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# CPLR 6514: Plaintiff May Not File a Second Notice of Pendency Where a Prior Notice Was Cancelled for Failure to Serve a Timely Summons

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defendants, while at the same time denying other residents of New Hampshire the use of this jurisdictional tool where defendant is from a non-*Seider* forum, arguably denies the latter group equal protection of the law. It might be argued that such a procedure merely serves to put New Hampshire residents on an equal footing with *Seider* forum parties. However, this one-sided application must fall when one considers that the primary basis for adopting a *Seider* procedure was to give residents a convenient forum — a policy which should not be limited to one class of plaintiffs.[293]

*Seider* spawns too many problems on its own, without the aid of new variations of the doctrine such as that espoused in *Forbes*. Such one-sided applications of *Seider* by states, even if only defensively, can only serve to deliver up a host of problems for which neither *Seider* courts nor commentators have formulated solutions.

### ARTICLE 65 — NOTICE OF PENDENCY

*CPLR 6514: Plaintiff may not file a second notice of pendency where a prior notice was cancelled for failure to serve a timely summons.*

Prior to the adoption of the CPLR, New York courts uniformly held that where a prior notice of pendency[294] filed against real property was cancelled due to the failure of a plaintiff to serve a timely

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293 States are constitutionally permitted to treat classes of people differently but the classifications

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). While this "rational basis test" has been used primarily to test state legislation challenged as violative of the equal protection clause of the fourteenth amendment, *see, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961), there would appear to be no reason why it should not apply in like manner to state decisional law, since this, too, can be viewed as "state action." *See* Shelley v. Kraemer, 334 U.S. 1, 14-18 (1948). Moreover, the *Seider* doctrine, as enunciated in New York, has been described as a "judicially created direct action statute." Minichiello v. Rosenberg, 410 F.2d 106, 109 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969).

294 Upon its filing with a court and indexing by the clerk of the county in which the subject property is located, a notice of pendency provides subsequent purchasers and encumbrancers of the property with constructive knowledge of the existence of a claim concerning it. CPLR 6501. An individual recording a conveyance or encumbrance after the filing of such notice is "bound by all proceedings taken in the action . . . to the same extent as if he were a party." *Id.*

CPLR article 65, which contains the procedure for filing a notice of pendency, was designed to restrict the common law doctrine of *lis pendens*. *See* 7A WK&M ¶ 6501.03. At common law, a prospective purchaser of property was required to "search the court calendar to determine whether the land he wished to buy or encumber was subject to pending litigation." *Id.* ¶ 6501.01. It should be observed that CPLR article 65 applies only to actions involving real property and not to personal property claims. CPLR 6501.

summons, a second notice could not be filed despite subsequent compliance with statutory prerequisites.[295] In *Deerfield Building Corp. v. Yorkstate Industries, Inc.*,[296] plaintiff, alleging its inadvertent failure to properly effect service of process after filing a notice of pendency, asked the court to reconsider the pre-CPLR policy. The plaintiff argued that although CPLR 6514(a)[297] obligated the court to cancel the notice where the summons had not been properly served, nothing in the statute barred a second filing. Accordingly, the plaintiff contended that the decision to cancel a second filing rests in the discretion of the court under the guidelines of CPLR 6514(b), which permits discretionary cancellation of a notice of pendency if the court finds that the plaintiff has not commenced or prosecuted an action in good faith.[298]

The Supreme Court, Westchester County, held that a court lacked discretion under CPLR 6514 to permit the filing of a second notice. In reaching this conclusion, Justice Gagliardi cited the leading decision in this field, *Israelson v. Bradley*,[299] wherein the Court of Appeals, upon similar facts, construed CPA 123, the predecessor of CPLR 6514, as affording a court no authority to allow a second filing.[300] The *Israelson* Court viewed the notice of pendency as an "extraordinary privilege"[301] granted on an *ex parte* basis to preserve the subject matter of the suit. It recognized that such a notice necessarily affected the

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295 *See* Israelson v. Bradley, 308 N.Y. 511, 127 N.E.2d 313 (1955); Lanzoff v. Bader, 13 App. Div. 2d 995, 216 N.Y.S.2d 632 (2d Dep't 1961); Cohan v. Ratkowsky, 43 App. Div. 196, 59 N.Y.S. 344 (1st Dep't 1899); Lipschutz v. Horton, 55 Misc. 44, 104 N.Y.S. 850 (Sup. Ct. Nassau County 1907). Where a defendant intentionally avoided service, the bar to the filing of a second notice of pendency would not arise. *See* Levy v. Kon, 114 App. Div. 795, 100 N.Y.S. 205 (2d Dep't 1906).

296 77 Misc. 2d 302, 353 N.Y.S.2d 331 (Sup. Ct. Westchester County 1974).

297 CPLR 6514(a) provides in pertinent part:

> 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 . . . .

Pursuant to CPLR 6512, a notice of pendency is normally effective only if a summons is served within 30 days of the filing of the notice.

298 CPLR 6514(b) provides:

> The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith.

299 308 N.Y. 511, 127 N.E.2d 313 (1955).

300 CPA 123 did not mandate cancellation for failure to serve a timely summons, but rather left the matter to the court's discretion. As a result,

> when a court was requested to cancel a notice because of the plaintiff's failure to serve the summons, it referred to its discretionary power, now found in CPLR 6514(b), to cancel a notice when there was an unreasonable neglect to proceed in an action.

7A WK&M ¶ 6514.06.

301 308 N.Y. at 516, 127 N.E.2d at 315.

alienability of the subject property, and that unless the statutory terms were strictly observed, this privilege would be transformed from a safeguard into a weapon to be used against the owner of real property. For this reason, the Court of Appeals determined that once this privilege was invoked, a failure to conform to the statutory provisions foreclosed the granting of an additional notice of pendency.[302] Moreover, Justice Gagliardi noted that the Judicial Conference in response to *Israelson*, recommended that CPA 123 be amended to make cancellation mandatory where timely service of summons was not accomplished.[303] When this recommendation was included in CPLR 6514, the last vestige of discretion was extinguished.[304]

The court's conclusion in *Deerfield* that a second filing of a notice of pendency is unauthorized under CPLR 6514(b) is clearly appropriate.[305] To permit the filing of a second notice would once again result in the alienability of the subject property being in doubt. Such a consequence would pose a serious hardship to any defendant who sought to engage in a transaction involving his property. Additionally, allowing a second notice would provide an opportunity for a plaintiff to wield the notice as a weapon against a defendant, a clear misapplication of the purpose of a notice of pendency.

## CRIMINAL PROCEDURE LAW

*CPL § 170.15(3): Conflict of interest as a basis for removal of a criminal action.*

Under section 170.15 of the Criminal Procedure Law,[306] the trial of a defendant arraigned upon an information, simplified information, prosecutor's information, or misdemeanor complaint in a city, town, or

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302 *Id.*

303 *See* SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 117-20 (1957). In 1957, CPA 123 was amended to include the Judicial Conference's recommendation. *See* N.Y. SESS. LAWS [1957], ch. 877, § 586.

304 The plaintiff in *Deerfield* sought to compare his position to that of a plaintiff in a mortgage foreclosure action, since the plaintiff in such an action may file following the cancellation of a prior notice of pendency. However, the case relied upon by plaintiff, Robbins v. Goldstein, 36 App. Div. 2d 730, 320 N.Y.S.2d 553 (2d Dep't 1971), *appeal dismissed*, 28 N.Y.2d 924, 271 N.E.2d 702, 323 N.Y.S.2d 173, *stay granted*, 30 N.Y.2d 621, 282 N.E.2d 128, 331 N.Y.S.2d 42 (1972), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 176-77 (1971), clearly distinguished mortgage foreclosures from other real property actions involving cancellation of notices of pendency. *See generally* RPAPL 1331.

305 Since the enactment of the CPLR, two other cases have dealt with the issue presented in *Deerfield*; both have held that a second filing was impermissible. *See* Pelligrina v. Falcone, 160 N.Y.L.J. 101, Nov. 22, 1968, at 17, col. 5 (Sup. Ct. Kings County); Telchman v. Marrazzo, 42 Misc. 2d 354, 247 N.Y.S.2d 741 (Sup. Ct. Kings County 1963).

306 N.Y. CRIM. PRO. LAW § 170.15 (McKinney Supp. 1974).