No Second Chance for Expired Notices of Pendency

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A notice of pendency is filed in the county where the realty is situated (CPLR §6511) and is effective for three (3) years from the date of filing (CPLR §6513). Before expiration of the three (3) year period, the plaintiff may seek an extension of the notice of pendency for another three (3) year period upon motion to the court and the showing of good cause (Id.). The court order extending the notice period is to be filed, recorded and indexed prior to the expiration of the existing notice of pendency (Id.). A person aggrieved by a notice of pendency may, upon motion, seek to have the notice cancelled if, among other reasons, service of summons has not been completed within the statutory time prescription, the action has been settled, discontinued or abated or the plaintiff has not commenced or prosecuted the action in good faith (CPLR §6514(a), (b)).

The Sakow decision makes it imperative that a lienor docket the expiration date of the notice of pendency, since the failure to extend the lis pendens will result in the irretrievable loss of that remedy, with only limited exceptions. The inability to put the world on notice as to the claim would likely preclude the plaintiff from binding a prospective purchaser or lender to the results of the subject litigation.

The Court in Sakow made clear that the application for an extension must be requested prior to the expiration of the notice of pendency. In reaching its decision, the Court noted that the extension of the "no second chance" rule balances the interest of a plaintiff in preserving the status quo and the interest of the property owner in maintaining the ability to freely transfer the property unencumbered.

In Sakow, the two (2) daughters of Max Sakow, who died in 1956, instituted a compulsory accounting procedure against their mother and brother in 1984 claiming fraud, breach of fiduciary duty and unjust enrichment relating to Max Sakow's estate. Notices of pendency were filed by the daughters in

1987 and renewed in 1990. During the trial in 1994, the Surrogate authorized removal of the notices of pendency (the notices had not been extended by the beneficiaries prior to their expiration in 1993). In 1996, the Surrogate granted permission to the two (2) daughters to reinstate the notices of pendency. The notices were not filed, however.

In 1999, the Surrogate again granted permission to the two (2) daughters to reinstate the notices of pendency, reasoning that the purpose of the procedural requirements of CPLR §6513 is only to insure that there is continuous notice with no gaps created by failure to extend. Nothing in the statute, according to the Surrogate, prevented a subsequent notice of pendency to be filed in the same action and to take effect from the date of filing. The Appellate Division reversed the lower court ruling, and the Court of Appeals affirmed the Appellate Division decision, citing the plain language of the statute, legislative history, and underlying public policy.

According to the Court of Appeals, the requirement in CPLR §6513 that an extension of a notice of pendency be requested prior to its expiration is an exacting rule. "A notice of pendency that has expired without extension is a nullity" (citing 13 Weinstein, Korn & Miller, NY Civ Prac, §6513.04 (2000)). The Court did not distinguish between an expired or cancelled notice of pendency, noting that both are void. In Israelson, the Court stated that the privilege of a notice of pendency should not be used as a sword against the owner of realty. If the procedural requirements of the statute are not strictly complied with, the privilege is at an end. Thus, in Israelson, a cancelled notice of pendency could not be revived in the same cause of action. The Court applied this rule with equal force in this case of an expired notice of pendency.

The Court cited in support of its reasoning the legislative history underscoring the strict statutory requirements of filing a lis pendens. The predecessor to CPLR §6513, §121-a of the Civil Practice Act, established a three (3) year life to a notice of pendency to minimize the cloud on title and allow for the transfer of property free from encumbrances. That time limitation is much like the filing requirements of CPLR §6513 – both are designed to counterbalance the harsh effect of the filing of a notice of pendency. Allowing a notice to be filed after the previous notice has expired renders the time limit in CPLR §6513 useless. Thus, the Court held that an

expired or cancelled notice of pendency may not be re-filed in the same cause of action or claim.

The Court cited public policy to further support its holding. The Court explained that a notice of pendency clouds title without any judicial review or showing of likelihood of success of the action on the merits. To offset the ease with which a party's property can be encumbered, the Court has required strict compliance with the procedural requirements of the statute (citing 5303 Realty Corp. v. O&Y Equity Corp., 64 N.Y.2d 313, 319-20 (1984)).

The holding in Sakow clearly indicates that New York courts will strictly adhere to the procedural requirements of CPLR §6513 in evaluating a request for an extension of a notice of pendency. A motion for extension should be filed in sufficient time so that the court order can be recorded and indexed prior to the expiration of the existing notice of pendency. Plaintiffs cannot expect courts to extend the expiration date, although there have been cases, in instances of clerical error, where the court has directed recording and indexing of an order to extend a notice of pendency nunc pro tunc. For example, in H.M. Hughes Co., Inc. v. Carmania Corp., N.V. and Custom Art Metals, Inc., et al. (187 A.D.2d 287, 589 N.Y.S.2d 170 (1972)), the court ordered an extension of a notice of pendency where the plaintiff timely filed an extension order but the county clerk did not record and index the order. In H.M. Hughes, the plaintiff obtained a timely order to extend its notice of pendency, but failed to describe the affected property in the extension order. As a result, the county clerk did not record and index the order and the notice of pendency lapsed. The court held that under these circumstances it was proper to order that the notice of pendency be extended and recorded and indexed nunc pro tunc as of the date the plaintiff received an order to extend.

In Thelma Sanders & Associates, Inc. v. Hague Development Corp. (131 A.D.2d 462, 516 N.Y.S.2d 93 (1987)), two days before its notice of pendency was to expire, the plaintiff obtained an order to extend its notice of pendency. The next day, the plaintiff filed the order with the county clerk. The county clerk, however, failed to record and index the order. Noting that the plaintiff timely obtained and filed an extension of the notice of pendency and that it was the county clerk's error that resulted in the lapse of the

notice of pendency, the court held that it was proper to direct the recording and indexing of the order nunc pro tunc as of the date the plaintiff filed the order.

Counsel should note that the Second Department has recognized an exception to the "no second chance" rule where a plaintiff files successive notices of pendency in a mortgage foreclosure action, in which the filing of a notice of pendency is mandatory (New York Real Property Actions and Proceeding Law, §1331). In Slutsky v. Blooming Grove Inn, Inc., 542 N.Y.S.2d 721 (1989), and Robbins v. Goldstein, 320 N.Y.S.2d 553 (1971), the Second Department held that a lis pendens may be filed prior to the entry of final judgment even where the original lis pendens has been cancelled. The Court in Sakow did not address this exception to the general rule.

The cases indicate that, while the courts will have limited flexibility with the three (3) year rule where an extension order was recorded and indexed due to error, such a liberal interpretation will not apply to instances where the plaintiff simply failed to seek an extension. Critically, once this right under the CPLR to file a lis pendens expires, there is no reviving it. Counsel would be wise to advise their clients, in writing, of the expiration date of the lis pendens, and maintain their own effective docketing system to avoid the irreversible loss of a valuable remedy.