

Matter of Agnes Vaccaro Trust
2018 NY Slip Op 32625(U)
September 24, 2018
Surrogate's Court, Nassau County
Docket Number: 2018-1887/A
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Proceeding to Discharge the Notice of Pendency against
the Real Property owned by the**

AGNES VACCARO TRUST.

DECISION

**File No. 2018-1887/A
Dec. No. 34893**

**Proceeding to Compel the Trustee to Distribute the asset
held in the name of the**

AGNES VACCARO TRUST.

**File No. 2018-1887
Dec. No. 34892**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition and Exhibits.....	1
Order to Show Cause.	2
Memorandum of Law in Support of Petition.	3
Affirmation in Opposition.	4
Memorandum of Law in Opposition to Petition.....	5
Reply Affirmation (Baker).	6
Sur-Reply Affirmation (Harold).....	7

In this proceeding to discharge a notice of pendency, petitioner, Joseph Vaccaro, seeks an order (a) pursuant to CPLR 6514 (a) and (b), directing the Clerk of the County of Nassau to cancel and discharge the Notice of Pendency filed as Instrument Number 2018-0067504, on April 11, 2018, against the real property known as 70 Ormonde Boulevard, Valley Stream, New York 11580, designated as Section 37, Block 430, Lot 348, on the Nassau County Tax Map (the “Property”), and owned by the Agnes Vaccaro Trust (the “Trust”); (b) authorizing Joseph Vaccaro, as Trustee of the Agnes Vaccaro Trust, to sell the real property located at 70 Ormonde Boulevard, Valley Stream, New York 11580; and (c) pursuant to CPLR 6514

(c) directing respondent, Jacqueline Fedynak, to pay the petitioner, Joseph Vaccaro such costs and expenses as the filing of the notice of pendency occasioned.

The “property” is the sole asset of the “trust” created by agreement, dated August 16, 2012. The agreement is between the decedent, Agnes Vaccaro, and petitioner. The decedent died on January 13, 2018.

Pursuant to Article “3.1” of the trust, the trustees are authorized to pay income but cannot invade principal for the benefit of the decedent. Section “3.3” sets forth the requirements for the invasion of principal for the remaindermen. Section “4.2” designates respondent and petitioner as the remaindermen.

The petitioner as trustee executed a contract of sale for the real property on February 27, 2018. The notice of pendency was recorded on April 11, 2018. Respondent previously commenced a proceeding to compel distribution by the filing of a petition on May 24, 2018. Citation issued May 31, 2018 and was served upon petitioner on July 4, 2018. The petition seeks distribution of the property.

The petitioner seeks to cancel the notice of pendency and obtain an order authorizing a sale. The petitioner argues that he has the power, conferred both by statute and the trust agreement, to sell the real property and distribute the proceeds. In opposition to this petition, respondent argues that the petitioner is compelled to convey title to the real property to the remainderman, upon demand.

CPLR 6501 permits the filing of a notice of pendency in an action in which a judgment “would affect the title to, the possession, use or enjoyment of, real property . . .” (CPLR 6501). “When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself; the court’s analysis is to be limited to the pleading’s face” (*Ewart v Ewart*, 78 AD3d 992 [2d Dept 2010] [internal citations and quotations omitted]). In this case, the petition to compel distribution alleges that respondent is entitled to conveyance of title to real property under the terms of the trust. The court’s determination of that proceeding will clearly affect the title to, the possession, use or enjoyment of, the property. The court finds that the requirements of CPLR 6501 are therefore satisfied.

Petitioner’s attorney argues that cancellation of the notice of pendency is mandatory pursuant to CPLR 6514 (a) because respondent failed to comply with the procedural requirements of CPLR Article 65, specifically, the requirement in CPLR 6512 that a summons be served within thirty (30) days of the filing of the notice of pendency. The citation was not served within that time frame. Before reaching that issue, the court notes the petitioner’s own failure to comply with the procedural requirements of CPLR Article 65, specifically, that an application to cancel a notice of pendency should be made by motion (CPLR 6514 [a]); here, the application was made by petition. However, where the court has obtained jurisdiction over the parties, the proceeding should not be dismissed merely because it was brought in an improper form and the court is authorized, in the interests of justice, to

convert a special proceeding into a motion (CPLR 103; *Tara V. v County of Otsego*, 12 AD3d 984 n 2 [3d Dept 2004]). The court will therefore overlook the procedural irregularity and address the proceeding on the merits.

Pursuant to CPLR 6512, a notice of pendency is effective only if a “summons” is served on the defendant within thirty (30) days of the filing of the notice of pendency. The failure to timely serve results in mandatory cancellation of the notice of pendency (CPLR 6514 [a]). In Supreme Court practice, the plaintiff’s attorney prepares the summons and arranges for its service upon the defendant. In Surrogate’s Court practice, however, there is no “summons” and the process that issues in most cases is a citation (*see* SCPA 103 [43]), which, while prepared by the attorney, may not be served on the respondent until it has been issued by the court. In this case, the petition and citation were timely filed in the court but by the time the citation had issued, more than thirty (30) days had elapsed since the filing of the notice of pendency. However, the court notes that the citation issued on May 31, 2018 and that was the first date on which service of process could have been made. Service was made upon petitioner on June 4, 2018, a mere four days later. On these facts, the court **DENIES** the application for mandatory cancellation of the notice of pendency, pursuant to CPLR 6514 (a).

Alternatively, discretionary cancellation of the notice of pendency is sought pursuant to CPLR 6514 (b) which authorizes the court to cancel a notice of pendency where it finds

that the plaintiff or petitioner has not commenced or prosecuted the proceeding in good faith. At this stage of the litigation, there is nothing to indicate that the proceeding was not brought in good faith. Therefore, the petition to cancel the notice of pendency is **DISMISSED**.

The petition to compel distribution of the trust asset will appear on the court's calendar for conference on October 23, 2018 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: September 24, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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