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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,215

DCA CASE NO: 88-1479

FLORIDA BAR NO.: 224571

AMERICAN LEGION COMMUNITY  
CLUB OF COCONUT GROVE, INC.,

Petitioner,

v.

MURRY DIAMOND,

Respondent,

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FILED

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SUPREME COURT

By \_\_\_\_\_  
Date \_\_\_\_\_

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	4
STATEMENT OF THE CASE AND OF THE FACTS.....	5-8
ISSUES PRESENTED FOR REVIEW.....	8-9
SUMMARY OF ARGUMENT.....	9-10
ARGUMENT.....	10-20
CONCLUSION.....	20-21
CERTIFICATE OF SERVICE.....	21
APPENDIX.....	22

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Albesa Corporation v. Manning,</u> 468 So.2d 1109 (Fla. 1st DCA 1985).....	8, 15, 20
<u>Berkley MultiUnits, Inc. v. Linder,</u> 464 So.2d 1356 (Fla. 4th DCA 1985).....	12
<u>Bridger v. Exchange Bank,</u> 56 S.E. 97 (Ga. 1906).....	17
<u>Cain &amp; Bultman, Inc. v. Miss Sam, Inc.,</u> 409 So.2d 114 (Fla. 5th DCA 1982).....	18, 19, 20
<u>Central Trust Company v. Harless,</u> 152 S.E. 209 (W.Va. 1930).....	15
<u>Chapman v. L&amp;N Grove, Inc.,</u> 244 So.2d 154 (Fla. 2nd DCA 1971).....	8, 11, 15, 20
<u>Crown Corporation v. Robinson,</u> 174 So. 737 (Fla. 1937).....	18
<u>Housh v. Stewart,</u> No. 88-2184 (Fla. 5th DCA May 11, 1989) (WESTLAW) .....	17, 18, 19, 20
<u>Leuders v. Thomas,</u> 17 So. 633 (Fla. 1985).....	15
<u>McAlister v. Salas,</u> 485 So.2d 1333 (Fla. 2d DCA 1986).....	18
<u>Mohican Valley, Inc. v. MacDonald,</u> 443 So.2d 479 (Fla. 5th DCA 1984).....	12, 13, 14
<u>Montserrat Overseas Holdings, S.A. v. Larsen,</u> 709 F.2d 22 (9th Cir. 1983).....	15
<u>Ross v. Breder,</u> 528 So.2d 64 (Fla. 3rd DCA 1988).....	12, 14
<u>Stout v. Lye,</u> 103 U.S. 66 (1881).....	17
 <b><u>OTHER AUTHORITIES:</u></b>	
Section 48.23, Florida Statutes (1985).....	9, 11
 BLACK'S LAW DICTIONARY p. 785 (Revised Fourth Edition, 1968).....	 10

**PRELIMINARY STATEMENT**

Reference to the Petitioner will be by the use of its formal name or "**Petitioner**". Reference to the Respondent will be by the use of his formal name or "**Respondent**". Reference to the record on appeal will be by use of the term "**R.**" Reference to the transcript of the hearing on May 6, 1988 will be by use of the term "**Tr.**" Reference to File Number 84-25832 will be by use of an Appendix as to the particular documents necessary for reference and by use of the term "Appendix Exhibit."

STATEMENT OF THE CASE AND OF THE FACTS

In Case No. 84-25832 CA (27), The American Legion Department of Florida v. Bill Adkins , American Legion Community Club of Coconut Grove, Inc., n/k/a Post 70 (Lindley DeGarmo Post), Del Rossi Enterprises, Inc., and Mary Jeannette Taylor, Defendants, the American Legion Department of Florida', filed an Amended Complaint seeking to quiet title in real property located at 2903 McFarlane Road, Coconut Grove, Miami, Florida on which was located the Post home of Lindley De Garmo Post No. 70 of the American Legion<sup>2</sup>. [Appendix Exhibit 13. As set forth therein, the American Legion Community Club of Coconut Grove, Inc., Petitioner, had been suspended under the constitution and bylaws of the American Legion Department of Florida and the

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- 1 The American Legion Community Club of Coconut Grove, Inc. was named as a Defendant because of its recalcitrance to join as a Plaintiff, given its suspension by the American Legion Department of Florida. [Tr. 422]
- 2 The American Legion Community Club of Coconut Grove, Inc. was the entity incorporated by Post 70 for purposes of holding title to the Post home.

Uniform Code of Procedure. In conjunction with the filing of the Amended Complaint, a lis pendens was recorded on June 27, 1985 in the Public Records of Dade County, Florida. [Appendix Exhibit 2]. The purpose of this litigation was to quiet title into the American Legion system, the suspended post having deeded the subject real property to Del Rossi Enterprises, Inc. without authorization and allegedly through deception practiced upon it, by warranty deed recorded August 31, 1983 and recorded in the Public Records of Dade County, Florida [Appendix Exhibit 3]. During the pendency of Case No. 84-25832 CA (27), and within this one year of the recording of the lis pendens the Respondent obtained a Final Judgment in Case No. 82-7193 CA (27) in the amount of \$1.5 million dollars against Del Rossi Enterprises, Inc. and others, jointly and severally. A certified copy of this judgment was recorded on January 3, 1986 in the Public Records of Dade County, Florida and re-recorded on April 1, 1986 in the Public Records of Dade County, Florida. In or about December of 1987, in Case No. 82-7193 CA (27), the Sheriff of Dade County, Florida noticed the subject real property for sheriff's sale on January 27, 1988. [R. 393-3991 On December 23, 1987, the American Legion Department of Florida and Del Rossi Enterprises, Inc. stipulated to the entry of a judgment in Case No. 84-25832 CA (27) resolving the dispute between them, whereby the subject real property was quieted into the American Legion Community Club of Coconut Grove, Inc. [Appendix Exhibit 4]. The lower tribunal,

as set forth and revealed in the Final Judgment, carried forward the force and effect of the lis pendens recorded on June 27, 1985 through the entry of the Final Judgment on the 23rd of December, 1987. Specifically, the lower tribunal stated:

The claims of the Defendants, if any, Bill Adkins and Del Rossi Enterprises, Inc. and any and all who claim title under them here and to the subject real property, are without any right whatever and title is quieted in the American Legion Community Club of Coconut Grove, Inc. against any and all claims or demands of the Defendants, Bill Adkins and Del Rossi Enterprises, Inc. and any person claiming by, through and under them since the filing of the lis pendens to any estate right, title or interest in the subject real property. The Defendants, Bill Adkins and Del Rossi Enterprises, Inc. and any persons claiming by, through, and under them since the filing of the lis pendens are permanently enjoined and restrained from asserting any claim or interest in or to the subject real property or any part thereof.

In January of 1988, the Petitioner filed its Motion to Stay Sheriff's Sale and Motion to Quash Writ of Execution [R. 393-3991.

The merits of the Petitioner's Motion to Stay Sheriff's Sale and Motion to Quash Writ of Execution [R. 393-3991 were heard on May 6, 1988 and the lower tribunal entered its orders on May 16, 1988 and May 19, 1988 determining the lis pendens to be of force and effect as it related to the Respondent's judgment of December 11, 1985, and by the order appealed from, denied the Respondent's right to levy against the subject real property.

The Third District Court of Appeal in its opinion of April 25, 1989 concluded that a lawsuit to quiet title to real property predicated on allegations of fraudulent conveyance and misrepresentation, which was the lawsuit filed by The American Legion Department of Florida in Case No. 84-25832 (Dade County Circuit Court) from which emanated the subject lis pendens, is not an "action... founded upon a duly recorded instrument" and therefore a notice of lis pendens filed in such an action is not "effectual for any purpose beyond one year, from the commencement of the action... except when the Court extends the time on reasonable notice and for good cause." reversing the ruling of the lower tribunal while certifying conflict with the opinions of the First and Second District Court of Appeals, Albesa Corp. v. Manning, 468 So.2d 1109 (Fla. 1st DCA 1985); and Chapman v. L&N Grove, Inc., 244 So.2d 154 (Fla. 2nd DCA 1971), and further certifying the following question as being of great public importance:

WHETHER A SUIT TO SET ASIDE A CONVEYANCE OF REAL PROPERTY IS AN ACTION "FOUNDED ON A DULY RECORDED INSTRUMENT" AS SET FORTH IN 548.23, FLORIDA STATUTES (1985), AUTHORIZING THE MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

The Notice To Invoke Discretionary Jurisdiction followed on May 23, 1989.

#### ISSUES PRESENTED FOR REVIEW

A. WHETHER A SUIT TO SET ASIDE A CONVEYANCE OF REAL PROPERTY IS AN ACTION FOUNDED ON A DULY RECORDED INSTRUMENT AS SET FORTH IN 548.23, FLORIDA STATUTES (1985), AUTHORIZING THE



MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

B. DID THE LIS PENDENS FILED IN THE LOWER TRIBUNAL CHARGE THE RESPONDENT WITH CONSTRUCTIVE NOTICE SO AS TO SUBJECT THE RESPONDENT TO THE OUTCOME OF THE RULING IN CASE NO. 84-25832 CA (27) QUIETING TITLE IN THE SUBJECT REAL PROPERTY TO THE AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.?

SUMMARY OF ARGUMENT

First, issue (A) is determinable in large measure by this Court's resolution of whether the action filed in Case No. 84-25832 (27) was "founded on a duly recorded instrument". There is a split of authority among the District Courts that have addressed the issue. The Petitioner contends that the Amended Complaint in Case No. 84-25832 (27) [Appendix Exhibit 13 was founded on a duly recorded instrument and thus the lis pendens recorded on June 27, 1985 is effectual beyond a one (1) year period. [See generally, Section 48.23, Florida Statutes, (1985)]. Second, it is the Petitioner's contention that, as revealed by the lower tribunal's Final Judgment in Case No. 84-25832 CA (27), [Appendix Exhibit 4] the lower tribunal extended the effect of the lis pendens through the entry of its Final Judgment of December 23, 1987, as authorized by the applicable statute 848.23, Florida Statutes (1985). The lower tribunal controlled the lis pendens with the discretion that the statute affords it, extending its effect, there having been no motion to discharge it.

As to issue (B), even if the vitality of this lis pendens expired after a period of one (1) year, it served its purpose in

providing constructive notice, if not actual notice, to the Respondent, during its one-year period so that the Respondent, being on notice, was subject to the Final Judgment quieting title into the American Legion Community Club of Coconut Grove, Inc. upon entry of Final Judgment in Case No. 84-25832 CA (27). [Appendix Exhibit 4] The Respondent, having once been placed on notice, cannot thereafter disclaim the effect of that notice.

#### ARGUMENT

A. A SUIT TO SET ASIDE A CONVEYANCE OF REAL PROPERTY IS AN ACTION FOUNDED ON A DULY RECORDED INSTRUMENT AS SET FORTH IN §48.23, FLORIDA STATUTES (1985), AUTHORIZING THE MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

The Respondent, Murry Diamond, suggests that it would require a linguistic contortion to conclude that the Amended Complaint filed in Case No. 84-25832 CA (27) [Appendix Exhibit 13 is "founded **on**" a duly recorded instrument. "**Founded**" as defined in Black's Law Dictionary means "based upon; arising from, growing out of or resting upon; as in the expressions of 'founded in fraud', 'founded on a consideration', 'founded on contract', and the like." [Black's Law Dictionary, p. 785 (Revised Fourth Edition, 1968)] "**Founded on**" as defined by Black's Law Dictionary means "[t]o serve as a base or basis for." [Id.] The American Legion's Amended Complaint arises from the warranty deed recorded August 31, 1983, which constitutes the basis therefor. But for that warranty deed, the Amended Complaint and lis pendens would not have been filed. The Petitioner submits that

the logic of its position lies in the clear meaning of the statutory terms, and that the argument asserted by the Respondent is nothing more than "splitting hairs" and challenges common sense. [See generally, Section 48.23, Florida Statutes (1985)].

The Petitioner acknowledges those decisions contrary to its position set forth in the opinion of the Third District Court of Appeal and submits that the better reasoned decision is set forth in Chapman v. L&N Grove, Inc., 244 So.2d 154 (Fla. 2nd DCA 1971). In that cause, the complaint sought equitable rescission and cancellation of a deed. A lis pendens was filed along with the suit. The trial court ruled that an indemnity bond was to be posted as a condition of maintaining the lis pendens. The Second District Court of Appeal reversed stating that:

...[P]laintiff's complaint, as the initial pleading in the cause, shows that the relief therein sought was 'founded on a duly recorded instrument', namely the deed which was allegedly obtained by fraud and which was sought to be rescinded and cancelled.

[244 So.2d 154, 156 (Fla. 2nd DCA 1971)]

Just as in Chapman v. L&N Grove, Inc., the cause of action in Case No. 84-25832 (27) [Appendix Exhibit 13 was founded on a duly recorded instrument, namely the deed which clouded the title of the American Legion Community Club of Coconut Grove, Inc.

The cases of Ross v. Breder, 528 So.2d 64 (Fla. 3rd DCA 1988); Berkley Multi-Units Inc. v. Linder, 464 So.2d 1356 (Fla.

4th DCA 1985); and Mohican Valley, Inc. v. MacDonald, 443 So.2d 479 (Fla. 5th DCA 1984) espouse opinion contrary to the position taken by the Petitioner. Berkley Multi-Units, Inc. v. Linder, 464 So.2d 1356 (Fla. 4th DCA 1985) involved numerous parties to a nine (9) count complaint seeking rescission and other relief based upon allegations of fraud and conspiracy. The appellate court determined that the action had not been founded on a duly recorded instrument. In rationalizing its opinion, that court stated that if an action to rescind a warranty deed is brought by the grantor of the deed, the action is not founded on the deed but on circumstances preceding and surrounding the execution of the deed. [Id. At 1356, 13581.

The Petitioner simply does not share this rationale. It seems to be "splitting hairs" to argue that an action brought to quiet title to a piece of property based upon a challengeable deed of record is not an action founded on a duly recorded instrument. The jist of any action to quiet title is to establish one's entitlement to realty, necessarily disputing any right, title, or interest asserted by other documents of record in conflict with that alleged entitlement and necessarily filed because of the duly recorded instruments.

In the instant case, the American Legion Department of Florida filed its Amended Complaint to quiet title to the subject **real** property alleging that the subject warranty deed was void,

in that it was in violation of the constitution and bylaws of the Defendant, American Legion Community Club of Coconut Grove, Inc. More specifically, the warranty deed was neither considered nor approved by the requisite number of members of the Executive Committee, Board of Directors, and Board of Trustees of the Defendant, American Legion Community Club of Coconut Grove, Inc., and there was a total absence of consideration.

[Appendix Exhibit "1"]

The Petitioner strongly asserts that the gist of this action was to remove the cloud from its title, this cloud being the subject deed. [Appendix Exhibit 3] Thus, the action arose from a duly recorded instrument.

In Mohican Valley, Inc. v. MacDonald, 443 So.2d 479 (Fla. 5th DCA 1984), the appellate court was dealing with a shareholder's derivative action to cancel a deed fraudulently transferred. Although the Petitioner does not subscribe to the outcome of that decision, the appellate court did acknowledge in its discussion of commonly recognized actions founded on duly recorded instruments that:

A suit to quiet title may be founded upon an instrument in writing and usually seeks a declaration of legal rights under competing instruments or separate claims.

[Id. At 481]

The suit to quiet title in Case No. 84-25832 (27) [Appendix Exhibit 13 sought a declaration of the Petitioner's entitlement to the subject real property. The focal point of that litigation was the alleged competing instrument and the

quiet title action was founded upon that competing instrument. The quiet title action did not incidentally involve a deed. Rather, the action would not have been brought but for the deed.

The Ross v. Breeder decision at 528 So.2d 64 (Fla 3rd DCA 1988) perpetuates the rationale of Mohican Valley, Inc. v. MacDonald, 443 So.2d 479 (Fla. 5th DCA 1984); a rationale which the Petitioner contends is inequitably grounded on a requirement that one's rights arise from the recorded instrument in order for the action to be founded upon that instrument. It appears to the Petitioner that the right asserted could emanate from varied sources while the action and lis pendens would be filed because of a recorded instrument. "Founded upon", "based upon", or "arising from" more commonly would suggest that the action filed would not have been filed but for the recorded instrument. The lis pendens calls the attention of all to the dispute concerning the subject real property. Any good faith purchaser with constructive notice by way of the lis pendens would then be cognizant that there is a cloud on the title. The instruments already of record are not required to provide this notice, for the lis pendens effects the notice. This is the lis pendens' purpose.

The Petitioner submits to the Court that the rationale utilized by the Second District Court of Appeal in Chapman v. L&N Grove, Inc., 244 So.2d 154 (Fla. 2nd DCA 1971), and by the First District Court of Appeal in Albega Corporation v. Manning, 468 So.2d 1109 (Fla. 1st DCA 1985) is the more correct.

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The Respondent was cognizant of the pending litigation, by the filing of the lis pendens, at the time he acquired his final money judgment. He was cognizant that the outcome of pending litigation in Case No. 84-25832 (27) might extinguish any claimed interest that he made to the subject real property by virtue of his final money judgment. The lis pendens remained effective through the entry of the Final Judgment in Case No. 84-25832 [Appendix Exhibit 4], and accordingly, the Respondent's interests were extinguished as it related to this real property. [Central Trust Company v. Harless, 152 S.E. 209, 212 (W.Va. 1930); cf. Leuders v. Thomas, 17 So. 633 (Fla. 1895); cf. Montserrat Overseas Holdings, S.A. v. Larsen, 709 F.2d 22 (9th Cir. 1983)].

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It is of moment to note that the Final Judgment in Case No. 84-25832 CA (27) carried forward the effect of the lis pendens through December 23, 1987 by its conclusion:

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The claims of the Defendants, if any, Bill Adkins and Del Rossi Enterprises, Inc. and any and all who claim title under them here and to the subject real property, are without any right whatever and title is quieted in the American Legion Community Club of Coconut Grove, Inc. against any and all claims or demands of the Defendants, Bill Adkins and Del Rossi Enterprises, Inc. and any persons claiming by, through and under them since the filing of the lis pendens to any estate, right, title or interest in the subject real property. The Defendants, Bill Adkins and Del Rossi Enterprises, Inc. and any persons claiming by, through and under them since the filing of the lis pendens are permanently enjoined and restrained from asserting any claim or interest

in or to the subject real property or any part thereof.

[Appendix Exhibit 4].

The lis pendens recorded on June 27, 1985 was never attacked throughout the course of the litigation in Case No. 84-25832 CA (27). It is submitted that the lis pendens, not having been discharged, and having been extended by the lower tribunal through entry of the Final Judgment, maintained its vitality, and this Court should not countenance any collateral attack thereon.

B. THE LIS PENDENS FILED ON JUNE 27, 1985 CHARGED THE RESPONDENT WITH CONSTRUCTIVE NOTICE SO AS TO SUBJECT THE RESPONDENT TO THE OUTCOME OF THE RULING IN CASE NO. 84-25832 CA (27) QUIETING TITLE IN THE SUBJECT REAL PROPERTY TO THE AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.

Assuming arguendo that the lis pendens filed by the American Legion in Case No. 84-25832 CA (27) [Appendix Exhibit 2] expired after a period of one (1) year (June 27, 1986), it is uncontradicted that the Respondent received constructive notice of the action filed by the American Legion in Case No. 84-25832 CA (27) seeking to quiet title into the American Legion during the period of vitality of the lis pendens. [R. 467-5091 Specifically, the subject lis pendens was recorded on June 27, 1985. The Respondent received his judgment on December 11, 1985, which judgment was recorded on December 17, 1985, certified copies of which were recorded on January 3, 1986 and April 1, 1986 in the Public Records of Dade County, Florida.



The Petitioner most respectfully asserts that the Respondent and the Third District Court of Appeal have missed the point when they assert that if the lis pendens expired in one (1) year the Respondent's interest in the subject real property would not be subject to the subsequent Final Judgment which was entered in Case No. 84-25832 CA (27). [Appendix Exhibit 4] The purpose of the lis pendens was to give notice, either constructively or actually, that the subject real property was involved in pending litigation, and all those on constructive or actual notice were charged with the consequences of the outcome of that litigation. The Respondent, a judgment creditor, was subject to the effect of the lis pendens. [Stout v. Lye, 103 U.S. 66 (1881); Bridger v. Exchange Bank, 56 S.E. 97 (Ga. 1906).] Assuming arguendo that the vitality of the lis pendens involved in this case expired on June 27, 1986, the Respondent had received constructive notice, clearly within the period of vitality, that he would be subject to the outcome of litigation pending concerning the subject real property [See generally, Hough v. Stewart, No. 88-2184 (Fla. 5th DCA May 11, 1989) (WESTLAW).] The lis pendens in this action was not rendered void ab initio simply because it may have expired prior to entry of Final Judgment in Case No. 84-25832 CA (27). Its purpose was served when it placed the Respondent on constructive notice that the outcome of that litigation would affect any interest in the real property, which he claimed by virtue of his judgment obtained during the vitality of the lis

pendens. [See generally, Hough v. Stewart, Case No. 88-2184 (Fla. 5th DCA May 11, 1989) (WESTLAW), citing to Crown Corporation v. Robinson, 174 So. 737 (Fla. 1937); and Cain and Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982); See also, McAlister v. Salas, 485 So.2d 1333 (Fla. 2nd DCA 1986).]

As set forth in Hough v. Stewart, the Respondent herein, once put on notice, cannot at the expiration of one (1) year, declare that he is no longer on notice, and thereby claim that any interest he claims in the real property would not be subject to the outcome of title being quieted into the American Legion, as was done by the Final Judgment entered in Case No. 84-25832 CA (27). [Appendix Exhibit 4] Clearly, as revealed in the Respondent's reply brief, filed in the appellate proceedings before the Third District Court of Appeal, he misconstrues the effect of the lis pendens when he argues that if the lis pendens expired prior to the entry of the Final Judgment "he could breathe **easy**". Such is not the case. The lis pendens served its purpose by providing constructive notice to the Respondent during its period of vitality. Having afforded the Respondent that notice, the Respondent cannot then close his eyes to the outcome of the litigation of which he was given notice, which litigation in quieting title to the American Legion, deprives the Respondent the opportunity to levy on that property. Even if he had levied on the subject property prior to the entry of the Final Judgment in Case No. 84-25832 CA (27), that levy would have been subject

to divestment by the subsequent and eventual entry of the Final Judgment quieting title. For having received notice, all the Respondent could receive by way of levy would be the interest in the real property held by Del Rossi Enterprises, Inc., which interest was divested and quieted into the American Legion. The recent decision of Houah v. Stewart, Case No. 88-2184 (Fla. 5th DCA May 11, 1989) (WESTLAW) is illustrative of this analysis.

The Respondent might have an argument had he not obtained his interest in the real property until after expiration of the one (1) year period. If that were the case, the Respondent might argue that the lis pendens having expired, he did not receive constructive notice. However, on the facts of this case, the Respondent cannot make that argument. [R. 467-5091 As clarified in Cain and Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982), since the Respondent acquired his interest in the subject real property with legal notice of the quiet title action, wherein the title to the property was subject to being quieted into the American Legion, his interest in the property is inferior to the rights of the American Legion ultimately culminated in the Final Judgment entered in Case No. 84-25832 CA (27). [Appendix Exhibit 4] The Respondent obtained his Final Judgment, and thus his interest in the property, during the vitality of this lis pendens, and thus he was on constructive notice that the title to the property, against which he subsequently attempted to exercise a writ of execution, was

subject to being quieted into the American Legion, free and clear of his judgment. As declared in Housh v. Stewart, "a notice of lis pendens is not rendered void ab initio simply because it expires prior to final judgment in the suit," [Case No. 88-2184 (Fla. 5th DCA May 11, 1989 (WESTLAW) citing to Cain and Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982)]

#### CONCLUSION

It is respectfully submitted that the certified question should be answered in the affirmative, upholding the rationale of the First and Second District Courts of Appeal as cited in Albesa Corp. v. Manning, 468 So.2d 1109 (Fla. 1st DCA 1985); and Chapman v. L&N Grove, Inc., 244 So.2d 154 (Fla. 2nd DCA 1971), and that the opinion of the Third District Court of Appeal, be reversed and the lower tribunal's order of May 19, 1988 affirmed.

However, irrespective of this Court's answering of the certified question, it is respectfully submitted that the lis pendens in this cause served its purpose in providing constructive notice to the Respondent so that the Respondent's interest in the real property, founded upon his Final Judgment, obtained against Del Rossi Enterprises, Inc., was subject to being eradicated by the quieting of title from Del Rossi Enterprises, Inc. into the American Legion Community Club of Coconut Grove, Inc. Thus, even if the lis pendens expired after one (1) year, the Respondent remained on notice, having received

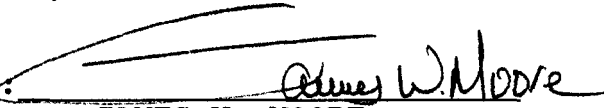
notice during the lis pendens' vitality, and the lower tribunal's ruling was correct in preventing execution by the Respondent upon the subject real property. Accordingly, the opinion of the Third District Court of Appeal should be reversed and the order of the lower tribunal affirmed.

CERTIFICATE OF MAIL

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 30 day of June, 1989 to: Joel S. Perwin, Esq., Suite 800, City National Bank Building, 25 W. Flagler Street, Miami, Florida 33130, and Armando E. LaCasa, Esq., 3929 Ponce de Leon Blvd., Coral Gables, Florida.

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