

## **The Wrongful Recordation of a Lis Pendens by Dale S. Alberstone, Esq.**

My discussion this month is more technical than usual. While I have tried to keep it as simple as possible, because of the nature of the topic, I understand if apartment owners become a little confused. As noted at the end of each of my monthly columns, you are welcome to telephone me to ask general questions about this or any topic.

Before discussing the issues attendant to the wrongful recordation of a lis pendens, I need to explain what a lis pendens is, and what constitutes a "rightful" recordation of a lis pendens.

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A lis pendens is a written document, generally two pages long, which is signed by an attorney (or by a litigant with the court's prior approval) and states that a specifically identified piece of real property is the subject of litigation. Before the lis pendens can even be prepared, the party, generally through his attorney, must file a lawsuit which affects (1) title to the real property or (2) possessory rights in the property. For example, a buyer might file a lawsuit to compel a seller to convey title to the property after the seller, allegedly, backs out of the deal. As another example, the beneficiary of, or a claimant to, an easement across property may file a lawsuit against a property owner asking the court to adjudicate the rights and limitations of the easement. Such a lawsuit satisfies the "possessory interest" requirement for recordation.

The more precise name for a lis pendens is a "Notice of Pendency of Action." However denominated, the lis pendens must include the case number of the previously filed lawsuit. In other words, if a lawsuit has not first been filed which affects title or possession to specific real property, a lis pendens cannot be prepared, let alone recorded.

Once the litigation has been filed, the plaintiff (or his lawyer) is required to mail a certified copy of the document to all owners of record, following which the plaintiff's lawyer will record the original lis pendens with the county recorder of the county in which the property is located. That recordation automatically imposes an encumbrance on the property, which is sometimes referred to as "a cloud on title."

The encumbrance will prevent the owner from selling or refinancing the property. That is because no prospective purchaser is likely to purchase property with such an encumbrance and no institutional lender will make a loan against the property so long as the lis pendens remains of record.

A new purchaser or lender who ignores the lis pendens and acquires title or makes a loan anyway will be bound by the judgment in the litigation. Thus, the new purchaser or lender will be divested of their ownership in the property or their trust deed against it if the original buyer wins the lawsuit.

It is important to note that the only requirement for the recordation of a lis pendens (other than the fact that it be mailed to the property owners) is that an underlying lawsuit has been previously filed which affects title or possession to the property. So long as such an action was first filed, a lis pendens may be properly recorded even if the property owner contends (and even proves) that the action has no merit.

Prior to legislation enacted in 1992, the recordation of a lis pendens was "absolutely privileged." That meant that no matter how wrongful or malicious the recordation may have been, a property owner could not counter sue or later sue the person for damages arising out of the wrongful or malicious recordation.

In 1992, the state legislature curtailed the "absolute immunity" privilege. The legislature restricted the protection of the privilege to only cases in which the underlying litigation actually affects title or possession to real property. In other words, before that legislation, a party might record a lis pendens against property which was not the subject of the litigation and still have a privilege of immunity. With the new legislation, such wrongful recordation gives rise to a "cause of action" against the party recording the lis pendens, as well as his attorney, for "slander of title."

A "cause of action" is a legal basis upon which a person may legitimately file a lawsuit. "Slander of title" is the recording or other publication of a statement about someone's property which is untrue and disparaging. If that false statement is significant and thereby causes the owner to suffer damages, the owner may recover money (including compensatory and punitive damages) against the person who defamed his property.

In the recent case of Palmer v. Zaklama, 109 Cal.App.4<sup>th</sup> 1367, the California Court of Appeal expressly approved of the right of a property owner to sue for damages based on the wrongful recordation of a lis pendens. In Palmer, the court observed that once a lis pendens is filed, it "clouds the title and effectively prevents the property's transfer until the litigation is resolved where the lis pendens is expunged."

It then analyzed the 1992 legislation, concluding: *"Therefore, if the pleading filed by the claimant [plaintiff] in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the lis pendens . . . is not privileged. It follows the lis pendens in that situation may be the basis for an action for slander of title."*

Some readers of this article might ask: "Why would any lawyer record a lis pendens if the underlying action does not affect the real property in question?" The answer is that sometimes attorneys make mistakes. For example, in connection with a case which I am presently litigating for a client, the lawyer representing the wife in a divorce action recorded a lis pendens against my client's property without the property having been specifically referenced in the pleadings. The recordation of the lis pendens prevented my client (who is the son of the wife's husband) from refinancing his property at a lower interest rate.

My office filed a motion with the judge who was handling the divorce case to expunge (i.e. nullify) the Notice of Pendency of Action on the basis that the property was not identified in the pleadings. The judge agreed, and expunged the lis pendens.

Unfortunately, interest rates had increased significantly during the several months it took to expunge the lis pendens, resulting in an alleged loss to my client over the life of the loan of approximately \$87,000.00. My client then sued the attorney and the wife for those monetary damages on the alleged basis of slander of title.

Another instance where the recordation of a lis pendens is not allowed is where a party sues for the recovery of money, but not to compel conveyance of title to the property, even though the claim may have arisen out of a contract for the purchase of the property. For example, if a seller breaches his obligation under a contract to sell the property, the buyer might elect to sue for monetary damages arising out of the breach (such as to recover his deposit or to be awarded a sum of money equal to the difference between the high market value of the property and a low contract purchase price), but not seek to compel the seller to sell the property to him. Since the buyer is only suing for money, and is not trying to obtain title to the property, he is not allowed to record a lis pendens. Any recordation of a lis pendens when the buyer only seeks a monetary award would be wrongful and expose the buyer to damages for slander of title.

## CONCLUSION

A lis pendens is most frequently used by a buyer of property to prevent the owner from selling his property pending the completion of the litigation. It is a powerful weapon which can be used as leverage against the seller in many cases, particularly where the buyer files suit to compel specific performance of the contract.

When a lawyer records a lis pendens, the lawyer (and his client) should be certain that the underlying litigation truly affects title or possession to the real property identified in the document, and is not merely a lawsuit to recover money. An action which does not affect title or possession exposes both the lawyer and his client to damages for slander of title.

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*Mr. Alberstone is rated "AV" by Martindale Hubbell, which is the highest nationwide rating Martindale Hubbell bestows on attorneys.*

*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.*