

Lien Away as It's an Absolutely Protected Right in California

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The California Court of Appeal recently held that the recording of a lis pendens in connection with a mechanic's lien foreclosure action is protected by the litigation privilege and cannot support a slander of title claim, even if the underlying lien claim lacked any evidentiary merit. As a practical matter, this holding makes clear that contractors, suppliers and other mechanic's lien claimants working on private projects should record their mechanic's liens (and, later, a lis pendens as part of their foreclosure actions) when in doubt about being paid given that their recording of such instruments is an absolutely protected activity that does not give rise to a property owner's cross-claim for slander of title.

In *Alpha & Omega Development, LP v. Whillock Contracting, Inc.*, 11 C.D.O.S. 13552 (Ct. App., Nov. 2, 2011), a contractor unsuccessfully tried to foreclose on a mechanic's lien for about \$1.5 million owed by the project owner for unpaid work on a condominium project. In connection with its action on the mechanic's lien, the contractor recorded a lis pendens, which the owner successfully moved to expunge after the trial court determined that the related mechanic's lien lacked merit.

Following settlement of the underlying payment dispute, the owner filed its own lawsuit against the contractor for slander of title, alleging that the contractor had "willfully, wrongfully, without justification and without privilege" recorded a lis pendens that damaged the owner. In response, the contractor filed an anti-SLAPP motion, asserting that the owner's slander of title action should be dismissed because the contractor's recording of the lis pendens was protected by the litigation privilege. The trial court granted the contractor's anti-SLAPP motion, dismissing the owner's slander of title action, and the owner appealed.

On appeal, the owner contended that the contractor's anti-SLAPP motion should not have been granted. Specifically, the owner argued it had established a probability of prevailing on its claim for slander of title because it had proved the lis pendens was recorded without privilege – a necessary element for a slander of title cause of action. In ruling, the *Alpha & Omega* court first discussed California Civil Code section 47, which establishes an absolute privilege for publications filed in judicial proceedings (the litigation privilege). Section 47(b)(4) provides that "[a] recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized by law." The court summarized this subsection as follows: "the litigation privilege codified in Civil Code section 47, subdivision (b) applies if the lis pendens (1) identifies an action 'previously filed' in a court of competent jurisdiction that (2) affects title or right to possession of real property."

The *Alpha & Omega* court then ruled that the contractor's lis pendens met the requirements of Civil Code section 47(b)(4), because the lis pendens properly identified the underlying foreclosure action and also "clearly affected title to real property." In so ruling, the court rejected as non-binding *dicta* language in the case of *Palmer v. Zaklama*, 109 Cal. App. 4th 1367 (2003), that the owner pointed to as creating a further exception to the litigation privilege when the claim underlying the lis pendens "lacked evidentiary merit."

Thus, the *Alpha & Omega* court affirmed the trial court's dismissal of the owner's slander of title action, holding that the recording of a lis pendens is an absolutely protected right under the litigation privilege, and there is no exception to this privilege "based on the lack of 'evidentiary merit[.]'"

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