



LIS PENDENS: REQUIRES CIVIL ACTION IN A COURT OF LAW

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When an owner of real estate refuses to sell to a buyer or denies occupancy rights to a tenant, the buyer or tenant may sue to force the owner to specifically perform its obligations. If the owner then sells the property for value to a third party who is unaware of the buyer or tenant's rights in the property, the third party, known as a bona fide purchaser, or BFP, may acquire the property free and clear. In other words, the buyer or tenant cannot force the BFP to honor the original owner's obligations. Instead, the buyer or tenant would only be able to recover money damages from the original owner. To protect a buyer or tenant from this situation, the law allows the buyer or tenant to record a lis pendens. The lis pendens provides constructive notice to the world that the buyer or tenant has filed a lawsuit against the owner claiming an interest in the property. Following a lis pendens, a third party that purchases the property does so subject to the buyer or tenant's rights. Consequently, the third party could now, unlike before, be forced to honor the original owner's obligations if the buyer or tenant prevails in its lawsuit against the original owner.

In the recent case of *Manhattan Loft, LLC v. Mercury Liquors, Inc.* 173 Cal. App. 4th 1040 (2009), a tenant recorded a lis pendens following a demand for arbitration. In response, the owner filed a slander of title action against the tenant alleging that the lis pendens was wrongfully recorded because the notice referred to an arbitration proceeding rather than to a civil action. The owner claimed that it sustained damages of \$10 million because the recording of the lis pendens notice had scared away potential third-party buyers. The trial court ruled in the tenant's favor. The court of appeal, however, reversed, holding that a lis pendens may only be filed when an action is pending in a court of law.

The Court of Appeal explained that the Code of Civil Procedure Section 405.20 provides that a party to an "action" who asserts a real property claim may record a notice of lis pendens. But the tenant was not authorized to file the lis pendens because no "action" was filed in a court. The court emphasizes that Title 4.5 of the Code of Civil Procedure which governs recording notices of certain actions, "repeatedly uses the word 'action'...and there is no reference to arbitration proceedings. This plain language compels the conclusion that a lis pendens may only be recorded when an action is pending in state or federal court."

The Court of Appeal further reasoned that from a policy-related standpoint, this "plain language" reading is consistent with the legislative intent to narrowly construe the lis pendens statutes; and thus, the court refused to expand the definition of the word "action" to include arbitration proceedings. The Court added that the lis pendens statutory scheme is intended in part to protect property owners by allowing them to expunge or remove the lis pendens by way of an expedited "mini-trial." This removal process, however, is only available by applying to the court in which the action is pending, as an arbitrator has no authority to expunge a lis pendens.

The court concluded that if its holding is "problematic," it is up to the legislature to change the law so that arbitration is added as an appropriate "action" that supports the recording of a lis pendens.

Practice Pointer

Code of Civil Procedure Section 1298.5 provides that a party to an action who records a lis pendens does not thereby waive a right to arbitrate or compel arbitration. The court advised that by utilizing the procedure set forth therein, "all parties' interests, vis-à-vis the lis pendens statutes and the right to arbitration, are protected." Consistent with Section 1298.5, the tenant should have (1) filed an action in Superior Court, (2) recorded the lis pendens, and then (3) moved the court to stay the action to permit the parties to arbitrate the real property claims.

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