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Real Property--Lis Pendens--Action to Abate Nuisance No Basis for Lis Pendens (Braunston v. Anchorage Woods, Inc., 10 N.Y.2d 302 (1961))

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negligence and assumption of risk—certainly relevant considerations in cigarette-cancer cases. And, should the consumer sue on an express warranty, he must show that an alleged assurance was actually an express warranty pertaining to the harm suffered; that it could reasonably be relied upon; and that he did in fact rely upon it. In addition to these safeguards, the approach of Judge Goodrich seemingly protects the manufacturer from an excessive exposure to absolute liability based on a causal relationship laden with doubt.[38]

REAL PROPERTY — LIS PENDENS — ACTION TO ABATE NUISANCE NO BASIS FOR LIS PENDENS.—The owners and developers of a tract of land constructed conduits which collected surface water and diverted it onto the plaintiffs' adjacent property. Plaintiffs brought suit, seeking damages and a mandatory injunction ordering defendants to eliminate the conduits, and filed a notice of *lis pendens* against the defendants' property. Special Term granted defendants' motion to cancel the *lis pendens,* conditioned upon the filing of an undertaking of $10,000. On appeal the Appellate Division reinstated the *lis pendens.* In a four-to-three decision, the Court of Appeals reversed and *held* that the plaintiffs were not entitled to file a *lis pendens,* since the action was one to abate a nuisance, and not one affecting the "use" of land within the meaning of Section 120 of the New York Civil Practice Act. *Braunston v. Anchorage Woods, Inc.,* 10 N.Y.2d 302, 178 N.E.2d 717, 222 N.Y.S.2d 316 (1961).

At the beginning of the 19th century New York followed the common-law doctrine of *lis pendens,*[1] which provided that a grantee of real property who received title from a litigant during the pendency of an action concerning the land took title subject to the outcome of the litigation.[2] This rule caused hardship to innocent purchasers who often had no way of discovering whether real property was the subject of litigation at the time of purchase.[3]

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[38] It is interesting to note that, in light of the concurring opinion, the majority advised the lower court, on remand, to submit interrogatories to the jury in order to ascertain upon which theory the jury reached their verdict. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 301 n.18 (3d Cir. 1961).

[1] 1957 N.Y. LEG. DOC. No. 88, N.Y. JUDICIAL CONFERENCE SECOND ANNUAL REPORT 107 [hereinafter cited as 1957 N.Y. LEG. DOC. No. 88].

[2] 1957 N.Y. LEG. DOC. No. 88, at 107.

[3] *Ibid.*

To reduce this hardship New York enacted a statute in 1823, which provided that purchasers of land would not be bound by the results of a pending suit affecting the land, unless a notice of pendency of the suit was filed in the county in which the land was situated.[4] The legislature thereby sought to preserve the rights of plaintiffs and, at the same time, protect innocent purchasers.[5]

Today, with the exception of certain specified instances in which the filing of a *lis pendens* is a requisite for maintaining the action,[6] filing is at the option of the litigant. This "permissive" *lis pendens* is governed by Section 120 of the Civil Practice Act. The present provision differs from the 1823 statute in that the right to file is restricted to litigants in actions "brought to recover a judgment affecting the title to, or the possession, *use or enjoyment* of real property."[7] In the principal case neither the title nor the right to possess the defendants' land was contested; therefore, the right to file a *lis pendens* depended upon whether the action was one affecting the "use or enjoyment" of that land.

Numerous lower courts in New York have undertaken to define what the legislature meant by the "use" of land, but apparently the question has not been previously before the Court of Appeals. One apparent factor which has been utilized as a criterion by the lower courts is: *whose property* is involved?

A *lis pendens* has been permitted when the purpose of an

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[4] Laws of New York, 1823, ch. 182, at 213. This statute provided that, "in case any bill is filed . . . in the court of chancery of this state, which, by the laws and rules of the court of chancery of this state, would amount to a constructive notice to a purchaser or purchasers of any real estate; it shall not be so deemed or held hereafter in any court in this state, unless the complainant shall file with the clerk of the county, in which the lands to be affected by such constructive notice are situate, a notice of the pendency of such suit in equity, which notice shall set forth the title of said cause, and the general object thereof, together with a description of the land to be affected thereby, and such county clerk shall place upon an index to be kept in his office, such references to the said notices, as will enable all persons interested, to search his office for such notice without inconvenience." *Ibid.*

[5] 1957 N.Y. LEG. DOC. No. 88, at 107.

[6] In the following actions, *lis pendens* must be filed "at least twenty days before a final judgment directing a sale is rendered": in an action to foreclose a mortgage on real estate, N.Y. CIV. PRAC. ACT § 1080; in a proceeding to appoint a committee for an incompetent where real estate is intended to be affected, N.Y. CIV. PRAC. ACT § 1361; in an action to establish a lien against a multiple dwelling used for prostitution, N.Y. MULT. DWELL. LAW § 356; in an action to foreclose a mechanic's lien on real property, N.Y. LIEN LAW §§ 17, 18; in a proceeding to register title to real property, N.Y. REAL PROP. LAW § 382. Also, in actions to enforce a "mortgage, charge, lien or encumbrance" against real property, the pendency of the action is not notice to the registrar or anyone dealing with the property or any interest therein until a notice of the pendency is filed. N.Y. REAL PROP. LAW § 420.

[7] N.Y. CIV. PRAC. ACT § 120 (emphasis added).

action was to restrict or control the manner in which a defendant's property was employed.[8] Where a *lis pendens* was sought in conjunction with an action to enjoin the damaging of a party wall, the contention that the action was merely one for trespass on the plaintiff's land was denied.[9] The court therein stated that the plaintiff was alleging an interest in the defendant's land, that he had been damaged by its use, and that he was "entitled to have the use and enjoyment of defendant's land restricted and limited. . . ." [10] Similarly, in a suit to enjoin a defendant from erecting a garage on his property in violation of a zoning ordinance, the court decided that the plaintiff could file a *lis pendens,* likening the case to one in which a restrictive covenant was sought to be enforced, where a *lis pendens* may be filed because the covenant is an encumbrance on the defendant's land.[11] A *lis pendens* has also been allowed in actions to compel a defendant to provide lateral support for adjacent land, since an easement of lateral support is considered an interest in defendant's land.[12] The thread running through these cases, often explicitly mentioned, but sometimes only implied, is that the right to restrict the use of defendant's land is predicated upon an interest claimed by the plaintiff in that land.

A *lis pendens* has not been allowed, however, where the action would not affect the use of defendant's land, but would merely restrain the collateral use of the plaintiff's land by the defendant. This was the situation in *Gregdon Corp. v. Fierro,*[13] where it was sought to compel the removal of part of a building encroaching upon the plaintiffs' land. The only interest in land claimed by the plaintiffs was in their *own* land, *i.e.,* that the defendants not trespass upon it. A *lis pendens* was denied. A similar conclusion was reached in *Meissner v. Van Iderstine,*[14] where the defendant utilized a catch basin and pipe to collect and discharge surface water onto the plaintiff's land, a situation similar to that of the

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[8] *E. g.,* Bienstock v. Nista Constr. Co., 225 App. Div. 534, 233 N.Y. Supp. 630 (1st Dep't 1929); Moeller v. Wolkenberg, 67 App. Div. 487, 73 N.Y. Supp. 890 (1st Dep't 1902); Ottinger v. Arenal Realty Corp., 146 Misc. 847, 262 N.Y. Supp. 310 (Sup. Ct. 1930). See Leerburger v. Hennessey Realty Co., 154 App. Div. 158, 138 N.Y. Supp. 921 (1st Dep't 1912), *aff'd mem.,* 214 N.Y. 659, 108 N.E. 1099 (1915).

[9] Moeller v. Wolkenberg, *supra* note 8.

[10] Moeller v. Wolkenberg, *supra* note 8, at 489, 73 N.Y. Supp. at 891.

[11] Ottinger v. Arenal Realty Corp., *supra* note 8.

[12] Bienstock v. Nista Constr. Co., *supra* note 8; *accord,* Leerburger v. Hennessey Realty Co., *supra* note 8.

[13] 206 Misc. 530, 134 N.Y.S.2d 128 (Sup. Ct. 1954).

[14] 206 Misc. 418, 131 N.Y.S.2d 518 (Sup. Ct. 1952). It is interesting to note that this case, which is clearly in line with the position of the defendants and the majority of the Court, was cited in the briefs for both parties but was not referred to in the majority opinion.

present case. The court stated that the action did not come within the statutory standard for filing a permissive *lis pendens,* but did not elaborate on its reasons for so finding. Nonetheless, the fact that the plaintiff's land was in issue makes this decision consistent with the suggested distinction that a *lis pendens* is available when an interest in the defendant's realty is claimed, not when the plaintiff asserts a right in his own land.

While it is possible to suggest the above elements (plaintiff's *interest* in *defendant's* land) as criteria utilized by the courts, there is still lacking a definitive statement on what constitutes "use" of land. The courts have limited the phrase—they have not defined it.

In the present case the Court of Appeals had an opportunity to clarify the meaning of "use" within Section 120 of the Civil Practice Act. While no definition was promulgated, the majority did reiterate the criteria suggested by the lower court opinions. In finding that this was not the type of action in which the statute authorized the filing of a *lis pendens,* the Court said that the plaintiffs were claiming "no *interest* in *defendant's* tract of land." [15] Moreover, the Court indicated that the interest sought to be protected by filing a *lis pendens* must be one which would be lost under the recording acts,[16] stating:

> . . . The usual object of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim.[17]

Since a subsequent purchaser would be no more entitled to continue the nuisance than the defendants, the Court held that such an action did not claim an interest which justified the filing of a *lis pendens.* Furthermore, the plaintiffs could adequately protect themselves by obtaining an injunction against any subsequent purchasers.[18] The Court buttressed its opinion by indicating that the plaintiffs' motive for filing a *lis pendens* was "either merely

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[15] Braunston v. Anchorage Woods, Inc., 10 N.Y.2d 302, 305, 178 N.E.2d 717, 718, 222 N.Y.S.2d 316, 318 (1961).

[16] According to Walsh, "the object of the recording acts . . . is to create a permanent record of title to real property which may be examined by any subsequent purchaser or incumbrancer, disclosing the ownership of the property, and all restrictions, limitations or liens upon it, and to protect all subsequent purchasers or incumbrancers for value from all outstanding conveyances, mortgages, or other liens which have not been recorded and of which they have no notice." WALSH, PROPERTY 767 (2d ed. 1937).

[17] Braunston v. Anchorage Woods, Inc., 10 N.Y.2d 302, 305, 178 N.E.2d 717, 718, 222 N.Y.S.2d 316, 318 (1961).

[18] *Id.* at 306, 178 N.E.2d at 719, 222 N.Y.S.2d at 319.

to embarrass the defendants or to tie up their real estate so as to obtain security for the payment of a judgment for damages if they succeed in obtaining it." [19]

The dissenting opinion took the position that a *lis pendens* should not be denied merely because the underlying action was in nuisance. To so deny a *lis pendens* would, in the opinion of the dissent, defeat the purpose of the statute inasmuch as a subsequent purchaser would thereby be deprived of notice of a judgment which might affect his land. Thus, a developer might create a nuisance and then sell the property, placing the responsibility for correcting the nuisance upon the shoulders of innocent purchasers.[20] This approach adopts a broader interpretation of "use," and would permit the filing of a *lis pendens* under section 120 without a requirement that the interest sought to be protected be subject to the recording acts.

This decision, the first by the Court of Appeals in this area, brings some certitude to an area of law heretofore unclear. Under this rule, a *lis pendens* may be filed where a plaintiff claims an interest in defendant's land, provided the interest is subject to the recording acts. The application of this rule might, however, produce some undesirable results. Thus, to finally abate a nuisance, a plaintiff may well be required to institute a separate action against a subsequent purchaser without notice.[21] Furthermore, the innocent purchaser would thereby be subjected to an action, the possibility of which would have been revealed had a *lis pendens* been filed.

It would seem that the Court of Appeals, in its zeal to preserve the free alienability of property, which a *lis pendens* admittedly hampers, may have let pass an opportunity to establish a rule of law which would serve to protect many innocent parties and reduce litigation.

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[19] *Id.* at 305, 178 N.E.2d at 718, 222 N.Y.S.2d at 318.

[20] *Id.* at 307-08, 178 N.E.2d at 719-20, 222 N.Y.S.2d at 319-20 (dissenting opinion).

[21] Compare Leerburger v. Hennessey Realty Co., 154 App. Div. 158, 138 N.Y. Supp. 921 (1st Dep't 1912), *aff'd mem.*, 214 N.Y. 659, 108 N.E. 1099 (1915). In that case the defendant, whom the plaintiff sought to compel to abate a nuisance, argued that he could not do so because he had sold the land and therefore would be guilty of trespass if he entered and attempted to abate the nuisance. The court answered that the purchaser was under a duty to cooperate with the defendant's efforts to abate the nuisance because "the notice of *lis pendens* was filed, and . . . the property was taken subject to and with notice of the pending action." *Id.* at 161, 138 N.Y. Supp. at 923-24.