

## **Lis Pendens – An Update**

by Dale S. Alberstone, Esq.

When the economy is strong, real estate investors, developers and contractors are generally too busy doing deals and working on projects than to think about litigation to redress anything other than the most serious of contract breaches or other wrongs. They attend to their business in a manner consistent with the slogan of a now defunct Wall Street investment firm, “We make money the old fashion way – we earn it.”

When the economy is bad, as certainly is the case now, real estate transactional work has dramatically slowed and profits are few and far between. Instead of earning income the old-fashioned way, entrepreneurs in real estate turn to a different American way of making money, namely: they litigate.

Litigation certainly has its place and many times it is necessary and well-justified. However, in a bad economy, businessmen and women become less willing to overlook breaches and mistakes, particularly because they have more time available as they are participating in far fewer business transactions. Consequently, when the economy is down, litigation is up. That is particularly true with real property dealings.

### **NATURE OF A LIS PENDENS**

In real estate law, one of the most potent weapons a plaintiff has when filing an action affecting title or possession to real property is to record a lis pendens. With the anemic economy, expect to see many more of them.

Readers of this magazine know from my prior articles that 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 impart notice (more technically, “constructive notice”) to everybody in the world who might be interested in the property which is the subject of the litigation. 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 estate 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 comparison, 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 subject to and bound by any decision of the court

handling the 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 maintains that he has the right to purchase the property, whereas the property owner asserts that the contract is no longer effective.

One such scenario might occur 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 a 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 remove the title 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 has a chilling effect on any resale or refinancing of the property pending the conclusion of the litigation.

#### **UPDATED LAWS**

On December 10, 2008, the California Supreme Court entertained a novel idea, namely: Whether a plaintiff who files a lawsuit in another state to compel construction of condominiums to be built in Mono County, California, followed by the sale thereof to the plaintiff, could record the lis pendens with Mono County while prosecuting the litigation in Florida?

In analyzing the issue, the Court recognized that the statute authorizing the recordation of a lis pendens simply states the following: ***“A party to an action who asserts a real property claim may record a Notice of Pendency of Action (Lis Pendens) in which that real property claim is alleged.”***

The Court then noted that the California Civil Code defines “action” as: “an ordinary proceeding in a court of justice by which one party prosecutes another . . . .”

In Formula Inc. v. Superior Court, filed in Mono County, the California Court of Appeal recognized that there was an underlying lawsuit which plaintiff filed against the developer and his agent (who were Maryland and Delaware corporations, respectively), in a Florida Court. Plaintiff maintained that since the Florida proceeding which was an ordinary proceeding in a court of justice, he should be allowed to keep his lis pendens recorded against the property.

Disagreeing with plaintiff's position, the defendants moved in the Superior Court of Mono County to expunge the lis pendens. Both the California Superior Court and Court of Appeal

agreed with the defendants. In its published opinion on December 10, 2008, the appellate Court explained that California's lis pendens statutory scheme was not intended to be extended to litigation filed in the courts of other states.

**Thus, what is important to know is that a plaintiff who wishes to record a Notice of Pendency of Action against a property in California, must file his/her litigation before the appropriate California Superior Court, and not with the court of another state, even if other states might have jurisdiction to decide the contract dispute.**

Incidentally, in the Formula case, there was no clear explanation as to why plaintiff first filed his action in Florida. Presumably, he felt that he would receive better justice from a Florida judge than one in California.

In another recent case (Dyer v. Martinez, 147 Cal.App.4<sup>th</sup> 1240), the court held that even though a lis pendens is recorded, it does not provide constructive notice until it has been properly indexed by the county clerk. In other words, the lis pendens is not effective until the recorder has been able to enter it into his records, notwithstanding the fact that the document is date and time-stamped the moment it is presented for recordation by the plaintiff.

In the Dyer case, timing was critical. There, 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 an opportunity to index the document in order that someone searching the title of the property could become aware of the September 9 recordation.

Unfortunately for Mr. Dyer, on September 10, 2004, escrow closed in favor of a new purchaser. Mr. Dyer claimed that that the new purchaser was subject to his previously filed litigation because his lis pendens was recorded one day before the recordation of the deed to the subsequent purchaser.

The Court of Appeal disagreed, holding that the recordation of the document alone is not sufficient to impart notice to a new buyer. The lis pendens did not become effective until the clerk indexed it.

## **CONCLUSION**

Even in a good economy, litigation is sometimes a necessary evil. In a depressed economy, litigation explodes with the number of lis pendens filings increasing dramatically.

Ordinarily, a defendant will want to eliminate the lis pendens from his/her property as soon as possible in order to avoid the practical effect of preventing its future sale or financing. That process can only be accomplished through a Motion to Expunge the document.

On the other hand, plaintiffs desperately want to maintain the recorded instrument as it often provides a great deal of leverage for settlement purposes against defendants.

With many additional recordings of lis pendens, we are likely to see an increase in appellate court decisions which modify existing law or establish new law as to the validity, removal and legal effect of those notices of pendency of actions.

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*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.*

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