

# Notice of Pendency in Courts Again

## Recent Rulings Underscore the Power of This Ex Parte CPLR Article 65 Tool

BY JOEL DAVID SHARROW

A TRIO OF RECENT cases has underscored the overwhelming impact of an ex parte CPLR Article 65 notice of pendency.<sup>1</sup> Although the issue in each case arose from disparate facts, the unifying theme was the limited circumstances available to the defendant-owners of the affected realty to vacate validly filed Article 65 notices, and the sustaining of the notices in each case.<sup>2</sup>

Indeed, other than an Order of Seizure under CPLR Article 71 (which, even when granted ex parte, requires a meritorious showing and a bond), the ex parte notice of pendency (which does not require any showing of merits or an undertaking) may very well be the most powerful weapon in the arsenal of provisional pre-judgment remedies authorized by the CPLR. E.g., *5303 Realty Corp. v. O&Y Equity Corp.*:

"A notice of pendency, commonly known as a 'lis pendens,' can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property"; and

*Slutsky v. Blooming Grove Inn, Inc.* ("If properly filed pursuant to CPLR Article 65, a notice of pendency is a powerful tool for a plaintiff [cit. om.]")<sup>3</sup> Indeed, it has been referred to as an "extraordinary privilege."<sup>4</sup>

Before looking at the three recent cases, a brief look at this remarkable tool and its history is in order.

### The Notice of Pendency

The codified CPLR 6501 notice of pendency, which requires nothing more than a statement of the names of the parties, the object of the action and a description of the affected real property, and which is filed in the local county's land records, CPLR 6511(b), may be filed without any prior judicial review and, thereby, unilaterally impede a defendant's ability to transfer good title to, or an interest in, the subject realty.<sup>5</sup>

Joel David Sharrow is a member of Moses & Singer, Amy Opp, an associate at the firm, assisted in the preparation of this article.

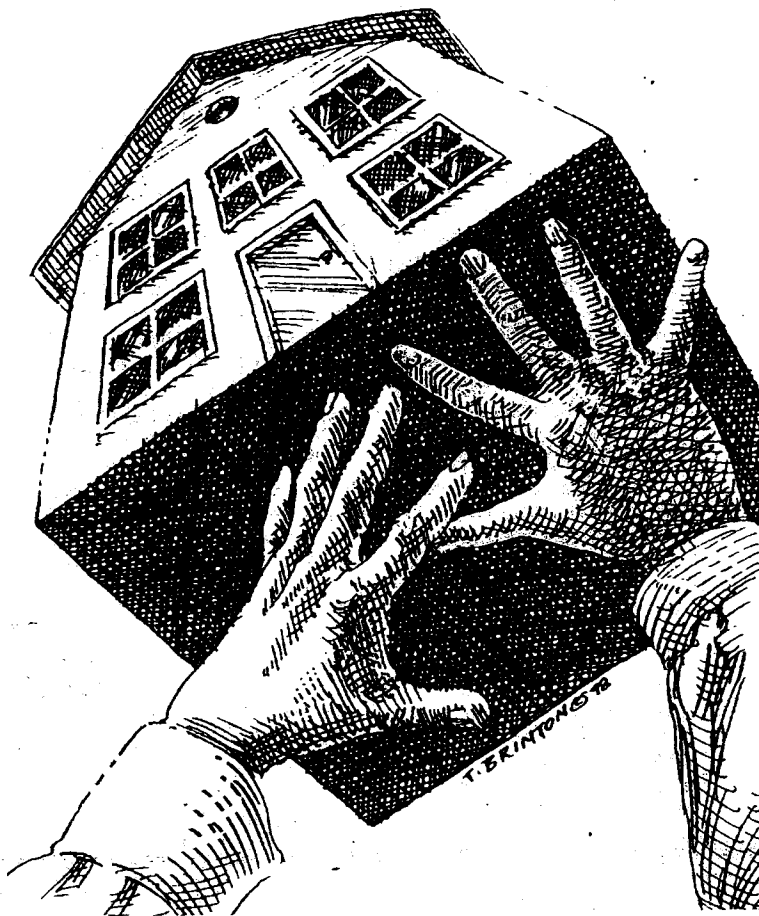


ILLUSTRATION BY TIM BRINTON/NEWS ART

*The codified ... notice of pendency ... may be filed without any prior judicial review and, thereby, unilaterally impede a defendant's ability to transfer good title to, or an interest in, the subject realty.*

Further, and unlike other provisional remedies (such as seizure, preliminary injunction and attachment, each of which require an undertaking as well as authorization by a court pursuant to a showing of merits),<sup>6</sup> there is no requirement that the party filing the notice of pendency furnish a bond to indemnify the owner of the affected realty against damages that may be incurred as a result of the sudden cloud upon the title.

At first blush, the lack of a requisite undertaking might seem inviting to a potential filer. That is because a bond requires not merely payment of a premium but, normally, collateral to assure the surety that it will be able to recoup any payment it might have to make under the bond. But, a bond also has a salutary effect for the party obligated to obtain it: an undertaking normally caps the potential measure of damages to which the party obtaining the provisional remedy might be

exposed if later it is held that such interim relief was wrongly granted.<sup>7</sup>

Because of the ease of filing and the immediate cloud on title it causes, a party seeking to file a notice of pendency must strictly adhere to the rigid requirements of CPLR 6501.<sup>8</sup>

The Article 65 notice of pendency traces its lineage back through New York's various procedural codes and earlier common law to that of at least as early as post-Tudor England — indeed, possibly back to ancient Roman law — under its former nomenclature "lis pendens."<sup>9</sup> "Lis pendens" means, simply, litigation pending.<sup>10</sup> Its purpose was, and remains, to give notice to potential vendees that an action has been brought seeking a judgment adversely affecting the title held, or claimed, by the defendant-owner in, or its use or enjoyment of, the subject realty. As a result, a vendee who purchases the affected land after the lis pendens is filed is bound by the judgment in that earlier-commenced action.<sup>11</sup>

It is well-settled that a plaintiff may file a lis pendens, n/k/a the statutory "notice of pendency," only where it claims an interest in realty owned, held or used, by the defendant.<sup>12</sup>

Section 1670 of New York's late 19th Century Code of Civil Procedure provided:

"In an action brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property, the plaintiff may ... file ... a notice of pendency of the action ...."

In *Moeller*, supra, fn. 12, the court sustained the lis pendens. The plaintiff alleged, among other things, that defendant's new structure on the adjoining parcel no longer adequately supported plaintiff's contiguous lot; that defendant was using the mutual

party wall as a terminus wall of her new structure; and that defendant had encroached upon plaintiff's realty. The plaintiff also alleged that, during the construction, defendant had altered her lot so as to cause water and sewage run-off onto plaintiff's lot. In rejecting the defendant's assertion that plaintiff alleged only a mere trespass (preventable by an injunction or compensable in damages), the court held that on the face of the complaint, the plaintiff's action was

"intended to restrict the use which the defendant has made and is making of her property and of the party wall, the plaintiff who claims an interest therein alleging that he has been damaged thereby and is entitled to have the use and enjoyment of defendant's land restricted and limited to

what they were before [defendant] commenced to build the new structure. The Code does not require that the right asserted should be as extensive as the title claimed by the defendant; nor is it indeed necessary that the title itself should be directly involved. It is sufficient if the right asserted by the plaintiff is of a character that *could* affect "the possession, use or enjoyment" of the [defendant's] property, and the action is one wherein the judgment asked would be binding not only upon the defendant, but upon her successors in title as well. In such an action — which in substance is one *in rem* — the object of the lis pendens is to retain the subject-matter within the power of the court until the judgment is entered, since otherwise, by successive alienations, such judgment or decree would be rendered ineffectual."<sup>13</sup> (Emphasis in original).

Thus, *Moeller* stood for three propositions: (a) so long as the title, possession, use or enjoyment of real property by another was at issue, and (b) so long as a restraint of free alienation of the parcel owned, possessed, used or enjoyed by another was needed to enable the claimant to enforce the plaintiff's anticipated judgment against a non-party successor owner of the other's realty, then the filing of the by-then codified common law lis pendens was appropriate; and (c) in determining whether the claimant was entitled to file a lis pendens, the court would rely only upon the pleadings without addressing the merits of the claim.<sup>14</sup>

The rule is the same under CPLR 6501, which provides:

"A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property;" and

"A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party."

Thus, CPLR 6501 itself statutorily reiterates the first two propositions which, as enunciated in *Moeller*, Code of Civil Procedure §1670 stood for.

Lest there be a vestige of doubt that a CPLR Article 65 notice of pendency is only a reformatting of New York's common law and statutory former lis pendens, the Court in *5303 Realty Corp.*, in holding that a CPLR 6501 notice of pendency had not been validly filed, quoted approvingly from the 1815 decision in *Murray*, supra, fn. 9 (which had been decided under the pre-Code common law concept of a lis pendens), stating:

"[t]he doctrine of lis pendens — the pendency of a suit — 'was, of itself, notice to the purchaser ... It is no more than an adoption of the rule in a real action at common law,

where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation' [cits. om.]"<sup>15</sup>

The Court went on to hold that the purpose of CPLR 6501 and its predecessors

"was to assure that a court retained its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any [actual] notice of the pending suit.

\*\*\*

Critically, the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review."<sup>16</sup>

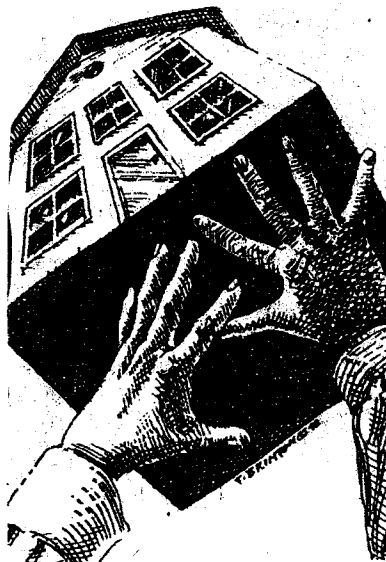
By case law, the third proposition of *Moeller*, under §1670 of the old Code of Civil Procedure and the earlier common law lis pendens, applies today:

"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 [cits. om.]" (Emphasis added). Id.<sup>17</sup>

The primary distinction between the old lis pendens and the present notice of pendency stems from the statutory bases to vacate even a validly filed Article 65 notice of pendency while, originally, a lis pendens that was validly filed, i.e., filed in an action where it was appropriate to do so, could not be vacated.

Thus, under Code of Civil Procedure §1670:

"Where, therefore, it is provided by [Code §1670] that a plaintiff has the



right to file a lis pendens, such a right is absolute and the court has no power to cancel the same after it has been filed. [cit. om.]"<sup>18</sup>

As a result, judicial inquiry was limited to determining only whether, on nothing more than the face of the complaint, the action was brought to affect the title to or the posses-

sion, use or enjoyment of the defendant's property.<sup>19</sup>

## Vacating a CPLR 6501 Notice

In contrast to the old lis pendens, even a validly filed CPLR 6501 notice of pendency, in certain limited circumstances, statutorily may be vacated.

First, under CPLR 6514(a), a court on motion must vacate the notice if service of the summons has not been made upon at least one defendant within 30 days of filing the notice. In other words, the notice of pendency may be filed, and is effective, even before the defendant is served with the summons, as long as process upon at least one defendant is made within 30 days of filing the notice. See CPLR 6512. Further, CPLR 6514(a) also requires vacating the notice of pendency if the action has been settled, discontinued or abated; or, if the time to appeal from a final judgment against the plaintiff who filed the notice of pendency has expired, or enforcement of such a judgment has not been stayed pending an appeal.

The court also has the authority, but is not required, to order cancellation of the notice of pendency if the action has not been commenced or prosecuted in good faith. CPLR 6514(b). Further, a notice of pendency may be canceled pursuant to stipulation, the form and content of which is set out in CPLR 6514(d)(1) and (2). Last, a notice of pendency must be canceled by the clerk of the county wherein the realty is located, prior to entry of judgment, upon the filing by plaintiff's attorney of an affidavit that there have been no appearances and the time for all parties to appear has expired. CPLR 6514(e).

In addition, the court is given discretionary authority to cancel the notice of pendency under CPLR 6515. This section provides that a court may compel bonding of a notice of pendency, to wit: to cancel a notice of pendency in other than a

---

*In contrast to the old lis pendens, even a validly filed CPLR 6501 notice of pendency, in certain limited circumstances, statutorily may be vacated.*

---

mortgage foreclosure, partition or dower action, "upon such terms as are just ... if the moving party [usually, the defendant-owner] shall give an undertaking in an amount to be fixed by the court, if:

1. the court finds that adequate relief can be secured to the plaintiff

by the giving of such 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 may incur if the notice is not canceled."

### The Trio of Recent Cases

The triumvirate of cases that prompted this article all denied the defendant-owners' motions to cancel notices of pendency.

In *Evangelista v. VSL Enterprises Corp.*, the plaintiff sought to invalidate an apparently fraudulent transfer of property. Defendant transferee claimed that the notice of pendency should be canceled because he was not properly served with the summons and complaint within 30 days after its filing. As an alternative, defendant transferee requested that plaintiff be required to post a bond in the amount of \$500,000.

But, there were multiple defendants and one of them, a mortgagee of the realty, thus a defendant that (per the court) had "an ownership interest in [actually, a lien upon] the premises which are the subject of the litigation," had appeared within the 30-day period and demanded service of the complaint — an indication that it had been served with process within the time limit of CPLR 6512. And, if the mortgagee had been served within 30 days of filing the notice, then the fraudulent conveyance action was timely commenced for CPLR Article 65 purposes, the IAS court citing *Slutsky v. Blooming Grove Inn*, supra.

Arguably, that should have been the end of this disputation. It was not.

The problem, per the court, concerned service of process on the transferee. Substituted service was sought to be made upon him by delivery of process to a person of suitable age and discretion at the transferee's office on the 30th day after the notice of pendency was filed, but the mailing component of CPLR 308(2) did not occur until the next day, to wit: 31 days after filing of the notice. The transferee claimed that no one at his office was served.

The court stated that service at the transferee's office on the 30th day would have sufficed if the transferee had actually been present but avoiding service, citing *Schwartz v. Certified Management Corp.*<sup>20</sup> The court then stated that if the transferee had not been present, then the notice (referred to by the court as a "lis pendens") would be vacated based upon the timing of the mailing of process to the transferee.

The court, however, did not need to resolve that factual issue, instead deciding the case on the law, arising out of a procedural snafu.

The transferee, who claimed to have learned of the notice of pen-

gency only upon a title up-date of his intended resale of the property several months after the notice had been filed, served an answer disputing service and then timely moved to dismiss on that basis. Thereafter, the transferor filed for bankruptcy protection and the transferee withdrew the dismissal motion, voluntarily agreeing not to dispute the applicability of the automatic stay of 11 U.S.C. §362 to the fraudulent conveyance action. Subsequently, the stay was lifted by the bankruptcy court as it applied to the subject realty.<sup>21</sup> The transferee did not promptly renew his motion to dismiss.

Consequently, the IAS court, citing the 60-day time limit for prosecuting an alleged lack of service of process defense under CPLR 3211(e), held that the transferee's "time to controvert service has expired resulting in a waiver the result of which is that the process server's affidavit must stand uncontroverted (CPLR 3211[e])."

The court also denied the transferee's request to compel the plaintiff to post a bond, holding that:

"[CPLR 6515] addresses an application by a defendant to vacate a lis pendens [sic] in exchange for posting a bond. Vacatur of the lis pendens [sic] is conditioned upon posting a bond [by the defendant-owner], and the plaintiff may prevent vacatur by also giving an undertaking to indemnify the defendant for continuing the notice of pendency. The double bonding procedure of CPLR 6515 does not admit of an undertaking imposed upon the plaintiff only, which is improper as 'CPLR 6515 requires that the moving party, the defendant [-owner], post an undertaking' (*Andesco, Inc. v. Page*, 137 A.D.2d 349, 354). Accordingly, the motion is denied."

*Ungureanu v. Battaglia* involved a fence, built by defendant, which plaintiff alleged encroached upon her property. Plaintiff commenced a lawsuit for trespass and nuisance, and also sought removal of the fence.

Plaintiff filed a notice of pendency against defendant's property. Defendant moved to cancel the notice on the basis that the judgment demanded did not affect title to, or the possession, use or enjoyment of his property. The IAS court denied the motion, holding that "the essence of plaintiff's complaint involves a claim to possession of defendant's premises and is not, as claimed by defendant, merely an encroachment or wrong perpetrated by defendant upon plaintiff's property that cannot form the basis for the filing of a notice of pendency."

Further, the court also acknowledged that even though an action for trespass may or may not affect the

Further, the court also acknowledged that even though an action for trespass may or may not affect the title, possession or use of the disputed property, "the current state of the law is that such a possibility is sufficient to justify the filing of a notice of pendency," and sustained it. The court discussed the lead cases concerning when it was, and was not, appropriate to file a lis pendens or notice of pendency [compare, *Lafayette Forwarding*, supra, with, among others, *5303 Realty*, supra, and *Braunston*, supra], and concluded that, in this case, defendant's realty was affected by the plaintiff's action:

"Plaintiff's claim involves defendant's impermissible use of plaintiff's property by erecting a fence upon land plaintiff claims is hers. Defendant's application indicates that he claims that the fence was built on his land. Consequently, the nature of this dispute involves plaintiff seeking to protect his right, title or interest in property that defendant claims to possess. Clearly, if the plaintiff is correct, the boundary lines of defendant's property would be changed and defendant's use or enjoyment would be affected. This interest in the disputed property might be lost in the transfer of defendant's property to a buyer for value without notice of the claim. Compare, *Rose v. Montt Assets, Inc.*, supra. As such, plaintiff was entitled to file the instant Notice of Pendency. See, *Lafayette Forwarding Company, Inc. v. Rothbart Garage Operators*, [supra]. (An action to force defendant to remove a wall and return possession to plaintiff's premises was one brought to recover a judgment affecting the possession, use, or enjoyment of real property that justified filing a notice of pendency.) See, also, Weinstein, Korn [sic], & Miller, 1 NY Civil Practice, CPLR P6501.06."

The defendant also raised a CPLR 6512 claim. But, unlike *Evangelista*, supra, in *Ungureanu*, the IAS court held that service upon only one defendant within 30 days of filing the notice of pendency indisputably sustained it for the entire action:

"Defendant acknowledges an ownership interest in the property and that he was properly served. As such,

service upon only one defendant with an ownership interest in the subject property and against which the notice of pendency was filed is sufficient to satisfy CPLR 6512. *Weiner v. MKVII-Westchester, LLC*, 292 AD2d 597 (2d Dept 2002)."

The case of *Nastasi v. Nastasi* involved a family dispute arising out of an alleged breach of an agreement to transfer shares of the family business. In connection therewith, plaintiff sold realty to defendants and, upon the alleged breach, plaintiff sued for damages and either the imposition of a constructive trust upon, or reconveyance to her of, the realty. The claim for a constructive trust or reconveyance of the land sufficed to enable plaintiff to file a notice of pendency. There were clauses requiring arbitration of disputes found in both the contract to convey the realty as well as the document regarding transfer of the shares in the family business. Defendants moved to compel arbitration and to vacate the notice of pendency.

The IAS court found the arbitration clauses valid and, pursuant to CPLR 7503(a), directed arbitration of the claims raised by plaintiff in the action. But, the court denied the application to vacate the notice of pendency.

The court pointed out that a notice of pendency is not one of the provisional remedies that CPLR 7502(c) authorizes a court to impose in connection with an arbitration. But, the notice had been filed in connection with the earlier commenced action. Thus, it had been properly and validly filed under CPLR 6501. Therefore, the court held that CPLR 6514 did not apply, ruling that:

"[t]here is little a court may do to provide relief to the property owner if the procedures described in article 65 have been followed or if the action has been commenced or prosecuted in good faith."

The court went on to conclude that although CPLR 7502(c) does not authorize a notice of pendency to be filed in connection with a pending arbitration, there "is nothing [in article 75] to suggest that an existing Notice of Pendency must be canceled while the arbitration is pending."<sup>22</sup>

On the other hand, if arbitration initially had been brought, then the plaintiff — as the claimant in the arbitration — could not have filed a CPLR Article 65 ex parte notice of pendency. Instead, the claimant would have had to have shown some merit to the claim and post a bond to obtain either an injunction or an attachment as an aid to the arbitration. See CPLR 7502(c). And, it is clear that an ex parte notice of pendency may not be used in lieu of the judicial provisional remedies available in an arbitration that are more difficult to obtain.<sup>23</sup>

The decision in *Nastasi* seems correct since the earlier commenced litigation theoretically remains pending while the compelled arbitration proceeds. Nevertheless, arguably, it could inadvertently be used by a party who is subject to an arbitration clause yet, without a showing of merits or furnishing an undertaking, wishes to restrain the alienability of realty subject to the potential arbitration simply by commencing an action affecting the land and filing an ex parte notice of pendency. Under *Nastasi*, the unilateral imposition upon the land caused by the filed notice remains even though the filer is directed to arbitrate instead of proceeding with the litigation.

Yet, even then, all is not necessarily lost. The owner of the affected realty could move to vacate the notice under CPLR 6514(b). But, that invites additional litigation as to the bona fides of the commencement of the earlier action while the parties simultaneously arbitrate.

## Conclusion

The holdings of these cases emphasize the power and in terror effect of a properly filed ex parte CPLR Article 65 notice of pendency.

It continues to be an important and powerful provisional tool available to a plaintiff in a real property action, to immediately prevent the free conveying of the defendant's realty or an interest therein, even if the plaintiff later finds itself in a judicially compelled arbitration instead of the earlier commenced court action. And, if a plaintiff satisfies the strict requirements for filing a CPLR Article 65 ex parte notice of pendency, it is remarkably difficult for defendant-owners of the affected realty to vacate such notices whether the dispute proceeds in a court litigation or an arbitration forum.

1. *Evangelista v. VLS Enterprises Corp.*, \_\_\_ Misc. 3d \_\_\_, New York Law Journal, Jan. 21, 2004, p. 19, cols. 3-4 (Sup. Ct., Nassau Co.); *Ungureanu v. Battaglia*, \_\_\_ Misc. 3d \_\_\_, NYLJ, Jan. 21, 2004, p. 19, cols. 1-4 (Sup. Ct., Queens Co.); and, *Nastasi v. Nastasi*, \_\_\_ Misc. 3d \_\_\_, NYLJ, Jan. 2, 2004, p. 19, cols. 1-2 (Sup., Q. Co.).

2. The notices of pendency authorized by Real Property Actions and Proceedings Law §1331 (judicial mortgage foreclosure) and §1403 (foreclosure of mortgage by power of sale), are beyond the purview of this article. But, we note that while a plaintiff may not file a new CPLR Article 65 notice of pendency if the original has lapsed, e.g., *Matter of Sakow*, 97 N.Y.2d 436 (2002), a mortgagee may file a second RPAL §1331 foreclosure notice of pendency since a filed RPAL §1331 notice of pendency is a prerequisite to entry of a final judgment in a mortgage foreclosure action. E.g., *Chiarelli v. Kotsifos*, \_\_\_ A.D.2d \_\_\_, NYLJ, March 5, 2004, p. 26, col. 4 (2d Dept.); *Campbell v. Smith*, 309 A.D.2d 581, at 582 (1st Dept. 2003) (recalling and vacating that court's contrary prior decision, reported at 297 A.D.2d 502; [2002]).

3. 64 N.Y.2d 313, at 315 (1984); and, 147 A.D.2d 208, at 212 (2d Dept. 1989), respectively.

4. *In re Sakow*, supra, 97 N.Y.2d at 441 (2002)

—CPLR 6501), quoting from *Israelson v. Bradley*, 308 N.Y. 511, at 516 (1955 — Civil Practice Act §120).

5. 5303 Realty, supra, 64 N.Y.2d at 320.

6. Compare CPLR 6501 with CPLR 6301, 6312(a), with 6201(1)-(5), and with CPLR 7102(c).

7. E.g., *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 476 (1977) (holding that the purpose of requiring a plaintiff to post a bond is to reimburse the defendant for damages if the provisional remedy later is determined to have improperly been granted).

8. 5303 Realty, supra, 64 N.Y.2d at 318; *In re Sakow*, supra, 97 N.Y.2d at 436.

9. 5303 Realty, supra, 64 N.Y.2d at 318. See also, Civil Practice Act §120; Code of Civil Procedure §1670, deemed "a re-enactment of former statutes," *Hailey v. Ano*, 136 N.Y. 569, at 575 (1893); Code of Procedure, (see, Laws of 1848, Ch. 379, §111); and, earlier mortgage foreclosure statutes; *Murray v. Ballou*, 1 Johns Ch. 566 (1815 — NY Common Law); Rule 12 of Lord Chancellor Bacon's Ordinances for the Government of the Court of Chancery (1618).

10. Black's Law Dictionary, p. 942 (1999 7th Ed.).

11. CPLR 6501; 5303 Realty, supra, 65 N.Y.2d at 318.

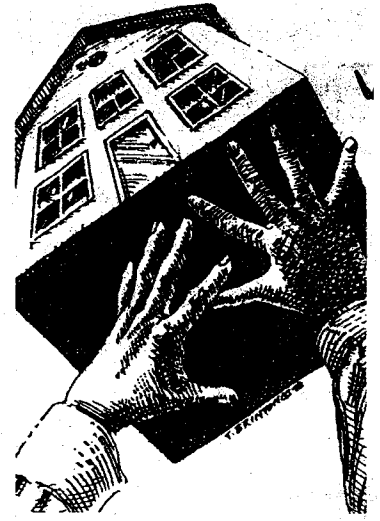
12. Compare, *Moeller v. Wolkenberg*, 67 App. Div. 487, at 489 (1st Dept. 1902 — Code of Civil Procedure §1670), discussed in text, infra, cited with approval in 5303 Realty, supra, 64 N.Y.2d at 322, and *Lafayette Forwarding Co., Inc. v. Rothbart Garage Operators, Inc.*, 205 App. Div. 247, at 249-250 (1st Dept. 1923) (citing both the Code of Civil Procedure §1670 and the early 20th Century Civil Practice Act §120), (an action to compel defendant to remove invasive support beams and an extension on plaintiff's land of a party wall, and to restore windows in plaintiff's building that were bricked over by defendant) — both cases sustaining the filed notices; with, *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, at 304-305 (1961 — Civil Practice Act §120) (an action to enjoin defendant from collecting rain water on its realty and "dumping" such water onto plaintiff's land, deemed an action to abate a nuisance) and, 5303 Realty, supra, (CPLR § 6501) (an action to specifically enforce a contract to sell 100 percent of the shares of an entity whose sole business was owning a general partnership, the sole business of which partnership was owning and operating a building which the plaintiff wanted to acquire) — the filed notices were vacated because these actions, while having some relationship to realty, did not seek to impact upon the defendants' real estate.

13. 67 App. Div. at 489-490.

14. In *Hailey*, supra, the court, quoting from *Hopkins v. McLaren*, 4 Conn. 678 (1825), noted that State Senator Colden had said that the reason why a filed lis pendens would give notice to non-party successor owners was to prevent the need for successive joinders of new parties, to wit: "the rule [was] to be that 'if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end of litigation; ... for as soon as a new party was brought in, he might transfer to another and render it necessary to bring that other before the court, so that a suit might be interminable'" *Hailey* was an action for damages due to a trespass and arose out of an earlier trespass action seeking only money, and there was nothing in the pleadings in the earlier trespass action sufficient to put a non-party purchaser on notice that an action was pending that would impact upon the lot line between and ownership of two parcels. Therefore, in *Hailey*, the court held that the common law doctrine of, and thereafter the codified, lis pendens did not apply.

15. 64 N.Y.2d, at 318, 319.

16. Id., at 319. Indeed, a notice of pendency is legitimate even if its sole purpose is to stop a sale of realty so long as the filer of the notice alleges in the complaint that the action seeks to affect an interest in the subject realty, although the filer also may have acted out of maliciousness in seeking to stop the sale, because a notice of pendency is not "process," the filing of which otherwise might expose the filer to an "abuse of process" claim. *Andesco, Inc. v. Page*, 137 A.D.2d 349, at 356-357 (and cases thereat)



(1st Dept. 1988); followed, *Griffin v. Tedaldi*, 228 A.D.2d 554, at 555 (2d Dept. 1996), and, *Roeder v. Rogers*, 206 F.Supp.2d 406, at 414 (W.D.N.Y., 2002).

But see, the earlier decision in *Parr Meadows Racing Ass'n, Inc. v. White*, 76 A.D.2d 858 (2d Dept. 1980) holding that notices of pendency are process and may support a claim for abuse of process; followed, *Klass v. Frazier*, 290 F.Supp.2d 425, at 427 (S.D.N.Y., 2003).

17. Compare CPLR 6501 with CPLR 6201(1)-(5) (attachment), CPLR 6312(a) (preliminary injunction) and CPLR 7102(c) (seizure), provisional remedies that require some showing of likelihood of success on the merits to grant and sustain each of those remedies.

18. *Moeller*, supra, 67 App. Div., at 489. Concomitantly, courts always have had the inherent power to cancel a lis pendens/notice of pendency when invalidly filed because the action in which it was filed did not seek to change defendant's title to, possession, use or enjoyment of the subject realty. E.g. *Schomaker v. Michaels*, 189 N.Y. 61, at 64 (1907), discussed with approval in *Lafayette Forwarding*, supra, 205 App. Div. at 250; *Moeller*, supra, 67 App. Div. at 492; *Braunston*, supra, 10 N.Y.2d at 305 (and cases thereat); and, *Rose v. Montt Assets, Inc.*, 250 A.D.2d 451, at 451-452 (1st Dept. 1998).

19. *Moeller*, supra, 67 App. Div., at 489, 490; see also, *Lafayette*, supra, 205 App. Div., at 249, 250.

20. 78 A.D.2d 823 (1st Dept. 1980).

21. The IAS court stated that the lift-stay order was dated June 13, 2003, but then alternately went on to state that it was a "June 7th order lifting the stay" and that the stay was lifted as of "June 6, 2003." It appears from the IAS court's opinion that defendant's renewed effort to controvert service was commenced more than 60 days after June 7 (defendant "had until August 7th to timely contest service once the stay was lifted"), thereby indicating that the lift-stay order was dated June 7. But, was the renewed motion timely if, as initially stated by the court, the stay "was lifted by order dated June 13, 2003"?

22. In dictum, the IAS court went on to state, "that given the ability to file a Notice of Pendency without court permission, it is likely that a Notice of Pendency may be filed after the commencement of the arbitration, as well." But, if only an arbitration is commenced, then it is questionable whether our codified notice of pendency is allowed to be filed, since CPLR 6501 requires that its notice may be filed in an action in court. Indeed, if the IAS court's needless dictum is correct, then that nullifies CPLR 7502(c). That section authorizes a court to impose an injunction or grant an attachment in connection with an arbitration — but, it is totally silent as to a court authorizing the filing, or without court permission allowing a party to the arbitration to file, a notice of pendency.

23. E.g., 5303 Realty, supra, 64 N.Y.2d at 324.