

# Recovery of Counsel Fees & Positive Expenses for Filing an Improper Lis Pendens

By Leo K. Barnes Jr.

It has long been said that "with great power comes great responsibility." The maxim is especially appropriate in connection with the effectuation of a CPLR Article 65 Notice of Pendency. Assuming compliance with the requisite procedures outlined in CPLR 6511 (it is filed with the County Clerk where the property is situated; and the complaint which founds the claim is filed with the Notice of Pendency) and CPLR 6512 (the summons and complaint is served within 30 days of filing the notice of pendency (not the typical

120 day afforded by CPLR 306-b)), the filing serves as an immediate cloud on title, effectively undermining the viability of a property transfer until the *lis pendens* is removed or otherwise resolved. In that regard, CPLR 6501 provides:

A notice of pendency may be filed in any action in a court of the state or of the United States 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. **The 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. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party** [bold added].

Unlike the other provisional remedies contained within the CPLR (preliminary injunction; temporary restraining order; at-



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tachment; and seizure of chattel), Article 65 permits the unilateral, *ex parte* filing of a *lis pendens* against real property *without advance court approval*. But the proverbial "stick" in the "carrot and the stick" metaphor is that if the court ultimately determines that the filing of a *lis pendens* was not effectuated in accordance with the permissi-

ble statutory framework, counsel fees, costs and other expenses may be awarded in accordance with a motion to cancel a notice of

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pendency as per CPLR 6514(c) and 22 NYCRR 130-1.1.

The most common basis for a motion to cancel is that the plaintiff's claim does not comply with CPLR 6501 in that the claim does not "affect the title to, or the possession, use or enjoyment of, real property" but, rather, seeks monetary damages. See *Stangel v. Zhi Dan Chen*, 74 A.D.3d 1050, 1054 (2d Dept. 2010).

For example, in *Delidimitropoulos v. Karantinidis*, 142 A.D.3d 1038 (2d Dept. 2016), the Second Department cancelled a notice of pendency pursuant to the court's inherent power to analyze whether a pleading complies with CPLR 6501 and granted defendant's application for an award of costs and attorneys' fees pursuant to 22 NYCRR 130-1.1:

Here, the judgment demanded in the complaint clearly would not affect the title to, or the possession, use, or enjoyment of, any real property. Five months prior 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. at 1040 (citing *Makan Land Dev.-Three, LLC v. Prokopov*, 42 A.D.3d 439 (2d Dep't 2007); cf. *Congel v. Malfitano*, 61 A.D.3d 807, 809 (2d Dep't 2009)).

In other instances, including *Josefsson v. Keller*, 141 A.D.2d 700 (2d Dept. 1998), the Second Department sustained the trial court's entry of an award for costs and expenses incurred by defendants following the improper filing of a notice of pendency by plaintiff. Indeed, the absence of a binding contract constitutes just cause for the imposition of costs and expenses pursuant to CPLR 6514(c). See *Saul v. Vidokle*, 151 A.D.3d 780 (2d Dept.

2017). See also *Delmestro v. Marlin*, 168 A.D.3d 813 (2d Dept 2019) (affirming cancellation of notice of pendency and remitting for a hearing and determination as to the "actual costs and expenses reasonably incurred by the defendants by the filing and canceling the notice of pendency, as well as any costs of the action, pursuant to CPLR 6514(c)").

### Positive expenses

CPLR 6514(c) awards are not limited solely to counsel fees and costs, but also encompasses the recovery of other "expenses occasioned by the filing and cancellation, in addition to any costs of the action." These other expenses include "positive expenses" incurred in connection with the wrongful filing of a notice of pendency. See, e.g., *No. 1 Funding Center, Inc. v. H & G Operating Corp.*, 48 A.D.3d 908, 911 (3rd Dep't 2008) (affirming award of costs and expenses in the amount of \$213,641.97 and legal fees in the amount of \$34,809 pursuant to CPLR 6514(c)); *Josefsson v. Keller*, 141 A.D.2d 700, 701 (2d Dept. 1988) (awarding total costs and expenses, including carrying charges on the subject properties and

attorneys' fees, "occasioned by the filing of a *lis pendens* by the plaintiff" in the amount of \$39,189.75 pursuant to CPLR 6514(c) based upon finding that, inter alia, party did not file *lis pendens* in good faith); *Hulko v. Connell*, 1990 WL 139022, at \*5 (S.D.N.Y. 1990) (awarding \$9,504.14 for "out-of-pocket costs and expenses" for, inter alia, unnecessary carrying costs like additional "mortgage payments, property taxes, utility costs, and the like" prior to sale of property to new purchaser pursuant to CPLR 6514(c)).

In light of the foregoing, it is necessary that counsel evaluating whether to file a notice of pendency conclusively establish, in advance of the filing, that the theories espoused in the complaint correspond with the CPLR 6501 limitations, and that the client is adequately advised concerning the exposure to liability for counsel fees, costs of the action and ancillary "positive expenses."

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