

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KMI GROUP, INC.,)
)
Plaintiff,)
)
v.) C.A. No. N20C-11-086 JRJ
)
NICOLE BOLT COMER,)
)
Defendant.)

Date Submitted: December 1, 2020
Date Decided: February 1, 2021

ORDER

Upon consideration of Defendant’s request that the Court award attorneys’ fees and costs in connection with Defendant’s Motion for Mandatory Cancellation of *Lis Pendens* pursuant to 25 *Del. C.* § 1611, **IT APPEARS THAT:**

1. On December 1, 2020, Defendant filed an Emergency Motion for Mandatory Cancellation of *Lis Pendens*¹ (“Motion”) pursuant to 25 *Del. C.* § 1606, requested an emergency hearing on the Motion,² and asked that Plaintiff be directed to pay Defendant’s attorneys’ fees and costs incurred in connection with the Motion.³

2. The *lis pendens* at issue was recorded against Defendant’s personal residence in connection with Plaintiff’s complaint (“Complaint”), which asserts one

¹ D.I. 5.

² D.I. 6.

³ D.I. 5 ¶ 15.

claim for money damages arising out of an alleged breach of a personal guaranty not involving the Defendant's residence.⁴

3. Before filing the Motion, Defendant contacted Plaintiff's counsel and requested the *lis pendens* be canceled and offered various assurances to show the sale of her home was unrelated to the alleged breach of personal guaranty pled in the Complaint. The Defendant also provided a copy of the contract for sale of Defendant's residence.⁵ When Plaintiff failed to cancel, Defendant moved for mandatory cancellation of the *lis pendens* pursuant to 25 Del. C. § 1606. Section 1606 mandates cancellation when the claim asserted, if sustained, "would entitle the party solely to recover money or money damages."⁶

4. The Court scheduled an emergency hearing via teleconference on Defendant's Motion for December 3, 2020. One hour before the hearing, Plaintiff's counsel wrote to inform the Court that Plaintiff agreed to file a notice of cancellation of the *lis pendens* with the Recorder of Deeds, and as such, the emergency hearing was no longer necessary.⁷

⁴ D.I. 1. Plaintiff alleged Defendant was attempting to fraudulently transfer assets to avoid a judgment collection in this action by selling her personal residence. D.I. 5 ¶ 2.

⁵ D.I. 5 ¶ 7.

⁶ 25 Del. C. § 1606(3).

⁷ D.I. 7.

5. The Court instructed the parties that the scheduled teleconference would go forward. Following discussion with the parties, the Court instructed Plaintiff's counsel to submit a letter explaining why it was appropriate to record the *lis pendens* and why attorneys' fees should not be assessed,⁸ and instructed Defendant to submit an affidavit setting forth the fees and costs she incurred in connection with the Motion.⁹

6. As Defendant correctly notes in her Motion, the *lis pendens* recorded in this action was improper under the statute because it was recorded on a property with no relation to Plaintiff's claim.¹⁰ 25 *Del. C.* § 1601(a) permits a party "asserting a claim, the object of which is to affect the title to, or enforce an equitable lien on, real estate[,]” to file a notice of pendency of the action with the recorder of deeds of any county.¹¹ The Delaware Supreme Court has held that a fundamental requirement of the *lis pendens* doctrine is that the underlying litigation must be "addressed to the title or other interests in a specific and identified parcel of land.”¹²

7. Further, 25 *Del. C.* § 1601(b)(1) prohibits filing a notice of pendency where the "claim relating to real estate which, if sustained, would entitle the party to

⁸ D.I. 9.

⁹ D.I. 8, D.I. 14. The Court also provided Defendant with an opportunity to respond to Plaintiff's argument against assessing attorneys' fees. D.I. 12. Finally, the Court allowed Plaintiff to contest the reasonableness of the attorneys' fees requested by Defendant. D.I. 16.

¹⁰ 25 *Del. C.* §§ 1601(b)(1), 1606(3).

¹¹ *Id.* § 1601(a).

¹² *DiSabatino v. Salicete*, 695 A.2d 1118, 1119 (Del. 1997).

recover solely of money or money damages[.]”¹³ This same language is repeated in § 1606(3) of the statute, as a circumstance which requires mandatory cancellation of the notice of pendency.¹⁴

8. Pursuant to 25 *Del. C.* § 1611, a court may award reasonable attorneys’ fees to the prevailing party if the court finds that the party against which the attorneys’ fees are to be assessed has “wilfully asserted a claim or defense thereof without foundation in law or fact[.]”¹⁵

9. Defendant avers she incurred \$16,097.00 in legal fees and costs in connection with the *lis pendens*, including but not limited to filing and pursuing the Motion, investigating the factual and legal bases for the *lis pendens*, preparing for the hearing, correspondence with opposing counsel, and preparing and filing a reply to Plaintiff’s Filing Addressing the Basis for Recording a *Lis Pendens*.¹⁶

10. Plaintiff acknowledges that recording a *lis pendens* in this case appears improper at first glance, but argues that its allegations of Defendant’s fraudulent transfer of real property provide a sufficient connection to real estate such that a notice of pendency is appropriate.¹⁷ This argument is tenuous at best. The

¹³ 25 *Del. C.* § 1601(b)(1).

¹⁴ *Id.* § 1606(3).

¹⁵ *Id.* § 1611.

¹⁶ *See* D.I. 10.

¹⁷ D.I. 9. Plaintiff relies on a Chancery Court decision for the proposition that a *lis pendens* may be recorded in conjunction with a claim that a defendant seeks to fraudulently transfer interests in

underlying litigation at issue here is separate from the sale of Defendant’s personal property—it involves a dispute over a contract between two businesses, Plaintiff’s and Defendant’s business, and alleges a single claim for breach of personal guaranty. The statute unambiguously requires the purpose of the underlying claim to be one that “affects the title to, or enforce an equitable lien on, real estate[.]”¹⁸ That requirement is not satisfied here.

11. The Court finds Plaintiff recorded the *lis pendens* against Defendant’s personal property in violation of the express terms of 25 *Del. C.* §§ 1601(a) and (b)(2). The Court has considered Plaintiff’s argument regarding the reasonableness of the attorneys’ fees and costs sought by Defendant but finds attorneys’ fees and costs in the amount of \$16,097.00 to be reasonable.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff shall pay Defendant’s attorneys’ fees and costs totaling \$16,097.00 in connection with the Motion for Mandatory Cancellation of *Lis Pendens*.

real property, even if the plaintiff may also receive monetary damages from the claim if sustained. *See Luchi v. Luchi*, 2020 WL 1274879, at *5 (Del. Ch. Mar. 17, 2020). This reliance is misguided. In *Luchi*, the underlying litigation involved a claim that the Defendant fraudulently conveyed his real property interest to a third party to hinder, delay, or defraud the Plaintiff as his creditor, brought under the Delaware Uniform Fraudulent Transfer Act (“DUFTA”). Unlike in *Luchi*, the underlying litigation here is unrelated to the Defendant’s real property interest or DUFTA—it involves an alleged breach of personal guaranty in connection with Defendant’s business.

¹⁸ *See supra* note 11.

Jan R. Jurden

Jan R. Jurden, President Judge

cc: Prothonotary