

PURCHASERS AT FORECLOSURE SALES MUST NOW REMOVE A *LIS PENDENS* BEFORE INITIATING EVICTION!

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For years now, California, as well as many of its cities and counties have waged an outright war on a property owners right to evict tenants. Now, the courts have joined the siege. In *Homeward Opportunities Fund I Trust 2019-2 v. Taptelis*, the California Court of Appeals recently held that the purchaser at a foreclosure sale that is subject to a recorded *lis pendens*, must remove the cloud on title before starting an eviction. The Court's ruling is a complete deviation from the law that has been in effect for decades.

Facts:

Ilias Taptelis (the "Borrower") borrowed \$1.24 million to purchase residential property in Santa Clara County. The loan was secured by a deed of trust. The Borrower defaulted on the loan, and the lender initiated foreclosure. Before the trustee's sale occurred, the Borrower filed a civil action challenging the impending foreclosure. In conjunction with the lawsuit, the borrower recorded a *lis pendens* just two days before the trustee's sale. The trustee's sale went forward, with the foreclosing lender ("Homeward") buying the property with a credit bid. A few months after the sale, Homeward served a notice to quit on the Borrower. After the Borrower failed to vacate the Property, Homeward filed an unlawful detainer action seeking to take possession of the Property (the "UD Action").

Procedural Posture:

At a bench trial in the UD Action, Homeward introduced several recorded documents — including the Deed of Trust, Assignment, Notice of Default, Notice of Trustee's Sale, and Trustee's Deed — to establish that it had "perfected title" to the property before initiating the UD Action in compliance with Code of Civil Procedure section 1161a(b)(3). However, the trial court excluded from evidence Borrower's efforts to introduce his recorded *lis pendens*. The trial court ruled in favor of Homeward, and the Borrower appealed. On Appeal, the Court of Appeal reversed, holding that the recorded *lis pendens* was a cloud on title that, unless first expunged, barred the unlawful detainer claim.

Reasoning/Logic:

Although recording a trustee's deed is typically sufficient to raise a conclusive presumption of title under the sale as to a *bona fide* purchaser for value without notice, the Appellate Court found that Homeward purchased the Property with notice of, and subject to, the Borrower's recorded *lis pendens*. The Appellate Court first cited the general rule that a "lis pendens clouds title until the litigation is resolved or the lis pendens is expunged[.]" Turning to the unlawful detainer statute at CCP Section 1161a, the court stated that "a plaintiff seeking a judgment of unlawful detainer must establish that the title under the sale has been duly perfected. ... Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which has purchased, valid and good beyond all reasonable doubt ... *which includes good record title...*" The court based its analysis in part on the case of *Dr. Leevil, LLC v. Westlake Health Care Center*, (2018) 6 Cal.5th 474, which had held that the new owner following a foreclosure sale must perfect title under that sale before seeking to evict the trustor/borrower.

A *lis pendens* raises an issue of title and, thus, the Appellate Court found that it clouded the title acquired by the purchaser at the foreclosure sale that would preclude the purchaser from perfecting title. Since a cloud on title cannot be litigated in an unlawful detainer action, as an impediment to the perfection of title, that cloud must be cleared before the purchaser may serve a notice to quit and commence an unlawful detainer proceeding. Here, the *lis pendens* had not been expunged nor had the wrongful foreclosure suit of which it gave notice been resolved prior to the attempted eviction. As a result, the Appeal Court determined that Homeward could not prove that it had duly perfected title so as to enable it to seek to evict the Borrower.

There is a glimmer of hope, though, as the Court has granted a petition for rehearing, which has now been fully briefed and is under submission. Perhaps this cloud will have a silver lining after all.

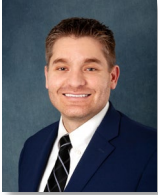
Take Away:

For decades, purchases at foreclosure sales have served their Notice to Quit after recording the Trustees Deed Upon Sale. Unfortunately, that is no longer allowed if the borrower has properly recorded a *lis pendens* prior to the foreclosure sale. Instead, the foreclosure purchaser must remove (expunge) the *lis pendens* before it can initiate the

eviction process. Of course, that process could take months, if not years, depending on the merits of the prior borrower's claims and the particular court. Meanwhile, the prior owner can continue living in the property payment free or, even worse, collecting rents while the foreclosure purchaser is trying to remove the *lis pendens*.

It will not take long for borrower attorneys to try to take advantage of this misguided ruling and to start routinely recording *lis pendens* prior to foreclosure sales, just to try to buy their clients more time in the property.

If you have any questions on this ruling or how it may impact a particular eviction or foreclosure, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net or Arnold Graff at agraff@wrightlegal.net.



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