Exceptions to the Purchaser Pendente Lite Theory

A Buyer's Guide for Real Property Investors in Litigation

In today's fast-paced real estate market, many Florida investors are buying property that is involved in litigation. These investors may discover that the court prohibits them from intervening in the lawsuit, relying on the term "purchaser pendente lite." The purchaser pendente lite theory can prohibit a purchaser from defending their new property in a lawsuit that was already pending when the property was bought. This often leaves new property buyers with no course but to simply observe while their property is subjected to a court judgment and sale in public auction.

This article is a property investor's guide to navigating intervention in a pending lawsuit on recently purchased property. This article also serves to reinforce well-established exceptions to the purchaser pendente lite theory, enabling investors to properly protect their real property investment through intervention. If you or a friend has questions about purchasing property in litigation, please contact Bernhard Law Firm at 786-871-3349 or abernhard@bernhardlawfirm.com. You can also visit us at www.bernhardlawfirm.com.

Background — Interested Parties Should Be Liberally Joined to Lawsuits

Under Florida Rule of Civil Procedure 1.230, anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention. Fla. R. Civ. P. 1.230. The vehicle to intervene is a motion to intervene filed with the court. The aim of Rule 1.230 is to allow liberal joinder of parties. *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957) (holding an intervenor's cross-complaint raising new claims was proper where circumstances rendered it necessary to depart from original complaint in order to

avoid irreparable injury); *Singletary v. Mann*, 157 Fla. 37, 43–44 (Fla. 1946) (intervenor was not estopped from asserting claims contrary to those asserted in original complaint); *Litvak v. Scylla Properties, LLC*, 946 So. 2d 1165, 1173 (Fla. 1st DCA 2006) (holding interested parties may intervene in order to pursue objectives that original named parties fail to pursue, or to protect interests adverse to or incompatible with interests that the original named parties are pursuing, or if their representation is otherwise inadequate).

Under Florida law, "[a] person is entitled to intervene when his interest in the matter is 'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" *Barnhill v. Fla. Microsoft Anti-Trust Litigation*, 905 So. 2d 195, 199 (Fla. 3d DCA 2005) (quoting *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992). Non-named persons who object to the entry of a final judgment affecting their rights should be afforded an opportunity to intervene, since they are subject to being directly affected by the operation and effect of such final judgment. *Id.* (holding non-named class members who objected to settlement agreement in class action should have been afforded intervention).

Liberal Intervention in Property Lawsuits

As to property actions, it has long been the law of the land that "in a suit in rem [i.e. on property], where the court has jurisdiction over the res [the property], and its decree affects the interest in the res of all persons who have an interest in the res, a person who has a lien or claim upon or interest in the res is allowed to intervene and be heard for his own interest in the res." *Krippendorf v. Hyde*, 110 U.S. 276, 282 (1884); *Lefkowitz v. Quality Labor Mgmt., LLC*, 159 So. 3d 147, 147 (Fla. 5th DCA 2014) (reversing denial of motion to intervene where "ends of justice" required property owner be afforded opportunity to defend his interests in property subject to action); *Hart v. Atlantic Intern. Inv. Corp.*, 513 So. 2d 768, 769 (Fla. 5th DCA 1987) (holding a present owner of land affected by substantive issues in a pending litigation [a purchaser pendente lite] is entitled to intervene, where a person becomes a new owner to land subject to pending litigation and desires to participate in determination of amounts owed on land).

In *Hart v. Atlantic*, the appellate court held that where a new property owner had purchased property subject to litigation during the pendency of that litigation, and desired

to participate in the litigation, the new owner was entitled to intervene. 513 So. 2d at 769. The *Hart* court reversed the denial of the motion to intervene thereunder and remanded with instructions that the trial court either grant the motion to intervene or treat it as a motion for substitution and grant it, stating: "[a]s the present owner of the land, [the new owner] is affected by, and is entitled to be heard as to, the substantive issues involved in this litigation." *Id.*

Although Florida law provides for liberal intervention by interested parties, the courts prefer to not be harried by any persons with nominal interest in the lawsuit. Further, substantial litigation could be saved if prospective property investors were forewarned of pending litigation on property for sale.

The Lis Pendens Provides Notice of Pending Litigation

A lis pendens is a publicly recorded document warning potential purchasers that a piece of property is in litigation. The historical purpose of a lis pendens is to put everyone on notice that whoever later buys the property "will stand in the same position as the current owner," and if a valid judgment is properly rendered in litigation, may be subject to that judgment. *Avalon Assocs. of Del. Ltd. v. Avalon Park Assocs., Inc.*, 760 So. 2d 1132, 1134 (Fla. 5th DCA 2000). As held by this Court, "[a] lis pendens primarily serves a notice function, by protecting third-parties from unknowingly 'purchasing a lawsuit.'" *Medical Facilities Dev., Inc. v. Little Arch Creek Properties, Inc.*, 656 So. 2d 1300, 1305 (Fla. 3d DCA 1995). Although a lis pendens may reduce the chances that a third-party purchaser "will somehow extinguish any *equitable* claim the proponent may have upon the property," it does not protect invalid and unsubstantiated legal claims. *Id.* (emphasis added). This provision of notice is the basis of the lis pendens doctrine. *Id*.

The Lis Pendens Doctrine Expands to a Purchaser Pendente Lite Theory

This lis pendens doctrine has expanded into a limited exception to the rule of liberal intervention—the purchaser pendente lite theory. A purchaser pendente lite is a person who bought property while that property was in litigation. The purchaser pendente lite originally restated the common law lis pendens doctrine, providing that because parties to

a lawsuit should not be permitted to withdraw or alienate property under a court's jurisdiction in pending litigation, purchasers who take title to such property are on notice that the property could be affected by that court's judgment in that litigation. *Intermediary Fin. Corp. v. McKay*, 93 Fla. 101, 103 (Fla. 1927). The purchaser pendente lite theory is supported by the maxim ut lite pendent nihil innoveteur, generally meaning that nothing new should complicate a pending fight. Yet, this purchaser pendente lite theory has, at times, been ambiguously applied to deny a purchaser pendente lite from intervening in the pending litigation regardless of the underlying circumstances. *See, e.g., Andresix Corp. v. Peoples Downtown Nat'l Bank*, 419 So. 2d 1107, 1107 (Fla. 3d DCA 1982) (affirming denial of motion to intervene of purchaser pendente lite but failing to provide analysis or explanation on application of lis pendens theory).

There Are Exceptions to the Purchaser Pendente Lite Theory

Despite its regularly overbroad application, the purchaser pendente lite theory is of limited scope and is not a strict bar to any intervention by a purchaser. It is a long-standing and well-established rule that a purchaser pendente lite should be allowed to intervene in a suit over real property if the purchaser asserts that: (i) the purchaser has a superior claim to that of the complainant; (ii) there are indicia of fraud by the original plaintiff; (iii) the original plaintiff's claims to the property or liens thereon are inchoate; *or* (iv) equitable or special circumstances support intervention. The following chain of case law evidences the enduring confirmation of these exceptions:

- *Mellen v. Moline Iron Works*, 131 U.S. 352, 371 (1889) ("Purchasers of property involved in a pending suit may be admitted as parties");
- *De Pass v. Chitty*, 90 Fla. 77, 82 (Fla. 1925) (discussing that the theory is limited to matters between the original parties to the action and has no application to other matters).
- *Intermediary Fin. Corp. v. McKay*, 93 Fla. 101, 104 (Fla. 1927) (noting limitation to pendente lite exception where fraud is charged);
- *Dutcher v. Haines City Estates, Inc.*, 26 F. 2d 669, 669 (5th Cir. 1928) ("It is immaterial that the title was acquired by [the purchaser] pendente lite, as it is valid and cannot be affected by the pending litigation. The [trial] court had jurisdiction to allow the intervention and to render judgment as it did.");

- *Nelson Bullock Co. v. So. Down Dev. Co.*, 132 Fla. 495, 497–98 (Fla. 1938) (affirming intervention by purchaser pendente lite asserting superior interest in property);
- *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957) (reversing denial of intervention and holding trial court had full authority to allow intervention of purchaser pendente lite and adjudicate its new claims, given rule for liberal intervention and that equitable and special circumstances allow intervention of purchaser pendente lite);
- *Freligh v. Maurer*, 111 So. 2d 712, 714–15 (Fla. 2d DCA 1959) (holding a claim cannot by the filing of a lis pendens be given priority over an intervenor);
- *Doyle v. Tutan*, 110 So. 2d 42, 46 (Fla. 3d DCA1959) (holding doctrine of equitable estoppel may be applied against a lis pendens and may support one whose rights are acquired pendente lite);
- *Dunn v. Stack*, 394 So. 2d 1076, 1077 (Fla. 1st DCA 1981) (trial court had jurisdiction to determine issues raised by quiet title claim even though earlier pending suit on title existed, where earlier suit did not purport to litigate the possible adverse interests of all interested persons);
- *Hart v. Atlantic Intern. Inv. Corp.*, 513 So. 2d 768, 769 (Fla. 5th DCA 1987) ("As the present owner of the land, [the new owner] is affected by, and is entitled to be heard as to, the substantive issues involved in this litigation.");
- *McIntosh v. Hough*, 601 So. 2d 1170, 1173 (Fla. 1992) (stating that in circumstances where a purchaser pendente lite obtained property in part on reliance on fraudulent documents, the normal lis pendens bar does not apply); and
- *Bymel v. Bank of America, N.A.*, 2015 WL 1044247 at *2 (Fla. 3d DCA 2015) (holding trial court abused its discretion in denying short-sale purchaser pendente lite's motion to intervene in pending foreclosure because purchaser was not a total stranger to foreclosure).

Limiting the Purchaser Pendente Lite Theory Makes Legal Sense

These limitations on the purchaser pendente lite theory are sensible because a lis pendens alone cannot *ipso facto* insulate a plaintiff from any intervention or challenge to the propriety of its claims. As the First District Court of Appeal has stated:

> "The filing of a notice of lis pendens does not in itself create any interest in the property, nor does it create any superior rights for the litigant who filed the notice."

USA Fin. Servs., Inc. v. Steward, 588 So. 2d 299, 302 (Fla. 1st DCA 1991). In *Steward*, the First District held that the trial court was in error in concluding that a plaintiff's suit and lis pendens had the effect of conferring some right or interest in real property, or of preventing another person from subsequently gaining priority over plaintiff by perfecting his interest first. *Id.* The First District reversed the trial court's order dismissing the claim and remanded for entry of final judgment in favor of the claimant. *Id.* at 303.
As the *Freligh* court—the court cited in *Andresix*—similarly stated:

> "It is obvious that a lis pendens is not the equivalent of a decree establishing a lien and that the plaintiff in this cause was at the commencement of the suit endowed with nothing more than a justiciable right."

Freligh v. Maurer, 111 So. 2d 712, 715 and n.3 (Fla. 2d DCA 1959); *see also Nat'l Bank of Sarasota v. Dugger*, 335 So. 2d 859, 861 (Fla. 2d DCA 1976) (reversing finding that lis pendens itself created superior interest in property, and holding that a recorded mortgage on motel property did not have priority over a subsequent mortgage on the same property where the second mortgagee was the first to perfect his interest by filing a financing statement). In *Freligh*, the appellate court held that where an intervenor-defendant's takes title before a plaintiff recorded its interest in a lien, the intervenor-defendant title was superior to any interest of the plaintiff. *Id.* Thus, the *Freligh* court held that the intervenor-defendant's motion for summary judgment against lienholder-plaintiff should have been granted, thereby reversing the trial court's order that gave judgment and priority to the lien holder under the lis pendens. *Id.* at 715.

Limiting the Purchaser Pendente Lite Theory Makes Policy Sense In Today's Real Estate Market

The purchaser pendente lite theory is grounded on the policy that parties to a lawsuit should not be permitted to withdraw or alienate the subject matter thereof pending litigation. *See Intermediary Fin. Corp. v. McKay*, 93 Fla. 101, 103–04 (Fla. 1927) (discussing limitation to pendente lite theory where fraud is charged); *De Pass v. Chitty*, 90 Fla. 77, 82

(Fla. 1925) (notice arising from lis pendens does not operate beyond prayer for relief, and "is also limited to those matters in dispute between the parties to the action, and has no application to matters not in issue and not pertinent to any issue and which cannot be determined in the proceeding."); *Dunn v. Stack*, 394 So. 2d 1076, 1077 (Fla. 1st DCA 1981) (trial court had jurisdiction to determine issues raised by quiet title claim even though earlier pending suit on title existed, where earlier suit did not purport to litigate the possible adverse interests of all interested persons).

However, this antiquated doctrine has lost any significant meaning in today's foreclosure environment, where the courts regularly allow and incentivize junior lienholders to foreclose and alienate property through judicial sale despite pending senior lien foreclosures. In fact, many investors take title to property specifically through a court-sanctioned junior lien judicial sale during the pendency of a senior mortgage foreclosure action. Thus, these investors are not strangers to the foreclosure and should not be treated as such. *Bymel v. Bank of America, N.A.*, 2015 WL 1044247 at *2 (Fla. 3d DCA 2015) (holding trial court abused its discretion in denying short-sale purchaser pendente lite's motion to intervene in pending foreclosure because purchaser was not a total stranger to foreclosure). Instead, these investors should be treated as the successor-in-interest to the prior owner or the association, and given the same opportunity to defend as those parties. *Id.*; *Hart*, 513 So. 2d at 769 (holding a purchaser pendente lite is entitled to intervene, where a person becomes a new owner to land subject to pending litigation and desires to participate in determination of amounts owed on land); § 718.116(1)(f), Fla. Stat. (2014) (an association and its successors are deemed a proper party to intervene in any foreclosure proceeding to seek equitable relief). Given that the current foreclosure environment has undermined the policy underlying the purchaser pendente lite theory, and that the courts should incentivize third-party purchasers to buy property at the numerous junior lien foreclosure sales occurring every day in Florida, a trial court abuses its discretion in denying intervention without cause or without full analysis of the purchaser pendente lite theory and its exceptions.

In sum, there are sensible exceptions to the purchaser pendente lite theory, and they include that: (i) the purchaser has a superior claim to that of the complainant; (ii) there are indicia of fraud by the original plaintiff; (iii) the original plaintiff's claims to the property or liens thereon are inchoate; *or* (iv) equitable or special circumstances support intervention.

A Court Abuses Its Discretion by Refusing to Acknowledge Exceptions to the Purchaser Pendente Lite Theory in Ruling on a Motion to Intervene

As discussed above, a lis pendens does not *ipso facto* prevent a purchaser from intervening in a lawsuit. Where, like in *Hart v. Atlantic*, an investor moves to intervene in litigation on their new property, the investor's interests are of such a direct and immediate character that he or she will either gain or lose by the direct legal operation and effect of a judgment. *Hart v. Atlantic Intern. Inv. Corp.*, 513 So. 2d 768, 769 (Fla. 5th DCA 1987) (holding a present owner of land affected by substantive issues in a pending litigation [a purchaser pendente lite] is entitled to intervene, where a person becomes a new owner to land subject to pending litigation and desires to participate in determination of amounts owed on land). Given the liberal policy toward joinder and the nature of an investor's interest, the trial court abuses its discretion by denying the motion to intervene without a sound basis to do so. Simply reciting "purchaser pendente lite" does not provide that basis. A trial court is obligated to consider a new property owner's allegations that (i) she has a superior claim to that of the complainant; (ii) there has been misrepresentation; (iii) the other claimants' interests are inchoate or unclear; and (iv) equitable or special circumstances support intervention. Should a trial court disregard these allegations and deny intervention without an overwhelming basis, the court abuses its discretion under Florida law, subjecting the denial of intervention to reversal.

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