OA 4-8-96 047

CASE NO. 86,392

SUPREME COURT OF FLORIDA

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MEDICAL FACILITIES
DEVELOPMENT, INC.,

Petitioner,

v.

CASE NO. 86,392

LITTLE ARCH CREEK
PROPERTIES, INC.,

Respondent.

DISTRICT COURT OF APPEAL,
THIRD DISTRICT - NO. 94-1662

______________________/

RESPONDENT'S BRIEF ON THE MERITS

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CASE NO. 86,392

PREFACE

This is Respondent Little Arch Creek Properties, Inc.'s brief on the merits in opposition to the application for discretionary review filed by Petitioner and its brief on the merits. The parties will be referred to as follows:

Petitioner Medical Facilities Development, Inc. will be referred to as "Medical."

Respondent Little Arch Creek Properties, Inc. will be referred to as "LACP."

"R" followed by a number will refer to a page in the Record.

"A" followed by a number will refer to a page in Medical's appendix to its jurisdictional brief.

"BHT" followed by a number will refer to a page in the transcript of the bond hearing before the trial court which transcript is included in Medical's appendix to its jurisdictional brief.

"MBR" followed by a number will refer to a page in Medical's brief on the merits.

STATEMENT OF THE CASE AND FACTS

In March, 1994, Petitioner Medical sued LACP in the Dade County Circuit Court seeking specific performance of an alleged contract to purchase a medical office building owned by LACP for $5.5 million. A1. The alleged contract was based on an exchange of letters between Medical Group Services, Inc. ("Group") and LACP. A1. Immediately before filing suit, Group assigned to Medical its "rights" to purchase the office building. Medical recorded a lis pendens against the office building when it sued for specific performance. A2.

LACP disputed Medical's claim that it had an enforceable contract. LACP claimed that the correspondence between Group and LACP did not give rise to an enforceable contract. R 16. At the time suit was filed, LACP had entered into a written contract for sale of the office building for $6.5 million, all cash, to Mt. Sinai Medical Center of Greater Miami, Inc. ("Mt Sinai"), a competitor of Medical. A1.

LACP moved the trial court to require Medical to post a lis pendens bond. A3. There was an evidentiary hearing after which the trial court ordered Medical to post a $1 million lis pendens bond representing the difference between Group's offer and the Mt. Sinai contract.[1] A4-5. Medical posted the bond and appealed the

[1]In its merits brief, Medical states that the trial court found in the bond order that no showing of irreparable harm was necessary. MBR 1. The bond order makes no such finding. A5.

bond order to the Third District Court of Appeal.[2] A6, 7.

The Third District affirmed the trial court's bond order. Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc., 656 So.2d 1300 (Fla. 3d DCA 1995). Medical then filed motions for rehearing, for rehearing en banc and the suggestion that the Third District certify the case to this Court as one of great public importance. R35-88. On August 2, 1995, the Third District denied the motions and issued its mandate on August 18, 1995. R101-102.

Medical then filed its Notice to Invoke Discretionary Jurisdiction and this Court accepted jurisdiction by its Order of January 9, 1996. R103-5.

[2]The case on the merits was tried before a jury during the week of January 30, 1995 and the jury returned a verdict in favor of LACP finding that Medical did not have an enforceable contract to purchase the building. A final judgment in favor of LACP was entered pursuant to the jury verdict which Medical appealed to the Third District. That appeal is presently pending.

SUMMARY OF ARGUMENT

The standard for review of an order requiring a lis pendens bond is whether the trial court abused its discretion. The evidence presented at the bond hearing showed that Medical's lis pendens was preventing a sale of LACP's medical office building to Mt. Sinai for $1 million more than Medical's offer. There was no abuse of discretion in requiring Medical to post a $1 million bond to protect LACP from the lis pendens.

Although a lis pendens is technically a notice to the world of pending litigation, practically it has the same effect as an injunction. The notice of lis pendens "handcuffs" a property owner from selling or mortgaging the affected property because it places a cloud on title. A property owner's only meaningful protection is to require the lis pendens filer to post a bond to protect the owner's property rights in the event the lis pendens is found to be unjustified.

Medical's argument that a bond should be required only if the lis pendens causes the property owner "irreparable harm," meaning harm that cannot be monetarily compensated, has no support in the better reasoned Florida decisions, serves no legitimate purpose, and frankly makes no sense. Irreparable harm is a term used in injunction actions, but the requirements of an injunction and a lis pendens are not parallel. Under the approach urged by Medical, a property owner would first have to prove the lis pendens caused solely non-monetary damages and then would have to quantify the

non-monetary damages in order to fix the amount of the bond. How does one quantify non-monetary damages?

The better rule is to require a lis pendens bond to protect the property owner from damages he will foreseeably sustain as a result of the recording of the lis pendens should the lis pendens be ultimately determined to be unjustified.

ARGUMENT

A. THE STANDARD FOR REVIEW OF AN ORDER REQUIRING A LIS PENDENS BOND IS ABUSE OF DISCRETION AND THERE WAS NO ABUSE OF DISCRETION HERE.

Where a suit for specific performance is based upon a written contract and not upon a duly recorded instrument or a mechanic's lien, Section 48.23, Florida Statutes allows a court to deal with a lis pendens as it may deal with injunctions. CAM Corp. of Broward v. Goldberger, 368 So.2d 56 (Fla. 4th DCA), cert. denied, 378 So.2d 343 (Fla. 1979). The fixing of the amount of an injunction bond is a discretionary matter. "Clearly the requirement of a bond in an injunction proceeding is within the sound discretion of the trial court. The same rationale extends to ... a lis pendens based on a contract." CAM Corp., 368 So.2d at 57.

An appellate court should not interfere with a trial court's discretion in dealing with injunctions where no abuse of discretion appears. U.S. Mfg. and Galvanizing Corp. v. Renfrow, 592 So.2d 1216 (Fla. 3d DCA 1992) (citing Alachua County v. Lewis Oil Co., Inc., 516 So.2d 1033 (Fla. 1st DCA 1987); Cunningham v. Dozer, 159 So.2d 105 (Fla. 3d DCA 1963); and Executive Uniform Rental, Inc. v. Sanitary Linen Service Co. of Florida, 265 So.2d 392 (Fla. 3d DCA), cert. denied, 270 So.2d 742 (Fla. 1972)).

There was no abuse of discretion here. The record demonstrates that Medical's lis pendens blocked a sale to Mt. Sinai for $1 million more than Medical was willing to pay and setting a lis pendens bond in that amount was certainly proper.

B. THE PURPOSE OF A LIS PENDENS BOND IS TO PROTECT A PROPERTY OWNER FROM HARM CAUSED BY THE IMPROPER FILING OF A LIS PENDENS.

Medical's brief suggests that a lis pendens is a rather benign creature designed to protect the courts, the public, third parties and the lis pendens proponent. Medical goes so far to state that the lis pendens doctrine allows for protection of the property owner because the property owner whose property is determined to be wrongfully encumbered by the lis pendens, can bring a later independent suit for slander of title, file a bar grievance complaint, or seek F.S. 57.105(a) sanctions. MBR 10-11.

Far from being benign, a lis pendens has the potential of causing severe damage to a property owner.

> "One court has termed a lis pendens a "practical blackjack." A legislative committee recently dubbed "[l]is pendens ... the 'nuclear weapon' of property disputes.""

Judge David M. Gersten, The Doctrine of Lis Pendens: The Need for a Balance, The Florida Bar Journal, June 1995, at 83.

As a practical matter, a lis pendens effectively clouds title to realty and prevents an owner from selling or encumbering the affected property. In Florida, the lis pendens is binding through the appeal process and thus a lis pendens can tie up property for several years while a case winds its way through the court system. Hough v. Stewart, 543 So.2d 1279, 1281 (Fla. 5th DCA 1989); Judge Gersten, supra at 85. In many cases, parties who purchase real property do so through newly formed corporations or as trustee, so it is hardly practical to advocate that a property owner whose

property is tied up for years by a wrongful lis pendens can sue for slander of title, etc. and therefore doesn't need a bond.

There is no harm in requiring a bond of a lis pendens proponent who proceeds on an unrecorded claim which damages a property owner. If the plaintiff wins, the cost of the bond can be taxed in his favor. If the plaintiff loses, the property owner has meaningful, not illusory, protection. As Florida courts have held on numerous occasions, the bond requirement is a vehicle for protecting the property owner just as the lis pendens protects the plaintiff and third parties. Chiusolo v. Kennedy, 614 So.2d 491 (Fla. 1993) (citing Sparks v. Charles Wayne Group, 568 So.2d 512 (Fla. 5th DCA 1990)); Nero v. Nero, 475 So.2d 1361 (Fla. 5th DCA 1985).

C. NO FLORIDA COURT HAS HELD THAT A LIS PENDENS BOND SHOULD BE REQUIRED ONLY UPON A SHOWING OF NON-MONETARY INJURY TO THE PROPERTY OWNER AND SUCH A REQUIREMENT SERVES NO LEGITIMATE PURPOSE.

Medical's argument in point II of its brief has as its basic premise that the phrase "irreparable injury" as used in the Chiusolo dicta means non-monetary harm and that the better policy in the lis pendens area is to require a property owner to prove the lis pendens caused non-monetary harm to the affected property before a bond is required. Medical, while admitting the unique nature of Florida's lis pendens statute, nevertheless cites numerous out-of-state cases to support its position. MBR 20-24. Medical argues that "irreparable harm" in the injunction area means non-monetary harm and, therefore, must have the same meaning in the lis pendens/bond area. In any event, Medical urges that the irreparable (i.e., non-monetary) harm test is the proper way to consider all interests and achieve fair and just results.

Medical's basic premises is flawed both legally and practically. Both Chiusolo and Sparks, the main Florida cases relied upon by Medical, point out that the requirements of an injunction and lis pendens are not parallel. Sparks, 568 So.2d at 517; Chiusolo, 614 So.2d at 492. Judge Barkdull in his concurring opinion below correctly observed that in the injunction area, the party who seeks the injunction (normally the plaintiff) must show irreparable injury in order to obtain the injunction. The party enjoined (usually the defendant) is entitled to a bond for

protection against loss if it is ultimately determined that the temporary injunction was wrongfully entered.

> The defendant's right to an injunction bond should not be conditioned upon defendant demonstrating an irreparable harm, rather it should be conditioned upon the defendant demonstrating the potential loss or damage it will incur if it is determined that the temporary injunction was wrongly imposed. Medical Facilities, 656 So.2d at 1306 (citing Mohican Valley, Inc. v. MacDonald, 443 So.2d 479 (Fla. 5th DCA 1984)).

It is illogical to require a property owner to show irreparable injury or non-monetary harm as a condition for a lis pendens bond. First, it is difficult to find realistic examples of how only non-monetary harm can affect a property burdened by a lis pendens. Judge Green, in her dissent below, found an example of irreparable injury in C.W. Bailey v. Rolling Meadow, 566 So.2d 63 (Fla. 5th DCA 1990), dealing with a lis pendens on fifty bulls. But bulls have monetary value. If you went to buy one, surely there would be a price. Medical's example of irreparable injury is Gay v. Gay, 604 So.2d 904 (Fla. 5th DCA 1992), where a lis pendens was lifted on a small parcel of a large tract so the small parcel could be sold to pay off a defaulted mortgage which encumbered the entire tract. But the small parcel and the entire tract each must have had monetary value and the mortgage amount was certainly determinable so how is this an example of non-monetary harm?

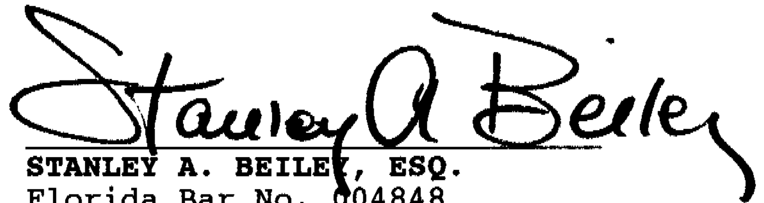
Second, even if there may be some rare and isolated instances of irreparable (non-monetary) harm to property, in what amount should the bond be set to compensate the owner for his non-monetary

damages? Or, to put it another way, how does one first prove that a lis pendens causes only non-monetary damages and then determine a monetary amount for the bond. Proof of the two is inconsistent.

The better rule is to require a bond where the property owner can show damage or injury to the affected property caused by the lis pendens. In this case LACP established that the lis pendens prevented a sale of its property for $1 million more than Medical would pay. The court set the bond at $1 million. Surely that was correct.

CONCLUSION

The opinion of the Third District should be affirmed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Brief on the Merits was mailed this 20 day of February, 1996, to Nancy W. Gregoire, Esq. and John R. Keller, Esq., Ruden, McClosky, Smith, Schuster & Russell, P.A., Attorneys for Medical, 200 East Broward Boulevard, P.O. Box 1900, Ft. Lauderdale, FL 33302; Joel S. Perwin, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler St., Suite 800, Miami, Florida 33130; and Michael B. Chesal, Esq., Kluger, Peretz, Kaplan & Berlin, P.A., Attorneys for Trustee, 201 South Biscayne Boulevard, Suite 1970, Miami, Florida 33131.

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LACP\MERITS.BRF