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Lis Pendens in Real Estate Transactions: Asserting and Defending Property Rights, Recent Cases

TUESDAY, OCTOBER 1, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Lis Pendens:

Asserting and Defending Property Rights

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Lis Pendens- What is it?

- “Lis pendens” means “pending suit.”
- Also referred to as a “notice of pendency.”
- Comes from common law. Now mostly a statutory device.
- A notice. A warning really.
- **Important: Constructive notice.**
- Filed/recorded in the real property record.

Lis Pendens- Sample (FL)

Leave space for recording according to local requirements

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

Case No. _____

Plaintiff, _____
vs.
Defendant. _____ /

NOTICE OF LIS PENDENS

TO DEFENDANT(S) _____, AND ALL OTHERS WHOM IT MAY CONCERN:
YOU ARE NOTIFIED OF THE FOLLOWING:

- a. The plaintiff has instituted this action against you seeking [“to foreclose a mortgage” or “to partition” or “to quiet title” or other type of action] with respect to the property described below.
- b. The plaintiff(s) in this action is/are: _____
- c. The date of the institution of this action is _____ OR: the date on the clerk’s electronic receipt for the action’s filing is _____ OR: the case number of the action is _____ as shown in the caption.
- d. The property that is the subject matter of this action is in _____ County, Florida, and is described as follows:
[legal description of property]

DATED on: _____
Attorney for _____
(address and phone number) _____
(email address(es)) _____

NOTE: this form cannot be recorded without the clerk’s case number.

Lis Pendens- What does it do?

- Warns all person, namely any persons considering taking an interest in certain real property, that identified real property is the subject matter of identified and filed litigation.
- Buyer or lender beware!

Lis Pendens- What does it do?

- Preserves plaintiff's claim to the real property while the litigation is pursued.
- So that claim cannot be interrupted, prolonged, or mooted by defendant's subsequent disposition or encumbrance.

Lis Pendens- What does it do?

- Designed to stop endless cycle of litigation.
 - Florida: constitutes a bar to the enforcement against the property of all unrecorded interests and liens unless the holder moves to intervene within 30 days
- Designed to protect third parties to the litigation.

Lis Pendens- What does it do?

- Confirms court's jurisdiction over the subject real property.
- Confirms court's authority to decide the pending claims. Before further disposition. Or makes such subsequent disposition subject to the court's determination.
- Must be recorded where the property is located.

Lis Pendens- How does it work?

- Potential subsequent interest holders are directed to the pleadings and record of the identified lawsuit so they can advise themselves of the facts, claims, parties relative to the real estate in interest.
- Potential subsequent interest holders have the burden to determine the risk of moving forward in light of the suit.
- Subsequent buyer or lender may lose out if they do not conduct due diligence or if they decide to take the risk once they find the lis pendens.

Lis Pendens- What does it NOT do?

➤ Not a lien... or is it?

➤ Not an injunction....or is it?

Lis Pendens- Practical Impact.

- **Acts like a lien. Acts to clouds title.**
 - Title company will not likely insure in face of recorded lis pendens.
- **Acts like an injunction.**
 - Stops potential buyers/lenders in their tracks.
 - Pending transactions blown up or stuck in the mud.
 - Florida: look to injunction process to dissolve.

Lis Pendens- Notice of ?

- Tied to pending lawsuit.
- Tied to nature of the claim.
- Tied to the real estate identified.
- Constructive notice –harsh results at times.
- Actual notice – Can *potentially* trump statutory requirements under common law lis pendens. But can you prove it?
- Timing and order of recording important.

Lis Pendens-Typical Requirements

Texas Property Code 12.007

(a) After the plaintiff's statement in an eminent domain proceeding is filed or during the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a party to the action who is seeking affirmative relief may file for record with the county clerk of each county where a part of the property is located a notice that the action is pending.

(b) The party filing a lis pendens or the party's agent or attorney shall sign the lis pendens, which must state:

- (1) the style and number, if any, of the proceeding;
- (2) the court in which the proceeding is pending;
- (3) the names of the parties;
- (4) the kind of proceeding; and
- (5) a description of the property affected.

...

(d) Not later than the third day after the date a person files a notice for record under this section, the person must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice.

Lis Pendens-Typical Requirements

Fl. Stat. 48.23 Lis pendens.

(1)(a) An action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby only if a notice of lis pendens is recorded in the official records of the county where the property is located and such notice has not expired pursuant to subsection (2) or been withdrawn or discharged.

...

(c)1. A notice of lis pendens must contain the following:

- a. The names of the parties.
- b. The date of the institution of the action, the date of the clerk's electronic receipt, or the case number of the action.
- c. The name of the court in which it is pending.
- d. A description of the property involved or to be affected.
- e. A statement of the relief sought as to the property.

Lis Pendens-Typical Requirements

Cal. Civ. Proc. Code

405.4. “Real property claim” means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.

405.20. A party to an action who asserts a real property claim may record a notice of pendency of action in which that real property claim is alleged. The notice may be recorded in the office of the recorder of each county in which all or part of the real property is situated. The notice shall contain the names of all parties to the action and a description of the property affected by the action.

405.21. An attorney of record in an action may sign a notice of pendency of action. Alternatively, a judge of the court in which an action that includes a real property claim is pending may, upon request of a party thereto, approve a notice of pendency of action. A notice of pendency of action shall not be recorded unless (a) it has been signed by the attorney of record, (b) it is signed by a party acting in propria persona and approved by a judge as provided in this section, or (c) the action is subject to Section 405.6 [eminent domain].

405.22. Except in actions subject to Section 405.6, the claimant shall, prior to recordation of the notice, cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded instead of the proof of service required above, and the service on that party or owner shall not be required. Immediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending. Service shall also be made immediately and in the same manner upon each adverse party later joined in the action.

Lis Pendens-Typical Requirements

NY CPLR Article 65 (2018)

6511. Filing, content and indexing of notice of pendency. (a) Filing. In a case specified in section 6501, [the notice of pendency shall be filed in the office of the clerk of any county where property affected is situated](#), before or after service of summons and at any time prior to judgment. Unless it has already been filed in that county, the complaint shall be filed with the notice of pendency. (b) Content; designation of index. [A notice of pendency shall state the names of the parties to the action, the object of the action and a description of the property affected](#). A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice. Except in an action for partition a notice of pendency filed with a clerk who does not maintain a block index shall contain a designation of the names of each defendant against whom the notice is directed to be indexed.

6512. Service of summons. [A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant](#) or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed.

6513. Duration of notice of pendency. A notice of pendency [shall be effective for a period of three years](#) from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period.

Lis Pendens- How Far Does It Extend?

- **Litigation involving establishment of an “interest in” real property**
- **Real property “involved” in litigation**
- **Real property “affected” by litigation**
- **Meaning? Extent? Limitations?**

Lis Pendens- How Far Does It Extend?

- Generally, the claim lodged in the underlying suit must be for the property itself
- Rather than solely a claim seeking monetary damages.
- Property sought as a means to solely satisfy a monetary claim is generally “collateral.” Typically insufficient to support a lis pendens
 - Lis pendens subject to attack

Lis Pendens-Constructive Trusts

- Equitable remedy asserted in a lawsuit to avoid or undo a defendant's unjust enrichment.
- Can be used to seek fraudulently acquired property.
- Can be pled in relation to fraudulently acquired funds.
- Can also be pled in connection with fraudulently acquired funds which are then used to acquire real estate.
- How the claim is pled will matter.
- Claim to title vs. judgment lien/proceeds to satisfy judgment
- Case examples

Lis Pendens-Duration

- State specific:
 - Florida: 1 year unless:
 - A notice of lis pendens is not effectual for any purpose beyond 1 year from the commencement of the action and will expire at that time, unless the relief sought is disclosed by the pending pleading to be founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 against the property involved, except when the court extends the time of expiration on reasonable notice and for good cause. The court may impose such terms for the extension of time as justice requires.
 - New York: 3 years unless extension by order.
 - Texas / California: until the case is concluded.
 - A lis pendens provides constructive notice of property litigation, such that any judgment later obtained in the action relates back to the filing of the lis pendens, and clouds title until the litigation is resolved or the lis pendens is expunged.

Lis Pendens-Cancellation at Judgment or Dismissal of Action

- Purpose is to put parties on notice of action relating to title of property
- Final adjudication of action resolves property interest
- Closing of case “closes” lis pendens of same case number

Lis Pendens- Voluntary Release

- The filing party can typically cancel or release a lis pendens at any time
 - Record a Release of Lis Pendens
 - Check state law
 - Impact of release depends of situation
 - Title company review
 - Contractual requirements
 - Loan document obligations
 - Owner dissatisfaction
 - May require dismissal of action or judgment
 - Settlement or Order of funds in trust to release

Lis Pendens – Expungement or Dissolution by Defendants/3d Parties

- Removal actions vary by state
- Florida:
 - When the pending pleading does not show that the action is founded on a duly recorded instrument or on a construction lien, or when the action no longer affects the subject property, the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions.
 - Full injunction hearing
 - Authority for award of attorneys' fees

Lis Pendens – Expungement or Dissolution by Defendants/3d Parties

- Texas:
 - A party to an action in connection with which a notice of lis pendens has been filed may:
 - apply to the court to expunge the notice; and
 - file evidence, including declarations, with the motion to expunge the notice.
 - The court may:
 - permit evidence on the motion to be received in the form of oral testimony; and
 - make any orders the court considers just to provide for discovery by a party affected by the motion.
 - The court may award attorneys fees.

Lis Pendens – Expungement or Dissolution by Defendants/3d Parties

- New York:
 - Motion for cancellation of notice of pendency.
 - (a) Mandatory cancellation. ...if service of a summons has not been completed within the time limited ... the action has been settled, discontinued or abated....
 - (b) Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith.

Lis Pendens – Expungement or Dissolution by Defendants/3d Parties

- California:
 - Nothing in this title precludes any party from seeking an attachment, injunction, or other relief in connection with a real property claim or the expungement of a notice of pending action.

Lis Pendens – Quiet Title/Slander of Title

- If quicker dissolution method is not available
 - State does not provide process to dissolve lis pendens
 - Lose at initial hearing
 - Lis pendens meets all requirements
 - Corresponding lawsuit not filed
- Action for Quiet Title or Slander of Title

Lis Pendens – Ethical Violations

- Florida:
 - Attorney drafted, signed, and recorded a misleading Notice of Lis Pendens
 - Attorney asserted that she filed the Notice of Lis Pendens without a lawsuit because her client wanted her to do so.
 - Florida Bar requested 30 day suspension.
 - Florida Supreme Court suspended attorney for 90 days.

Lis Pendens.

Final Thoughts

Lis Pendens.

Questions?

Thank you!

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