

SCAN

**SHORT FORM ORDER  
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice**

**TRIAL/IAS, PART 35  
NASSAU COUNTY**

\_\_\_\_\_  
**MARIANNE THOMPSON.**

**Plaintiff.**

*- against -*

**Sequence No.: 003  
Index No.: 015208/04**

**ROY E. BERG, DONNA L. BERG, ERIC H. BERG  
and CINDY BERG.**

**Defendants.**

\_\_\_\_\_  
**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	
<b>Order to Show Cause and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	

Upon reading the papers submitted and due deliberation having been had herein, defendants Roy E. Berg and Cindy Berg's (hereinafter "Berg defendants") motion for an order 1) canceling the notice of pendency filed herein against the real property located at 5 Roosevelt Avenue, Malverne, New York; and 2) for summary judgment on moving defendant's first counterclaim and first cross-claim for a declaratory judgment that defendant Roy E. Berg is entitled to reimbursement of legal fees and disbursements from the gross proceeds of the sale of the above referenced property is hereby determined as set forth below.

Plaintiff and defendants herein are siblings. Plaintiff alleges that as a result of a guardianship proceeding relative to the parties' mother, Viola Berg, this court authorized the transfer to defendant Roy E. Berg of Viola Berg's interest in real property located at 5 Roosevelt Avenue, Malverne, New York for the purpose of rendering Viola Berg eligible for medicaid benefits. On March 22, 2001 the parties entered into an agreement pursuant to which Roy E. Berg would hold title to the premises as constructive trustee on behalf of all parties herein. The agreement also provided that two years after execution or one year following Viola Berg's death, the parcel was to be sold and the proceeds therefrom divided equally among the siblings. Plaintiff commenced the instant action and asserted causes of action for 1) specific performance relative to the sale of the property; 2) imposition of a constructive trust in plaintiff's and defendants Donna, Eric and Cindy Berg's favor against defendant Roy E. Berg; 3) partition

pursuant to Real Property Actions and Proceedings Law Article 9; and 4) specific performance relative to the distribution of the decedent's personal property as set forth in the underlying constructive trust agreement. Defendants Roy E. Berg and Cindy Berg have answered and assert a counterclaim and cross-claim on behalf of defendant Roy E. Berg for a declaratory judgment that Mr. Berg is entitled to reimbursement for legal fees and disbursements in connection with the guardianship of decedent and administration of decedent's estate.

The Berg defendants move for an order pursuant to CPLR §6514 cancelling the notice of pendency filed by plaintiff in this action. CPLR §6514 provides that a notice of pendency may be cancelled upon motion where 1) plaintiff fails to effectuate service of the summons and complaint upon defendant within the time limits set forth in CPLR 6512, the matter settles, the matter is discontinued, the matter is abated, the time to appeal from a final judgment has expired or enforcement of a final judgment against plaintiff has not been stayed pursuant to CPLR 5519; and 2) plaintiff has not commenced or prosecuted the action in good faith. CPLR §6514(a) and (b). CPLR §6514(d) provides that the notice of pendency may be cancelled by stipulation of the parties and subsection (e) provides that same may be cancelled by plaintiff at any time prior to the entry of final judgment upon a showing that "there have been no appearances and that the time to appear has expired for all parties." It has also been held that a notice of pendency may be cancelled when same is defective. See, e.g., Chateau Rive Corp. v. Riverview Partners, 18 A.D.3d 492 (2<sup>nd</sup> Dep't 2005); Brox v. Riker, 56 A.D. 388 (1<sup>st</sup> Dep't 1900).

Moving defendant seeks cancellation of the notice of pendency herein on the basis that defendant Roy E. Berg is in contract to sell the subject property to a third-party for \$427,000.00 and that plaintiff's failure to agree to cancel the notice of pendency would jeopardize the sale and, by extension, the proceeds therefrom to divide among the parties hereto.

Such reason is not one of those enumerated by CPLR §6514. Further, moving defendants fail to demonstrate that the notice of pendency was otherwise defective. It is also noted that movants make no allegations regarding the legality or propriety of the notice of pendency. Accordingly, to the extent moving defendants seek an order cancelling the notice of pendency pursuant to CPLR §6514, the motion is denied.

Defendants also seek summary judgment on defendant Roy E. Berg's counterclaim and cross-claim for a judgment entitling Mr. Berg to legal fees and disbursements for his guardianship over decedent and his administration of decedent's estate.

In moving for summary judgment, moving defendants must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing a motion for summary judgment, plaintiff must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

In support of their motion defendants rely upon counsel's affirmation which is verified by defendant Roy E. Berg. In his affirmation, counsel asserts that based upon the unambiguous language of the trust agreement that Mr. Berg would be entitled to the above referenced sums.

Conspicuously absent from defendants' submissions is any proof in admissible form as to what amounts, if any, Mr. Berg expended in his capacities as guardian and/or administrator. Further, following trial on plaintiff's claims, any amounts proven by defendants may be negated based upon plaintiff's damages.

The court notes that the note of issue has been filed. As a determination of defendants' motion turns on proof of the amounts owed, the court adjourns that branch of the motion which seeks summary judgment on Roy E. Berg's counter and cross-claims to February 22, 2006 at 9:30 a.m. at which time a hearing shall be conducted on said branch of the motion. See, CPLR 3212(b); Siegel, Practice Commentaries C3212:22; C3211:47.

So Ordered.

  
A.J.S.C.

**Dated:** February 6, 2006

**ENTERED**

**FEB 14 2006**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**