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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

In Re: Foremost Industries, Inc.
Ralph C. Michael, Plaintiff vs. GLD Foremost Holdings, LLC, and
Daniel Gordon, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2016-109

HEADNOTES

Lis Pendens – In General

1. Lis pendens is defined as “a notice, recorded in the chain of title to real property, ... 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.” LIS PENDENS, Black’s Law Dictionary (10th ed. 2014).
2. “Generally, a lis pendens is the jurisdiction, power or control which a court acquires over property involved in a suit until a final judgment is rendered with respect to the property.” Vintage Homes, Inc. v. Levin, 554 A.2d 989, 994 (Pa.Super. 1989), *citing* U.S. Nat. Bank in Johnstown v. Johnson, 487 A.2d 809 (Pa. 1985).

Lis Pendens - Appropriateness

1. In order to determine whether lis pendens is appropriate “the lower court must balance the equities to determine whether the application of the doctrine is harsh or arbitrary and whether the cancellation of the lis pendens would result in prejudice to the non-petitioning party.” Rosen v. Rittenhouse Towers, 482 A.2d 1113, 1116 (Pa.Super. 1984), *citing* McCahill v. Roberts, 219 A.2d 306 (Pa. 1966).
2. A dispute in the Federal Courts over the ownership of a corporation, which owns real estate, is sufficient to justify a lis pendens. It is proper to place a notation in the title of that real estate in order to warn potential buyers of said real estate that the sale may in fact be voided by the Federal Court’s determination of ownership of the corporation.

Lis Pendens – Purpose / Function

1. “The existence of a *lis pendens* merely notifies third parties that any interest that may be acquired in the *res* pending the litigation will be subject to the result of the action.” U.S. Nat. Bank in Johnstown v. Johnson, 487 A.2d 809 (Pa. 1985).
2. “While listing property as lis pendens does not create an actual lien, it serves to give notice to third parties that the property is subject to litigation and that any interest acquired by the third party will be subject to the result of the litigation.” Vintage Homes, Inc. v. Levin, 554 A.2d 989, 994 (Pa. Super. 1989), *see also* McCahill v. Roberts, 219 A.2d 306, 309 (Pa. 1966).
3. The fact that there is a lis pendens on a property does not prohibit the sale of that property, and thus does not operate in the same manner as an injunction.

Appearances:

Joseph Macaluso, Esq. *Attorney for Plaintiffs*

Scott Arnoult, Esq. *Attorney for Defendant*

OPINION

Before Meyers, J.

FACTUAL & PROCEDURAL HISTORY

The parties to this action are the Plaintiff, Ralph C. Michael (“Michael”), and the Defendants, GLD Foremost Holdings, LLC (GLD) and Daniel Gordon (“Gordon”). At issue is the purchase of Foremost Industries, Inc. (“Foremost”) from Michael by Gordon and GLD. On or about May 29, 2015 Michael signed a Stock Purchase Agreement, pursuant to which Michael agreed to “validly sell, transfer, assign and convey” all “the issued and outstanding shares” in Foremost on the “Closing Date.” Plaintiff’s Answer, Exh. 1. In return, GLD Foremost Holdings, LLC (“GLD”) agreed to deliver to Michael the purchase price of three million dollars “at the Closing.” *Id.* The date of closing was left blank on the Stock Purchase Agreement. *Id.* Michael alleges that the sale has not been completed, and thus GLD is not the owner of Foremost. *Id.*, at 2. GLD holds that they are the “current owner of Foremost. Petition to Strike, ¶2.

On November 20, 2015 GLD filed a Complaint in the United States District Court for the Middle District of Pennsylvania, alleging “breach of contract, fraudulent inducement, conversion, and unjust enrichment against Michael.” Petition to Strike, ¶ 7. These allegations include that Michael misrepresented a transfer of land prior to the signing of the Stock Purchase Agreement, which GLD alleges “cost Foremost an estimated \$500,000 in corporate assets.” *Id.*, at ¶8. A lis pendens on the property at issue, Tax Parcel 01-0A16.-126 was filed by GLD on or about December 21, 2015 (hereinafter “GLD lis pendens”).

On November 20, 2015, Michael filed his own Complaint against GLD and Daniel Gordon (“Gordon”). Michael alleged breach of contract, fraud, and unjust enrichment. Gordon Federal Complaint. On January 11, 2016 Michael filed two Lis Pendens on the tax parcels in Greencastle – one Lis Pendens on Tax Parcel No. 01-0A16-027(hereinafter “Michael lis pendens 1”) and one on Tax Parcel Nos. 18-0K30-029 and 17-0J09-008 (hereinafter “Michael lis pendens 2”). The parcels are commonly known as 2375 Buchanan Trail West, Greencastle, PA, 17225 and 6100 Buchanan Trail West, Mercersburg, PA, 17236. GLD was notified of the filing of the lis pendens on February 19, 2016. Petition to Strike, ¶12.

On March 7, 2016 GLD filed an Emergency Petition to Strike the Lis Pendens. Michael filed an Answer to the Emergency Petition to Strike the Lis Pendens, on March 29, 2016. Oral Argument was held on March 30, 2016. This Court issued an Order and Opinion on April 1, 2016 denying

the Defendant’s Emergency Petition to Strike the Lis Pendens. On April 26, 2016 the Notice of Appeal was filed with this Court. On April 27, 2016 this Court issued an order directing the Defendants to file a concise statement of errors complained of on appeal within 21 days, pursuant to Pa.R.A.P. §1925(b)(2). The Defendant’s Statement of Errors Complained of on Appeal (hereinafter “Statement”) was filed May 17, 2016.

DISCUSSION

Requirements for Lis Pendens

The Defendants allege that this Court “improperly addressed purported equitable considerations in this case.” Statement, ¶2. Lis pendens requires “that title to the subject property be at issue or relating to the underlying action” and not merely have the real estate be “involved” in the case. *Id.*, ¶¶2-3. Defendants argue that the statute 42 Pa.C.S. §4302 “is a procedural statute intended to guide the records office, not the substantive test a court must use to evaluate whether a lis pendens can withstand a petition to strike.” *Id.*, ¶3. Defendants’ only case law support of this argument comes from a non-precedential Opinion.

Lis pendens is defined as “a notice, recorded in the chain of title to real property, ... 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.” LIS PENDENS, Black’s Law Dictionary (10th ed. 2014). “Generally, a lis pendens is the jurisdiction, power or control which a court acquires over property involved in a suit until a final judgment is rendered with respect to the property.” Vintage Homes, Inc. v. Levin, 554 A.2d 989, 994 (Pa.Super. 1989), *citing* U.S. Nat. Bank in Johnstown v. Johnson, 487 A.2d 809 (Pa. 1985).

In order to determine whether lis pendens is appropriate “the lower court must balance the equities to determine whether the application of the doctrine is harsh or arbitrary and whether the cancellation of the lis pendens would result in prejudice to the non-petitioning party.” Rosen v. Rittenhouse Towers, 482 A.2d 1113, 1116 (Pa.Super. 1984), *citing* McCahill v. Roberts, 219 A.2d 306 (Pa. 1966).

Effect of Lis Pendens

Defendants allege in their statement that this Court “ignored that the effect of the denial of the Petition effectively created an injunction prohibiting the pending sale of the subject property from GLD to a third-

party” without requiring Michael to demonstrate the elements required for issuing an injunction. Statement, ¶5.

“The existence of a *lis pendens* merely notifies third parties that any interest that may be acquired in the *res* pending the litigation will be subject to the result of the action.” U.S. Nat. Bank in Johnstown v. Johnson, *supra*. “While listing property as *lis pendens* does not create an actual lien, it serves to give notice to third parties that the property is subject to litigation and that any interest acquired by the third party will be subject to the result of the litigation.” Vintage Homes, Inc. v. Levin, 554 A.2d 989, 994 (Pa. Super. 1989), *see also* McCahill v. Roberts, 219 A.2d 306, 309 (Pa. 1966).

An injunction, however, is much more dramatic. It is “a court order commanding or preventing an action.” INJUNCTION, Black’s Law Dictionary (10th ed. 2014). In order for a court to issue a preliminary injunction all of the following elements must be met “ (1) a clear right to relief; (2) immediate and irreparable harm in the absence of an injunction; (3) restoration of the *status quo*; (4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; (5) greater injury will result by not granting than by granting the injunction; and (6) the preliminary injunction will not adversely affect the public interest.” Wyland v. W. Shore Sch. Dist., 52 A.3d 572, 582 (Pa. Commw. Ct. 2012), *citing* Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc., 828 A.2d 995 (Pa. 2003). “To justify the award of a permanent injunction, the party seeking relief must establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested.” Kuznik v. Westmoreland Cty. Bd. of Comm’rs, 902 A.2d 476, 489 (Pa. 2006), *internal citations omitted*.

The fact that there is *lis pendens* on a property does not prohibit the sale of that property as Defendants argue. As noted above, *lis pendens* is “a notice, recorded in the chain of title to real property” and not a prohibition on its sale. LIS PENDENS, Blacks, *supra*. Therefore Defendant’s assertion that Plaintiff must demonstrate the elements required for an injunction is improper.

Involvement of Property

Defendants further contend that this Court erred in making the determination that the pending litigation in the Federal Courts is sufficient to support a *lis pendens*. Id., ¶3. They allege that the Federal Court case involves “the calculation of the purchase price paid by GLD to Michael to purchase Foremost...not a dispute over ownership of Foremost or specific

property that Foremost owns.” *Id.*, ¶4. Defendants argue that this Court “abused its discretion” in determining that the fact that Michael is not demanding the return of the property in question as relief in the federal action to be irrelevant. Statement, ¶6.¹ Defendants claim that the litigation in Federal Court “is an in personam proceeding, not an in rem action,” a distinction which makes the lis pendens “wholly improper.” *Id.*, ¶7.

Both parties admit that the owner of the real estate in question is Foremost. Plaintiff’s Answer to Petition, ¶24, *see also* Defendant’s Petition to Strike, exhibit A. However, there is a dispute over who owns Foremost. Defendant’s allege that GLD “is the current owner of Foremost” and that the dispute is not over ownership of Foremost but rather over “the calculation of the purchase price paid by GLD to Michael to purchase Foremost.” Statement, ¶4.

Plaintiff “specifically denie[s] that GLD is the owner of Foremost” because GLD and Michael “have not closed the sale and GLD has not paid Michael the purchase price” for Foremost. Plaintiff’s Answer, ¶2. This point is critical, as it explains Plaintiff’s statement denying that he is seeking only monetary damages. Plaintiff’s Answer to Petition, ¶23. Plaintiff contends that he is still the owner of Foremost, which would make the sale of the real estate impossible without his consent. *Id.*, at ¶24.

This Court found that lis pendens was proper, given the nature of the underlying dispute. As there has been no determination regarding the proper ownership of Foremost by the Federal Courts, there has been no determination regarding who has the right to control Foremost’s real estate holdings. Therefore, a notation in the title of that real estate is proper, in order to warn potential buyers that a sale of Foremost’s real estate made by GLD may in fact be voided should the Federal Courts determine that Michael is in fact the proper owner of Foremost.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that the Superior Court dismiss the appeal or affirm the April 1, 2016 Order.

¹ Defendants cite to four cases to support their position on this issue. Two are Court of Common Pleas decisions from other counties in Pennsylvania and another is an unpublished memorandum decision issued by the Superior Court. As the two Court of Common Pleas decisions are not binding precedent, they will not be addressed within this Opinion. Furthermore, unpublished Superior Court decisions “shall not be relied upon or cited by a Court or a Party” unless specific requirements are met. §65.37, 42 Pa.C.S.A. As those exceptions are not met in this case, this Court will not address the unpublished opinion.

ORDER OF COURT

AND NOW THIS 13th day of June 2016 the Prothonotary is directed to transmit this Order and Opinion, together with the record in the above captioned cases to the Superior Court.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.

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CORRECTION

The attorneys on page 25 of the published opinion were listed incorrectly. Please see below for the corrected information

Appearances:

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