

**Ken Van Vleck**

Ken is a real estate and commercial litigation attorney at GCA Law Partners LLP

He can be reached at (650) 428-3900

*“The court found that the plain statutory language compels the conclusion that a lis pendens may only be recorded when an action is pending in state or federal court.”*

**No Lis Pendens in Arbitration****THIS ISSUE**

The court of appeal has held that an arbitration is not an “action” that will support the recording of a lis pendens on title to real property.

**BACKGROUND**

The case arose out of a storied real estate transaction. Manhattan Loft, LLC purchased real property from Sixth & Spring, LLC, subject to an existing lease for a portion of the basement and first floor to Mercury Liquors, Inc. A dispute arose, prompting those with an interest in the lease to commence two arbitration proceedings against Manhattan. In connection with the arbitration proceedings, the claimants recorded two notices of pending actions against the subject property.

Following a favorable arbitration award, Manhattan filed suit against the underlying claimants and their attorneys for slander of title, claiming that they erred in filing the notices of pending action. Those defendants filed a motion to strike Manhattan’s complaint. The trial court granted the motion, and Manhattan appealed, presenting the following legal question: Can a party to a pending arbitration record a notice of pendency of action without first filing a civil action in Superior Court?

The court concluded that the answer is no. Looking to the plain language of the Code of Civil Procedure, a lis pendens may only be filed when an action in a court of law is pending. Because no such action was pending at the time the claimants filed the two lis pendens, they improperly recorded the notices of pendency of action. Accordingly, the court reversed the order of the trial court, holding that the motion to strike should have been denied.

## WHAT IS A LIS PENDENS?

A notice of pendency of action, also known as a *Lis Pendens*, is a publicly recorded document giving notice to all persons that title to the identified property is in dispute in an action then pending before the court. Its purpose is to notify prospective purchasers and encumbrancers that any interest acquired by them is subject to the court's decision. Thus, title may be marred by the judgment, even if it occurs after title has passed.

## IN BRIEF

A good portion of the court's ruling in this recent case is devoted to determining whether the recording of a lis pendens is an action that is subject to California's Anti-SLAPP statute, which protects against lawsuits brought to quell participation in public events. In that respect, it is outside the scope of this newsletter. Briefly, however, the court found that the recording of a lis pendens is one of those actions protected by the Anti-SLAPP statutes. Since the court found this to be a protected activity, it then considered whether the claimants had a substantial probability of being able to prove their case, essentially considering whether a party may legitimately record a lis pendens in an arbitration proceeding.

## THE HOLDING

The court first looked to the language of the statute that authorizes the recording of lis pendens.

California law defines "an action" as follows: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." And the law that governs recording notice of certain actions repeatedly uses the word "action." One section says, "this title applies to an action pending in any United States District Court in the same manner that it applies to an action pending in the courts of this state." Another section says, "a party who asserts a real property claim may record a notice of

pendency of action in which that real property claim is alleged." But there is no reference to arbitration proceedings. The court found that the plain statutory language compels the conclusion that a lis pendens may only be recorded when an action is pending in state or federal court.

## STATE POLICY

In reaching this conclusion, the court was mindful of the various competing policies behind the lis pendens statutory scheme. In an earlier case, a party filed a civil action in Florida alleging a right to compel construction and sale to it of condominium units located in Mono County, California. The party then recorded a notice of the Florida action in Mono County. The respondents successfully applied to the Mono County Superior Court for an order expunging the recorded notice. The claimant filed a petition for writ of mandate, asking the Court of Appeal to overturn the expungement order.

But the Court of Appeal denied the petitioner's petition for writ of mandate. Relying in part upon the definition of the word "action" and legislative history, it concluded that litigation in courts of another state is not a matter within the ambit of California's lis pendens statutes. The court further determined that California's lis pendens statutory scheme should not be judicially construed to extend to litigation filed in the courts of other states.

As the court held, "certainly, one of the objects or purposes of the lis pendens statutes is to advance the interests of litigant claimants. This is manifest because the statutes continue the policy of protection the common law afforded such litigants, provided they record notice pursuant to its terms. However, as our Supreme Court has recognized, that was not the original object of the lis pendens statutes. Lis pendens statutes were designed to give notice to third parties and not to aid plaintiffs in pursuing claims. For this reason, the history of the lis pendens legislation indicates a legislative intent to restrict rather than broaden the application of the remedy. Our courts have followed suit by restricting rather than broadening the application of a lis pendens."

## CONCLUSION

While this is not an earth-shattering conclusion, it is nevertheless important to those who routinely practice real estate litigation. More and more, real property “litigation” is conducted in arbitration rather than in the courts. For unknowing practitioners, the results can be devastating. In this action, both the underlying claimants (who recorded the lis pendens) and their attorneys (well-known large law firms) were forced to defend themselves against a claim that they slandered the title of the party against whose property these lis pendens were recorded.

But one has to wonder whether these rulings will long stand. If the purpose of a lis pendens is to give future purchasers and encumbrancers notice that there is an “action” then pending that may affect title to the real property, it seems that limiting that notice to only those matters then pending in court may not provide potential purchasers with the notice they may be entitled to. In reality, a lis pendens is intended to give the plaintiff in an action involving title to the subject property the ability to assert their judgment against purchasers or encumbrancers who acquire title after the action is commenced. Since it is more and more common that judgments are acquired after arbitration rather than trial – given the prevalence of arbitration provisions in real property contracts – it seems likely there will be some judicial or legislative intervention to rectify this uncertain field.

## NEXT ISSUE

Eminent Domain damages.

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**KEN VAN VLECK**  
kvanvleck@gcalaw.com

1891 LANDINGS DRIVE  
MOUNTAIN VIEW, CA 94043  
TEL 650.428.3900  
FAX 650.428.3901  
[www.gcalaw.com](http://www.gcalaw.com)

