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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1401**

Sterling State Bank,
Appellant,

vs.

Reid E. Taggart, et al.,
Respondents.

**Filed May 4, 2010
Affirmed
Klaphake, Judge**

Stearns County District Court
File No. 71-CV-08-1863

Tracy J. Morton, Apple Valley, Minnesota (for appellant)

Bryan R. Battina, Bock & Battina, LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge;
and Crippen, Judge.*

UNPUBLISHED OPINION

KLAPHAKE, Judge

This appeal is from the district court's order discharging a notice of lis pendens filed by appellant Sterling State Bank against property owned by respondents Reid E. Taggart and Karen Taggart. Because the district court did not err in concluding that the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

bank had no interest in or lien against respondents' property that would support a notice of lis pendens, we affirm.

DECISION

This matter involves interpretation of both a statute and a contract. We review statutory construction de novo, as a legal issue. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). If a contract is unambiguous, its construction is also a question of law. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 221 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). If ambiguous, the terms of the contract present a question of fact and extrinsic evidence may be considered. *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). An order discharging a notice of lis pendens is immediately appealable. *St. Croix Dev., LLC v. Gossman*, 735 N.W.2d 320, 324 (Minn. 2007).

Discharge of Lis Pendens

The district court discharged the notice of lis pendens here because it concluded that the bank's complaint does not involve the title to or interest in respondents' property located at 706 Quinn Avenue in Elk River (the Quinn property) but rather it raises a claim for breach of contract.

A notice of lis pendens may be filed with the county recorder in "all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought into question by either party." Minn. Stat. § 557.02 (2008). The purpose of a notice of lis pendens is to inform purchasers and others with an interest in the property of

a pending action that affects the filing party's rights or equities in the property. *Id.*, *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 158 (Minn. 2007). The filing party must have an interest in the property that predates the lawsuit; one may not file a notice of lis pendens "merely as security for an anticipated money judgment against a litigant." *St. Croix Dev.*, 735 N.W.2d at 323.

In order to support the filing of a notice of lis pendens, the underlying action must involve either title to the property, an interest in the property, or an equitable lien on the property. *Rehnberg v. Minn. Homes, Inc.*, 236 Minn. 230, 233-34, 52 N.W.2d 454, 456 (1952). The bank's complaint does not involve title to the Quinn property and does not allege a security interest in the property because respondents have not conveyed any interest in the property to the bank. Rather, the bank alleges that commercial guaranties signed by respondents create an equitable lien on the property in the bank's favor.

Respondent Reid Taggart owned a business, Red Line Racing, LLC. Red Line borrowed money from the bank in 2005 and 2007, signing promissory notes, commercial security agreements, and business loan agreements. These loans were also secured by a mortgage on property owned by respondents' parents. In addition, in 2005 and 2007, respondents signed commercial guaranties for payment of the loans. Both commercial guaranties contain the same language: respondents agree to guarantee all of Red Line Racing's debt to the bank and "will not, without [the bank's] prior written consent . . . sell, lease, assign, encumber, hypothecate, transfer, or otherwise dispose of all or substantially all of the Guarantor's assets, or any interest therein."

An “equitable lien” is “[a] right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property.” *Black’s Law Dictionary* 1007 (9th ed. 2009). For example, an equitable lien on a property may arise in favor of an occupant, tenant, or joint owner who makes permanent improvements or repairs to land, or “when land or other property is transferred subject to the payment of debts, legacies, portions, or annuities to third parties.” *Id.*

But a notice of lis pendens cannot be based on a lien that will arise in the future based on litigation between the parties. *Bly v. Gensmer*, 386 N.W.2d 767, 769 (Minn. App. 1986). In *Bly*, the Gensmers divided a piece of land into five building lots and an outlot that could not be developed because it was subject to a conservation easement with the local municipality. *Id.* at 768. The conservation easement was perfected one day before the Gensmers sold one of the lots and the outlot to the Blys. *Id.* Upon discovering the conservation easement, the Blys sued the Gensmers, alleging fraud, breach of warranty of title, unjust enrichment, and punitive damages, and they also filed a notice of lis pendens against two of the Gensmers’ other lots. *Id.* This court affirmed the district court’s conclusion that the Blys would only have a lien created as the result of litigation between the parties and not as the result of transactions or dealings between the parties; thus, there was no basis for filing a notice of lis pendens. *Id.*

Likewise, in *Rehnberg*, the plaintiff entered into a contract with a corporation to develop some land; plaintiff agreed to plat the land and the corporation hired another person to build the houses. Plaintiff was to receive \$150 per house built and 25% share

in the net profits after all the houses were sold. 236 Minn. at 232, 52 N.W.2d at 455. Plaintiff duly platted the land and secured approvals for building and financing, but he was never paid. *Id.* at 232-33, 52 N.W.2d at 455-56. Plaintiff then brought suit against the corporation and the builder and filed a notice of lis pendens. The supreme court affirmed the district court's discharge of the lis pendens, stating, "No equitable lien by express contract arises, in that the complaint does not allege that the corporation agreed to give plaintiff a lien on the premises as security for the payment of his services." *Id.* at 234, 52 N.W.2d at 456.

Respondents did not grant a security interest in their assets to the bank. While entry of judgment on a successful claim of breach of contract may result in a specific lien upon an entry of judgment, a mere allegation of breach of contract does not provide a basis for a notice of lis pendens. *See id.* at 232, 52 N.W. 2d at 456. The commercial guaranties ensure that the bank can hold respondents responsible for payment of Red Line Racing's debts, but the bank has no specific recourse against individual pieces of property owned by respondents; a breach of the guaranty contract would permit the bank in the future to claim a lien against respondents' property, but an equitable lien against a specific piece of property would not arise solely because of the course of dealings between the parties. *See Bly*, 386 N.W.2d at 768. This is further supported by the language of the guaranty, which states that respondents may not sell or dispose of "all or substantially all" of their assets without informing the bank. This statement makes clear that the bank has not perfected an interest in particular pieces of property and that presumably respondents could sell something less than "substantially all" of their assets.

Because the underlying complaint does not involve the title of, an interest in, or an equitable lien on the Quinn property, the district court did not err by discharging the notice of lis pendens.

Counterclaim as Basis for Notice of Lis Pendens

In their answer to the bank's complaint, respondents raised counterclaims against the bank, alleging breach of their 2002 mortgage contract on the Quinn property, which was held by the bank, tortious interference with business, deceptive trade practices, and consumer fraud. Respondents also asked for a declaration of the payoff amount for their mortgage. The basis for these counterclaims was the bank's alleged interference in respondents' attempts to sell the Quinn property. The district court concluded that the mortgage payoff amount was moot because respondents had already paid the bank. The district court did not address whether the payoff was accurate. The bank asserts that therefore the issue of an accurate payoff remains and argues that this issue involves or invokes an interest in land that would support a notice of lis pendens.

Respondents' counterclaim alleged a breach of the mortgage contract by the bank's failure to provide an accurate payoff figure. This does not involve or invoke a question of title or an interest in land or a lien, thus providing no basis for a notice of lis pendens under Minn. Stat. § 557.02.

Affirmed.