

IN THE SUPREME COURT OF OHIO

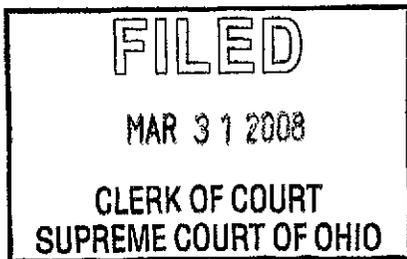
BENEFICIAL OHIO, INC. : Case No. 2007-1455
: :
Appellant/Plaintiff : :
: :
v. : :
: :
DALE S. ELLIS, et al. : :
: :
Appellees/Defendants : :
: :
v. : :
: :
ROBERT ELLIS, et al. : :
: :
Appellees/New Party : :
Defendants :

REPLY BRIEF OF APPELLANT BENEFICIAL OHIO, INC.

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STATEMENT OF FACTS

This Court accepted the following Proposition of Law in this case:

Service of process upon the defendant from whom a third party acquired an interest in real property must be completed in order to invoke the doctrine of *lis pendens* to invalidate the third party's interest in the real property.

In their Statement of Facts, Appellees do not present any facts that oppose this proposition. They concede that Dale Ellis was not served with summons and complaint in the *Jarman* case prior to executing a mortgage to Beneficial. Their claims rest on the alleged fraud committed by Mr. Ellis and the belief that Beneficial ignored the pending litigation, neither of which are in evidence in this case.

The question to be decided in this matter is whether the Eleventh District Court of Appeals erred in finding that Beneficial was bound by the judgment in *Jarman* when their borrower had not been served with process at the time he granted them a mortgage. Since appellees have not rebutted the proposition upon which this appeal was granted, the answer must be that the Court of Appeals committed reversible error when it held that service of process upon any defendant in a lawsuit where the doctrine is properly invoked, is a *lis pendens*.

ARGUMENT

Reply to Proposition of Law No. 1: The doctrine of *lis pendens* requires service of process on the property owner before rights of third parties are cut off.

The parties agree that a judgment or decree rendered in a lawsuit, meeting the requirements set forth in *Cook v. Mozer*, is a *lis pendens* to persons dealing with the subject of the litigation. That doctrine has been well established in the law in this state for over one hundred years.

Appellees note Mr. Bennett's comments from his *Treatise on the Law of Lis Pendens*, that for many, the filing of the complaint would seem to be enough to trigger the doctrine so to discourage defendants from dodging service. *Id.* § 66 *No reason for postponement of service.* At times it even seems that appellees want to return to that standard.

The common law authorities were at odds as to whether the filing of the complaint was a *lis pendens* or if service was required. *Id.* § 73 *Common law authorities not uniform.* The argument was that if a defendant is prohibited from alienating his property upon a *lis pendens*, it is better to make the filing date be the "trigger" rather than risk a bad result. *Murray v. Ballou* (1815), 1 Johns.Ch. 566.

Ohio did not follow the common law, however, when our *lis pendens* statute was passed.

Ohio's statute is consistent with the view that a *lis pendens* is complete when service is made upon the owner of the *res*. Garland, *American and English Encyclopedia of Law* (1890) § V (3) *Court Must Have Jurisdiction both of the Res*

and the Person [“The want of jurisdiction so as to invalidate the *lis pendens*, my arise from . . . a want of jurisdiction . . . from the want of service upon the owner of the *res* . . . “]; § X (2) *Judicial Construction of These Statutes* [“Under the *lis pendens* statutes the *res litigiosa* is brought into efficiency by the filing or recording of the notice after the court has acquired jurisdiction of the *res* and the person of the owner”].

The United States Supreme Court has rejected the common law rule in favor of service. In *Miller v. Sherry*, the court held that:

“. . . to affect a party as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside.

. . .

“The amended bill was undoubtedly sufficient, and it made [the legal title holder] a party. But he was not served with process, and if he had been, this bill could have operated only from the time of the service.

69 U.S. 237, 250 (1864).

In order to charge a third party with a *lis pendens* “. . . the party against whom it is invoked must take from a party to the suit as well as acquire the interest pending in the suit.” Bennett § 243 *When a conveyance before suit not pendente lite*. Thus if a purchaser acquires an interest in a subject that is not part of the litigation or if he is not served, there is no *lis pendens*.

In *Jarman*, there were two defendants, Bank One and Dale Ellis. Bank One acquired it’s interest from Mr. Ellis. Beneficial, the mortgagee against whom the doctrine is invoked, did not acquire any interest in the property from Bank One. It

also acquired from Dale Ellis. Therefore, until such time as Mr. Ellis was served, there was no *lis pendens* as to Beneficial.

Appellees argue that this court's decision in *Cook v. Mozer* bolsters the point of view that service upon any defendant is a *lis pendens*. In so doing, they suggest that divorce cases are unique to the doctrine because there is usually only one defendant to be served. In reality, a divorce case may include multiple defendants, just as a foreclosure or a suit like *Jarman*. Thus, the fact that *Cook* involved a divorce where a creditor of the husband took a judgment before the divorce was finished, is not conclusive of the service issue. What it does tell us is that a creditor (Mr. Mozer) who acquired his interest in the subject property via the owner (Mr. Cook) was bound by the judgment of the pending suit as if he were the owner - a purchaser *pendente lite* - if the owner had knowledge of the suit [in that case Mr. Cook had actual notice of his divorce].

Moreover, the doctrine of *lis pendens* does not look to the type but rather the subject of the litigation. "The primary object for which suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes." Bennett § 99 *The primary object of suit not material*.

In applying the doctrine, what any person needs to know is (a) whether the property can be the subject of a *lis pendens*; (b) whether it is adequately described; and (3) if service was obtained on the defendant from whom the endangered party acquired its interest in that property.

If those questions can be answered affirmatively, then there is a *lis pendens*. If not, the purchase is *ante litem*.

Reply to Proposition of Law No. 2: The conclusion that service upon any defendant triggers *lis pendens* is contrary to law.

Whether or not a suit is commenced within the period required under the Civil Rules has no bearing on this case. The statement that Ohio's *lis pendens* statute is still premised upon the definition of what it means to 'commence' a civil action" misconstrues the purpose of the doctrine and it's relationship to commencement.

A plaintiff could commence his suit well past the one year time period and still have a *lis pendens*. His suit would, however, be subject to dismissal regardless of the doctrine. Thus, we might say that you cannot have a *lis pendens* if suit is not commenced but only because service was not perfected timely. If that is the point appellees wish to convey, then it is well taken. If their suggestion is that commencement is the equivalent of a *lis pendens* then we must respectfully disagree.

There is no dispute that a defendant can avoid service for any number of reason including to stall past the one year period for commencement. It is unlikely, however, that a defendant would avoid service so he could alienate the *res* and then claim a victory over the plaintiff. After all, if the defendant had actual knowledge of the litigation, he would be charged with a *lis pendens* as would his purchasers *pendente lite*. Yet, if a defendant does not know of the filing, he

proceeds innocently. If he knows of the suit he proceeds perilously. Thus we need not be concerned with commencement at all when analyzing the doctrine.

In this case, there are no facts before this Court indicating that Mr. Ellis knew of the pending lawsuit before he granted a mortgage to Beneficial. Therefore, the suit cannot be a *lis pendens* to Beneficial.

Appellees also argue that the *Pease v. Huntington National Bank* case is helpful to their cause. They suggest that the decision infers that service on any defendant was sufficient for a *lis pendens*. That assumption is, actually, incorrect. The record in that case shows that the owners of the property, Gary and Bonita Burchfield were served with summons on the same date as the lender against whom the doctrine was being invoked. Therefore, *Pease* does not aid appellees as they suggest.

Reply to Proposition of Law No. 4: Public policy favors the application of the doctrine of *lis pendens* as found by the trial court

Although not in the record, appellees charge Beneficial with negligently or purposely ignoring their mother's lawsuit. They even go so far as to say that "Beneficial ignored the hallmarks of conventional real estate underwriting, disregarded the public record and raced ahead to engorge itself at the trough of record industry profits" even though none of those comments are relevant or part of the record in this case. Needless to say, such statements are an unfortunate attempt to pin Beneficial with a predatory lending label. Nothing in the record in this case supports any argument that the loan obtained by Mr. Ellis from

Beneficial was beyond his ability to repay or that the property appraisal was inflated, both hallmarks of predatory loans. Therefore, we must avoid the hype in favor of the facts.

R.C. § 2703.26 has been interpreted in this state for over one hundred years, to require service on the owner of the *res* before charging a purchaser *pendente lite* with knowledge. Beneficial, and the title agency that closed the transaction, had the right to proceed as they did just as did Mr. Miller's buyer in *Miller v. Sherry, supra*. Having not been impleaded and served, Mr. Ellis cannot be charged with misconduct, Beneficial cannot be made into a criminal and the title agent cannot be the scapegoat.

Beneficial is in the business of lending money. Mr. Ellis wanted a loan. We can like or dislike how Mr. Ellis obtained the property, but those actions do not make Beneficial a greedy pig at the trough. If anything, the benefit of any doubt should favor Beneficial because this doctrine has uniformly been applied in this state for over one hundred years. It cannot be charged with an immoral purpose if it followed that practice. If the legislature wants to change the statute, so be it, but those relying upon a particular interpretation, should not be penalized in the meanwhile.

CONCLUSION

The Appellate Court's decision that service upon any defendant in a lawsuit where the doctrine of *lis pendens* can be applied, is sufficient to invoke the doctrine, contradicts the law as it has been interpreted in this state for decades.

Appellees have not presented this court with a compelling argument to change that precedent.

Respectfully, therefore, Appellant requests this Honorable Court uphold the proposition upon which this appeal was taken, that service of process upon the defendant from whom a third party acquired an interest in real property must be completed in order to invoke the doctrine of *lis pendens* to invalidate the third party's interest in the real property.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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