

18 Misc.3d 1129(A), 856 N.Y.S.2d 503, 2008 WL 352325 (N.Y.Sur.), 2008 N.Y. Slip Op. 50238(U)
(Table, Text in WESTLAW), Unreported Disposition
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(The decision of the Court is referenced in a table in the New York Supplement.)

Surrogate's Court, Nassau County, New York.

In the Matter of the Petition of Richard TSCHERNIA, Petitioner, for a judgment declaring petitioner to be the owner of certain real property, located at 1728–1732 West Sunrise Highway, Merrick, NY, and imposing a constructive trust. Bernard Tschernia, Deceased.

No. 348650.
 Feb. 7, 2008.

Greenberg, Freeman, LLP, Goldfard, Abrandt, Salzman & Kutzin, New York, for respondent.

Bahn, Herzfeld & Multer, New York, for petitioner.

JOHN B. RIORDAN, J.

*1 In this miscellaneous proceeding, Richard Tschernia seeks a judgment declaring him to be the owner of real property located at 1728–1732 West Highway, Merrick, New York (the Property), or imposing a constructive trust.

The decedent, Bernard Tschernia, died on August 15, 2007 a resident of Florida, leaving his spouse, Roberta, and four children from a prior marriage, Richard, Beverly, Jacqueline and Paul. Bernard and Roberta had a prenuptial agreement under which Roberta waived her rights to inherit or elect against Bernard's estate or the assets held in the Bernard and Pamela Tschernia Family Trust. Pamela was Bernard's first wife and the mother of Richard, Beverly, Jacqueline and Paul. Pamela died on December 18, 2001.

On October 16, 2007, Beverly filed a petition seeking letters testamentary as the nominated executor of Bernard's purported last will and testament dated June 11, 2007 and for probate of the

will. Paragraph 9(a) of the probate petition lists the value of Bernard's improved real property located in New York State as \$3,000,000. On October 16, 2007, the court issued an order granting preliminary letters testamentary to Beverly. Bernard's purported will fails to provide for Richard and his issue. In the will, Bernard left his residuary estate to the trustee of the Survivor's Trust of the Bernard Tschernia and Pamela Tschernia Family Trust or, if that disposition was to be inoperative in whole or in part, to the persons named, and in the manner provided, in the Survivor's Trust of the Bernard Tschernia and Pamela Tschernia Family Trust.

The Bernard Tschernia and Pamela Tschernia Family Trust was executed on June 21, 1994 and was amended and restated on April 3, 2001 as the Total Amendment and Restatement of the Bernard Tschernia and Pamela Tschernia Family Trust. Section 4.3 states that after the death of the first to die of Bernard or Pamela, the surviving trustee was to divide the trust estate into three separate trusts, a survivor's trust (governed by section 4.4), an exemption trust and a marital trust. Section 6.1(a) states, in pertinent part, that, upon the deaths of Bernard and Pamela, the Property would be distributed outright to Richard. It is the disposition of the Property that is the subject of this proceeding. It is uncontroverted that title to the Property was never transferred to the trust (EPTL 7–1.18). The Total Amendment and Restatement of the Bernard Tschernia and Pamela Tschernia Family Trust was later amended a total of five times on December 10, 2004, July 14, 2005, August 1, 2005, November 28, 2006 and June 11, 2007. As a result of these Amendments, the disposition of the Property was revoked to the point where Richard and his issue are not provided for at all in the Survivor's Trust.

Richard commenced this proceeding by order to show cause and petition. In the petition, Richard advances five causes of action: (1) that a constructive trust be impressed on the Property based on his allegation that Bernard and Pamela committed to

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each other to transfer the Property to the trust; (2) that a constructive trust be impressed on the Property based on his allegations that Bernard promised Richard that the Property would be his upon Bernard's death and that Richard forewent certain opportunities in reliance upon that promise; (3) under certain terms of the trust, which Richard alleges became irrevocable after Pamela's death, the Property belongs to Richard; (4) the trust, Bernard's estate and the beneficiaries are unjustly enriched by reason of the failure to transfer the Property to the trust; and (5) the decisions to eliminate Richard's interest and circumvent the commitment to transfer the Property to the trust resulted from Beverly's campaign of fraud and undue influence on Bernard.

*2 The order to show cause, which was issued on November 9, 2007, contained a temporary restraining order restraining respondent, Beverly Polasko, and/or her agents from transferring, selling or otherwise encumbering the Property and from terminating the tenancy of First West Mortgage Brokers, Ltd. (First West) pending the return date of the order to show cause. By decision dated December 19, 2007, the court denied Richard's application for a preliminary injunction and vacated the temporary restraining order.

Thereafter, Beverly, on behalf of the estate, executed a contract to sell the Property for \$3,850,000.00 Under the contract of sale, the buyer has a sixty (60) day due diligence period from the contract's date of delivery (December 27, 2007) to cancel the contract, and the closing must occur within thirty (30) days following the due diligence period. Richard has filed a notice of pendency against the Property.

Respondent, Beverly Polasko, as preliminary executor of the estate, has now moved for an order (i) pursuant to CPLR § 6514(b) canceling the notice of pendency filed by Richard against the Property or (ii) in the alternative, pursuant to CPLR § 6515, canceling the notice of pendency upon the posting of an undertaking to be set by the court and/or requiring Richard to post an undertaking to indemnify

the estate for damages the estate may incur if the notice of pendency is not canceled.

In support of her application under CPLR § 6514(b), Beverly argues that Richard has commenced this action in bad faith. Beverly's has submitted a transcript and a CD of a voice mail message from Richard to Beverly's husband, Kevin. The voice mail message was transcribed by a certified court reporter as follows:

"You need to have all your stuff out of the office this weekend, I already spoke to Barbara. She is staying on with me. I'm gonna put somebody else in there. You're out. You're off the payroll. You're not getting the mortgage payments [for the Building] in New York because I'm out of my building. Okay? I already told your lovely wife [Beverly] never to threaten me again, telling me I'm going to be served, okay?"

Now I'm contesting the estate, Kevin. But you're tied up, so all that money you thought you were getting, you ain't getting nothing for awhile. Even if I win or I don't win, you're not getting anything. Okay? All you're getting is you're out of a job. That's it. You're done. You're done...."

Beverly suggests that Richard's sole purpose in bringing this proceeding is to tie up the estate and that he has no good-faith belief in the merits of his claim. In addition to the transcript of the voice mail message, Beverly has submitted the affidavit of a real estate broker who states that the decedent entered into a broker's agreement with him for the sale or lease of the Property in October 2006 and that Richard was aware of the decedent's actions. Beverly contends that if Richard truly believed he had any rights to the Property, he would have commenced an action at that time.

*3 Richard's counsel, in his affirmation in opposition, argues that the motion to cancel the lis pendens should be denied on a number of grounds. First, he argues that the application should be barred on the grounds of collateral estoppel. Ac-

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ording to counsel, Beverly raised the issue of canceling the lis pendens in response to the motion for a preliminary injunction and the court previously decided there was no basis to cancel it. Second, counsel asserts that, even if the application is entertained, Richard's behavior does not rise to the level of bad faith. Richard also submits his own affidavit explaining that he failed to take any action when his father listed the Property for sale in October 2006 because he trusted his father to honor his commitment or provide for him in some other fashion.

With respect to Beverly's request for an order pursuant to CPLR § 6515, Richard claims that Beverly incorrectly argues that the merits may be considered in determining the amount of the undertaking. Moreover, Richard argues that if an undertaking is allowed, it should be adequate to protect Richard's interests which includes the entire Property, not subject to reduction by the \$685,000 received from the 2006 mortgage refinancing by the decedent. Accordingly, Richard argues that the undertaking should be in the amount of the contract price of \$3,850,000. Richard's counsel argues that if the court instead determines that the lis pendens will remain in effect and requires Richard to post an undertaking, the amount of the bond should only be six months mortgage payments at the mortgage amount prior to the refinance, which was approximately \$8,850.00 per month. Richard asserts that the refinancing proceeds inured to the decedent's own benefit or were used by the decedent to redeem stock in First West.

Beverly's counsel has submitted a reply affirmation in which he refutes that the application is barred by Beverly's prior oral application for similar relief. According to counsel, that application was made only under CPLR § 6514(b) and not under CPLR § 6515 and prior to submission of the voice mail message. In addition, the court's prior decision expressly stated that Beverly's prior application to "cancel the lis pendens is denied without prejudice as the request was not properly raised."

The court agrees with Beverly's counsel that the current application made by motion is not barred by collateral estoppel. The court's prior decision clearly provided that the application was denied without prejudice. In addition, the only basis on which the court was previously asked to vacate the lis pendens was CPLR § 6514(b), not CPLR § 6515.

A notice of pendency may be filed in an action seeking a judgment that would affect the title to, or possession, use or enjoyment of, real property (CPLR § 6501; *Nastasi v. Nastasi*, 26 AD3d 32 [2d Dept 2005]). "A lis pendens is properly filed in an action seeking specific performance involving title or possession of real property," (*Elna Construction Co., Inc. v. Flynn*, 39 Misc.2d 254, 255 [Sup Ct, Westchester County 1963][internal citations omitted]). "An action seeking to impose a constructive trust over real property qualifies as one in which the filing of a notice of pendency is allowed" (citations omitted) (*Nastasi v. Nastasi*, 26 AD3d 32, 36 [2d Dept 2005][internal citations omitted]).

*4 CPLR § 6514 provides two statutory methods for cancellation of a notice of pendency. CPLR § 6514(a) provides for mandatory cancellation of a notice of pendency where the filing does not comply with the requirements of CPLR § 6501. In addition, CPLR § 6514(b) provides for discretionary cancellation upon the motion of any person aggrieved and upon such notice as the court may require "... if the plaintiff has not commenced or prosecuted the action in good faith."

In addition, CPLR § 6515, provides for cancellation, in the court's discretion, based upon the posting of an undertaking by the moving party or by a posting of security by the plaintiff. CPLR § 6515 provides as follows:

"In any action other than a foreclosure action as defined in subdivision (b) of section 6516 of this article or for partition or dower, the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk

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to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property. If the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or

2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled.”

The cancellation provisions of the CPLR exist to counteract the “powerful impact” that a lis pendens has on the alienability of property (*5303 Realty Corp v. O & Y Equity Corp*, 64 N.Y.2d 313 [1984]). The Court of Appeals has noted that the statutory scheme of CPLR § 6501 “permits a party to effectively retard the alienability of real property without any prior judicial review” (*5303 Realty Corp v. O & Y Equity Corp*, 64 N.Y.2d 313, 320 [1984]). Due to the adverse effects of a lis pendens, “the privilege of filing a lis pendens may be used only as a shield for the protection of the bona fide rights of a plaintiff in real property, but ... such privilege ceases when the lis pendens is used as a sword against the owner of the realty (*Weisinger v. Rae*, 19 Misc.2d 341, 347 [Sup Ct, Queens County 1959][internal citations omitted]). Once a notice of pendency is filed, it may only be canceled upon motion for one of the reasons set forth in CPLR § 6514 or § 6515. In *5303 Realty Corp v. O & Y Equity Corp* (64 N.Y.2d 313, 320 [1984]), the Court of Appeals noted as follows:

“To the extent that a motion to cancel the notice of pendency is available (CPLR 6514), the court's scope of review is circumscribed. One of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency.... Usually, there is little a court may do to provide relief

to the property owner. If the procedures prescribed in Article 65 have not been followed or if the action has not been commenced or prosecuted in good faith, the notice must be canceled in the first instance and it may be in the second.... If the notice of pendency is valid, the court may, in its discretion, cancel the notice, but the moving party will generally have to post an undertaking (CPLR § 6515)” (citations omitted).

*5 Here, no argument is made for mandatory cancellation under CPLR § 6514(a). Respondent asks the court to exercise its discretion under the discretionary cancellation provision of CPLR § 6514(b). This subdivision “permits, but does not require, cancellation of a notice of pendency if the plaintiff has not commenced or prosecuted the action in good faith” (*Nastasi v. Nastasi*, 26 AD3d 32, 41 [2d Dept 2005]). The moving party has the burden to establish the lack of good faith (*Yorktown Floorworld, Inc. v. Wagon Prod., Inc.*, 170 A.D.2d 823 [3d Dept 1997]). “This burden if not easily met” (*551 West Chelsea Partners LLC v. 556 Holding LLC*, 40 AD3d 546, 548 [1st Dept 2007]). A finding of lack of good faith can be made where a plaintiff is using the notice of pendency for an ulterior purpose (*Weisinger v. Rae*, 19 Misc.2d [Sup Ct, Queens County 1959]), but bad faith has not been found where the “plaintiff has utilized the process in a manner consonant with the purpose for which it was designed, even though a malicious impulse may simultaneously have been satisfied” (*Andesco v. Page*, 137 A.D.2d 349, 357 [1st Dept 1988]). A finding of bad faith has been made, however, where the plaintiff unreasonably delays in bringing the case to trial (*Weisinger v. Rae*, 19 Misc.2d 341 [Sup Ct, Queens County 1959] or engages in extremely dilatory tactics in discovery (*Sloben v. Stan*, 157 A.D.2d 835 [2d Dept 1990]).

Here, Beverly has the burden to show that Richard has not commenced or prosecuted the action in good faith. Even with the submission of the voice mail, the court finds that Beverly has not met

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her burden. Accordingly, the court declines to exercise its discretion to cancel the lis pendens under [CPLR § 6514\(b\)](#).

Beverly asks, in the alternative, that the court exercise its discretion under the statutory cancellation provisions of [CPLR § 6515](#). [CPLR § 6515\(1\)](#) provides for an undertaking by the moving party sufficient to provide adequate relief to the plaintiff. [CPLR § 6515\(2\)](#) provides that if the plaintiff (in this case, the petitioner) fails to give an undertaking to indemnify the defendant (in this case, the respondent) for his damages if the notice is not canceled, the court may order cancellation of the notice of pendency on the defendant's undertaking. "The purpose of the bond required by the plaintiff is to indemnify defendant against any damages he may sustain if the notice of pendency is not cancelled" (*Eposito v. FDIC*, 644 F.Supp. 276 (E.D.N.Y.1986)). Additionally, "[a]lthough the language of [CPLR 6515](#) makes both subdivisions applicable to actions where the judgment demanded would affect specific real property,' the preferred course in a claim for specific performance is the utilization of subdivision (2) by canceling the notice of pendency upon an undertaking by the defendant seller unless plaintiff buyer posts an undertaking which will indemnify defendant (*see Ansonia Realty Co. v. Ansonia Assocs*, 117 A.D.2d 527 [1st Dept 1986]). This double bonding' is preferable even when plaintiff's likelihood of success is doubtful...." (*An-desco, Inc. v. Page*, 137 A.D.2d 349, 357 [1st Dept.1988]).

*6 In the case at bar, Richard is not seeking a money judgment, but rather seeks title to the Property. Accordingly, utilization of [CPLR § 6515\(2\)](#) is the preferred course under which to proceed. The purchase price of the Property under the contract executed by Beverly, on behalf of the estate, is \$3,850,000. Richard has not alleged that the purchase price is less than the current fair market value. The court finds that Richard's interests will be adequately secured if Beverly maintains the net sales proceeds in escrow in an interest-bearing ac-

count and posts an undertaking of \$25,000 to cover any costs or expenses to which he may eventually be entitled. In addition, the court finds that an undertaking of \$4,100,000 will adequately indemnify the estate for the purchase price, the cost of maintaining the Property and the loss of interest on the \$3,850,000 sale to the prospective purchaser, if the lis pendens is not canceled. Thus, the respondent's motion to cancel the notice of pendency is granted on the condition that respondent holds the net proceeds of sale in an interest-bearing escrow account and posts an undertaking of \$25,000.00 within thirty (30) days hereof, unless the petitioner posts an undertaking of \$4,100,000 within the same thirty (30) day period, which will continue the notice of pendency pending determination of the action.

This constitutes the decision and order of the court.

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