

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

PHILADELPHIA WATERFRONT PARTNERS,	:	JANUARY TERM, 2007
L.P., PHILADELPHIA WATERFRONT	:	
DEVELOPMENT, LLC, CHARLES L. KAMPS,	:	NO. 03811
III, SCOTT A. BLOW, and PATRICK T.	:	
HANLEY,	:	COMMERCE PROGRAM
	:	
Plaintiffs,	:	Control No. 021118
	:	
v.	:	
	:	
CHURCHILL DEVELOPMENT GROUP, LLC,	:	
CHURCHILL RESIDENTIAL DEVELOPMENT,	:	
L.P., CHURCHILL COMMERCIAL	:	
DEVELOPMENT, L.P., and JOSEPH F.	:	
LOGUE, JR.,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 4<sup>th</sup> day of June, 2007, it is **ORDERED** that defendants' Renewed Emergency Motion to Strike Lis Pendens is **GRANTED**. The lis pendens filed by plaintiffs against 7777 State Road, Philadelphia, Pennsylvania is hereby **STRICKEN**. The Prothonotary is directed to take all necessary steps to remove the lis pendens of record.

**BY THE COURT,**

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**MARK I. BERNSTEIN, J.**

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CHURCHILL DEVELOPMENT GROUP, LLC,	:	
CHURCHILL RESIDENTIAL DEVELOPMENT,	:	
L.P., CHURCHILL COMMERCIAL	:	
DEVELOPMENT, L.P., and JOSEPH F.	:	
LOGUE, JR.,	:	
	:	
Defendants.	:	

**OPINION**

At the commencement of this action on January 30, 2007, plaintiffs filed a lis pendens against real property located at 7777 State Road. Defendants filed an Emergency Motion to Strike Lis Pendens. The court held a hearing on the Emergency Motion on May 24, 2007.

Prior to August 18, 2006, the individual plaintiffs, Charles L. Kamps III, Scott A. Blow, and Patrick Hanley owned 75 % of the membership interests in Philadelphia Waterfront Development, LLC (“PWD”). They were also the only Class C limited partners of Philadelphia Waterfront Partners, L.P. (“PWP”). PWD was PWP’s managing partner. PWP’s primary assets were the rights it held under two options to purchase, under very favorable conditions, property located at 7777 State Road. PWP intended to purchase and develop the property for commercial and residential use. The options to purchase were to expire in February, 2007.

On August 18, 2006, defendant Churchill Development Group, LLC (“CDG”)<sup>1</sup> purchased 100% of the membership interests in PWD and 75% of the Class C interests in PWP from the three individual plaintiffs.<sup>2</sup> In exchange for these interests, PWP gave the individual plaintiffs Promissory Notes in the amount of \$10,500,025,<sup>3</sup> a Mortgage on the residential portion of the Property as security for those Notes, and the option to convert this debt into 25% of the profits from the development of 7777 State Road.<sup>4</sup> Thus CDG became manager of PWD.<sup>5</sup>

The Purchase Agreement between plaintiffs and defendants had specific deadlines as follows:

1. By October 15, 2006, plaintiffs were required to provide PWP’s filed 2005 tax returns.
2. By November 15, 2006, PWP were required to obtain a loan commitment for the acquisition of 7777 State Road.
3. By December 15, 2006, PWP were required to close on the purchase of 7777 State Road.<sup>6</sup>

The Purchase Agreement provided that PWP had an additional thirty days in which to complete its tasks if the individual plaintiffs failed timely to provide the tax returns.<sup>7</sup> The

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<sup>1</sup> CDG is controlled by defendant Joseph Logue.

<sup>2</sup> Purchase Agreement between CDG and individual plaintiffs dated August 18, 2006, attached as Exhibit 2 to plaintiffs’ Response to Renewed Emergency Motion to Strike Lis Pendens (“Purchase Agreement”), ¶ 2(a).

<sup>3</sup> This amounts reflects the \$12 million purchase price less expenses.

<sup>4</sup> Notes of Testimony dated May 24, 2007 (“N.T.”), pp. 12-4. This option must be exercised nine months from the date of closing on the property.

<sup>5</sup> Purchase Agreement, ¶ 2(c).

<sup>6</sup> Purchase Agreement, ¶ 3(a).

<sup>7</sup> Purchase Agreement, ¶ 3(a)(iv).

Agreement further provided that, if PWP failed timely to complete either of its tasks, 75% of the PWD membership interests and 50% of the PWP Class C interests automatically reverted to the individual plaintiffs. If the interests reverted, defendants could repurchase the reverted interests for an additional \$12 million.<sup>8</sup>

Plaintiffs claim they timely provided the tax returns. They also claim that defendants failed to obtain a loan commitment by November 15<sup>th</sup> and, therefore, an automatic reversion occurred, so the individual plaintiffs again control PWD and PWP. On November 17<sup>th</sup>, plaintiffs notified defendants of their claim of reversion, which defendants refuse to acknowledge.<sup>9</sup>

Defendants claim plaintiffs failed to provide properly filed tax returns for PWP and all deadlines were therefore automatically extended thirty days.<sup>10</sup> Defendants further claim that they were unable to obtain a loan commitment in PWP's name because of the disarray of its financial records. To obtain a commitment by the extended deadline of December 15<sup>th</sup>, defendants assigned PWP's right to purchase the Property to CDG, which obtained a loan commitment.<sup>11</sup>

On December 4<sup>th</sup>, defendants informed plaintiffs of this assignment, the financing obtained, and their intention to close on the property.<sup>12</sup> Plaintiffs did not object to the closing.<sup>13</sup>

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<sup>8</sup> Purchase Agreement, ¶ 3(a) & (b).

<sup>9</sup> Letter from Henry E. Van Blunk to CDG/Logue dated November 17, 2006, attached as Exhibit B to plaintiffs' Complaint.

<sup>10</sup> Letter from CDG to individual plaintiffs dated October 13, 2006, attached as Exhibit 5 to defendants' Renewed Emergency Motion to Strike Lis Pendens.

<sup>11</sup> Letter from CDG to individual plaintiffs dated December 4, 2006 attached as Exhibit 1 to plaintiffs Response to Renewed Emergency Motion to Strike Lis Pendens.

<sup>12</sup> *Id.*

<sup>13</sup> Email from Henry Van Blunk to Juhan Runne dated December 14, 2006, attached as Exhibit 1 to defendants' Renewed Emergency Motion to Strike Lis Pendens, in which plaintiffs' counsel acknowledges that the closing is to occur shortly.

Plaintiffs fully understood that the property would be owned by CRD/CCD after the closing. Prior to the closing, plaintiffs worked with defendants to draft replacement Notes to reflect CDG and CRD/CCD's ownership and control of the property, as well as plaintiffs' interest in the project.<sup>14</sup> CRD and CCD closed on the property. Defendants claim that since they complied with the terms of the Purchase Agreement, no reversion occurred. Defendants are now trying to develop the property as planned, but the lis pendens prevents them from doing so.

Plaintiffs knowingly and intentionally chose to wait to commence this action until after defendants exercised the option to purchase 7777 State Road in CRD/CCD's name.<sup>15</sup> On January 30<sup>th</sup>, two and a half months after the alleged reversion took place, plaintiffs filed a Writ of Summons and a lis pendens against the property. Plaintiffs did not file a Complaint until April 10<sup>th</sup>, and then filed an Amended Complaint on May 22<sup>nd</sup>. In their Amended Complaint, plaintiffs seek to: rescind and nullify the transfer of the property rights from PWP to CRD/CCD; impose a constructive trust over 7777 State Road; and enjoin defendants' use of the loan proceeds.<sup>16</sup>

CDG, CRD, CCD and Logue have moved to strike the lis pendens because it prevents them from using the construction loan funds. They claim that without those funds, they will not be able to get a building permit. Unless they begin construction, their zoning permit will expire on June 30, 2007, and they will then be unable to develop the property. Defendants' Motion to Strike raises the question of whether plaintiffs' lis pendens was properly filed.

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<sup>14</sup> *Id.* The replacement Notes from PWP, CDG and CRD are dated December 14, 2006, and are attached as Exhibit 3 to defendants' Renewed Emergency Motion to Strike Lis Pendens. At the hearing, the parties discussed who held the original replacement Notes, and it appeared that defendants' prior counsel did. Current defense counsel agreed to send plaintiffs' counsel the originals. N.T., pp. 39, 84.

<sup>15</sup> N.T., p. 58.

<sup>16</sup> Amended Complaint. Plaintiffs further assert claims for: breach of fiduciary duty against Logue and another individual, Douglas Harris, who acted as counsel; fraud and civil conspiracy against Logue and Harris; breach of the Purchase Agreement by CDG and Logue; and unjust enrichment against all defendants.

As the Superior Court instructed, “lis pendens is based in common law and equity jurisprudence, rather than in statute, and is wholly subject to equitable principles.”<sup>17</sup> Our Superior Court has clearly said:

Lis pendens has no application except in cases involving the adjudication of rights in specific property. Thus, a party is not entitled to have his case indexed as lis pendens unless title to real estate is involved in litigation. Lis pendens may not be predicated upon an action seeking to recover a personal demand. . . . Lis pendens cannot be used to assert a claim that a conveyance of real estate has been made in fraud of the grantor’s creditors. Such a claim must first be made in an equity action to set aside the conveyance.<sup>18</sup>

The Superior Court further instructed:

If the operation of the doctrine should prove to be harsh or arbitrary in particular instances, equity can and should refuse to give it effect, and, under its power to remove a cloud on title, can and should cancel a notice of lis pendens which might otherwise exist. Thus, the lower court must balance the equities to determine whether the application of the doctrine is harsh or arbitrary and whether the cancellation of the lis pendens would result in prejudice to the non-petitioning party.<sup>19</sup>

One federal district court correctly summarized Pennsylvania law that it is plaintiffs’ burden of proof to show ab initio that they were entitled to file a lis pendens:

Because a lis pendens is only applicable if the title of the property at issue can be affected by the pending action, Pennsylvania courts generally only allow a lis pendens to stand when specific performance relating to the title of the property in question is an available remedy. This is consistent with the fact that under Pennsylvania law the doctrine of lis pendens must be strictly construed. The burden of demonstrating that specific performance is an available remedy, which must include a showing that money damages alone would be an inadequate remedy, rests on the party seeking that remedy.<sup>20</sup>

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<sup>17</sup> Rosen v. Rittenhouse Towers, 334 Pa. Super. 124, 129, 482 A.2d 1113, 1116 (1984).

<sup>18</sup> Psaki v. Ferrari, 377 Pa. Super. 1, 3, 546 A.2d 1127, 1128, n.1 (1988).

<sup>19</sup> Rosen, 334 Pa. Super. at 129-130, 482 A.2d at 1116.

<sup>20</sup> Ross v. Canada Life Assurance Co., 1995 U.S. Dist. LEXIS 18623, 5-6 (E. D. Pa. 1995).

Courts in other jurisdictions have reached similar conclusions under parallel laws.<sup>21</sup>

A lis pendens is a cloud on title, and its practical effect is to impede the development of real property. It is analogous to another equitable remedy, the preliminary injunction, because it effectively prevents, or enjoins, the record owner of real property from transferring its interest in the property for full market value, or, in this case, from undertaking construction. Therefore, the party who filed a lis pendens bears the burden of proof, as does the party asking for a preliminary injunction. To justify their lis pendens, plaintiffs must show:

- 1) that the lis pendens is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
- 2) that greater injury would result from lifting a lis pendens than from letting it remain;
- 3) that a lis pendens will properly restore the parties to their status quo ante;
- 4) that they are likely to prevail on the merits of their claims;
- 5) that the lis pendens is reasonably suited to abate the offending activity; and,
- 6) that a lis pendens will not adversely affect the public interest.<sup>22</sup>

Plaintiffs have failed to satisfy their burden of proof. Plaintiffs have not shown any reasonable likelihood of success on the merits of the claim that a reversion occurred because defendants were late in obtaining a loan commitment for 7777 State Road. Instead, it is likely that plaintiffs will be found to have intentionally and knowingly waived strict adherence to the

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<sup>21</sup> See Dickey v. Auer, 2006 U.S. Dist. LEXIS 31707 \* 10 (E. D. Cal. 2006) (“Unlike most other motions, when a motion to expunge is brought, the burden is on the party opposing the motion to show the existence of a real property claim.”); Founders C.D., LLC v. Bray, 2004 Conn. Super. LEXIS 1 \*2 (2004) (“In an application to discharge a lis pendens, pursuant to General Statutes § 52-325b, the burden of proof is switched to the plaintiffs to show that there is probable cause to sustain their claim.”); Kowal v. Clark, 2000 Del. Ch. LEXIS 88 \*10 (2000) (“In order to defeat seller’s Motion to Cancel the Notice of Lis Pendens, buyers must prove only a probability that final judgment will be entered in their favor.”); Medical Facilities Dev. v. Little Arch Creek Props., 675 So. 2d 915, 917 (Fla. 1996) (“The proponent of a notice of lis pendens has the burden of proof to show a fair nexus between the property and the dispute.”)

<sup>22</sup> See Warehime v. Warehime, 580 Pa. 201, 209-10, 860 A.2d 41, 46-47 (2004) (setting forth requirements for a preliminary injunction.) The public interest is not implicated in this private dispute over who controls the entity that owns the 7777 State Road.

Purchase Agreement's deadlines by allowing defendants to proceed with the purchase of the property before filing suit. It may even be found that they encouraged defendants to complete the transaction.

Neither have plaintiffs shown that the lis pendens filed on January 30<sup>th</sup> was necessary to prevent any harm. Plaintiffs knew the "harm" of which they complain was occurring as early as mid-November, when defendants failed to obtain a commitment and refused to acknowledge the alleged reversion. Plaintiffs knew of the alleged "harm" in early December when they were told that the right to purchase 7777 State Road had been assigned from PWP to CDG and a loan commitment had been obtained in CDG and CRD's names. Plaintiffs chose to sit on their rights and permitted the closings to occur because they did not want to lose their only chance to purchase the property by losing the loan that defendants had obtained.<sup>23</sup> Only after the purchase of the property was completed did plaintiffs raise any objection to procedure. Plaintiffs' conduct constitutes laches.<sup>24</sup>

Plaintiffs have not shown that the lis pendens actually restored the status quo ante, nor that it was reasonably suited to abate the offending activity. The lis pendens does not return control of PWP to plaintiffs, nor does it otherwise effectuate the reversion.

Plaintiffs' claimed harm can be adequately addressed by money damages without any transfer of title to the property. Even if plaintiffs can prove that a reversion occurred, defendants are entitled under the Purchase Agreement to repurchase the reverted interests for an additional \$12 million.

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<sup>23</sup> N.T., p. 58. Indeed, by negotiating with defendants regarding replacement Notes from CDG and CRD, plaintiffs assented to the subsequent purchase of the property by those entities.

<sup>24</sup> "Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." Stilp v. Hafer, 553 Pa. 128, 132, 718 A.2d 290, 292 (1998).



The equities which must be balanced demand that the lis pendens be stricken. It is clear that greater harm will result from continuation of the lis pendens than by striking it. The lis pendens prevents defendants from developing the property which benefits all parties. Plaintiffs' interests are fully protected by the Notes and Mortgage. After the Mortgage is recorded, the world is on notice of their interest in the Property.

Had plaintiffs regained control of PWP on November 16<sup>th</sup> when the reversion allegedly occurred, they would not have been able to obtain financing and purchase the property before the options expired in February, 2007.<sup>25</sup> They would now own 75% of nothing. If the lis pendens is lifted so that defendants can proceed with development of the property, plaintiffs may have a 25% interest in a viable project.

Because title to real property is not truly at issue in this case, because the equities do not favor continuation of the lis pendens, and because plaintiffs have failed to meet their burden of proof, plaintiffs' lis pendens is stricken.

**BY THE COURT,**

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**MARK I. BERNSTEIN, J.**

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<sup>25</sup> N.T., pp. 62-3. Plaintiffs admitted they did nothing to obtain financing, after the alleged reversion occurred, except meet with a potential purchaser of the option rights. This person never made any commitment to provide the \$8 million that plaintiffs claim they needed.