

# Leapin' Lizards! It's a Lis Pendens!

If you ask subcontractors or suppliers about a mechanic's lien, without missing a beat, their eyebrows instantly perk up. They think they know all about mechanic's liens—a favored legal “tool” of the subcontractor and supplier. They likely filed one (or at least know someone who filed one) after getting “stiffed” on a project. They know that a lien provides them with leverage to get paid—very often by a reluctant owner (with whom they do *not* have a contract). They also know that the mere filing of a lien does not always result in payment. (With all of this legal knowledge, you probably are wondering why these people even have to read this column!) In short, they do *not* know what to do next. This article explores the beginning of the terrain beyond filing a mechanic's lien—the terrain covered by two little Latin words: *lis pendens*.

## WHAT IS A LIS PENDENS?

Like a mechanic's lien, a notice of lis pendens is a real property filing that provides the claimant with additional leverage to get paid by the owner. It gets filed when a lienor attempts to enforce its mechanic's lien rights by commencing a lien foreclosure action in court. Translated from the Latin, lis pendens (pronounced lis-pen-denz) literally means “a pending lawsuit.” *Black's Law Dictionary* provides a more comprehensive definition: “A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation and that any interests acquired during the pendency of the suit are subject to its outcome.”

Let's parse this definition into understandable segments.

### Provides Notice

First, a lis pendens is a notice of a pending lawsuit. It tells all who read the document that a legal action has been commenced (and is pending) that may affect title to real property. The precise form and contents of the notice of lis pendens vary from jurisdiction to jurisdiction. Similarly, state statute also governs the timing as to when it's filed (e.g., simultaneous with the commencement of a lien foreclosure suit or shortly thereafter). (Although the lis pendens has its origins in common law, most states have enacted lis pendens statutes.)

Among other things, the typical notice includes a complete title of the lawsuit, a summary of the claims presented in the lawsuit, identification of the claimant, and identification of the real property that is the subject of the lawsuit (often by complete address and a full legal description of the real estate, similar to what you would find in a deed, mortgage, or other property record).

### Recorded in the Chain of Title

Second, the notice gets recorded in the chain of title to real property. This typically occurs at the city register's office, county clerk's office, or wherever deeds, mortgages, and other real estate records customarily are recorded. (Again, this varies by jurisdiction.) In this case, the notice of lis pendens likely will be recorded in the same property records office where your original mechanic's lien was recorded. For example, if the property is located in County X, you likely recorded your mechanic's lien in the clerk's office for County X; thus, you will record your notice of lis pendens there as well.

When you present the notice of lis pendens to the clerk, it typically is indexed in such a manner so that it appears in the chain of title to the real property in question. Thus, if someone is doing a title search for that real property—in connection with a purchase or refinance, for example—he would find deeds, mortgages, mechanic's liens, *and* your notice of lis pendens.

### The “Additional Leverage”

Third, the notice of lis pendens warns all persons that the real property in question is the subject matter of litigation and that any interests acquired while the litigation is pending are subject to its outcome. This is where the “additional leverage” discussed above comes into the picture.

A prospective purchaser of real property probably will be reluctant to close title to real property (assuming they can obtain title insurance and a bank loan) with a notice of lis pendens in place. No purchaser wants to negotiate the purchase of property with a seller who himself does not have good title (by virtue of the mechanic's lien and notice of lis pendens). The result is that the seller will try to settle its dispute with the lienor, so the lienor ultimately discharges its mechanic's lien and dismisses its lien foreclosure suit (and cancels the notice of lis pendens).

As long as the lien foreclosure suit is alive, title to the property remains in flux. One New Jersey Federal District Court recently explained, “[t]he filing of a notice of lis pendens has dual purposes. It ensures that a plaintiff's claim related to the property at issue is not defeated by a pre-judgment transfer of the property. It also informs a purchaser of that property that he takes the property subject to the outcome of the litigation.”

### THE EXAMPLE OF PAUL PLUMBER

Let's consider our standard hypothetical example of Paul Plumber. You may recall that Paul was retained as a subcontractor to HAH Housebuilders Unlimited, a general contractor, to supply and install six high-powered Flusher-oo 6500 china toilets for the \$1.5 million custom-built home of Mary Moviestar located in Wealthy County. We previously analyzed liability issues after one of the toilets in Mary's home exploded, causing personal injury to one of Mary's guests.

For this example, let's assume that Paul is owed \$20,000 (the contract balance) for his work in connection with this project. Paul's attorney filed a mechanic's lien in accordance with state law, and the lien gets recorded in the Wealthy County register's office.

Following the filing of Paul's lien, his numerous demands to HAH for payment were ignored. Similarly, Mary Moviestar ignored Paul since she does not have a contract with him (and she figures that she does not have to worry about the lien because she isn't selling her house anytime soon). Left with no other choice, Paul has his lawyer, Ace Attorney, file a lien foreclosure action in Wealthy County Superior Court against HAH and Mary. Simultaneously, Ace Attorney files a Notice of Lis Pendens in the Wealthy County register's office. The notice includes the complete title of Paul's lawsuit, a summary of his mechanic's lien foreclosure claim, identification of Paul, and the legal description (including block and lot) of Mary Moviestar's house.

The application and impact of laws can vary widely based on the specific facts involved. Nothing in this column should be considered legal advice, recommendations, or an offer to perform services. The reader should not act upon any information provided in this column, including choosing an attorney, without independent investigation or legal representation. As such, this column should not be used as a substitute for consultation with an attorney.

After Mary is served with the lawsuit papers, she forwards them to her attorney, Marvelous Marv, who reviews the paperwork and explains the ramifications of Paul's lawsuit and lis pendens. Marv tells Mary that Paul's lawsuit is now "linked" to her home in the Wealthy County register's property records, and, as a practical matter, she won't be able to refinance or sell until she resolves the lawsuit with Paul. Moreover, Marv explains that if Paul successfully prosecutes his lawsuit to its conclusion, it could result in the foreclosure of her home (whereby Mary's home would be sold, Paul's \$20,000 lien would be paid off, and Mary would get to keep the remainder of the proceeds).

To avoid the possibility of such a forced sale to pay off Paul's lien, Marv recommends that Mary settle with Paul. (Notably, Mary had not paid HAH for Paul's work. If she had done so, the outcome here might be different because Mary should not have to pay twice for the same toilets.)

The parties ultimately settle their dispute for \$18,000. Paul agrees to dismiss his lawsuit, file a cancellation of lis pendens with the Wealthy County register, and file a discharge of the mechanic's lien.

### CONCLUSION

The notice of lis pendens, like a mechanic's lien, is a legal "tool" designed to help a subcontractor or supplier get paid. In Paul's case, the lis pendens, coupled with the mechanic's lien, provided added pressure on Mary to settle her dispute with Paul. Because the lis pendens is subject to the stringent requirements of state

statutes, it is very important that you leave its preparation and filing to a qualified attorney. Only then will you be able to achieve the additional leverage that you occasionally need to get paid for your work on a project. **PSD**

### RECOMMENDED READING

1. *Black's Law Dictionary*, pp. 942-43 (7<sup>th</sup> ed. 1999).
2. *Svenson Environmental Services, Inc. v. McDonald*, No. 08-1386 (RMB), 2009 U.S. Dist. LEXIS 13394 (D.N.J. Feb. 20, 2009) (discussing application of New Jersey lis pendens statute).
3. *Diaz v. Paterson*, 547 F.3d 88 (2d Cir. 2008) (discussing application of New York lis pendens statute).
4. *Palmer v. Zaklama*, 109 Cal. App. 4<sup>th</sup> 1367 (Cal. Ct. App. 2003) (discussing California's lis pendens statute).

**STEVEN NUDELMAN** is a partner at the law firm of Greenbaum, Rowe, Smith and Davis LLP in Woodbridge and Roseland, New Jersey. He is a member of the firm's Litigation Department and its Construction, Green Building, and Dispute Resolution Practice Groups. He may be reached at 732-476-2428 or [snudelman@greenbaumlaw.com](mailto:snudelman@greenbaumlaw.com). To comment on this article, e-mail [articles@psdmagazine.org](mailto:articles@psdmagazine.org).



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