



## CONSTRUCTION LAW ALERT

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### The Use of the Lis Pendens in Real Estate Litigation

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The lis pendens is commonly used in litigation involving the ownership of and rights in real estate. Record foreclosure filings and lawsuits regarding real estate deposits will elevate the lis pendens an even more important role in real estate litigation.

#### What is a Lis Pendens?

*Lis pendens* is a Latin phrase meaning “a suit pending.” It is a written notice filed in the county in which the real property is located indicating that a lawsuit has been filed which concerns the title to real property or some interest in real property. The lis pendens (or notice of pending action) contains the names of the parties, the time of institution of the action, the name of the court in which it is pending, a description of the property involved or affected, and a statement of the relief sought as to the property.<sup>1</sup>

The purpose of the lis pendens is to notify prospective purchasers and encumbrancers that any interest acquired by them in the property in litigation is subject to the judgment of the court. For all practical purposes, it is virtually impossible to sell or mortgage property subject to a lis pendens because the interest of the purchaser or mortgagee is

subject to the eventual outcome of the lawsuit.<sup>2</sup>

There are two types of lis pendens, depending upon the plaintiff’s cause of action. The first type exists where the initial pleading shows that the action is founded upon a duly recorded instrument (e.g., construction lien, recorded lease/option purchase agreement). In this instance, the lis pendens is maintained as a matter of right for the duration of the action.

The second type of lis pendens exists where the initial pleading does not show that the action is founded upon a duly recorded instrument (e.g., lease, unduly recorded joint venture agreement), such that the lis pendens provides the first notice to the public of a clouded title. This type of lis pendens is ineffective beyond one year from the commencement of the underlying action, subject to the control of or discharge by the court.

The lis pendens filer may be allowed to maintain a lis pendens that is not based on a duly recorded instrument, if, at an evidentiary hearing, the filer establishes a fair nexus between the claimed legal equitable

ownership of the property and the dispute contained in the pleadings. In addition, as explained below, the lis pendens filer is required to post a bond.

#### Discharging a Lis Pendens

Once a lis pendens is recorded, the adversely affected party may move to discharge the lis pendens. The court will review the complaint, contract and any other relevant evidence to determine if there is a fair nexus between the property and the dispute.

Florida courts have found that there is no fair nexus between the claim and the property and have discharged lis pendens in cases where the owner of the property was not named in the complaint, where the complaint alleged breach of an oral contract for the sale of property and the oral contract was unenforceable based on the statute of frauds, and where the claim alleged that the defendants improperly transferred corporate funds to themselves and used them to purchase a home and a condominium.

Courts are also not likely to find a fair nexus between the claim and the property where the action does not affect title to

or possession of the property, although the parties to the action have some joint interest in real property. Nor will a fair nexus be established where a lis pendens is recorded against real property owned by a defendant who seeks to exert pressure on the defendant to pay an unrelated debt or claim.

## The Lis Pendens Bond

For claims that are not based upon duly recorded instruments, the court must require the party filing the lis pendens to post a bond to indemnify the property owner for the damages the owner is reasonably expected to sustain during the pendency of the lis pendens if the owner ultimately prevails. The court is required to conduct an evidentiary hearing to determine the amount of the bond.

The bond may include damages such as the difference between the fair market value of the property at the time of filing the lis pendens and the termination of the lis pendens or lawsuit, the interest, taxes, insurance and carrying costs incurred during the time the lis pendens is of record, profits which would have realized from a sale lost because of the recordation of the lis pendens, and the attorney's fees incurred in defending the underlying action

and obtaining the discharge of the lis pendens. Because the amount of a lis pendens bond can be substantial, often times, the filing party is not able to or will not post the required bond. The court will then discharge the lis pendens.

## Can The Wrongful Filing of a Lis Pendens Give Rise to a Slander of Title Claim?

A lis pendens may subject the filer to a slander of title claim if the lawsuit ultimately is unsuccessful. The law of each jurisdiction varies.

Slander of title is an action based on malicious publication of a false matter that disparages the title to property. In Florida, a defamatory statement made during a judicial proceeding is absolutely privileged provided that such statement is related to the proceeding's subject matter. Florida courts have held that a notice of lis pendens has no existence separate and apart from the litigation for which it gives notice. Therefore, the notice is within the absolute privilege of judicial proceedings and does not support a claim for slander of title. The aggrieved party should also evaluate whether it has claims other than slander of title and, if it prevails in the suit, seek disbursement of the lis pendens

bond, if such a bond has been posted.

## Conclusion

The notice of lis pendens is a valuable and effective tool whenever litigation affects the title to or possession of real property. There are certain types of actions in which the filing of a lis pendens should be considered: actions to quiet title, to partition real property, to determine adverse interests in real property, for specific performance of a contract to acquire title to real property, to rescind a contract to purchase real property, to cancel a deed, and to enforce a lien on real property.

Lis pendens filers, owners and other parties involved in real estate litigation should be aware of the procedures, requirements and consequences of filing of a lis pendens. ■

<sup>1</sup> Florida's lis pendens statute is Section 48.23, Florida Statutes.

<sup>2</sup> Even if a lis pendens has not been filed, the mere pendency of a lawsuit can affect the marketability of real property. It is virtually impossible to obtain title insurance to convey title when a lawsuit is pending relating to the property.

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