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SID J. WHITE

JAN 21 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

LOUIS CHIUSOLO,
Petitioner

vs.

WILLIAM KENNEDY and
MOIRA KENNEDY,

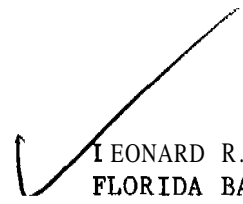
Respondents.

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CASE NO.: 79,103

APPEAL FROM THE DISTRICT COURT
IN AND FOR THE FIFTH DISTRICT, FLORIDA

PETITIONER'S BRIEF ON THE MERITS



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STATEMENT OF THE CASE AND THE FACTS

On February 25, 1991, Petitioner filed a complaint against Respondent WILLIAM KENNEDY in Case No.: 91-2996-CA-R, which was, in part, an in rem action seeking to establish and foreclose an equitable lien and impose a resulting and constructive trust on real property. (Exhibit "A" to the Petition for Writ of Common Law Certiorari) On March 8, 1991, Petitioner filed and recorded sworn notices of lis pendens with respect to the subject property. (Exhibit "B" to the Petition for Writ of Common Law Certiorari) On April 29, 1991, Petitioner filed an Amended Complaint which added Respondent MOIRA KENNEDY to Case no.: 91-2996-CA-R and realleged in Count IV an action to establish and foreclose an equitable lien, in Count V an action to impose a resulting trust on the real property, and in Count VI to impose a constructive trust upon the real property, all based, in part, upon allegations of ultimate issues of fraud and misrepresentations. (Exhibit "C" to the Petition for Writ of Common Law Certiorari) Respondent filed a motion to dissolve lis pendens and hearing was held on Monday, April 29, 1991 at 4:00 p.m. The Honorable Tonya Rainwater, Circuit Court Judge, reviewed the pleadings and affidavits filed by the parties but did not allow for a full evidentiary hearing and refused Petitioner's request for a bond if the Court were to discharge the lis pendens. The Circuit Court Judge stayed discharge of the lis pendens for five (5) days and no bond was set. (Exhibits "D", "E", "F", "G" AND "H" to the Petition for Writ of Common Law Certiorari) Petitioner filed a motion for stay with the Circuit Court pursuant to Rule 9.310, Florida Rules of Appellate Procedure. Petitioner filed an Emergency Motion for Stay of Discharge of Lis Pendens pursuant to Rule 9.310 (f) with the Fifth District Court of Appeal along with a Petition for Writ of Common Law Certiorari. The Fifth District Court of Appeal granted the stay on May 3, 1991. On November 14, 1991, the Fifth District Court of Appeal

issued an En Banc Opinion granting the Petition for Writ of Common Law Certiorari, quashing the order discharging the lis pendens and remanding for an evidentiary hearing. In said opinion, however, the Fifth District Court of Appeal receded from its prior holding in Sparks v. Charles Wayne Group, 568 So.2nd 512 (Fla. 5th DCA 1990) and acknowledged and certified conflict with the contrary dictum in Cacaro v. Swan, 394 So.2nd 538 (Fla 4th DCA), rev. dismissed, 402 So.2nd 608 (Fla. 1981).

SUMMARY OF THE ARGUMENT

In the instant **case** the Fifth District Court of Appeal held that the burden of proof at an evidentiary hearing challenging a lis pendens is on the proponent of the lis pendens to show that his claim does effect the real property and that there is a substantial likelihood he will be successful on the merits. The Court receded from its **prior** holding in Sparks v. Charles Wayne Group, 568 So.2nd 512 (Fla. 5th DCA 1990) and acknowledged and certified conflict with contrary dictum in Cacaro v. Swan, 394 So.2nd **538** (Fla 4th DCA) rev. dismissed, 402 So.2nd 608 (Fla. 1981).

Petitioner submits that this Honorable Court should reverse that part of the District Court's holding in the instant case that places the burden of **proof** on the proponent of the lis pendens. It is Petitioner's opinion that Judge Sharp's decision concurring in part and dissenting in part is correct. **The** party moving for dissolution of the lis pendens must have the burden of showing that the lis pendens **is** inappropriate to the circumstances. The moving party will continue to be protected by the right to demand a bond. If, however, the decision of the District Court of Appeal prevails this will create an insurmountable burden for **the** proponent and convert the hearing on **the** motion to dissolve into a premature hearing **on** the merits.

ARGUMENT

AT HEARING TO **CHALLENGE THE** FILING OF A LIS
PENDENS THE BURDEN **MUST** BE ON THE **MOVING**
PARTY TO ESTABLISH THAT THE LIS PENDENS WAS
INAPPROPRIATE TO THE CIRCUMSTANCES AND CAUSE
OF ACTION **STATED** IN THE COMPLAINT.

In the instant case, the Fifth District Court of Appeal held that the proponent **of** a lis pendens **has** the burden of **proof** at an evidentiary hearing on the motion to dissolve the lis pendens. **The** Court held that **the** proponent must show his claim does effect the real property and that there is a substantial likelihood he will be successful on the merits. In so holding, the Fifth District Court **of** Appeal expressly receded **from** its prior opinion in Sparks v. Charles Wayne Group, 568 So.2nd 512 (Fla. 5th DCA 1990), authored by Judge Sharp.

In the separate opinion filed by **Judge** Sharp in the instant **case**, she concurred in part on the issue that the trial **court erred** by failing to allow an evidentiary hearing but dissented with respect to the Court receding **from** its **prior** ruling in Sparks, Supra. Judge Sharp correctly opined in her dissent that " The burden of proof at **the** evidentiary hearing is properly placed on the party moving **for** discharge of the lis pendens."

The decision in the Fifth District Court of Appeal in the instant case is clearly in direct conflict with the holding in Cacaro v. Swan, 394 So.2nd 538 (Fla. 4th DCA), rev. dismissed, 402 So.2nd 608 (Fla. 1981). In Cacaro, the Fourth District Court of **Appeal expressly** stated "The burden was on the moving party to establish that the lis pendens was inappropriate to the circumstances and cause of action stated in the **complaint.**" Id at 540. **As** succinctly articulated in Cacaro, "First, a lis pendens is not an injunction nor is it the equivalent **of** an injunction." Id at 539. In Wiggins v. Dojcsan, 411 So.2nd 894 (Fla. 2nd DCA 1982), the Second District Court of Appeal agreed with the

Fourth District Court of Appeal and stated "We are persuaded by the logic expressed in Cacaro that a notice of lis pendens has only indirect effect on the alienability of the property." Id at 1019.

Judge Sharp correctly stated in the majority opinion In Sparks, "The language in section 48.23 (3) regarding dissolving lis pendens like "injunctions" is somewhat ambiguous." Id at 517. This statutory language does not require that every element challenging an injunction is applicable to the challenge of a lis pendens. All of the "procedural hoops" applicable to injunctions are not necessarily applicable to lis pendens. See Sparks v. Charles Wayne Group, 568 So.2nd 512 (Fla. 5th DCA 1990); Hough v. Bailey, 421 So.2nd 708 (Fla. 1st DCA 1982), rev. denied, 441 So.2nd 614 (Fla. 1983); Cacaro v. Swan, 394 So.2nd 538 (Fla 4th DCA), rev. dismissed, 402 So.2nd 608 (Fla. 1981).

The Cacaro ruling with respect to the burden of proof was reiterated in Buchman v. Fishbein, 537 So.2nd 704 (Fla. 4th DCA 1989), wherein the Court quashed an order dissolving petitioner's notice of lis pendens and ruled "This quashal shall be without prejudice to respondents' right to prove at any future hearing that such lis pendens is inappropriate. Cacaro v. Swan, 394 So.2nd 538 (Fla 4th DCA), rev. dismissed, 402 So.2nd 608 (Fla. 1981)." Buchman, Supra at 704.

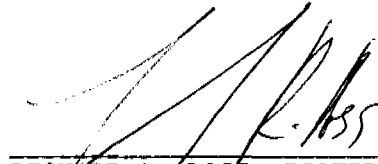
Similarly in Diamond Builders, Inc. v. Radnor/Sarasota corporation, 572 So.2nd 1018 (Fla. 2nd DCA 1991) the Second District Court of Appeal approved of the Cacaro opinion. The Second District Court of Appeal stated that "At this juncture, we will not rule on the merits of whether respondent established that the notice was inappropriate in this cause" and added that the "...trial court shall consider whether the notice of lis pendens is appropriate in this matter and if so, whether a bond should be posted and in what amount." Id at 1019.

The opinion rendered by the Fifth District Court of Appeal in the instant case is unworkable. While it is not unrealistic to require the proponent to demonstrate that his claims does effect the real property, it is unrealistic to require the proponent to meet the almost insurmountable burden of showing that there is a substantial likelihood he will be successful on the merits. As Judge Sharp correctly paints out in her dissent, one can envision a battle of contrary affidavits that would allow the challenging party to claim that the proponent has failed to carry its burden. Judge **Sharp's** opinion is correct that "In other **words**, the hearing to dissolve the **lis pendens** will necessarily **be** converted into a hearing on **the** merits, if the present view of the Court prevails." Petitioner submits that this Honorable Court should, instead, adhere to the established rule followed by the Second District Court of Appeal and the Fourth District Court of Appeal, See ~~Cacaro v. Swan~~, 394 So.2nd 538 (Fla 4th DCA), rev. dismissed, 402 So.2nd 608 (Pla. 1981); Diamond Builders, Inc. v. Radnor/Sarasota Corporation, 572 So.2nd 1018 (Fla. 2nd DCA 1991). The moving party must have the burden of showing that the **lis pendens** is inappropriate to **the** circumstances. The moving party will continue to be protected by the right to demand a bond if there is the danger of irreparable harm in **the** event a **lis pendens** is subsequently deemed to **have** been unjustified. See ~~Feinstein v. Dolene, Inc.~~, 455 So.2nd 1126 (Fla. 4th DCA 1984).

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner respectfully **requests** that this Honorable Court reverse that part of the Fifth District Court of Appeal's opinion that places the burden at an evidentiary hearing on motion to dissolve a lis pendens **on** the proponent to show that his claim **does** effect the real property and that there is a substantial **likelihood** he will **be** successful on the merits. Petitioner respectfully requests this Court **adopt** and approve of the holding in Cacaro v. Swan, 394 So.2nd 538 (Fla 4th DCA), rev. dismissed, 402 So.2nd 608 (Fla. 1981) and hold that the burden **of proof** is on the moving party to establish that the lis pendens was inappropriate to the circumstances and cause of action stated in the complaint.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been provided by U.S. Mail to the Clerk of Courts, Supreme Court of the State of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy of the foregoing has been provided to Richard A. Manazo, Esquire, Post Office Box 599, Titusville, Florida 32780 this J7 day of January, 1992.



Leonard R. Ross, Esquire