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Indexing the lis pendens: Dyer v Martinez, 2007

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Filing of lis pendens with county recorder does not impart constructive notice until indexed.

Dyer v Martinez (2007) 147 CA4th 1240, 54 CR3d 907

On September 9, 2004, Dyer sued the Rojases for specific performance and damages based on their alleged breach of a sales agreement for real property and, on the same day, deposited a lis pendens with the county recorder's office for recording. Although the lis pendens reflected a September 9, 2004, recording date, it was not indexed until September 14, 2004. On September 10, 2004, escrow closed on the sale of the property to Martinez, who purchased it through loans provided by Argent, secured by trust deeds that listed Town & Country as trustee.

Dyer filed an amended complaint for breach of contract, quiet title, and declaratory relief against Martinez, Argent, Town & Country (collectively, Defendants), and the Rojases, against whom she continued to seek specific performance. Defaults were entered against the Rojases. The trial court granted the remaining Defendants summary judgment on the ground that Dyer's lis pendens failed to provide constructive notice of her claim against the property, and ordered the lis pendens expunged. Dyer petitioned for writ of mandate directing the superior court to vacate its expungement order.

The court of appeal deemed the writ petition to be a notice of appeal from the judgment and affirmed. For more than a century, the law in California has been that a recorded document does not provide constructive notice to a bona fide purchaser of real property unless and until it can be located by a diligent title search, even if the literal wording of the relevant statute provided that the document imparted constructive notice from the date of filing with the recorder. To rely on the fiction of constructive notice and abrogate the requirement of actual notice, the party seeking recordation must ensure that all of the statutory requirements are met. Real property purchasers or mortgagees cannot be charged with constructive notice of documents they cannot locate; thus, a lis pendens that is not indexed does not give notice because no one can find the document.

Nothing in the statute governing the recording of a lis pendens (CCP §405.24) indicates the legislature intended to abrogate the long-standing and uniformly applied rule that purchasers do not receive constructive notice if a diligent title records search would not locate the documents providing that notice. The statute provides that constructive notice is given only when an instrument is recorded, not simply when an instrument is delivered to the recorder's office. Given the history of constructive notice in California and the legislature's comment that enactment of §405.24 was not intended to change existing law, the term "recording" in that statute means "recorded as prescribed by law." Government Code §27250 requires indexing of all recorded lis pendens. Thus, a lis pendens does not provide constructive notice until it has been properly indexed.

Although failing to impute constructive notice until a lis pendens is indexed may create uncertainty because the claimant has no control over when the recorder indexes the document,

the uncertainty would be greater if a purchaser of real estate could not rely on a diligent search of public records to reveal a prior claimant's interest. Placing the risk of loss due to a recorder's delay in indexing on the claimant provides an incentive to diligently deposit the lis pendens for recordation. Placing the risk on the innocent purchaser or the purchaser's title insurer does nothing to ensure the lis pendens is properly and timely recorded.

The Editor's Take: The plaintiff had to lose this case if the recording system was going to work; otherwise, none of the rest of us could ever rely on the indexes. But reaching that common-sense outcome is made difficult by the fact that the literal language of our statutes seems to dictate a contrary result. Our lis pendens act provides that a recorded document gives constructive notice "[f]rom the time of recording" (CCP §405.24); "recording" is defined (in CC §1170) as meaning "deposited in the recorder's office, with the proper officer," without adding that the recorder's office had better next make appropriate index entries showing its location in the official records so that searchers can thereafter find it. A document not properly indexed should not be deemed recorded, even though it may have been left with the recorder (and even though it may also have been placed in the official records), since no one will ever come across it thereafter. Thank heavens our courts have gone activist on this issue and displaced the literal and unworkable statutory definition in favor of a functional one that makes recording depend on findability.

Not all courts are so bold. Last year, the Pennsylvania Supreme Court chose the literal version of the definition to conclude that a mortgage indexed under the wrong name nevertheless gave constructive notice to a subsequent party who had no actual knowledge of it because it had been properly delivered to the recorder's office. *First Citizens Nat'l Bank v Sherwood* (Penn 2005) 879 A2d 178. It took a considerable amount of work by the Pennsylvania Bar Association to get that statute amended to undo that result, by changing the statute to say that a document gives constructive notice only if it is "indexed properly." The Pennsylvania court's decision may seem silly, but that is considered to be the rule in a majority of states, according to Patton & Palomar on Land Titles §68 (3d ed 2003). (While I am suspect of that count, because many of the citations are pretty old, it is a fact that the Idaho Supreme Court reached the same result just three years ago—*Miller v Simonson* (Idaho 2004) 92 P3d 537—as did courts in Florida, Kansas, Louisiana, Vermont, and, more recently, West Virginia, where indexing is considered merely a ministerial act, according to Patton & Palomar.)

More surprisingly, the drafters of Article 9 of the Uniform Commercial Code consciously take that same position. Section 9–517 provides, "The failure of the filing office to index a record correctly does *not* affect the effectiveness of the filed record." (Emphasis added.) (See also Com C §9517.) They say that mistakes don't happen that often and they don't want to overburden the filing office by having everybody coming back to double-check their filings, although that worry is rather hard for me to understand given the ability to computer search those files from one's own office.

Making life sensible for searchers, as this case does, comes at a price, however, and filers are the ones who will have to pay it. They will lose even if they have done everything

right—*i.e.,* left the right document at the right office with the right fee—but a governmental clerk then failed to properly index it thereafter. Under a definition that deems a document recorded only when it has been properly indexed, the filing party has to double-check that this critical last step was done right.

In many cases, a search a few days later will show whether that was the case, but not always. Here, for instance, this plaintiff lost not because of a recorder's error, but because of its delay, in a situation where time was critical. The plaintiff had to get her lis pendens on file fast in order to stop a closing that was to occur the next day. (The facts are not clear, but I assume that the timing of her filing was not just coincidental.) Ignoring the merits of her strategy and claim, her problem is one that I do not know how to solve.

Government Code §27320 says that the recorder shall record any instrument deposited there "without delay," but I fear that means only copy it into the official records; the obligation to index it, in Govt C §27324, does not include the same time constraint. The Orange County Recorder's Office indexing delay of 5 days violated no statute. (The only other statutory speed mandate I am aware of is in CC §2941(c), where a two-business-day deadline is imposed on the recorder, but that only requires the office to "stamp and record" a satisfaction of mortgage form it receives in the mail.)

A frantic filer can perhaps nag the recorder to move more quickly, but I doubt that she could get any judge to issue a writ to that effect. Possession can also give notice, so there is the possibility of the plaintiff camping out on the property, but that idea seems subject to the legal difficulty that a purchaser's obligation to look at the property may not require going there every day to do so (and the practical difficulty that a vendor in possession may not take kindly to the plaintiff's conduct).

In this case, because the plaintiff did appear to know that escrow was to close the next day, she probably also knew, or could have found out, who the purchaser was or where the closing was to be. Since actual knowledge is supposed to be a good substitute for the constructive notice furnished by an indexed lis pendens (see *Packard Bell Electronics Corp. v Theseus, Inc.* (1966) 244 CA2d 355, 363, 53 CR 300), perhaps a letter to the right place might also work. (I would caution her to use Federal Express rather than the U.S. mails if she really wants it to get there in time.)—*Roger Bernhardt*