

The Lis Pendens Doctrine In Real Estate Litigation

With the real estate market in flux, real estate litigation is on the rise. For any litigation involving real estate, the key asset in play is often not money but the property itself.

This article provides a basic summary of an important doctrine to anyone litigating real estate disputes: lis pendens. “Lis pendens” is a Latin term meaning “a pending lawsuit.” It is a common law doctrine, codified in ORS 93.740, that operates to place the world on notice of a pending claim against real estate. The doctrine creates no lien as a formal matter; it is solely a notice vehicle – that is, it imposes constructive notice on the world that any buyer of the property will take subject to the outcome of the pending litigation.

For better or worse, a plaintiff can use the doctrine to generate significant leverage at the outset of a lawsuit. From a malpractice perspective, however, the key point to remember is that failing to file a lis pendens notice – when it is appropriate – can have a significant detrimental impact on a claim against real property. If a claimant fails to file, the party holding title can sometimes sell, lease, encumber, or otherwise transfer the property to a bona fide purchaser. Although such transfers may not affect liability for damages, the loss of title by the defendant may, in practical terms, result in your client losing the economic value of the case. Consequently, though lis pendens is merely a notice doctrine, its economic impact can be considerable and can preserve (albeit not create) legal rights.

Lawyers representing buyers of real estate should also beware if a notice appears on a title report. Absent presale resolution, your client will

be buying subject to the litigation. That undesirable result is yet one more reason for you or your client to invest in a title report before buying real property.

Filing Requires Bona Fide Nexus to Property

A lis pendens notice is not appropriate in all cases. Such notices are only appropriate in actions “in which the title to or any interest in or lien upon real property is involved, affected or brought into question.” (ORS 93.740(1).) There is little case law in Oregon explaining exactly what kinds of claims implicate an “interest” in real property.

In terms of judicial gloss to that standard, in 1998 the Oregon Court of Appeals stated that, for a plaintiff to file a lis pendens, “the subject of the suit must be an actual interest in real property, not merely a speculative future one.” Courts in other jurisdictions have held that the underlying claims must present an “adequate” or “fair” nexus to the subject real property. The claim must not be merely “collateral” to the property, though the claimed interest can be less than a claim to fee simple ownership. Under these standards, a claim to specifically enforce a real estate purchase agreement, construction lien, or a lease would easily qualify. By contrast, a bare claim for money damages, such as a personal injury or trespass claim, would not.

On occasion, lawyers assert claims to impose a “constructive trust” on real property as a tactic

Continued on page 2

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to fuse money damage claims with the property. A number of out-of-state cases, however, have found that improper, at least in the absence of allegations of fraud by the plaintiff or a prior determination imposing a constructive trust on the property.

Motions to Quash

When a lis pendens is filed without sufficient nexus to the property, the aggrieved party may move the court for an order that the filing is a nullity. If the motion is successful, the court will order that the lis pendens filing be stricken from the property records, and the litigation would proceed from there. Courts ought to be receptive to such motions because the lis pendens statute is subject to abuse. With the stroke of a pen, a claimant can hold up someone's real property (or worse, an entire real estate development). As a California court put it: "The purpose of the lis pendens statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for settlement purposes."

It appears to be unsettled in Oregon whether a party who files an improper lis pendens notice is subject to liability for slander of title, or whether such filings are the subject of a litigation "privilege." Caution is warranted on this front, however, because a bad faith lis pendens filing has the potential for liability, and you don't want to be the test case.

Logistics

The lis pendens form is simple. It is generally comprised of a single cover page with the formal property description attached as an exhibit. The form of the notice is prescribed by ORS 93.740(4), which sets forth a template for the document.

Lawyers filing a lis pendens notice need to be sure, of course, that the legal description is correct. The easiest way to get a copy of the legal description is to call a title company. Title companies are generally happy to provide lawyers with copies of the vesting deed on the property. Many will fax you a copy within an hour for free. If the case merits it, pay for an insured report. You must also make sure that your property description is clearly legible. Clerks will reject a filing if any aspect cannot be clearly read.

You file the lis pendens notice with the county recorder of deeds where the subject property is located, not with the court in which the suit was filed. (Years ago, the filing of a lawsuit in Oregon was sufficient in itself to place the world on notice of a claim, but that is no longer the law in Oregon.) Also, don't forget your filing fee, which is generally calculated on a per-page basis. Call the county recorder's office before filing so you know the amount of your check.

Finally, be sure to discharge your lis pendens filing after your case is over. Failure to discharge presents a potential liability risk for your client (and potentially you), as a filing could interfere with or even disrupt a subsequent property transaction.

A more detailed discussion of Oregon's lis pendens doctrine, with citations to legal authorities, is found in the Fall 2006 issue of the *Litigation Journal*, a publication of the litigation section of the Oregon State Bar.

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