

Lis Pendens: The New Law

by Dale Alberstone, Esq.

On February 23, 2007, the California Court of Appeal, in the case of Dyer v. Martinez, fashioned new law concerning to the legal effect of a lis pendens during the first few days following the recordation of the document. Before discussing the court's new ruling, let me review with you the general nature of a lis pendens.

Nature Of A Lis Pendens

A lis pendens is a document which is recorded with a County Recorder following (but never preceding) the filing of a lawsuit in which the plaintiff (i.e. the person who is suing) asks the court to issue an order or other judgment which affects title or possession to a specific piece of real property.

The purpose of the lis pendens is to provide notice (more technically, "constructive notice") to everybody in the world who might be interested in the property that the plaintiff has filed litigation which pertains to the real estate. The technical name of a lis pendens is a "Notice of Pendency of Action."

Once the lis pendens is recorded with the County Recorder in the county in which the real property is located, all persons who thereafter deal with the property are bound by all past and future rulings of the court in the subject litigation.

By analogy, a lis pendens is a little bit like a first trust deed. Anybody who thereafter loans money and secures the loan with a second trust deed against the property, is bound by the terms of the previously recorded trust deed. Similarly, a lis pendens constitutes an encumbrance against the owner's title to the property. If he/she sells it or refinances it after the recordation of the lis pendens, the new buyer or lender will be bound by any decision of the court in the underlying litigation.

The most frequent occurrence of the recordation of a lis pendens is by a buyer who contends that he and the property owner are parties to an enforceable contract, whereas the seller maintains that the contract was cancelled or is otherwise unenforceable. Thus, the proponent of the lis pendens contends that he has the right to purchase the property whereas the property owner contends that the contract is no longer effective.

One such scenario might arise where the selling property owner cancels the escrow based on a contention that the buyer did not timely perform. The seller then seeks to resell the property to a new purchaser. The original buyer, who disputes the seller's position, then files a lawsuit and records a lis pendens before the seller is able to consummate an escrow with the new purchaser.

If the new purchaser then proceeds to accept title to the property and close the escrow, he acts at his own peril. That is because if the court finds that the contract with the first buyer was enforceable, the court will take the title away from the new purchaser and reconvey it to the original buyer upon the buyer's payment of the purchase price to the seller.

Thus, the recordation of a lis pendens will have a chilling effect on any resale or refinancing of the property pending the conclusion of the litigation.

The New Law

In the Dyer case, the following occurred. On June 9, 2003, Dyer entered into a written contract to purchase some property in Orange County. On July 3, 2003, the seller cancelled the sale on the basis that Dyer purportedly failed to obtain loan approval and timely close the escrow.

On July 15, 2004 (one year later), the seller relisted the property for sale and found a new purchaser. In early September 2004, Dyer filed a lawsuit against the seller seeking specific performance, damages and declaratory relief based on the seller's alleged breach of the agreement. Promptly thereafter, on September 9, 2004, Dyer recorded his lis pendens with the Orange County Recorder. However, it was not until September 14, 2004, that the recorder had the time to index the lis pendens in order that someone searching the title of the property would be aware of the September 9 recordation.

On September 10, 2004, escrow closed in favor of the new purchaser.

Dyer claimed that the new purchaser was subject to the litigation and subordinate to his 2003 contract against the seller because the lis pendens was recorded prior to the close of the new escrow. Specifically, Dyer pointed to California Code of Civil Procedure Section 405.24 which provides:

“From the time of recording the Notice of Pendency of Action, a purchaser, encumbrancer or other transferee of the real property . . . **shall be deemed to have constructive notice** . . . of the action as it relates to the real property”

Thus, Dyer asked the court to enforce the statute as written, namely: that the lis pendens was enforceable against the new purchaser “from the time of recording,” because it was recorded one day prior to the closing.

The new purchaser objected. He argued that because the lis pendens was not indexed, even though it was recorded, as of the time of the close of escrow, he should not be charged with constructive notice of the lis pendens because, he explained, he had no possible way of knowing of its existence.

The Court of Appeal agreed with the new purchaser, holding:

“We are compelled to read the term ‘recording’ in the statute as meaning ‘recorded as prescribed by law.’ Government Code §27250 requires indexing of all recorded lis pendens. Accordingly, a lis pendens will not provide constructive notice until has been properly indexed.”

The court then concluded that new purchaser owned the property free and clear of anything which might happen in the litigation because the purchaser did not have constructive notice of the lis

pendens at the time escrow closed. Of course, the purchaser's title company was also happy with result because at the close of escrow, presumably, it issued a policy of title insurance to the new purchaser guaranteeing that the purchaser owned the property. If the purchaser would have been bound by the lis pendens and the litigation, then potentially Dyer would have succeeded to title and the title company would have had to reimburse the purchaser for the price the purchaser paid.

Commentary

The Dyer case is important because a lis pendens will now only be binding against a subsequent purchaser or lender if the document has been both recorded **and** indexed at the time of the consummation of the sale or refinance.

On a cerebral level, I have trouble with what the court did. I certainly agree that the result was fair as it would not be equitable to subject the new purchaser to constructive notice of the litigation under circumstances where it was impossible for him to have known of the existence of the lis pendens after recordation but prior to its indexing.

On the other hand, the Code of Civil Procedure could not have been clearer where it says that constructive notice is imparted "from the time of the recording." It does not say that notice is imparted from the time of the indexing, which, in every instance, will be some time after the recordation.

Thus, what the appellate court has done is to rewrite the Legislature's state law in a manner which the court construes as equitable. In this particular instance, I agree that the court's decision is fair but disagree that the court, rather than the Legislature, should have rewritten the statute. In other words, I believe that the Legislature, not the court, should have rewritten the Code to provide that constructive notice is imparted following "the indexing of a properly recorded lis pendens."

Other than the specific buyer in the Dyer case, the court's ruling probably does not offend anyone. However, that case points out a subtle but important example of the court's willingness to engage in judicial activism when a statute, as written by the Legislature, is not, in the court's opinion, equitable.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and 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. Address correspondence to Dale S. Alberstone, Esq.,

*ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California
90067. Phone: (310) 277-7300.*