

CPLR 6515: Court Utilizes Discretionary Power in Cancellation of Notice of Pendency upon Substitution of Surety Bond for Property

St. John's Law Review

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It is thus apparent that the efficacy of this new procedure will rest largely upon the still untested reaction of the foreign courts. If the procedure proves impractical, the New York courts may be compelled to devise yet another means of providing the requisite notice.

ARTICLE 56 — APPEALS TO THE COURT OF APPEALS

CPLR 5602: Warning by Court of Appeals with regard to observance of Court rules.

Failure to comply with the mandates of article 56 of the CPLR and the various court rules relating to appeals may result in dismissal of a litigant's motion for appeal or reargument.

In *In re Estate of Hart*¹⁴⁹ a motion for leave to appeal was filed from an order of the appellate division, and in *Blistein v. Kassner*¹⁵⁰ a motion was filed for reargument of a decision of the Court of Appeals. In both cases the motions were dismissed by the Court of Appeals since they failed to substantially comply with the Court rules.¹⁵¹ It should be noted that the dismissals were without prejudice and the motions could therefore be renewed upon filing the proper papers within thirty days. However, the Court warned the appellants that "[t]he new rules, simplifying practice in this court and conforming it to modern procedure, specify requirements for papers on motions, as well as on appeals, and the court will enforce compliance with these requirements."¹⁵²

In light of this warning by the Court, it is incumbent upon the practitioner to be familiar with the rules and comply with them; the Court may very well dismiss future nonconforming motions with prejudice.

ARTICLE 65 — NOTICE OF PENDENCY

CPLR 6515: Court utilizes discretionary power in cancellation of notice of pendency upon substitution of surety bond for property.

Under the common law doctrine of *lis pendens*, after the plaintiff had filed his bill or petition and the defendant had been served, any purchaser or encumbrancer of real property involved in the

¹⁴⁹ 24 N.Y.2d 158, 247 N.E.2d 148, 299 N.Y.S.2d 182 (1969).

¹⁵⁰ *Id.*

¹⁵¹ 22 NYCRR 500.1-500.9 (1969) contains the rules governing appeals. Among other requirements, 20 copies of the moving papers and brief must be filed with the Court, and the brief must show that the Court has jurisdiction of the motion and appeal. In addition, the questions of law presented must be identified and shall show why they merit review. In a motion for reargument of a prior decision, the points alleged to have been overlooked must be referred to.

¹⁵² 24 N.Y.2d at 160, 247 N.E.2d at 149, 299 N.Y.S.2d at 184.

litigation was chargeable with knowledge of the dispute. The purpose of the rule was to prevent any conveyance of the disputed property during the pendency of the action which would destroy the value of a judgment in favor of the plaintiff.¹⁵³ In a similar manner, article 65 of the CPLR requires that a notice of pendency be filed in any action which would affect the title, possession, use or enjoyment of real property before constructive notice of the litigation is attributed to a purchaser or encumbrancer.

CPLR 6515 enables a defendant to cancel the notice of pendency.¹⁵⁴ Such cancellation will release the property from the constructive notice effect of article 65 and allow the defendant to deal freely with it during the proceedings.¹⁵⁵ In order to obtain such a cancellation, the defendant must appeal to the court's discretion and give an adequate undertaking to secure the plaintiff.

*John H. Dair Building Construction Co. v. Mayer*¹⁵⁶ affords an example of the foregoing procedure. Plaintiff instituted an action to recover monies alleged to have been wrongfully taken by one defendant and used for the purchase of the real estate which was the subject of the notice of pendency. The lower court granted defendants' motion to cancel the notice of pendency on the condition that defendants file a surety undertaking in the amount of \$31,500. The defendants complied with the order, settled a mechanic's lien on the property, and sold it for an amount in excess of \$41,000. The appellate division modified the order by requiring a surety bond in the amount of \$42,000 on the grounds that the bond would serve as a substitute for the property, and plaintiff, if successful, should be entitled to an amount equal to the net proceeds realizable after a bona fide sale of the property.

ARTICLE 75 — ARBITRATION

CPLR 7501: Court refuses to enforce inadequate arbitration agreement in child custody dispute.

It has been suggested that under CPLR 7501 a court is primarily concerned with three questions in determining whether or not to

¹⁵³ 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6501.01 (1968). For a discussion of the doctrine of *lis pendens*, see *Hailey v. Ano*, 136 N.Y. 569, 32 N.E. 1068 (1893).

¹⁵⁴ It should be noted that not only the defendant but any "person aggrieved" can secure cancellation of a notice of pendency. The movant must have an interest in the realty that will be adversely affected by the judgment. See generally 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6515.06 (1968).

¹⁵⁵ However, CPLR 6515 does not apply in three instances: (1) an action to foreclose a mortgage; (2) an action for partition; and (3) an action for dower.

¹⁵⁶ 31 App. Div. 2d 835, 298 N.Y.S.2d 122 (2d Dep't 1969).