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SID J. WHITE
MAR 2 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LOUIS CHIUSOLO

Petitioner,

vs.

WILLIAM KENNEDY **and** MOIRA KENNEDY,

Respondents.

CASE NO. 79,103

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On appeal from the District **Court** of Appeals in and for the Fifth District, Florida.,.'

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STATEMENT OF THE CASE AND FACTS

Respondents adopt the Petitioner's Statement of the Case and Facts found in the Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

The issue before the Court is which party has the burden of proof on a motion to dissolve a lis pendens in a proceeding held under s. 48.23(3), Florida Statutes. The Fifth District Court of Appeals has addressed this issue in the instant case and previously in Sparks v. Charles Wayne Group, 568 So.2d 512 (Fla. 5th DCA 1990). The Respondent believes the majority opinion below, and the dissenting opinion in Sparks is the better reasoned approach and should be affirmed.

As Judge Cobb stated in his dissenting opinion in Sparks, the mere allegation of a cause of action of an equitable lien does not translate into an automatic right to injunctive relief. (i.e., notice of lis pendens) absent an appropriate evidentiary showing of entitlement to that relief.

The statute at issue, s. 48.23(3), Florida Statutes, specifically incorporates by reference the procedure used in injunction cases. The legislature would not have included the reference to injunction procedure merely as an analogy. The direct incorporation of this procedure by reference by the legislature in the statute has to be found to mean what it says, the courts must consider the imposition and discharge of a lis pendens as they would consider the imposition and discharge of injunctions.

In injunction proceedings the party seeking to impose the limitation (i.e. the injunction or the lis pendens) has the initial burden of proof. That burden would then shift after the initial determination is made to whatever party then seeks a change.

The party obtaining the lis pendens is protected in that the lis pendens is awarded automatically upon the filing of the complaint and it is not until a hearing can be held to dissolve the lis pendens that the court must rule on the proper issues.

To approve Judge Sharp's dissenting opinion below, or the Court's prior decision in Sparks, would be to allow unreasonable interference with the alienation of property,

ARGUMENT

The issue before the Court in this proceeding is which party has the burden of proof on a motion to dissolve a lis pendens in a proceeding held under s. 48.23(3), Florida Statutes. This statute governs lis pendens in cases that do not involve recorded instruments or mechanic's lien claims. This issue has apparently been a bone of contention with the Fifth District Court of Appeals. In Sparks v. Charles Wayne Group, 568 So.2d 512 (Fla. 5th DCA 1990) a divided court held that the party moving to dissolve the lis pendens had the burden of proof. Judge Sharp writing for the Court addressed Judge Cobb's dissenting opinion by stating:

> The dissent argues that the burden of proof at the hearing on the motion to dissolve was on the Sparkses [the party that filed the lis pendens]. However, that is exactly backwards from judicial hearings in general where the burden is placed on the moving party, ... (Citation omitted).
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> id at 517.

In the dissenting opinion of which Judge Sharp was speaking, Judge Cobb wrote:

> For purposes of analysis, then, a notice of lis pendens should be construed to ensure that the safeguards applicable to injunctions are applicable to a lis pendens. Under [s. 48.23(3), Florida Statutes] the proponent of a notice of lis pendens based upon an unrecorded contract must justify its continuation at the evidentiary hearing held on the motion to dissolve the notice. (Citations omitted) The proponent must show (1) irreparable harm, (2) an inadequate remedy at law, and (3) a substantial likelihood of success on the merits. (Citations omitted) **The mere allegation of a cause of action of an equitable lien does not translate into an automatic right to injunctive relief. (*i.e.*, notice of lis pendens) absent an appropriate evidentiary showing of entitlement to that relief.** (Emphasis added) The mistake of the majority opinion is in the failure to make this distinction.
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> id at 518.

This issue was not visited again by the Fifth DCA (or by any other court that the Respondent has been able to find) until the instant case. In the decision entered below, Judge Cobb, this time writing the majority opinion for the court sitting en *banc*, reversed the prior holding in Sparks and expressly held:

> [I]n an action not based upon a recorded instrument or mechanic's lien, the proponent of a lis pendens has the burden of proof at the evidentiary hearing held on the motion to dissolve the lis pendens. (Citations omitted) At that hearing, the proponent of the lis pendens must show that his claim does affect the real property and that there is a substantial likelihood he will be successful on the merits.

See, Chiusolo v. Kennedy, 589 So.2d 420 (Fla. 5th DCA 1991).

Judge Sharp was the sole dissenting member of the ***en*** *banc* court and the arguments raised in her dissenting opinion are restated in the Petitioner's Brief on the merits.

What this issue comes down to is the interpretation of the statutory language found in s. 48.23(3), Florida Statutes which reads:

> (3) When the initial pleadings does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of Chapter 713, the court may control and discharge the notice of lis pendens as the court may grant and dissolve injunctions. (Emphasis added)

Judge Sharp is of the opinion that the language regarding dissolving lis pendens like injunctions is "somewhat ambiguous" (See, Sparks, supra at 517) and was referenced only for purposes of "analogy". (See Judge Sharp's dissenting opinion below) By contrast, Judge Cobb believes the injunction procedure incorporated into the statute by reference is controlling. The party imposing a lis pendens in situations where there is not a recorded instrument is likened to a party moving for a temporary injunction

without notice. Both must bear the burden of proof throughout the initial proceedings. (Note Judge Cobb reliance on DeLisi v. Smith, 401 So.2d 925 (Fla. 2nd DCA 1981) an injunction case.)

The Respondents herein believe the majority opinion below, as expressed by Judge Cobb, is the better reasoned approach and should be affirmed. Firstly, we do not believe the legislature would have included the reference to injunction procedure as merely an analogy. The direct incorporation of this procedure by reference in the statute has to be found to mean what it says, the courts must consider the imposition and discharge of lis pendens as they would consider the imposition and discharge of injunctions. In injunction proceedings the party seeking to impose the limitation (i.e. the injunction or the lis pendens) has the initial burden of proof. That burden would then shift after the initial determination is made to whatever party then seeks a change. As pointed out by Judge Cobb, what the dissenting opinion (and the Petitioner herein) fails to address is that since the lis pendens is entered automatically, the proceeding on a motion to dissolve the lis pendens is the initial proceeding and is analogous to a proceeding to enter a temporary injunction. Just as there is no question that a party moving for a temporary injunction must bear the burden of proof, there should be no question that the party seeking the lis pendens should also bear the burden of proof. As Judge Cobb stated in Sparks (cited above) the mere allegation of a cause of action of an equitable lien does not translate into an automatic right to injunctive relief. (i.e., notice of lis pendens) absent an appropriate evidentiary showing of entitlement to that relief.

The Petitioner's reliance on Diamond Builders, Inc. v. Rander/Sarasota Corporation, 572 So2d 1018 (Fla. 2nd DCA 1991) is misplaced. Although in Diamond Builders the court approved Cacaro v. Swan, 394 So.2d 538 (Fla. 4th DCA 1981), the only portion of Cacaro addressed was that portion that held that a hearing was not necessary prior to recording a notice of lis pendens under s. 48.23(3), Florida Statutes. This point is not at issue herein. The portion of the Cacaro opinion that is at issue was merely dicta and is not supporting authority for the Petitioner's position.

Judge Sharp in the dissenting opinion below, (and the Petitioner in his brief on the merits), is concerned that if the majority decision herein is approved by this Court, initial lis pendens hearings on a motion to dissolve the lis pendens will become a "battle of contrary affidavits". However, this type of proceeding is exactly what is typically before the trial court in initial hearings seeking temporary injunctions or temporary restraining orders. Courts have been following this procedure in injunction cases for considerable time. Respondents believe that from the language used by the legislature in the statute at issue it is apparent that the legislature intended this same procedure to be followed in cases concerning lis pendens and does not believe that it is for the courts to disrupt the clearly stated legislative intent of the statute.

The statutory provision at issue offers protection to the filing party by allowing the lis pendens to be recorded automatically, without the need of notice or hearing, upon the filing of a complaint seeking to impose an equitable lien on property. (See, Cacaro, *supra* and Diamond Builders, *supra.)* It is

only reasonable for the party that obtains this relief to bear the burden of persuasion on the initial hearing on a motion to dissolve the lis pendens (the trial courts first opportunity to address the issue). To do otherwise would be to allow the unreasonable interference with the alienation of property, which is exactly what has happened in the instant case.

CONCLUSION

The opinion of the lower court sitting en *banc* should be affirmed in that it is appropriate for the party obtaining a lis pendens under s. 48.23(3), Florida Statutes to bear the burden of proof in the initial proceedings to decide whether the lis pendens should stand or be dissolved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: LEONARD R. ROSS, ESQUIRE, 434 N. Halifax Avenue, Suite 1, Daytona Beach, FL 32118 on this 28th day of February, 1992,

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