

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Kenneth F. Payne PART 4
Justice

TRIBECA EQUITIES, LTD.,
Plaintiff,

- against -

19-21 LEONARD ST. CONDOMINIUM,
CARLOS A. FIERRO, JENNIFER TONKIL,
BRANDON JONES, LELA ROSE, STEVEN
SCHULMAN, LAURIE O'LOUGHLIN,
DOUGLAS TAUSIK, AMY POULAD and
ROBERT GROTELL,
Defendants.

Index No. 109406/03
Motion Date 07-18-03
Motion Sequence 002

DECISION/JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for to cancel a lis pendens

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

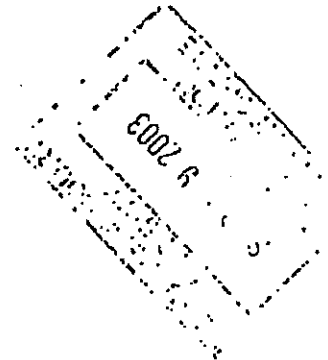
The action is disposed of in accordance with the accompanying memorandum
decision/judgment.

FILED

OCT 10 2003

COUNTY CLERK'S OFFICE
NEW YORK

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COUNTY CLERK
N.Y. COUNTY
2003 OCT 14 PM 2:08

Dated: September 12, 2003

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

[Signature]
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 4**

TRIBECA EQUITIES, LTD.,
Plaintiff,

**Index No. 109406/03
Motion Sequence 002**

- against -

**19-21 LEONARD ST. CONDOMINIUM,
CARLOS A. FIERRO, JENNIFER TONKIL,
BRANDON JONES, LELA ROSE, STEVEN
SCHULMAN, LAURIE O'LOUGHLIN,
DOUGLAS TAUSIK, AMY POULAD and
ROBERT I. GROTELL,**

DECISION/JUDGMENT

Defendants.

Kibbie F. Payne, J.S.C.:

Defendants move for an order pursuant to CPLR 6514 cancelling a notice of pendency dated May 21, 2003 filed against all of the condominium units owned and occupied by the individual defendants as unit owners of the building referred to as 19-21 Leonard Street, New York, New York. Additionally, defendants move to dismiss the complaint on the grounds that plaintiff Tribeca Equities Ltd. a/k/a Tribeca Equity, Ltd. lacks legal capacity to sue, that there is another action pending between the parties in this Court, that the complaint fails to state a cause of action against defendants Schulman, O'Loughlin and Tonkel, who are not unit owners in the condominium, that the court lacks personal jurisdiction over defendants Tonkel, Jones Rose, Schulman, O'Loughlin, Tausik, Poulad and Grotell and further that defendants be awarded costs and sanctions for plaintiff's assertion of this frivolous claim. In the event the notice of pendency is not cancelled and the complaint dismissed, defendants seek an order staying this action and compelling arbitration (CPLR 7503 [a]), in the alternative.

The plaintiff opposes the motion and ~~cross~~-moves for an order amending the caption of action pursuant to CPLR 3025, to correct typographical errors, so as to correctly reflect the true name of the plaintiff corporation and defendant Amy (Emy) Poulad and further, to "delete" Jennifer Tonkel as a defendant.

On the issue of personal jurisdiction of the defendants, all of the individual defendants, except defendants Grotell and O'Loughlin for whom the denial of service is made by their respective spouse and the defendant Fierro, have tendered a sworn denial of receipt of the service of process in this action. The plaintiff does not contradict defendants' averments, but curiously refers to the affidavits of service for the notice of pendency annexed as Exhibit I to the cross-motion. However, it is the filing of the summons and complaint which commences the action and not the filing of a lis pendens (see, *Deerfield Building Corp. v Yorkstate Industries, Inc.*, 77 Misc2d 302, 304; *Mentz v Efficient Building Corp.*, 145 Misc 505 affd 234 App Div 797, affd 258 NY 616). In addition, it is the service of process on the defendants in the statutorily mandated way that confers personal jurisdiction on the court. Here, examination of the County Clerk's file maintained for index number 109406/03, indicates that plaintiff filed the summons and complaint with clerk of court on May 22, 2003; this was sufficient to commence the action (CPLR 304). However, with respect to acquiring personal jurisdiction over the defendants, plaintiff had not filed with the clerk of the court proof of service of summons and complaint on defendants as of the date of submission of this motion. In any event, plaintiff's time in which to serve and file such proof has not yet expired (CPLR 306-b). Consequently, the application to dismiss on the ground of lack of personal jurisdiction is premature.

Addressing the cancellation of the lis pendens, plaintiff fails to present a legal or factual

basis for filing the notice of pendency against the individual units of the defendant owners. The complaint is clear that the object of the parties' present dispute is their competing rights to the title, use and possession of the disputed space [commonly referred to as Unit 1S and certain other common elements of the condominium building] which have absolutely nothing to do with the units individually owned and occupied by the defendants. Plaintiff's filing of the notice of pendency against defendants' units was not done in good faith and, therefore, discretionary cancellation of the notice of pendency is warranted (CPLR 6514 [b]). Plaintiff's action in filing the notice of pendency impresses the court as being retaliatory in nature and done with an apparent intent to harass the defendants. So strong is this impression, I find an award of costs and expenses pursuant to CPLR 6514 [c] is warranted. Accordingly, it is

ORDERED AND ADJUDGED that defendants' motion to cancel the notice of pendency dated May 21, 2003 is granted; and it is further

ORDERED AND ADJUDGED that the County Clerk shall upon defendants' service of a certified copy of this judgment cancel the notice of pendency dated May 21, 2003 filed against the property identified as 19-21 Leonard Street, Section 1, Block 179, Lots 1051-1057 in the Borough of Manhattan, City and State of New York; and it is further


ORDERED AND ADJUDGED that defendants' motion to dismiss on the grounds that the corporate plaintiff lacks legal capacity to sue, that there is another action pending between the parties in this court, for failure to state a cause of action, or in the alternative, staying this action and compelling arbitration is denied in its entirety as academic (see this court's decision and judgment dated July 30, 2003 rendered in *Rolf v 19-21 Leonard St. Condominium*, New York County Index No. 107574/03); and it is further

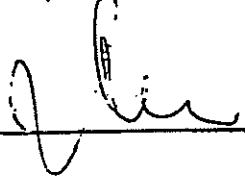
ORDERED AND ADJUDGED that ~~the~~ defendants are awarded costs in the amount of \$100.00 on this motion pursuant to CPLR 6514 [c] and 8202, together with the disbursements occasioned by the filing and cancellation of the notice of pendency for the reasons previously stated. Such costs and disbursements shall be taxed by the Clerk upon defendants presenting a bill of costs and supporting affidavit showing that the disbursements were necessarily incurred and are reasonable in amount (CPLR 8201, subd. [1]); and it is further

ORDERED AND ADJUDGED that plaintiff's cross-motion to amend the caption of this action to correctly reflect the true names of the plaintiff corporation and defendant Poulad and to delete defendant Tonkel is granted. Counsel for plaintiff is directed to serve the proposed amended pleading together with a copy of this judgment within 20 days of entry on each of the defendants and to file a copy of the same with the Trial Support Office (Room 158) and the County Clerk. This constitutes the decision and judgment of the court.

DATED: September 12, 2003

ENTER:



J.S.C.


FILED

OCT 10 2003

**COUNTY CLERK'S OFFICE
NEW YORK**