At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of August, 2008.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

- X

WAYNE MCLEOD,

Index No. 9748/08

Plaintiff,

- against -

YANIV MIREL, 165 EAST 54 CORP., YMGA BUILDERS CORP., YMGA BUILDINGS, INC., CLIFF FERRANDI, FERRY POINT INDUSTRIES, DANIEL WEINTRAUB, THE PLBG CO., INC., NYC TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, JOHN DOE, JANE DOE (SAID NAME BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ALL PARTIES, CORPORATIONS OR ENTITIES, IF ANY, HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PREMISES),

Defendants.

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The following papers numbered 1 to 13 read on these motions:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2; 4-7
Opposing Affidavits (Affirmations)	8-10
Reply Affidavits (Affirmations)	11
Other Papers Memoranda of Law	3; 12-13

Upon the foregoing papers, defendant Yaniv Mirel (defendant) moves, pursuant to CPLR 6514, for an order canceling the notice of pendency filed by plaintiff Wayne McLeod (plaintiff) against two properties owned by defendant: Property No. 1 at 165 East 54th Street and Property No. 2 at 167 East 54th Street. Both properties are in Kings County. Plaintiff cross-moves for a preliminary injunction restraining any further construction work on the properties and for a default judgment against defendant.

Factual Background

Plaintiff owns a six-family apartment building located at 169 East 54th Street in Brooklyn. Defendant owns the neighboring properties, which originally constituted a single lot, but for which defendant obtained an authorization to subdivide into two lots, each to contain a three-family house and re-designated as 165 East 54th Street (Property No. 1) and 167 East 54th Street (Property No. 2). Defendant's contractors obtained demolition and construction permits from the New York City Department of Buildings. In the course of the demolition and construction on the properties, defendant's contractors allegedly "dug to a depth of five (5) feet into [p]laintiff['s] property and excavated sixteen (16) inches into [p]laintiff's property without authorization and consent." These contractors allegedly disturbed the subsoil beneath plaintiff's property and failed to adequately underpin its foundation, thereby causing its foundation to settle and the walls to crack. In particular, immediately following the contractors' excavation, plaintiff states that he "discovered diagonal step cracks developing in his building's north exterior wall at parapet location, said location adjoins [d]efendant's property [No. 2], also the same condition was observed at the front wall at the same location." Plaintiff believes that his "building is in imminent danger of collapse."

Thereafter, numerous violations were issued against defendant and his contractors by the Department of Buildings and other agencies responsible for supervising construction sites in New York City. Specifically, a stop work order has been issued, and currently remains in effect, enjoining defendant and his contractors from continuing work on Property No. 2, which is immediately adjacent to plaintiff's property. As the result of the stop work order, plaintiff alleges that defendant "attempted to obtain retroactive consent from Plaintiff pertaining to the underpinning." Plaintiff apparently has not granted defendant the necessary consent and commenced an action against defendant and his contractors, seeking compensatory and punitive damages under six theories of liability (negligence, continuing trespass, continuing private nuisance, continuing public nuisance, unjust enrichment, and intentional infliction of emotional distress). Additionally, plaintiff has sought equitable relief or, in the alternative, monetary damages under a cause of action for an illegal easement. On March 25, 2008, plaintiff filed with the Kings County Clerk a Notice of Pendency, together with a copy of the complaint, against Property No. 1 and Property No. 2.

Parties' Contentions

Defendant

Defendant asserts that the Notice of Pendency is improper, pursuant to CPLR 6501, because the claims asserted in the complaint do not challenge title to, or use or enjoyment, of defendant's properties; rather, the claims concern title to, and use and enjoyment of, plaintiff's property.

Plaintiff

Plaintiff asserts that the Notice of Pendency is proper because the complaint seeks both equitable and monetary relief against defendant, included under a cause of action for an illegal easement. By way of cross- motion, plaintiff seeks a preliminary injunction to enjoin any further

work on defendant's properties, arguing that the walls of plaintiff's building are cracked and that it is in an imminent danger of collapse. In addition, plaintiff seeks entry of a default judgment against defendant for failure to timely answer the complaint. Defendant opposes both branches of plaintiff's cross- motion and seeks the imposition of sanctions on plaintiff for his allegedly frivolous claim of a default.

Discussion

Notice of Pendency

Defendant seeks to cancel the Notice of Pendency pursuant to CPLR 6514, which enumerates the reasons when a notice of pendency must or may be canceled by the court. However, none of these grounds are applicable to this case. Additionally, "[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR 6501" (*Nastasi v Nastasi*, 26 AD3d 32, 36 [2005]; *see Rose v Montt Assets, Inc.*, 250 AD2d 451, 451-452 [1998] ["It is axiomatic that a court possesses the inherent power to grant relief to an aggrieved party from any action taken in violation of the procedural rules"]). Accordingly, an examination of the rules for filing a notice of pendency pursuant to CPLR 6501 is warranted (*see Henrietta Piping, Inc. v Antetomaso & Micca Group, LLC*, 11 Misc 3d 909, 912 [2006]).

A notice of pendency may be filed where "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Since resort to filing the notice of pendency requires no prior application before the Court, the device is considered "an extraordinary privilege" (*Israelson v Bradley*, 308 NY 511, 516 [1955]) "because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property" (*In re Sakow*, 97 NY2d 436, 441 [2002]). The filing of a notice of pendency requires no showing of the likelihood

of success on the merits (*see id.*), nor does it require consideration of material beyond the complaint itself (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321 [1984]).

To counterbalance the ease with which a party may hinder another's right to transfer property, the Court of Appeals has required strict compliance with the statutory requirements of CPLR Article 65 (*see 5303 Realty*, 64 NY2d at 320). As the Court of Appeals held in *5303 Realty*:

> "A notice of pendency, commonly known as a '*lis pendens*,' can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its *narrow* application to only those lawsuits *directly* affecting title to, or the possession, use or enjoyment of, real property (emphasis added)."

(*Id.* at 315-316; *see also Board of Managers of Woodpoint Plaza Condominium v. Woodpoint Plaza, LLC*, 43 AD3d 971, 972 [2007] ["the courts have applied a narrow interpretation in reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property"]).

Courts have consistently held that a notice of pendency "cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment or wrong perpetrated by defendants on plaintiffs' land" (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305-306 [1961] ["To hold that the defendant owners may not wrongfully use their property to the injury of their neighbors does not involve the kind of restrictions on use or enjoyment designed by section 120 of the Civil Practice Act [the predecessor to CPLR 6501] as furnishing the basis for the filing of a lis pendens"]). For example, an "action to abate a nuisance is not one affecting the title to, or the possession, use or enjoyment of real property" (*Braunston*, 10 NY2d at 306; *see Weidel v Kaba Realty, LLC*, 36 AD3d 796 [2007] [affirming cancellation of notice of pendency filed in an action to require property owner to board

up certain windows on the subject property]). Likewise, a trespass action seeking only money damages does not justify a notice of pendency as the judgment would not affect title to or possession of the realty (*see 5303 Realty*, 64 NY2d at 321; *Tavolacci v Valentine Enters., Inc.*, 34 Misc 2d 775, 776 [1961]). Moreover, where a plaintiff's claim is, "in essence only a money claim," a notice of pendency is not proper (*see Shkolnik v Krutoy*, 32 AD3d 536, 537 [2006] ["The complaint here seeks only monetary damages and an accounting to determine the amount of such damages. Accordingly, since a judgment for the plaintiff would not affect 'the title to, or the use, possession, or enjoyment of, real property,' the Supreme Court should have granted the defendants' motion to vacate the notice of pendency"]).

The narrow construction of CPLR 6501 (or its predecessor Civil Practice Act § 120) is illustrated by *Schlaifer v Shelby-Coleridge, Inc.* (206 Misc 315 [1954]), decided by the Supreme Court, Westchester County, and *Gregdon Corp. v Fierro*, (206 Misc 530 [1954]), decided by the Supreme Court, New York County. In *Schlaifer*, the complaint alleged multiple trespasses upon and wrongful use by defendant of the adjoining lot owned by the plaintiffs and sought: (1) a judgment declaring the rights of the parties in plaintiffs' lot; (2) a judgment against defendant for possession of that lot; (3) an injunction compelling the defendant to remove the earth which was encroaching on that lot and a drainpipe; and (4) a judgment compelling the defendant to restore that lot to the same condition it was before the placing thereon of the earth fill and the drainpipe. The court granted defendant's motion to cancel the notice of pendency since "[t]he subject of the action is trespasses upon and the use and possession of plaintiffs' lot, and not the title to or the use or possession of the defendant's lots against which the notice is filed" (*Schlaifer*, 206 Misc at 316).

In *Gregdon*, the complaint alleged that the defendant had erected a building on his property, the easterly wall of which rested on footings which encroached upon the plaintiff's land by at least seven inches, that the defendant had no right, title or interest to that portion of the plaintiff's land and that the encroachment was unlawful. The plaintiff sought a mandatory injunction to compel the removal of the encroaching wall and to restore the plaintiff to possession of the land that is the subject of encroachment. In canceling the notice of pendency, the court held "[t]he title of the defendant to the property described in the notice is not questioned. The plaintiff does not make any claim to it nor to its use, possession or enjoyment" (*Gregdon*, 206 Misc at 531). To the same effect is *Doyle v Hafner*, (12 Misc 3d 844 [2006]), in which a lot owner who built a garage encroaching on the adjacent owner's property sought a declaration that under adverse possession or prescriptive easement principles, he either owned or was entitled to use the disputed strip of land located on his neighbor's property. The neighbor filed a notice of pendency against the lot owner's property. The court canceled the notice of pendency because the disputed easement was located on the neighbor's property, while the notice of pendency was against the lot owner's property (*id.* at 847). *See also O'Connor v Long*, 283 AD 887 [1954], and *McManus v Weinstein*, 108 AD 301 [1905], in which an encroachment by the defendant on the plaintiff's property did not entitle the plaintiff to file a notice of pendency against the defendant's property.

In this case, no valid basis exists which justifies the filing of a Notice of Pendency against Property No. 1 (165 East 54th Street). Plaintiff does not dispute that such property does not adjoin plaintiff's building and that no underpinning work was performed at Property No. 1. The Notice of Pendency against Property No. 1 is, therefore, canceled.

Regarding Property No. 2 (167 East 54th Street), plaintiff offers no real opposition to defendant's motion to vacate the Notice of Pendency filed against it. Plaintiff's complaint alleges that *his* property has been damaged by actions of defendant, that a permanent encroachment relates to *his* own title, not the title to defendant's property, and that his claim for a declaration that defendant lacks an easement relates to the title to *his* own property, not to the title to defendant's properties (*see Braunston*, 10 NY2d at 305 ["Plaintiffs are claiming no interest in defendants' tract of land, they merely seek to prevent defendants from committing a wrongful act against plaintiffs. It does not give a right to file a lis pendens that the wrong is perpetrated by defendants in order to benefit their own real estate"]). None of plaintiff's claims against defendant involve or will in any way affect the title to, possession of, or use and enjoyment of Property No. 2; rather, it appears that plaintiff may be using the Notice of Pendency as a form of attachment to secure a source of funds (*see Richard J. Zitz, Inc. v Pereira*, 965 F Supp 350, 356 [ED NY 1997]). Therefore, "the extraordinary provisional remedy of a notice of pendency pursuant to CPLR 6501 is not available and consequently must be cancelled; nor may it be used as a form of attachment" (*Downs v Yuen*, 297 AD2d 251, 251 [2002] [internal citation omitted]). Accordingly, the Notice of Pendency against Property No. 2 is likewise canceled.

Preliminary Injunction

Plaintiff seeks to preliminarily enjoin any further work on both of defendant's properties until defendant "complies with the proper procedures for underpinning and until an investigation can be conducted to identify and repair the inadequate and improper underpinning of plaintiff's property."

Although plaintiff's request for an injunction encompasses both of defendant's properties, it is only Property No. 2 (167 East 54th Street), which adjoins plaintiff's building. Defendant's Property No. 1 (165 East 54th Street) has nothing to do with the underpinning of plaintiff's building and, thus, plaintiff is not entitled to a preliminary injunction with respect to such property. Accordingly, the court will examine plaintiff's entitlement, or not, to a preliminary injunction with respect to Property No. 2 only.

The standards for obtaining a preliminary injunction pursuant to CPLR 6301 require a plaintiff to demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of equities in the movants' favor (*see Ruiz v Meloney*, 26 AD3d 485, 485-86 [2006]; *see also W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The determination to grant or deny such relief is within the discretion of the court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Concerning the first element of the three-part test, plaintiff has made no showing of the likelihood of success on the merits. On August 30, 2007, an inspector from the Department of Buildings, in response to plaintiff's complaint, examined Property No. 2 and plaintiff's building. The inspector reported that "no violation [was] warranted for complaint at time of inspection" with respect to Property No. 2 and that the cracks on plaintiff's building "appear[ed to be] existing prior to excavation." Moreover, the inspector cited plaintiff with a violation for his "failure to maintain exterior building wall."

Plaintiff's expert, Sheldon Pulaski, P.E., has found cracks on the north and east walls of plaintiff's building and concluded that it "remains in danger of collapse, as the integrity of the foundation may have been undermined." However, he does not state that he personally has

examined the underpinning of plaintiff's building. Furthermore, he has not conclusively established that the cracks on plaintiff's building exterior are due to the defective underpinning of plaintiff's building. He states that the "above cracking is *usually* attributed to construction vibration *and/or* defective underpinning." In contrast, defendant's expert, Hari V. Soni, P.E., states that he personally inspected and supervised the underpinning operations of plaintiff's property and that he prepared a certification to the Department of Buildings (known as TR-1),[1] stating that the underpinning of plaintiff's building has been performed "in accordance with applicable City Building Code rules and regulations." The report of defendant's expert with its certification to the court is entitled to more weight than the inconclusive affidavit of plaintiff's expert. In light of the foregoing, plaintiff has failed to demonstrate the likelihood of success on the merits.

The next element of the test is a showing of irreparable harm. A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual (*see* CPLR 6301). A claim for money damages is neither an action for an injunction nor one in which there is involved a "subject of the action" as referred to in CPLR 6301[2] (*see James v Gottlieb*, 85 AD2d 572, 572 [1981]).

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[1] According to plaintiff, TR-1 stands for "Technical Report Statement of Responsibility."

[2] CPLR 6301 provides, in relevant part:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting *the subject of the action*, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff (emphasis added)."

Plaintiff's complaint, in furtherance of which a preliminary injunction is being sought, requests only money damages, which, as a matter of law, do not constitute irreparable harm. Moreover, in March 2008, the Department of Buildings reinstated a "full stop work" order, precluding defendant or its contractors from performing any further work on Property No. 2. As long as such stop work order is in effect, no basis exists to preliminarily enjoin the continuation of the work on that property. On the other hand, if, in the future, the stop work order is lifted, the Department of Buildings will have necessarily satisfied itself that the underpinning has been completed in accordance with the applicable rules and regulations and that such underpinning poses no risk to the structural integrity of plaintiff's building.

The outcome of the final element of the test – balancing of the equities – depends on the reason why the Department of Buildings reinstated a stop work order against Property No. 2. The complaint alleges that as a result of the stop work order, defendant "attempted to obtain retroactive consent from Plaintiff pertaining to the underpinning." This suggests that the cause for the reinstatement of the stop work order may have been plaintiff's failure to consent to the underpinning of plaintiff's property. If that is the case, then plaintiff has no need for an injunction since he can consent to the underpinning of his property at any time.

Based on the foregoing factors, plaintiff's request for a preliminary injunction is denied.[3]

Timeliness of Defendant's Answer and Sanctions

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[3] Plaintiff also requests a temporary restraining order. Such request is denied for the same reasons as his request for a preliminary injunction.

In his cross-motion, plaintiff argues that defendant untimely answered the complaint and seeks to hold defendant in default. Defendant counters that his answer was timely and requests the imposition of sanctions.

According to the affidavit of service dated May 1, 2008, the summons and complaint were affixed to the door of defendant's residence on April 3, 2008 and were mailed to defendant's residence on April 4, 2008. Pursuant to CPLR 308 (4), "proof of such service shall be filed with the clerk of the court designated in such summons within twenty days of either such affixing or mailing, whichever is effected later . . . ." The affidavit of service, however, was filed on May 2, 2008 or more than twenty days after mailing. Thus, service was not in compliance with CPLR 308 (4) and defendant cannot be held in default. Even assuming that the filing was timely (and it was not), defendant's answer would have been due, in accordance with CPLR 308 (4) and 320, within 40 days after the affidavit of service was filed; that is, on June 11, 2008. Even if the court were to overlook plaintiff's failure to properly serve defendant, defendant's answer, which was served on May 9, 2008 and filed on May 12, 2008, was timely.

Moreover, without waiting for the expiration of defendant's time to answer, plaintiff filed a cross- motion and a memorandum of law dated May 5, 2008, arguing that "[t]he time for defendant . . . to appear, answer, or raise an objection to the complaint has expired" and seeking to hold defendant in default in accordance with CPLR 3215 (a). Plaintiff characterized the so-called default on defendant's part as "intentional and willful . . . designed to prejudice or hamper [p]laintiff's ability to litigate this action expeditiously." In his response, defendant explained why his answer was timely and requested sanctions. In reply, plaintiff ignored defendant's response as to the timeliness of his answer and the request for sanctions.

22 NYCRR § 130-1.1 (a) permits the imposition of financial sanctions upon any party or attorney in a civil action who engages in "frivolous conduct." Sanctions may be requested by an aggrieved party by way of a motion or cross-motion in compliance with CPLR 2214 or 2215 (22 NYCRR 130-1 [d]). Since defendant requested sanctions in his reply, rather than by way of a motion or cross-motion, the court denies defendant's request for sanctions.

Conclusion

Accordingly, it is:

ORDERED that defendant's motion to cancel the Notice of Pendency is granted; and it is further

ORDERED that the Kings County Clerk is directed to cancel the Notice of Pendency dated March 24, 2008, indexed against Block 4660, Lot 44 (165 East 54th Street, Brooklyn, New York), and Block 4660, Lot 45 (167 East 54th Street, Brooklyn, New York); and it is further

ORDERED that plaintiff's cross- motion for a preliminary injunction and to hold defendant in default is denied; and it is further

ORDERED that defendant's request for sanctions is denied.

The foregoing constitutes the decision and order of this court

ENTER

J.S.C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT