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Advocate's VIEW

Vacating an erroneously filed notice of pendency

A notice of pendency is a powerful device used in real property litigation. By filing a notice of pendency, a litigant constructively notifies potential purchasers of a claim on the subject property. The filing clouds the title of the property. Accordingly, the Court of Appeals has recognized “[t]he powerful impact that [a notice of pendency] has on the alienability of property.” *5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313, 315 (1984).

While notices of pendency are frequently filed, they are not appropriate in every action concerning real property. This article discusses the circumstances in which a motion to cancel a notice of pendency will be successful.

A notice of pendency may only accompany an action that seeks to directly affect the title to or possession of real property. When defending a lawsuit where a notice of pendency is filed, it is important to analyze whether the filing was appropriate, and the potential for vacating the notice. Actions that seemingly warrant such a filing, often times do not. “[C]ourts have been frequently confronted by attempts to file a notice of pendency in controversies that more or less referred to real property, but which did not necessarily seek to directly affect title to or possession of the land. In the absence of this direct relationship, the remedy was denied.” *5303 Realty Corp.*, 64 NY2d at 321.

The rules governing notices of pendency are set forth in Article 65 of New York's Civil Practice Law and Rules (“CPLR”). CPLR § 6514 establishes the grounds upon which a court may cancel a notice of pendency. When deciding a motion to cancel a notice of pendency, courts examine the pleadings. While a careful analysis of each case is appropriate, the crucial factor courts analyze is whether there is a



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direct relationship between the relief sought and title to, or possession of the land.

Cases that are obvious

Some cases are straightforward. For instance, actions seeking monetary damages for breach of contract or tort do not support the filing of a notice of pendency, even if

they appear to relate to real property. See *Distinctive Custom Homes Bldg. Corp. v. Esteves*, 12 AD3d 559, 559 (2d Dept. 2004) (breach of contract causes of action inadequate to support notice of pendency); *Braunston v. Anchorage Woods, Inc.*, 10 NY2d 302, 306 (1961) (“[a]n action to abate a nuisance is not one affecting the title to, or the possession, use or enjoyment of real property.”). The reasoning is simple: These causes of action would survive a transfer of the property. Moreover, lease disputes often do not justify a notice of pendency. *Rose v. Montt Assets, Inc.*, 250 AD2d 451, 452 (1st Dept. 1998) (“[e]ven in the context of a summary proceeding to recover possession under a lease, a notice of pendency is unavailable ... it is a basic concept that a leasehold interest is deemed personalty.”).

But, not all cases have an obvious answer. The leading case demonstrates the confusing analysis that sometimes applies. In *5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313, 325 (1984), the Court of Appeals reversed the Appellate Division and canceled a notice of pendency. The underlying action was for specific performance of a contract to transfer the

stock of a company whose business was owning and operating an office building. *Id.* at 316-17. Even though the building was owned by the defendant corporation and a stock transfer would necessarily affect ownership of the building, the Court found that the “true action [was] to enforce a contract to sell stock” and thus it did not seek to directly impact the title to the property. *Id.* at 323. The dissenting opinion noted this confusing result emphasized “form over substance” as the judgment demanded would “inescapably” affect the title to the property. *Id.* at 325.

Nevertheless, the case remains good law, and is applied to a number of cases that potentially impact real property. Recently, the Fourth Department has held that claims for equitable distribution of marital property do “not necessarily affect the title to, or possession, use or enjoyment of, the subject real property” and accordingly do not support the filing of a notice of pendency. *Gately v. Gately*, 117 AD3d 1490, 1491 (4th Dept. 2014) (*quoting Jolley v. Lando*, 99 AD3d 1256, 1256 [4th Dept. 2012]).

Improper filing

The onus is not only on the defense attorney to recognize an improper filing of a notice of pendency. Plaintiff's attorneys should also be aware of the requirements as CPLR § 6514(c) authorizes the court to direct the plaintiff to pay costs and expenses of canceling the notice. Costs and expenses may be awarded even where there is no bad faith by the plaintiff in the erroneous filing. See *Knopf v. Sanford*, 132 AD3d 416, 418 (1st Dept. 2015). Moreover, attorneys' fees may be awarded under the same provision. See *Josefsson v. Keller*,

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141 AD2d 700, 701 (2d Dept. 1988).

The impact of a notice of pendency filing warrants careful examination by lawyers. Case law suggests that these notices are fre-

quently filed erroneously. Rather than waiting for the conclusion of litigation, it is often prudent to move to cancel the notice to potentially clear the title of the subject property.

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