

**Coney Realty LLC v Kings Highway Printers Inc.**

2013 NY Slip Op 33444(U)

December 19, 2013

Supreme Court, Kings County

Docket Number: 502375/2013

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> day of December, 2013.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X  
CONEY REALTY LLC,

Plaintiff,

- against -

Index No. 502375/13

KINGS HIGHWAY PRINTERS INC., 2209 CONEY ISLAND AVE, LLC, MICHAEL CLARK WIMPFHEIMER, ESQ., as receiver appointed to 2209 Coney Island Ave LLC, and SS2209, LLC,

Defendants.  
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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

1-4, 5-6

Opposing Affidavits (Affirmations) \_\_\_\_\_

6

Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_

Other Papers \_\_\_\_\_

Plaintiff Coney Realty LLC (Coney Realty) brings the present Order to Show Cause for an order: (1) pursuant to CPLR § 602, to consolidate this instant action with a pending licensee holdover proceeding entitled, *Coney Realty LLC v Kings Highway Printers, Inc.*, Civil - Kings (Housing), L&T Index No. 86854/12 (Holdover Proceeding); and (2) pursuant to CPLR § 1012 (a) (3) or § 1013, to intervene in a pending foreclosure action entitled *The Dime Savings Bank of Williamburg v 2209 Coney Island Ave. LLC, et al.*, Supreme - Kings, Index No. 30003/10 (Foreclosure Action) for the purpose of protecting the alleged

real property ownership rights of Coney Realty.<sup>1</sup> Defendant SS2209, LLC (SS2209) cross-moves for an order, pursuant to CPLR 3211, (a) (1), (2) and (7) to dismiss the complaint as against it, and for an order, pursuant to CPLR 6514, to cancel the Notice of Pendency filed against the premises by Coney Realty against 2209 Coney Island Avenue, in Brooklyn, New York.

This action involves a dispute between the parties concerning the ownership, use and possession of the space located in the rear of the premises (2207 Rear Space) owned by Coney Realty and located at 2207 Coney Island Avenue, in Brooklyn (2207 Building). Pursuant to a deed dated July 12, 1996, and recorded on August 12, 1996 with the Office of the Kings County Register, Coney Realty owns the 2207 Building which includes the 2207 Rear Space.<sup>2</sup> The 2207 Rear Space abuts to the back wall of a store (the 2209 Store) which is located on the ground floor of the adjoining building at 2209 Coney Avenue (the 2209 Building). The 2207 Rear Space is located approximately 75 feet from the entrance of the Store. Prior to the Judgment in the Foreclosure Action, Gamliel Oziel, who is the managing member of 2209 Coney Island Ave, LLC (2209 Coney Island Ave), previously owned the 2209 building with his wife Rochelle. In 1991, Mr. Oziel leased the 2209 store to defendant Kings Highway Printers, Inc. (Kings Highway Printers). Kings Highway Printers currently occupy the 2209 Store as well as the 2207 Rear Space.

In support of its Order to Show Cause for, among other things, consolidation of the present action with the Holdover Action, Coney Realty submits the affidavits of Florence Edelstein, who is the managing member of Coney Realty, and of Mr. Oziel. The court notes that both affidavits were previously submitted in opposition to a motion to dismiss filed by

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<sup>1</sup> The court (J. Saitta) previously denied that aspect of Coney Realty's Order to Show Cause seeking an order, pursuant to CPLR § 2201, to stay the Foreclosure Action.

<sup>2</sup> A subsequent correction deed dated January 24, 2013 was recorded by Coney Realty on February 12, 2013 with the Kings County Register.

Kings Highway Printers in the Holdover Proceeding and in support of Coney Realty's cross motion for use and occupancy. Ms. Edelstein states that she granted Mr. Oziel and his commercial tenants a license to use the 2207 Rear Space (License). Ms. Edelstein also maintains that she permitted Mr. Oziel to remove the back wall that separated the 2207 Rear Space from the 2209 Store, and to construct a new wall separating the 2207 Rear Space from the 2207 Building.

According to Ms. Edelstein, 2209 Coney Island Ave and its commercial tenants were permitted to use the 2207 Rear Space up until Coney Realty revoked the License, effective July 31, 2012, pursuant to a written notice dated July 10, 2012. She contends that Kings Highway Printers, who is the current tenant of the 2209 Store, refuses to vacate and surrender possession of the 2207 Rear Space despite Coney Realty's termination of the License. According to Ms. Edelstein, she has paid all property taxes accruing from the 2207 Rear Space, either individually or through Coney Realty, and she has received no rent from 2209 Coney Island or from Kings Highway Printers for the use of the 2207 Rear Space.

Coney Realty also submits the affidavit of Mr. Oziel, the prior owner of the 2209 Building, and the managing member of 2209 Coney Island, LLC (2209 Coney Island) who, along with his wife, owned the Adjoining Building.<sup>3</sup> Mr. Oziel states that Ms. Edelstein was the prior individual owner of the 2207 Building in or about 1987 when she granted Mr. Oziel and his commercial tenants of the Store the License to use and occupy the 2207 Rear Space, which abutted to the back wall of the 2209 Store located on the ground floor of the 2209 Building. Mr. Oziel states that, within a year of receiving the License to occupy the 2207 Rear Space, he tore down the wall which separated the 2207 Rear Space from the 2209 Building, and constructed a new wall in order to separate the 2207 Rear Space from the 2207

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<sup>3</sup> Mr. Oziel avers that he originally purchased the 2209 Building along with a business partner in or around May 1985. According to Mr. Oziel, he then purchased his partner's interest and subsequently owned the Adjoining Building with his wife under the entity known as 2209 Coney Island Ave.

Building. Mr. Oziel avers that he advised all commercial tenants of the 2209 Store that they were permitted to occupy the 2207 Rear Space solely under the License granted by the owner of the 2209 Building. Specifically, Mr. Oziel states that he advised Mr. Sanoff, President of Kings Highway Printers, that the License to use the 2207 Rear Space was conditioned on the continued permission by the owner of the 2209 Building and could be revoked at any time.

### ***The Holdover Proceeding***

Coney Realty submits a Notice to Quit, dated July 10, 2012, that was served upon Kings Highway Printers and 2209 Coney Island Ave, which revoked the License and cancelled their right to continue occupancy of the 2207 Rear Space as of July 31, 2012. Coney Realty subsequently commenced the Holdover Proceeding by filing a summary proceeding in the commercial part of the Kings County Housing Court. A copy of Coney Realty's Notice of Petition and Petition, dated August 1, 2013, and Amended Petition, dated September 10, 2012, are annexed to Coney Realty's Order to Show Cause.

### ***The Foreclosure Action***

In December 2009, The Dime Savings Bank of Williamsburgh (Dime Savings), as the first mortgagee on the 2209 Building, commenced the Foreclosure Action based upon the alleged nonpayment by 2209 Coney Island Ave of its mortgage obligation, which is entitled *The Dime Savings Bank of Williamsburgh v 2209 Coney Island Ave. LLC et al*, Index No. 30003/10.

On or about March 1, 2012 defendant SS2209 purchased the mortgage note from Dime Savings. An assignment of mortgage from Dime Savings, as Assignor, to SS2209, as Assignee, dated March 1, 2012, was filed with the Office of the Kings County Register at CRFN 2012000099622 (Assignment of Mortgage). In accordance with its rights under the Assignment of Mortgage, SS2209 replaced Dime Savings as the "plaintiff" in the Foreclosure Action.

On or about December 1, 2012, defendant Michael Clark Wimpfheimer, Esq., the court-appointed receiver in the Foreclosure Action, entered into a lease extension and modification agreement renewing and extending the lease with Kings Highway for the 2209 Store (2209 Store Lease) until November 30, 2013. The modification agreement states, in pertinent part:

“WHEREAS, Receiver and Tenant have agreed and hereby do agree to extend the term of the Lease and to modify the certain provisions thereof . . . as follows:

“1. The term of the Lease is extended for a period of one (1) year commencing on December 1, 2012 and expiring on November 30, 2013 (the “Renewal Term”).

“2. The annual fixed rent during the Renewal Term shall be \$48,000.00 per annum, payable in equal monthly installments of \$4,000.00 in the manner provided in the Lease.

“3. Except as herein expressly provided, all of the terms, covenants and conditions of the Lease (except those which are applicable only to the original Lease term) shall remain in full force and effect during the Renewal Term.”

On or about June 14, 2013, the court issued a Decision and Order granting the motion by SS2209 for a judgment of foreclosure and sale of the Adjoining Building (“Judgment of Foreclosure and Sale”). Specifically, the Decision states, in pertinent part: “[p]laintiff’s motion for a Final Judgment of Foreclosure and Sale to confirm the Referee’s Report and to fix attorneys’ fees is granted subject to review of the foreclosure department.” A Judgment of Foreclosure, along with a bill of costs, was entered on August 16, 2013.

### ***The Present Action***

Coney Realty commenced the instant action by filing a summons with notice, dated May 6, 2013, and a verified complaint, dated May 15, 2013, against Kings Highway Printers, 2209 Coney Island, Mr. Wimpfheimer, and SS2209. Coney Realty seeks (1) a declaration that the 2209 Store Lease is void to the extent that it permits defendants to use and occupy

the 2207 Rear Space; (2) a declaration that defendants do not have a claim for adverse possession against the 2207 Rear Space; (3) a declaration that Coney Realty is the rightful owner of the 2207 Rear Space. Coney Realty also seeks damages against Mr. Wimpfheimer, the receiver in the Foreclosure Action, for tortious interference with property. On or about May 15, 2013, Coney Realty caused to be filed a notice of pendency against the 2209 Building.

***Coney Realty's Order to Show Cause***

In moving for consolidation of this action with the Holdover Proceeding, Coney Realty argues that it commenced both actions to determine Coney Realty's rights, and the rights of the defendants, to use or occupy the 2207 Rear Space. It also argues that no parties would be prejudiced by a consolidation. In addition, Coney Realty maintains that, given the particular nature and location of the 2207 Rear Space, any commercial eviction will necessitate a court order granting a marshal access to the 2209 Building. According to Coney Realty, given New York Housing Courts' limited injunctive powers, the relief sought in the Holdover Proceeding is more appropriately brought in Supreme Court, where the court has the authority to issue orders securing access to the 2209 Building, the 2209 Store and the 2207 Rear Space.

In addition, Coney Realty seeks to intervene in the Foreclosure Action as of right, on the grounds that the Foreclosure Action involves the disposition of the 2209 Building, which would substantially and adversely affect Coney Realty's interest in the 2207 Rear Space. In the event the court does not find that Coney Realty may intervene as of right, Coney Realty requests that the court issue an Order, pursuant to CPLR § 1013, granting it permission to intervene in the Foreclosure Action.

Coney Realty argues that the description of the 2209 Store contained in the 2209 Store Lease does not specifically limit the location of the 2209 Store solely to the 2209 Building.

Coney Realty also objects to the Modification Agreement because it is based upon the original Lease between 2209 Coney Island Ave and Kings Highway Printers, which does not explicitly exclude use of the 2207 Rear Space. Coney Realty states that, absent its intervention in the Foreclosure Action, any new owner of the 2209 Building who enters into possession of the 2209 Store would continue to have unrestricted use of the 2207 Rear Space. To that effect, Coney Realty alleges that SS2209 requested 2209 Coney Island Ave to sign documents that would enable the next owner of the 2209 Building to make a legal claim of adverse possession of the 2207 Rear Space. In addition, Coney Realty maintains that the parties in the Foreclosure Action will not be prejudiced by said intervention because the instant Order to Show Cause was served prior to entry of the Judgment of Foreclosure and Sale in the Foreclosure Action.

***SS2209's Opposition and Cross Motion***

At the outset, SS2209 contends that Coney Realty's Order to Show Cause must be denied as procedurally defective because (1) it failed to serve the Order to Show Cause and supporting papers via personal service upon defendants' attorneys on or before August 23, 2013, as required by the terms of the papers; (2) Coney Realty failed to obtain the requisite prior leave of the court to sue the receiver, Mr. Wimpfheimer.

Turning to the merits, defendant SS2209 argues that this action should not be consolidated with the Holdover Proceeding because there are no common questions of law or fact in the two cases. According to SS2209, (1) it has asserted no claim against the 2207 Building, and (2) Mr. Wimpfheimer is prevented from entering into any leases involving any part of the 2207 Building, which includes the 2207 Rear Space. SS2209 also contends that there is no dispute as to the ownership of the 2207 Rear Space, as the deed clearly indicates that Coney Realty is the owner of the 2207 Building. Moreover, SS2209 points out that, as for the rights of the Kings Highway Printers, the parties in both this action and the Holdover



Proceeding acknowledge that possession of the 2207 Rear Space of the 2209 Building was authorized and governed by the License. Accordingly, SS2209 counters that there are no common questions of law or fact that would warrant consolidation.

SS2209 also cross-moves, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss this action as against SS2209 and Mr. Wimpfheimer, and further seeks to cancel the Notice of Pendency on the 2209 Building. First, it argues that Coney Realty's request for a declaratory judgment must be denied here, where there is no "justiciable controversy" pursuant to CPLR § 3001 regarding the terms of the 2209 Store Lease. SS2209 also cites to Coney Realty's specific assertion that defendants are not in dispute concerning the fact that Kings Highway Printers previously occupied the 2207 Rear Space pursuant to the License. It further explains that any alleged controversy can be conclusively resolved through reviewing the deeds and titles to both the 2207 and 2209 Buildings.

SS2209 also argues that Coney Realty's second cause of action, which is for declaratory judgment that defendants do not have a claim for adverse possession of the 2207 Rear Space, must be denied as the cause of action is not "justiciable." To that effect, SS2209 contends that Coney Realty's alleged prejudice here is hypothetical and remote.

### ***Discussion***

#### *SS2209's Motion to Dismiss Under CPLR 3211 (a) (1), (2), and (7)*

The court first addresses SS2209's cross motion to dismiss Coney Realty's complaint as against it and Mr. Wimpfheimer under CPLR 3211 (a) (1), (2) and (7). A CPLR 3211(a)(1) motion to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations" and conclusively establishes a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Wild Oaks, LLC v Joseph A. Beehan, Jr., Gen. Contr., Inc.*, 77 AD3d 924 [2010]; *Stein v Garfield Regency Condominium*, 65 AD3d

1126 [2009]). Documentary evidence must be “unambiguous, authentic, and undeniable” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996–997 [2010]). A defendant must show that the documentary evidence upon which the motion is predicated resolves *all* factual issues as a matter of law (*Unadilla Silo Co. v Ernst & Young*, 234 AD2d 754 [1996]) (emphasis provided).

The court finds that SS2209 does not proffer any documentary evidence to utterly refute Coney Realty’s factual allegations that, among other things, that the 2207 Rear Space is part of the 2207 Building and accordingly belongs to Coney Realty. Rather, SS2209 merely states that the respective deeds of the 2207 and 2209 Buildings can “resolve” the present dispute. This is wholly insufficient to support a claim for dismissal based upon documentary evidence. Accordingly, that branch of SS2209’s motion which was to dismiss the complaint pursuant to CPLR 3211 (a) (1) is hereby denied (*see Stein v Garfield Regency Condominium*, 65 AD3d 1126 [2009]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2006]).

The court finds that SS2209’s contention that the complaint should be dismissed based on lack of jurisdiction grounds is similarly without merit. On a motion to dismiss for lack of jurisdiction pursuant to CPLR 3211 (a) (2), the burden of proving jurisdiction is upon the party asserting it, and when challenged on jurisdiction, such party must sustain that burden of proof (*Steiner v Steiner*, 81 AD2d 725 [1981]). SS2209 argues that there is no “justiciable controversy” pursuant to CPLR 3001. Under CPLR 3001, a court may render a declaratory judgment “having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” Here, Coney Realty alleges that (1) occupancy of the 2207 Rear Space is pursuant to a License; (2) Coney Realty subsequently revoked the License; (3) Kings Highway Printers continue to occupy and use the 2207 Rear Space, which Coney Realty owns. Further, Coney

Realty contends that the 2209 Store Lease does not limit use and occupancy of the 2207 Building so as to explicitly exclude use and occupancy of the 2207 Rear Space. Coney Island has sufficiently raised a justiciable controversy in the case at bar.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) the criterion is whether the pleadings' factual allegations manifest a cause of action cognizable at law (*Morris v Morris*, 306 AD2d 449 [2003]). When considering a motion to dismiss, the court is constrained to "accept the facts as alleged in the complaint as true" and accord plaintiffs the benefit of every possible favorable inference (*Kevin Spence & Sons, Inc. v Boar's Head Provisions Co.*, 5 AD3d 352 [2004]; *MRI Management Recruiters of Mohawk Valley, Inc. v Cowan*, 277 AD2d 921 [2000]). With respect to a motion to dismiss under CPLR 3211 (a) (7), a plaintiff's ultimate success on the merits is not considered (*see Graham Court Owners Corp. v Powell*, 196 Misc 2d 825 [2003]); *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373 [2003]).

Applying these principles here, the court finds that the allegations set forth in the complaint state valid causes of action for declaratory relief. Among other things, Coney Realty sufficiently alleges that Kings Highway Printers continue to occupy the 2207 Rear Space despite Coney Realty's revocation of the License. Coney Realty also contends that the 2209 Store Lease is ambiguous in that it fails to clearly establish that the 2207 Rear Space is part of the 2207 Building which belongs to Coney Realty. The 2209 Store Lease, which may resolve the issue of whether the 2207 Rear Space was "rented" to Kings Highway Printers as part of the 2209 Store, has not been provided. Coney Realty has sufficiently stated a cause of action against SS2209, because it is not clear whether Kings Highway Printers' lease of the 2209 Store includes use of the 2207 Rear Space. Thus, SS2209, as current owner of the 2209 Building, should remain in this action. That aspect of SS2209's motion is denied.

The Court, however, grants that aspect of SS2209's motion to dismiss the complaint as against Mr. Wimpfheimer, as Coney Realty failed to seek and obtain the court's permission to sue Mr. Wimpfheimer as the receiver in the Foreclosure Action (*see Metropolitan Sav. Bank*, 102 Misc 2d 1105 [1980]). Here, Coney Realty has failed to allege sufficient facts showing that Mr. Wimpfheimer acted beyond the extent of his judicial immunity or in bad faith (*see Matter of U.S. Capital Ins. Co.*, 36 Misc 3d 635 [2012]).

*Coney Realty's Request For Consolidation*<sup>4</sup>

CPLR 602 (b) authorizes the Supreme Court to remove an action or proceeding pending in another court for consolidation or joint trial with a Supreme Court action. "A motion for consolidation is addressed to the sound discretion of the trial court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of fact and law" (*Beerman v Morhaim*, 17 AD3d 302 [2005]). "[T]here is a preference for consolidation in the interest of judicial economy where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*Dukhvalov v Pshierer*, 15 AD3d 334 [2005]). Consolidation is favored where inconsistent determinations may occur if the actions are tried separately (*see generally New York Annual Conference of the Methodist Church v Cho*, 156 AD2d 511 [1989], *lv dismissed* 75 NY2d 947 [1990]).

The court grants consolidation of the instant action for declaratory relief and the Holdover Proceeding for joint trial. Given the common issues of fact and law concerning the determination of title to, and use of, the 2207 Rear Space, the court finds that joinder of the actions for trial is appropriate (*see generally 192 Sheridan Corporation v O'Brien*, 252

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<sup>4</sup>At the outset, SS2209's contention that the Order to Show Cause should be denied based on lack of proper service is without merit. Specifically, see September 9, 2013 Affirmation of Service by Charles L. Mester, Esq. (NYSCEF Doc. No. 36).

AD2d 934 [1998]). Both the instant action and the summary proceeding involve a dispute over possession of the 2207 Rear Space, the resolution of which will determine all the rights of the parties (*see generally Cohen v Goldfein*, 100 AD2d 795 [1984]). Since resolution of the action in the Supreme Court will necessarily decide the issues in the Holdover proceeding, the two should be joined for trial in the interest of judicial economy (*see Kelly v Mount Sinai Hosp.*, 44 AD3d 1010 [2007]).

Although the Civil Court is the preferred forum for landlord-tenant disputes, a summary proceeding may be removed where the Civil Court is unable to afford the parties complete relief (*see Glenball, Ltd. v TLY Coney, LLC*, 48 AD3d 415 [2008]). Coney Realty cannot obtain a declaration with respect to title of the 2207 Rear Space in that forum (*see Capolino v Bua*, 63 AD3d 1092 [2009]; *Spirounias v Renwick, LLC.*, 294 AD2d 262 [2002]; *Finkelman v Finkelman*, 105 AD2d 771 [1984]). Given that Coney Realty cannot thus obtain complete relief in the Civil Court and given that the ownership of 2207 Rear Space and the possessory rights therein are common issues, and in the absence of any opposition papers from SS2209 showing that it would be prejudiced by consolidation, Coney Realty's motion to consolidate should be granted (*see Kelly v Mount Sinai Hosp.*, 44 AD3d 1010 [2007]; *Panish v Panish*, 32 AD3d 382 [2006]; *Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 494 [2004]). Moreover, the particular location of the 2207 Rear Space, and the fact that the 2207 Rear Space is accessible through the 2209 Store in the 2209 Building, render consolidation appropriate here, where the court has the authority to issue orders with respect to access to the 2209 Building.

*Coney Realty's Request to Intervene in the Foreclosure Action*

CPLR 1012 provides, in relevant part:

- (a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

\* \* \*

3. When the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

Further, intervention generally should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings (*see County of Westchester v Dept. of Health*, 229 AD2d 460).

The court denies Coney Realty's request to intervene in the Foreclosure Action on the grounds that Coney Realty has failed to demonstrate that it has a legal basis to warrant such relief. Coney Realty does not have a direct interest in the 2209 Building. Rather, Coney Realty's dispute with defendants lies with the 2207 Rear Space, which is located on the 2207 Property. Coney Realty commenced both the present action and the Holdover Proceeding specifically to protect its interest in the 2207 Rear Space, and the Court finds that intervention in the Foreclosure Action is not warranted. In any event, a Judgment of Foreclosure has been entered on September 16, 2013, and thus, the court has already issued a final determination with respect to the title and possession of the 2209 Building. Accordingly, Coney Realty's request to intervene in the Foreclosure Action is denied.

*SS2209's Request to Vacate the Notice of Pendency*

A notice of pendency is properly filed in an action "in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501; *see generally 5303 Realty Corp. v O&Y Equity Corp.*, 64 NY2d 313, 319-321 [1984]). "The notice of pendency does not create an encumbrance or a lien but merely provides notice that an action is pending which may affect title to real property" (75A N.Y. Jur. 2d Lis Pendens § 49).

CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:

“[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, . . . if the action has been settled, discontinued or abated . . . (emphasis added).

The plain meaning of the word “abated,” as used in CPLR 6514 (a) is “the ending of an action” (*477 Clinton Avenue LLC v Clinton Rising, LLC et al.*, 22 Misc 3d 1104[A], 2009 NY Slip Op 50014[U], \*10 [2009]; see also *Wells Fargo Bank, N.A. v Reyes*, 20 Misc 3d 1104(A) [2008]). Here, the court in the Foreclosure Action has determined title and possession of the 2209 Building. Consequently, cancelling the notice of pendency necessarily follows.

The court has considered the parties’ remaining contentions and finds them to be without merit.

### ***Conclusion***

Accordingly, it is

ORDERED that the part of SS2209’s motion to dismiss the complaint against Mr. Wimpfheimer is granted; it is further

ORDERED that the Notice of Pendency filed with the Kings County Clerk on May 15, 2013 by Coney Realty against real property located at 2209 Coney Island Avenue in Brooklyn is hereby canceled; it is further

ORDERED that the remaining parts of SS2209’s motion are denied; it is further

ORDERED that the part of Coney Realty’s motion for consolidation is granted to the extent that Index # 502375/2013 (Supreme Court, Kings County) and L&T Index No. 86854/2012 (Civil Court, Kings County) are joined for the purpose of trial; and it is further

ORDERED that above-captioned action shall be jointly tried with *Coney Realty LLC v Kings Highway Printers, Inc.*, L&T Index No. 86854/2012, currently pending in Civil (Housing) Court, Kings County; and it is further

ORDERED that the Clerk of the Civil (Housing) Court of Kings County upon receipt of a certified copy of this order and upon payment of the proper fees, shall transfer to the Clerk of the Supreme Court, Kings County, all of the papers on file in the proceeding *Coney Realty LLC v Kings Highway Printers, Inc.*, L&T Index No. 86854/2012, in Civil (Housing) Court, Kings County; and it further

ORDERED that the Clerk of the Supreme Court, Kings County, upon receipt of a copy of this order with notice of entry, shall, upon payment of the proper fees, assign an index number to the file transferred pursuant to this order; and it is further

ORDERED that upon payment of the appropriate calendar fees, the filing of notes of issue and statements of readiness in each of the above actions, and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further


ORDERED that the order in which the parties open and close shall be determined by the court; and it is further;

ORDERED that each shall file a separate RJJ if not already filed, separate notes of issue, and file separate judgments; and it is further

ORDERED that the remaining requests for relief set forth in Coney Realty's Order to Show Cause are denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

  
J. S. C.

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT

FILED  
KINGS COUNTY CLERK  
2013 DEC 26 AM 8:13

