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Lis pendens in fraudulent conveyance claims:

Kirkeby v Superior Court, 2004

Roger Bernhardt

Fraudulent conveyance claim seeking to void transfer of real property affects title to or right to possession of that real property and therefore supports recording of lis pendens.

Kirkeby v Superior Court (2004) 33 C4th 642, 15 CR3d 805

Kirkeby, who controlled 49 percent of the stock of FasTags, Inc., sued the officers, directors, and attorneys of the company. The complaint in her derivative action contained 27 causes of action, including one to annul fraudulent conveyances of two properties to a family trust of the majority shareholders. She recorded notices of lis pendens against the two properties. The trial court found that Kirkeby's complaint, primarily involving money damages, had not stated a real property claim, and ordered the lis pendens expunged. Under CCP §405.4, a real property claim is a cause of action in a pleading "which would, if meritorious, affect . . . title to, or the right to possession of, specific real property." The court of appeal agreed that the complaint did not support a lis pendens.

The California Supreme Court reversed, concluding that Kirkeby's fraudulent conveyance claim affected "title to, or the right to possession of, specific real property." The court pointed out that a fraudulent conveyance claim that seeks to avoid a transfer, could, if successful, result in the voiding of a transfer of title of specific real property. See CC §3439.07(a)(1). In this case, Kirkeby adequately pled a fraudulent conveyance claim by alleging the transfer of title of the subject properties with the intent to defraud, and she asked the court to void the transfers of both properties to the extent necessary to satisfy the claims in her complaint. The court rejected the defense argument that a lis pendens was not a permissible remedy under the Uniform Fraudulent Transfer Act (UFTA) (CC §§3439–3439.12). The court noted that, although the UFTA does not specifically provide for lis pendens as a remedy, it does not exclude it, and CC §3439.07(a)(3)(C) entitles a creditor bringing a UFTA claim to "[a]ny other relief the circumstances may require."

THE EDITOR'S TAKE: It is intriguing to wonder how the supreme court can unanimously decide that a lis pendens is proper in a fraudulent conveyance action when both the trial court and the court of appeal had concluded just the opposite. Who is it who doesn't understand?

For the lower courts, the issue was clear because the plaintiff's basic claim was for money she had been swindled out of in a non-real-estate commercial venture; her only purpose in the fraudulent conveyance action was to ensure that an asset be kept available from which she could satisfy her judgment. For the supreme court, however, that underlying-purpose analysis is trumped by a plain-meaning test: An action to set aside a conveyance of real property is, by definition, one that affects title or possession of real property; if the legislators didn't mean what they said, let them fix it.

While that is an easy conclusion to make, I wonder if this court will agree with the same logic when it must address the question it was not deciding here: whether an action to

impose a constructive trust also supports a lis pendens. According to this plain-meaning logic, imposing a trust on real property clearly affects its title as much as a lis pendens; so that case should be another slam dunk.

The proper scope of the lis pendens raises difficult policy issues, as I discussed in my column (see Bernhardt, *The Lessened Lis Pendens*, 26 CEB RPLR 178 (Sept. 2003)) on the now-depublished court of appeal decision in *Kirkeby v Superior Court* (2003) 109 CA4th 1275, 135 CR2d 861, reported in 26 CEB RPLR 192 (Sept. 2003). By virtue of its literal plain-meaning approach, the high court has passed the ball to the legislature, which means that that body may itself have to confront the issue. —*Roger Bernhardt*