

**IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

DAN RYAN BUILDERS WEST VIRGINIA, LLC,
a West Virginia limited liability company,

Plaintiff,

vs.

Civil Action No. 20-C-110
Presiding Judge: H. Charles Carl, III
Resolution Judge: Shawn D. Nines

OVERLAY I, LLC,
A Virginia limited liability company,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION TO EXPUNGE PLAINTIFF'S MEMORANDUM OF LIS PENDENS**

Comes now the Court this 17th day of June 2021, upon *Defendant, Overlay I, LLC's*
Motion to Expunge Plaintiff's Memorandum of Lis Pendens.

The Dan Ryan West Virginia Builders, LLC, by counsel, William F. Gibson, II, Esq., and Defendant, Overlay I, LLC, by counsel, Gregory E. Kennedy, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This action commenced on May 6, 2020, with the filing of the Complaint in which Plaintiff, Dan Ryan West Virginia Builders, LLC (hereinafter "Dan Ryan" or "Plaintiff") alleged causes of actions against Defendant Overlay I, LLC (hereinafter "Overlay" or "Defendant") regarding agreements between the parties to develop residential lots for building residential real

estate improvements for sale as new homes to consumer purchasers in Berkeley County, West Virginia. *See* Compl., ¶¶1, 3; *see also* Def's Mem., p 1. On March 23, 2021, Plaintiff filed its Amended Complaint asserting the following causes of action against Defendant: 1) Count 1 – Declaratory Judgment/Specific Performance/Injunctive Relief; 2) Count 2 – Breach of Money Damages (in the Alternative); and 3) Count 3 – Establishment of a Vendee's Lien (in the Alternative). *See* Am. Compl., ¶¶20-31.

2. Plaintiff recorded its Memorandum of *Lis Pendens* in the Office of the Clerk of Berkeley County Council of Berkeley County, West Virginia, in Deed Book 1285, at Page 90. *See* Def's Mem., p. 1-2.

3. On February 21, 2021, Defendant filed *Defendant, Overlay I, LLC's Motion to Expunge Plaintiff's Memorandum of Lis Pendens*, arguing Plaintiff's Memorandum of *Lis Pendens* should be expunged from the records of the Office of the Clerk of the County Council of Berkeley County, West Virginia, because the real property described on Plaintiff's Memorandum of *Lis Pendens* exceeds Plaintiff's alleged contractual rights described in the Complaint and as such, constitutes an impermissible cloud on the title of real property owned by Defendant. *See* Def's Mem., p. 2.

4. On May 14, 2021, Plaintiff filed its Opposition to Motion to Motion to Expunge Memorandum of *Lis Pendens*, arguing its Memorandum of *Lis Pendens* is proper and cannot be quashed unless and until the Defendant defeats Plaintiff's claim. *See* Pl's Resp., p. 1.

5. On May 24, 2021, Defendant filed its Reply, entitled Defendant Overlay I, LLC's Response to Plaintiff's Opposition to Motion to Expunge Memorandum of *Lis Pendens*, arguing that Plaintiff's Response argument that the Memorandum of *Lis Pendens* cannot be quashed unless and until Overlay defeats Plaintiff's claims must fail because Plaintiff terminated the parties' entire

agreement via the October 1, 2019 Notice of Termination, at issue in this civil action, and because it argues Plaintiff's claims for specific performance are time barred. *See Reply*, p. 2.

6. The Court now finds this issue ripe for adjudication.

CONCLUSIONS OF LAW

7. In this matter, Plaintiff has recorded a Memorandum of *Lis Pendens* pursuant to W.Va. Code, § 55-11-3. It is well settled that a memorandum of *lis pendens* is not itself a seizure of property, but rather a notice to all potentially interested parties that -- while the property remains 100% alienable -- subsequent purchasers will take subject to the Court's decision in the litigation. *See, e.g.*, W.Va. Code, § 55-11-3 (*lis pendens* provides constructive notice a suit involving the subject property).

8. Indeed, a memorandum of *lis pendens* is a means of protecting the Court's jurisdiction over the property and preventing a multiplicity of suits, as:

The object of the rule is to preserve the property which is the subject of the litigation, so as to enable the court, when the questions involved in the suit are finally determined, to execute its judgment or decree and to prevent further suits for the same subjects.

12A M.J. *Lis Pendens* §3; *see also* Wingfield v. Neal, 60 W.Va. 106, 54 S.E. 47, 48 (1906) (object of *lis pendens* is "to preserve the subject of litigation, in order to make it possible for the courts to execute their judgments and decrees").

9. In short, a memorandum of *lis pendens* serves the critical function of protecting the plaintiff's rights in the property during the pendency of the litigation. *Id.* Without a *lis pendens* (*i.e.*, without notice of a plaintiff's asserted right to ownership of the property), a *bona fide* purchaser for value might take title to the property free and clear of the plaintiff's rights in the property (as would-be contract purchaser and/or lien creditor)...leaving the plaintiff without recourse to either the land or the hypothetical *bona fide* purchaser(s).

10. Here, this case involves Plaintiff, who is in the business of acquiring finished building lots for the construction of residential real estate improvements to be sold to consumer purchasers as new homes, and Defendant, who is a residential land developer who allegedly agreed to develop certain building lots for Plaintiff, including that the lots be fully approved/subdivided and that they be fully developed into finished home building sites. *See* Am. Compl., ¶¶1-3. As Defendant is the fee simple and record title holder to the real estate that is subject to this litigation, specifically related to Defendant's alleged obligations of finishing and tendering fully developed lots to Plaintiff, the Court finds that the Plaintiff has asserted a right to title to the parcel of real estate owned by Defendant via its specific performance cause of action. *Id.* at ¶¶1, 7.

11. The Court finds and concludes that the specific performance Count of the Amended Complaint asserts a right to title to the real estate at issue, and the *lis pendens* is just record notice of that fact to the outside world. W. Va. Code, § 55-11-2. The Court has found in its Order Denying Defendant's Motion to Dismiss that the specific performance Count of the Amended Complaint was plainly and validly pled in the alternative, as authorized under West Virginia Rule of Civil Procedure 8(a).

12. The Court considers that Defendant has argued that Plaintiff's argument that the Memorandum of *Lis Pendens* cannot be quashed unless and until Overlay defeats Plaintiff's claims must fail because Plaintiff terminated the parties' entire agreement via the October 1, 2019 Notice of Termination, at issue in this civil action, and because it argues Plaintiff's claims for specific performance are time barred. *See* Reply, p. 2. However, the Court declined to adopt these arguments of Defendant as a matter of law when it entered its Order Denying Defendant's Motion to Dismiss. Therefore, Plaintiff's Amended Complaint asserts a right to encumber the real estate identified in the Memorandum, and as such (and unless/until the Defendant defeats Plaintiff's

claims as decided by the trier of fact) the Memorandum – as mere notice of that pending and as-yet unresolved claim – is clearly proper.

13. Further, with regard to the scope of real estate, the Court finds and concludes as follows. The Court considers that the Amended Complaint clearly asserts a right to/interest in additional property of the Defendant because the Defendant's alleged failure to convey finished lots to Plaintiff or subdivide the Defendant's property so as to delineate where those lots would specifically be located means that the entire parcel in which those lots were to be located is subject to Plaintiff's lawsuit. *See* Pl's Resp., p. 6. Along these lines, the Court considers Plaintiff has pointed out that the Defendant's alleged breach of the parties' agreement and failure to perform the development work needed to transform the property to be conveyed to Plaintiff into finished lots (as was promised to Plaintiff under the parties' agreement) may necessarily require that Plaintiff have lawful easement access rights over the Defendant's property in order to perform Defendant's (promised, but not performed) development work itself. *Id.*

14. With regard to the scope of the property at issue, and the additional considerations of easements and right-of-ways needed for development work, as well as Planning Commission approval and other property development concerns, the Court considers that if the parties wish to come to an agreement to refine the encumbered property subject to the memorandum of *lis pendens*, including placing a plat on record, the Plaintiff is free to amend its recorded Memorandum of *Lis Pendens*. However, currently, the Court concludes Plaintiff's Amended Complaint asserts a right to encumber the entire parcel, and as such the Memorandum – as mere notice of that pending and as-yet unresolved claim – is clearly proper.

15. For all of the foregoing reasons, the Court finds the Memorandum of *Lis Pendens* recorded by Plaintiff is fully supported by W. Va. Code § 55-11-2 and applicable case law and, accordingly, Defendant's Motion to Expunge must be denied.

16. Therefore, it is hereby ADJUDGED and ORDERED that *Defendant, Overlay I, LLC's Motion to Expunge Plaintiff's Memorandum of Lis Pendens*, is DENIED.

17. The Clerk is directed to provide a copy of this Order to counsel of record, and to the West Virginia Business Court Division, Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, WV 25401.

IT IS SO ORDERED.

ENTERED this 17th day of June 2021.



JUDGE H. CHARLES CARL, III
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION