

## *Ober v. Town of Lauderdale-By-The-Sea*

Court of Appeal of Florida, Fourth District

August 24, 2016, Decided

No. 4D14-4597

### Reporter

2016 Fla. App. LEXIS 12813

JAMES OBER, Appellant, v. TOWN OF LAUDERDALE-BY-THE-SEA, a Florida Municipality, Appellee.

**Notice:** NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

**Prior History:** [\*1] Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 14-006782 (05).

**Counsel:** Manuel Farach of McGlinchey Stafford, Fort Lauderdale, for appellant.

Susan L. Trevarthen, Laura K. Wendell, and Eric P. Hockman of Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for appellee.

Heather K. Judd and Jordan R. Wolfgram, St. Petersburg, for Amicus Curiae City of St. Petersburg.

Alexander L. Palenzuela of Law Offices of Alexander L. Palenzuela, P.A., Miami, for Amicus Curiae City of Coral Gables.

**Judges:** FORST, J. GROSS and KLINGENSMITH, JJ., concur.

**Opinion by:** FORST

## Opinion

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FORST, J.

This case involves the application of Florida's lis pendens statute, *section 48.23, Florida Statutes*, to liens placed on property between a final judgment of foreclosure and the judicial sale. We agree with the Appellee, Town of Lauderdale-by-the-Sea ("the Town"), and hold that liens

placed on property during this time window are not discharged by *section 48.23*. We affirm without discussion with respect to any other challenges to the trial court's entry of summary judgment.

### Background

On November 26, 2007, a non-party bank recorded a lis pendens on the subject property as part of a foreclosure proceeding against a non-party [\*2] homeowner. On September 22, 2008, the bank obtained a final judgment of foreclosure. Beginning on July 13, 2009, and continuing through October 27, 2011, the Town recorded a total of seven liens on the property related to various code violations.<sup>1</sup> These liens all stemmed from violations occurring after the final judgment was entered.

On September 27, 2012, the property was sold at a foreclosure sale to the Appellant, James Ober ("the Property Owner"). Shortly thereafter, the clerk issued the certificate of title. Beginning on February 26, 2013, the Town imposed three more liens on the property.

The Property Owner filed suit to quiet title, attempting to strike the liens against his property. The Town counterclaimed to foreclose the liens. Both parties moved for summary judgment. The trial court granted the Town's motion (and denied the Property Owner's motion) and entered a final judgment of foreclosure on the ten liens. This appeal followed.

### Analysis

The issue in this case is the interpretation of a statute, which we review de novo. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 2011). The statute at issue here states, in

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<sup>1</sup>The Town also recorded one lien before the final judgment was issued, but concedes that this lien was discharged.

relevant [\*3] part:

[T]he recording of . . . lis pendens . . . constitutes a bar to the enforcement against the property described in the notice of all interests and liens . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. . . .

§ 48.23(1)(d), Fla. Stat. This statute "not only bars enforcement of an accrued cause of action, but may also prevent the accrual of a cause of action when the final element necessary for its creation occurs beyond the time period established by the statute." *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1253 (Fla. 5th DCA 2010).

By its terms, *section 48.23(1)(d)* does not provide an end date for the lis pendens. In order to avoid the absurd result of a lis pendens precluding any lien from ever being placed on the property into perpetuity, see *Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006) (avoiding absurd results), the parties both urge this Court to apply an implied end date to the lis pendens. The Town argues that the lis [\*4] pendens applies only to liens existing or accruing prior to the date of final judgment, whereas the Property Owner argues that the lis pendens continues to the date of the judicial sale, which in this case was over four years later.

In attempting to discern which of these dates was intended by the legislature to be the operative "shut off" date, we read the statute "in the context in which it is found and in conjunction with related statutory provisions." *Maddox*, 923 So. 2d at 448. One of the related provisions is *section 48.23(1)(a)*, which states that "[a]n action in any of the state or federal courts in this state operates as a lis pendens . . . only if a notice of lis pendens is recorded." The plain meaning of this provision indicates that the action itself is the actual lis pendens, which takes effect if and when a notice is filed. The lis pendens therefore logically must terminate along with the action. The "action" in this case was the foreclosure action initiated by the non-party bank, which terminated thirty days after the court's issuance of a final judgment.<sup>2</sup>

Although it does not appear to have been a litigated issue, this conclusion has been reached by this Court and other District Courts of Appeal in the past. See *U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012) ("[T]he court presiding over the action which created the *lis pendens* has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the *lis pendens* is recorded to the date it enters final judgment" (emphasis added)); *Seligman v. N. Am. Mortg. Co.*, 781 So. 2d 1159, 1163 (Fla. 4th DCA 2001) ("[T]he court in the dissolution proceeding had jurisdiction over the property until final judgment . . ." (emphasis added)); *Hotel Eur., Inc. v. Aouate*, 766 So. 2d 1149, 1151 (Fla. 3d DCA 2000) ("Because a Final Judgment has been entered, the instant case is no longer pending and thus the Notice of Lis Pendens is no longer valid"); *Marchand v. De Soto Morg. Co.*, 149 So. 2d 357, 359 (Fla. 2d DCA 1963) ("[T]he doctrine of lis pendens is the jurisdiction, power or control which courts acquire of property involved in a suit pending the continuance of the action and until final judgment therein" (emphasis added)). The Florida Supreme [\*6] Court has also used the "until final judgment" phrase when describing the scope of a lis pendens. *De Pass v. Chitty*, 90 Fla. 77, 105 So. 148, 149 (Fla. 1925). We find these authorities both controlling and persuasive, and hold that a lis pendens bars liens only through final judgment, and does not affect the validity of liens after that date, even if they are before the actual sale of the property.

We do note, however, that this case appears to reveal a misstatement of the law in Form 1.996(a) of the Florida Rules of Civil Procedure. That rule provides an example foreclosure judgment, and includes a provision stating: "On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed." *Fla. R. Civ. P. Form 1.996(a)*. This language suggests that all liens from the filing of the lis pendens until the certificate of sale is filed are discharged. Although we recognize the conflict between the form and our holding in this case, to hold otherwise would be to create conflict between this decision and both the legislative intent and prior case law. But the form has been, and could again, be modified "to bring it into conformity with current statutory provisions and requirements . . . and better conform to prevailing practices in [\*7] the courts." *In re Amendments to the Florida Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)*, 51 So. 3d 1140, 1140 (Fla. 2010).

order. *Fla. R. App. P. 9.110(b)*. Here, no appeal from the final [\*5] judgment in the original action was taken. There is also no question in this case that the liens at issue accrued after this 30-day period, making the precise distinction between the date of the final judgment and the date of the termination of the action irrelevant under the facts before us.

<sup>2</sup>When no appeal is taken, an action terminates when the time for appeal expires. *S. Title Research Co. v. King*, 186 So. 2d 539, 544-45 (Fla. 4th DCA 1966). That time is 30 days after rendition of the

Such an amendment may be appropriate here.

**Conclusion**

The lis pendens statute serves to discharge liens that exist or arise prior to the final judgment of foreclosure unless the appropriate steps are taken to protect those interests. However, it does not affect liens that accrue after that date.

The ten liens that were involved in the case before us were all recorded and based on conduct which occurred after the date of the first final judgment. The trial court therefore did not err in entering summary judgment in favor of the Town foreclosing those liens.

*Affirmed.*

GROSS and KLINGENSMITH, JJ., concur.