

Commentary

Let the Filer Beware the Risks of a Lis Pendens Filing

by Theresa M. Marchiewski, Esq.

Long the ultimate weapon in the arsenal of real property litigation, the lis pendens filing has recently been subjected to judicial scrutiny, the effect of which has been to highlight the risks inherent in such a filing.

A lis pendens - a notice of pending litigation relating to the ownership or possession of real property - can be easily recorded in the official records of the county where the property is located, immediately after the filing of a complaint. Generally utilized by prospective purchasers who maintain a seller has wrongfully backed out of a proposed sale, filing a lis pendens renders the property unmarketable until the underlying litigation wends its way through the courts. For all practical purposes, the property is tied up for an indefinite time period. Rather than dealing with such indefiniteness, many sellers found themselves capitulating to the demands of unscrupulous filers giving rise to what courts have termed "practical blackjack" settlements.

In an effort to control the rampant misuse of the lis pendens procedure, the California Legislature enacted the lis pendens procedure currently set forth in the California Code of Civil Procedure. The statute now authorizes a lis pendens to be filed only in actions concerning real property or affecting the title or right to possession of real property.

Code of Civil Procedure §409.1 also authorizes the person or entity against whom the lis pendens has been recorded to file a motion to expunge it. The effect of the motion is to shift the burden to the lis pendens filer to demonstrate that the lawsuit is being brought for a proper purpose and in good faith. If the Court determines the filer does not meet these tests, it can order that the lis pendens be expunged and that the filer compensate the seller for the attorney's fees and costs incurred in bringing the motion. The filer would also be subjected to a potential suit for malicious prosecution or slander of title if the litigation does not relate to ownership or possession of the real property.

Unfortunately, the lis pendens filer's burden as specified by Code of Civil Procedure §409.1 is easily met, even in what appear to be spurious cases. Because of the uniqueness of each parcel of real property, courts are loathe to expunge a lis pendens if the filer can demonstrate even a mere possibility rather than probability of success on the merits.

Should the court decline from expunging the lis pendens, however, Code of Civil Procedure §409.1 authorizes it to require the filer to post a bond to indemnify the seller "for all damages which he may incur if he ultimately prevails." The exact amount of the bond to be ordered by the court depends on various factors including market conditions, the buyer's monetary resources and bonafides, and the presence or absence of other prospective purchasers. The bond is generally issued by a licensed bonding company. It must be filed with the court. The bond is to remain in place until the underlying litigation is completed.

Assuming that the seller ultimately prevails in the litigation, attempts to collect against the bond can be instituted once the underlying judgment becomes final. A seller can then choose to either file a separate action or utilize the simpler avenue of filing a motion for enforcement of the bond under Code of Civil Procedure §996.440. The motion must notify both the lis pendens filer and bonding company of the proceeding and specify the amount of claim, supported by affidavits setting forth the facts upon which the claim is based. The court can either grant the motion as filed or set the matter for a trial at the earliest date available on the trial court calendar.

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Until recently, lis pendens filers and even bonding companies assumed the risk of a seller's recovery and payment under the bond was minimal. Recent court decisions, however, have indicated a willingness by the courts to compensate sellers for the monetary mischief caused by lis pendens filings.

As noted previously, Code of Civil Procedure §409.1, under which a lis pendens bond is filed, requires that the bond indemnify the seller for "all damages" suffered if it ultimately prevails. Courts have wide latitude in determining to what constitutes "all damages". As noted by one court, the specific items recoverable as damages will depend on the facts of the particular case, adjudicated on a case by case basis. Awardable damages include the difference between the fair market value of the property at the time of filing and termination of the lis pendens, the interest, taxes and carrying costs incurred during the time the lis pendens is of record, profits which the seller would have realized from a sale lost because of the recordation of the lis pendens and the attorney's fees incurred by the seller in defending the underlying action and obtaining expungement. In any given circumstances these costs could be substantial, especially in a declining market where the seller can demonstrate an actual sale lost as a result of the lis pendens filing or where other factors such as slow growth ordinances or initiatives adversely affected development or marketability of the property during the time the lis pendens was of record.

For anyone contemplating the filing of a lis pendens, the message is clear - a valid legal basis must exist to justify the recording, and a careful assessment of the probability of success in the underlying lawsuit should be undertaken. A potential filer should also attempt to ascertain if market, political or regulatory conditions affecting the property could drastically alter its usefulness, marketability or value while the lawsuit is pending as if such disaster strikes, the filer may be held to have assumed these risks and compensate the property owner therefor.

Those seeking expungement should conduct a similar investigation and utilize the data uncovered to attempt to persuade the Court at the hearing on the motion to expunge that the lis pendens should be removed. Assuming the lis pendens remains in place, the seller should attempt to obtain the largest bond possible so as to assure itself of a captive fund from which to recover should it ultimately prevail in the action and suffer monetary damages during the pendency thereof.

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