

New Twist On Lis Pendens Law by Dale Alberstone, Esq.

On September 14, 2005, the San Diego branch of the California Court of Appeal parted company with prior decisions of some of the other appellate court districts, ruling that a lis pendens cannot be used to place a lien against real property alleged by a creditor to be held by a third party in a "constructive trust." I know that is a mouthful, so let me try to explain this new pronouncement starting with a review of the nature of a lis pendens.

Nature of a Lis Pendens

A lis pendens is a short document, usually two or three pages long, which is recorded with the county recorder after a lawsuit is filed affecting title or possession to specific real property. The purpose of that recordation is to impart notice to anyone who might become involved with the property that a lawsuit has been filed concerning it. Any person thereafter dealing with the property, such as a purchaser or a lender, will be bound by the judgment of the litigation.

Thus, in order to know whether one will be bound by any lawsuit affecting the property, that person need only research the documents filed with the local county recorder. If a lis pendens is not recorded with the county recorder, then the individual will not be bound by any judgment of the court.

Origin of the Lis Pendens

In the developing law of England from the time of the Norman conquest in 1066 through the 20th Century, as well as during the history of the United States, jurisprudence in both nations followed what was known as the "common law." The common law was developed by judicial tribunals through expressions of what the law was even though it was not set forth in any statute. As time passed, judicial decisions would build upon the pronouncements of earlier decisions which would collectively constitute the common law.

At common law, the mere existence of a lawsuit affecting real property was sufficient to impart notice that if anyone acquired an interest in the property after the suit was commenced, that person would be bound by the judgment in the case. That could result in a harsh effect because it was difficult, if not impossible, for a person to search the records of all of the courts in the districts to ascertain whether any official proceeding had been filed affecting the property.

To ameliorate the adverse impact of that common law rule of notice, the California state legislature enacted various lis pendens statutes to eliminate the fiction of constructive knowledge and to replace it with a sensible system of imparting notice only when a lis pendens has been recorded. Because the legislature prescribed that the lis pendens must be recorded in the county in which the property is located to be effective, it is relatively easy for an interested party to search only the records of the county recorder of that county, rather than the courts of the entire district, shire or state.

Use and Abuse of a Lis Pendens

California has enacted numerous statutes to simplify and clarify the use and abuse of a lis pendens. A lis pendens may only be lawfully recorded if the following conditions exist: (1) a plaintiff has previously filed a lawsuit against a defendant, and (2) the lawsuit affects title or possession to specific real property. If the action satisfies the second condition, then the litigation is said to assert a "real property claim."

Conversely, if no lawsuit has been filed, or the lawsuit which has been commenced does not allege a real property claim, then the recordation of a lis pendens is improper. Nevertheless, if a suit is filed which does not contain a real property claim, a recorded lis pendens will still adversely affect the owner's title until the court expunges it (i.e. orders it to be removed) from the county recorder's records.

The adverse consequence of a lis pendens, whether properly or wrongfully recorded, to the owner of the property may be substantial, if not oppressive. For example, once a lis pendens is recorded, even if the recordation was not justified, the property owner cannot deliver clear title to

his land if he attempts to sell it. Also, few lenders, if any, will make a loan which is secured against property encumbered by a lis pendens. To do so would almost assuredly mean that the lender would be named as a defendant in the existing litigation and, in addition, be bound by any loss which the property owner may suffer to the person recording the lis pendens.

New Twist on Lis Pendens Law

As noted above, on September 14, 2005, the California Court of Appeal seated in the San Diego area ruled in Campbell v. Superior Court that a lis pendens cannot be used when a plaintiff asserts a "constructive trust" against specific real property. Some earlier cases ruled similarly, whereas other California cases held that a lis pendens could be used for a constructive trust. Such inconsistent rulings makes real estate attorneys want to pull out their hair.

It is difficult to define a constructive trust, but let me try. In general, a constructive trust is an equitable remedy available to a person to recover his or her property from someone else who wrongfully acquired it. For example, a constructive trust may be imposed by the court where a person has wrongfully obtained money and then uses the money to buy a piece of real property or to improve his existing property. The person defrauded out of his money may seek reimbursement of his funds by placing a lien (i.e. a constructive trust) on the property the other acquired with the money.

In the Campbell case, Campbell filed a complaint against La Barrie alleging that La Barrie exercised undue influence over Campbell's father in persuading the father to expend \$200,000 of funds to pay for the remodeling of La Barrie's house. Campbell filed suit requesting the court to impose a constructive trust and equitable lien on La Barrie's home. Campbell then recorded a lis pendens against La Barrie's property in order to prevent it from being transferred. Campbell reasoned that if the court ruled in his favor, the residence would be sold and Campbell could recover the \$200,000 from the proceeds.

La Barrie filed a motion to expunge the lis pendens claiming that Campbell's lawsuit was really not an action against the title or possession to the house, but instead, only a claim for money. The trial court agreed with La Barrie and expunged the lis pendens. On September 14 one of the six California Court of Appeal districts in the state also agreed with La Barrie and upheld the Superior Court's expungement of the lis pendens.

The Court of Appeal reasoned that the gravamen of the lawsuit was to obtain money damages with the requested remedy being the sale of the house in order to collect that money. In other words, the court said, the lawsuit was not claiming title or possession to the property, but merely that the property should be used as collateral for any monetary award Campbell might acquire.

Candidly, the San Diego Court of Appeal acknowledged that other courts in this state have ruled that a constructive trust is sufficient to support a lis pendens because if the plaintiff wins, title to the property will be affected due to the court-ordered sale. However, the San Diego Court declined to follow that line of cases.

Conclusion

It is likely that within the next twelve months the California Supreme Court will issue its own definitive decision as to whether or not a lawsuit filed to impose a constructive trust on someone else's real property adequately justifies the recordation of a lis pendens.

For readers of this column, the majority of whom are not attorneys, it is sufficient to understand that most real property lawsuits do affect title to property, thereby justifying the recordation of a lis pendens. The most common such litigation is an action by a buyer for specific performance of a contract against a seller who has reneged in the sale.

Attorneys reading this column who desire a more in depth discussion should review the California Supreme Court's ruling in Kirkeby v. Superior Court (2004) 33 Cal.4th 642, in which the high court held that a fraudulent transfer of property does support the recordation of a notice of pendency of action. However, in Kirkeby, the Supreme Court also noted that the issue of whether a constructive trust case is a proper basis for a lis pendens was not before it, and therefore declined to issue a ruling.

We will soon see what the future holds for constructive trusts.

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Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill in integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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