

RESOLUTION 5-03-03

DIGEST

Notice of Pendency of Action: Amended Definition of Real Property Claim

Amends Code of Civil Procedure section 405.4 to include causes of action for constructive trust and equitable lien in the definition of “real property claim.”

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 405.4 to include causes of action for constructive trust and equitable lien in the definition of “real property claim.” This resolution should be approved in principle because it would ensure that parties claiming a constructive trust or equitable lien have the same remedies available to them as other claimants under this statute.

In 1992, when the Legislature enacted section 405.4, the new Lis Pendens Statute, it left open the question of whether or not to include constructive trusts or equitable liens in the definition of “real property claims” for judicial development. (See Code Civ. Proc., § 405.4; 14 West’s Ann. Code Civ. Proc. (2003 supp.) at “Code Comment” [Real Property Section of State Bar of California Comments to Lis Pendens Statutes of 1992], n. 5; *BGJ Associates, LLC v. Superior Court* (1999) 75 Cal.App.4th 952, 955-956 [the Comments “indicate legislative intent” regarding the Lis Pendens Statute].) However, the hoped-for judicial development has not yet fully occurred. In the most pertinent case, the court found that because the plaintiff asserted both constructive trust and other causes of action, he could not file a lis pendens against the property at issue as there was too much danger of coercion; but limited its holding to the facts of the case. (*BGJ Associates, LLC, supra*, at p. 97.) As a result, claimants asserting a constructive trust or equitable lien against a property may, or may not, be blocked from preserving the status quo. If blocked, claimants will have only a right to damages. Because of the unique nature and investment quality of real property, damages alone may not compensate claimants once the property at issue has been transferred.

Sufficient safeguards exist to protect against coercive use of such claims. The lis pendens expungement process requires that the claimant, if challenged, establish by a preponderance of evidence the probable validity of his or her claim. (Code Civ. Proc., § 405.30 et seq.) “Probable validity” is defined as more likely than not that the claimant will obtain a judgment against the defendant. (Code Civ. Proc., § 405.3.) The old lis pendens statute only required a court to find that such notice was filed for a proper purpose and in good faith. Further, under the new Lis Pendens Statute courts may require claimants to post a bond to sustain the notice.

This resolution strikes a reasonable balance between a claimant’s interest in maintaining the status quo and the titleholder’s interest in an immediate, effective and final determination of the claim.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 405.4 to read as follows:

1 §405.4

2 "Real property claim" means the cause or causes of action in a pleading which would, if
3 meritorious, affect (a) title to, or the right to possession of, or a constructive trust or equitable lien
4 upon, specific real property or (b) the use of an easement identified in the pleading, other than an
5 easement obtained pursuant to statute by any regulated public utility, whether or not money damages
6 are requested in the pleading.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Code of Civil Procedure sections 405 through 405.60 deal with a "notice of pendency of action", commonly referred to as a "lis pendens". Under existing case law, a lis pendens cannot be used to prevent the transfer of property pending the resolution of an action to impose a constructive trust or equitable lien upon the property. See, *BGA Associates v. Superior Court* (1999) 75 Cal.App.4th 952.

This Resolution: Provides that an action to impose a constructive trust or equitable lien constitutes a "real property claim" thereby enabling a lis pendens to be maintained upon real property pending the resolution of a claim for a constructive trust or equitable lien upon the property.

The Problem: The Lis Pendens Statute was reenacted in 1994. Under the previous statute, in order to support a lis pendens it was only necessary for the trial court to consider whether the plaintiff had commenced an action "for a proper purpose and in good faith." When considering a motion to expunge the lis pendens, the court could not consider whether or not the plaintiff was likely to prevail on the merits of the action. Consequently, the Lis Pendens Statute was sometimes abused by unscrupulous plaintiffs in order to tie up real property, whether or not the action had any merit. The new Lis Pendens Statute adopted in 1994 was proposed by the Real Property Section of the State Bar of California. The State Bar report on the proposal acknowledged that the new statute neither includes nor excludes claims of constructive trust or equitable lien, and suggested that the law in this area be left for judicial development. The State Bar report is included in the legislative comments to Code of Civil Procedure section 405.4 (Note 5, West's Annotated Codes) and states, "[s]hould case law continue to allow use of the lis pendens procedure in cases claiming a constructive trust or equitable lien, any abuse that might have previously occurred should be mitigated by the provisions of C.C.P. 405.32 (requiring proof by the Claimant of the probable validity of the claim) and the provisions of C.C.P. 405.34 (allowing the Court to require a bond from the Claimant)." Unfortunately, the courts have not interpreted the new Lis Pendens Statute to include actions for a constructive trust or equitable lien. Yet, as indicated in the State Bar Report, there is no reason not to do so. A lis pendens is a necessary tool in an action to impose a constructive trust or equitable lien, since if the property can be disposed of pending a trial on the merits, the plaintiff will be deprived of an effective remedy.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution should be disapproved because it restores the bad old days of using a notice of pendency of action for extortion.

The proponent uses history loosely. Under the English doctrine of lis pendens, all persons dealing in real property were deemed to have notice of pending litigation that affected the property. With the development of recording acts, American law came to require a recorded document to inform good faith transferees of litigation affecting real estate. This was the notice of lis pendens, now the notice of pendency of action.

Recording a notice of pendency of action makes property unmarketable. The notice is therefore a powerful tool, subject to abuse for which no effective remedy exists. The victim of an improperly recorded notice cannot recover damages for abuse of process because the recording is an absolutely privileged publication. The victim cannot recover damages for malicious prosecution unless the underlying suit itself, as opposed to the contention that the suit affects real property, meets the rigorous elements of the malicious prosecution cause of action.

Before the 1992 statute, some cases suggested that a party could record a notice of pendency based on allegations that tortiously diverted assets could be traced into a defendant's investment in real estate. Such claims, often strategically filed just days before closing of sales or financing transactions, were used to extort settlements unrelated to the merits of the case. The term "specific real property" in Code of Civil Procedure section 405.4 makes dubious any claim that an action for money affects real property just because the plaintiff might ultimately establish a constructive trust or equitable lien as security for the money.

A notice of pendency of action satisfies social and constitutional notions of fair play when it performs its historic function of telling the world that interests in real estate are disputed. Used as a self-help writ of attachment, it's a different creature entirely. When a plaintiff in a case for money has potentially meritorious grounds for prejudgment invasion of a defendant's assets, the plaintiff should use attachment in a contract case and preliminary injunction in a tort case. Those prejudgment remedies provide the socially and constitutionally required notice, impartial hearing, and objective legal standards.