THE SUFFOLK LAWYER
THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION
DEDICATED TO LEGAL EXCELLENCE SINCE 1908
www.scba.org Vol. 30, No. 1 – September 2014

Non-Parties and the Notice of Pendency

By Lance R. Pomerantz

Many practitioners think of the notice of pendency ("NOP") as a routine paper that yields little in the way of controversy. Two recent New York Supreme Court determinations illustrate ways in which concerns about the rights of non-parties influence NOP practice.

The Unrecorded Contract of Sale

123 Powell, LLC v. Camacho, #23499/2013 (Sup. Ct., Queens Cty.) (reported at NYLJ 1202665019281, at *1, July 30, 2014) is an action for specific performance brought by a contract vendee, 123 Powell, LLC ("123 Powell"), against Camacho, the prior record owner. It turned out that Camacho had entered into two contracts, one with 123 Powell, and the other with Mansfield. Camacho wound up selling to Mansfield and 123 Powell brought the instant action, filing a notice of pendency against the property.

Mansfield, a non-party who was now trying to sell the property, sought to have the notice of pendency cancelled. The court (Justice McDonald) held that Mansfield had the right to seek cancellation despite her non-party status pursuant to CPLR §6514(b). That section permits the court, "upon motion of any person aggrieved … to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith." In her motion, Mansfield alleged that 123 Powell's bad faith arose from their commencement of the action despite constructive notice of Mansfield's recorded deed from Camacho.


Lance Pomerantz

While allowing Mansfield to move for cancellation, the court denied the motion. Mansfield was claiming superior title pursuant to RPL §294(3), whereby a recorded deed to a "subsequent purchaser … in good faith and for a valuable consideration" trumps an unrecorded executory contract executed by the same seller.

The court held that the affirmation of 123 Powell's attorney was sufficient to raise a question of fact concerning Mansfield's actual or inquiry knowledge about the 123 Powell contract at the time she purchased the property. There is nothing in the opinion to indicate that an affidavit of someone with first-hand knowledge of the situation was submitted in support of 123 Powell.

The Mistaken Cancellation

Up in Westchester County, an E-filing glitch in a mortgage foreclosure gave rise to an interesting situation.

Lender's counsel had commenced the action by E-filing a summons and complaint, along with a NOP. An index number was immediately assigned. The following day a law firm employee sent an email to the county clerk's office indicating that the filing was in error and requesting "cancellation" of the action along with a refund of the filing fees.

The county clerk issued the refund and deleted the docket entries, but otherwise left the electronic file intact, permitting the filing of papers in the future. Both parties continued to file papers until the order of reference was granted by the court, at which time the problem came to light. Lender's counsel then moved, pursuant to CPLR §2001, to reinstate the index number, the summons and complaint, and the NOP, upon payment of the applicable fees.

The court (Justice Connolly) granted the motion concerning the index number and the summons and complaint, but denied it regarding the NOP. Restoring the NOP *nunc pro tunc* to the original filing date "potentially implicates the interests of non-parties" *i.e.* "parties who acquired an interest in the property during the period that the notice of pendency was deleted from the County Clerk's records." In the court's view, this difficulty cannot be addressed merely by doing an updated search, because off-record interests such as tenants can be implicated.

CPLR 2001 directs that a "mistake, omission, defect or irregularity shall be disregarded" so long as a "substantial right of a *party* is not prejudiced [emphasis supplied]," but the lender was seeking to reinstate a document that is intended for the benefit of non-parties. The court held that, in this instance, "the purpose and spirit of the statute can only be accomplished if consideration is given to the potential prejudice that could be caused to non-parties by granting the requested relief." *Wells Fargo Bank, NA v Gonsalves,* 2014 NY Slip Op 24143 (Sup. Ct., Westchester County, June 3, 2014). The lender was permitted to file a new NOP, but without retroactive effect.

The court jumped through some semantic hoops to reach this result, namely, by finding that the word "party" "is susceptible of two or more significations," before concluding that "party" can also mean "non-party." It seems as though the court could have more easily couched the decision as allowing a "mistake in the filing process[,] to be corrected, upon such terms as may be just," which is also permitted under CPLR §2001.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title law newsletter "Constructive Notice." For more information, please visit www.LandTitleLaw.com.