LEGAL PRECEDENT ON ATTORNEY'S PRIVILEGE TO FILE NOTICE OF LIS PENDENS

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Tags: lis pendens, Odermann v. Mancuso, real property, Sugar Creek, ugar Creek Homeowners Ass'n v. Jefferson Bank & Trust Co.

Odermann v. Mancuso, 670 SW3d 461 (Mo. App. W.D. 2023), a recent decision from the Missouri Court of Appeals, Western District, when read with a prior Missouri Supreme Court decision of *Sugar Creek Homeowners Ass'n v. Jefferson Bank & Trust Co.* 464 S.W.3d 177 (Mo. 2015), provides a comprehensive overview of the privilege and agency of an attorney to file a notice of lis pendens (NOLP) against real property involved in civil litigation. *Odermann v. Mancuso*, 670 SW3d 461 (Mo. App. W.D. 2023) also addresses attempts to penalize an attorney for protecting a client's property rights during ongoing litigation.

The filing of a lis pendens is governed by RSMo. section 527.260, which states:

> *In any civil action, based on any equitable right, claim or lien, affecting or designed to affect real estate, the plaintiff shall file for record, with the recorder of deeds of the county in which any such real estate is situated, a written notice of the pendency of the suit, stating the names of the parties, the style of the action and the term of the court to which such suit is brought,*

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> *and a description of the real estate liable to be affected thereby; and the pendency of such suit shall be constructive notice to purchasers or encumbrancers, only from the time of filing such notice.*

Filing a lis pendens serves to notify potential purchasers of a pending suit that may affect the title to the property, preserving rights pending the outcome of litigation. According to *State ex rel. Lemley v. Reno*, 436 S.W.3d 232, 234 (Mo. App. E.D. 2013), "Where lis pendens have a reasonable relation to the action filed, absolute privilege attaches to their recordation." Missouri law places no limitations or qualifications on the absolute privilege it accords lis pendens notices, as emphasized in Birdsong v. Bydalek, 953 S.W.2d 103, 114 (Mo. App. S.D. 1997).

In the 2015 Missouri Supreme Court case of *Sugar Creek Homeowners Ass'n v. Jefferson Bank & Trust Co.* 464 S.W.3d 177 (Mo. 2015), the complaint involved the filing of a NOLP on undeveloped property, which allegedly caused a diminution in value or dampened its marketability. However, the complainant could not demonstrate that the NOLP did not bear a "reasonable relation" to the controversy regarding the development of the lots and their impact on existing properties. The underlying litigation stemmed from differing interpretations of subdivision covenants affecting both developed and undeveloped lots.

The attorney filed the NOLPs against properties subject to disputed covenant provisions, alerting the public to the ongoing dispute and its potential impact on property development and enjoyment. This action was deemed to bear a reasonable relation to the properties in question, and thus did not constitute misuse or abuse of the NOLP privilege.

Filing of NOLP and Slander of Title

Slander of title requires three elements: (1) false words concerning title to property; (2) malice in the publication of such; and (3) injury to the party whose title was slandered. *Tongay v. Franklin Cnty. Mercantile Bank*, 735 S.W.2d 766, 770 (Mo. App. E.D. 1987). Only if the filing of a lis pendens is unauthorized by statute does it meet the "false words" requirement for a slander of title action. Additionally, proving malice requires evidence that the lis pendens was filed "without legal justification or excuse." *First Nat'l Bank of St. Louis v. Ricon, Inc.*, 311 S.W.3d 857, 865 (Mo. App. E.D. 2010).

In *Odermann v. Mancuso*, the attorney adhered to the standards articulated in *Lemley*, enforcing and disputing actions based on subdivision covenants. This unqualified right, as pleaded, does not rise to the level of actionable slander, defamation, or slander of title.

Abuse of Process Claims

Sugar Creek is similarly instructive regarding abuse of process claims. To sustain a claim for abuse of

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process, there must be: (1) an illegal and unauthorized use of process; (2) an ulterior motive for the use of such process; and (3) resulting damages. The essence of an abuse of process claim is not the commencement of an action without justification, but rather the misuse of process to accomplish an unlawful end or compel the opposite party to do something they could not be legally compelled to do. *Sugar Creek*, 436 S.W.3d 232.

Even if the defendant had a bad motive, a claim for abuse of process does not lie where the defendant's use of legal process was within their legal rights or if they have done nothing more than pursue a lawsuit to its authorized conclusion. In the Arbors at Sugar Creek case, the homeowners pursued the action to accomplish a lawful end, seeking injunctive relief and declaratory judgment. The court held that the homeowners' action in filing the lis pendens was entirely legitimate, and the trial court did not err in granting summary judgment on the counterclaim for abuse of process.

In the context of the *Sugar Creek* facts, a legitimate dispute over the interpretation of subdivision covenants existed based on planned deviations from the homeowners' interpretation of the covenants. The filings, pleadings, and statements made by the attorney while serving as counsel for the homeowners stemmed directly from that disputed interpretation of the covenants—a contractual filing in the public records that impacted the title to the property owned by the homeowners and the developer.

The decision underscores the importance of understanding the legal protections afforded to attorneys when filing a NOLP. It highlights that as long as the NOLP bears a reasonable relation to the underlying litigation, it is protected by absolute privilege. This protection is crucial for attorneys to effectively represent their clients' interests without fear of unwarranted legal repercussions.

Moreover, the decision reinforces the principle that the motive behind filing a NOLP is irrelevant as long as the filing is legally justified. This ensures that attorneys can focus on the legal merits of their actions rather than potential accusations of malice or improper conduct.

In conclusion, the recent decision of *Odermann v. Mancuso,* in tandem with *Sugar* Creek, serves as a significant reference point for attorneys and property owners alike. It clarifies the scope of an attorney's privilege to file a NOLP and the legal standards that protect such filings from being construed as slander of title or abuse of process. This legal precedent is essential for maintaining the integrity of property rights and the judicial process in civil litigation involving real estate.

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