

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kari L. Conrad,) ND Supreme Court No. 20170074
) District Court No. 51-2016-CV-01626
Plaintiff/Appellant,)
)
vs.)
)
Wilbur D. Wilkinson,)
)
Defendant/Appellee.)

Appeal from an Order Dismissing Plaintiff's Emergency Application to Remove a *Lis Pendens* from Plaintiff's real property in Ward County, North Dakota and ruling on a Motion for Judgment on the Pleadings and every part thereof, entered in the above-entitled action on December 22, 2016 and Order date January 24, 2017, denying Plaintiff's Motion for Reconsideration.

District Court - North Central Judicial District
Ward County, North Dakota
Honorable Kirsten M. Sjue, Presiding

BRIEF OF APPELLANT

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[1] STATEMENT OF THE GROUNDS UPON WHICH
JURISDICTION OF THE NORTH DAKOTA SUPREME COURT IS
INVOKED

[2] Plaintiff invokes the Jurisdiction of the North Dakota Supreme Court to hear this Appeal pursuant to Rule 3 (a) (1) of the North Dakota Rules of Appellate Procedure.

[3] STATEMENT OF THE ISSUE ON APPEAL

[4] Did the District Court of Ward County, North Dakota err in finding that plaintiff's request to cancel a *lis pendens* filed against her homestead in Minot, Ward County, North Dakota, could only be brought before the Tribal Court of the Three Affiliated Tribes at the Fort Berthold Indian Reservation in North Dakota.

[5] STATEMENT OF THE CASE

[a] Nature of the Case:

[6] This case was commenced on September 23, 2016 by Kari L. Conrad by the filing of an Emergency Application and Affidavit asking the District Court to remove a *lis pendens* from her homestead in Minot, Ward County North Dakota pursuant to Section 28-05-08 N.D.C.C. (App. p. 3)

[b] Course of the Proceedings:

[7] On September 30, 2016 the person who had filed the *lis pendens*, Wilbur D. Wilkinson filed a Response in Opposition to Plaintiff's Motion to Remove the *lis pendens*. (App. p. 35)

[c] On October 26, 2016. Kari Conrad filed a Rule 12 (c) Motion for Judgment on the Pleadings or in the alternative judgment as a matter of law. (App. p. 30)

[d] On November 8, 2016, Wilbur Wilkinson filed a Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings. (App. p. 35)

[e] On December 22, 2017, District Judge Kirsten M. Sjue, viewing the matter as a Rule 56 Motion for Summary Judgment, dismissed, without prejudice, Kari Conrad's request for removal of the *lis pendens* upon the grounds that the Motion should have been brought in Fort Berthold District Court. (App. p. 40)

[f] On January 4, 2017, Kari Conrad filed a Motion for Reconsideration. (App. p. 44)

[g] Final Disposition of the District Court: On January 24, 2017, District Judge Kirsten M. Sjue issued an Order denying Motion for Reconsideration. (App. p. 45)

[8] STATEMENT OF THE FACTS

[9] There is a lawsuit pending in the Tribal District Court of the Three Affiliated Tribes, Fort Berthold Reservation in New Town North Dakota. It is entitled Wilbur D. Wilkinson v. Ervin J. Lee, Case No. CV-2010-0673. (See Complaint) (App. p. 15) The case was filed on December 16, 2010. The subject matter of the Complaint is a fee dispute between Mr. Wilkinson and his former attorney, Ervin J. Lee. The facts of that case

are summarized well in Disciplinary Board v. Lee, 2013 ND 151, 835 N.W.2d 836. In that disciplinary action Lee was sanctioned for not having a fee agreement in writing that clearly spelled out the terms and for not keeping his client informed of the disposition of funds after settlement. The final agreement between the parties, however, has spelled out in detail the fee agreement to which Mr. Wilkinson agreed and appended his signature. Disciplinary Board v. Lee. Id.

[10] On two occasions, using the heading of his Tribal Court lawsuit against Mr. Lee, Mr. Wilkinson's counsel filed Notices of *lis pendens* against real property in Ward County, North Dakota. At the time of the filing the property was owned by Richard J. Lee (App. p. 9) and was subject to a purchase agreement entered into in July of 2010 between Richard J. Lee as owner and Kari Conrad and Ervin Lee as purchasers. (App. p. 9) In December of 2010 when the first *lis pendens* was filed the obvious purpose was to encumber title the Ward County real property so that an attempt might be made to levy upon it should Wilkinson succeed in getting a money judgment against Ervin Lee in his fee dispute then pending in Tribal Court. (App. p. 28) The real property in Ward County had nothing to do with the disputed issues in the Tribal Court lawsuit between Wilkinson and Lee. No mention of it is made in that litigation.

The Complaint in that action makes no assertions of any transfer made in defraud of creditors. (App. p. 15)

[11] The first Notice of *lis pendens* was issued by Mr. Wilkinson's attorney on December 14, 2010. (App. p. 24) It was filed with the Recorder in Ward County December 17, 2010. It bears the heading of the Wilkinson v. Lee lawsuit in Three Affiliated Tribes Tribal Court. It has never been filed in the Tribal Court to this date. It has never been approved by any Judge of the Tribal Court. It has never been transmitted by the Clerk of the Tribal Court to the Clerk of the Ward County District Court nor to that County's Recorder. The document falsely states, "The real estate subject to the pending action [which is the Wilkinson v. Lee case] is situated in Ward County, North Dakota". The address given in the *lis pendens* for the real estate that is supposedly "subject to the pending action" in Tribal Court is described as 224 8th Street SE, N18' of Lot 7 & 8 Block 5, Eastwood Park Addition to the City of Minot. (App. p. 12)

[12] At the time this *lis pendens* was filed with the Ward County Recorder on December 14, 2010 the property filed against was owned by Richard J Lee. (App. p. 24) It was the subject matter of a Purchase Agreement dated six months earlier on July 27, 2010 between Richard J.

Lee as owner and Kari Conrad and her husband, Ervin Lee as purchasers. (App. p. 9) The *lis pendens* that is the subject matter of this appeal is that same one as was filed on December 14, 2010. It is the *lis pendens* that Kari Conrad unsuccessfully sought to have removed from the Record by the District Court of Ward County. The District Court ruled that the remedial provision of Section 28-05-08 N.D.C.C. for removal of a *lis pendens* in this case could only be presented to the Tribal Court. Kari Conrad has no connection to the Fort Berthold Reservation. The Fort Berthold District Court has no jurisdiction over her. She has no standing to intervene in the lawsuit pending in Tribal Court. Her property on 8th Street in Minot is not the subject matter of the Wilkinson v. Lee action pending in Tribal Court as is falsely stated in the *lis pendens*. Nowhere is Kari Conrad named as a party. No notice of the filing was ever given to Kari Conrad nor to her husband Ervin Lee. No attempt has ever been made to join Kari Conrad as a party to that suit.

[13] The debt owing to Richard J. Lee was paid in full and Kari Conrad completed the purchase of the home at 224 8th Street SE, in Eastwood Park Addition. Title was transferred into her name alone. (App. p. 38) It is Wilkinson' assertion that because some of the money he is demanding as a refund of fees in his fee dispute with Ervin

Lee in Tribal Court was used to pay off the balance owing Richard Lee for the 8th street home he, Wilkinson, is entitled to what is in effect a pre-judgment attachments to secure the money judgment he is pursuing in his fee dispute lawsuit in the event he should win. In the past 6 years Wilkinson has brought no action in Ward County against either Kari Conrad or Ervin Lee alleging transfer in defraud of creditors or other action based on any other cause.

[14] Kari Conrad is retired. She decided to sell the 8th Street home in Minot and move to Bismarck. She entered into a contract to sell the house on 8th Street with a closing date set for September 23, 2016. When the 2010 *lis pendens* showed up on the Record at the time of closing the closing failed. Wilkinson's counsel was asked to release the *lis pendens* so the sale could go through but refused. The result was the buyers who had contracted to buy her home would not go through with the purchase. At that time Conrad had entered into a contract to buy a home in Bismarck. When the closing on the Minot house failed she was unable to make the purchase of the home in Bismarck and had to breach the purchase contract she had signed there. (App. p. 8)

[15] This was the second time attempt had been made to stop Ms. Conrad from making a sale of real estate in Ward County by use of a *lis*

pendens. A *lis pendens* against another property owned by Conrad was issued by Wilkinson's attorney on January 18, 2013. (App. p. 12) Again that *lis pendens* falsely asserted that the real property in Ward County was subject to an action pending in Tribal Court even though reliance was again based on the same fee dispute between Ervin Lee and Mr. Wilkinson. It is asserted in that document that Wilkinson "believes he is entitled to monies that have been utilized upon the property described below". (App page 15) This second *lis pendens* was filed against a Condominium unit owned by Ms. Conrad at 1408 - 17th Avenue S.W. No. 2 in Minot. It was filed with the Recorder in Ward County on January 22, 2013. It also bears the heading of the 2010 Wilkinson vs Lee lawsuit in Tribal Court. It was never filed in Tribal Court nor approved by any Tribal Judge. Neither was it ever transmitted by the Clerk of the Tribal Court to Ward County District Court or the Ward County Recorder. Nowhere is Kari Conrad named on that *lis pendens*. No notice of this second filing was ever given to Kari Conrad nor to Ervin Lee. No lawsuit was commenced within 60 days of filing. When an action for slander of title was threatened (App. p. 17) Wilkinson's counsel released the *lis pendens* on Conrad's Condominium so that sale could go through on April 16, 2014. (App. p. 26)

[16] *Lis Pendens* statutes are strictly construed because of the risk of an erroneous deprivation and depreciation in value in the real property involved. The degree of risk of erroneous deprivation depends on the safeguards present in the applicable *lis pendens* statute. Error is most likely when there is no opportunity for a pre-filing or a post filing hearing at which the property owner can challenge the validity of the *lis pendens*. This is true when few or no statutory grounds for cancellation exist, and when there is no bond requirement available to protect against damage to the property owner's interests. North Dakota has provided a safeguard in Section 28-05-08 N.D.C.C. whereby one, such as Ms. Conrad, can apply to the District Court for relief except in this instance when she did that the District Court told her she had to go to a court that had no jurisdiction over her or the property, the property was not the subject matter of any pending lawsuit in that court, and she had no standing to intervene in any lawsuit then pending.

[17] Wilkinson's counsel asserts in the Notice of *lis pendens* that his client believes he is entitled to monies that Lee earned as legal fees some of which were admittedly used to pay off the balance of a debt owing to Richard J. Lee that was still owing against the 8th Street property. (App. page 9) In an attempt to make the connection between the requirements

of Section 28-05-07 N.D.C.C. which allows for a *lis pendens* "in any civil or criminal action affecting the title to real property..." Wilkinson's lawyer relies upon the honest testimony by Lee before the Disciplinary Board that some of the funds he had earned representing Wilkinson had been used to pay off the debt that was still owing to Richard Lee on the 8th Street home.

[18] The findings by the Disciplinary Board asserted various violations of lawyer standards by Lee. The Supreme Court upheld findings of violations for not having a fee contract with Wilkinson in writing and for disposition of funds in a Settlement without keeping Wilkinson advised. But the Court also made these findings:

"the evidence demonstrates there was a legitimate dispute between the parties whether the contingent fee applied to the value of the \$1.4 million judgment, and Lee in good faith believed he was entitled to a total contingent fee in excess of \$160,000 and entitled to apply the full \$140,000 settlement proceeds in payment of his fee."

[19] The Court further noted,

"...there was a legitimate, good faith dispute between the parties whether Lee was entitled to retain the additional \$126,000 as payment toward fees owed to him under the parties' contingent fee agreement. The hearing panel found that Lee's testimony regarding the reasonableness of the fee was more credible than Wilkinson's testimony, and accordingly found no evidence of dishonesty, fraud, deceit, misrepresentation, or a criminal violation."

[20] The case of Wilkinson v. Lee that is still “pending” in Tribal Court is clearly a contract dispute involving those \$126,000 for which Wilkinson seeks a money judgment. (App. p. 30) The circumstance does not meet the requirements of 28-05-07 N.D.C.C. which allows for a *lis pendens* only “In any civil or criminal action affecting the title to real property...”.

[21] So that an important fact not be lost in the recitation above Conrad contends that what is really at stake in the lawsuit pending in Tribal Court is not the money that Ervin Lee in good faith believed was his and part of which was used to pay off the debt on the 8th Street house. What is really at stake in the Tribal Court lawsuit is what appears as a request at the end of Wilkinson's Complaint where he asks the Court to divest Lee of any and all interest he may have in future royalties and benefits of the Settlement Agreement." (App. p. 15) Although the magnitude of this request does not appear on the face of the Complaint the divestiture if granted would deprive Ervin Lee of hundreds of thousands, if not millions of dollars granted to him for legal fees under a provision in the Federal Court Settlement Agreement that Lee successfully crafted for Wilkinson. (App. p. 17) By that settlement Wilkinson avoided a \$1.4 million dollar judgment against him and retained the right to valuable

overriding royalty interests in oil wells. At the end of Paragraph 6 of the Tribal Court Complaint against Lee, Wilkinson attempts to take advantage of the Disciplinary sanctions against Lee for not having their agreement in writing and for not advising him of the disposition of the funds that were received in the Federal Court lawsuit settlement. He asks the Tribal Court to divest Lee of any and all interest he may have in future royalties and benefits even though that is what he expressly agreed to in the Settlement Agreement Lee obtained for him. (App. p. 15)

[22] These rights were what the North Dakota Supreme Court discussed in Disciplinary Board v. Lee, 2013 ND 151, 835 N.W.2d 836, when it said:

"The final settlement agreement expressly provided that 10 percent of the \$140,000 bonus payment would be paid directly to Lee and that 10 percent of Wilkinson's share of the overriding royalty interest would be assigned to Lee." (Emphasis added)

[23] Wilkinson's benefits under this Settlement involves millions of dollars. The Settlement Agreement goes back to October 4, 2010 and Lee's 10% interest in those overriding royalties have been accruing over these past seven years. In the Tribal Court action Wilkinson brought a "Motion to Hold all Mineral Royalty and other Payments to Defendant" in the law office trust account of Wilkinson's attorney. (App.

p. 13) By today there should have accrued funds hundreds of thousands times more than the \$140,000 Wilkinson is seeking as a money judgment in Tribal Court. (See Wilkinson Complaint, App. p. 15) Even if legal the *lis pendens* on Kari Conrad's Minot home is unnecessary and represents an extortion to try get Lee to walk away from these millions. This case is not about Kari Conrad's house on 8th Street in Minot. It is an attempt to use the Disciplinary findings against Lee to avoid a Settlement Agreement reached in Federal Court that Wilkinson agreed to in a hope the Tribal Court will somehow find that Lee should be denied what Wilkinson agreed to pay him in the Settlement.

[24] ARGUMENT AND STANDARD OF REVIEW

[25] Appellant, Kari Conrad believes the applicable standard of review of all the issues raised by this appeal is de novo.

Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403

Funke v. Aggregate Construction, Inc., 2015 ND 123, N.W.2d 855

Heart River Partners v. Goetzfried, 2005 ND 149, 703 N.W.2d 330

Riverside Park Condominiums Unit Owners Association v. Lucas, 2005 ND 26, 691 N.W.2d 862

[26] APPELLANT'S CONTENTIONS:

[27] It is the contention of Kari Conrad that the District Court erred in refusing to grant her judgment on the pleadings (or in the alternative summary judgment) when she asked that the *lis pendens* Wilbur Wilkinson's counsel filed for record against her house in Minot be removed.

[28] Over SIX years have elapsed and Wilkinson has failed to commence any lawsuit in Ward County Court against Kari Conrad or Ervin Lee alleging wrongful transfer of funds in defraud of creditors. Section 28-05-07 N.D.C.C. requires that a party filing a *lis pendens* file an action in the District Court of the County where the Notice of Lis Pendens was filed within 60 days of the filing of the *lis pendens*. Holding it without release for seven years makes the *lis pendens* document in effect a pre-judgment attachment to secure payment of a money judgment should Wilkinson win his unlikely case before the Tribal Court in Civil No. 2010-CV-0673.

[29] Lee achieved a remarkable success for Wilkinson in that lawsuit. Lee's legal representation was not on the Reservation or in Tribal Court. It is for representation of Wilkinson in a lawsuit brought against him and

others in Federal Court in North Dakota by Peak North Dakota, a Colorado Corporation, Peak Energy Resources LLC a Delaware LLC, Jack Vaughn, Alex McLean and Matt Gray. It was not a lawsuit involving title to land. It involved personal property, i.e. Wilkinson's entitlement to money Peak has been paid for sale of oil. (App. p. 35)

[30] The house upon which the *lis pendens* was filed is located in Ward County. The *lis pendens* document carries a Tribal Court heading but has never been filed with or approved by the Tribal Court nor has it been transmitted to the Recorder or Clerk of Court in Ward County. No Notice of its filing was ever given to her or to Ervin Lee. The North Dakota Supreme Court has held that the filing of a *lis pendens* with the Recorder without filing a complaint in the district court clerk's office is not constructive service. Plott v Kittelson, 58 N.D. 881, 228 N.W. 217, 220 (1929).

[31] Kari asked the District Court to Order removal of the Notice of *lis pendens* pursuant to 28-05-08 N.D.C.C. The District Court declined without prejudice saying Kari's only relief could be found in the Tribal Court where the *lis pendens* was issued. It was not "issued" by the Tribal Court. That court has no reason to even know about it. It was issued by Wilkinson's attorney. It was never filed or otherwise noted in the Tribal

Court. It still has not been. Kari Conrad would have to ask the Tribal Court to assume jurisdiction over her and she would have to volunteer to have it asserted. She would then have to successfully move to intervene in the Wilkinson v. Lee fee dispute lawsuit. She would have no standing to ask the Tribal Court for any relief including a release of her house in Minot from the *lis pendens*.

[32] In Bragg v. Burlington Res. Oil & Gas Co. LP, 2009 ND 33, 763 N.W.2d 481, the North Dakota Supreme Court said that the primary purpose of the notice of lis pendens is to preserve the property which is the subject matter of the lawsuit from actions of property owner so that full judicial relief can be granted, if the plaintiff prevails. This is consistent with North Dakota's statutory and case law declarations for the use of *lis pendes*.

[33] Most apropos is the case of In Investors Title Insurance Co. v. Herzig, 2010 ND 169, 788 N.W.2d 312. In that case the Court said,

"Where only collateral issues are involved that ultimately may affect the parties' interest in property, the doctrine of lis pendens does not apply. Thus, a notice of lis pendens is improper in an action against a property owner where a constructive trust is sought only to satisfy a judgment against the owner, and the interest in the property is thus no more than collateral. The doctrine of lis pendens may not be predicated on an action or suit seeking merely to recover a money judgment. An action for money only, even if it relates in some way to specific real property, will not

support a lis pendens. Accordingly, where the primary purpose of a lawsuit is to recover damages and the action does not directly affect title to or right of possession of real property, the filing a notice of lis pendens is inappropriate. There is authority, in some states, that lis pendens may be based on an action to recover a money judgment where a valid judgment has been secured and made a lien against the property. However, there is also authority, in other states, that a cause of action does not affect title to real property where the action seeks to secure a personal judgment for the payment of money, even though such a judgment, if obtained and properly docketed, would be a lien upon the defendant's land."

[34] The Court in Herzig, id, cited with approval from 54 C.J.S. Lis Pendens § 11 (2010). where it is said it is "generally improper to use a notice of pendency as a form of attachment, as the purpose of lis pendens is not to obtain the type of prejudgment attachment which can later be used in the eventual collection of a judgment." Id. § 14.

[35] CONCLUSION

[36] The case should be remanded with directions to the District Court to enter an Order requiring that the County Recorder of Ward County, North Dakota notice in its records that the *lis pendens* has been released by Court Order.

Respectfully submitted.

Dated this 31st day March 2017.

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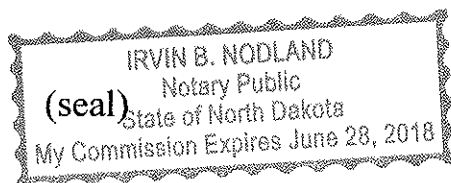
[1] I, Peggy A. Oster, being first duly sworn, depose and state that I am of legal age and that on the 31st day of March 2017 I served the **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** in the above matter electronically as follows:

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PEGGY A. OSTER

Subscribed and sworn to before me this 31st day of March 2017.




NOTARY PUBLIC