

Consumer Finance Litigation

A Burr & Forman **BLOG**

“Eviscerate” is the Proper Term for What the Ober Opinion Did to the Lis Pendens Statute-But What About Jurisdiction?

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Florida’s 4th District Court of Appeal sent the real property and mortgage world into a frenzy this week after issuing its opinion in [Ober v. Town of Lauderdale-By-The-Sea](#), dramatically weakening the protections of Florida’s *lis pendens* statute. It held that a lien placed on a property after the foreclosure judgment which arises from an action occurring post-judgment, is not extinguished by Florida Statute [§48.23](#). The term most commonly used in emails and articles drafted by attorneys to describe the impact of this decision on the *lis pendens* statute is “eviscerate”. This type of hyperbolic word usage is fairly unusual for the real property and mortgage professionals impacted by this decision. In this case though, it is absolutely appropriate. [Eviscerate](#) means to deprive something of its essential content. That is exactly what this decision has done. Further, the Court (and even Mr. Ober’s appellate brief) fails to address the issue of the trial court’s continued jurisdiction.

In *Ober*, after a foreclosure judgment was entered in 2008, the Town recorded liens on the property due to code violations occurring after final judgment. In 2012, the house sold to Mr. Ober at the foreclosure sale. The Court held that the intervening liens were not extinguished and still encumbered the property.

Why is this news?

Section 48.23 of the Florida Statutes says that if you record a *lis pendens*, providing official notice that you are pursuing an action to enforce a lien that encumbers a given property, anyone who acquires an interest in the property during the *pendency of the action* shall take that interest subject to your lien. This is why a Florida foreclosure plaintiff does not have to continually run title updates to ensure it has not missed a new interest-holder.

The key here is the definition of “pendency of the action”. The Court mentions that Florida courts have regularly held that the *lis pendens* is no longer valid after final judgment is entered.[\[1\]](#) The cases cited

do not contemplate a situation in which a court retains jurisdiction. In practice, that protection has been extended to include liens recorded up until the date of the foreclosure sale. In fact, Form 1.996(a) of the Florida Rules of Civil Procedure provides a template for a foreclosure judgment which includes a provision, “On filing the certificate of sale, defendants and all persons claiming under or against defendants since the filing of the notice of lis pendens shall be foreclosed.”

The Jurisdiction Question

There is a gap in the rationale that the 4th District did not address—jurisdiction. The final judgment in *Ober* reserved jurisdiction to enter a deficiency judgment. The 2nd District put it well when it stated, “While the term “lis pendens” literally implies a pending suit, it is defined as the jurisdiction, power, or control which courts acquire over property involved in a pending suit.”^[2]

That jurisdiction, power, or control is routinely reserved in the language of final judgments to extend jurisdiction to hear complaints for deficiency judgments^[3] and re-foreclosure. With deficiency judgments in particular, *that jurisdiction extends beyond the date of the foreclosure sale*, as the plaintiff will not know whether there is a deficiency until the property is sold. The court in *Ober* retained jurisdiction and the lis pendens should have remained active until the foreclosure sale occurred when the court was divested of its jurisdiction. Why this issue was not raised in the appellate briefs is unclear.

What is the potential impact?

If a junior lien is not extinguished in a foreclosure, it must be satisfied or extinguished by re-foreclosure^[4], in order for there to be marketable title. If a lien attaches post-judgment, a plaintiff is more likely to negotiate payment and satisfaction to avoid the delay and expense of re-foreclosing.

While all the intervening liens in *Ober* were individual occurrences that took place post-judgment, it is not clear how this opinion will affect liens that arise out of an ongoing duty where one incident occurs post-judgment but most occur pre-judgment, such as non-payment of HOA/COA fees or ongoing code violations. Can a HOA or municipality wait until a payment/fine is missed post-judgment to record the entirety of its lien, including all the past due amounts? We are likely to find out the answer to this question only after a parade of litigation. The Real Property, Probate & Trust Law section of the Florida Bar has taken an interest in this case and predicts, amongst other things, that the decision will create uncertainty as to the status of title thus discouraging fair market bids at foreclosure sale. There is likely to be an increase in sale rescissions by third party purchasers if they discover large liens have attached to their property. If bids go down, that creates the potential for increased deficiency liability for borrowers. The unintended consequences of this decision could be quite broad. There is still time for Mr. Ober to file a Motion for Rehearing of this Opinion and the 4th District could clarify or revise its opinion; many real property and mortgage professionals are crossing their fingers tonight, hoping the Court will do just that.

^[1] The Opinion cites the following cases: See *U.S. Bank Nat’l Ass’n v. Quadomain Condo. Ass’n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012) (“[T]he court presiding over the action which created the lis pendens has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the lis pendens is recorded to the date it enters final judgment”); *Seligman v. N. Am. Mortg. Co*

., 781 So. 2d 1159, 1196 (Fla. 4th DCA 2001) (“[T]he court in the dissolution proceeding had jurisdiction over the property until final judgment”); *Hotel Eur., Inc. v. Aouate*, 766 So. 2d 1149, 1151 (Fla. 3d DCA 2000) (“Because a Final Judgment has been entered, the instant case is no longer pending and thus the Notice of Lis Pendens is no longer valid”); *Marchand v. De Soto Morg. Co.*, 149 So. 2d 357, 359 (Fla. 2d DCA 1963) (“[T]he doctrine of lis pendens is the jurisdiction, power or control which courts acquire of property involved in a suit pending the continuance of the action and until final judgment therein”).

[2] *Med. Facilities Dev., Inc. v. Little Arch Creek Properties, Inc.*, 675 So. 2d 915, 917 (Fla. 2nd DCA 1996).

[3] “A judgment of foreclosure is a final order, but ‘the law contemplates a continuance of the proceedings for entry of a deficiency judgment’ as a ‘means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor,’ *Timmers v. Harbor Fed. Sav. & Loan Ass’n*, 548 So.2d 282, 283 (Fla. 1st DCA 1989).” *L.A.D. Prop. Ventures, Inc. v. First Bank*, 19 So. 3d 1126 (Fla. 2d DCA 2009).

[4] Re-foreclosures are actions to extinguish junior liens that were missed in the initial foreclosure action. The right to re-foreclose passes with the title, so the purchaser at foreclosure sale may re-foreclose. It can be brought as a separate action, but can also be completed by re-opening the original action if the final judgment of foreclosure specifically reserves jurisdiction.

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