NYSBA FALL 2009 | VOL. 37 | NO. 4

N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

Inside

NYSBA

Notices of Pendency: Protecting Sellers in Contracts for the Sale and Purchase of Real Property

By William W. Weisner and Amy Carper Mena

I. Introduction

You represent an elderly client selling a commercial property that is the most valuable asset in her estate. She is in poor health and needs the money to pay medical bills and living expenses. She receives a good offer from a buyer who has a reputation for being litigious. She has not received any other acceptable offers and does not want to lose this offer. She also fears that the property's value will decline in the near future. She asks you to draft a sales contract that will prevent the buyer from tying up the property if a dispute arises (or is invented by the buyer to gain negotiating leverage) before closing, because tying up the property until a dispute is resolved would cause her severe financial distress. You draft a firm contract with limited seller representations. Among other things, you also include a provision stating that the buyer covenants not to file a notice of pendency if a dispute arises. Is the provision enforceable? Should the buyer accept it? Is it necessary? This article provides guidance to real estate attorneys pondering these issues, and includes sample provisions to be used in appropriate circumstances.

II. Background

A. What Is a Notice of Pendency and When Is It Available?

Section 6501 of the N.Y. Civil Practice Law and Rules ("CPLR") provides that a notice of pendency is a notice filed in an action "in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property."[1] The filing gives constructive notice that an action concerning such real property is pending, and binds any person "whose conveyance or incumbrance is recorded after the filing . . . [to] all proceedings taken in the action after such filing to the same extent as a party."[2] A notice of pendency does not create a lien, although the effect from a conveyance standpoint is similar in some respects.[3] "A notice of pendency is a statutory device, superseding the harsher common law doctrine of *lis pendens*."[4]

The right to file a notice of pendency is absolute if the statutory prerequisites are met; the right to file is not subject to judicial discretion or prior judicial review.[5] A notice of pendency may not be filed in a summary proceeding brought to recover the possession of real property.[6] If the prerequisites are met, a notice of pendency may be filed in any action in a state or federal court.[7] The United States Court of Appeals for the Second Circuit recently rejected a due process challenge to the notice of pendency statute.[8]

B. How Do You File a Notice of Pendency?

The notice of pendency must be filed in the office of the clerk of any county where property affected is situated.[9] In an action to recover a judgment affecting the title to real property, the notice must state the names of the parties and the object of the action, and contain a description of the property affected.[10] Additional filing requirements are listed in CPLR 6511. Strict compliance with the statutory requirements is a condition precedent to a valid notice of pendency.[11]

A complaint must already be on file or be filed simultaneously with the notice of pendency.[12] A plaintiff and a cross-claiming or counterclaiming defendant may file a notice of pendency in actions where notices of pendency may be filed under CPLR 6501.[13] "A notice of pendency is effective only if, within 30 days after [its] filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed."[14]

Typically, no bond or other security is required to file a notice of pendency.[15] This distinction from other provisional remedies creates the potential for a purchaser to tie up a property by filing a notice of pendency without incurring any additional expense other than the cost of commencing an action and filing the notice. Although a property owner may bring a tort claim for the malicious filing of a notice of pendency,[16] such a remedy may involve difficult issues of proof, and provide little relief to an owner who does not have the means to litigate or where the notice filer has no assets.

C. How Long Is a Notice of Pendency Valid?

A notice of pendency is valid for three years.[17] Before the notice expires, a court may extend the notice for another three years upon plaintiff's motion, providing such notice as the court may require, and making a showing of good cause.[18]

D. What if the Property Is Sold to a Third Party While Title or Possession Is Subject to Litigation but No Notice of Pendency Has Been Filed?

If no notice of pendency has been filed, a purchaser cannot be charged with *constructive* notice of the litigation under Article 65 of the CLPR and, hence, will not be bound by proceedings taken in the action absent actual knowledge of the litigation.[19]

Pursuant to common law, a purchaser of real property will generally be bound by the consequences of a lawsuit of which he or she has *actual* knowledge.[20]

E. What if the Property Is Sold to a Good-Faith Purchaser for Value, but Between the Closing and Recording of the Deed, a Notice of Pendency Concerning the Property Is Filed by a Prior Contract Vendee?

Courts have interpreted N.Y. Real Property Law ("RPL") §§ 291 and 294(3) (the race-to-record statutes for good faith purchasers for value) as providing exceptions to the general rule of CPLR 6501 that a person whose conveyance or encumbrance is recorded after the filing of the notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as a party.[21] These courts have done so on the premise that a notice of pendency "does not create rights that did not already exist."[22] In *2386 Creston Avenue Realty v. M-P-M Management Corp.*,[23] the Appellate Division, First Department, held that plaintiff's filing a notice of pendency for a specific-performance action was fruitless where defendant had deeded the property to a third-party good faith purchaser for value before the notice of pendency was filed, but the deed was recorded after the notice was filed, on the grounds that plaintiff had failed first to record its contract and that "[t]he filing of a notice of pendency does not substitute for the recording of the contract of sale or conveyance."[24]

F. Practical Consequences

Generally speaking, a purchase of real property may proceed, not impacted by litigation concerning the real property, if the purchaser did not have actual or constructive notice of the litigation.[25] In other words, a court generally will not unwind a sale to a bona fide purchaser for value. Only an injunction would conclusively prevent a property owner from selling or mortgaging its property to a bona fide purchaser.

But, effectively, a notice of pendency is tantamount to an injunction in many respects. In *In re Sakow*, the N.Y. Court of Appeals observed:

> [W]e have referred to a litigant's ability to file a notice of pendency as an "extraordinary" privilege because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property. The notice of pendency is a unique provisional remedy, in that "the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review." Critically, the filing of a notice of pendency requires no showing of the likelihood of success on the merits of the cause of action. Thus, "a plaintiff can cloud a defendant's title merely by serving a summons and filing a proper complaint and notice of pendency stating the names of the parties, the object of the action, and a description of the property."[26]

Most potential purchasers will not contract to buy a property if a notice of pendency has been filed with respect to the property, or at least will not close on the purchase of a property until the notice, and perhaps the litigation, is discharged. Lenders, too, are unlikely to close a loan secured by such a property, because consummating the transaction would subject their mortgage to the litigation's result.

Unlike a party who files for a preliminary injunction, a notice-filer need not show a probability of success in the litigation to obtain a notice of pendency.[27] Compare this with a *lis pendens* filed under Connecticut law, which does require such a showing,[28] or compare this with New Jersey's requirement to show "a probability that final judgment will be entered in favor of the plaintiff."[29] In fact, the Second Circuit, in *Diaz v. Paterson*, noted that New York's "mere good-faith standard . . . does not afford the most meaningful process to a property holder burdened by a notice of pendency filed in conjunction with a patently meritless law suit."[30]

Judge Joseph M. McLaughlin has commented that "the notice of pendency is the one provisional remedy a plaintiff is free to employ without posting an undertaking to indemnify the defendant in the event the plaintiff loses the action,"[31] and that this right "lends itself to abuse at the hands of unscrupulous plaintiffs who may tie up the defendant's property during the lawsuit."[32]

Even where a seller prevails in the lower court, the notice of pendency may stay in place during an appeal if the purchaser receives a discretionary stay under CPLR 5519(c),[33] which would deter a title insurance company from insuring title unless the seller posts a large deposit with the insurer covering potential defense costs. Indeed, under New York case law, a title insurer has good reason to be wary of insuring title even after a notice of pendency has been dismissed.[34]

Before exploring possible remedies for this problem, we will first examine how and when a notice of pendency may be cancelled.

G. How May an Owner Cancel a Notice of Pendency?

The CPLR distinguishes between mandatory and discretionary cancellation of a notice of pendency.[35]

First, mandatory cancellation is called for under CPLR 6514(a) if (1) the summons has not been served within the 30-day time limit of CPLR 6512, (2) the action has been settled, discontinued, or abated, (3) the time to appeal from a final judgment against the plaintiff has expired, or (4) enforcement of a final

judgment against the plaintiff has not been stayed under CPLR 5519.[36]

Second, the court has discretion under CPLR 6514(b) to cancel a notice of pendency, upon motion of any person aggrieved and upon notice, if the plaintiff has not commenced or prosecuted the action in good faith.[37] According to the N.Y. Court of Appeals in *5303 Realty Corp. v. O & Y Equity Corp.*, a court's scope of review under CPLR 6514(b) is "circumscribed," and "[o]ne 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."[38]

CPLR 6515 also provides a court with discretion to cancel a notice of pendency. Under this provision, a court, upon motion of any aggrieved person in any action other than a foreclosure action as defined in CPLR 6516(b) or an action for partition or dower, and upon such notice as the court requires, may cancel a notice of pendency rightfully filed upon "terms as are just," even where the judgment demanded would affect specific real property, if the moving party (i.e., seller) provides:

> [A]n undertaking in an amount to be fixed by the court, *and* if:
>
> 1. the court finds that adequate relief can be secured to the plaintiff [i.e., the notice filer] by the giving of such an undertaking; *or*
>
> 2. in such an 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 or she may incur if the notice is not cancelled.[39] (emphasis added)

Courts generally have interpreted CPLR 6515 to call for cancellation of a notice of pendency, upon the property owner/seller's motion, if the property owner/seller provides an undertaking but the notice filer does not; however, where the notice filer provides an undertaking, courts have not cancelled the notice of pendency.[40] Notwithstanding the disjunctive word "or" connecting subsections (1) and (2) of CPLR 6515, thereby making either subsection applicable where "judgment demanded would affect specific real property," New York courts prefer to "double-bond" in actions for specific performance even when the notice filer's likelihood of success is doubtful,[41] thereby requiring the property owner/seller to post an undertaking to have the notice cancelled, but permitting the notice to remain in place if the notice filer also posts an undertaking. Query whether a property owner/seller should be required to maintain in place the undertaking that it posted to have the notice of pendency cancelled, where ultimately the notice is not cancelled because the notice filer also posted a bond under subsection (2) of CPLR 6515.

H. Amount of Undertakings

As briefly touched upon in the preceding section, the tortured language of CPLR 6515 has led to varying interpretations concerning who must post an undertaking, and, also, what the amount of such undertakings should be.[42] Courts usually focus on the damages that the other party would suffer if the notice of pendency is or is not cancelled, and a court's discretion is guided by the pleadings, the parties' acts, and the circumstances set forth in the affidavits, as well as the question of good faith, the probability of success, and the uniqueness of the property as revealed in the papers submitted.[43]

In *Weiss v. Alard*, the court held that the proper amount of the undertakings was the amount of the "benefit of the bargain" for each party.[44] The undertaking that the property owner/seller had to post was held to be the difference between the amount that the notice filer contended the property was worth ($1,750,000) over the contract price ($925,000), for an undertaking of $825,000; the notice filer's undertaking was held to be the property owner's prima facie benefit of the bargain, i.e., the contract price ($925,000).[45] But, in an older case, *Ansonia Realty Co. v. Ansonia Associates*, the Appellate Division, First Department, found that requiring the purchaser to post an undertaking representing the balance of the purchase price was disproportionate to any damages that defendants might suffer as a result of the continuance of the notice of pendency.[46]

In *Weksler v. Yaffe*, the court held that the notice of pendency should be cancelled if seller posted a bond equal to purchaser's lost profits and brokerage commission ($180,000), and if the purchaser failed also to post a bond in the amount of seller's potential damages if the notice of pendency were not lifted (measured as the cost of maintaining the property—$13,000).[47]

I. Permitted Forms of Undertakings

Undertakings under CPLR 6515 must comply with CPLR 2501, which defines an undertaking as either (1) an obligation containing a covenant by a surety to pay the required amount if any required condition is not fulfilled, or (2) any deposit, made subject to the required condition, of the required amount in legal tender of the United States or in the face value of unregistered bonds of the United States or of the state.[48] CPLR 2502 further provides that a surety must be:

> (1) an insurance company authorized to execute the undertaking within the state, or (2) a natural person, except an attorney, who executes with the undertaking his affidavit setting forth his full name and address and that he is domiciled within the state and worth at least the amount specified in the undertaking exclusive of liabilities of property exempt from application

to the satisfaction of a judgment.[49]

For undertakings of more than $1,000, which are not deposits of legal tender of the United States or bonds, and upon which a natural person is a surety, CPLR 2503 provides that such undertakings must be secured by real property located in the state that is worth the amount specified in the undertaking exclusive of encumbrances.[50] This undertaking will create a lien on the real property when recorded in the individual-surety-bond-liens docket where the real property is located.[51]

III. Protecting the Seller

A. Suggestions

Given the potential difficulty and cost in having a notice of pendency cancelled, a purchaser may effectively tie up a seller's property regardless of the merits of purchaser's claims.[52] A seller who cannot afford to have the property tied up until the dispute is resolved will be anxious to remove the lien quickly. The uncertain requirements of CPLR 6515 do not promise a quick resolution unless the seller is prepared to post a potentially significant undertaking and the purchaser does not, in turn, post its own undertaking. The purchaser has little to lose by filing a notice of pendency, and by making such a filing it gains substantial leverage to demand the return of some or all of its contract deposit.

Accordingly, it may be advisable under certain circumstances (such as the circumstances in which our elderly client found herself) for a property owner to address this problem by seeking an express waiver in the sale/purchase agreement of the purchaser's right to file a notice of pendency in the event of a dispute under the contract. Here is sample waiver language:

> Purchaser acknowledges and represents that it is purchasing the Premises solely for investment purposes and that from Purchaser's perspective there is nothing particularly unique about the Premises. Purchaser hereby irrevocably waives the right to file a notice of pendency (under Section 6501 of the New York Civil Practice Law and Rules or otherwise) in connection with any dispute, claims, actions, or proceedings arising under or related to this Agreement and the transactions contemplated hereby. Purchaser's filing a notice of pendency shall constitute a material breach by Purchaser entitling Seller to (a) terminate this Agreement, (b) demand and receive the Deposit from the Escrow Agent as liquidated damages for such breach (Purchaser agreeing that the amount of Seller's damages from the filing of such notice of pendency may be material and are difficult to quantify, and that the amount of the Deposit is a reasonable estimate of the possible damages that Seller may suffer therefrom), (c) obtain a dismissal of Purchaser's action, and (d) obtain a court order canceling the notice of pendency without posting any undertaking that might otherwise be required under Section 6515 of the New York Civil Practice Law and Rules or otherwise. If Purchaser files a notice of pendency for any reason, Escrow Agent may rely on this waiver and shall have no liability whatsoever if Escrow Agent releases the Deposit to Seller, and Purchaser shall be deemed to have waived (x) any and all claims that Purchaser may have against Seller and Escrow Agent, and (y) any right to receive a return of the Deposit.

Alternatively, the seller could permit the purchaser to file a notice of pendency if a dispute arises but only if the purchaser posts an additional contract deposit with the escrow agent under the contract at the time of filing a notice of pendency. This forces the purchaser to "put its money where its mouth is," discouraging a purchaser with a weak claim from filing a notice of pendency. Here is sample language for such a provision:

> If any dispute arises and litigation ensues between Purchaser and Seller in connection with this Agreement, Purchaser shall deposit with Escrow Agent an additional deposit of $_____ before and as a condition to Purchaser's filing a notice of pendency (in addition to all conditions provided by applicable law). Such additional deposit shall be added to and become a part of the Deposit for all purposes hereunder and shall constitute a reasonable estimate of the possible damages that Seller may suffer as a result of the additional period of time that the property may become unmarketable while a notice of pendency is in place, such damages being material and difficult to quantify. Purchaser's failure to provide the additional deposit described in this paragraph before filing a notice of pendency shall constitute a material breach by Purchaser entitling Seller to (a) terminate this Agreement, (b) demand and receive the Deposit from the Escrow Agent as

liquidated damages for such breach, (c) obtain a dismissal of Purchaser's action, and (d) obtain a court order canceling the notice of pendency without posting any undertaking that might otherwise be required under Section 6515 of the New York Civil Practice Law and Rules or otherwise. If Purchaser files a notice of pendency without providing such additional deposit, Escrow Agent may rely on this provision and shall have no liability whatsoever if Escrow Agent accordingly releases the Deposit to Seller, and Purchaser shall be deemed to have waived (x) any and all claims that Purchaser may have against Seller and Escrow Agent, and (y) any right to receive a return of the Deposit.

This requirement could be coupled with an additional provision that would require the purchaser to pay the seller's legal fees for litigation concerning the notice of pendency. If the purchaser believes that it has a valid claim, and the purchaser has the funds available, this is a reasonable position for the parties to take in appropriate circumstances.

As another alternative, the parties may consider contractually agreeing to the amount of the seller's undertaking under CPLR 6515(1), upon which posting the parties agree that a court should cancel a notice of pendency, along the lines of the following: "Seller's providing an undertaking of $_____ shall constitute adequate relief securing Purchaser within the meaning of section 6515(1) of the N.Y. Civil Practice Law and Rules. Upon Seller's providing such an undertaking, a court should cancel any notice of pendency that purchaser may have filed in connection with the real property."

Of course, the purchaser's readiness to agree to any of these options will be a function of its negotiating leverage.

B. Enforceability of Suggested Provisions

What if the purchaser files a notice of pendency despite the purchaser's waiver of its right to do so or the purchaser's failure to provide an additional deposit as required in the sale/purchase agreement? It is unclear whether or how a court will enforce these contractual provisions because there are no reported cases on point. Presumably, the parties are free to contract on these issues. The suggested provisions, including the provision concerning an agreed-upon amount of undertaking for cancellation of the notice of pendency, might also provide a factual basis for the court's consideration in cancelling the notice of pendency or requiring an additional deposit in light of the equities of the case, under a view that the purchaser would not have waived its rights under Article 65 of the CPLR if the purchaser considered the property specifically unique or that the purchaser's failure to abide by its agreement demonstrates bad faith.

The purchaser's counsel should note that by waiving the purchaser's right to file a notice of pendency, the purchaser may effectively relinquish its right to obtain specific performance of the seller's obligation to sell to the purchaser. No constructive notice of the purchaser's legal action would have been provided pursuant to CPLR Article 65, so a subsequent good faith purchaser/mortgagee for value may take free of the consequences of the litigation.[53] The purchaser may still be able to obtain specific performance if it can prove that the subsequent purchaser/mortgagee had actual notice.[54] Even where the purchaser cannot obtain an order of specific performance, if its claim in the action is meritorious, it may recover damages against the seller (assuming that the purchaser did not expressly waive its right to recover damages in the sale/purchase agreement).[55]

IV. Conclusion

Where does this leave our elderly client who needs to sell her property? Absent proper counseling and planning, she will be exposed to risk if confronted with an aggressive buyer who decides after signing (or perhaps before) that he does not wish to proceed with the transaction at the contracted price. The suggested contract provisions should eliminate or at least reduce her exposure.

Endnotes

1. N.Y. CPLR 6501 (McKinney Supp. 2009).
2. *Id.* (indicating that "[t]he pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed"); *see, e.g., Grid Realty Corp. v. Winokur*, 43 N.Y.2d 956, 957, 375 N.E.2d 376, 376, 404 N.Y.S.2d 315, 315 (1978) (concluding that a filed notice of pendency gave plaintiffs constructive notice of a foreclosure action and bound plaintiffs to the same extent as if they had been parties to the action).
3. *See Colombo v. Caiati*, 129 Misc. 2d 338, 340, 493 N.Y.S.2d 244, 246 (Sup. Ct. Rockland County 1985) (stating that a notice of pendency does not create a lien and does not restrain the conveyance of land, though an adverse judgment may affect title to the land).
4. *In re Sakow*, 97 N.Y.2d 436, 440–41, 767 N.E.2d 666, 669–70, 741 N.Y.S.2d 175, 178–79 (2002):

   > [T]he common–law lis pendens doctrine was replaced in most states by statutes requiring the filing of a notice of pendency before a would–be purchaser or encumbrancer would be charged with notice of the prior interest. This substantially reduced the harshness of the common–law rule because the notice of pendency was filed with the records pertaining to the real property itself, and third persons were charged with knowledge only of what appeared in those records. The

statutory filing requirement first appeared in New York in 1823, and continues in its current statutory expression in CPLR article 65.

See e.g., Da Silva v. Musso, 76 N.Y.2d 436, 440 n.1, 559 N.E.2d 1268, 1269 n.1, 560 N.Y.S.2d 109, 110 n.1 (1990) ("This filing procedure [of CPLR article 65] was adopted to mitigate the harshness of the former common-law rule, which bound the purchaser to the outcome of litigation pending at the time of the purchase, regardless of whether the purchaser had actual knowledge of, or even the practical means to discover, the existence of the pending action.").

5. *See Da Silva*, 76 N.Y.2d at 442, 559 N.E.2d at 1271, 560 N.Y.S.2d at 112 (stating that "CPLR 6501 permits a plaintiff who has commenced an action potentially affecting title to or the use and enjoyment of real property to file a notice of pendency, and thereby impair its marketability, *as a matter of right*").

6. *See* N.Y. CPLR 6501 (McKinney Supp 2009) (stating that "[a] notice of pendency may be filed in any action in a court of the state or of the United States . . . except in a summary proceeding brought to recover the possession of real property").

7. *See id.* (recognizing that "[a] notice of pendency may be filed in any action in a court of the state or of the United States . . . .").

8. *See Diaz v. Paterson*, 547 F.3d 88, 99–100 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2789 (2009) (stating that a "mere good-faith standard" used by the CPLR does not constitute a violation of due process).

9. *See* N.Y. CPLR 6511(a) (McKinney Supp. 2009) (noting that "[i]n a case specified in section 6501, the notice of pendency shall be filed in the office of the clerk of any county where property affected is situated, before or after service of summons and any time prior to judgment").

10. *See* N.Y. CPLR 6511(b) (McKinney Supp. 2009).

11. *See In re Sakow*, 97 N.Y.2d 436, 441, 767 N.E.2d 666, 670, 741 N.Y.S.2d 175, 179 (2002) (indicating that the New York Court of Appeals "require[s] strict compliance with the statutory procedural requirements [of CPLR article 65]").

12. *See* N.Y. CPLR 6511(a) (McKinney Supp. 2009).

13. *See* N.Y. CPLR 3019(d) (McKinney Supp. 2009) (providing that a cause of action contained in a counterclaim or a cross-claim must be treated as if it were contained in a complaint).

14. N.Y. CPLR 6512 (McKinney Supp. 2009) (defining when a notice of pendency is effective in relation to the summons being served); *see Israelson v. Bradley*, 308 N.Y. 511, 515–16, 127 N.E.2d 313, 315 (1955) (holding that the plaintiff could not file a second notice of pendency for the same cause of action, where a court had already canceled the same cause of action first filed by the plaintiff and the notice of pendency for a lack of service of summons).

15. *See Diaz v. Paterson*, 547 F.3d 88, 99–100 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2789 (2009) (analyzing the constitutionality of CPLR 6514(b) and its lack of a bond requirement).

16. *See Chappelle v. Gross*, 26 A.D.2d 340, 343, 274 N.Y.S.2d 555, 559 (1st Dep't 1966) (citing *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E.2d 268 (1937)) (acknowledging the tort of malicious prosecution, where a person uses a notice of pendency not for its legislatively intended purpose, but for a collateral object to damage another party). A discussion of a property owner's potential recourse against a notice filer for damages incurred as a result of the filing of a notice of pendency where the notice filer is ultimately unsuccessful in the litigation or chooses ultimately to default under the sales contract after filing a notice of pendency is beyond the scope of this article.

17. *See* N.Y. CPLR 6513 (McKinney 1980).

18. *See id.* (noting that "[b]efore expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period"); *In re Sakow*, 97 N.Y.2d 436, 442, 767 N.E.2d 666, 670–71, 741 N.Y.S.2d 175, 179–80 (2002) ("A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause."); *see also MCK Bldg. Assocs. v. St. Lawrence Univ.*, 5 A.D.3d 911, 912, 773 N.Y.S.2d 475, 476 (3d Dep't 2004) (holding that a mechanic's lien and the notice of pendency that extends it, expire if the plaintiff fails to obtain an extension of the notice pursuant to CPLR section 6513). *But see* N.Y. CPLR 6516 (McKinney Supp. 2009) (permitting successive notices of pendency in foreclosure actions defined therein); *Campbell v. Smith*, 309 A.D.2d 581, 582, 768 N.Y.S.2d 182, 183 (1st Dep't 2003) (permitting successive notices of pendency for prosecuting mortgage foreclosure action).

19. *See Grid Realty Corp. v. Winokur*, 43 N.Y.2d 956, 957, 375 N.E.2d 376, 376, 404 N.Y.S.2d 315, 315 (1978) (holding that the defendant was bound by a foreclosure action because the notice of pendency gave him constructive notice).

20. *See Patterson v. Brown*, 32 N.Y. 81, 96 (1865) ("Courts of equity do not relieve a party from the consequences of risks that he thus voluntarily assumes."). But note that the N.Y. Court of Appeals has found an exception to the general rule that a purchaser of real property will be bound by litigation of which the purchaser has actual knowledge at the time of the conveyance. *See Da Silva v. Musso*, 76 N.Y.2d 436, 438, 559 N.E.2d 1268, 1268–69, 560 N.Y.S.2d 109, 109–10 (1990) (holding that a purchaser of real property with actual knowledge of a pending (ultimately successful) appeal against the real property did not take subject to such litigation, where the original complaint in such litigation had been dismissed earlier on the merits and no notice of pendency or stay was in place). *But cf. Marcus Dairy v. Jacene Realty Corp.*, 298 A.D.2d 366, 368, 751 N.Y.S.2d 237, 239 (2d Dep't 2002) (holding that, where a notice of pendency had been vacated, but where the first mortgagee ultimately had been successful on appeal, a first mortgagee would have priority over a second mortgagee after weighing the fact that the first mortgagee had sought a stay, but the stay was denied and the first mortgagee, otherwise, would have no remedy). The *Da Silva* court's holding further underscores the fact that the common-law *lis pendens* doctrine has been replaced by the statutory notice-of-pendency framework. *Cf. Gaugert v. Duve*, 628 N.W.2d 861, 873, 244 Wis.2d 691, 713 (Wis. 2001) (rejecting the *Da Silva* court's reasoning on the basis of the lack of "any intent [in Wisconsin's statutory lis pendens] to abandon the application of common law principles of lis pendens").

21. *See, e.g., 2386 Creston Ave. Realty v. M-P-M Mgmt. Corp.*, 58 A.D.3d 158, 160–61, 867 N.Y.S.2d 416, 418–19 (1st Dep't 2008) (holding that "[a]lthough New York is a 'race-notice' state, plaintiff's failure to avail itself of the protection of either § 291 or § 294 deprives it of the right to substitute a notice of pendency for the recording of a conveyance or a contract") (citing *Avila v. Arsada Corp.*, 34 A.D.3d 609, 610, 826 N.Y.S.2d 322, 323 (2d Dep't 2006); *Finkleman v. Wood*, 203 A.D.2d 236, 238, 609 N.Y.S.2d 655, 657 (2d Dep't 1994)); *LaMarche v. Rosenblum*, 50 A.D.2d 636, 636–37, 374 N.Y.S.2d 443, 444–45 (3d Dep't 1975) (holding that a sale of real property to third parties would not be disturbed where the plaintiff filed an action for specific performance and a notice of pendency after the defendant contracted to sell the property to the third parties but before the third parties recorded their contract of sale, on the grounds that the plaintiff would "not now be heard to argue that his filing of a notice of pendency serves as a substitute [for recording his purchase contract under subdivision 3 of section 294 of the Real Property Law] and affords him the same protection since such notices have as their general object the preservation of existing property rights during litigation").

22. *2386 Creston Ave.*, 58 A.D.3d at 161, 867 N.Y.S.2d at 419 (citing *Varon v. Annino*, 170 A.D.2d 445, 445, 565 N.Y.S.2d 540, 541 (2d Dep't 1991)).

23. 58 A.D.3d 158, 867 N.Y.S.2d 416 (1st Dep't 2008).

24. *Id.* at 160, 867 N.Y.S.2d at 419 (citing 11 WARREN'S WEED NEW YORK REAL PROPERTY § 115.04 (5th ed. 2004)).

25. *See* N.Y. CPLR 5523 (McKinney 1995) (providing that the court may not order restitution of property or rights lost by a prior court order ultimately reversed or modified if the title of such property of a purchaser in good faith and for value would be affected; in that case, the court may order only that the value or the purchase price be restored or deposited in court). *But cf. Da Silva*, 76 N.Y.2d at 442, 559 N.E.2d at 1271, 560 N.Y.S.2d at 112 (noting that "the 'good faith' [under CPLR 5523] of a purchaser who has acquired the property for value during the pendency of claimant's appeal is not vitiated by the purchaser's actual knowledge of the appeal," where the notice of pendency had been cancelled).

26. *In re Sakow*, 97 N.Y.2d, 436 441, 767 N.E.2d, 666 670, 741 N.Y.S.2d 175 179 (quoting *Da Silva*, 76 N.Y.2d at 442, 559 N.E.2d at 1268, 560 N.Y.S.2d 109, *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 476 N.E.2d 276 (1984), and *Israelson v. Bradley*, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955)).

27. *See Da Silva v. Musso*, 76 N.Y.2d 436, 442, 559 N.E.2d 1268, 1271, 560 N.Y.S.2d 109, 112 ("[T]he claim on which the notice of pendency is based need not necessarily be a meritorious one.") (referencing JOSEPH M. MCLAUGHLIN, MCKINNEY PRACTICE COMMENTARY, N.Y. CPLR 6501 (McKinney 1987)).

28. CONN. GEN. STAT. § 52–325b(a) (2005) (requiring that the notice filer "establish that there is probable cause to sustain the validity of his claim").

29. N.J. STAT. ANN. § 2A:15–7(b) (West 2000).

30. *Diaz v. Paterson*, 547 F.3d 88, 99–100 (2d. Cir 2008).

31. JOSEPH M. MCLAUGHLIN, MCKINNEY PRACTICE COMMENTARY, N.Y. CPLR 6515 (McKinney 1980).

32. *Id.*

33. *See* N.Y. CPLR 5519(c) (McKinney 1995) (providing that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings . . . .").

34. *See, e.g., Marcus Dairy v. Jacene Realty Corp.*, 298 A.D.2d 366, 368, 751 N.Y.S.2d 237, 239 (2d Dep't 2002). The Second Department held that a first mortgagee had priority over a second mortgagee, even though the second mortgage had been entered into after the dismissal of a notice of pendency filed by the first mortgagee, in part based upon the fact that the ultimately successful appellant first mortgagee would have had no effective remedy if it were to lose its priority, whereas the second mortgagee had a claim against its title insurance company. The court so held, even though, similar to the facts of *Da Silva*, the lower court had vacated the first mortgagee's notice of pendency, and further directed that the first mortgage be cancelled and discharged of record, and no CPLR 5519 stay of the lower court's judgment was in place during the first mortgagee's ultimately successful appeal of the case—but a stay had been sought, unlike in *Da Silva*. The lower court's judgment had been entered into the county clerk's office and the notice of pendency had been cancelled, but the judgment was never actually recorded in the land records, and, consequently, the first mortgage was never discharged of record. Interestingly, when the title company insured the second mortgage, it had discovered that the first mortgage still existed as an open item in the land records, but insured title without excepting the first mortgage in light of (1) the canceled notice of pendency, and (2) the holding of the N.Y. Court of Appeals in *Da Silva*, that actual knowledge did not vitiate the good faith of a purchaser acquiring property for value during a pending appeal where the notice of pendency had been cancelled because no CPLR 5519 stay was in place during the appeal. [Editor's Note: This case is also discussed in Bruce J. Bergman, "Oh, Do Lenders Need Title Insurance!", which appears on page 42 of this *Journal*.]

35. *See* N.Y. CPLR 6514(a), (b) (McKinney 1980) (defining mandatory cancellation in section 6514(a), and defining discretionary cancellation in section 6514(b)).

36. *See* N.Y. CPLR 6514(a) (McKinney 1980).

37. N.Y. CPLR 6514(b); *see also, e.g., Israelson v. Bradley*, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955) (canceling a second notice of pendency filed for the same cause of action brought in Supreme Court, where the County Court had already canceled the plaintiff's first filed action and notice of pendency for failure to serve summons and complaint).

38. *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320, 476 N.E.2d 276, 280, 486 N.Y.S.2d 887, 881 (1984) (citing *Interboro Operating Corp. v. Commonwealth Sec. & Mortgage Corp.*, 269 N.Y. 56, 59, 198 N.E. 665, 666 (1935); *Keating v. Hammerstein*, 196 A.D. 18, 21, 187 N.Y.S. 446, 448 (1st Dep't 1921); *J. Henry Small Realty Co. v. Barnett Strauss*, 162 A.D. 658, 659, 147 N.Y.S. 478, 478 (2d Dep't 1914); *Brox v. Riker*, 56 A.D. 388, 391, 67 N.Y.S. 772, 774 (1st Dep't 1900)); *see also Interboro Operating Corp.*, 269 N.Y. at 59, 198 N.E. at 666 ("[N]otice of pendency may not be canceled for the reason that a court, looking into the future, may conclude that plaintiff will not on the merits finally prevail. So long as this action is pending, the notice may not be canceled.") (citing *Schomacker v. Michaels*, 189 N.Y. 61, 65, 81 N.E. 555, 556 (1907); *Beman v. Todd*, 124 N.Y. 114, 116, 26 N.E. 326, 327 (1891); *Mills v. Bliss*, 55 N.Y. 139, 141 (1873); *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 62 A.D. 538, 538, 71 N.Y.S. 82, 82 (3d Dep't 1901)).

39. N.Y. CPLR 6515 (McKinney Supp. 2009).

40. *See, e.g., Weiss v. Alard*, 150 F. Supp. 2d 577, 583–84 (S.D.N.Y. 2001) (maintaining a notice of pendency under CPLR 6515(2) because the notice filer offered to post undertaking, but noting that the notice filer need not post an undertaking, and notice of pendency will stay in place, if property owner fails to post undertaking); *Ansonia Realty Co. v. Ansonia Assocs.*, 117 A.D.2d 527, 527–28, 498 N.Y.S.2d 141, 142 (1st Dep't 1986) (affirming the cancellation of the notice of pendency if property owner posts bond and notice filer does not "opt to retain the notice" by filing undertaking); *Weksler v. Yaffe*, 129 Misc. 2d 633, 637–38, 493 N.Y.S.2d 682, 686 (Sup. Ct. Kings County 1985) (stating that notice filer may maintain notice by posting undertaking, and if notice filer does not post undertaking, notice will be canceled upon property owner's posting of undertaking because property was not unique). *See also* JOSEPH M. MCLAUGHLIN, MCKINNEY PRACTICE COMMENTARY N.Y. CPLR 6515, at 1 (McKinney 1980) (questioning whether every notice filer should be required to post an undertaking to indemnify the property owner/seller without first requiring the property owner/seller to put up an undertaking). In fact, a four-member plurality of the Supreme Court reached the (non-precedential) conclusion that the absence of a bond requirement in Connecticut's prejudgment attachment statute violated due process, *see Connecticut v. Doehr*, 501 U.S. 1, 1–3, 111 S.Ct. 2105, 2107–08, 115 L. Ed. 2d 1, 2 (1991). *But see Diaz v. Paterson*, 547 F.3d 88, 100 (2d Cir. 2008) (rejecting the property owners' claim that due process required that the notice filer post a bond in every case).

41. *See Weiss*, 150 F. Supp. 2d at 583 (S.D.N.Y. 2001) ("New York courts have held that 'double-bonding' is '[p]referable even when plaintiff's likelihood of success is doubtful.'") (quoting *Andesco v. Page*, 137 A.D.2d 349, 357, 530 N.Y.S.2d 111 (1st Dep't 1988)).

42. *See, e.g., id.*

43. *See, e.g., Ansonia Realty*, 117 A.D.2d at 527–28, 498 N.Y.S.2d at 142 (holding that the amount of undertaking should be the amount of damages that each party would suffer); *Weksler*, 129 Misc.2d at

638, 493 N.Y.S.2d at 686 (holding that undertakings should be the amount of damages in light of the weakness of defendant's case).

44. 150 F. Supp. 2d 577, 583 (S.D.N.Y. 2001) ("The amount of the respective undertakings is a matter of discretion to be informed by the pleadings, the acts of the parties and the circumstances set forth in their affidavits.") (quoting *Ronga v. Alpern*, 45 Misc. 2d 1029, 1031, 258 N.Y.S.2d 731 (Sup. Ct. Bronx County 1964)).

45. *See Weiss*, at 584.

46. *See Ansonia Realty*, 117 A.D.2d at 527–28, 498 N.Y.S.2d at 142 (holding that seller's undertaking would be $2.5 million as the amount of the purchaser's potential damages, and purchaser's undertaking would be $4 million rather than the $38.5 million balance of the purchase price).

47. 129 Misc. 2d 633, 638, 493 N.Y.S.2d, 682 686 (Sup. Ct. Kings County 1985).

48. *See Weksler v. Yaffe*, 129 Misc. 2d 633, 637, 493 N.Y.S.2d 682, 686 (Sup. Ct. Kings County 1985) (quoting N.Y. CPLR 2501); *see also* N.Y. CPLR 2501 (McKinney 1991).

49. N.Y. CPLR 2502 (a) (McKinney 1991) (defining surety).

50. *See* N.Y. CPLR 2503(a) (McKinney 1991) (defining an undertaking of more than one thousand dollars).

51. *See id.*

52. *See, e.g., Da Silva v. Musso*, 76 N.Y.2d 436, 442, 559 N.E.2d 1271, 1271, 560 N.Y.S.2d 109, 112 (1990) (stating that a claim for a notice of pendency need not be meritorious).

53. *See* N.Y. REAL PROP. LAW §§ 291, 294(3) (McKinney 2006) (stating that any conveyance of real property not recorded is void against any subsequent good faith purchaser who duly first records the conveyance); N.Y. CPLR 5523 (McKinney 1995) (stating that a court reversing a final judgment of lost property rights may order restitution except where the title of a good faith purchaser may be affected); *2386 Creston Ave. Realty v. M–P–M Mgmt. Corp.*, 58 A.D.3d 158, 160, 867 N.Y.S.2d 416, 418–19 (1st Dep't 2008) (arguing that "[w]hen two or more prospective buyers contract for a certain property, pursuant to Real Property Law §§ 291 and 294, priority is given to the buyer whose conveyance or contract is first duly recorded.").

54. *See, e.g., Da Silva*, 76 N.Y.2d at 439, 559 N.E.2d at 1270, 560 N.Y.S.2d at 110 (holding that "a purchaser of real property is bound by the consequences of a lawsuit of which he has actual knowledge," and that a notice of pendency can be filed to bind a subsequent purchaser to the extent as if he were a party to the action).

55. *See* N.Y. CPLR 5523 (stating that "A court reversing or modifying a final judgment or order or affirming such a reversal or modification may order restitution of property or rights lost by the judgment or order, except that where the title of a purchaser in good faith and for value would be affected, the court may order the value or the purchase price restored or deposited in court."); *see also Da Silva*, 76 N.Y.2d at 440-41, 559 N.E.2d at 1270, 560 N.Y.S.2d at 111 (noting that a plaintiff may obtain only "monetary relief in cases where the owner has exercised his rights under the unstayed judgments and transferred the property to a 'good faith' purchaser for value.").

William W. Weisner is a partner at Patterson Belknap Webb & Tyler LLP in New York City. Amy Carper Mena is an associate at Patterson Belknap Webb & Tyler LLP.