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CPLR 6501: Notice of Pendency Improper in Action Involving Contract for the Sale of Stock Representing the Beneficial Ownership of Real Property

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lose sight of such important considerations as: the court's ability to enforce a judgement;¹⁸ the potential for confusion in interpreting the laws of the state of incorporation;¹⁹ and the possibility that the state of incorporation could better adjudicate the issue.²⁰ By addressing these concerns, the courts will preserve the value of the internal affairs rule as an element in *forum non conveniens* determinations.²¹

Joseph J. Pash, Jr.

CPLR 6501: Notice of pendency improper in action involving contract for the sale of stock representing the beneficial ownership of real property

Section 6501 of the CPLR permits a plaintiff to file a notice of pendency in any action if the title, possession, use or enjoyment of real property may be affected by the judgment demanded.¹ The filing of a notice of pendency² gives constructive notice of the liti-

¹⁸ See *Sternfeld v. Toxaway Tanning Co.*, 290 N.Y. 294, 297, 49 N.E.2d 145, 145 (1943); 17 W. FLETCHER, *supra* note 4, at § 8426; Note, *The Development of the "Internal Affairs" Rule in the Federal Courts and its Future Under Erie v. Tompkins*, 46 COLUM. L. REV. 413, 415-16 (1946).

¹⁹ See *Adolph Meyer, Inc. v. Florists' Tel. Delivery Ass'n*, 36 Misc. 2d 566, 567-68, 232 N.Y.S.2d 913, 915 (Sup. Ct. Queens County 1962).

²⁰ See *Langfelder v. Universal Laboratories, Inc.*, 293 N.Y. 200, 204, 56 N.E.2d 550, 552 (1944).

²¹ See generally *Reese & Kaufmann, The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124-28 (1958); *Latty, supra* note 4, at 143-62; Note, *Substitute, supra* note 4, at 249-50.

¹ See CPLR 6501 (1980). Section 6501 of the CPLR provides in pertinent part: 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.

Id.; see, e.g., *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 304-05, 178 N.E.2d 717, 718, 222 N.Y.S.2d 316, 317-18 (1961) (notice of pendency inapplicable when suit concerns encroachment); *Sourian v. Saleh*, 50 App. Div. 2d 756, 756, 376 N.Y.S.2d 166, 167 (1st Dep't 1975) (action to prevent landowner from committing wrong on plaintiff not proper subject of notice of pendency); *General Property Corp. v. Diamond*, 29 App. Div. 2d 173, 175, 286 N.Y.S.2d 553, 554 (1st Dep't 1968) (filing proper when judgment would affect possession).

² A notice of pendency is sometimes called a *lis pendens*. 7A WK&M ¶ 6501.04, at 65-9

gation to any person who subsequently purchases or encumbers the realty.³ The use of this provisional remedy⁴ in actions concerning the sale of corporate stock generally has been unsuccessful because such transactions do not directly relate to realty.⁵

Despite the increasing hybridization of the corporate form and the ownership of real property,⁶ the Court of Appeals in *5303 Re-*

(1984). It should be noted that the term "lis pendens" is used to denote the common law remedy, while "notice of pendency" is used in the new CPLR to denote the statutory notice. *Id.* The terms will be referred to in this survey accordingly.

³ See *Flushing Sav. Bank v. CNN Realty Corp.*, 82 App. Div. 2d 907, 908, 440 N.Y.S.2d 699, 700 (2d Dep't 1981); *Levine v. Carr*, 33 Misc. 2d 425, 426, 215 N.Y.S.2d 402, 404 (Sup. Ct. Nassau County 1961); CPLR 6501 (1980); 7A WK&M ¶ 6501.02, at 65-6 to 65-7. Persons with such constructive notice of the pending litigation can purchase or encumber only the property subject to the outcome of the action. See *Hailey v. Ano*, 136 N.Y. 569, 574 (1893); *Levine*, 33 Misc. 2d at 426, 215 N.Y.S.2d at 404; Comment, *Abuses of the California Lis Pendens: An Appeal for Legislative Remedy*, 39 S. CAL. L. REV. 108, 109 (1966); 7A WK&M ¶ 6501.01, at 65-3 to 65-4.

At common law the lis pendens attached upon service of the subpoena and the commencement of the suit. See 7A WK&M ¶ 6501.01, at 65-6; Decisions, *Real Property—Lis Pendens—Action to Enjoin a Nuisance*, 28 BROOKLYN L. REV. 349, 349 n.7 (1962). The purpose of this remedy was to ensure that the plaintiff's action was not impeded or defeated by alienation of the property during the action, see *The Cayuga Indian Nation of New York v. Fox*, 544 F. Supp. 542, 548 (N.D.N.Y. 1982); *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 304-05, 178 N.E.2d 717, 718, 222 N.Y.S.2d 316, 317-18 (1961); *Hercules Chem. Co. v. VCI Inc.*, 118 Misc. 2d 814, 817, 462 N.Y.S.2d 129, 132 (Sup. Ct. N.Y. County 1983), and to permit the court to render a meaningful judgment, see *Hailey*, 136 N.Y. at 574-75 (suit might be interminable). This procedure caused purchasers of real property considerable hardship; many state legislatures required that formal notice be given. See SECOND ANN. REP. N.Y. JUD. CONFERENCE 107, 107 (1957); Note, *A Proposal for Reformation of the Iowa Lis Pendens*, 67 IOWA L. REV. 289, 291 (1982); Comment, *supra*, at 109-10; 7A WK&M ¶ 6501.01-6501.02, at 65-6 to 65-7.

⁴ SEGEL § 306, at 361 (1982). A notice of pendency is provisional because it offers the plaintiff protection only during the pendency of the action. *Id.*; see also CPLR 6001 (Article 60 of the CPLR lists five provisional remedies: arrest, attachment, injunction, receivership and notice of pendency).

⁵ See, e.g., *Holbrook v. New Jersey Zinc Co.*, 57 N.Y. 616, 632 (1874) (lis pendens not applicable to "an action concerning the title to stocks"); *Leitch v. Wells*, 48 N.Y. 585, 613 (1872) ("articles of commerce" excluded from lis pendens); see *infra* note 24 and accompanying text; *accord American Press Ass'n v. Brantingham*, 75 App. Div. 435, 437, 78 N.Y.S. 305, 307 (1st Dep't 1902); Note, *The Application of Lis Pendens to Personalty*, 47 HARV. L. REV. 1023, 1026 (1934); *infra* note 30.

⁶ See Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?* 73 COLUM. L. REV. 250, 256 (1973). With the marked increase of cooperative apartment ownership, see *Berger, Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 992 n.25 (1963), courts have recognized a "hybrid" between stock ownership and a proprietary interest, see *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 524-25, 400 N.Y.S.2d 805, 806 (1977); Note, *supra*, at 256. Consequently, the courts consider cooperative ownership to be, in part, an interest in real property deserving of traditional real property protections. Note, *supra*, at 257. However, the distinction between the ownership of stock in a corporation whose sole asset is a build-

alty Corp. v. O & Y Equity Corp.,⁷ recently adhered to a strict construction of CPLR 6501, holding that a notice of pendency will not be granted in an action for the specific performance of a contract for the sale of stock representing the beneficial ownership of real property.⁸

In *5303 Realty Corp.*, the plaintiff contracted to purchase from the defendant a Manhattan office building and the underlying land.⁹ The transaction was structured as a sale of stock rather than as a transfer of the title by deed.¹⁰ As a result of the defendant's alleged breach of certain provisions in the contract, the closing never occurred.¹¹ The plaintiff instituted an action requesting specific performance, and subsequently filed a notice of pendency against the property.¹² The Supreme Court, Special Term, denied a motion by the defendant to cancel the notice, holding that the complaint, on its face, entitled the plaintiff to a notice of pendency.¹³ The Appellate Division, First Department, affirmed.¹⁴

ing, and the stock ownership in a cooperative, is that the cooperative shareholder is entitled to a proprietary lease that represents the real property interest. *Shor*, 43 N.Y.2d at 156, 371 N.E.2d at 526, 400 N.Y.S.2d at 808; Note, *supra*, at 253; Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 *MIAMI L. REV.* 305, 310-11 (1961). The leasehold and shareholder interests are inseparable. *Shor*, 43 N.Y.2d at 154, 371 N.E.2d at 524-25, 400 N.Y.S.2d at 806; Note, *Cooperative Apartments—A Legal Hybrid*, 13 *U. FLA. L. REV.* 123, 125 (1960).

⁷ 64 N.Y.2d 313, 476 N.E.2d 276, 486 N.Y.S.2d 877 (1984).

⁸ *Id.* at 316, 476 N.E.2d at 278, 486 N.Y.S.2d at 879.

⁹ *Id.*

¹⁰ *Id.* O & Y Equity Corporation (Equity) wholly owned 41 Fifth Ave Realty Corp. (the Corporation). This realty corporation was a general partner owning a 97% interest in the limited partnership. The contract further stipulated that Equity would cause the limited partners to sell their interest to the plaintiff. The contract was allegedly structured in this manner at the request of the defendants to avoid over half a million dollars in New York City Real Property Transfer Taxes. See 98 App. Div. 2d 632, 632, 469 N.Y.S.2d 388, 388 (1st Dep't 1983), *rev'd*, 64 N.Y.2d 313, 476 N.E.2d 276, 486 N.Y.S.2d 877 (1984). The tax would be avoided because the real property would vest in the surviving corporation, and therefore the deed would never be transferred. See *Torrey Delivery Inc. v. Chautauqua Truck Sales & Serv. Inc.*, 47 App. Div. 2d 279, 283, 366 N.Y.S.2d 506, 511 (4th Dep't 1975).

¹¹ 64 N.Y.2d at 317, 476 N.E.2d at 278, 486 N.Y.S.2d at 879. Plaintiff claimed that non-compliance caused irreparable injury, thereby making closing impossible. *Id.*

¹² *Id.* at 317, 476 N.E.2d at 279, 486 N.Y.S.2d at 880. The filed notice described the action as one to enforce a contract to transfer fee ownership and to gain possession of property. *Id.*

¹³ *Id.* The supreme court did not consider the effect of an amended complaint alleging fraudulent conduct by the defendants. *Id.* Courts assume that the allegations in the complaint are true, and therefore the complaint does not have to manifest the likelihood of success. See *Fontanarosa v. Ryan*, 51 N.Y.S.2d 951, 952 (Sup. Ct. Westchester County 1944).

¹⁴ 98 App. Div. 2d 632, 469 N.Y.S.2d 388 (1st Dep't 1983), *rev'd*, 64 N.Y.2d 313, 476 N.E.2d 276, 486 N.Y.S.2d 877 (1984). The court reasoned that the contract in *5303 Realty*

On appeal, the Court of Appeals reversed,¹⁵ holding that an action for specific performance of a contract "for the sale of stock representing a beneficial ownership of real estate will not support the filing of a notice of pendency."¹⁶ Chief Justice Cooke, writing for the majority,¹⁷ reasoned that both the "relative procedural ease" with which a notice of pendency can be filed and the drastic effect that such a filing has on a defendant's title require a strict construction of the statute.¹⁸ Accordingly, the Court determined that, to justify the filing of a notice of pendency, an action must be directly related to real property, especially in cases concerning personal property which represents the beneficial ownership of real property.¹⁹ After establishing that the essence of the action was to enforce a contract to sell stock,²⁰ Chief Justice Cooke concluded that a direct relationship to realty could not exist because the ownership of corporate stock and the ownership of property are mutually exclusive.²¹ Moreover, the Court observed that other "protective devices" were available that would allow for judicial review of the underlying merits of the action.²²

had the same net effect as a sale of real property. *Id.* at 632, 469 N.Y.S.2d at 389.

¹⁵ 64 N.Y.2d at 325, 476 N.E.2d at 284, 486 N.Y.S.2d at 885.

¹⁶ *Id.* at 316, 476 N.E.2d at 278, 486 N.Y.S.2d at 879.

¹⁷ *Id.* at 315, 476 N.E.2d at 278, 486 N.Y.S.2d at 879. Judges Jones, Wachtler, Meyer, Simons and Kaye concur, with Judge Jasen dissenting. *Id.* at 326, 476 N.E.2d at 285, 486 N.Y.S.2d at 886. Dissenting, Judge Jasen contended that the filing of a notice of pendency was proper because the judgment demanded by the plaintiff would affect a "specific parcel of real property." *Id.* at 325, 476 N.E.2d at 284, 486 N.Y.S.2d at 885 (Jasen, J., dissenting). Judge Jasen noted that, "[i]n recognition of the hybridization of modern applications of corporate law and traditional protections accorded to realty transfers, courts have sought to render such potentially divergent approaches complementary, rather than mutually exclusive." *Id.* (Jasen, J., dissenting). The dissent maintained that the majority's analysis of the transaction elevated "form over substance" and, therefore, completely disregarded "economic reality." *Id.* (Jasen, J., dissenting). *But see id.* at 323 n.7, 476 N.E.2d at 283 n.7, 486 N.Y.S.2d at 884 n.7 (majority noted that cases dissent relied on concerned "the special nature of shares in cooperative apartment buildings"). Moreover, the dissent asserted that the majority's analysis raised significant questions regarding the applicability of "other devices designed to limit purchaser risks." *Id.* at 326, 476 N.E.2d at 284, 486 N.Y.S.2d at 885 (Jasen, J., dissenting). Judge Jasen reasoned that if the transfer of stock that represents realty is not considered a transaction involving real property, under CPLR 6501, it is doubtful that the transaction falls within the protection of the Recording Act, Real Property Law 290, the Statute of Frauds, GOL § 5-703, or that insurance companies can issue title insurance on such transactions. *Id.* at 326, 476 N.E.2d at 285, 486 N.Y.S.2d at 886 (Jasen, J., dissenting).

¹⁸ *Id.* at 323, 476 N.E.2d at 283, 486 N.Y.S.2d at 884; see *supra* note 3.

¹⁹ 64 N.Y.2d at 321, 476 N.E.2d at 281, 486 N.Y.S.2d at 882.

²⁰ *Id.* at 323, 476 N.E.2d at 283, 486 N.Y.S.2d at 884.

²¹ *Id.*; see *infra* notes 26 & 27 and accompanying text.

²² 64 N.Y.2d at 324, 476 N.E.2d at 283, 486 N.Y.S.2d at 884. Other courts have noted

It is submitted that the Court of Appeals' decision to restrict the application of notices of pendency to actions directly affecting realty was proper in light of the harshness of the remedy, the distinctions between stock ownership and the ownership of real property, and the procedural due process problems that could arise from an overbroad application of the statute.

Indeed, the notice of pendency is considered to be a harsh remedy because it results in the suspension or reduction of a defendant's property rights before any adjudication on the merits.²³ Consequently, courts have strictly construed CPLR 6501, refusing to grant notices of pendency in actions based upon stock transactions and in other cases not directly affecting real property.²⁴

that alternative forms of protection are available. *See, e.g.*, *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 306, 178 N.E.2d 717, 719, 222 N.Y.S.2d 318, 319 (1961); *Chambi v. Navarro, Vives & Cia, Ltd.*, 95 App. Div. 2d 667, 667, 463 N.Y.S.2d 218, 219 (1st Dep't 1983) (attachment, temporary restraining order, preliminary injunction); *Mageloff v. Sarkin*, 52 Misc. 2d 737, 740, 276 N.Y.S.2d 708, 710 (Sup. Ct. Onondaga County 1966) (attachment, injunction).

In contrast to the ease with which a notice of pendency may be filed, *see infra* note 31, the other provisional remedies have stricter requirements, *see* SIEGEL §§ 306-342. For example, to obtain an injunction the moving party would be required to establish a likelihood of ultimate success on the merits. *See Paine & Chriscott v. Blair House Assoc.*, 70 App. Div. 2d 571, 572, 417 N.Y.S.2d 68, 69 (1st Dep't 1979) (irreparable injury, balance of equities in his favor, and clear legal right to relief sought); *DeCandido v. Young Stars, Inc.*, 10 App. Div. 2d 922, 922, 200 N.Y.S.2d 695, 696 (1st Dep't 1968) (injunction should not be granted unless clear legal right and irreparable damages are shown).

²³ *See* SIEGEL § 306, at 363. Courts and commentators have recognized serious consequences resulting from the filing of the notice of pendency. *See, e.g.*, *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319 (3d Cir. 1982) (severely restricts ability to convey); *Hercules Chem. Co. v. VCI, Inc.*, 118 Misc. 2d 814, 818, 462 N.Y.S.2d 129, 132 (Sup. Ct. N.Y. County 1983) (restricts power of conveyance); Casenote, *Lis Pendens and Procedural Due Process*, 1 PEPPERDINE L. REV. 433, 437 (1974) (hinders ability to obtain credit; threatened loss of profits forces quick settlement). *But cf.* 7A WK&M ¶ 6501.13, at 65-32 (1984) (notice of pendency does not necessarily render title unmarketable or defective).

²⁴ *See, e.g.*, *Holbrook v. New Jersey Zinc Co.*, 57 N.Y. 616, 627-29 (1874); *Leitch v. Wells*, 48 N.Y. 585, 613 (1872); *Ciambi v. Navarro, Vives & Cia Ltd.*, 95 App. Div. 2d 667, 667, 463 N.Y.S.2d 218, 218 (1st Dep't 1983); *Deerfield Bldg. Corp. v. Yorkstate Indus., Inc.*, 77 Misc. 2d 302, 304-05, 353 N.Y.S.2d 331, 334 (Sup. Ct. Westchester County 1974).

In *Ciambi*, a notice of pendency was denied where the plaintiff contracted to purchase all of the shares of a corporation whose sole asset was a building. 95 App. Div. 2d at 667, 463 N.Y.S.2d at 218. The court asserted that the stock transaction was only indirectly related to the sale of the property and concluded that the judgment demanded would affect only the ownership of the stock. *See id.*, 463 N.Y.S.2d at 219; *see also* *General Property Corp. v. Diamond*, 29 App. Div. 2d 173, 175, 286 N.Y.S.2d 553, 554-55 (1st Dep't 1968) (interest in joint venture having to do with realty is not realty in itself); *Whittemore v. DePasquale*, 8 App. Div. 2d 793, 794, 187 N.Y.S.2d 53, 54 (1st Dep't 1959) (notice of pendency improper in suit to compel issuance of stock in corporation owning realty); *Arcaro v. Arcaro*, 20 Misc. 2d 489, 490-91, 193 N.Y.S.2d 493, 494 (Sup. Ct. Bronx County 1959) (notice of pendency inap-

The assertion that the adjudication of stock transaction cases cannot directly affect real property is based upon the fundamental principle that the assets of a corporation are the property of the corporate entity and not the stockholders.²⁵ While the stock represents a proportionate interest in any real property owned by the corporation,²⁶ a stockholder—even a sole stockholder—does not own the property and does not have any legal right to title or possession.²⁷ A notice of pendency might have been appropriate in *5303 Realty Corp.* if the plaintiff had pierced the corporate veil by proving the requisite misuse of the corporate form, (i.e. by fraud, or illegality).²⁸ However, the Court did not consider the plaintiff's allegations of fraudulent conduct.²⁹

It is submitted that the Court of Appeals' decision to restrict the use of notices of pendency was especially prudent because a broader interpretation of 6501 is susceptible to constitutional at-

plicable when partnership assets used to purchase realty in name of corporation).

²⁵ See *Elenkrieg v. Siebrecht*, 238 N.Y. 254, 262-63, 144 N.E. 519, 521-22 (1924); *Grant v. Adler*, 30 App. Div. 2d 657, 657-58, 291 N.Y.S.2d 206, 207-08 (1st Dep't 1968).

Clearly, one fundamental principle of modern economic life is that a corporate entity exists separate from and independently of its shareholders. See *Jenkins v. Moyses*, 254 N.Y. 319, 324, 172 N.E. 521, 522 (1930); *Cone v. Acme Mkts., Inc.*, 41 App. Div. 2d 409, 412, 343 N.Y.S.2d 765, 768 (4th Dep't 1973). The concentration of stock ownership has no effect on the ownership of the corporate entities ownership. See *State v. Harris*, 147 Conn. 589, 590, 164 A.2d 399, 401 (1960); *Elenkrieg*, 238 N.Y. at 262-63, 144 N.E. at 521-22.

²⁶ See *Pollitz v. Gould*, 202 N.Y. 11, 15, 94 N.E. 1088, 1089 (1911); *Clark v. Bankers Trust Co.*, 99 Misc. 300, 310-11, 163 N.Y.S. 748, 755 (Sup. Ct. N.Y. County 1917); see also *United States v. Evans*, 375 F.2d 730, 731 (9th Cir. 1967) (stock is equity representing ownership interest).

²⁷ See *Brock v. Poor*, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915); *First Nat'l Bank v. Hyman Novick Realty Corp.*, 68 App. Div. 2d 191, 194, 416 N.Y.S.2d 844, 846 (1st Dep't 1979); *Torrey Delivery, Inc. v. Chautauqua Truck Sales and Serv. Inc.*, 47 App. Div. 2d 279, 283, 366 N.Y.S.2d 506, 510 (4th Dep't 1975); see also *Sterling-Midland Coal Co. v. Chicago-Williamsville Coal Co.*, 336 Ill. 586, 587, 168 N.E. 655, 657 (1929) (shareholder cannot personally possess property, nor transfer or convey it to third party); *Buffalo T. & S.D. Co. v. Medina Gas & Elec. Light Co.*, 162 N.Y. 67, 76, 56 N.E. 505, 507 (1900) (sole ownership of stock and subsequent conveyance does not affect legal title). The court in *Torrey* concluded that "ownership of capital stock being distinct from ownership of corporate property, it follows that the sale of such stock is not a sale of corporate property." 47 App. Div. 2d at 282-83, 366 N.Y.S.2d at 510; see *Forrest City Mfg. Co. v. Levy*, 33 S.W.2d 984, 986 (Mo. Ct. App. 1931) (purchaser of entire stock of corporation only acquires benefit of assets); *McClory v. Schneider*, 51 S.W.2d 738, 741 (Tex. Civ. App. 1932) (sale of all stock not sale of physical properties of corporation).

²⁸ *International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 292, 79 N.E.2d 249, 252 (1948); *Jenkins v. Moyses*, 254 N.Y. 319, 324, 172 N.E. 521, 522 (1930); see also *Colin v. Altman*, 39 App. Div. 2d 200, 202, 333 N.Y.S.2d 432, 433 (1st Dep't 1972) (veil can only be pierced against shareholder who is using corporation to defraud).

²⁹ See 64 N.Y.2d at 314, 476 N.E.2d at 279, 486 N.Y.S.2d at 880.

tack on procedural due process grounds. Both federal and state courts have subjected provisional remedies statutes to rigorous procedural due process scrutiny resulting in many of these statutes being declared unconstitutional.³⁰ Both courts and commentators have scrutinized pendency statutes on procedural due process grounds because these statutes limit the ability to alienate or finance real property without notice or a prior judicial hearing.³¹ Be-

³⁰ See *Hercules Chem. Co., Inc. v. VCI, Inc.*, 118 Misc. 2d 814, 819, 462 N.Y.S.2d 129, 133 (Sup. Ct. N.Y. County 1983) (provisional remedies statutes unconstitutional for "failure to provide basic due process safeguards to protect against an unreasonable taking of the defendant's property").

The Supreme Court has invalidated a number of state provisional remedies statutes on procedural due process grounds. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (Georgia garnishment statute violates procedural due process); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) ("Florida and Pennsylvania pre-judgment replevin provisions work a deprivation of property without due process"); *Sniadich v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (garnishment procedure of Wisconsin "violates the fundamental principles of due process"). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974) (upholding constitutionality of Louisiana statute that allows ex parte prejudgment seizure of property). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-14, at 547-48 (1978) (discussing Supreme Court's analysis regarding procedural due process scrutiny of provisional remedies statutes).

New York courts have also subjected many of its provisional remedies statutes to a procedural due process analysis. See, e.g., *Sharrock v. Dell-Buick*, 45 N.Y.2d 152, 163-64, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 46-47 (1978) (enforcement of garageman's lien violates due process standards); *Morse Inc. v. Rentar Indus. Dev. Corp.*, 56 App. Div. 2d 30, 37, 391 N.Y.S.2d 425, 430 (2d Dep't 1977) (mechanic's lien deemed constitutional by divided court after rigorous due process scrutiny), *aff'd*, 43 N.Y.2d 952, 375 N.E.2d 409, 404 N.Y.S.2d 343 (1978). See generally SIEGEL § 307, at 363-68 (1977) (discussing New York's provisional remedies statutes and their possible unconstitutionality in light of recent Supreme Court decisions).

³¹ See *Recent Decisions, Massachusetts Lis Pendens Statute and Landowners' Right to Procedural Due Process*, 16 SUFFOLK U.L. REV. 263, 269-70 (1982) (Supreme Court expresses no definite statement on lis pendens statute, majority of courts have subjected lis pendens to due process analysis). Pendency statutes do not provide adequate procedural safeguards when the following three elements exist: 1) state action; 2) a significant deprivation of a property interest; and 3) lack of notice and a timely hearing. See *Note, After Malcolm v. Superior Court and Peery v. Superior Court: A Due Process Analysis of California Lis Pendens*, 70 CALIF. L. REV. 909, 920 (1982); see also *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1321-31 (3d Cir. 1982) (detailed application of three elements to New Jersey's lis pendens statute). The majority of courts deciding on the constitutionality of lis pendens statutes have held them to be valid for procedural due process purposes. See *Note, supra*, at 920 & n.81 (citations omitted).

Notice of pendency statutes have been held to invoke sufficient state action for due process purposes. See, e.g., *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1327 n.7 (3d Cir. 1982) (court finds state action); *Note, supra*, at 920 (California case law implies lis pendens involve state action). But see *Debral Realty, Inc. v. DiChiara*, 383 Mass. 589, 593, 420 N.E.2d 343, 348 (1981) ("level of State involvement in the lis pendens procedure is minimal"). Additionally, courts have held that lis pendens statutes deprive a property owner of a significant property interest. See, e.g., *Kukanskis v. Griffith*, 180 Conn. 501, 504, 430 A.2d

cause of the increased possibility of federal and state constitutional attack on CPLR 6501, it is submitted that the Court's narrow interpretation of the statute should be maintained in future cases.

Dennis W. Russo

INSURANCE LAW

Ins. Law § 3404: Failure to provide for shortened limitation period in fire insurance policy results in application of the general six-year period

Section 3404 of the Insurance Law requires that all fire insurance policies issued in New York conform to a statutorily mandated form.¹ Subsection (e) of section 3404 enables an insurer to

21, 25 (1980) ("sufficiently interferes with the alienability of real estate" for due process purposes); *Hercules Chem. Co. v. VCI, Inc.*, 118 Misc. 2d 814, 823, 462 N.Y.S.2d 129, 135 (Sup. Ct. N.Y. County 1983) ("interference sufficient"). *But see* *Batey v. Digirolamo*, 418 F. Supp. 695, 697 (D. Hawaii 1976) (*lis pendens* not sufficient property taking). Finally, courts have noted that many *lis pendens* lack adequate due process procedural safeguards. *See, e.g.*, *Kukanskis v. Griffith*, 180 Conn. 501, 504, 430 A.2d 21, 25 (1980) (Connecticut's *lis pendens* statute does not provide "even the barest minimum of due process protection"); *Note, supra*, at 928 (California *lis pendens* procedural safeguards "constitutionally inadequate").

New York's pendency statute may be more susceptible to procedural due process scrutiny under the New York Constitution, which does not require state action for a procedural due process violation to exist. *See* N.Y. CONST. art. I, § 6; *Hercules Chem.*, 118 Misc. 2d at 821, 462 N.Y.S.2d at 134. "[T]he absence of any express State action language simply provides a basis to apply a more flexible State involvement requirements than is currently being imposed by the Supreme Court with respect to the Federal provision." *Sharrock v. Dell-Buick*, 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 44 (1978). Therefore, even if New York's pendency statute does not entail sufficient state action to trigger federal due process protection, "it certainly is sufficient to invoke protection of due process rights under the more flexible standard of the State constitution." *Hercules Chem.*, 118 Misc. 2d at 821, 462 N.Y.S.2d at 134.

¹ N.Y. INS. LAW § 3404 (McKinney 1984). Section 3404 provides, in pertinent part:

(a) The printed form of a policy of fire insurance, as set forth in subsection (e) hereof, shall be known and designated as the "standard fire insurance policy of the state of New York."

(b)(1) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform as to all provisions, stipulations, agreements and