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Dear Mr. Gonski:

It is my pleasure to enclose a reprint of your article, "Proper Record Notice Is Key To Protecting Judgments on Litigated Title Issues" which will be published in next week's June real estate supplement to the Law Journal.

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Please consider writing again for the Law Journal. You should contact Law Editor Louis Tafuri to discuss a proposed topic.

Sincerely yours,



# New Jersey Law Journal

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## Real Estate

### Proper Record Notice Is Key To Protecting Judgments on Litigated Title Issues

Nevertheless, vestiges of the common-law doctrine of *lis pendens* arguably remain applicable today in New Jersey

By Dennis M. Gonski

Today, the vast majority of New Jersey *lis pendens* litigation involves the interpretation to be given to the *lis pendens* statutes, as opposed to the doctrine itself. However, except as modified by statute, common-law notions of *lis pendens* are still alive and well in New Jersey.

*Lis pendens* means pending lawsuit and traditionally has been interpreted to mean "a pending lawsuit in a particular jurisdiction." Today in New Jersey, *lis pendens* has become synonymous with a statutory notice designed to give record notice that affected real property has been made the subject of litigation.

Any attempt to understand *lis pendens* must begin with the distinction between the pendency of a lawsuit and the particulars of litigation.

A *lis pendens* does not give notice of the particulars of litigation; it merely gives notice "that a suit is pending against a certain party, affecting certain

lands in a certain way." See *Trus Joist Corp. v. Treetop Assocs., Inc.*, 97 N.J. 22 (1984). The minutia of the lawsuit must be discovered by an inquiry independent of the *lis pendens*.

#### Historical Development

The notion of *lis pendens* has been attributed to Sir Francis Bacon, who in 1618, while Lord Keeper of the Great Seal of England, is said to have promulgated a decree:

No decree bindeth any that cometh in bona fide, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill, nor order, but where he comes in *pendente lite*, and, while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth.

(See *Mabee v. Mabee*, 85 N.J. Eq. 353 (Ch. 1915).)

This seemingly simple decree — that a *pendente lite* purchaser is bound to the outcome of a lawsuit — was embraced into early New Jersey jurisprudence. In *Haughwout & Pomeroy v. Murphy*, 22 N.J. Eq. 531 (E. & A. 1871), the Court said:

It is a doctrine of courts of equity, of ancient origin, and rests not upon the principles of the court with regard to notice,

but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding not only on the litigant parties but also upon those who acquire title from them during the pendency of the suit. Such a purchaser need not be made a party, and will be bound by the decree which shall be made.

The justification for *lis pendens* is easy to comprehend. At common law (as is still the case today) a court's judgment will be considered binding only on those persons who are made a part of the lawsuit in which a judgment was issued.

Absent *lis pendens*, mischief abounds. A litigant seeking to avoid a judicial resolution of title to real property need only convey that property to a nonparty prior to the court having rendered its final judgment. Absent the rule of *lis pendens*, the subject matter of the lawsuit could be conveyed *ad nauseam*, promoting endless litigation and avoiding the finality of a court's judgment.

It was this anomalous situation that led to *lis pendens* as a means to enforce the status quo ante. See *Chrysler v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982).

#### Public Policy Considerations

The early life of *lis pendens* in New

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Jersey was to simply continue the early English rule. However, the English rule developed at a time when lawsuits were few and thus notorious.

With population growth came exponential increases in lawsuits. The existence of lawsuits lost notoriety. Fictitious constructive notice manifested practical problems. A prospective purchaser of land was placed at the mercy of a seller's confession — the affidavit of title.

Courts faced with the dilemma of common-law lis pendens soon began crafting ways to ameliorate the unduly harsh results caused by the fictitious imputation of constructive notice.

These early judicial attempts to avoid lis pendens ultimately influenced the enactment of the present day statutory scheme, which protects a purchaser of property who otherwise qualifies as a bona fide purchaser for value, without notice of the pendency of a lawsuit. (N.J.S.A. 2A:15-6, -7 and -8).

Nevertheless, because the lis pendens statutes abrogate the common law and, thus, are to be restrictively construed, an argument can be made that traces of the common law doctrine of lis pendens remain applicable.

For example, where a grantee acquires title from one spouse during divorce litigation, any alienation of title that frustrates equitable distribution remains in peril because pendente lite purchasers are deemed to be aware of the risk attendant to an equitable distribution of matrimonial property. See *Arnold v. Anvil Realty Investment, Inc.*, 233 N.J. Super. 481 (App. Div. 1989).

Similarly, a fiduciary conveyance in the chain-of-title remains perilous because pendente lite purchasers are deemed aware of the risks attendant to fiduciary conveyances. See *Matter of Castner*, 283 N.J. Super. 187 (Law Div. 1993).

Similar arguments could also be made regarding pendente lite sales of tax titles (*Schnitzer v. Rinderer*, 294 N.J. Super. 241 (App. Div. 1996)), titles emanating from mortgage transactions (*First American Title Ins. Co. v. Vision Mortgage Corp.*, 298 N.J. Super. 138 (1997)) or titles to land controlled by Green Acres legislation (*First American Title Ins. Co. v. Township of Rockaway*,

322 N.J. Super. 583 (Ch. Div. 1999)).

### Modern Lis Pendens Statutes

New Jersey's present lis pendens statutes are N.J.S.A. 2A:15-6 (written notice of pendency of action; contents); N.J.S.A. 2A:15-7 (filed notice and effect as to persons claiming interest in real estate affected by notice); and N.J.S.A. 2A:15-8 (rights of bona fide purchasers, mortgagees or lienors before notice filed and prior to final judgment).

These statutes serve to alter the common-law rule by providing a means of record notice to the pendency of a lawsuit. No longer is the mere filing of a lawsuit intended to serve as constructive notice. Instead, the onus is placed on the litigants to register a written instrument (a notice of lis pendens) to protect the status quo ante.

A bona fide purchaser, mortgagee or lienor is not automatically charged with fictitious constructive notice — nor burdened with the outcome of the pending lawsuit — unless and until the notice of lis pendens is properly filed and indexed. See *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J. Super. 336 (Law Div. 1999) (filing absent proper indexing is insufficient to create constructive notice).

However, by definition, N.J.S.A. 2A:15-6, -7 and -8 do not apply to a purchaser who has obtained actual notice of a pending lawsuit from some other source.

One having actual notice is not affected by the statutes, and, therefore, the common-law rule of lis pendens — binding the purchaser to the decree retroactive to the filing of the lawsuit — will still apply, even today, in actual notice situations.

### Timely and Proper Filing

The objective of the statutory lis pendens is to permit a title searcher the opportunity to review litigation pleadings in advance of a title event. A statutory lis pendens must therefore be filed after the filing of the lawsuit.

Because the statutory lis pendens is a notice device, it must be properly filed and properly indexed before it becomes

effective. New Jersey is a race/notice jurisdiction. One is only charged with constructive notice of instruments that are properly recorded. Today, properly recorded also means properly indexed.

Because one who files a lis pendens does so for his own benefit, it is the filer who is in the best position to ensure that his lis pendens is properly filed and indexed. The onus is put on the filer (that is, the one seeking the benefit) to ensure that his document is both properly filed and properly indexed.

### Duration of a Lis Pendens

A lis pendens is effective from the time it is properly filed and indexed. Once properly filed and indexed, and unless sooner discharged, a lis pendens is effective for a full five years and can be discharged only in the manner provided by statute.

A discharge may be obtained by consent of the person filing the lis pendens or it may be obtained by order of the court under three circumstances: (a) N.J.S.A. 2A:15-7b (unsuccessful plaintiff); (b) N.J.S.A. 2A:15-10 (plaintiff's failure to prosecute); or (c) N.J.S.A. 2A:15-15 (defendant's posting such security as the court determines).

In practice however, a county recording officer will often discharge a lis pendens upon the presentation of a final judgment from which no further appeal is permitted. See N.J.S.A. 2A:15-14; see also 2 Lawrence J. Fineberg, *Handbook of New Jersey Title Practice* §7501 (footnote 3) (2d Ed. 2000).

Because of the reference to final judgment in N.J.S.A. 2A:15-7b and N.J.S.A. 2A:15-8, unless it is earlier discharged, a lis pendens arguably survives all appeals, being dischargeable only after a final determination of the underlying case. See *Boice v. Conover*, 69 N.J. Eq. 580 (1905) (E. & A. 1906).

A lis pendens survives the death of one of the parties to the lawsuit. *Turner v. Houpt*, 53 N.J. Eq. 526 (Ch. 1895) (death of a party is not a final determination of the lawsuit).

A question exists as to whether a lis pendens survives an interlocutory dismissal of the real property issues. In *B.J.I. Corp. v. Larry W. Corp.*, 183 N.J.

Super. 310 (Ch. Div. 1982), the court held that when a *lis pendens* is properly filed on a legitimate claim concerning real property, its effectiveness will not be defeated should the plaintiff later choose to abandon the real property claim and seek exclusively money damages.

But, in *Jackson v. Manasquan Savings Bank*, 271 N.J. Super. 136 (Law Div. 1993), the court discharged the *lis pendens* because the claim for specific performance of a real estate contract was dismissed and the remaining claim was for damages.

There is also authority holding that an interest obtained in real property after the filing of a *lis pendens* is bound by resolution of the underlying lawsuit, even if that litigation is concluded after the effective statutory period of the *lis pendens* expires. *Manzo v. Shawmut Bank, N.A.*, 291 N.J. Super. 194 (App. Div. 1996).

#### Relating Back

Today, as was at common law, *lis pendens* is intended to protect the court's judgment on the litigated title issue. Hence the court's adjudication necessarily relates back to the status *quo ante* at the filing of the *lis pendens*. This means that the interest that existed at the filing of the *lis pendens* is retroactively bound by the outcome of the lawsuit, provided that such interest was made a party to the suit. See *Trus Joist Corp.*

Conversely, a person whose interest existed at the commencement of the lawsuit will not be bound by the proceedings unless he was made a party to the suit. *Four-G Corp. v. Ruta*, 56 N.J. Super. 52 (App. Div. 1959).

Whether a new party added to a lawsuit is subject to an earlier filed *lis pendens* need be determined by the interest at issue. In *Manzo*, a junior mortgagee whose lien was recorded within three years after filing of notice of *lis pendens* was bound by the relation back of a final judgment foreclosing the

senior mortgage, even though final judgment was not entered until after the term of the *lis pendens* had technically elapsed.

The test of relation back is an objective one. Are the parties the same? Is the property to be affected the same? Are the general purpose and subject of suit the same?

In *Trus Joist Corp.*, the relation-back doctrine was denied application to a subsequent mortgagee, except as to those issues raised in the original pleadings, because neither the complaint nor the *lis pendens* was amended before the subsequent mortgagee obtained its good-faith interest in the property.

#### Wrongful Filings and Remedies

New Jersey recognizes a cause of action for slander of title as a tort. Two New Jersey cases have ruled, however, that the filing of a *lis pendens* is privileged as part of the litigation process and, therefore, immune from slander actions.

Nevertheless, in both of these cases, the courts found that the *lis pendens* was properly filed. In *Wendy's of South Jersey, Inc. v. Blanchard Management Corp. of New Jersey*, 170 N.J. Super. 491 (Ch. Div. 1979), a *lis pendens* was filed in a lawsuit seeking specific performance of a contract to purchase land, and in *Lone v. Brown*, 199 N.J. Super. 420 (App. Div. 1985), a *lis pendens* was filed in a case involving specific performance of a contract for the sale of land.

From these two holdings it is conjecture whether the privilege announced by the court will also protect an improperly filed *lis pendens*. The dictum in *Lone* arguably indicates that one will not be so protected:

It is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, which have some relation thereto, are

absolutely privileged from slander or defamation actions, even if the statements are made with malice.

The doctrine of *lis pendens* is an application of the equitable maxim, *pendente lite nihil innovatur* — during a litigation nothing new should be introduced.

The law of *lis pendens* as developed in New Jersey is essentially, as a matter of public policy, based on practical necessity. The necessity comes from the possibility of endless litigation resulting from the abortive alienation of real property during a pending lawsuit. The public policy promotes the court's entitlement to proceed to the full and final exercise of its jurisdiction without hindrance from the parties.

At common law, the simple filing of the lawsuit served as the effective notice to the world that any rights acquired from the parties would be subject to the outcome of the suit.

The common-law doctrine, however, was changed by New Jersey statute to require that a *lis pendens* "instrument" be filed in order for there to be record notice given that future interests in the subject real property will be charged with the ultimate fate of pending litigation.

According to the Professors Pomeroy (father and son) in 2 Pomeroy, *A Treatise on Equity Jurisprudence* §633, at 1216 (4th Ed. 1918):

[T]he general rule may be accurately formulated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine.

Today, the vast majority of New Jersey *lis pendens* litigation involves the interpretation to be given to the *lis pendens* statutes, as opposed to the doctrine itself. However, the common-law notions of *lis pendens* must not be ignored. ■