

Poguntke v Carrier
2015 NY Slip Op 30692(U)
April 28, 2015
Supreme Court, New York County
Docket Number: 162523/2014
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ELIZABETH EZRINE POGUNTKE,
JONATHAN EZRINE and JAMES EZRINE,

Index No.: 162523/2014

DECISION & ORDER

Plaintiffs,

-against-

LUCILLE CORRIER, 174 EAST 64TH STREET
CORPORATION and ABINGDON FARMS, INC.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Defendant Lucille Corrier (Lucille) moves by order to show cause, pursuant to CPLR 6514, to vacate a notice of pendency. Lucille's motion is granted for the reasons that follow.

I. Procedural History & Factual Background

The facts pertinent to this motion are not in dispute.

Plaintiffs Elizabeth Ezrine Poguntke, Jonathan Ezrine, and James Ezrine (Allan's Children) are the three children of Ivan Allan Ezrine (Allan), who died intestate on August 27, 2013. On December 2, 2013, Lucille, Allan's second wife,¹ was appointed Administratrix of Allen's estate by the New York County Surrogate's Court. On December 18, 2014, Allan's Children commenced this action against Lucille, accusing her of various acts of malfeasance in connection with Allan's estate. The complaint asserts four causes of action: (1) declaratory judgment; (2) fraud; (3) conversion; and (4) breach of fiduciary duty. After Lucille filed the instant motion, Allan's Children filed an amended complaint on February 18, 2015. *See* Dkt. 14. The court will not address the amended complaint because, as set forth below, the law prohibits consideration of an amended complaint when assessing the validity of a notice of pendency

¹ They married on August 8, 1991.

predicated on a prior pleading. Additionally, the court will not address the allegations of the original complaint in detail as they are not pertinent to this motion, and, as set forth below, such allegations will be litigated in Surrogate's Court.

The only issue relevant to this motion is the parties' dispute over ownership of a company that owns a brownstone building located at 174 East 64th Street in Manhattan (the Building). On May 10, 1993, Allan formed a corporation, 174 East 64th Street Corporation (the Company), to purchase the Building.² On July 15, 1993, the Company purchased the Building. At the time of Allan's death, the Company still owned the Building. Lucille continued living in the Building after Allan's death.

The parties dispute who owns the Company, but agree that the Company owns the Building. In other words, their dispute is over equity in a company, not equity in real estate. This distinction, as discussed below, is determinative of the instant dispute regarding the notice of pendency, which Allan's Children filed against the Building on December 18, 2014 (the Notice of Pendency). *See* Dkt. 2. Corrier was served on December 29, 2014. *See* Dkt. 3. On February 3, 2015, Corrier moved by order to show cause to vacate the Notice of Pendency and for attorneys' fees.

II. Discussion

5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313 (1984), is the seminal case governing motions to vacate a notice of pendency. *See generally In re Sakow*, 97 NY2d 436,

² Allan's Children argue that the Company is a sham because it was used to purchase the Building in a tax optimal manner. However, there is nothing wrong with owning real estate through the corporate form so long as doing so is not itself a violation of the applicable tax (or other) laws. Nor have Allan's Children pleaded facts to support veil piercing. Simply put, conclusory allegations that one effectively "owns" real estate though a company is not a valid legal argument that warrants disregarding the corporate form or the applicable doctrines governing when one may validly file a notice of pendency.

440-41 (2002) (“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 [of CPLR article 65]”), quoting *5303 Realty*, 64 NY2d at 320. Pursuant to CPLR 6514(a), a notice of pendency is subject to mandatory cancellation when the action upon which it is based does not qualify for a notice of pendency under CPLR 6501. The court, moreover, has discretion to cancel a notice of pendency under CPLR 6514(b) if the action supporting the notice was not commenced in good faith. *See 551 W. Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548 (1st Dept 2007). “In entertaining a motion to cancel [a notice of pendency], the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501.” *5303 Realty*, 64 NY2d at 320. “[T]he complaint filed with the notice of pendency must be adequate unto itself; **a subsequent, amended complaint cannot be used to justify an earlier notice of pendency.**” *Id.* (emphasis added).

It is well settled that where, as here, the dispute is over ownership of a company that owns real estate – as opposed to a dispute over ownership of the real estate itself – such a controversy will not support the filing of a notice of pendency. *Id.* at 316; *see Sealy v Clifton, LLC*, 68 AD3d 846, 847 (2d Dept 2009) (dispute over membership in LLC that owns real estate does not support notice of pendency because equity in LLC is personal property, not interest in real estate); *see also Savasta v Duffy*, 257 AD2d 435, 436 (1st Dept 1999) (“The court [] properly canceled the notice of pendency since shares in a cooperative apartment are personal and not real property”).

The Notice of Pendency must be canceled because this action does not seek adjudication of title to real property. The case law simply does not permit a notice of pendency to be filed

where, as here, the dispute is over ownership of the company that owns real estate. Nor will the court consider Allan's Children's argument that a claim for a constructive trust over real estate may sustain the Notice of Pendency. While the law in this area is somewhat unclear [*see Peterson v Kelly*, 173 AD2d 688, 689 (1st Dept 1991); compare *Ostad v Nehmadi*, 31 Misc3d 1211(A), at *5-7 (Sup Ct, NY County 2011) (Fried, J.), with *Schlesinger v Schlesinger*, 2002 WL 221100, at *3-5 (Sup Ct, Kings County 2002)], the court will not address this issue since it is not properly before the court.³ Though the original complaint does assert a claim for breach of fiduciary duty, nothing in the original complaint can be fairly read as seeking the imposition of a constructive trust. *See Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010) ("The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment"). That Allan's Children's amended complaint and opposition brief raise the issue is immaterial since the court is strictly limited to determining the validity of a notice pendency based on the original complaint alone. *See 5303 Realty*, 64 NY2d at 320.

Nonetheless, Lucille's motion for costs is denied. In light of the serious nature of the accusations made against Lucille, which are supported by non-conclusory pleadings, the court declines to award costs. However, those allegations all concern the disposition of Allan's estate. The court, therefore, *sua sponte* removes this action to Surrogate's Court pursuant to CPLR

³ The issue seems to turn on whether the corpus of the constructive trust is real estate or a corporate entity that owns real estate. *Compare Gen. Prop. Corp. v Diamond*, 29 AD2d 173, 175-76 (1st Dept 1968), with *Peterson*, 173 AD2d 689; *see Don v Singer*, 73 AD3d 583 (1st Dept 2010), citing *Yonaty v Glauber*, 40 AD3d 1193, 1195 (3d Dept 2007); *Herman v Herman*, 2014 WL 2898592, at *1-2 (Sup Ct, NY County 2014) (Kornreich, J.) (relying on *Yonaty*).

325(e).⁴ This court is permitted – and, indeed, may sometimes be required – to *sua sponte* remove cases to Surrogate’s Court when the issues concern the affairs of an estate. *See Epstein Becker & Green, P.C. v Simon*, 2015 WL 1505223, at *2 (Sup Ct, NY County 2015) (Moulton, J.), citing *Johnson v Stafford*, 18 AD3d 324 (1st Dept 2005) (Supreme Court has authority to *sua sponte* transfer cases to Surrogate’s Court). Accordingly, it is

ORDERED that the motion by defendant Lucille Corrier to vacate the notice of pendency dated December 17, 2014 (Dkt. 2) is granted, said notice of pendency is hereby canceled, and the motion for costs is denied; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the New York County Clerk shall vacate and cancel the notice of pendency filed by plaintiffs (Dkt. 2) against the property known as 174 East 64th Street, New York, NY, New York County Block 1398, Lot 145; and it is further

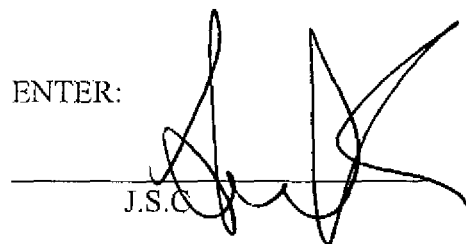
ORDERED that the action is hereby removed from this court and transferred to the Surrogate’s Court in New York County; and it is further

⁴ “While CPLR 325(e) appears to require the consent of the surrogate’s court, any such requirement ‘is [superseded] by the State Constitution empowering the Supreme Court to transfer action over which it has concurrent jurisdiction with the Surrogate’s Court to the Surrogate’s Court **without** the Surrogate’s Court’s consent.’” *Sexter & Warmflash, P.C. v Gilford*, 2011 WL 486282 (Sup Ct, NY County 2011) (Madden, J.) (emphasis added), quoting *Birnbaum v Cent. Trust Co.*, 156 AD2d 309 (1st Dept 1989); *see Lawrence v Miller*, 48 AD3d 1, 6 (1st Dept 2007) (“Although CPLR 325(e) does not mandate removal ... **the interests of judicial economy dictate a strong preference for removal to Surrogate’s Court of all matters affecting the administration of a decedent’s estate**”) (emphasis added).

ORDERED that the Clerk of this Court is directed to transfer the papers on file in this proceeding to the Clerk of the Surrogate's Court, New York County, upon service of a copy of this order and payment of appropriate fees, if any and the filing of the appropriate e-filing forms.

Dated: April 28, 2015

ENTER:

A handwritten signature in black ink, appearing to be 'Shirley Werner Kornreich', written over a horizontal line. The signature is stylized and cursive.

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.