8-15

IN THE SUPREME COURT OF FLORIDA

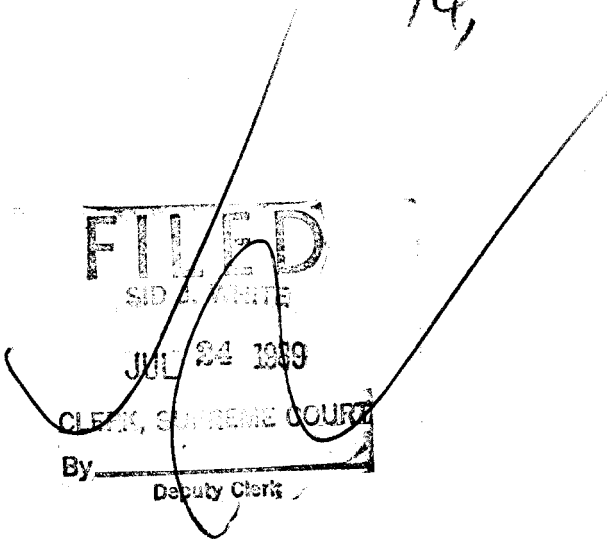
CASE NO. 88-1479

74,215

AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.,
Petitioner.

vs.

MURRY DIAMOND,
Respondent,
_____/



RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CASES

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I
STATEMENT OF THE CASE AND FACTS

The petitioner's statement of the case is accurate but incomplete, because it omits to inform the Court that one of the petitioner's principal arguments--that the notice of lis pendens, even if effective for only one year, provided constructive notice under equitable principles--was not raised in the trial court, was not raised in the district court, and has been asserted by the petitioner (hereinafter "American Legion") for the first time in this proceeding. In addition, the American Legion's statement of the procedural history of this case, while accurate, is somewhat incomplete, and we think that the Court ought to have the full picture of the course of proceedings leading up to the instant proceeding.

This case was previously before the district court in *American Legion Community Club of Coconut Grove, Inc. v. Diamond,* 461 So.2d 130 (Fla. 3d DCA 1984) (per curiam), in which the court affirmed the order of the trial court (R. 99a-99b), which upheld the validity of the lease agreement, dated February 1, 1980 **(P.X.** 1 of Dec. 5, 1985), between respondent Murry Diamond (hereinafter "Diamond') and the American Legion Community Club of Coconut Grove, Inc. (hereinafter "Community Club").[1/] The case (82-7193) was remanded for further proceedings upon some remaining damage claims.

On the same day that the trial court entered its order upholding the lease (August 31, 1983) (R. 99a-99b), the Community Club conveyed title to the property in

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[1/] "R." refers to the Record on Appeal. "Tr." refers to the three separately- and consecutively-paginated volumes of testimony constituting Volumes IV-VI of the Record on Appeal. For the purposes of this proceeding, we are concerned with Volume VI, constituting Tr. 394-473. The Index to the Record on Appeal contains two sets of exhibits--one marked August 15, 1983, and another marked December 5, 1985; we will identify the exhibit cited both by one or the other date, and by the number of the exhibit. In addition, four or five exhibits were introduced during the hearing on the particular issue on appeal (Tr. 439-40, 455-56), but are not included in the Record on Appeal. Most of them, however, are found elsewhere in the record, and we will cite them in that way. All of these documents were acknowledged and stipulated to below (see Tr. **416-17).**

question, subject to Diamond's lease, to Del Rossi Enterprises, Inc. (R. 473-74), of which Giorgio Del Rossi was the president and sole shareholder (Tr. 457). A few months later, while the Community Club's appeal to the district court was still pending, Del Rossi Enterprises borrowed money from a woman named Mary Taylor, and gave her a mortgage on the property to secure the loan (R. 473-74); it subsequently modified the mortgage to secure additional advances by Ms. Taylor (R. 476-89).[2/] In the interim, the district court affirmed the validity of Diamond's lease on the property, and denied rehearing. 461 So.2d 130.

In June of 1985, the American Legion filed an action against Del Rossi Enterprises in Dade County circuit court, to quiet title to the property (Case No. 84-25832).[3/] The American Legion's complaint alleged that the Community Club's charter had been suspended, and named the Community Club as a defendant, as well as Del Rossi Enterprises (see R. 423-24). It alleged that the Community Club had conveyed the property to Del Rossi Enterprises upon false pretenses, and with no authority from the American Legion to do so (see Tr. 434).

In addition to filing this action, the American Legion also filed a lis pendens on the property. Under § 48.23(2), Fla. Stat. (1985), that lis pendens operated as a bar to the enforcement of any pre-existing unrecorded interests in the property by anyone who failed to intervene in the litigation--but only for one year if the "relief sought" in the American Legion's action was not "founded on a duly recorded instrument . . . ."[4/]

[2/] Both the mortgage and its modification were introduced as exhibits (see R. 439-40), but were not included in the Record on Appeal. They are not necessary to the disposition of this proceeding.

[3/] The trial court took judicial notice of the entire file in Case No. 84-25832 (Tr. 416-17). The nature of the American Legion's complaint, described herein, was undisputed. A copy is found in the appendix to the American Legion's brief.

[4/] § 48.23(2) provides: "No notice of lis pendens is effectual for any purpose beyond 1 year from the commencement of the action unless the relief sought is disclosed by the (continued..)

On December **11, 1985,** upon remand from the district court in Case No. **82-7193,** Diamond secured a Final Judgment in his third-party complaint against Del Rossi Enterprises, Inc., Giorgio Del Rossi individually, and two other corporations, in the amount of **$1,500,000.00** (R. **382-83, 491).** That judgment was not appealed, and was duly recorded in the official records of Dade County, thus becoming a lien on the realty owned by Del Rossi Enterprises, Inc.

On June **27, 1986,** unless the "relief sought" by the American Legion was "founded on a duly-recorded instrument," the lis pendens in Case No. **84-25832** expired, under **§ 48.23,** Fla. Stat.

On November **19, 1987,** in Case No. **82-7193,** at Diamond's request, the Clerk of Court issued an Alias Execution, followed by appropriate instructions for levy, notice of sheriffs sale, and other relevant documents, seeking to sell the property, then still held by Del Rossi Enterprises, Inc., to satisfy the December **11, 1985** judgment against Del Rossi Enterprises in the amount of $1.5 million. The sale was scheduled for January **27, 1988.** See R. **393-99.**

About a month later, on December **21, 1987,** the American Legion and Del Rossi Enterprises entered into a settlement agreement of all pending claims in Case No. **84-25832,** including counterclaims by Del Rossi Enterprises for money damages. Under that settlement, Del Rossi Enterprises agreed to convey the property back to the American Legion in return for a promissory note and mortgage, in which the American Legion promised to pay **$125,000.00,** ***not*** to Del Rossi Enterprises, but to its attorney, Armando E. LaCasa, P.A. (R. **493-509).** The promissory note, and accompanying mortgage, provided that the American Legion was obligated to pay the **$125,000.00** to

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[4/](...continued)
initial pleading to be founded on a duly recorded instrument, or on a mechanic's lien claimed against the property involved except when the court extends the time on reasonable notice and for good cause. The court may impose such terms for the extension of time as justice requires."

LaCasa only out of Diamond's rental payments on the property, except that if Diamond should default on his lease, the American Legion would be responsible on the note (R. **496-97; see** Tr. **448-49).** Two days later, the trial court in Case No. **84-25832** entered a final judgment pursuant to the settlement between the American Legion and Del Rossi Enterprises, Inc.

On January **20, 1988,** in Case No. **82-7193,** the trial court granted Del Rossi Enterprises' motion (R. **393-99)** to stay the sheriff's sale of the property (R. **400).** In March, in addition to his claim against the property, Diamond filed a motion for writ of execution against the mortgage which Del Rossi had directed the American Legion to give to Armando LaCasa, **P.A.,** to secure LaCasa's "fees," and served a copy of that motion upon LaCasa (R. 404-17).[5/]

The case was heard by the trial court on May 6, with the American Legion, Del Rossi and LaCasa all appearing (Tr. **394-473).** Diamond argued that he was entitled to levy against the property, because his rights under his judgment lien were superior to those which the American Legion had obtained in its settlement in Case No. **84-25832;** and that he was entitled to levy against the mortgage securing LaCasa's attorneys' fees, because the agreement to pay those fees was a fraud on Del Rossi's creditors (Tr. **418-28, 473-74).** See ***supra*** note 5. **He** argued that his rights in the property were superior to the American Legion's notwithstanding the lis pendens, because the lis

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[5/] Diamonds claim against the LaCasa mortgage is not at issue in this proceeding. That claim is based upon the fact that Del Rossi had made a 40-percent contingency-fee agreement with LaCasa, which entitled LaCasa to an attorney's fee only if Del Rossi secured a money judgment or settlement on his counterclaims against the American Legion in Case No. **84-25832** (Tr. **432, 457-58). As** Del Rossi and LaCasa both acknowledged, however, and **as** the uncontradicted evidence disclosed, Del Rossi received no money **as** a result of the settlement with the American Legion (Tr. **433-44, 437, 449-**50). Thus, Del Rossi was not entitled to any attorney's fees. Nevertheless, the Del Rossi/American Legion settlement provided for the American Legion to pay directly to LaCasa **$125,000.00** (out of Diamonds prospective rental payments to the American Legion). Diamond's contention was that, because Del Rossi did not owe any attorney's fees to LaCasa, the arrangement had the purpose and effect of defrauding Del Rossi's creditors, including Diamond.

pendens had expired a year after it was filed, since the American Legion's action against Del Rossi had not been founded upon a duly-recorded instrument. To the contrary, the action against Del Rossi was filed to invalidate a duly-recorded instrument--the sales agreement between the Community Club and Del Rossi. And he argued that the agreement to pay LaCasa attorney's fees was patently fraudulent, because Del Rossi did not owe LaCasa any attorney's fees.

The trial court rejected both arguments. It ruled that the American Legion's action against Del Rossi Enterprises was founded upon a duly-recorded instrument, and thus that the lis pendens continued after one year, and thus constituted a bar to Diamond's claim (Tr. **428-29).** And it ruled that in the absence of any evidence that LaCasa intended to kick-back any part of his attorneys' fees to Del Rossi, ***see supra*** note 5, "these people had a right to settle the way they settled," and "[i]t has no bearing in my opinion in connection with the lawsuit between Mr. Diamond and the Legion and Mr. Del Rossi" (Tr. **473-74).** The trial court subsequently entered two orders denying Diamond's motion for a writ of execution on the LaCasa mortgage, and granting the motion to stay execution against the property (R. 515, 516).

Diamond appealed to the district court on both points, and the district court held that the American Legion's action to quiet title to the property (Case No. **84-25832)** was not founded upon a duly recorded instrument within the contemplation of **§ 48.23(2),** and therefore expired after one year. Thus, the judgment entered upon the settlement between the American Legion and Del Rossi Enterprises in Case No. **84-25832,** which was entered more than one year after the filing of the lis pendens, did not extinguish Diamond's pre-existing recorded judgment against Del Rossi Enterprises in the instant case, and therefore survived the subsequent Del Rossi conveyance of the property back to the American Legion. In the light of this disposition, for a number of complicated reasons, the district court found it unnecessary to resolve Diamond's claim against Armando LaCasa, **P.A.** *See* ***supra*** note 5.

For the convenience of the Court, it might be useful to re-state the above narrative in summary form:

Date	Event
02/01/80	Lease Agreement between Legion and Diamond signed.
04/15/82	Community Club files suit against Diamond to cancel lease (Case No. 82-7193).
08/29/83	Final Judgment in favor of Diamond on specific performance of his lease.
08/29/83	Community Club conveys title to the property to Del Rossi Enterprises, Inc.
10/23/84	Del Rossi Enterprises grants mortgage on realty to Mary Taylor to secure advance of $23,230.00.
05/20/85	Del Rossi Enterprises modifies prior mortgage on realty to Mary Taylor, to secure additional advance of $10,700.00.
06/27/85	American Legion files action to quiet title to the property, in Case No. 84-25832, and files notice of lis pendens.
12/11/85	Final Judgment entered for Diamond in Case No. 82-7193 against Del Rossi Enterprises for $1,500,000.00; judgment recorded on December 17, 1985.
06/27/86	Unless the American Legion's action in Case No. 84-25832 was founded upon a duly-recorded instrument, its lis pendens expired under § 48.23, Fla. Stat.
11/19/87	Alias Execution issued in Case No. 82-7193 (followed by appropriate instructions for levy, notice of sheriff's sale, etc.) by clerk of court at Diamond's request, seeking sale of realty still held by Del Rossi Enterprises, Inc., to satisfy December 11, 1985, judgment. Sale set for January 27, 1988.
12/21/87	American Legion and Del Rossi Enterprises settle all claims between them in Case No. 84-25832, and agree to reconvey title to the American Legion in exchange for, ***inter alia,*** grant of a $125,000.00 note and mortgage to Armando LaCasa, **P.A.**

Date	Event
01/20/88	Trial court in Case No. 82-7193 stays Diamond's execution sale pending resolution of Diamond's claim.
03/31/88	Diamond files motion seeking writ of execution against the mortgage held by Armando LaCasa, P.A.
05/16/88 & 05/19/88	Trial court enters its orders denying Diamonds motion for writ of execution against the mortgage, and granting the motion to prevent Diamond's execution against the property. Appeal follows.

II
ISSUES ON APPEAL

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 § 48.23, FLORIDA STATUTES (1985), AUTHORIZING THE MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

B WHETHER THE LIS PENDENS FILED IN THE LOWER TRIBUNAL 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.

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SUMMARY OF THE ARGUMENT

Diamond secured a judgment against Del Rossi Enterprises in the amount of $1.5 million, and he recorded that judgment. At that time, although the American Legion's action to quiet title to the property was still pending, Del Rossi Enterprises was still the record title holder of that property. Subsequently, the American Legion and Del Rossi Enterprises entered into a settlement agreement in which Del Rossi Enterprises conveyed the property back to the American Legion, and at the same time directed that the $125,000.00, which the American Legion had agreed to pay as a part of the deal, be

conveyed not to Del Rossi Enterprises, but to its attorney, Armando LaCasa, P.A. The effect of that transaction, if not its purpose, was to insure that Del Rossi Enterprises--against which Diamond has a judgment of $1.5 million--would have record title neither to the land nor to the money, and therefore nothing upon which Diamond might levy.

Diamond's response to this was to get all of the parties together in one proceeding, arguing that he was entitled to levy against both the land and the money. His rights in the land were superior, he argued, because they arose and were recorded before the judgment through which Del Rossi Enterprises conveyed the land back to the American Legion, and because they were not extinguished by the notice of lis pendens which the American Legion had filed in that action. Under § **48.23,** Fla. Stat. (1985), the lis pendens was effective only for one year, and thus expired before the settlement between the American Legion and Del Rossi Enterprises, because the legion's action was not "founded on a duly recorded instrument," but to the contrary was filed to invalidate a duly-recorded instrument. Thus, Diamond's lien remained superior. ***As*** we will demonstrate, and as the district court concluded, an overwhelming body of Florida cases supports that conclusion. They are controlling of this case, notwithstanding the American Legion's newly-discovered equitable arguments, which have been waived at least twice, and which are not relevant in the context of this proceeding.

IV
ARGUMENT

A. A SUIT TO SET ASIDE **A** CONVEYANCE OF REAL PROPERTY IS NOT 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.

Section **48.23(2),** Fla. Stat. **(1985),** plainly provides that "[n]o notice of lis pendens is effectual ***for any*** *purpose* beyond one year from the commencement of the action unless the *relief* ***sought*** is disclosed by the initial pleading to be *founded* on a duly

recorded instrument . . ." (our emphasis). Under this language, the longevity of a notice of lis pendens is not dependent upon the question of whether the *action* "arises from" a duly-recorded instrument (American Legion's brief at 10). It is not dependent on the question of whether the "cause of action" (as opposed to the "relief sought" in that action) was "founded on a duly recorded instrument . . ." (American Legion's brief at 11). It is not dependent on the question of whether the action seeks a "declaration of . . . entitlement" to property (American Legion's brief at 13). And is not dependent on the question of whether the action "would not have been brought but for the deed" in question (American Legion's brief at 14). To the contrary, the notice extends beyond one year only if the "relief sought" in the action is "founded on a duly recorded instrument." If the "relief sought" is not "founded on a duly recorded instrument," the notice of lis pendens may be extended beyond one year only "on reasonable notice and for good cause."

The American Legion's action against Del Rossi Enterprises (Case No. 84-25832) and lis pendens were filed on June 27, 1985. If the "relief sought" in that action was not "founded on a duly recorded instrument," the notice of lis pendens ceased to be "effectual for any purpose" on June 27, 1986. That date was before the settlement agreement in Case No. 84-25832 between the American Legion and Del Rossi Enterprises (December 21, 1987) (R. 493-509), and before the court entered its final judgment on that settlement (December 23, 1987). Thus, the issue is clearly presented. If the "relief sought" in the American Legion's action against Del Rossi Enterprises was "founded on a duly recorded instrument," Diamond loses. On the other hand, if the "relief sought" in the American Legion's action against Del Rossi Enterprises was not "founded on a duly recorded instrument," then the notice of lis pendens expired of its own force, well before the settlement agreement (and judgment thereon) between the American Legion and Del Rossi Enterprises, and Diamond's interest in the property, pursuant to his prior recorded judgment of December 11, 1985, was unaffected by the

subsequent outcome of that litigation. All of parties have agreed to that, and thus have framed the issue before this Court.

Even a cursory review of the American Legion's complaint against Del Rossi Enterprises (copy attached to American Legion's brief) reveals that "the relief sought" was not "founded on a duly recorded instrument." The only "instrument" at issue in that litigation was the conveyance from the Community Club to Del Rossi Enterprises, which indeed was duly recorded. But the American Legion's action was not in any way "founded on" that duly-recorded instrument. To the contrary, the entire purpose of the American Legion's action was to invalidate that instrument as fraudulent. It is inconceivable in that context--it would require linguistic contortion--to conclude that the American Legion's complaint was "founded on" a duly-recorded instrument.

As the American Legion has acknowledged, a number of decisions in Florida support this position. For example, *Berkley Multi-Units, Inc. v. Linder,* 464 So.2d 1356, 1358 (Fla. 4th DCA 1985), like this case, involved a "complaint seeking rescission and other relief based upon allegations of fraud and conspiracy," and "[a] notice of lis pendens was filed with the original complaint." The court held that the action was not "founded on a duly recorded instrument," and thus that the trial court should have granted a motion to dissolve the notice of lis pendens, 464 So.2d at 1357-58:

> [T]he recording of a conveyance such as a warranty deed serves as notice that the grantor has relinquished to the grantee all of his right, title and interest in the real property. The "recorded instrument" is notice of the grantee's ownership and therefore interest in the real property. It also serves as notice that the grantor no longer has any interest in the real property. If it is later claimed by the grantor that the grantee fraudulently or otherwise wrongfully obtained title and an action is brought to rescind the deed, the plaintiff is not entitled as of right to file a notice of lis pendens. The action is not founded on the deed but on circumstances preceding and surrounding the execution of the deed. A notice of lis pendens alerts to the possibility of rescission of the deed, a cloud on title not evident from inspection of the bare deed on the public records. Because of its potential to cloud title it is subject to scrutiny by the court for the protection of the title, the property owner, and existing lienholders, as well as the interests of the plaintiff. Thus, the statute requires that the

court "control and discharge the notice of lis pendens as the court may grant and dissolve injunctions."

Likewise in *Hough v. Bailey,* 421 So.2d 708, 708-09 (Fla. 1st DCA 1982), *review denied,* 441 So.2d 614 (Fla. 1983), the plaintiffs "filed a complaint seeking specific performance of an agreement and reformation or cancellation of several deeds as fraudulent," and the "agreement has not been recorded . . . ." The plaintiff argued "that an action seeking to set aside a fraudulent deed is founded upon that deed," but the appellate court was "not persuaded." It held that the "asserted right in this case arose from an unrecorded contract, so it was not *so* founded." 421 So.2d 709.

Similarly, in *Mohican Valley, Inc. v. MacDonald,* 443 So.2d 479, 481 (Fla. 5th DCA 1984), the plaintiff filed an action which he characterized as

> a quiet title suit, but it is not. It is a shareholder's derivative suit to cancel a deed fraudulently transferred. That is a lawsuit founded on fraud or other tortious misconduct. . . . While it seeks to correct the misconduct which incidentally involves a deed, it is not founded upon the deed itself. A lis pendens is permitted and proper in these cases but the trial judge has the authority and the discretion to require a bond to indemnify the defendants in case the lawsuit fails.

By the same reasoning, although "[a] lis pendens is permitted and proper in these cases," it expires of its own force after one year, because not founded upon a duly-recorded instrument.[6/]

In *Daugharty v. Daugharty,* 502 So.2d 1289, 1290 (Fla. 1st DCA 1987), the wife filed a notice of lis pendens in connection with her action under Rule 1.540(b), Fla. R. Civ. P., to vacate a final judgment of dissolution of marriage. The court held

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[6/] As the American Legion has pointed out (brief at 13), the *Mohican Valley* court also observed 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." 443 So.2d at 481. But the suit to quiet title in *Mohican Valley* did not follow this "usual" practice. Although denominated a suit to quiet title, it actually sought to invalidate the recorded instrument upon which the defendant--not the plaintiff--claimed title. Likewise in the instant case, the American Legion denominated its action as a suit to quiet title, but it sought to do so only by invalidating the instrument upon which the defendant claimed title.

that the action was not founded upon a duly-recorded instrument, because, "[i]f the relief sought is granted, the result will be that the disposition of marital property made by the court in the final judgment of dissolution, including the disposition of the real property named in the wife's notice of lis pendens, will be set aside. Notwithstanding that title to the real property may be affected, this remains an action founded on fraud and not on a duly recorded instrument."

Finally, in ***Ross v. Breder,*** 528 So.2d 64, 65 (Fla. 3d DCA 1988), the plaintiff filed an action to prevent his partners from executing a contract for sale of partnership property, and later filed a notice of lis pendens. He asked for specific performance of a provision of the partnership agreement assertedly giving the plaintiff the right to control any sale of the property. The district court held that "the fact that the partnership agreement and the [partnership's] warranty deed to the property involved here are recorded does not automatically transform those documents into a statutory predicate for a lis pendens as of right. . . . This is true because while the lawsuit is facially based on the instruments of record, the partnership agreement and deed would not put **a** good faith purchaser on notice that there is a cloud on the title." The action was based not upon any challenge to the underlying partnership agreement or the warranty deed, but rather upon the invalidation of an executory contract for the sale of the property. The action was "founded upon" the asserted necessity of ***invalidating*** that contract--not upon the pre-existing recorded indices of the partnership's ownership.

As we have noted, the holdings of these cases are self-evident, because of the plain language of the statute. The notice of lis pendens is effective for only one year unless "the relief sought is disclosed by the initial pleading to be founded on a duly recorded instrument . . . ." By its plain language, the "relief sought" in the American Legion's complaint against Del Rossi Enterprises was not "founded on a duly recorded instrument"; to the contrary, it depended upon the invalidation of that instrument. Under plain logic, and the decisions above, the notice of lis pendens expired after one

year. For this reason, as the district court concluded, Diamonds lien against the property was not extinguished by the judgment subsequently entered upon the settlement between the American Legion and Del Rossi.

As against all of this, the American Legion makes three arguments. First (brief at 11, 14), the American Legion relies upon the conclusory and unreasoned holdings of two district-court decisions,[7] to advance the self-contradictory contention that an action to invalidate a duly-recorded instrument in fact seeks relief which is founded upon a duly-recorded instrument. In order to avoid this non-sequitur, the American Legion in several ways has attempted to re-write § 48.23(1). It has argued (brief at 10) that the American Legion's *complaint* "arises from the warranty deed recorded August 31, 1983 . . . ." It has argued (brief at 11) that the American Legion's "cause of action" (as opposed to "the relief sought" in that action) "was founded on a duly recorded instrument . . . ." It has argued (brief at 13) that its action "sought a declaration of the Petitioner's entitlement to the subject real property." And it has argued (brief at 14) that the American Legion's "action would not have been brought but for the [recorded] deed."

Every one of these statements is correct, and every one of them is irrelevant, because § 48.23(2) is not invoked by an action which "arises from" a duly-recorded instrument; it is not invoked merely because "the cause of action . . . was founded on a duly recorded instrument"; it is not invoked merely because the complaint "sought a declaration of the Petitioner's entitlement to the subject real property"; and it is not invoked merely because "the action would not have been brought but for the [recorded] deed." Under the plain statutory language, the notice of lis pendens will exceed one year only if the "relief sought" in the action is "founded on" a duly-recorded instrument. The

[7] ***Albega Corp.*** *v. Manning,* **468** So.2d **1109** (Fla. 1st **DCA 1985);** *Chapman* ***v. L & N Grove, Inc.,*** **244** So.2d **154** (Fla. 2d DCA **1971).**

American Legion's observations are all correct, but they have nothing whatsoever to do with the statute.

If the lis-pendens statute had been written to prescribe an indefinite duration for any lis pendens filed in an *action* "founded on a duly recorded instrument," the American Legion might at least have a colorable, if strained, construction of the statutory language. But as written, the statute says that the notice expires after one year unless "the *relief* sought" (our emphasis) in the action is "founded on a duly recorded instrument." The "relief sought" in the American Legion's action against Del Rossi Enterprises was the invalidation of a duly-recorded instrument--the declaration that it was void and unenforceable as the product of fraud. The "relief sought" was "founded on" and dependent upon the *non-existence* of that instrument--upon a judicial declaration that it was *void* as fraudulent. In this light, there is no view of the statutory language which supports the American Legion's position, and it is not surprising that the clear majority of decisions to have addressed this question have rejected that position.

Second (brief at 15), the American Legion argues that at the time he acquired his money judgment, Diamond was aware of its pending litigation with Del Rossi Enterprises, by virtue of the lis pendens, and thus for some reason that the American Legion's construction of the statute should be adopted. But this is a non-sequitur. We are concerned here with the meaning of a statute, and Diamond's actual knowledge of the pending litigation between Del Rossi Enterprises and the American Legion has no relevance whatsoever to that interpretation. To the contrary, if Diamond's interpretation of the lis-pendens statute is correct, then he had a perfect right to ignore the other litigation from a point one year after the lis pendens had been filed.

To put the same point otherwise, the American Legion's argument would render the lis-pendens statute meaningless. Why would the legislature prescribe the expiration of a lis pendens "for any purpose" after one year, if the notice provided by the lis pendens (or a party's independent knowledge) nevertheless might require a party to

intervene after one year? Under that circumstance, it could hardly be said that the lis pendens had ceased to be effective "for any purpose."

It should not be forgotten that in construing the plain meaning of the statute, we are concerned fundamentally with a principle of reliance. The statute gives notice to those with a potential interest in litigation that they must intervene to protect their rights under certain circumstances, and that they need not intervene under other circumstances. The statute told Murry Diamond that under all circumstances, unless he intervened in the dispute between the American Legion and Del Rossi Enterprises, his interest was subject to divestment by any judgment to be entered in that action within one year. The statute also told Diamond that if the relief sought in the action was based upon a duly-recorded instrument, his interest was subject to divestment by any judgment to be entered in that action at any time. And finally, if the action was not based upon a duly-recorded instrument, the statute told Diamond that it had no effect "for any purpose" after one year.

Therefore, if the relief sought in the action was not founded on a duly-recorded instrument, Diamond was assured by the statutory language that he need not be concerned with the outcome of the litigation after one year. Since Diamond was not a party to that litigation, he had no obligation to intervene, because the outcome of the litigation did not threaten to affect his interests.

As a general proposition, it is axiomatic that a judgment entered in an action is binding only upon the parties to that action.[8/] The exception to this rule is that a non-party may be bound by or estopped to challenge such a judgment if he was obligated to

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8/ *See Freidus v. Freidus,* 89 So.2d 604 (Fla. 1956); *Alger v. Peters,* 88 So.2d 903 (Fla. 1956); *Lynn v. City of Ft. Lauderdale,* 81 So.2d 511, 513 (Fla. 1955); *Sample v. Ward,* 156 Fla. 210, 23 So.2d 81 (1945); *Coral Realty Co. v. Peacock Holding Co.,* 103 Fla. 916, 138 So. 622 (1931); *Bemudez v. Bemudez,* 421 So.2d 666 (Fla. 3d DCA 1982); *Feldman v. Feldman,* 390 So.2d 1231 (Fla. 3d DCA 1980); *Moretto v. Staub,* 370 So.2d 1220 (Fla. 3d DCA 1979); *Rosselle v. Rosselle,* 366 So.2d 1197 (Fla. 3d DCA 1979) (per curiam); *Massey v. Massey,* 205 So.2d 1 (Fla. 3d DCA 1967).

intervene. In this case, Murry Diamonds obligations were controlled by the lis-pendens statute, § 48.23, Fla. Stat.. If Diamond was not required by the statute to intervene, because the lis pendens had expired after one year (before the entry of any judgment), then he was not bound by the subsequently-entered judgment.

Thus, the American Legion's second argument depends upon the very conclusion which it purportedly pursues. Since the relief sought by the American Legion's action was not founded upon a duly-recorded instrument, the statute obligated Diamond to intervene only for a period of one year, and then the lis pendens expired of its own force, after which Diamond had no obligation to intervene. For this reason, under the authorities cited, he was not bound in any way by the judgment entered in an action to which he was not a party.

This same observation answers the American Legion's third argument (brief at 15-16)--that the final judgment entered in Case No. 84-25832 recited (retroactively) that the lis pendens remained effective through the time of that judgment.[9/] Even if the court in Case No. 84-25832 had the power retroactively to extend the lis pendens beyond the point of its expiration under the statute (a dubious proposition), the fact is that Diamond was not a party to the action in which that order was entered, and was not bound by it. Thus, this argument suffers the same fallacy as the second argument--that is, it assumes the conclusion for which it is offered. Diamond is bound by the judgment in Case No. 84-25832 only if he had an obligation to intervene in that proceeding. Since he had no obligation, because the notice of lis pendens had expired after one year, he is not bound by the judgment, whether or not it purports retroactively to extend the life of the lis pendens.

[9/] This argument was not raised in the trial court, and therefore was not appropriate for the district court's consideration, nor is it appropriate for this Court's consideration.

To put the same point otherwise, the American Legion's third argument also would render the lis-pendens statute meaningless. It would hardly have been necessary for the legislature to prescribe the conditions under which a lis pendens expires "for any purpose" in an action, if the trial court in that action had the power retroactively to extend the lis pendens so as to bind non-parties even after one year. Thus, it is not surprising that the American Legion did not raise this argument in the trial court, and has been unable to cite any authority, either in the district court or in this Court, to support it.

The bottom line is that the American Legion cannot escape the plain language and the obvious import of § 48.23(2). That language says that because the American Legion's action against Del Rossi Enterprises did not seek relief which was founded upon a duly-recorded instrument, the lis pendens expired after one year. The import of that language is that after one year, Diamond had no obligation to intervene in the action between the American Legion and Del Rossi Enterprises, and was not bound in any way by the decree subsequently entered in that action. The district court was correct in reaching that conclusion, in reliance upon the clear majority rule in Florida.

B. THE LIS PENDENS FILED ON JUNE 27, 1985 DID NOT CHARGE DIAMOND WITH CONSTRUCTIVE NOTICE SO AS TO SUBJECT HIM 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.

Here the American Legion argues 1) that even if the lis pendens expired after one year, it certainly was not void *ab initio,* and therefore gave all interested parties notice of the action during the one year in which it was effective; 2) that Diamond acquired his interest during the one-year period in which the lis pendens was effective, and therefore was an interested party; 3) that Diamond therefore received constructive notice of the action; and 4) that notwithstanding the expiration of the notice of lis

pendens, Diamond was equitably obligated to intervene in the other action even after the expiration of the lis pendens. We have two responses.

First, this argument was not raised in the trial court, and was not raised in the district court, and has been advanced for the first time in this Court. The American Legion's sole argument in both the trial court and the district court was that the lis-pendens statute, § 48.23(2), should be construed such that Diamond would be bound by the decree entered in Case No. 84-25832. The American Legion raised no argument based upon any principle of constructive notice or equitable estoppel, and it therefore waived any such argument.[10/]

Second, the fact that a notice of lis pendens is not invalid *ab initio*, even if it subsequently expires after one year, *see Hough v. Stewart*, 14 F.L.W. 1153 (Fla. 5th DCA May 11, 1989), has no probative value in suggesting that the judgment or decree entered in an action *after* the expiration of a lis pendens can be considered binding upon a non-party who holds a prior recorded judgment. If the rule were otherwise, then the lis-pendens statute could not possibly say that after the expiration of one year, a notice of lis pendens is not effectual "for any purpose." To the contrary, under the American Legion's argument, the lis pendens indeed would be effective in a very material way after one year; it would operate to render binding against non-parties a judgment entered in an action after the expiration of that one year. That outcome is inherently inconsistent with the statutory language.

[10/] On the waiver in the trial court, see *Clark & Bostic v. State*, 363 So.2d 331 (Fla. 1978); *Linebeiger v. Domino Canning Co.*, 68 So.2d 357, 359 (Fla. 1953); *Atlantic Coast Line R Co. v. Shouse*, 83 Fla. 156, 91 So. 90, 95 (1922); *Marks v. DelCastillo*, 386 So.2d 1259 (Fla. 3d DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981). On the waiver in the district court, see *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Gifford v. Galaxie Homes of Tampa, Inc.*, 204 So.2d 1 (Fla. 1967); *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959); *Wingate v. United Services Automobile Association*, 480 So.2d 665 (Fla. 5th DCA 1985); *Lesperance v. Lesperance*, 257 So.2d 66 (Fla. 3d DCA 1972). *See generally Gran Financiera S.A. v. Nordbeig*, 57 U.S.L.W. 4898, 4899-4900 (U.S. June 23, 1989); *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 862 n.5, 107 S. Ct. 2161, 95 L. Ed.2d 791, 803 n.5 (1987).

Thus, the American Legion's equity argument would render the statutory language meaningless, and would undermine the important statutory principle of reliance. In the area in which it operates, the statute must supplant any otherwise-available equitable principles, or else the statute would have no meaning. The statute declares that a lis pendens is ineffectual for any purpose after the expiration of one year. It thus necessarily must supersede any otherwise-applicable equitable principle which would render the filing of such a lis pendens effective even after one year. The statute must pre-empt any otherwise-applicable principles. It is not surprising that the American Legion did not raise its estoppel argument in the trial court or in the district court, and therefore waived it twice.

V
CONCLUSION

It is respectfully submitted that the question certified to this Court by the district court--which is the only question properly before this Court--should be answered in the negative.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of July, 1989, to: JAMES C. MOORE, ESQ., Taylor, Brion, Buker & Greene, 1111 South Bayshore Drive, Eleventh Floor, Miami, Florida 33131; and to ARMANDO LACASA, ESQ., 3929 Ponce de Leon Boulevard, Coral Gables, Florida.

Respectfully Submitted,

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