

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice**

**RKO PROPERTIES LTD. x Index  
Number 29822 2002**

**-against- Motion  
Date March 1, 2006**

**SHAYA BOYMELGREEN, et al. Motion  
Cal. Number 68  
x**

The following papers numbered 1 to 8 read on this application by plaintiffs an order extending the period of duration of the notice of pendency on this action for three years. On February 28, 2006, this application was referred to this Court by Justice Schulman.

	<b><u>Papers Numbered</u></b>
<b>Order to Show Cause - Affidavits - Exhibits ...</b>	<b>1-3</b>
<b>Answering Affidavits - Exhibits .....</b>	<b>4-6</b>
<b>Reply Affidavits - Exhibits.....</b>	<b>7-9</b>

Upon the foregoing papers, this application by plaintiff for an order extending the period of duration of the notice of pendency on this action for three years is denied for the following reasons:

A lis pendens is a notice of a claim made in respect to property which is the subject of a pending suit, but it does not of itself create an encumbrance upon the property. Simon v Vanderveer, 155 N.Y. 377, 382 (1898). The purpose of a notice of pendency is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit. Mechanics Exchange Savings Bank v Chesterfield, 34 A.D.2d 111 (3rd Dept 1970).

To counterbalance the ease with which a party may hinder another's right to transfer property, the appellate court has

required strict compliance with the statutory procedural requirements of N.Y. C.P.L.R. art. 65. Proper administration of the law requires promptness on the part of a litigant so favored and that he accept the shield which has been given to him upon the terms imposed, and that he not be permitted to so use the privilege granted that it becomes a sword usable against the owner or possessor of realty. If the terms imposed are not met, the privilege is at an end. In re Sakow, 97 N.Y.2d 436 (2002.)

A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause. C.P.L.R. 6513. The extension, however, must be requested prior to the expiration of the prior notice. This is an exacting rule; a notice of pendency that has expired without extension is a nullity. In re Sakow, 97 N.Y.2d 436.

Plaintiff now seeks an order extending its time to extend the expiration of a lis pendens that was to expire on November 15, 2005. Pursuant to CPLR 6513, an extension of the period of a notice of pendency may be granted by the court "upon motion of the plaintiff and upon such notice as it may require, for good cause shown. . . An extension order shall be filed, recorded and indexed before expiration of the prior period."

Here, rather than proceed by motion prior to the expiration of the original 3 year period, plaintiff prepared an order to show cause, and made an ex parte application for an extension to Justice Alan LeVine on November 9, 2005. Justice Levine signed the ex parte order on that date and extended the expiration of the lis pendens to the hearing and determination of the instant application. The order required overnight carrier service of the order and accompanying papers upon defendants by November 15, 2005. Significantly, November 15 is the day the three year period of the then existing lis pendens expired. As evidenced by the affidavit of Steven H. Blatt, dated November 15, 2005, the order to show cause and accompanying papers were served by regular mail upon defendants on November 15, 2005--the day the notice of pendency expired. Consequently, defendants had no notice of this application for an extension prior to the expiration of the lis pendens.

As stated in the CPLR 6513 the time for moving to extend a lis pendens must be made prior to its expiration and upon notice. The Notice of Pendency automatically expired on November 15, 2005 Schoepp v. State, 69 A.D.2d 917 (3d Dep't 1979) Had service of the order of Justice LeVine been made prior to November 15, 2005, then notice of the application for the extension would have been timely, since, the original three year period would have been in effect when service was made.

Moreover, it is well established that the court has no authority to extend the time period of an expired Notice of Pendency. See, In re Sakow, 97 N.Y.2d 436; Slutsky v Blooming Grove Inn, Inc., 147 AD2d 208 (2d Dept 1989.) Contrary to plaintiff's claim, CPLR 2004 is inapplicable and does not confer jurisdiction to the court to extend the three year period of a lis pendens.

Furthermore, any order extending the Notice of Pendency had to be filed, recorded and indexed before expiration of the existing Notice. CPLR 6513. There is no indication that Justice Levine's November 9 order extending the time of the Notice of Pendency was filed, recorded and indexed prior to November 15, 2005. This court should not absolve or in any way condone plaintiff's failure to timely move for an extension since to do so would violate the plain language of the statute which contemplates that plaintiff notify defendants of the request and that an order exist prior to the expiration of the Notice of Pendency. Clearly, the application to grant an extension should be sought in advance of the termination of the prior period not at its expiration. Had the plaintiff proceeded by regular notice of motion, and served it prior to the expiration of the three year period, plaintiff would have been protected. By seeking to expedite and gain protection by using an order to show cause containing an ex-parte extension, plaintiff failed to timely comply with CPLR 6513.

While the above ruling is harsh, such strict adherence to the terms of CPLR 6513 has been forewarned, as indicated by the following from New York Practice, Fourth Edition, David D. Siegel, Section 234, note 13:

"An extension must be applied for within the prior three-year period so that any extension order can be filed and indexed before the existing notice expires. It ill behooves a plaintiff to so postpone commencing the renewal process.

Even though some earlier case law had held that as long as the plaintiff at least started the extension machinery within the three-year period, as with an order to show cause to bring on the motion to extend, and even filed the order, plaintiff was allowed a nunc pro tunc order to retain the continuity of the lis pendens. After Sakow, it would be risky to rely on cases like Thelma Sanders & Assoc., Inc. v Haque Development Corp., 131 A.D.2d 462.

Accordingly, the application is denied.

DATED: March 2, 2006

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ORIN R. KITZES, J. S. C.

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