

**SUPREME COURT OF FLORIDA
CASE NO. SC05-2045**

S AND T BUILDERS

Petitioner,

v.

GLOBE PROPERTIES, INC.

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

FROM THE DECISION OF THE DISTRICT COURT
FOURTH DISTRICT

CASE NO.: 4D04-4911

L.T. No. 04-16367 CACE (04)

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STATEMENT OF THE CASE

On or about October 19, 2004, Petitioner, S & T BUILDERS, INC. (“Petitioner”), filed a Complaint for Pure Bill of Discovery asking equitable relief and discovery of a set of plans which allegedly are in possession of Respondent, GLOBE PROPERTIES, INC. (“Respondent”), and which were agreed upon and made part of an agreement (“Contract”) between the parties for the construction and improvement of a property, (the “Project”), located in Broward County, Florida. Petitioner claims they are currently working under a different set of plans, (the “Substitute Plans”), which have caused them to incur additional construction work.

Subsequently, Petitioner filed an Amended Complaint claiming, *inter alia*, Foreclosure of an Equitable Lien, Breach of Contract, Quantum Meruit. Because Petitioner had failed to join an indispensable party, G.E. Builders (“G.E.”) which was a party to the contract which Petitioner is suing upon, the Trial Court entered an Order making G.E. an additional Plaintiff. Concurrently with its Amended Complaint, Petitioners filed a Notice of Lis Pendens which Respondent moved to dissolve or alternatively require bond because the foreclosure of the equitable lien was not based on a recorded instrument. During a Uniform Motion Calendar, the Circuit Court Judge Robert Carney agreed with Respondent’s position that this

matter was governed by F.S. §48.23(3), and that the Trial Court could treat it as an injunction and either dissolve it or require the posting of a bond to avoid irreparable damages. Subsequently, an Order was entered requiring Petitioner to post bond in the amount of \$480,000 based upon the amount of the contractual agreement between the parties to the Complaint. It is this Order that Petitioner appealed by way of a Writ of Certiorari before the Fourth District Court of Appeals.

On August 3, 2005, the Fourth District Court of Appeals issued its Per Curiam decision granting Petitioner's Writ of Certiorari and remanding the case to the Trial Court for an evidentiary hearing. Because in its first decision the Trial Court had included attorney's fees as part of the amount of the bond, one of the issues appealed and determined was whether attorney's fees could be included in the amount of said bond as an element of the damages for wrongful filing of a lis pendens. The Fourth District Court of Appeal—following established case precedent from its jurisdiction and other sister districts—determined that the attorney's fees were part of the damages. In response to Petitioner's Motion to Certify Direct Conflict, the Fourth District Court of Appeals certified the conflict with *Wagner v. Birdman*, 460 So.2d 463 (Fla. 3d DCA 1984).

This appeal ensued.

STATEMENT OF FACTS

Almost two years after the execution of the Contract, and at a time that the Project has entered its final stages of its completion, Petitioner suddenly claims without foundation or proof that it is entitled to additional funds. Petitioner also claims additional funds under this Contract which Petitioner has worked upon during all this time and for which they have been in possession of the Plans for the Project. As is clear from the record, and it is undisputed, Petitioner has not made a claim for monies owed or that are due under the contract, including all Change Orders. If such was the case, Petitioner would have validly filed a Claim of Lien and would have by now foreclosed upon the property. Instead, the majority of Petitioner's claims are based upon an equitable lien. (*See Amended Complaint*).

On or about December 9, 2002, Petitioner entered into the Contract with Respondent for the construction and improvement of the Project, located at 11590 Wiles Road, Coral Springs, Broward County, Florida 33067. (*Amend. Compl ¶ 18, 20*) Petitioner alleges that they bid for the Project based upon one set of plans, but were subsequently working on another set of plans, which plans allegedly require additional work that was not contemplated by the Contract. (*Amend. Compl ¶ 21, 24-25*). Fully aware of the absence of a recorded instrument which would entitle Petitioner to a claim of lien, Petitioner filed a Notice of Lis Pendens with the lower

court. (*See* Petitioner’s Appendix No. 3 in the appeal below). In response, Respondent filed its Motion to Dissolve Lis Pendens or Alternatively to Require the Posting of the Bond as required by the statutes. (*See* Petitioner’s Appendix No. 4 in the appeal below). Respondent alleges that in order to protect it from irreparable harm and damages, Respondent is entitled to require Petitioner post bond. (Joint Statement of Evidence ¶ 11¹) In fact, Respondent tried to schedule the hearing twice hearing on its Motion to Dissolve or Alternatively to Require the Posting of the Bond—one notice was sent for a scheduled hearing on December 16, 2004, and the other for December 20, 2004. During this hearing, the trial court agreed with Petitioner’s analysis that it would be a departure from the central requirements of the law not to require a bond. (Joint Statement of Evidence ¶ 14, 15)

On or about December 28, 2004, Petitioner filed its Emergency Motion to Stay Order Dissolving Lis Pendens. Petitioner’s Motion was based on an Order granting Respondent’s Motion to Dissolve Lis Pendens or to Alternatively Require Posting of a Bond as ordered by the Trial Court on December 20, 2004. Petitioner is correct in their statement of the background where they assert that this project has been going on for quite same time. However, instead of bringing the Project to

¹ Because during the first hearing on the Motion to Dissolve Lis Pendens no court reporter was present, the parties filed a Joint Statement of Evidence which same is in the record in the appeal below.

completion and without the expenditure of additional funds, Petitioner would like to have its Notice of Lis Pendens filed against Respondent's property, based upon no recorded instrument but purely on an equitable claim, be set without a bond which protects Respondent from the encumbrance of Petitioner, and pending an evidentiary hearing sometime in the future. Until such time as an evidentiary hearing could be had, Petitioner would have the benefit of the imposition of a lien against Respondent's property, thus damaging Respondent's rights, especially in the event that Petitioner is unsuccessful in moving forward with its claim. The Circuit Court Judge recognized the potential for loss and damages and ordered Petitioner to post bond in the amount of \$480,000 for less than the value of the property, combined with the structure build upon the same.

Afterwards, the trial court asked Respondent's attorney the total amount of the contractual agreement without the addition of the change orders. (Joint Statement of Evidence ¶ 17) Respondent's attorney represented that amount to be \$450,000, and that an appraisal of the property with the improvement as of January 2003 shows the value to be in the amount of \$825,000. To avoid further and unnecessary litigation of side issues, Respondent's attorney agreed to set the bond at the original contract value foregoing almost half the value of the appraisal. (Joint Statement of Evidence ¶ 17)

QUESTION PRESENTED

WHETHER ATTORNEY’S FEES ARE AN ELEMENT OF DAMAGES FOR WRONGFUL FILING OF A LIS PENDENS?

STANDARD OF REVIEW

Although a trial court’s conclusions of law come to appellate courts upon a *de novo* review, see *State v. O’Daniels*, 911 So.2d 247 (Fla. 3d DCA 2005), this appeal comes before this Honorable Court upon the District Court’s affirmance of the Trial Court’s Order permitting the inclusion of attorney’s fees in a lis pendens bond. Because in a lis pendens situation pursuant to F.S.§48.23(3) “the court may control and discharge the notice of lis pendens as the court may grant and dissolve *injunctions*,” this Court should take into consideration that “[a] trial court’s ruling on a temporary injunction comes to the appellate court with presumption of correctness, reversible only upon a showing of a clear abuse of discretion. *Golden Shores Properties, LLC v. Santopietro*, 792 So.2d 644, 645 (Fla. 3d DCA 2001); *Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc.*, 675 So.2d 915, 916 (Fla. 1996). (holding that the trial court has discretion to determine whether to require the lis pendens proponent to post a bond in those situation

where the property-holder can demonstrate that damages will likely result if the lis pendens is unjustified). (Emphasis added.).

SUMMARY OF ARGUMENT

If an action is not found upon a duly recorded instrument, Florida Statutes §48.23(3) grants power and authority to a trial court to control and discharge a notice of lis pendens the same as it would grant and dissolve injunctions. In addition, the law is well-settled that bond, although discretionary with the trial court, is required if the property holder shows a potential loss which same could be monetary and nonmonetary as well as when irreparable harm results. This grant of authority is clear from the language of the Florida statutes and case law, and no question of interpretation of same arises in this appeal.

To the contrary, the only issue before this Court is: Whether attorney's fees are an element of damages for wrongful filing of a lis pendens. Simply put, the question before this Court is whether a proponent of a lis pendens should be held responsible for the attorney's fees of the adverse party should it be found that his or her lis pendens—which same clouds the title of the real property involved safeguards the proponent's rights from being extinguished and places third parties on notice of the pendency of the lawsuit—is wrongfully filed. Clearly, different concerns are implicated by the inclusion of the attorney's fees in the amount of a

lis pendens bond from the entitlement of the attorney's fees in the underlying claim, despite the fact that the lis pendens springs off that underlying claim.

Finding otherwise would create a windfall and unjustified protection because the real property will still be available to the proponent of the lis pendens for lien rights, while exposing the real-property holder to uncollectible damages. These were the concerns which the Fourth District Court of Appeals had in mind when it refused to follow *Wagner*, and the same concerns which this Court should take into consideration in upholding the rule that attorney's fees are an element of damages for a wrongful filing of a lis pendens.

ARGUMENT

ATTORNEY'S FEES ARE AN ELEMENT OF DAMAGES FOR A WRONGFUL FILING OF A LIS PENDENS

Attorney's fees are an element of those potential and foreseeable damages a property holder can recover should the trial court find that the lis pendens has been unjustified. *Town of Davie v. Sloan*, 566 So.2d 938, 939 (Fla. 4th DCA 1990); *Montville v. Mobile Medical Industries, Inc.*, 855 So.2d 215 (Fla. 4th DCA 2003); *Haisfield v. ACP Florida Holdings, Inc.*, 629 So.2d 963 (Fla. 4th DCA 1993); see generally *Saporito v. Madras*, 576 So.2d 1342 (Fla. 5th DCA 1991). Although the general rule is that attorney's fees are granted on those situations that are

specifically provided by either statutes or contracts, and when an attorney brings a fund to the court, those are not the only situations where a court could award attorney's fees. *Glusman v. Lieberman*, 285 So.2d 29, 31 (Fla. 4th DCA 1973).

“However, there are other instances in which attorney's fees are recoverable, such as wrongful attachment, false imprisonment, and malicious prosecution....”

Susman v. Schuyler, 328 So.2d 30, 32 (Fla. 3d DCA 1976) (citations omitted). In addition, the law is well-settled that damages under a slander of title action include attorney's fees. *Aspen Investments Corp. v. Holzworth*, 587 So.2d 1374, 1377 (Fla. 4th DCA 1991); *Bonded Investment and Realty Co. v. Waksman*, 437 So.2d 162 (Fla. 2d DCA 1983); see also *Price v. Tyler*, 890 So.2d 246 (Fla. 2004) (holding that attorney's fees are not recoverable in quiet title actions but affirming, albeit in dicta, that attorney's fees are recoverable in slander of title actions).

In *Chiusolo v. Kennedy*, 614 So.2d 491(Fla. 1993), this Court identified the purposes of the lis pendens doctrine especially in those situation where the pending lawsuit affects real property. *Id.* at 492. Most importantly, this Court recognized the dual protection which the filing of a lis pendens affords the proponent of the lis pendens and third parties on the one hand and the property holder on the other. *Id.* First, a lis pendens gives notice to future purchasers and protects their right from

being extinguished by a subsequent purchaser and also protects the plaintiff from intervening liens. Second,

“the statutory reference to injunctions exists merely to permit property holders to ask in an appropriate case that the plaintiff post a bond where needed to protect the former from irreparable harm. The bond requirement, whenever appropriate, is a vehicle for protecting the property holders just as the lis pendens protects the plaintiff and third parties.”

Id. at 493.

Similarly, in *Medical Facilities*, this Court upheld the trial court’s discretion in requiring the posting of a bond when the property-holder demonstrated likely damages or injury. *Id.* at 917-918. In doing so, this Court restated and affirmed its reasoning in *Chiusolo* and the dual protection of the lis pendens doctrine when the underlying suit affected title in real property. *Id.*

In that case, the lower court faced the petitioner’s claim for specific performance of a real estate contract and its lis pendens which petitioners filed to prevent a further purchase to a third party. *Id.* at 916. The lower court required bond in the amount of \$1 million where the price of the contract was \$5.5 million. *Id.* Before this Court, the issue was whether the property holder, in lis pendens actions not founded on a duly recorded instrument, is entitled to require bond upon a demonstration of irreparable harm only. *Id.* This Court was clear and specific:

The trial court has broad discretion and is not limited to require bond only in those cases where the property holder shows irreparable harm; rather, it may consider other damages; “[t]hese damages can materialize in a variety of ways including **monetary harm**...or nonmonetary harm. *Id.* at 918. (Emphasis added.)

In line with the reasoning of *Chiusolo* and *Medical Facilities*, the Fourth District Court of Appeals has continuously held that the “bond required as a condition to issuance of a temporary injunction is to provide a sufficient fund to cover the adverse party’s costs and damages, including attorney’s fees, if injunction is wrongfully issued.” *Montville*, at 215, citing *Town of Davie* (holding that the amount of the injunction included attorney’s fees and costs where town prevailed in dissolving a temporary injunction). *Haisfield*, at 967.

In *Haisfield*, the Fourth District Court of Appeals faced a similar issues, mainly, whether the seller of a real property was entitled to recover attorney’s fees as part of the damages arising from the wrongful filing of a lis pendens by the buyer. *Id.* at 964-65. The buyer, in that case, entered into a contract to purchase the real property and filed suit and a lis pendens after seller refused to lower the purchase price. *Id.* After Final Judgment was entered against buyer, seller brought action for declaratory judgment that buyer had breached the real estate contract, and when he prevailed, seller moved for damages for the wrongful filing of the

notice of lis pendens. *Id.* The Appellate Court affirmed the trial court's inclusion of attorney's fees as part of the damages arising out of the wrongful filing of lis pendens. *Id.* at 967.

The reasoning of the Fourth District Court in its opinion below, and in all the authorities cited herein, is correct and proper not only because it furthers the purposes which the lis pendens doctrine serves but also because of its effect on the real property as a cloud on the title. See *Avalon Associates of Delaware Limited v. Avalon Park Associates, Inc.*, 760 So.2d 1132, 1134 (Fla. 5th DCA 2000); see also *Aspen*, at 1377.

In *Aspen*, Fourth District Court demonstrated the very reason slander of title—and wrongful filing of a lis pendens for that matter—constitutes an exception to the general rule regarding entitlement to the attorney attorney's fees:

[T]he general rule of law is that where the wrongful act of the defendant has involved the claimant in litigation with others or placed him (or her) in such relation with others as makes it necessary to incur expenses to protect his interest, such costs and expenses, including attorney's fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages.

Id. at 1377.

Although in the opinion below the Fourth District Court of Appeal certified direct conflict with *Wagner*, that opinion—per curiam opinion reversing the trial

court's assessment of attorney's fees after discharging a lis pendens—does not shed a single light into the circumstances that prompted the trial court discharge the lis pendens and the time when the attorney's fees were assessed. *Id.* at 463.

Likewise, Petitioner's brief and its argument confuses the issues at hand: Whether or not attorney's fees are recoverable in equitable lien claims is wholly irrelevant here. Although the right to a lis pendens springs from the underlying equitable lien claim, the two are distinct for the purposes of calculating damages. For example, the amount of the damages for wrongful filing of a lis pendens is limited to the time that a lis pendens is effective, i.e., one year from the date of the commencement of the suit. See F.S. §48.23(3). On the other hand, damages which Respondent may recover in the underlying claim are not limited to that one year. As argued *supra*, Respondent has never disputed or argued against the general rule that attorney's fees are recoverable only when expressly provided by contract or statutes; however, this appeal falls upon the class of those cases which constitute exception to the general rule such as cloud of title actions and recognized by this Court. See generally, *Price*, 890 So.2d at 246.

In addition, Petitioner's argument that since Florida Statutes §48.23(3) "does not speak in clear, unequivocal, plain terms explicitly mandating attorney's fees be included in a lis pendens bond," then no such attorney's fees must be calculated in

the amount of the Petitioner's bond in the underlying action is flawed. Using Petitioner's reasoning, it follows that since Florida Statutes §48.23(3) does not explicitly mention bond state, then no bond is required. The rule in statutory interpretation is clear that "[c]ourts have no authority to interpret a statute such that the interpretation would extend, modify, or limit its express terms *or its reasonable and obvious implications.*" *Campbell v. Kessler*, 848 So.2d 369, 371 (Fla. 4th DCA 2003) quoting *Metroplex Investments, Inc. v. Precision Equity Investments, Inc.*, 647 So.2d 304, (Fla. 5th DCA 1994). (Emphasis added.)

CONCLUSION

This Court should find that attorney's fees are an element of damages recoverable as the result of a wrongful filing of a lis pendens. Because entitlement to attorney's fees is in derogation of the common law, the general rule prescribes that such attorney's fees would be awarded only when provided by statutes or contract. However, some cases have been excepted from the application of the general rule such as here when a party is given protection and assurance that his rights in the real property affected by the notice of lis pendens would not be extinguished. With the same token, the law also provides protection to the property-holder whose rights have been prejudice and title of the real property clouded; that protection comes in the form of a bond which same does and should

include all potential loss and injury, including attorney's fees. Therefore, this Court should affirm the Trial Court's Order directing Petitioner to post a bond in an amount which includes foreseeable attorney's fees.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the fond requirements of Rule 9.210. This brief uses Times New Roman 14-point font.

By: _____
Patrick Dervishi, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits has been furnished via U.S. Mail to: Randall L. Gilbert, Esq., 15700 N.W. 7th Avenue, Miami, FL 33169 on this _____ day of January 2006.

Patrick Dervishi, Esq.
For the Firm