

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 599 Lis Pendens  
**SPONSOR(S):** Altman  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 904

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	10 Y, 0 N	Tuszynski	Bond
2) Judiciary Committee			

### SUMMARY ANALYSIS

An interest in real property is not effective unless the instrument creating such interest is recorded in the public records. In general, documents are recorded soon after creation of such documents to create a clear chain of title. However, where there are conflicting documents, the first recorded document takes priority over any filed later. Where a lawsuit is filed affecting a real property interest, an interest recorded during the pendency of the lawsuit may take priority over the final resolution of title in the court case. A lis pendens resolves this.

A notice of lis pendens is recorded in any legal action where a court may affect an interest in real property. Where a lis pendens is recorded, the final disposition of the court relates back to the recording of the lis pendens, thereby barring any intervening document from affecting the real property interest determined by the court.

In 2016, an appellate court ruled that a lis pendens terminated when the time to appeal the final judgment of foreclosure had expired. The effect of that ruling was to leave a gap between final judgment and judicial sale where an intervening interest could impact title. The court reversed that ruling on rehearing to provide that the lis pendens is valid though the judicial sale.

The bill provides that, in a proceeding involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title. This requirement maintains lis pendens protection against subordinate interests or liens, including those filed after a final order of judicial sale in a foreclosure case but before an instrument transferring title is recorded.

The bill applies to pending actions at the time of the effective date.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

Florida is considered a "notice" state, meaning the state employs a system in which interest in real property is legally established through recorded notice, placing interests in order according to when they were recorded. Section 695.01, F.S., requires a person with any interest in real property to record that interest, giving constructive notice to any subsequent purchaser or lienor of that interest.

##### Lis Pendens

The term "lis pendens" literally means "pending lawsuit."<sup>1</sup> A notice of lis pendens is a statutory notice to all persons that certain identified property, real or personal, is the subject matter of pending litigation and the court now has jurisdiction and control over the identified property.<sup>2</sup> This creates an exception to the notice system, barring enforcement of all interests and liens that arise after the filing of a notice of lis pendens, but allowing the holder of an unrecorded interest or lien to intervene in a proceeding within 30 days.<sup>3</sup> If that interest holder does not intervene and the proceedings are prosecuted to a judicial sale, the property is forever discharged from all such unrecorded interests and liens, preventing impaired title.<sup>4</sup> This protects the plaintiff from intervening liens that could impair any claimed property rights and protects future purchasers and lienors from becoming involved in disputed title.<sup>5</sup>

While a notice of lis pendens may be used in any legal action where title to real property may be at issue, it is most common in foreclosure actions. A mortgagee is entitled to record a notice of lis pendens as the action is founded on a duly recorded instrument, the mortgage.<sup>6</sup> The established understanding of lis pendens is that, except as otherwise provided by law, the lis pendens protection from intervening interests and liens remains in effect through the judicial sale of the property and the subsequent issuance of the instrument transferring title.<sup>7</sup> This understanding is evidenced by the language of Section 48.23(1)(d), F.S.:

“ . . . [T]he recording of such notice of lis pendens . . . , constitutes a bar to the enforcement against the property described in the notice of all interests and liens, . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and **if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.** . . . “

The language of the lis pendens statute is the foundation for the following language found in the "Final Judgement of Foreclosure" - Form 1.996(a) of the Florida Rules of Civil Procedure:<sup>8</sup>

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<sup>1</sup> Black's Law Dictionary (10<sup>th</sup> ed. 2014), lis pendens

<sup>2</sup> S. 48.23, F.S.

<sup>3</sup> S. 48.23(1)(d), F.S.

<sup>4</sup> Id.

<sup>5</sup> *Medical Facilities Development, Inc. v. Little Arch Creek Properties*, 675 So.2d 915, 917 (Fla. 1996).; *Fischer v. Fischer*, 873 So.2d 534, 536 (Fla. 4<sup>th</sup> DCA 20014).

<sup>6</sup> *Berkley Multi-Units v. Linder*, 464 So.2d 1356, 1357 (Fla. 4<sup>th</sup> DCA 1985).

<sup>7</sup> Real Property, Probate & Trust Law Section of the Florida Bar, *White Paper on Proposal to Amend s. 48.23, F.S. (lis pendens)* (on file with Civil Justice & Claims Subcommittee Staff).

<sup>8</sup> Available at: <https://www.floridabar.org/wp-content/uploads/2017/08/Civil-Procedure-Rules-Updated-8-4-2017.pdf>, pg. 223

“On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed.”

### Ober v. Town of Lauderdale-by-the-Sea

On August 24, 2016, the Fourth District Court of Appeal ruled that a notice of lis pendens terminates when the time for appeal of the final judgment of foreclosure has passed. This ruling meant in that case that code enforcement liens recorded after the final judgment of foreclosure and prior to the judicial sale *were not discharged* by the operation of the notice of lis pendens and remained an encumbrance on the real property.<sup>9</sup>

On January 25, 2017, the Fourth District Court of Appeal granted rehearing and reversed its previous ruling. The court found that liens placed on property between the entry of a final judgment of foreclosure and a judicial sale *are discharged* by s. 48.23(1)(d), F.S.<sup>10</sup> The Court held that a proper reading of s. 48.23(1)(d), F.S., where the proceeding is prosecuted to a judicial sale, the sale discharges all liens, whether recorded before or after the final judgment.<sup>11</sup> This ruling confirms that the operation of the notice of lis pendens is a bar to enforcement against the property of all interests or liens, recorded or unrecorded, from the time of recording of the notice of lis pendens through the issuance of the certificate of sale. The Court concluded by stating:<sup>12</sup>

“Resolution of the competing interests—of the Town, the lending and title insurance industries, property owners, and buyers at foreclosure sales—is in the province of the legislature.”

On February 7, 2017, the Town of Lauderdale-by-the-Sea filed a Motion for Certification of a question of great public importance to the Florida Supreme Court. On March 22, 2017, the District Court of Appeal granted the Town's motion and certified the following question to the Florida Supreme Court:

“Whether, pursuant to section 48.23(1)(d), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank's foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final foreclosure judgment, where the local government's interest or lien on the property arises after final judgment and did not exist within 30 days after the recording of the notice of lis pendens.”

On September 6, 2017, the Florida Supreme Court issued an order declining to exercise jurisdiction and denying the Town of Lauderdale-by-the-Sea's Petition for Review.<sup>13</sup>

### **Effect of Proposed Changes**

HB 599 amends s. 48.23, F.S. to provide that, in a proceeding involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title. This requirement maintains lis pendens protection against subordinate interests or liens, including those filed after a final order of judicial sale in a foreclosure case but before an instrument transferring title is recorded. In effect, the bill upholds the final appellate resolution of *Ober*.

The bill applies to pending actions.

<sup>9</sup> *Ober v. Town of Lauderdale-by-the-Sea*, 2016 WL 4468134 (Fla. 4th DCA Aug. 24, 2016), withdrawn; *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952 (Fla. 4th DCA 2017).

<sup>10</sup> *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 954 (Fla. 4th DCA 2017).

<sup>11</sup> *Id.* at 954.

<sup>12</sup> *Id.*

<sup>13</sup> *Town of Lauderdale-by-the-Sea v. Ober*, 2017 WL 3883662 (Fla. 2017).

The bill has an effective date of upon becoming law.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 48.23, F.S., relating to lis pendens.

**Section 2:** Applies the proposed changes to actions pending on the effective date of the bill.

**Section 3:** Provides an effective date of upon becoming law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES