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Notice of Dispute

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When litigating issues affecting real property, understanding how, when and why to file a notice of *lis pendens* often can avoid the undesirable circumstance of succeeding on the merits of a claim only to discover that the property at issue has been transferred and there is no practical means of effectuating the relief.

Under the common law, there was no effective mechanism to provide adequate notice of a dispute affecting real property to prospective acquirers. The suit itself was deemed constructive notice to anyone who thereafter acquired an interest in the real property that was the subject matter of the pending litigation of the legal and equitable rights being claimed in the litigation. Thus, the institution of the action itself placed a subsequent interest holder in the property on notice that their rights would be subordinate to any determination or out-

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come in the action. This, however, would require a search of any and all pending lawsuits potentially affecting the property — a cumbersome process, especially in the absence of a centralized registry of such actions.

To remedy these deficiencies under common law, the New Jersey Legislature enacted the *lis pendens* statute, N.J.S.A. 2A:15-6, et seq., in an effort to create a more reasonable and equitable method of constructive notice of a dispute concerning an interest in real property to a subsequent interest holder in that real property. The statute accomplishes the public policy goal of “preserving the subject matter of litigation” by requiring a separate filing of a *lis pendens* in order for the interests of a party to a litigation involving real property to have priority over one who acquires an interest in that property after the action has been filed.

A party may file a notice of *lis pendens* when an action has been commenced that seeks either to enforce an existing lien upon real property or to affect the title to or a lien or encumbrance on real property. This includes actions for specific performance and divorce proceedings in which real property is subject to equitable distribution.

This statute is applicable in actions arising in federal court concerning real property located in New Jersey. 28 U.S.C.A. § 1964. The New Jersey statute provides that:

In every action, instituted in any court of this State having civil jurisdiction or in the United States District Court for the District of New Jersey, the object of which is to enforce a lien upon real estate or to affect the title to real estate or a lien or encumbrance thereon, plaintiff or his attorney shall, after the filing of the complaint, file in the office of the county clerk or register of deeds and mortgages, as the case may be, of the county in which the affected real estate is situated, a written notice of the pendency of the action, which shall set forth the title and the general object thereof, with a description of the affected real estate.

The *lis pendens* notice is filed with the county clerk or register of deeds and mortgages of the county in which the subject property is located and is then recorded, so that it will appear in a title search of the subject property. The notice must state the title and general object of the underlying action and pro-

vide a description of the affected real estate. If the notice of lis pendens is being filed as part of a foreclosure action, it must also "specify the book and page number of the record or registration of the mortgage or of the record of the certificate of tax sale." Additionally, in a foreclosure action, both the dates of the filing of the lis pendens and the complaint, along with the names of the plaintiff and first named defendant must be, "in lieu of any other indexing or recording, noted in the margin of the record of the mortgage or the record of the abstract thereof or in the margin of the record of the certificate of tax sale," whichever is applicable. This framework establishes clear and certain guidelines and parameters of information necessary to provide sufficient notice of the dispute.

The statute requires that the notice be filed "after the filing of the complaint" and only where that complaint effects *title* to the property. This is to prevent the misuse of the lis pendens as a mechanism for coercion or as a strategic ploy to gain an unfair tactical advantage in negotiating for an interest in a property. A lis pendens filed prior to the complaint or where it has no relationship to the property's title, such as where the remedy sought is for money damages, is ineffectual. Moreover, filing before litigation is commenced may lead to an action against the filer for slander of title, which exposes the filer to damages for any injury to the property's transferability caused by the improper filing.

At its core, the filing of a notice of lis pendens ensures that a subsequent purchaser or creditor of real property need only look to the title search to discover if there are any hindrances to their interest. Thus, any action taken would be with the knowledge that their interest is subject to the outcome of the pending litigation for which the real property is the subject.

When a notice of lis pendens is filed in an action where the plaintiff's claim to an interest in the property arises out of a written instrument either executed by defendant identifying the property or

that appears of record, those affected by it must wait for a determination on the merits or bring a motion for a decision by the court, stating the action is one for damages at law.

If the notice of lis pendens is filed under any other circumstances, however, the plaintiff must serve copies of the notice of lis pendens and complaint upon the defendant within three days. According to the statute, any party that claims to have an interest in the real property may file a motion with the court seeking a determination "as to whether there is a probability that final judgment will be entered in favor of the plaintiff sufficient to justify the filing or continuation of the notice of lis pendens." New Jersey Court Rule 4:63A states that "[t]he motion shall be determined on the pleadings, affidavits and any testimony taken by leave of court, which may be applied for ex parte, pursuant to R. 1:6-6."

When such a motion is filed, the court is to hold a hearing within 10 days to determine whether the requisite probability that plaintiff will ultimately prevail in the action has been met. The plaintiff bears the burden of establishing the sufficient probability of success. If the court finds that the plaintiff has failed to meet the standard, the court will order that the notice of lis pendens be discharged of record. If the plaintiff sustains the burden, the lis pendens remains until a final judgment is rendered and all who acquire interest subsequent to the filing of notice of lis pendens are subject to the outcome of the litigation.

In adjudicating a motion filed under the statute, the court weighs and evaluates the proofs, as opposed to accepting the pleading as true. This higher standard of probability reflects the impact of a lis pendens on the marketability of the title. The statute also requires the court to weigh the strength of plaintiff's proofs against the harm a lis pendens can cause to the defendant. This weighing process makes the determination of whether a lis pendens will stand dependent on the facts in a given case.

Failure to file a notice of lis pendens

will result in a party's interest being subordinate to that of "any bona fide purchaser or mortgagee of, or a person acquiring a lien on, the affected real estate" prior to the entry of a final judgment. Additionally, the notice of lis pendens only serves as constructive notice as to the interests of the party or parties named in the notice. If a new action is brought concerning the same property, the new matter may only relate back to the previous notice of lis pendens if the same parties, property and general purpose of suit are involved. If not, a party must file a new notice of lis pendens.

There are two statutory ways, other than by motion, for a lis pendens to be discharged. A court in which an action has been filed and is pending may discharge a lis pendens by order to the county clerk or register of deeds and mortgages, "for such cause or for other good cause shown," if a plaintiff has failed to prosecute the action with diligence. Further, in an action for the payment of money by way of enforcement against real property, wherein a lis pendens has been filed, a court may order the discharge of the property from the claim if the defendant provides, what the court in which the action is pending deems to be, sufficient security.

A notice of lis pendens is only effective for a period of five years from its filing. A party that acquires an interest in the property while the lis pendens is effective, however, remains bound by the resolution of the underlying litigation after it has expired.

If a final judgment is entered in favor of the defendant in an action in which a lis pendens has been filed, a notice of the judgment and its determination shall be entered by the county clerk or register of deeds and mortgages in the margin of the record and the property as described in the notice of the judgment shall be discharged. Where an appeal or other relief from the judgment is sought, however, the plaintiff may file a lis pendens setting forth the basis of the appeal or proceeding for relief and such a notice of lis pendens has the effect of the first lis pendens filed.

Once the judgment is paid, satisfied or performed, or the action has been settled or abandoned, the party who filed the lis pendens is to execute a warrant to satisfy judgment. Failing to do so permits a court to order that the affected real property in the lis pendens “be discharged of all claims or equities set up in the complaint in the action.”

In a recent unpublished Chancery Division decision, the court addressed significant issues concerning the expiration of the lis pendens and the impact judgments entered and recorded after the expiration of the lis pendens may have on marketable title. In *Hudson City Savings Bank v. Tebbenhoff*, 2007 WL 711831 (N.J. Super. Ch. Div. Feb. 16, 2007), the successful bidder at a sheriff’s sale sought to be relieved of his bid and his deposit returned when marketable title could not be conveyed since several judgments were entered and recorded after the expiration of the mortgagee’s lis pendens, which was filed in conjunction with a foreclosure action that resulted in the entry of judgment that the mortgagee failed to record. The court held that “lien holders who have entered judgment after the expiration of the mortgagee’s lis pendens are not divested of their interests in the property, and said judgments are not subordinate to the outcome of the litigation which was the subject of the lis pendens.” Moreover, the court rejected any tolling of the lis pendens based on repeated bankruptcy filings by the mortgagor, since no case law, statute or rule provided for such tolling. Finally, the court found “the subsequent judgment creditors d[id] represent a defect or a cloud upon the title....[U]ntil a judgment creditor’s judgment is recorded as a lien, the lien fails to properly serve as

‘notice to the world.’”

What is clear from the *Tebbenhoff* decision is that the filing of a notice of lis pendens is no substitute for and cannot correct a failure to properly docket a lien or judgment.

A second unpublished decision, *ARC Properties, Inc. v. Landmark Realty, LLC*, 2006 WL 2473938 (N.J. Super. Ch. Div. Aug. 22, 2006), addresses the mechanism for discharging the lis pendens by motion pursuant to R. 4:63A. The underlying action in *ARC Properties* sought a permanent injunction, a constructive trust and damages. The complaint alleged breach of fiduciary duty, conversion, tortious interference of contract and conspiracy. The plaintiff, ARC Properties, Inc. alleged that defendants Landmark Real Estate Company, LLC and Lawrence Liebowitz were acting as its agents/brokers in negotiating a deal for the sale of property by defendants Margolis and/or Triple Five Turnpike, Inc. to ARC. ARC intended to develop and lease the property to Walgreens. ARC contended that Liebowitz, Landmark and ARC entered into a joint venture agreement to purchase and develop the property together. ARC brought the underlying action after Liebowitz entered into a contract for sale with Margolis for the purchase of the property without the inclusion of ARC.

ARC filed its lis pendens in connection with its lawsuit and defendants Liebowitz, Landmark, Margolis and Triple Five filed a motion to discharge the lis pendens. The court discharged the lis pendens as to defendants Margolis and Triple Five based on the finding that ARC never had a contract for the sale of the property with Margolis and/or Triple Five and the only wrongdoing claimed

did not involve the property, but rather accusations of wrongful interference which could be cured by money damages. The court further discharged the lis pendens as to Liebowitz and Landmark since ARC’s claims were premised on an interest in the purchase and development of the property and if the transaction was prevented, ARC would receive nothing even if it was successful in pursuing its claims.

As a condition of discharging the lis pendens, however, the court required that Liebowitz, and/or any entity controlled by him that received title to the property, could “not thereafter transfer the property to any other entity, absent a court order.” Additionally, ARC was permitted to record the order, but could “not file any subsequent lis pendens after” the sale between Margolis and Liebowitz was completed.

The court’s ruling in *ARC Properties* reiterates the requirement that the lis pendens relate to the property in dispute and that a court can fashion alternative remedies or protections in lieu of maintaining a lis pendens to promote the interests of the parties while the dispute is pending.

When confronted with disputes involving real property, the preparation and filing of the complaint is just the beginning. Prosecuting and protecting the interests at issue requires a sound understanding of the requirements, mechanisms, nuances and pitfalls of filing a notice of lis pendens. Doing so enables both counsel and client the ability to plan a focused litigation strategy, keeping in mind not only the merits of the dispute at issue, but protecting those interests until the dispute is resolved. ■