

**Goldman v Rose Castle Redevelopment II LLC**

2021 NY Slip Op 31724(U)

May 18, 2021

Supreme Court, Kings County

Docket Number: 510224/2021

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 510224/2021  
Motion Date: 5-14-21  
Mot. Seq. No.:1

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YOEL GOLDMAN,

Plaintiff,

-against-

**DECISION/ORDER**

ROSE CASTLE REDEVELOPMENT II LLC, ZELIG  
WEISS, FEDOR ITSKOVITCH, WYTHE BERRY LLC,  
FRANKLIN REALTY OWNERS LLC, LOTUS  
RESIDENCES LLC and FLUSHING & LITTLE  
NASSAU LLC,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 3-7, 9-29, the motion is decided as follows:

Defendant, Flushing & Little Nassau LLC ("Defendant"), moves for an Order: (1) pursuant to CPLR §§ 6501 and 6514, canceling the portion of the notice of pendency filed by plaintiff Yoel Goldman ("Plaintiff") in connection with this action [NYSCEF Doc. No. 2] directed against the real property known as (i) 376-382 Flushing Avenue, Brooklyn, New York 11205 (Block 1884, Lot 48), and (ii) 31-33 Little Nassau Street, Brooklyn, New York 11205 (Block 1884, Lot 40) (collectively, the "Flushing/Nassau Property"); (2) pursuant to either CPLR § 6514(c) or Rule 130-1.1(a) of the Rules of the Chief Administrative Judge, awarding Defendant the costs and fees it incurred in connection with Defendant's Motion; and (3) granting Defendant such other and further relief as the Court deems just and proper (collectively, "Defendant's Motion").

A notice of pendency may be filed only when “the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property” (CPLR 6501; *see Ewart v. Ewart*, 78 A.D.3d 992, 912 N.Y.S.2d 265). “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’ ” (*Nastasi v. Nastasi*, 26 A.D.3d 32, 36, 805 N.Y.S.2d 585, quoting *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 321, 486 N.Y.S.2d 877, 476 N.E.2d 276; *see Ewart v. Ewart*, 78 A.D.3d

at 992–993, 912 N.Y.S.2d 265). A notice of pendency may be filed only “[i]n a case specified in [CPLR] section 6501” (see CPLR 6511(a)).

In the complaint, plaintiff alleges eight causes of action. The first, fifth and seventh causes of action seek only money damages. Clearly, any judgment rendered in favor of the plaintiff on these causes of action would not “affect the title to, or the possession, use or enjoyment of, real property.”

The second, third, fourth and sixth causes of action seek, *inter alia*, judgment directing the defendants to assign and deed the Goldman Parcel to the plaintiff. While a judgment in plaintiff’s favor would arguably affect the title to, or the possession, use or enjoyment of the Goldman Parcel, the defendant is not seeking to vacate that portion of the notice of pendency that concerns the Goldman Parcel.

In the eighth cause of action, the plaintiff claims that he is entitled to an equitable lien on the Goldman Parcel as well as on the Flushing/Nassau Property. Plaintiff alleged as follows:

87. Plaintiff repeats and realleges each of the allegations set forth in each preceding paragraph, as if fully set forth herein.

88. Pursuant to the agreements between the parties, including the Settlement Agreement, by making the Converted Payments, Plaintiff acquired and preserved an equitable interest in the Property.

89. By reason of the foregoing, Plaintiff is entitled to an equitable lien on the Property in the amount of such payments, including the Converted Payments.

New York law permits the imposition of an equitable lien on property if there is an express or implied contract, meeting certain requirements, concerning the property (*James v. Alderton Dock Yards*, 256 N.Y. 298, 303, 176 N.E. 401, *see Datlof v. Turetsky*, 111 A.D.2D 365, 365, 365, 489 N.Y.S.2d 353, 354; *Thorne Real Estate, Inc. v. Nezelek*, 100 A.D.2d 651, 652, 473 N.Y.S.2d 82, 83). The contract must identify the property directly, or describe the property in such a way as to make identification possible, and must clearly state the parties' intention that the identified property be “held, given or transferred as security for [an] obligation” (*James*, 256 N.Y. at 303, 176 N.E. 401; *see also Datlof*, 111 A.D.2D at 365, 489 N.Y.S.2d at 354). An equitable lien may be imposed on land, chattels, or a certain fund, but a mere promise, whether parol or written, to satisfy a debt from a “designated fund” does not support creation of an

equitable lien on that fund (*James*, 256 N.Y. at 303, 176 N.E. 401; *Datlof*, 111 A.D.2d at 365, 489 N.Y.S.2d at 355).

Thus, in establishing an equitable lien, plaintiff must show a particular agreement by defendant to confer a security interest in the property at issue (*James*, 256 N.Y. at 303, 176 N.E. 401; *Datlof*, 111 A.D.2d at 365, 489 N.Y.S.2d at 355). “[P]laintiff’s mere expectation [of payment], however sincere, is insufficient to establish an equitable lien” (*Scivoletti v. Marsala*, 61 N.Y.2d 806, 809, 473 N.Y.S.2d 949, 950, 462 N.E.2d 126). Without this type of specific contract creating a confidential relationship, the parties have merely contracted at arm’s length, and the plaintiff has no claim to an interest in specific property (*James*, 256 N.Y. at 303–04, 176 N.E. 401; see *Matco Electric Co. v. Plaza Del Sol Constr. Corp.*, 82 A.D.2d 979, 980, 440 N.Y.S.2d 407, 409). A plaintiff without the promise of an interest in particular property must enforce his rights under the contract and cannot rely on an equitable lien (*James*, 256 N.Y. at 303, 176 N.E. 401; *Datlof*, 111 A.D.2d at 365–66, 489 N.Y.S.2d at 355).

When deciding whether plaintiff has sufficiently pleaded a cause of action to impress an equitable lien upon real property, the Court must accept every allegation set forth in the complaint as true without consideration of whether plaintiff will ultimately prevail on the merits (*219 Broadway Corp. v. Alexander’s, Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Applying this standard, plaintiff’s complaint does not set forth any facts or circumstances upon which an equitable lien recovery could be ordered on the Flushing/Nassau Property. Thus, the Eighth cause of action did not support the filing of the notice of pendency on Flushing/Nassau Property.

For the above reasons, defendant’s motion to vacate the portion of the notice of pendency on the “Flushing/Nassau Property” is **GRATNED**.

That branch of Defendant’s motion for an award of the costs and fees that it incurred in connection with this motion is **DENIED**, without prejudice, and may be renewed as the time of trial.

For all of the above reasons, it is hereby

**ORDRED** that defendant’s motion to vacate the portion of the notice of pendency directed against the parcels of real property known as (i) 376-382 Flushing Avenue, Brooklyn, New York 11205 (Block 1884, Lot 48), and (ii) 31-33 Little Nassau Street, Brooklyn, New York

11205 (Block 1884, Lot 40) is **GRANTED** and the Clerk is directed to vacate those portions of the notices of pendency forthwith; and it is further

**ORDERED** that defendant's motion for an award for the costs and fees that it incurred in connection with this motion is **DENIED**, without prejudice, and may be renewed as the time of trial.

This constitutes the decision and order of the Court.

Dated: May 18, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020