

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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CASEY HENRY,

Petitioner,

v.

AIM INDUSTRIES, LLC,  
and AMY ABDNOUR,

Respondents.

No. 2D22-330

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December 16, 2022

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Darren D. Farfante, Judge.

Jonathan W. Newlon of Newlon Law Office, P.A., Dade City, for Petitioner.

J. Scott Taylor, Riverview, for Respondents.

CASANUEVA, Judge.

Casey Henry petitions for a writ of certiorari requesting that this court quash the circuit court's order discharging her notices of lis pendens. Because there is an inadequate appellate record, this court is unable to determine whether the circuit court's actions departed from the essential requirements of law. Therefore, we must deny the petition.

## I. Background

In April 2021, Ms. Henry, as a member of AIM Industries, LLC (AIM), filed an amended petition for dissolution and sale of assets of AIM and a request for judicial declaration of her rights and interest in AIM. The petition alleged that the main asset owned by AIM was the property located at 5005 Performance Park Boulevard, Tampa, Florida. Prior to filing her amended petition, Ms. Henry submitted a notice of lis pendens on the same property, which was recorded in duplicate. AIM later filed a motion to discharge the notices of lis pendens pursuant to section 48.23(3), Florida Statutes (2021).

The circuit court conducted a hearing on the motion to discharge and granted the same. During this hearing, however, Ms. Henry alleges that the circuit court did not take any evidence regarding the motion to discharge before entering the order in favor of AIM. Ms. Henry argues that by failing to conduct an evidentiary hearing prior to discharging the notices of lis pendens, the circuit court departed from the essential requirements of law.

## II. Analysis

"To obtain certiorari relief, [Ms. Henry] must demonstrate that the trial court's interlocutory order departs from the essential requirements of the law, and causes irreparable harm that cannot be corrected on direct appeal." *Fla. W. Realty Partners, LLC v. MDG Lake Trafford, LLC*, 975 So. 2d 479, 480 (Fla. 2d DCA 2007). The second and third prongs—establishing a harm which cannot be corrected on a direct appeal—are jurisdictional and must be considered first. *Tetrault v. Calkins*, 79 So. 3d 213, 215 (Fla. 2d DCA 2012).

As described by the Florida Supreme Court, one purpose of a notice of lis pendens is to alert all others that title to the property is involved in

litigation and that "future purchasers or encumbrancers of that property" are at risk of being bound by an adverse judgment. *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993). Here, if Ms. Henry's notices of lis pendens remain discharged, it will affect her ability to protect herself "from intervening liens that could impair any property rights claimed." *Fla. W. Realty Partners*, 975 So. 2d at 480 (quoting *Chiusolo*, 614 So. 2d at 492). Thus, the order discharging the notices of lis pendens subjects Ms. Henry to an irreparable harm that cannot be remedied on direct appeal.

In determining the essential requirements of law for discharging a notice of lis pendens, we first look to section 48.23. Section 48.23(3) provides that unless the pending pleading demonstrates that an action is based on a duly recorded instrument or a lien pursuant to chapter 713, the court has the power to discharge a notice of lis pendens as the court would grant and dissolve injunctions. *See Carollo v. Henderson*, 290 So. 3d 1088, 1090 (Fla. 5th DCA 2020). When an action is not founded on a duly recorded instrument or a chapter 713 lien, but alleges a nexus between the real property and the claims set forth, an evidentiary hearing is required on a motion to discharge a lis pendens. *Id.* There is no dispute that Ms. Henry's action is not founded on a duly recorded instrument or a chapter 713 lien.

"[T]he supreme court held that a lis pendens could not be dissolved if, 'in the evidentiary hearing on request for discharge, the proponent [of the lis pendens] can establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit.'" *Fla. W. Realty Partners*, 975 So. 2d at 480 (quoting *Chiusolo*, 614 So. 2d at 492). Discharging a notice of lis pendens without affording the proponent notice and an opportunity to be heard is a departure from

the essential requirements of law. *Hallmark Builders, Inc. v. Hickory Lakes of Brandon, Inc.*, 458 So. 2d 45, 46–47 (Fla. 2d DCA 1984).

Here, Ms. Henry asserts that based on her amended petition, she was entitled to an evidentiary hearing to establish a fair nexus and that the hearing conducted by the circuit court did not provide an opportunity to present evidence. AIM agrees that Ms. Henry was entitled to a hearing wherein she was afforded the opportunity to present evidence but asserts that Ms. Henry's entitlement to due process was accomplished by the hearing on January 2022.<sup>1</sup> It further asserts that without the transcript of the hearing on the motion to discharge, the presumption of correctness afforded to the circuit court remains intact.

At the outset, we acknowledge that there are certain factors within the record which suggest that the court did not take any evidence during the hearing. First, the order discharging the lis pendens contains no written finding on whether a fair nexus existed<sup>2</sup> and states that in drawing its conclusion, the court considered the appropriate pleadings and argument of counsel but failed to mention any evidence. Second, the hearing was not scheduled as an evidentiary hearing and was set for fifteen minutes.

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<sup>1</sup> We take a moment to emphasize that for this court to obtain a complete and accurate factual background, we rely on the record provided and the duty of candor owed to the court by counsel for each party. See R. Regulating Fla. Bar 4–3.3(a)(1).

<sup>2</sup> While there is "no strict requirement that trial courts make written findings of fact," we note that there are "some instances, most often when findings are required by legislative mandate, [that] the lack of . . . findings could result in a remand for such findings." *Naples Ests. Ltd. P'ship v. Glasby*, 331 So. 3d 863, 866 (Fla. 2d DCA 2021).

We also acknowledge that this court has previously ruled that circumstances exist in which a lack of a transcript would not be dispositive. In *Tampa Medical Associates, Inc. v. Estate of Torres*, 903 So. 2d 259, 260 (Fla. 2d DCA 2005), the petitioner sought certiorari review of the trial court's order requiring it to deliver certain incident reports to counsel for the Estate. The issue pertinent to our case was whether the trial court departed from the essential requirements of law in determining that the Estate made a sufficient showing of need and inability to obtain equivalent information without undue hardship. *Id.* at 262. The trial court order stated that the Estate "made a specific showing of need and inability to obtain equivalent information, without undue hardship," but made no factual findings on how it made a showing. *Id.* at 263. The Estate argued that "without a transcript of the telephonic hearing, this court must assume that it made the showing necessary to entitle it to obtain the disputed documents." *Id.* Applying *D'Amato v. D'Amato*, 848 So. 2d 462 (Fla. 4th DCA 2003), this court held that the lack of a transcript was not dispositive "because it appear[ed] to be undisputed that no evidence or testimony was presented at the telephonic hearing." *Id.* Therefore, having the transcript in that instance would not provide any additional information on the issue before the court.

In the instant case, Ms. Henry alleges that the circuit court heard counsel's argument during the hearing but did not permit the admission of any evidence in support of the allegations in her petition. Unlike *Estate of Torres*, the transcript is necessary for our review of the issue alleged, particularly when AIM asserts that Ms. Henry's entitlement to

due process was accomplished by the hearing.<sup>3</sup> Stated plainly, for the circuit court to receive evidence, counsel must have indicated a desire to present evidence. If counsel was thereafter not permitted to do so, it was error. Since we have no transcript of the hearing and Ms. Henry did not attempt to provide a statement of proceedings, see Fla. R. App. P. 9.200(b)(5), it is unclear whether the circuit court committed that error.

We are bound by the presumption of correctness afforded to the circuit court and the burden is on Ms. Henry to show a departure from the essential requirements of law. See *United States Auto. Ass'n v. Bay Area Inj. Rehab Specialists Holdings, Inc.*, 311 So. 3d 172, 176 (Fla. 2d DCA 2020) (stating that it is the obligation of the appellant or petitioner to demonstrate error on the part of the trial court, which "necessarily includes the burden of making, preserving, and presenting an adequate record for appellate review").

Petition denied.

ROTHSTEIN-YOUAKIM and ATKINSON, JJ., Concur.

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Opinion subject to revision prior to official publication.

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<sup>3</sup> Under due process, "the right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the right to 'introduce evidence at a meaningful time and in a meaningful manner.'" *Baron v. Baron*, 941 So. 2d 1233, 1236 (Fla. 2d DCA 2006) (quoting *Brinkley v. County of Flagler*, 769 So. 2d 468, 472 (Fla. 5th DCA 2000)).