

February 6, 2017

*Samantha Joseph, Daily Business Review*

# Appeals Court Reverses Self in Real Estate Case That Spawned 8 Amicus Briefs

A state appellate court reversed itself on the application of Florida's lis pendens statute after a rehearing supported by eight amicus briefs.

"This is an uncommon event where a court reconsiders a decision," said Kelley Kronenberg partner Irwin Gilbert, who wrote a brief on behalf of the Florida Bar's business law section.

This time, the Fourth District Court of Appeal ruled that Florida's lis pendens statute renders unenforceable all liens placed on a property after a final foreclosure judgment, but before a judicial sale—a reversal of a prior finding that chilled buyers and caused panic among real estate attorneys. Under the statute, a notice of lis pendens, which provides public notice of a pending claim, starts the clock for creditors with unrecorded claims to take action or risk having their interests wiped out. But in a real estate market where the foreclosure process often drags on for years, the appellate court had to consider legislative intent. The question before the panel: When does that window close for recording liens—within the statutory 30 days, with the final foreclosure judgment, or at the foreclosure sale?

The first ruling found liens placed between a final judgment of foreclosure and the judicial sale were enforceable, which meant investors could face new liability from creditors who sat out the foreclosure process but tacked on post-judgment claims.

"Lenders stood to suffer unless they collected from delinquent borrowers, which is always a difficult thing to do," said **Pathman Lewis partner Peter Meltzer**.

Some attorneys, like Eric Hockman of Weiss Serota Helfman Cole & Bierman, heralded the first ruling as a victory for claimants looking to preserve claims during the so-called "black hole" period when foreclosures linger.

"It clarifies a huge gap in Florida law that no court has opined on before," he said.

But others, like the bar's business law section, described it as "a radical departure from common practice."

The rehearing garnered unusual interest for a case at the district court level, drawing briefs from two cities, three sections of the Florida Bar and several trade groups. It ended with the judicial panel making a rare 180-degree turn, reversing itself Jan. 25 and remanding the case *Ober v. Town of Lauderdale-By-the-Sea*.

West Palm Beach real estate attorney Michael J. Gelfand, partner at of Gelfand & Arpe,

welcomed the move.

"The decision reinstates the vitality of the lis pendens statute," he said. "It reinforces expectations that a buyer takes a property free and clear of interest arising after the lis pendens, and before the certificate of sale."

The rulings stemmed from quiet-title litigation pitting investor James Ober against Lauderdale-by-the-Sea.

Ober purchased a zombie foreclosure—a house abandoned by residents and left unattended and in disrepair—and faced \$328,000 in code enforcement liens. The town later imposed three more liens after he purchased the house.

Neither the lender, Bank of America, nor the defaulting homeowner was a litigant in the Ober case. Their suit had dragged on for years, with long lapses between the foreclosure judgment, judicial sale and property transfer to Ober, who was left to bear responsibility for years of neglect. The bank obtained a final foreclosure judgment in 2008, but didn't sell the property for about four years while the city recorded seven post-judgment liens. After Ober purchased, the town imposed three more liens.

Ober sought to quiet title and strike the liens as invalid, but Lauderdale-by-the-Sea filed a counterclaim to foreclose. Broward Circuit Judge Thomas M. Lynch IV sided with the town and issued a final judgment of foreclosure on all 10 liens. The appellate panel initially affirmed his ruling, but reconsidered last month with a ruling that noted the influence of the amicus briefs.

"The judges corrected an issue that caused great consternation," Gelfand said. "Though not infallible, they strive to ensure perfection. It's not easy for folks to correct their course publicly, but the judges did that."