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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

223 SAM LLC and AARON WEXLER,

Plaintiff,

- against -

**223 15TH STREET LLC, MAG 2011 TRUST,
MANUEL GOLDSCHMIDT, Trustee, and
VIVIANA GOLDSCHMIDT, Trustee,**

Defendants.

**TRIAL/IAS PART 19
Index No.: 602838-16
Motion Date: 11/10/16
Sequence No.: 002**

DECISION AND ORDER

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The following papers were read on this motion:

Notice of Motion, Affirmation, M. Goldschmidt Affidavit.....	1
Exhibits to Motion.....	2
Attorney Affirmation and Exhibits.....	3
Plaintiffs' Memorandum of Law.....	4
Reply Affirmation and M. Goldschmidt Affidavit.....	5

PRELIMINARY STATEMENT

Defendants bring this application for an order: (1) pursuant to CPLR §§ 6501 and 6514(c) cancelling the Notice of Pendency dated May 12, 2016 filed by plaintiff and referring the matter for an inquest on the costs and expenses suffered by defendants; (2) pursuant to CPLR §§ 3211 and 3212 granting defendants partial summary judgment dismissing the complaint as a matter of law in view of the absence of any material issue of fact warranting direction of judgment in favor of defendants and against plaintiff; awarding defendants' partial summary judgment on their first and second counterclaims and referring the matter for an inquest to determine the amount of defendants' damages and sanctions for having to defend against this frivolous action and the improper filing of said Notice of Pendency; and (3) granting such other and further relief as this Court may deem just and proper. Plaintiffs have submitted opposition to this application.

BACKGROUND

Plaintiffs commenced this action by filing of a Summons and Complaint dated April 22, 2015. The Complaint alleges that defendant 223 15th ST LLC is the fee owner of commercial property located at 223 15th Street, Brooklyn, New York. It further alleges that plaintiff 223 SAM LLC is a 50% member of 223 15th ST LLC, and is the sole manager of 223 15th ST LLC, and is the sole entity with authority to bind 223 15th ST LLC. Plaintiff Aaron Wexler is the principal of 223 SAM LLC.

The Complaint alleges that on or about July 1, 2014, plaintiff 223 SAM LLC and defendant MAG 2011 TRUST, entered into an agreement. Alternatively 223 SAM LLC and Aaron Wexler entered into a partnership with defendant MAG 2011 TRUST, which joint venture concerned the same undertaking as the Agreement and was upon substantially the same terms of the Agreement.

Plaintiffs contend that as a result of the Agreement, 223 SAM LLC obtained a 50% membership interest in defendant 223 15th LLC, and 223 SAM LLC, and its principal, Aaron Wexler were designated the sole and exclusive manager of 223 15th ST LLC, with complete authority and control of the business and operations of 223 15th ST LLC.

Plaintiffs claim that, in furtherance of this Agreement, they undertook the management responsibilities for the premises, retained counsel to pursue proceedings before the New York City Loft Board and/or Office of Administrative Trials and Hearings, negotiated with tenants, managed the legal affairs of 223 15th ST LLC, and expended no less than \$40,000.00 in connection with the management of the premises.

Plaintiffs' Complaint seeks a Declaratory Judgment that 223 SAM LLC is a 50% member of 223 1st ST LLC, that 223 SAM LLC and Aaron Wexler are the sole managers of 223 1st ST LLC, and that 223 SAM LLC has the sole, full, exclusive and complete authority and control of the business operations of 223 15th ST LLC and the sole power and authority to do any and all acts for the furtherance of the purposes of 223 15th ST LLC.

Defendants served an Answer with Counterclaims dated June 9, 2016, which contained Affirmative Defenses and Two Counterclaims. The First Counterclaim is for injunctive and declaratory relief with respect to the filing of the Notice of Pendency, together with monetary damages in excess of \$250,000.00. The Second Counterclaim alleges that the action commenced by plaintiff is frivolous and that the Court should impose sanctions and their counsel, entitling them to legal fees, costs and disbursements incurred in the defense of the claims brought by

plaintiffs.

Defendants have served a Demand for a Bill of Particulars and Demand for Production of Documents upon which plaintiff bases its claims. No such documents have been produced. Counsel for plaintiffs filed a Notice of Pendency dated May 12, 2016, stating that plaintiffs have brought an action seeking declaratory judgment, injunctive relief, and monetary damages based upon unjust enrichment, promissory enrichment and breach of a contract related to a membership interest in 223 15th ST LLC, and the management and operation of the real property known as 223 15th Street, Brooklyn, New York. The Notice of Pendency was to be indexed against the property under Block 01042, Lot 75.

DISCUSSION

Plaintiffs are not seeking relief in their Complaint which affects title to real estate. The filing of the Notice of Pendency, and the refusal to withdraw it were unwarranted. Plaintiffs are seeking declaratory relief that they are 50% members of the owner of the real property, but this has no bearing on the fact that the company is the fee holder of the property. “A notice of pendency may be filed only when ‘the judgment demanded would affect the title to, or possession, use or enjoyment of real property.’” (*Delidimitropoulos v. Karantinidis*, 142 A.D.3d 1030 [2d Dept. 2016], quoting CPLR §6501). The motion by defendants to cancel the Notice of Pendency dated May 12, 2016, and filed in the Office of the Kings County Clerk, is granted.

On its face, the Complaint in this action does not seek relief that would affect the title to, or the possession, use or enjoyment of real property. Rather, it seeks a determination that plaintiff 223 SAM LLC is a 50% member of the owner of the real estate, that they are entitled to a determination that they are authorized to act as the sole managers of the property, and that they are entitled to make business decisions with respect to 223 15th ST LLC.

The conduct by plaintiffs in this action is frivolous. A litigant’s ability to file a notice of pendency is an “ ‘extraordinary privilege because of the relative ease by which it can be obtained.’ ” (*Id.*, quoting *Matter of Sakow*, 97 N.Y.2d 436, 441 [2002]) , and because it permits a party “ ‘to effectively retard the alienability of real property without any prior judicial review.’ ” (*Id.*, quoting *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320 [1984]).

Plaintiffs’ filing of a Notice of Pendency in the first instance, and then refusing to vacate it after defendants’ demand of August 5, 2016 (Exh. “I”) was “ ‘completely without merit in law and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law’ ”, and was therefore frivolous within the meaning of 22 NYCRR 13–1.1. (*Id.*,

citing *Makan Land Dev.-Three, LLC v. Prokopov*, 42 A.D.3d 439 [2d Dept. 2007], and *Congel v. Malfitano*, 61 A.D.3d 807 [2d Dept. 2009]).

The cancellation of the Notice of Pendency is being ordered pursuant to the inherent power of the Supreme Court, and not pursuant to CPLR § 6514(a) or (b). The Court has no authority to award costs and disbursements under CPLR 6514(c). (*Id.*, citing *Congel v. Malfitano*, supra at 809). It is therefore:

ORDERED, that the Notice of Pendency is cancelled and this matter shall be set down for an hearing on the 27th day of February, 2017, in the Calendar Control Part, subject to the approval of the Justice there presiding, and provided that a Note of Issue has been filed at least thirty-five (35) days prior thereto, to assess the issue(s) of amounts of costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees to be awarded from plaintiffs' improper filing of the Notice of Pendency. This directive with respect to a hearing is subject to the right of the Justice presiding in the Calendar Control Part to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate; and it is further

ORDERED, that defendants shall serve a copy of this order upon plaintiffs' counsel, by ordinary mail, and it is further

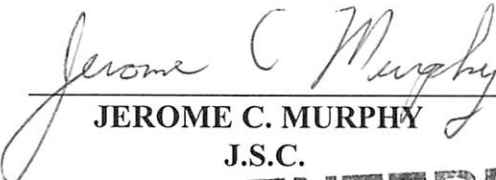
ORDERED, that a copy of this order shall be served on the Calendar Clerk along with the Note of Issue. The failure to file a Note of Issue as directed or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 23, 2016

ENTER :


JEROME C. MURPHY
J.S.C.

ENTERED

JAN 09 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE