conditional order of preclusion and this Decision and Order shall result in an order of preclusion.

#### Summary Judgment

Defendants' application for summary judgment dismissing the Plaintiff's Amended Complaint based upon an order of preclusion is denied without prejudice to renew. Defendants may renew their application for such relief after the entry of a final order of preclusion as determined above. Accordingly, the parties shall appear for a Skype conference call with the Court on August 17, 2020 at 10:00 a.m. to determine Plaintiffs' compliance with the conditional order of preclusion dated March 4, 2020.

In light of the foregoing, it is hereby

**ORDERED AND ADJUDGED** that the Plaintiffs' application seeking to extend the notice of pendency is hereby denied in accordance with the Court's findings hereinabove; and it is further

**ORDERED AND ADJUDGED** that the Defendant's application seeking enforcement of Justice Douglas' conditional order of preclusion dated March 4, 2020 is hereby denied as premature in accordance with the Court's findings hereinabove; and it is further

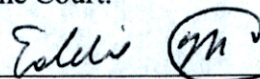
**ORDERED AND ADJUDGED** that Plaintiffs shall fully comply with the conditional order of preclusion dated March 4, 2020 on or before July 31, 2020; and it is further

**ORDERED AND ADJUDGED** that Defendants' application for summary judgment dismissing Plaintiffs' Amended Complaint against them based on the order of preclusion is denied with leave to renew in accordance with the Court's findings hereinabove; and it is further

**ORDERED AND ADJUDGED** that the parties shall appear for a Skype conference call with the Court on August 17, 2020 at 10:00 a.m. to determine Plaintiffs' compliance with the Justice Douglas' conditional order of preclusion dated March 4, 2020.

This shall constitute the decision and order of the Court.

Dated: July 2, 2020



Hon. Eddie J. McShan, J.S.C.