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CPLR 6513: Section Is Self-Executing; Court May Not Deny CPLR 6514 Motion To Cancel If Notice of Pendency Is More Than Three Years Old

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On plaintiff's appeals from both orders, the Second Department held that the ninety-day expiration provision contained in CPLR 6214(e) pertains to a *notice of levy* and not an attachment order. Therefore, since the attachment order remained valid, the second sum of money could be retained pursuant thereto.

The result achieved is clearly correct. For, a determination that the attachment order expired at the end of the ninety days would contradict the provisions of CPLR 6224.[213] Moreover, a different result would have required the return of the money, a new levy and an additional seizure, and the plaintiff's claim might have been subordinated to the claim of an intervening creditor. Even though a court can now extend a notice of levy after the ninety-day period has expired,[214] there appears to be no justification for requiring a new seizure in circumstances such as these.

However, one should carefully scrutinize the facts present in the instant case. The default judgment was vacated, but the action was still pending. Had the action been *dismissed, e.g.*, for lack of jurisdiction of the person, a different result would be warranted. In such an instance, and in similar situations, no justification would exist for giving the plaintiff priority over a creditor who attached property before the plaintiff could institute a new action.

ARTICLE 65 — NOTICE OF PENDENCY

CPLR 6513: Section is self-executing; court may not deny CPLR 6514 motion to cancel if notice of pendency is more than three years old.

New York at one time followed the common-law rule which declared that a notice of pendency was effective until the termination of the action.[215] However, with the enactment of the CPA[216] and the subsequent adoption of the CPLR,[217] a *lis pendens* is subject to a definite time limit unless extended by court order. CPLR 6513 mandates that "[a] notice of pendency shall be effective for a period of three years . . . [unless] . . . [a]n extension order shall be filed, recorded and indexed before expiration of the prior period."

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213 CPLR 6224 governs the expiration of an attachment order:

> An order of attachment is annulled when the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the plaintiff is fully satisfied, or a judgment is entered therein in favor of the defendant. . . .

214 *See* Seider v. Roth, 28 App. Div. 2d 698, 280 N.Y.S.2d 1005 (2d Dep't 1967). For an extensive analysis of the recent developments relating to CPLR 6214 see 7B McKINNEY'S CPLR 6214, supp. commentary 33-34 (1968).

215 *See* 7A WK&M ¶ 6513.01 (1969).

216 CPA 121(a).

217 CPLR 6513.

In *Robbins v. Goldstein*,[218] the appellate division reversed a lower court determination holding that, although the *lis pendens* was more than three years old, a court, in its discretion, could deny a CPLR 6514 motion to cancel. Indeed, it was concluded that CPLR 6513 actually mandated such cancellation.[219]

Although CPLR 6514(b) allows a court certain discretion when confronted with a motion to cancel, the clear and unequivocal wording of 6513 appears to constitute an exception to such latitude. Moreover, 6514(b) pertains to a *lis pendens* which is not more than three years old and was clearly intended to encompass those instances where a "neglect to prosecute" or the lack of a "good faith pursuit" might require cancellation.[220] The *Robbins* decision clearly demonstrates that CPLR 6513 is self-executing;[221] plaintiffs *must* move to extend the notice of pendency before the expiration of the three-year period if they wish to give valid constructive notice to potential purchasers or encumbrancers.

ARTICLE 75 — ARBITRATION

CPLR 7510: United States treaty does not supplant the common law.

In *Engelbrechten v. Galvanoni & Nevy Bros., Inc.*,[222] a German national sought enforcement of a German arbitration award pursuant to CPLR 7510. According to a treaty between the United States and Germany, awards in arbitration "which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in . . . the courts of either party. . . ."[223] The defendant, however, argued that the award, although final, was unenforceable in Germany because

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218 32 App. Div. 2d 1047, 303 N.Y.S.2d 822 (2d Dep't 1969).

219 The courts, in analyzing a similar provision in CPA 121(a), held that the expiration of three years mandated cancellation and that the section was self-executing. Carvel-Dari-Freeze Stores, Inc. v. Lukon, 219 N.Y.S.2d 716 (Sup. Ct. Suffolk County 1961), *modified*, 18 App. Div. 2d 700, 236 N.Y.S.2d 374, 239 N.Y.S.2d 889 (2d Dep't 1963).

220 *See* Sunshine v. Ainspan, 39 Misc. 2d 292, 240 N.Y.S.2d 449 (Sup. Ct. Albany County 1962). *See also* 7A WK&M ¶ 6514.10 (1969).

221 CPLR 6512 similarly mandates that if a *notice of pendency* is filed before an action is commenced it is effective only if service is perfected within 30 days. The second department construed this provision's predecessors (CPA 120 and 123), as imposing an obligation upon the court to cancel unless the filing party specifically conformed to the requirement. *See* Langoff v. Bader, 13 App. Div. 2d 995, 216 N.Y.S.2d 632 (2d Dep't 1961).

It is also interesting to note section 17 of the Lien Law which states that no lien shall be effective for more than one year unless extended by the court. N.Y. LIEN LAW § 17 (McKinney 1965). In *In re* Bullock, 129 N.Y.S.2d 360 (Sup. Ct. Kings County 1954), the court reasoned that this provision was also self-executing and, hence, the lien automatically lapsed.

222 59 Misc. 2d 721, 300 N.Y.S.2d 239 (N.Y.C. Civ. Ct. N.Y. County 1969).

223 Friendship, Commerce and Navigation Treaty with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593 (effective July 14, 1956).