IN THE SUPREME COURT OF MISSOURI

No. SC94693

THE ARBORS AT SUGAR CREEK HOMEOWNERS ASSOCIATION, et al.

Plaintiffs-Appellants,

v.

JEFFERSON BANK AND TRUST COMPANY, et al.

Defendants/Respondents/Cross-Appellant.

Appeal from the Circuit Court of St. Louis County
Hon. Gloria C. Reno and James R. Hartenbach

JEFFERSON BANK AND TRUST COMPANY'S SUBSTITUTE REPLY BRIEF ON ITS CROSS APPEAL

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B. THERE WAS AN ISSUE OF MATERIAL FACT RELATIVE TO WHETHER PLAINTIFFS FILED THE UNAUTHORIZED LIS PENDENS WITH MALICE.

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT II OF THE JEFFERSON BANK COUNTERCLAIM (SLANDER OF TITLE) BECAUSE THERE WERE AT LEAST DISPUTED ISSUES OF MATERIAL FACT ON ALL ELEMENTS OF SUCH A CLAIM, IN THAT: (A) AS A MATTER OF LAW THE MAY 27, 2010 LIS PENDENS FILED WAS NOT AUTHORIZED BY MO. REV. STAT. § 527.260; (B) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE UNAUTHORIZED LIS PENDENS WAS MALICIOUSLY PUBLISHED; AND (C) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE FILING OF THE LIS PENDENS CAUSED PECUNIARY LOSS OR INJURY TO DEFENDANTS.

A. PLAINTIFFS' MAY 27, 2010 LIS PENDENS WAS NOT AUTHORIZED BY SECTION 527.260 BECAUSE IT DOES NOT ASSERT ANY CLAIM BASED UPON ANY EQUITABLE RIGHT, CLAIM OR LIEN DESIGNED TO AFFECT REAL ESTATE.

The decision of the Court of Appeals in *First National Bank of St. Louis, v. Ricon, Inc.* 311 S. W. 3d 857 (Mo. App. 2010) is definitive authority that a notice of *lis pendens* must be based on a claim involving an equitable right, claim or lien. In that case, the plaintiff filed an action to collect on debt owed by the defendant. At the same time, that bank filed a notice of *lis pendens* against the collateral pledged to secure the loan – that

is, the residences owned by a principal of the defendant. The Court discussed the requirements to establish an equitable lien. The Court concluded that the bank in that case did not have an equitable lien against the personal residences in question and that no reasonable relationship between the lawsuit and the residences existed. Therefore, the bank's lawsuit not being based upon an equitable right claim or lien, such notices of *lis pendens* were unauthorized under Section 527.260.

Similarly, in *21 West, Inc. v. Meadowgreen Trails, Inc.,* 913 S.W.2d 858 (Mo. App. 1995), the Court of Appeals approved the trial court's order setting aside two notices of *lis pendens* because the underlying lawsuit was not based upon any equitable right, claim or lien affecting an interest in the property in question. The Court held: "The record shows John Gorse was ready and willing to convey marketable title to the Lilac Ridge lots on Meadowgreen's behalf on December 15, 1989. There is no claim or indication that Meadowgreen's title to the lots was defective in any way. The Laytons' two notices of *lis pendens* had been properly set aside, as the Laytons' action for dissolution of Meadowgreen was not 'based on any equitable right, claim or lien, affecting or designed to affect real estate.' RSMo. 527.260" [1](Id. at 888).

Section 527.260, the Missouri *lis pendens* statute, provides for the filing of a *lis pendens* notice: "[I]n a civil action, based on any equitable right, claim or lien**,** affecting or designed to affect real estate, the plaintiffs shall file for record, with the recorder of

[1] The action of the Laytons referred to was one to dissolve a corporation that owned certain real estate. (*Id.*at 873).

deeds of the county in which such real estate is situated a written notice of the pendency of the suit . . .” Mo. Rev. Stat. § 527.260 The statute requires three things in order to have an authorized notice of *lis pendens*: (1) a lawsuit; (2) “based on any equitable right, claim or lien;” and (3) that affects or is designed to affect real estate.

First National Bank of St. Louis v. Ricon, Inc., 311 S.W.3d teaches that when a notice of *lis pendens* is not authorized by Section 527.260, the wrongful filing of the invalid notice is sufficient to meet the ‘false words’ requirement in a claim for slander of title. Plaintiffs’ lawsuit did not involve “any equitable right, claim or lien” and was, therefore, unauthorized. The trial court, therefore, was correct in determining that the notice of *lis pendens* was improper. (App. Final Judgment, p. 1422-24)

Ignoring completely the “any equitable right, claim or lien” requirement in the statute, Plaintiffs repeat and emphasize that the notice of *lis pendens* herein relates to an action that affects real property and, thus, they argue Plaintiffs have complete immunity from a slander of title claim. (Plaintiffs’ Substitute Brief as Cross-Respondents, 34-36) Assuming that Plaintiffs’ notice of *lis pendens* relates to a lawsuit that affects real estate, only elements one and three are met. However, Plaintiffs completely ignore element number two—that is, the lawsuit affecting real estate must be “based on any equitable right, claim or lien.”

The cases relied upon by Plaintiffs harken back to *Houska v. Frederick,* 447 S.W.2d 514 (Mo. 1969). *Houska* did not address the words of the statute now at issue. In fact, this Court in *Houska* focused solely on the relationship between the lawsuit and the affected real estate. It quoted extensively from the Restatement of Torts, Section 38

and the California Supreme Court case of *Albertson v. Raboff*, 295 P.2d 405, 409 (Ca. 1956), and both sources emphasized this relationship between the lawsuit and the real estate. The Restatement and the *Albertson* case do not address the issue herein – that is, a statutory requirement that the lawsuit be "based on any equitable right, claim or lien." In fact, in *Houska* when the Court referred to Section 527.260, it quoted the section leaving out the "based on any equitable right, claim or lien" requirement of the statute. *Houska*, 447 S.W.2d at 519. That phrase which is critical in this case, was not an issue in *Houska.*

Plaintiffs cite as authority *Hammersley v. District Court In and For the County of Toutt,* 610 P.2d 94, 96 (Colo. banc 1980), and the Arizona case of *Tucson Estate, Inc. v. Superior Court In and For The County of Pima,* 729 P.2d 954, 969 (Ariz. Ct. App. 1986). Those cases are not applicable. Unlike Section 527.260, the Colorado and Arizona *lis pendens* statutes do not contain the requirement that the lawsuit be based upon an equitable right, claim or lien.

Likewise, contrary to Plaintiffs' contention, the issue was not decided by the Writ Panel of the Court of Appeals. That court's opinion focused only on whether the lawsuit affected the ownership of real estate. (March 26, 2013 Opinion, *State ex rel. Lemley, et al. v. Hon. Gloria C. Reno*, 436 S.W.3d 232 (Mo. App. 2013).

Plaintiffs would have this Court conclude that the "based on any equitable right, claim or lien" provision of Section 527.260 is mere surplusage placed in the statute by the General Assembly for no purpose or reason. As the Court of Appeals held in *Bolt v. Giordano,* 310 S.W.3d 237, 242 (Mo. App. 2010): "The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give

effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *South Metro. Fire Prot. Dist. v. City of Lee's Summit,* 278 S.W.3d 659, 666 (Mo. banc 2008)(*quoting State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008)). "The corollary to this rule is that a court should not interpret a statute so as to render some phrases mere surplusage. *Middleton v. Missouri Dept. of Corr*., 278 S.W.3d 193, 196 (Mo. banc 2009)."

The phrase in the statute "based on any equitable right, claim or lien" has meaning. It is a prerequisite to a valid notice of *lis pendens. 21 West, Inc v. Meadowgreen Trails, Inc.* 913 S. W. 2d at 877-78. It is not mere surplusage. Nor (contrary to Homeowners suggestion at 36 of their Substitute Brief as Cross-Respondent) is the requirement met if the lawsuit "affects" real property. The issue is whether the filer of the *lis pendens* has an equitable right, claim or lien in the real property as to which the *lis pendens* is filed. That element, necessary to support a valid *lis pendens*, is missing here.

Because Plaintiffs' litigation, as previously detailed in Jefferson Bank's substitute brief, did not involve such an equitable claim, right or lien, Plaintiffs' notice of *lis pendens* was not authorized by Section 527.260. Defendant Jefferson Bank has established the first element of its slander of title claim.

B. THERE WAS AN ISSUE OF MATERIAL FACT RELATIVE TO WHETHER PLAINTIFFS FILED THE UNAUTHORIZED LIS PENDENS WITH MALICE.

Plaintiffs claim that Defendant Jefferson Bank is "boot-strapping." They ignore and do not respond to the plain statements of law in *First National Bank of St. Louis* that malice at law can be inferred from "the mere intentional doing of a wrongful act to the injury of another without legal justification or excuse." *First Nat'l Bank of St. Louis*, 311 S.W.3d 857 (Mo. Ct. App. 2010) at 868 n. 3.

Plaintiffs unsuccessfully attempt to refute the Bank's argument that Plaintiffs have no explanation for why attorneys, Mr. and Mrs. Lemley, would include the common ground in the notice of *lis pendens.* (Plaintiffs' Substitute Brief as Cross-Respondent at 41). They knew that the provisions of Article X of the Declaration did not pertain to the common ground. They had the Declaration. This overreaching provides evidence from which a jury could determine that Plaintiffs were acting with malice, attempting to be as burdensome as possible.

A jury could also infer malice from Plaintiffs' failure to comply with the plain language of the *lis pendens* statute when their counsel proceeded without asserting any equitable right, claim or lien in the referenced lawsuit.

A jury is entitled to make the determination as to whether Plaintiffs acted with malice. There remains a genuine issue of fact for the trier of fact on the second element of Defendant Jefferson Bank's slander of title claim.

C. THERE WAS AN ISSUE OF MATERIAL FACT RELATIVE TO WHETHER DEFENDANTS SUFFERED INJURY AS A RESULT OF THE UNAUTHORIZED LIS PENDENS.

In support of its position that Jefferson Bank had been damaged, Jefferson Bank filed an affidavit of James Brennan, President of McKelvey Homes. (LF, Affidavit, pp. 960–61) Mr. Brennan testified that: "If the lawsuit herein and notice of *lis pendens* filed by Plaintiffs on May 28, 2010 with the Recorder of Deeds of St. Louis County, Missouri against all of the undeveloped lots and common ground in the Subdivision had not been filed by plaintiffs, McKelvey would have purchased by this time a number and, possibly all, of additional lots from Jefferson Bank at the Contract purchase price of at least $200,000.00 per lot." (*Id.*)

Realizing that the affidavit from James Brennan of McKelvey Homes effectively prevents the trial court from granting summary judgment, Plaintiffs now claim that Defendant Jefferson Bank cannot rely upon the affidavit because Plaintiffs were frustrated in certain discovery attempts to take the depositions of McKelvey's customers before Plaintiffs filed their motion for summary judgment. The summary judgment motion with respect to this counterclaim came from Plaintiffs. Plaintiffs had the burden of showing that the Bank had no damages. They were wrong when they asserted in that motion that Defendant Jefferson Bank did not have any facts upon which to base their claim for slander of title, including damages. They proceeded without the discovery that they now claim they should have obtained. Moreover, Plaintiffs did not request the trial court to delay ruling on their motion until they could conduct appropriate discovery on

the issue after the Brennan affidavit was filed in opposition to their motion for summary judgment. Instead, Plaintiffs chose to proceed with the motion. They cannot complain about not having discovery.

Plaintiffs did submit evidence contesting the Brennan affidavit. They asserted that Defendant Jefferson Bank allegedly admitted that it suffered no damages. The fact that Plaintiffs had some evidence that suggested that Jefferson Bank suffered no damages (LF, Affidavit, p. 1103) did not require the trial court to grant summary judgment. Rather, conflicting evidence on the issue merely requires a determination of the issue of fact by the trier of fact. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993). There remains a genuine issue of fact for the trier of fact on the issue of damages suffered by Jefferson Bank.

Moreover, the affidavit of Mr. Dulle referred to by Plaintiffs contains no admission that the notice of *lis pendens* did not slander Jefferson Bank's title to the real estate owned by Jefferson Bank in the Subdivision. (LF, Affidavit, p. 1103). The plain language of the affidavit is to the contrary. The affidavit confirms Jefferson Bank's position that the *lis pendens* did not affect its title to the property. It states that no claim has been made against Jefferson Bank's ownership or title to the 13 lots in the Subdivision owned by the Bank. (*Id.*) The affidavit does not claim that some person or entity has asserted a claim of ownership to the lots in question. Even Plaintiffs, in the lawsuit, do not claim that they have an ownership interest in the lots. Mr. Dulle further affirmed that he knew of no facts "by reason of which title or possession of the property might be disturbed or questioned, or by reason of which any claim to any of said property

might be asserted adversely to said individuals." (*Id*.) Nor do Plaintiffs claim in this lawsuit or otherwise that anyone other than Jefferson Bank was entitled to title or possession to the property. In short, Mr. Dulle confirms Jefferson Bank's contention in this case that there is no issue as to its title or right to possession of any lot in the Subdivision. He did not state that there was no notice of *lis pendens.* Obviously, the title company could see the notice of *lis pendens* in the record of the recorder of deeds. Plaintiffs' characterization of the affidavit as an admission that Jefferson Bank suffered no damages is without merit.

In sum, Plaintiffs' notice of *lis pendens* was not authorized by Section 527.260, and there are remaining issues of material fact to be determined by the trier of fact with respect to the elements of malice and damages on Jefferson Bank's counterclaim for slander of title. Therefore, the trial court erred in granting summary judgment against Jefferson Bank on its slander of title counterclaim.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT III OF THE JEFFERSON BANK COUNTERCLAIM (ABUSE OF PROCESS) BECAUSE THERE REMAINED ISSUES OF MATERIAL FACTS INCLUDING WHETHER: PLAINTIFFS IMPROPERLY FILED THIS LAWSUIT; PLAINTIFFS HAD AN IMPROPER PURPOSE IN FILING THIS LAWSUIT; AND DEFENDANT WAS THEREBY DAMAGED, THE ESSENTIAL ELEMENTS OF AN ABUSE OF PROCESS CLAIM.

Plaintiffs attempt to mischaracterize Defendant Jefferson Bank's position in this case. Plaintiffs state that "the Bank claims that the Homeowners' filing of this lawsuit constituted an abuse of process because the Homeowners initially sought to compel arbitration of this dispute pursuant to the Declaration." (Substitute Brief as Cross-Respondents at 45). That is not the Bank's position. The Bank's position is that the lawsuit was filed so that Plaintiffs could file a notice of *lis pendens* to cloud the title to the property and thereby impede the Bank from selling or developing its lots in the Subdivision.

Plaintiff Katherine Lemley filed an affidavit denying that Plaintiffs filed the lawsuit for a reason other than to obtain the relief prayed for therein and denying that Plaintiffs filed the lawsuit with malicious intent. (LF, Affidavit, p. 1100, ¶¶4–5) However, Plaintiff Lemley also attached to her affidavit another document that demonstrated the perverse purpose of the lawsuit. (LF, Motion, pp. 1108–1111) That motion stated in paragraph 4:

> "Plaintiff filed this suit against Defendants on May 27, 2010. The action was filed in order to allow for notice to be given to third parties by way of a *lis pendens* recorded in the office of the St. Louis County Recorder of Deeds. However, in compliance with ADR Provision, Plaintiffs simultaneously filed with their Petition a Motion to Stay these proceeding pending alternative dispute resolution."

(*Id.*) .

Did the document say that the lawsuit was filed to have the judicial system determine the disputes? No, Plaintiffs admit that the lawsuit was filed so a notice of *lis pendens* could be filed. That is an admission that the claim was brought to accomplish a purpose for which the lawsuit was not designed. A jury hearing this evidence could very well believe that Plaintiffs filed this lawsuit to stop Jefferson Bank from being able to sell vacant lots to McKelvey Homes, not to resolve disputes over the meaning of the Declaration. Also, a jury could believe that Plaintiffs filed this lawsuit to prevent McKelvey Homes from building and transferring homes to its customers, not to resolve disputes over the meaning of the Declaration.

Plaintiffs attempt to divert the Court's attention away from this admission by asking the Court why Defendant Jefferson Bank did not ask for arbitration when plans for homes were finally submitted to the Board of the ASC HOA in July 2011. (Substitute Brief as Cross-Respondents at 45). The answer is simple. By then Plaintiffs had abandoned their request for arbitration. They were litigating. (LF, Docket, pp. 1-19) They were engaged in discovery in the lawsuit. The parties were one year into the

litigation with all of the lawsuit's discovery and motions for summary judgment long before plans for proposed homes were presented to the Board of the ASC HOA for consideration under Article X of the Declaration. However, whether Defendant Jefferson Bank did or did not seek arbitration is irrelevant.

What is highly relevant is the fact that Plaintiffs admitted in a pleading filed in the trial court that the purpose of the lawsuit was not to obtain an adjudication of disputes, rather to allow Plaintiffs to file a *lis pendens*.

Finally, Plaintiffs seek to justify their actions by stating that they followed the only reported case law that they could find. Unfortunately, for Plaintiffs, that defense is not supported by anything in the record. Even if it were in the record (which it is not), the admission referred to above creates a genuine issue of material fact for the jury as to whether the lawsuit was filed for a perverse purpose.

As to the issue of damages with respect to the abuse of process claim, as discussed with respect to the slander of title claim, Mr. Brennan's affidavit creates a material issue of fact with respect to the final element of Defendant Jefferson Bank's abuse of process claim.

With respect to each of the three essential elements of Jefferson Bank's abuse of process claim, there remain genuine issues of fact for the trier of fact. Therefore, the trial court should not have granted summary judgment in favor of Plaintiffs on Counts II and III of Jefferson Bank's counterclaim.

CONCLUSION

For the reasons set forth in the Substitute Brief of Jefferson Bank and Trust Co. as Cross-Appellant and in this Substitute Reply Brief, the Court should reverse the trial court's grant of summary judgment against Jefferson Bank with respect to its slander of title and abuse of process claims and remand those claims for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b), in that there are 3,918 words in the brief (except the cover, signature block, certificate of service, and appendix) according to the word count of the Microsoft Word word processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 4th day of May, 2015, the foregoing brief was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon the following:

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