

<b>Ehrenfeld v Ainslie Terrace LLC</b>
2014 NY Slip Op 33048(U)
November 18, 2014
Supreme Court, Kings County
Docket Number: 507951/14
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial 4 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 18<sup>th</sup> day of November, 2014

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

MARTIN EHRENFELD,

Plaintiff,

- against -

Index No.: 507951/14

AINSLIE TERRACE LLC AND ABRAHAM MANDEL,

Defendants.

-----X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2, 3, 4 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers ( Memorandum of Law) _____	5 _____
Other Papers _____	6, 7, 8 _____

Defendants move to vacate the notice of pendency filed by plaintiff and awarding sanctions against plaintiff and his attorneys.

In his complaint, plaintiff alleges that in “late 2012” he was approached by one Aaron Lemma, who had “heard that the real property located at 58-66 Harrison Avenue in Brooklyn would be put up for sale.” Plaintiff “approached” defendant Mandel, described by plaintiff as a “wealthy and successful businessman.”

By deed dated August 6, 2013, the subject property was sold by the seller, 60 Harrison Corp., to defendant Ainslie Terrace LLC. In email correspondence to Ainslie’s managing partner, Joseph Brunner, Lemma informed Brunner that plaintiff would attend the closing, and asked if plaintiff could “pick up my check.” Plaintiff indeed attended the closing, and was given a check for Lemma, as well as a check for plaintiff made payable, at his request, to SL Holdings LLC. Both checks were in the amount of \$100,000 and both stated in the memo field “60 Harrison - Brokerage.”

In his affidavit in support of the motion, Brunner argues that “the facts make clear that Plaintiff’s only connection with the Property was a mere introduction by Plaintiff to the Property’s broker;” that Ainslie is the sole owner of the property; plaintiff has no relationship to or interest in Ainslie; that plaintiff “never provided any capital to Ainslie or in anyway funded Ainslie’s purchase of the Property;” and that plaintiff waited more than a year after the closing to make his preposterous claim to the property. Plaintiff was “extremely thankful” for the check for his brokerage services. He never claimed to have a joint venture agreement with Mandel, Ainslie or anyone else, and never claimed he was entitled to 50% of the profits Ainslie might realize from the property.

Plaintiff's claim, as asserted in the complaint dated August 28, 2014, is that he approached defendant Mandel "to discuss a possible joint venture on the Property." After "much discussion" plaintiff asserts he and Mandel reached an agreement to form a joint venture to acquire the property. Plaintiff, it is alleged, "contributed the information, opportunity and business plan concerning the Property and Mr. Mandel contributed the acquisition capital." There was "an agreed-upon division of profits (reflecting the relative value of their respective contributions to the venture). Mandel was given an "option" to build a "mansion" (described in the complaint as a 40-foot wide and 100 deep). If Mandel build this "mansion" then plaintiff's share of the profits would be 2.7% of the price to acquire the Property unless the profit was more than \$1,000,000 in which case plaintiff's share would be 50% of the profit realized. If Mandel did not exercise his option, plaintiff would be entitled to half the profit from the sale of the property, with plaintiff and Mandel "together" deciding "the fate of the Property as equal members of the joint venture."

Plaintiff alleges further that the property was bought for \$3,650,000, and that he was not offered "membership interests in Ainslie Terrace" which was formed to "solely to acquire the Property. The \$100,000 payment to plaintiff, it is alleged, "represented the minimum distribution (of 2.7 percent of the acquisition price) to which" plaintiff was allegedly entitled under the purported joint venture agreement. Upon information and belief, it is alleged, Mandel executed a contract to sell the property to the current tenant - plaintiff's purported "precise business plan" - for \$5,700,000.

Upon these allegations, plaintiff seeks a judgment declaring that Mandel lacked the authority to sell the property without plaintiff's consent and that plaintiff is a 50% member of Ainslie Terrace, and that the contract of sale is void. Plaintiff, it is alleged, "performed under the joint venture agreement by providing the opportunity to acquire the Property, information concerning the Property and "access to the broker." The second cause of action seeks a permanent injunction enjoining defendants from selling or transferring the Property absent plaintiff's consent. The third cause of action seeks a constructive trust claiming that the "binding joint venture for the acquisition and disposition of the Property" cause a "fiduciary or confidential relationship as to the Property." Permitting the sale would result in Mandel's unjust enrichment, and a constructive trust is necessary "to prevent inequity" resulting from the sale without plaintiff's consent.

Defendants strongly deny that any joint venture agreement exists, written or oral, and assert that plaintiff will never be able to prove it does. Even assuming the allegations as true, they cannot form the basis for a notice of pendency, since plaintiff's claim is one for an interest in the purported joint venture, and thus one for personal property, not real property.

In opposition, plaintiff's attorneys argue that as long as the complaint on its face meets the criteria of CPLR 6501, the notice of pendency is by definition filed in good faith and cannot be vacated. The likelihood of success on the merits is irrelevant and insufficient to warrant cancellation of the notice of pendency.



CPLR 6501 provides that “A notice of pendency may be filed in any action \* \* \* in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.” “[T]he statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review \* \* \* 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 NY2d 313 at 320 [1984]). In a motion to cancel the notice of pendency, the likelihood of success on the merits is not a factor in determining the validity of the notice (CPLR 6514; *5303 Realty Corp.*, *supra*). If the notice is valid, a court, may, in its discretion, cancel it, but the movant will generally have to post an undertaking (CPLR 6515; *5303 Realty Corp.*, *supra*).

Courts have restricted the statute’s application by requiring that the relief requested “be directly related to the statutory terms” (*5303 Realty Corp.*, *supra* at 321 [The courts have been frequently confronted by attempts to file a notice of pendency on 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]). Thus, in *5303 Realty Corp.*, an action to enforce a contract to sell the fee ownership in the property and to deliver its possessions, the Court of Appeals reversed the Appellate Division, First Department, and concluded that an action to specifically perform a contract for the sale of stock representing a beneficial ownership of real estate will not support the filing of a notice of pendency

(cf. dissent of Judge Jasen, who argued that the judgment demanded, specific performance of a contract to compel defendant to transfer full beneficial ownership, “would inescapably affect the title to, and the possession, use and enjoyment of a specific parcel of real property).

Similarly, an action for specific performance of a letter of intent, “even if the defendants were granted specific performance in the underlying action, that fact alone would not give them an interest in the subject realty because the defendants’ interest in the joint venture would be an interest in personal property, not an interest in the realty” (*Felske v Bernstein*, 173 AD2d 677 [2d Dept. 1991]; *General Property Corp. v Diamond*, 29 AD2d 173 [1<sup>st</sup> Dept. 1968]). In *Liffiton v DiBlasi*, (170 AD2d 994 [4<sup>th</sup> Dept. 1991]), an action to enforce an oral partnership agreement, the court concluded that the Statute of Frauds was not applicable to the oral agreement to deal in real property, because the interest of each partner in a partnership is deemed personalty, and therefore, plaintiff was not seeking to acquire an interest in real property. Accordingly, a notice of pendency “is not appropriate” and it was properly dismissed. See also *Homespring, LLC v Lee*, 55 AD2d 541 [2d Dept. 2008], where even though plaintiff, a broker, made a claim to set aside a conveyance as fraudulent, the gravamen of the action was the recovery of damages and therefore a motion to cancel the notice of pendency should have been granted.

On the other hand, a “cause of action for specific performance of a contract to convey land would affect the title to, or possession, use or enjoyment of, real property”, and the Supreme Court

therefore erred in granting a motion to cancel the notice of pendency (*Poly Mfg. Corp. v Dragonides*, 109 AD3d 532 [2d Dept. 2013]; see *RKO Properties, Ltd. v Boymelgreen*, 37 AD3d 580 [2d Dept. 2007])[A claim for specific performance of contracts for the purchase of real property “falls within the scope of the statute and the notice of pendency was properly filed”]; *Urigo v Patel*, 279 AD2d 518 [2d Dept. 2001][Since plaintiff seeks specific performance of a joint venture agreement which would require defendants to transfer the subject real property to the enterprise, this action falls within the scope of the statute]).

In effect, plaintiff argues that because his complaint has the proper buzz words, “joint venture,” “specific performance,” and “constructive trust,” the motion to vacate the notice of pendency has to be denied. This court disagrees. The proper approach is to determine the gravamen of the complaint, and then analyze whether it seeks to *directly* affect title to, or possession of, the land. In the case at bar, it does not.


While recognizing that the likelihood of success on the merits is not a factor in determining the validity of the notice, it is worthwhile reviewing the salient facts. Plaintiff introduced Mandel to the property. Plaintiff concededly did not make any financial contribution to the purchase of the property. His purported justification for 50% of the profits realized from the sale of the property is his share of an alleged oral joint venture, to which he contributed by introducing Mandel to the property (for which he received a substantial payment) and by providing a purported business plan,



namely selling the property to the current tenant. On its face, plaintiff's claim strains the credulity of this court. Nevertheless, even accepting plaintiff's claim as stated, plaintiff does not seek to own the property per se, but only to enforce the purported oral joint venture agreement, and thereby recover damages for the profits to which plaintiff claims he is entitled. Accordingly, the gravamen of the complaint does not *directly* affect title to, or possession of, the subject real property; rather it is to enforce his share of the purported oral joint venture, which is personalty. To the extent plaintiff argues that the allegations in the complaint do ultimately affect the property, he is relying on the dissent of *5303 Realty Corp*, not the majority.

Accordingly, the motion to vacate the notice of pendency is granted. This order shall take effect 10 days from the date hereof to allow plaintiff an opportunity to obtain a stay pending appeal. The branch of the motion for sanctions is denied.

The foregoing constitutes the decision and order of this court.

ENTER  
  
 J. S. C.

HON. LAWRENCE KNIPEL

FILED  
 2014 NOV 19 AM 8:54  
 KINGS COUNTY CLERK