IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV (2024)

DUSTIN PETERSON and ANDRA ERBAR,

Plaintiffs/Appellants,

vs.

LAWRENCE E. WOLF and RUTH M. WOLF,

Defendants/Appellees,

and

LOAN DEPOT.COM, LLC,

Interested Party.

Case No. 122,515

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, DISTRICT JUDGE

AFFIRMED

Maria Tully Erbar
MARIA TULLY ERBAR, P.C.
Oklahoma City, Oklahoma — For Plaintiffs/Appellants

T. Carter Steph
T. CARTER STEPH, PLLC
Oklahoma City, Oklahoma — For Defendants/Appellees

OPINION ON REMAND BY GREGORY C. BLACKWELL, JUDGE:

¶1 Dustin Peterson and Andra Erbar (sellers), entered into a contract to sell a residential lot in Oklahoma City to Lawrence and Ruth Wolf (buyers) in August

2022. The buyers agreed to a purchase price of $319,000 and paid an earnest money deposit of $3,200. Ultimately, the sale was not completed based on the parties' inability to reach an agreement regarding treatments, repairs, and replacements (TRRs), as the contract required. In a prior suit—Oklahoma County No. CJ-2022-4756—the buyers sued for return of their earnest money and to require the sellers to execute a release of contract. The buyers simultaneously filed a lis pendens in the county records. The sellers counterclaimed for anticipatory repudiation, breach of contract, and tortious breach of contract. In their prayer for relief, the sellers sought specific performance of the contract at issue.

¶2 The buyers moved for summary judgment. Prior to the summary judgment hearing, the sellers filed a motion to discharge the lis pendens. The court granted summary judgment in favor of the buyers. The journal entry for summary judgment reflected that the lis pendens issue was moot. The sellers filed a motion to reconsider, alleging, among other things, that the lis pendens should be discharged. The court denied the motion to reconsider as to the summary judgment order but stated that the sellers "shall be allowed to have their Motion to Discharge Lis Pendens set for hearing before this court." The sellers appealed the grant of summary judgment in Supreme Court Case No. 121,625. However, the sellers withdrew their motion to discharge the lis pendens at the time they filed the appeal.

¶3 In that case, this Court held that the trial court properly granted summary judgment in favor of the buyers, finding that the contract perished by its own

terms because the parties failed to reach an agreement on the TRR. As none of the sellers' twenty-one allegations of error related to the release of the lis pendens, no issue related to the lis pendens was addressed in the prior appeal. The sellers sought certiorari review on August 5, 2024. The request was unanimously denied on January 13, 2025. Mandate issued February 5, 2025.

¶4 In January 2024, while the prior appeal was ongoing, the sellers filed a new action related to this same property as a completely separate case (CJ-2024-114), which was randomly assigned to a different trial judge. In the new action, the sellers, pleading claims for quiet title and slander of title, sought the removal of the same lis pendens that was at issue in the prior case and damages for the buyers' alleged refusal to release the same. The sellers specifically alleged that the buyers "wrongfully filed" the lis pendens and that they had demanded that the buyers execute and file a "Release of Lis Pendens" but the buyers had refused. Such refusal, according to the sellers, "caused further damages ... by preventing [sellers'] quiet enjoyment and exclusive right to convey their property." Doc. 1, *Petition*, 2. As to the question of slander of title, the sellers pled special damages "because [sellers] have been unable to sell the Property." *Id.* at 3.

¶5 The buyers filed a motion to dismiss, alleging that the lis pendens was before the trial court on three separate motions, was before this Court on appeal, and that the sellers failed to attach a copy of the lis pendens to their petition or otherwise alert the court in the new case that there was previous litigation related to the subject property. In their response, the sellers argued that "even if [buyers]

perhaps had a right to file the lis pendens initially—the basis for such a right has evaporated." Doc. 3, *Plaintiffs' Response and Objection to Motion to Dismiss*, 4. That is, the sellers argued that because the buyers' earnest money had apparently been returned, the buyers were required to execute a release of the lis pendens. The sellers also argued that "[t]he earlier lawsuit did not justify a *lis pendens*. It was not a lawsuit about title to real property. Nor did it even actually involve real property. It was, instead, a contract lawsuit about whether $3,000 of earnest money was to be returned upon failure of the contract." *Id.* at n.4.

¶6 The trial court held a hearing and found as follows:

> I find that this matter is substantially the same as the previous matter. To say that the subject property was not the subject property in the prior case is a misstatement of the facts, or worse, disingenuous. This obviously was the subject of the contract for a real estate purchase that was the very subject of the entire suit in the previous case .... [T]here is nothing that is going to prohibit the litigants from trying to bring this issue before the Court in the prior suit if there was a procedure for them to do so. There has never been a denial by this Court of any subsequent motion to either reset or refile or amend or supplement the prior motion [to discharge the lis pendens] that was withdrawn from the Court's hearing docket.

Tr. (June 12, 2024), 14-15. A journal entry dismissing the case was filed. The sellers appeal.

¶7 The crux of the sellers' petition is that they are entitled to a release of the lis pendens because either (1) the buyers had no right to file it in the first instance or, (2) the return of the buyers' earnest money deposit automatically required the buyers to execute a release. Neither proposition is supported by law, and thus, the trial court's dismissal was warranted. *See McMinn v. City of Oklahoma City*, 1997 OK 154, ¶ 11, 952 P.2d 517, 521 ("This Court is not bound

by the reasoning of the trial court. If that court reaches the correct result we may affirm if there is a different but proper legal theory upon which to base the decision.").

¶8 A lis pendens, which literally means "[a] pending lawsuit," is simply "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." LIS PENDENS, *Black's Law Dictionary* (12th ed. 2024). It may also "be viewed as a device by which the courts acquire the power or control over property involved in a suit for the period during which the action remains pending and before final judgment is rendered." *White v. Wensauer*, 1985 OK 26, ¶ 8, 702 P.2d 15, 18.

¶9 In Oklahoma, a lis pendens is permitted, and limited, by statutory law. 12 O.S. § 2004.2; *White*, 1985 OK 26, ¶ 7 ("Statutes are not to be regarded as creating the doctrine of lis pendens. Rather, they actually limit its application by making the notice effective only when the action has been filed in accordance with the statutorily-prescribed provisions and the procedural requirements for the doctrine's invocation have been met." (footnotes omitted)). A lis pendens "does not impress the affected property with a lien but rather operates to bind third parties with notice that any interest they may acquire in the property pending litigation will be subject to the outcome of the action." *White*, 1985 OK 26, ¶ 8. Contrary to the implications of the sellers' arguments, a lis pendens *does not in any way legally restrict the alienation of property. See* 12 O.S. § 2004.2. It

is "simply notice of pending litigation which may affect the described real property.... **No release of the lis pendens notice need be recorded.**" Section 3.6, Oklahoma Title Examination Standards, Title 16 O.S. Ch.1, App (emphasis added).[1]

¶10 Under these principles, the buyers had a clear and absolute right to file a lis pendens when they initiated the prior litigation. Although, practically, it may be that the *aim* of the buyers' suit was to effectuate the return of their earnest money, the sellers had theretofore refused to acknowledge the death of the contract. Indeed, the reason the buyers had not been paid back the earnest money was due to a disagreement about the continued viability of the contract to purchase land. This dispute was continued when the sellers sought certiorari in the prior appeal and is undoubtedly a suit "involving real property" within the meaning of 12 O.S. § 2004.2. The sellers' protestations to contrary were, and are, to be blunt, absurd.

¶11 Second, *at no time*, and certainly not at the time this lawsuit was filed, have the sellers had a right to a release of the lis pendens at issue. While, as stated, equity may grant such a right, the equities have not in any way favored

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[1] "Title Examination Standards are not binding upon this Court, but, because of their general acceptance by members of the Oklahoma Bar, are persuasive authority." *Stump v. Cheek*, 2007 OK 97, n. 20, 179 P.3d 606, 613. As a practical matter, we find that no release of the lis pendens is needed. First, as noted, the sellers could have sold the property at any time, and the new buyers would have simply taken subject the old buyers' rights as determined by the litigation. A lis pendens does not legally affect the alienation of real property, though the Court acknowledges there are practical effects. Here, however, now that the first case has been concluded in favor of the buyers, which results in the buyers having no interest, it is difficult to imagine the need for a release of the lis pendens. Nevertheless, we make no decision here on the viability of such an equitable claim, if sought pursuant to the trial court's prior instructions.

the sellers at any point in this saga. At the time this suit was filed, the prior case was ongoing. The reason it was ongoing was *because the sellers had filed a petition for certiorari to keep it going.* Had the sellers succeeded in their efforts in the prior case, the buyers could have been found in breach of the contract and the sellers could have sought, and were seeking, specific performance of the contract. To require the buyers to release their lis pendens in such a situation would not be equitable. As discussed, a lis pendens exists to notify potential buyers that there is a lawsuit on file and to point them to where to look to determine for themselves whether to purchase the property anyway. Even if the sellers had some absolute right to a release of the lis pendens when the litigation affecting the real property ended, they clearly had no basis in law to request the release of the lis pendens when the litigation, under which they continued to seek specific performance of the contract, was ongoing.[2] Similarly, the sellers' claim that the litigation at issue did not concern the title to property was initially wrong for the reasons stated above, but completely farcical once the sellers filed

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[2] There is no positive law right to a release of a lis pendens, which, as discussed, simply serves as notice of suit. *White v. Wensauer*, 1985 OK 26, ¶ 6, 702 P.2d 15, 17 ("[O]ur lis pendens statute does not expressly provide a method for discharge, release or cancellation of notice."). *White* considered the "narrow first-impression question" of "whether, in the absence of express statutory authority, a court sitting in equity may effect a discharge of lis pendens notice based on compelling equitable considerations." *Id.* ¶ 1. The Court answered in the affirmative. *Id.* The sellers here stated no "compelling equitable considerations," where the lis pendens itself simply and clearly provided notice of the existence of a lawsuit affecting the real property at issue, the litigation as pressed by the sellers sought to enforce the contract against the buyers (including the remedy of specific performance), and the litigation had not concluded at the time the second suit was filed. We further find, contrary to the sellers' claims related to slander of title, that there was nothing extraordinary, deceitful, or incorrect about the lis pendens at issue. The notice simply stated the style of the case, that the action "involves claims regarding real property situated in Oklahoma, County, Oklahoma" (which, as discussed above, it did), and gave the legal description of the property. A more matter-of-fact lis pendens is difficult to envision.

a counterclaim seeking specific performance of the contract at issue. While that case was pending on appeal, which it was until mandate issued, the sellers had no basis in law or fact to request the release of the lis pendens.

¶12 For these reasons, we find that the sellers' filing of the second suit below was frivolous. The sellers sought the removal of a lis pendens which had been legally filed, which was not subject to removal, and which concerned a case that was ongoing precisely because of the actions of the sellers themselves. They also did so under a new case number when the trial court had given clear and specific permission to renew the motion to release in the prior case.[3] Having filed a

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[3] This was the basis of the trial court's dismissal. We also find that the trial court did not error in dismissing the motion because the sellers had been previously instructed, and had refused, to renew their motion to remove the lis pendens in the prior suit. The trial court's instructions had been clear and, for reasons upon which we can only speculate, the sellers chose to file an entirely new action. It was not error for the trial court to dismiss the action under the circumstances. Each of the sellers' contentions to the contrary will be briefly addressed.

The sellers first argue that the trial court's reassignment prior to dismissal was contrary to Oklahoma County Local Rule 8(A). The rule requires that "[w]hen either a civil or criminal case is terminated other than on its merits and the same cause of action is thereafter refiled, the case shall be returned to the judge to whom it was originally assigned ...." The sellers effectively dismissed their own action as to the release of the lis pendens when they withdrew their motion in the prior case. When the same matter was filed as new case, Rule 8(A) required it to be reassigned to the previous judge. The sellers misconstrue Rule 8(A).

The sellers also claim that the trial court's actions violated Rule 8(D), which states: "It should be noted that it is the cause of action rather than the identity of the parties that is determinative of whether or not the case comes within the scope of this rule and should be reassigned." The docket sheet reflects that the case was transferred to Judge Mai for "common issues" and "same parties." Judge Mai's order of dismissal explicitly states that "the court found that the facts alleged in this case are the same issues presented and decided by this court in CJ-2022-4756." She does not reference the identity of the parties as a basis of her ruling. Thus, it is unclear how the sellers arrived at the conclusion that the court based its decision to reassign the case on the identity of the parties alone.

Next, the sellers allege errors related to Oklahoma County Local Rule 9 and Local Rule 16. But Rule 9 concerns the consolidation of cases and Rule 16 default judgments. The case was neither consolidated nor decided by default judgment. Hence, neither rule is applicable here.

frivolous action, we find the sellers' appeal was also frivolous—that is, "there are no debatable issues upon which reasonable minds might differ and the appeal is so totally devoid of merit that there is no reasonable possibility of reversal ...." *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 14, 829 P.2d 15, 23. Accordingly, the trial court is affirmed.

¶13 **AFFIRMED.**

HUBER, P.J., and HIXON, J., concur.

June 5, 2025

The sellers also allege that the court erred when it dismissed the case after an improper *ex parte* communication with the buyers' attorney in violation of Oklahoma County Local Rule 5. Local Rule 5 states: "Communication with the office of the assigned judge regarding scheduling and procedural matters is permitted. A lawyer shall have no *ex parte* communication of the substance of a pending case with the assigned judge." The record contains no evidence of *ex parte* communications between the buyers' attorney and the judge. It appears the sellers could be referencing the fact that the buyers' counsel sent the proposed order to the judge's chambers, and the judge signed it. This does not constitute *ex parte* communication, especially when the sellers' counsel apparently refused to communicate with the buyers' attorney, who promptly sent the order directly to the judge. Additionally, because the substance of the order had already been decided by the court at the hearing on the motion to dismiss, it is clear that even if counsel had a conversation with the judge or someone in chambers about the order, it would constitute a procedural matter, which is permissible under the rule.

Finally, the sellers allege that there was error in presumably the buyers' failure to comply with the requirements of 12 O.S. § 696.2 and 696.3. These statutes provide general requirements for the preparation, filing, and mailing of notice of an order. At the hearing on the motion to dismiss, the court asked the buyers' counsel to draft the order, and he did promptly did so. The buyers' counsel asked for input from the sellers' counsel and never received a response. The buyers' counsel submitted the order to the court. The order was subsequently signed by the judge and filed. Document 9 in the record on appeal reflects that the order was emailed to the sellers' counsel on August 14, 2023, and that a copy was also mailed to her office. None of the above referenced actions violate either statute. The judgment properly contains a caption, the statement of the action and relief, and the signature of the court. Thus, it is unclear how the buyers or the court could have possibly violated § 696.2 or § 696.3.