

COMMERCIAL DIVISION UPDATE

Expert Analysis

Direct Interest and Impact: Key Limitations on Notice of Pendency

A notice of pendency can be an important tool to protect a litigant's alleged rights in contested real property. A trio of recent Commercial Division cases, however, highlights critical judicial limitations on what constitutes a controversy impacting an interest in real property such as to make a notice of pendency proper.¹ While these limitations—which require that the impacted interest in property be a direct one, and that the relief sought directly impact that interest—circumscribe the factual situations in which a notice of pendency may be used, a careful pleading of the complaint might avoid them.

The Notice of Pendency

The filing of a notice of pendency protects the “right, title or interest claimed by a plaintiff in the lands of a defendant” in an ongoing litigation.² The filing of the notice functions by binding subsequent purchasers of the real property to the outcome of the litigation.³ In other words, if the plaintiff prevails on its claims, it may assert its rights to the real property even against a party who purchased the property from the defendant during the pendency of the dispute.

CPLR §6501 provides that a plaintiff may file a notice of pendency when the relief sought in an action “would affect the title to, or the possession, use or enjoyment of, real property.” The plain language of this section might suggest that an action having any conceivable bearing on the ownership or use of real property provides grounds to file a notice of pendency. Important judicial doctrines, however, limit its application.

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Direct Interest Required

Despite Section 6501's broad language, the New York Court of Appeals has confined the use of notices of pendency to cases in which the plaintiff alleges a direct interest in the property at issue.⁴ Justice Bernard J. Fried of the New York County Commercial Division recently examined, in *Ostad v. Nehmadi*,⁵ how this principle applies when a partner seeks to vindicate his or her interest in real property owned by the partnership.

Plaintiff David Ostad alleged that he held a 10 percent interest in a partnership, which in turn owned a limited liability company formed for the purpose of owning a parcel of real property. Ostad sought an accounting of proceeds generated by the real property and the imposition of a constructive trust on the limited liability company and on the real property. Based on these claims, Ostad filed a notice of pendency against the real property. The defendants moved to cancel the notice on the grounds that the dispute involved only Ostad's personal interest in the partnership, and not any direct interest in the real property.

In assessing the propriety of Ostad's notice of pendency, Justice Fried began by observing that the issue before the court was whether Ostad's asserted interest was an interest in real property, or merely an interest in the partnership, which is personal property. This distinction was critical because only a direct claim to contested real property itself supports a notice of pendency.⁶

Justice Fried noted multiple precedents holding that controversies involving interests in business entities holding real property did not involve sufficiently direct interests in the underlying real property to support a notice of pendency. Specifically, the courts have found that controversies over stock in corporations whose sole asset was real property and over interests in partnerships dealing in real property only indirectly impacted interests in real property.⁷ Justice Fried adopted the logic of these precedents in holding that Ostad sought to vindicate only his personal property interest in the partnership.⁸ That the partnership may have owned real property through a limited liability company did not give Ostad any direct interest in the property that could support a notice of pendency.⁹

Ostad attempted to avoid vacatur of his notice of pendency by pointing to his claim for the imposition of a constructive trust over the limited liability company's real estate. Justice Fried rejected this maneuver. Justice Fried had noted earlier in his decision that the court is not bound by the labels a plaintiff assigns to claims.¹⁰ Although Ostad did seek to impose a constructive trust directly over the real property, the “rest of the trust remain[ed] a partnership interest. ... That [Ostad] alleged a constructive trust... [was] not by itself enough to convert his claim into one [for which a notice of pendency was proper.]”¹¹ Because Ostad's artful pleading could not convert his interest in personal property—his partnership interest—into a claim for an interest in real property, the notice of pendency still failed.¹²

The Appellate Division, Second Department, came to a similar conclusion in *Sealy v. Clifton LLC*.¹³ In *Sealy*, a 50 percent member of a limited liability company sought judicial partition of the limited liability company's assets, which included its real property. The member, Daryl Sealy, filed a notice of pendency to protect his alleged interest in the property during the litigation. Writing for the Kings County Commercial

Division, Justice Sylvia O. Hinds-Radix had held that partition of the limited liability company's property would affect title to its real property; thus a notice of pendency was proper.¹⁴

The Second Department reversed, noting that a membership interest in a limited liability company is personal property, and that a member has no direct interest in the company's property.¹⁵ Because the interest Sealy sought to protect was his share of the partnership, he had no direct interest in the partnership's real estate. Sealy's claims therefore could not support a notice of pendency, and the Second Department held that the Commercial Division should have canceled the notice.¹⁶

Direct Impact Required

In addition to requiring that a plaintiff filing a notice of pendency plead a direct interest in the real property in dispute, the New York Court of Appeals has held that the relief sought in the action must relate to the statutory requirement for the filing of the notice, that the relief sought must directly affect title to or possession of the land.¹⁷ Justice Stephen A. Bucaria of the Nassau County Commercial Division addressed this requirement in his recent decision in *Gitlin v. Chirinkin*.¹⁸

In *Gitlin*, the plaintiff member of a limited liability company attempted to use a notice of pendency to protect his alleged interest in the company's real property. Asserting claims individually and derivatively on behalf of the company, Eduard Gitlin sued a fellow member of the company seeking damages for fraud, misappropriation, breach of fiduciary duty and self-dealing. Gitlin filed a notice of pendency against the defendant's personal residence, asserting that the member had purchased it with proceeds wrongfully diverted from the limited liability company.

In assessing the propriety of the notice of pendency, Justice Bucaria noted that such notice "is authorized to be filed in an action seeking a judgment that would affect the title to, or the possession, use or enjoyment of, real property."¹⁹ Because Gitlin sued derivatively on behalf of the limited liability company to recover the company's own property, Justice Bucaria entertained the notion that the suit concerned the company's alleged direct interest in the property.

Although a member of a limited liability company may not generally file a notice of pendency to protect his personal interest in the company's real property, an indirect interest in the real property, Justice Bucaria noted that a shareholder of a corporation may file a notice of pendency in a derivative action seeking to recover a corpora-

tion's real property.²⁰ Therefore, Justice Bucaria did not invalidate Gitlin's notice of pendency based upon the indirectness of Gitlin's interest, as the limited liability company's interest in the property was sufficiently direct.

Instead, Justice Bucaria took issue with the relief Gitlin sought. Gitlin's complaint sought money damages and dissolution of the limited liability company.²¹ It did not seek relief directly affecting title to the real property. Although Gitlin later tried to characterize his complaint as seeking a constructive trust over the property, the court disagreed even based on its "liberal reading" of the complaint. The court disregarded Gitlin's subsequent arguments and looked only to the face of the complaint.²² Because the action was merely one for money damages, and did not seek relief directly affecting the "title to, or the possession, use or enjoyment of the subject real property," Justice Bucaria canceled Gitlin's notice of pendency as improper.²³

A trio of cases highlights critical judicial limitations on what constitutes a controversy impacting an interest in real property such as to make a notice of pendency proper.

Lessons on Pleading

The decisions in *Gitlin*, *Ostad* and *Sealy* demonstrate the pitfalls awaiting members of a partnership or limited company or shareholders of a corporation who attempt to use a notice of pendency to protect their interests in their entity's real property. The limitations that these and other cases impose, however, may at times be circumvented by more creative pleading of the complaint. For example, the plaintiff in *Ostad* might have attempted to plead a derivative action on behalf of the partnership or the limited liability company holding a direct interest in the disputed property.

Similarly, the plaintiff's complaint in *Gitlin* might have sought for his limited liability company the remedy of a constructive trust over the real property for the various wrongdoings by the limited liability company's other member. Indeed, the New York Court of Appeals has recently confirmed the ability of a limited liability company or limited partnership member to sue derivatively and, with appropriate pleading, to take advantage of the benefits a notice of pendency provides.²⁴

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1. See *Gitlin v. Chirinkin*, No. 012131/07, 2011 WL 3276708 (Nassau Co. June 29, 2011) (Bucaria, J.); *Ostad v. Nehmadi*, No. 650460/10, 2011 WL 1420879 (N.Y. Co. April 8, 2011) (Fried, J.); *Sealy v. Clifton LLC*, 21 Misc.3d 1124(A), 873 N.Y.S.2d 515 (Kings Co. 2008), rev'd, 68 A.D.3d 846, 890 N.Y.S.2d 598 (2d Dept. 2009).
2. *Braunston v. Anchorage Woods*, 10 N.Y.2d 302, 305, 222 N.Y.S.2d 316, 317 (1961).
3. *Da Silva v. Musso*, 76 N.Y.2d 436, 440, 560 N.Y.S.2d 109, 110 (1990).
4. *Shihab v. 215-217 W. 10th St. Assocs.*, 133 Misc.2d 145, 148, 506 N.Y.S.2d 651, 653 (1986).
5. 2011 WL 1420879 (N.Y. Co. April 8, 2011).
6. *Id.*, at *3.
7. 2011 WL 1420879, at *3 (citing *Barash v. Estate of Sperlin*, 271 A.D.2d 558, 706 N.Y.S.2d 439 (2d Dept. 2000); *Gen. Prop. Corp. v. Diamond*, 29 A.D.2d 173, 286 N.Y.S.2d 553 (1st Dept. 1968)).
8. *Id.*, at *5.
9. *Id.*, at *5.
10. *Id.*, at *2.
11. *Id.*, at *8 (citations omitted).
12. *Id.*, at *2.
13. 68 A.D.3d 846, 890 N.Y.S.2d 598 (2d Dept. 2009).
14. 21 Misc.3d 1124(A), 873 N.Y.S.2d 515 (Kings Co. 2008).
15. 68 A.D.3d at 847, 890 N.Y.S.2d at 600.
16. *Id.*, 890 N.Y.S.2d at 600.
17. *5303 Realty Corp. v. O&Y Equity Corp.*, 64 N.Y.2d 313, 321, 486 N.Y.S.2d 877, 882-83 (1984).
18. 2011 WL 3276708 (Nassau Co. June 29, 2011).
19. *Id.*, at *10.
20. See *id.*
21. *Id.*
22. *Id.*; see also *Nastasi v. Nastasi*, 26 A.D.3d 32, 36, 805 N.Y.S.2d 585, 588-89 (2d Dept. 2005) (canceling a notice of pendency because the complaint failed to meet the statutory requirements).
23. 2011 WL 3276708, at *10.
24. See *Tzolis v. Wolff*, 39 A.D.3d 138, 829 N.Y.S.2d 488 (1st Dept. 2007), *aff'd*, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008).