Buffalo Law Review

Volume 12 | Number 1 Article 52

10-1-1962

Personal And Real Property—Use of Lis Pendens in an Action to Enjoin a Nuisance

Gerald S. Lippes

USE OF LIS PENDENS IN AN ACTION TO ENJOIN A NUISANCE

Because defendant collected, diverted, and dumped surface water from his property onto plaintiff's adjacent land, plaintiff filed a complaint praying for a mandatory injunction to compel defendant to eliminate the conduits through which the surface water was diverted and demanding damages and other relief. In addition, a notice of pendency (lis pendens) was filed by plaintiff in pursuance to section 120 of the Civil Practice Act on the theory that the judgment he sought would limit the "use" defendant could make of his land. Defendant moved to have it cancelled. Both the lower and intermediate courts agreed that the lis pendens was permitted by section 120.[1] On appeal, *held*, reversed, with three judges dissenting. A judgment in accordance with the nuisance cause of action stated in the complaint would not affect "the title to, or the possession, use or enjoyment of real property." *Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302, 178 N.E.2d 717, 222 N.Y.S.2d 316 (1961).

The doctrine of lis pendens is founded on public policy and convenience to prevent litigants from giving rights to others during the litigation, so as to affect the court's power to enforce its judgment. It guarantees the finality of the decision and preserves the property so that the pending suit may not be defeated by successive alienations and transfers of title. There are also situations where plaintiff's rights in the property may be conclusively defeated depriving him of any recourse; therefore, the order preserves his rights. The object of filing is not necessarily to give notice but to terminate litigation and prevent new suits by binding not only the litigants but also those who derive title from them.[2] These were the common law purposes behind granting a lis pendens, which the New York Legislature modified by passing section 120. The statute made the right to file dependent on the purpose of the suit which was to be determined from the complaint, and if the purposes affect rights other than those specified in the statute, the notice should be cancelled.[3] Therefore, if the cause of action was not to recover judgment affecting "the title to, or the possession, use, or enjoyment" of the defendant's real property as the claim was described in the complaint, no lis pendens could issue.[4]

What does the Court consider to be an action affecting the title, use, possession or enjoyment of real property? Where plaintiff brought an action for money damages and to restrain defendant from using a catch basin and

1. N.Y. Civ. Prac. Act § 120:
In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property, if the complaint is verified, the plaintiff when he files his complaint, or at any time afterwards before final judgment, may file in the clerk's office of each county where the property is situated a notice of the pendency of the action, stating the names of the parties and the object of the action, and containing a brief description of the property in that county, affected thereby . . . .
2. Holbrook v. New Jersey Zinc Co., 57 N.Y. 616 (1874).
3. Bissell v. Taylor, 229 App. Div. 369, 241 N.Y. Supp. 717 (4th Dep't 1930).
4. McManus v. Weinstein, 108 App. Div. 301, 95 N.Y. Supp. 724 (1st Dep't 1905).

pipe located on defendant's lands but emptying on plaintiff's property, one court posited that such a claim does not meet the requirements described in section 120.[5] The same conclusion was reached in an action for trespass where a drain pipe discharged water onto plaintiff's land,[6] and in many other similar fact situations.[7] In none of these situations did plaintiff claim a right in the defendant's land which was recognized in section 120. These decisions made it clear that rights derived from nuisance, trespass, and waste do not give plaintiff a direct property interest in defendant's land.

These precedents strongly support the decision of the Court in the instant case. Here the complaint alleged no more than a nuisance, and the relief requested would not give plaintiff a right in defendant's property, as described in section 120. The majority reasoned:

> Plaintiffs are claiming no interest in defendants' tract of land, they merely seek to prevent defendants from committing a wrongful act against plaintiffs. It does not give a right to file a lis pendens that the wrong is perpetrated by defendants in order to benefit their own real estate.

The Court went on to declare that the "usual object" of filing lis pendens is to protect plaintiff's rights which may be lost in the event of transfer. However, here as the majority suggests, plaintiff's motives are to embarrass defendant or to provide security for the judgment. These considerations were not within the contemplation of the legislature, and in any event, the nuisance could not be maintained by a purchaser any more than by a defendant. The dissent based its decision on the word "use"; "the complaint seeks to restrict the use to which the defendant's property is being put." However, although framing a complaint so as to bring it within the statute is said to be possible when there has been a diversion of water causing a nuisance on plaintiff's land,[8] this type of "use" has been held not to be the "use" meant in the statute. The minority, stressing the efficacy of allowing the lis pendens in this case, relies on its use to protect the purchaser (by giving notice) as well as the plaintiff. This reason is not precedented, and it is not one of the primary common law purposes for granting lis pendens.

The courts have ruled that the statute should be interpreted strictly,[9]

5. Meissner v. Van Iderstine, 206 Misc. 418, 131 N.Y.S.2d 518 (Sup. Ct. 1952).
6. Schlaifer v. Shelby-Coleridge, 206 Misc. 315, 131 N.Y.S.2d 462 (Sup. Ct. 1954).
7. O'Connor v. Long, 283 App. Div. 887, 129 N.Y.S.2d 905 (2d Dep't 1954) (mem.) (action to compel defendant to remove encroachments on plaintiff's land emanating from defendant's land); Starkie v. Nib Construction Corp., 235 App. Div. 699, 255 N.Y. Supp. 401 (2d Dep't 1932) (mem.); McManus v. Weinstein, 108 App. Div. 301, 95 N.Y. Supp. 724 (1st Dep't 1905); Ackerman v. True, 44 App. Div. 106 (1st Dep't 1899); Gregdon Corp. v. Fierro, 206 Misc. 530, 134 N.Y.S.2d 128 (Sup. Ct. 1954); Pfeil v. Trischett, 137 N.Y.S.2d 668 (Sup. Ct. 1954); Cullen v. Anchor Building Lynbrook Corp., 134 N.Y.L.J. 13 (Sup. Ct. 1955) (not otherwise reported) (defendant deposited soil on plaintiff's adjoining property).
8. Anthony v. Huntley Estates, 137 N.Y.S.2d 664 (Sup. Ct. 1954).
9. Weisinger v. Rae, 19 Misc. 2d 341, 188 N.Y.S.2d 10 (Sup. Ct. 1959).

since it has modified the common law rule. The minority view would call for an extension of the scope of the notice which under a restrictive interpretation would appear to be unwarranted. The protection afforded by lis pendens would not aid the plaintiff in this matter. As hereinbefore mentioned, whether the lis pendens is continued or not will have no bearing on the effectiveness of the court's decision concerning the nuisance, and plaintiff's rights acquired by a favorable judgment can not be lost by a transfer of defendant's interests. Conversely, the notice to a purchaser of the encroachment is obvious without the aid of a pendency in action. The Court's construction of the word "use" is reasonable. If it is extended, as the minority advocates, to cases where the claim is simply a nuisance, the door will be open for its use in all cases, with the attendant ill of injuring marketability, even where the cause of action is remotely associated with the land, since the possession and title to the land are not crucial to the judgment. This would not be consonant with the purposes of the statute to prevent the alienation of the res, which would cause the decision to be ineffective. Certainly it would benefit both the litigants and the bench to take notice of the advantageous results of a lis pendens order, such as putting a purchaser on notice by making plaintiff's claim a public record for all to see. However, as previously mentioned, affirming the order would not effectuate the relevant considerations.

G. S. L.

TAXATION

APPORTIONMENT OF ESTATE TAXES AMONG INDIVIDUAL AND CHARITABLE LEGATEES

A codicil to a will provided that all taxes, including those on $1,050,000 in pre-residuary gifts, were to come from the $17,500,000 residue. The residue was to be equally divided between a charitable trust, which enjoyed a charitable exemption, and three individual trusts. Section 124 of the New York Decedent Estate Law provides that, where express provisions of the will are not to the contrary, the residue will be apportioned and taxes paid out of the individual gifts. Surrogate's Court held that section 124 applied to the estate and death taxes attributable to the residue, and also that income during the time that the estate was being settled be paid according to ratios established after apportionment and tax. A provision of the will directed that taxes on pre-residuary gifts be deducted from the residuary estate prior to computation of residuary shares. The intermediate court modified the Surrogate's Court determination by ordering that during the period of administration, the ratios set up in the will be used to determine the payment of income in accordance with section 17-b of the New York Personal Property Law. On appeal, *held*, affirmed. The testator did not expressly state that he did not want section 124 to apply and thus did not rule out apportionment. So, apportionment must