SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	Index No. 609510/2016
Plaintiffs,	Hon. Jerry Garguilo
-against-	Motion Sequence Nos. 008 and 009
JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	**AFFIRMATION OF FRANKLIN C. MCROBERTS IN OPPOSITION TO MOTION TO EXTEND AND IN SUPPORT OF CROSS-MOTION TO CANCEL NOTICE OF PENDENCY AND FOR SANCTIONS**
Defendants.	

FRANKLIN C. MCROBERTS, an attorney admitted to practice law in the courts of the State of New York, affirms under penalty of perjury:

1. I am Counsel with the law firm of Farrell Fritz, P.C., attorneys for Defendants.

2. I respectfully submit Affirmation in opposition to Plaintiffs' motion for an Order, pursuant to CPLR § 6513, extending the Notice of Pendency attached to Plaintiffs' moving papers as Exhibit "A."

3. I also respectfully submit this Affirmation in support of Defendants' cross-motion for an Order: (i) pursuant to CPLR § 6514 (a), cancelling and vacating of record the Notice of Pendency; (ii) pursuant to CPLR § 6514 (c) and 22 NYCRR § 130-1.1, awarding Defendants as a sanction recovery of their attorneys' fees, costs, and disbursements in opposing Plaintiffs' motion and making this cross-motion; and (iii) awarding such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

4. In January 2017, in its very first decision, the Court fully and permanently dismissed from this lawsuit each and every claim by Jonathan seeking to recover either money damages or equitable relief based upon the so-called "Compost Yard" transaction.

5. Thereafter, in motion after motion, decision after decision, the Court continually rebuffed Jonathan's efforts to try to replead a viable claim based on the Compost Yard transaction, including his claims for constructive trust and quiet title, or to obtain documents or testimony concerning the property.

6. Now, after serially losing each and every motion concerning the Compost Yard, and lacking even a single claim or allegation that could conceivably affect title to real property, Jonathan moves to extend the Notice of Pendency he filed upon the Compost Yard in 2016, in the case's infancy, prior to the Compost Yard's inevitable, total dismissal.

7. When Jonathan informed Joseph he intended to make this motion, Joseph immediately warned him that it would be frivolous and sanctionable, and urged him not to make the application. Stubborn as a mule, recalcitrant as ever, Jonathan insisted on making his motion nonetheless. The consequences should be swift and severe.

8. *First*, under CPLR § 6513, the Court should deny Jonathan's motion to extend the Notice of Pendency for failure to show "good cause." Under CPLR § 6514 (a), the Court should grant Joseph's cross-motion for mandatory cancellation of the Notice of Pendency. Jonathan lacks any extant claims that would affect title to real property (*see* Point I).

9. *Second*, under CPLR § 6514 (c) and 22 NYCRR § 130-1.1, the Court should sanction Jonathan by awarding Joseph his fees, costs, and disbursements in opposing Jonathan's motion and making this cross-motion (*see* Point II).

ARGUMENT

Point I

THE COURT SHOULD DENY PLAINTIFFS' MOTION TO EXTEND AND GRANT DEFENDANTS' CROSS-MOTION TO CANCEL THE NOTICE OF PENDENCY

10. CPLR § 6513 provides that before expiration of a notice of pendency, "the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, *may* grant an extension . . ." (emphasis added).

11. It is reversible error to extend a notice of pendency without a showing of "good cause" (*see e.g. Deutsch v Grunwald*, 138 AD3d 915, 915 [2d Dept 2016] ["Here, the plaintiff failed to establish good cause. . . . Under these circumstances, the Supreme Court should have denied the plaintiff's motion"]).

12. As held by one of Jonathan's own cases, "[e]ven when good cause is shown, the use of the word 'may' indicates that it is still a matter addressed to the discretion of the court as to whether to grant the extension" (*Tomei v Pizzitola*, 142 AD2d 809, 810 [3d Dept 1988]; *compare* Affirmation of Jeffrey D. Powell in Support of Motion to Extend Notice of Pendency, dated May 6, 2019 ["Powell Aff."], ¶ 10 [citing *Tomei*]).

13. In contrast to the discretionary power of CPLR § 6513, cancellation of a notice of pendency under CPLR § 6514 (a) where the claims upon which it was predicated have been dismissed is mandatory and non-discretionary.

14. CPLR § 6514 (a) provides:

> **Mandatory cancellation.** The court, upon motion of any person aggrieved and upon such notice as it may require, *shall* direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or

> if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519.

(emphasis added).

15. Applying CPLR § 6514 (a), each of the following First and Second Department decisions holds that at the instant the Supreme Court grants dismissal of a plaintiff's claims affecting title to real property under CPLR 3211, the defendant is entitled to cancellation of the notice of pendency as of right, denial of which is an abuse of discretion:

- *Mew Equity, LLC v Sutton Land Servs., LLC* (144 AD3d 872, 874 [2d Dept 2016] ["Since the Supreme Court properly directed the dismissal of th[e] counterclaims, title to, possession of, and the use and enjoyment of the properties owned by the counterclaim defendants are no longer at issue. Therefore, the court also properly granted that branch of the motion of the Mew plaintiffs and the counterclaim defendants which was to cancel the notices of pendency against those properties"]);
- *3801 Review Realty LLC v Review Realty Co. LLC* (111 AD3d 509, 510 [1st Dept 2013] ["The cause of action for specific performance—the only cause of action asserted that could affect title to real property—having correctly been dismissed, the notice of pendency was correctly cancelled"]);
- *Jericho Group Ltd. v Midtown Dev., L.P.* (67 AD3d 431, 432 [1st Dept 2009] ["Since the motion court properly dismissed plaintiff's claims for specific performance, it properly granted Midtown's motion to cancel the notices of pendency that were filed with this action"]);
- *Freidus v Sardelli* (192 AD2d 578, 580 [2d Dept 1993] ["We agree with Sardelli's contention that he was entitled to cancellation of the notice of pendency filed by Freidus in Action No. 1. That complaint alleged only one cause of action, for

> specific performance, which warranted a notice of pendency. Once the cause of action for specific performance was discontinued, the notice of pendency was subject to mandatory cancellation (see CPLR 6514 [a]), since any judgment rendered upon the remaining causes of action and counterclaims would not directly affect title to, or the possession, use or enjoyment of, real property"] [quotations omitted]).

16. Here, Jonathan admits that the only claims that would have affected title to the Compost Yard were his "causes of action to quiet title and for imposition of a constructive trust" (Powell Aff., ¶ 4; *compare* Powell Aff., Ex. C, ¶¶ 95-105).

17. Jonathan further admits, "The Court dismissed the causes of action to Quiet Title, and Constructive Trust" (Powell Aff., ¶ 7; *compare* Powell Aff., Ex. D at 4 ["The branch of defendants' motion to dismiss the second cause of action which seeks a constructive trust is granted"]; and *id*. ["The branch of defendants' motion to dismiss the third cause of action which seeks to quiet title is granted."]).

18. In a stinging series of subsequent decisions, the Court denied Jonathan leave to reargue (*see* **Ex. 1**), then denied him leave to replead (*see* **Ex. 2**), then granted Joseph's motion to quash subpoenas Jonathan served seeking documents concerning the dismissed Compost Yard transaction (*see* **Ex. 3**).

19. Although Jonathan initially appealed the Court's dismissal of his claims for the Compost Yard, he withdrew his appeal at the eleventh hour, declining to perfect it (*see* **Exs. 4** and **5**).

20. As a result of these four adverse decisions by the Court, and the tactical choice made by Jonathan himself not to appeal the dismissal decision, the Compost Yard transaction is

irreversibly gone from this lawsuit. All that is left of this litigation, barely clinging to life support, is the First Cause of Action for breach of fiduciary duty to the extent it seeks money damages for events on or after June 27, 2013 (post-dating the Compost Yard transaction on March 12, 2013), and the Fourth Cause of Action, relabeling the First Cause of Action for breach of fiduciary duty as a "derivative action" and tacking on a request for an accounting (*see* Powell Aff., Ex. D at 5; Ex. 1 at 2; Powell Aff., Ex. C, ¶¶ 62-70, 83-88).

21. Under these circumstances, if the Court were to extend the Notice of Pendency upon the Compost Yard, or to deny Joseph's motion to cancel the Notice of Pendency, it would be an abuse of discretion (*see e.g. Shkolnik v Krutoy*, 32 AD3d 536, 537 [2d Dept 2006] ["The complaint here seeks only monetary damages and an accounting to determine the amount of such damages. Accordingly, since a judgment for the plaintiff would not affect the title to, or the use, possession, or enjoyment of, real property, the Supreme Court should have granted the defendants' motion to vacate the notice of pendency"] [quotations omitted]).

22. Jonathan argues that even if a court has dismissed all claims upon which a notice of pendency was based, the plaintiff may nonetheless extend the notice of pendency until "final judgment has been entered" and the "time to appeal from a final judgment has expired" (Powell Aff., ¶¶ 11, 13). For at least three reasons, Jonathan's argument, if adopted, would lead to a reversal.

23. *First*, Jonathan's argument is based upon an intentionally misleading, myopic construction of CPLR § 6514 (a). CPLR § 6514 (a) provides four disjunctive, nonexclusive grounds for as-of-right cancellation of a notice of pendency, including: [i] "service of a summons has not been completed within the time limited by section 6512; *or* [ii] if the action has been settled, discontinued or abated; *or* [iii] if the time to appeal from a final judgment against the

plaintiff has expired; *or* [iv] if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519" (CPLR § 6514 [a] [emphasis added]). Jonathan's argument focuses exclusively on ground "iii," ignoring the rest of the statute.

24. *Second*, Jonathan's argument that he is entitled to maintain the Notice of Pendency upon the Compost Yard, despite full and final dismissal of all claims upon which the Notice of Pendency was based, is irreconcilable with the holdings of *Mew Equity, LLC v Sutton Land Servs., LLC* (144 AD3d at 874), *3801 Review Realty LLC v Review Realty Co. LLC* (111 AD3d at 510), *Jericho Group Ltd. v Midtown Dev., L.P.* (67 AD3d at 432), and *Freidus v Sardelli* (192 AD2d at 580) (*see supra*, ¶ 15).

25. Each of these four cases holds, in crystal clear terms, that an aggrieved defendant is entitled to mandatory, as-of-right cancellation of a notice of pendency the moment Supreme Court dismisses the claims upon which the notice of pendency was based, and that the defendant simply does not have to suffer a cloud on title and the resulting restrictions an alienability of land during the inordinately lengthy appeal process to which litigants have unfortunately grown accustomed in the Second Department.

26. *Third*, as held by one of the very cases upon which Jonathan relies, where the only claims affecting title to real property have been dismissed under CPLR 3211, a defendant is entitled to immediate, mandatory cancellation of a notice of pendency (*RH39 Realty, L.P. v Parigi Intern., Inc.*, 33 Misc 3d 1210(A) [Sup Ct, NY County 2010] ["Defendants could have presented these arguments in a motion to dismiss, which, if granted, would ultimately result in 6514 (a) mandatory cancellation of the *lis pendens*"]; *compare* Powell Aff., ¶ 10 [citing *RH39 Realty, L.P.*]).

27. In sum, the Court should deny Jonathan's motion to extend the Notice of Pendency and grant Joseph's cross-motion to cancel the Notice of Pendency.

Point II

THE COURT SHOULD GRANT DEFENDANTS' CROSS-MOTION FOR SANCTIONS

28. CPLR § 6514 (c) empowers courts to impose sanctions for frivolous conduct in connection with a notice of pendency. The statute provides, "The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action" (CPLR § 6514 [c]).

29. "This provision permits an award for counsel fees which flow from the wrongful filing and cancellation of such notice and, therefore, Supreme Court act[s] within its statutory authority to include such reasonable fees within its award" (*No. 1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908, 911 [3d Dept 2008] [citation omitted]).

30. In addition to CPLR § 6514 (c), the Second Department in *Delidimitropoulos v Karantinidis* (142 AD3d 1038, 1040 [2d Dept 2016]), held that courts have the power to impose sanctions for frivolous conduct in connection with a notice of pendency under 22 NYCRR § 130-1.1.

31. In *Delidimitropoulos*, the Court reversed Supreme Court's denial of a motion for sanctions, ruling that it was an abuse of discretion *not* to impose sanctions against the plaintiff:

> [T]he Supreme Court should have granted that branch of the defendants' motion which was for an award of costs and attorney's fees pursuant to 22 NYCRR 130-1.1. 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 and because it permits a party to effectively retard the alienability of real property without any prior judicial review. Here, the judgment demanded in the complaint clearly would not affect the title to, or the possession, use, or enjoyment of, any real property.

(*id*. [citations and quotations omitted]).

32. The Second Department continued:

> [P]rior to making the instant motion, the defendants' counsel advised the plaintiff that the notices of pendency were improperly filed, citing applicable case authorities, and requested removal of the notices of pendency in order to avoid motion practice. The plaintiff's conduct in improperly filing the notices of pendency in the first instance, and then refusing to cancel them in response to the defendants' demand, 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 therefore, was "frivolous" within the meaning of 22 NYCRR 130-1.1.

(*id*. [citations and quotations omitted]).

33. Here, as in *Delidimitropoulos*, the "judgment demanded in the complaint clearly would not affect the title to, or the possession, use, or enjoyment of, any real property" because the constructive trust and quiet title claims were dismissed in January 2017, never to return (*id.*; *compare supra* ¶¶ 10-29; Powell Aff., Ex. D at 4-5).

34. Further, here, as in *Delidimitropoulos*, "prior to making the instant motion, the defendants' counsel advised the plaintiff that the notice[] of pendency w[as] improperly filed, citing applicable case authorities, and requested [Jonathan refrain from pursuing his motion to extend the Notice of Pendency] in order to avoid motion practice" (*Delidimitropoulos v Karantinidis*, 142 AD3d at 1040).

35. Copies of (i) Jonathan's request for Joseph's consent to extent the Notice of Pendency, (ii) Jonathan's response that a motion to extend the Notice of Pendency would be frivolous and would force Joseph to seek sanctions, (iii) Jonathan's reply, and (iv) Joseph's sur-reply, are attached as **Exs. 6, 7, 8,** and **9**.

36. In sum, despite repeated warnings and earnest entreaties by Joseph to Jonathan not to proceed with his motion, Jonathan made the motion anyway, knowing that he would be faced with a motion for sanctions. Jonathan even stipulated to Joseph's right to cross-move for sanctions

(*see* Affirmation of Jeffrey D. Powell of Compliance with 22 NYCRR 202.7 (f), dated May 8, 2019, Ex. B, ¶ 3 ["The execution of this Stipulation is without prejudice to Defendants' . . . right to seek sanctions . . ."]).

37. Having serially lost exactly four prior motions on the exact same subject as this one – the Compost Yard transaction – the Court should shift the costs of opposing this motion to Jonathan under CPLR § 6514 [c] and 22 NYCRR § 130-1.1, and require Jonathan to pay Joseph's fees and expenses in opposing this frivolous motion, and in being forced to make this cross-motion.

WHEREFORE, Defendants respectfully request that the Court: (i) deny Plaintiffs' motion to extend the Notice of Pendency; (ii) grant Defendants' cross-motion to cancel the Notice of Pendency; (iii) grant Defendants' cross-motion for recovery of their attorneys' fees, costs, and disbursements as a sanction; and (iv) award such other and further relief as the Court deems just and proper.

Dated: Uniondale, New York
June 5, 2019

/s/ *Franklin C. McRoberts*
Franklin C. McRoberts