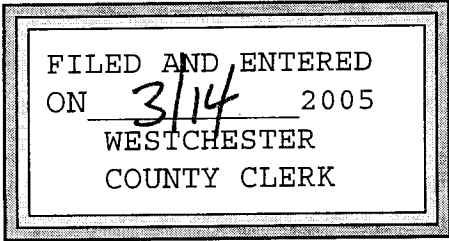


DECISION AND ORDER

To commence the statutory time period of appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.



**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY
Present: HON. ALDO A. NASTASI, J.S.C.**

-----X
MARIO V. GRECO,

Plaintiff,

- against -

ERIC BYRNE, ANDREA BYRNE, AND
DANIELS AND PORCO, LLP, AS ESCROWEE,

Defendants.
-----X

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Motion Date & Cal. No.
2/18/05 35

NASTASI, J.

The following papers numbered 1 to 14 read on this motion by defendants Byrne to cancel notice of pendency pursuant to CPLR 6501.

Papers Numbered

Order to Show Cause-Affidavits-Exhibits	1-9
Answering Affidavits-Exhibit	10-12
Replying Affidavit	13
Amended Complaint	14

Upon the foregoing papers it is ordered that this motion is disposed of as follows:

The motion by defendants to cancel the notice of pendency is granted (CPLR 6514). Submit order, on notice, directing the Clerk to cancel the notice of pendency filed by plaintiff and providing for an award of costs and expenses occasioned by the filing and subsequent cancellation, accompanied by defendants' counsel's affidavit specifically setting forth the costs and expenses incurred (CPLR 6513(c)).

It is well-settled that a notice of pendency may be filed in an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property (CPLR 6501; see 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 317-318; Wilson v. Power House Development Corp., 12 A.D.3d 505; Rajic v. Sarokin, 214 A.D.2d 663; Tsiporin v. Ziegel, 203 A.D.2d 451). The right thereto, however, is narrowly interpreted. In reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property, the court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501, but, rather, its analysis is to be limited to the face of the pleadings (5303 Realty Corp. v. O & Y Equity Corp., supra at 321; see Rajic v. Sarokin, supra at 664). Concomitantly, in reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501, the complaint filed with the notice of pendency must be adequate unto itself, and a subsequent, amended complaint cannot be used to justify an earlier notice of pendency (5303 Realty Corp. v. O & Y Equity Corp., supra at 320; citing Interboro Operating Corp. v. Commonwealth Security & Mortgage, Corp., 269 N.Y. 56; Keating v. Hammerstein, 196 App. Div. 18, 21; Van Tuyl v. New York Real Estate Security Co., 153 App. Div. 409, affd. no opinion sub nom. Carnegie Trust Co. v. New York Real Estate Security Co., 207 N.Y. 691; Jones v. Armenia Ins. Co., 136 App.Div. 453; Brox v. Riker, 56 App. Div. 388, 391; Kunz v. Bachman, 61 How. Prac. 519).

Here, the complaint served with the notice of pendency seeks only the return of the down payment and punitive and related damages and does not support the filing thereof (see e.g., Rajac v. Sarokin, supra; Tsiporin v. Ziegel, supra at 452; compare Macho Assets, Inc. v. Spring Corporation, 128 A.D.2d 680, 682-683). Plaintiff's protestations to the contrary notwithstanding, the service of an amended complaint provided to the Court, is simply of no moment.¹

To the extent that the amended complaint seeks to foreclose a "vendee's lien" to recover the down payment predicated upon paragraph 24 of the parties' contract of sale

¹Moreover, the Court notes that the copy of the amended complaint provided to this Court bears no proof of its filing with the County Clerk. Further, its purported verification by plaintiff is not notarized and thus a nullity. Similarly, the attorney certification is not signed.

dated September 27, 2004, declines to make any ruling with respect to any future notice of pendency which plaintiff may file or set an appropriate amount for a deposit or undertaking pursuant to CPLR 6515. This relief, requested in defendants' replying papers, must be the subject of a proper motion, on notice to plaintiff, pursuant to CPLR 6515.

Nevertheless, and in any event, the Court is constrained to note that pursuant to the clear and unequivocal terms of paragraph 24, the lien did "not continue after default, by Purchaser under this contract". Further, paragraph 33 of the Rider annexed to said contract prohibits the recording of any "notice" thereof in the Westchester County Clerk's Office or in any other land recording office relating to the premises, absent a default by the seller under the contract.

Thus, while this Court may not cancel a notice of pendency simply because it concludes that plaintiff will not finally prevail on the merits, it may nevertheless cancel a notice of pendency if it finds that plaintiff has not commenced or prosecuted the action which forms the predicate therefor "in good faith" (CPLR 6514(b); cf. Interboro Operating Corp. v. Commonwealth Security and Mortgage Corp., supra at 59; Twaite v. Buckhorn Estates, Inc., 84 A.D.2d 632).

The parties shall appear for a preliminary conference before Adolph Orlando, J.H.O. on March 31, 2005, at 10:00 a.m. in Room 806, the Preliminary Conference Part.

Unless it appears otherwise to the satisfaction of the Court at the preliminary conference, this matter will be differentiated "Standard".

The parties shall each complete, and file a Case Status Report on or before June 14, 2005. A copy thereof is enclosed herewith for all counsel. Said report must be filed with this Court's DCM Coordinator, Janice Leitner.

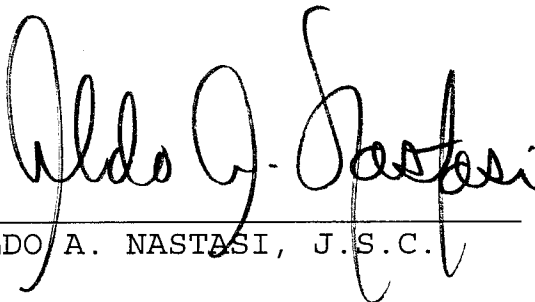
A compliance conference will be held on October 14, 2005.

A trial readiness conference will be held January 13, 2006. All discovery must be completed by that date. Any discovery not completed shall be deemed waived and/or appropriate sanctions imposed.

Any motion for summary judgment shall be made within thirty (30) days after the date of filing of the note of issue.

Counsel who appear at each conference must be familiar with the file and authorized to settle or dispose of the matter.

Dated: White Plains, New York
March 14, 2005


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