

Prime Homes LLC v O'Reilly
2016 NY Slip Op 31742(U)
September 20, 2016
Supreme Court, New York County
Docket Number: 151308/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

PRIME HOMES LLC,
Plaintiff,
-against-
BRIAN O'REILLY and L.H.U. DEVELOPMENT LLC,
Defendants.

INDEX NO. 151308/2016
MOTION DATE 07/13/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to dismiss, consolidate and cancel Notice of Pendency.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Brian O'Reilly's motion is denied.

Plaintiff commenced this action by Summons and Complaint on February 17, 2016. At the commencement of this action Plaintiff also filed with the Clerk of the Court a Notice of Pendency. Plaintiff asserted causes of action (1) to quiet title to the property located at 227 Edgecombe Avenue, New York, New York (herein "the subject property"), (2) for tortious interference with a contract, and (3) for specific performance. Plaintiff asserts that a contract of sale for the subject property was entered into between Plaintiff and Defendant Brian O'Reilly (herein "Defendant O'Reilly") in May of 2012, that O'Reilly has failed to sell the property to Plaintiff, and that O'Reilly has since entered into a contract to sell the property to Defendant L.H.U. Development LLC (herein "Defendant L.H.U.").

Defendant O'Reilly brings this motion for an Order: (1) cancelling Plaintiff's third filed Notice of Pendency pursuant to CPLR §6516(c); (2) dismissing the complaint pursuant to CPLR §3211(a)(8); (3) costs pursuant to CPLR §6514(c), or; (4) in the alternative, consolidating this action with the other action pending between the parties under Index No. 154505/2012, pursuant to CPLR §602.

Plaintiff opposes the motion.

A review of the e-filing docket on NYSCEF shows that the prior action brought by Plaintiff against Defendant O'Reilly, under Index No. 154505/2012, was discontinued by Plaintiff filing a Notice of Discontinuance without prejudice on June 6, 2016. (See NYSCEF e-filing doc #27 under Index No. 154505/2012). The case has since been disposed.

The discontinuance of the 2012 action renders Defendant O'Reilly's relief sought in this motion to either dismiss the Complaint, or in the alternative to consolidate both actions, moot. Therefore, that relief is denied.

Defendant O'Reilly also seeks to cancel the Notice of Pendency filed in this action pursuant to CPLR §6516(c). O'Reilly argues that there is a prohibition against filing successive notices of pendency against the same property, that the two actions against him by Plaintiff are the same except for the addition of L.H.U. as a defendant, and that the addition of this defendant only changes the form not the substance of the action.

CPLR § 6501 allows a Notice of Pendency to be filed in any action "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." "To counterbalance the ease with which a party may hinder another's right to transfer property, this court has required strict compliance with the statutory procedural requirements" (5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 320, 476 N.E.2d 276 486 N.Y.S.2d 877 [1984]).

CPLR §6516(c) provides in relevant part that, "a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective." The ability to file a notice of pendency is a privilege that can be lost if abused. Thus...successive filings are not permitted after a notice of pendency has been cancelled. (Matter of Sakow, 97 N.Y.2d 436, 767 N.E.2d 666, 741 N.Y.S.2d 175 [2002], citing Siegel, New York Practice 336, at 512, see also Slutsky v. Blooming Grove Inn, 147 A.D.2d 208, 542 N.Y.S.2d 721 [2nd Dept. 1989]).

Plaintiff filed a Notice of Pendency with the prior 2012 action, and renewed that Notice in 2015 prior to its expiration. (Mot. Exhs. 2 & 3). Plaintiff also filed a Notice of Pendency when commencing the instant action in February of 2016. The prior Notice of Pendency filed in the 2012 action was cancelled when Plaintiff discontinued that action. (NYSCEF e-filing doc #28 ¶5). The "no second chance" rule for a cancelled notice of pendency applies with equal force as one that has expired...an expired or cancelled notice of pendency may not be refiled on the same cause of action or claim. (Sakow, *Supra*).

The addition of a defendant in a second cause of action is a change in form not substance, and warrants cancellation of a second notice of pendency. (*Weiner v. MKVII-Westchester, LLC*, 292 A.D.2d 597, 739 N.Y.S.2d 432 [2nd Dept. 2002]). Likewise, a party should not be afforded a second chance to file a new notice of pendency when the new filing is premised upon correcting a pleading defect that had led to the cancellation of the original notice. (*Old World Custom Homes, Inc. V. Crane*, 33 A.D.3d 600, 822 N.Y.S.2d 155 [2nd Dept. 2006]). Where a plaintiff cancels a notice of pendency upon discontinuing a prior action without prejudice, then commences a new action with an additional defendant and a new claim, the second filing of the notice of pendency is not permitted. (*Avdoulos v. Douglaston Realty, LLC*, 42 Misc.3d 1207(a) [Sup. Ct., Queens County 2014]).

Plaintiff argues that the Notice of Pendencies were filed in two separate actions. This action is not the same as the 2012 action because there is a new defendant and new claims. The only claim that is the same between both actions is the one for specific performance, and filing another Notice of Pendency is only successive if both are filed in the same action. Further, where there is a significant change in circumstances (such as a potential new buyer of the subject property) a successive filing of a notice of pendency is permitted.

The filing of a first Notice of Pendency in a prior action does not preclude the filing of a second notice of pendency in a different action. (*Deutsch v. Grunwald*, 63 A.D.3d 872, 882 N.Y.S.2d 167 [2nd Dept. 2009]). The holding in *Deutsch*, however, was based on distinguishing between the error that the plaintiff made in filing the Notice of Pendency in that action, and statutory filing errors made by a plaintiff that will prevent a second Notice from being filed. *Deutsch* stands for the proposition that where a plaintiff complies with the statutory filing requirements under CPLR §6511, but the error was plaintiff naming the wrong party as a plaintiff in the initial action, and there's no evidence of the plaintiff attempting to abuse the privilege of filing a Notice of Pendency (CPLR 6516(c)), then a second filing of a Notice of Pendency in a different action will be permitted. (See *Deutsch, Supra*). That is not the case here, thus it does not apply.

There are limited exceptions to strictly construing CPLR §6516(c) that may be available where applicable. (*Guttman v. Guttman*, 78 A.D.3d 779, 910 N.Y.S.2d 543 [2nd Dept. 2010], citing the limited exceptions in *Duetsch, Supra*; *Sears Mtge. Corp. V. Yaghobi*, 19 A.D.3d 402, 796 N.Y.S.2d 392 [2nd Dept. 2005]- regarding mortgage foreclosure actions, and; *Bonded Concrete v. Johnson*, 280 A.D.2d 758, 720 N.Y.S.2d 227 [3rd Dept., 2001]). Plaintiff contends that the exception in the *Bonded* matter (*supra*) applies because Defendant L.H.U., as a potential new buyer, recorded a memorandum of contract for the subject property, and this is a significant change in circumstances warranting the filing of a successive Notice of Pendency. *Bonded* stands for the proposition that a significant change in circumstances permits a successive filing where the plaintiff is no longer trying to protect his rights from being

violated, and is instead now seeking damages for an actual breach of his right of first refusal. The Third Department held that the second notice of pendency was not merely an extension of the first, but was premised on new alleged illegal action. (Bonded, Supra).

In construing all the applicable and available case law, and in applying the standard set forth in the Bonded matter, a successive Notice of Pendency filing is permitted here. Although Plaintiff has asserted the same cause of action for specific performance here, as was done in the now discontinued 2012 action, Plaintiff also asserts a new cause of action, adding a new defendant to quiet title, and for tortious interference. At the outset, it appears that Plaintiff would not be entitled to file a successive Notice of Pendency. However, Defendant L.H.U. has recorded a memorandum of contract for the subject property, and this is a significant change in circumstance. Further, construing the case law where successive notice of pendencies are not permitted in subsequent actions, or where there is an addition of a defendant and new claims, these appear to all have been based on the party trying to circumvent their failure to comply with the strictures of the statutory filing requirements. That is not the case here. Therefore, the Notice of Pendency filed in this action will remain and the relief requested in the motion is denied.

Accordingly, the relief requested in Defendant O'Reilly's motion to dismiss this action, cancel the Notice of Pendency, or to consolidate with the 2012 action, is denied.

ENTER:

Dated: September 20, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE