

7-2015

# Mira Overseas Consulting Ltd. v Muse Family Enters., Ltd.

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

---

## Recommended Citation

Bernhardt, Roger, "Mira Overseas Consulting Ltd. v Muse Family Enters., Ltd." (2015). *Publications*. Paper 742.  
<http://digitalcommons.law.ggu.edu/pubs/742>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

**Creditor seeking monetary damages may file lis pendens in connection with claim seeking to set aside fraudulent transfers to extent necessary to satisfy judgment.**

*Mira Overseas Consulting Ltd. v Muse Family Enters., Ltd. (2015) 237 CA4th 378*

The Muse parties invested in BTM Funding, a vehicle created by its sole owner, David Smith, to finance construction of churches. BTM's only asset was a \$10 million personal residence that Smith put in BTM's name in order to hide the property from his first wife during a divorce. Smith partly financed his purchase with a loan from another entity he beneficially owned, Mira Overseas Consulting (Mira). The following year, problems with BTM's projects and finances came to light and Investors discovered the residence had been quitclaimed from BTM to Smith, from Smith to his second wife, and finally to his second wife's living trust, leaving BTM insolvent. In September 2010, Investors sued for damages and to set aside the quitclaim deeds as fraudulent conveyances. They recorded a lis pendens on September 16, 2010. After a jury trial in 2012, Investors were awarded damages and the quitclaim deeds were nullified. Investors recorded their judgment on February 26, 2013.

By the time Investors filed their suit, Smith's first wife owned Mira, which she received in the Smiths' divorce settlement. In March 2011, she also sued BTM, Smith, Smith's second wife, and the living trust to set aside the quitclaim deeds and recover the loan that Mira made to BTM for purchase of the residence. The Mira suit quickly resulted in a stipulated judgment for damages, which the parties agreed would be enforced through levy on the property. An abstract of the stipulated judgment was recorded on July 15, 2011. Mira then sought a declaratory judgment that Mira's lien was superior to any lien Investors might obtain on the property as a result of their lawsuit. Investors cross-complained, asserting that they had the superior lien because their lis pendens was filed in 2010.

In November 2013, the trial court found for Mira, holding that Investors' February 2013 judgment did not relate back to the 2010 lis pendens. The trial court reasoned that Investors had no right to record a lis pendens because they had no interest in the property. Their suit was for monetary damages; the fraudulent transfer claim was merely filed so that title would return to BTM for enforcement of any damages award.

The court of appeal reversed, holding that Investors were entitled to record a lis pendens with respect to their fraudulent transfer claim and their lien, relating back to the lis pendens recorded on September 16, 2010, was superior. The court applied *Kirkeby v Superior Court (2004) 33 C4th 642*, reported at 27 CEB RPLR 140 (Sept. 2004), in which the California Supreme Court interpreted the "broad" relief provisions of the [Uniform Fraudulent Transfer Act \(UFTA\)](#) (CC §§3439–3439.12) to hold that a fraudulent conveyance claim is a real property claim for purposes of the lis pendens statutes. The court of appeal noted that the judgment creditor in *Kirkeby* did not allege a direct interest in the property but filed a fraudulent transfer claim only to void the transfers "to the extent necessary to satisfy the claims set forth in her complaint"; none of her other 26 claims involved the real property. Furthermore, *Kirkeby* allows a creditor to elect the lis pendens remedy in lieu of the provisional remedies set out in the [UFTA](#), such as attachments, injunctions, and the appointment of receivers. The court of appeal concluded

that Investors' lis pendens was properly filed under *Kirkeby*, their rights and interests in the property related back to the date it was recorded, and they had the superior lien.

**THE EDITOR'S TAKE:** The normal rule dictating the priority of rival claims generally depends on which party got its judgment first (rather than, *e.g.*, which made its loan first, or first went unpaid, or was first to file suit), but this decision adds that the date of getting a judgment relates back to an earlier time if a lis pendens had been filed.

Just as our system allows a creditor who has properly secured her claim to prevail over an unsecured creditor who may have otherwise come first, so does a lis pendens give one a leg up. Unlike getting a security interest, such creditor does not need the debtor's consent to do so. In *Kirkeby v Superior Court* (2004) 33 C4th 642, our supreme court made the lis pendens procedure very available—see my Editor's Take at 27 CEB RPLR 140 (Sept. 2004)—and an unsecured creditor is a fool not to get one, if she can.

So don't try to win the race to the courthouse—head for the recorder's office instead.—*Roger Bernhardt*

- From Real Property Law Reporter (Cal CEB [July 2015]) © The Regents of the University of California, reprinted with permission of CEB