

e-FILE

SHORT FORM ORDER

INDEX NO. 16/609510

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

**JONATHAN TROFFA, individually and
derivatively on behalf of JOS. M. TROFFA
LANDSCAPE AND MASON SUPPLY, INC., and
JOS. M. TROFFA LANDSCAPE AND MASON
SUPPLY, INC.,**

Plaintiff,

-against-

**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.,**

Defendants.

**ORIG. RETURN DATE: 52219
SUBMISSION DATE: 7/10/19
MOTION SEQ#008, 009
MOTION: 008-MD, 009-MotD**

**ATTORNEY FOR PLAINTIFF
MARGOLIN BESUNDER LLP
1051 OLD NICHOLD ROAD, STE 200
ISLANDIA, NY 11749**

**ATTORNEY FOR DEFENDANTS
FARRELL FRITZ, PC
622 3RD AVENUE, STE 37200
NEW YORK, NY 10017**

Upon the following papers numbered 218 to 253 read on this motion to extend notice of pendency and cross motion to cancel notice of pendency and sanctions; Notice of Motion/Order to Show Cause and supporting papers 218 - 230; Notice of Cross Motion and supporting papers 232 - 242; Answering Affidavits and supporting papers 251 - 253; Replying Affidavits and supporting papers _____; Other _____; and upon due deliberation; it is,

ORDERED that plaintiff's motion (00) to extend the notice of pendency is denied; and it is further

ORDERED that defendants' cross motion (00) to cancel the notice of pendency and for

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sanctions is granted to the extent that the notice of pendency, dated June 30, 2016 is hereby canceled; and it is further

ORDERED defendants' counsel is directed to serve a copy of this order with notice of its entry upon plaintiff and the Suffolk County Clerk within twenty days of the date of this order.

ORDERED that the Suffolk County Clerk is directed to cancel the Notice of Pendency dated June 30, 2016 and vacate the Supplemental Order RE Notice of Pendency, dated June 24, 2019; and it is further

ORDERED that counsel and the parties are directed to appear in Commercial Division Part 48 on Monday, August 26, 2019 at 9:45 a.m. for a status conference.

During the pendency of this action, the notice of pendency filed by plaintiff at commencement was about to expire. Plaintiff timely moved for an order extending the notice of pendency, and defendants cross-moved to cancel the notice of pendency and for sanctions.

In support of the motion to extend the notice of pendency, plaintiff relies upon *Jonestown Place Corp. v 153 West 33rd Street Corp.* (74 AD2d 525, 425 NYS2d 314 [1st Dept 1980], notice of pendency not cancelled upon dismissal of the action), *551 W. Chelsea Partners LLC v 556 Holding LLC* (40 AD3d 546, 838 NYS2d 24 [1st Dept 2007], defendant failed to meet burden of demonstrating bad faith in commencing action), and *RH39 Realty L.P. v Parigi Intl., Inc.*, (33 Misc3d 1210[A], 939 NYS2d 743 [S. Ct. NY Cty, 2010], good cause shown to extend notice of pendency). In addition, plaintiff claims that since the note of issue has been filed and there is a stay on the action pending an appeal that it would be proper to extend the notice of pendency.

In opposition and in support of their cross motion, defendants contend that the court dismissed the causes of action which would have been affected by a notice of pendency. Defendants further state that plaintiff has failed to show good cause, inasmuch as plaintiff lacks any extant claims that would affect title to real property.

CPLR 6501 provides that [a] notice of pendency may be filed in any action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property. "In the absence of this direct relationship, the remedy of a notice of pendency is denied" (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321, 486 NYS2d 877 [1984]). CPLR 6513 provides that before the 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.

Here, by order dated January 11, 2017 (Garguilo, J.), this court dismissed the second and third causes of action, respectively, seeking a constructive trust and quiet title to all six properties, including the compost yard, as time-barred. The remaining claims seek money damages and attorney fees. Therefore, the action is no longer one in which the judgment demanded would affect title to,


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or the possession, use, or enjoyment of, real property (see CPLR 6501, 6514 [a]; *DeCaro v East of E., LLC*, 95 AD3d 1163, 945 NYS2d 159 [2d Dept 2012], citing *Stangel v Zhi Dan Chen*, 74 AD3d 1050, 1054, 903 NYS2d 110 [2010]; see also *Hiu Ian Cheng v Salguero*, 164 AD3d 768, 83 NYS3d 645 [2d Dept 2018]; *Khanal v. Sheldon*, 55 AD3d 684, 867 NYS2d 460 [2d Dept 2008], app denied 12 NY3d 714, 883 NYS2d 797 [2009]; *Ali v Ahmad*, 24 AD3d 475, 476, 805 NYS2d 283 [2005]). In addition, the case law relied upon by plaintiff is not binding upon this court. Therefore, the court exercises its discretionary power and declines to extend the notice of pendency.

Defendants' cross motion is granted solely to the extent that the notice of pendency is hereby cancelled and is otherwise denied.

Accordingly, the defendants' counsel is directed to serve a copy of this order with notice of its entry upon plaintiff and the Suffolk County Clerk within twenty days of the date of this order. The Suffolk County Clerk is hereby directed to cancel the Notice of Pendency dated June 30, 2016 and vacate the Supplemental Order RE Notice of Pendency, dated June 24, 2019. Counsel and the parties are directed to appear in Commercial Division Part 48 on Monday, September 9, 2019 at 9:30 a.m. for a trial scheduling conference.

DATED: July 31, 2019


HON. JERRY GARGUILO, J.S.C.