



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 4, 2023

LETTER OPINION

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RE: *Givago Growth, LLC, et al. v. iTech AG, LLC, et al.*
Case No. CL-2023-5669

Dear Counsel:

The Court has before it the question of apparent first impression whether the filing

OPINION LETTER

of a *lis pendens*¹ can by itself constitute the “process” underlying the basis for a claim of malicious abuse of process. Because a *lis pendens* does not command an action but instead merely republishes the information in the complaint, this Court finds that the filing of a *lis pendens* is not a “process.” The Court thus holds that a *lis pendens* is just a “filed declaration,” and like the recording of a mechanic’s lien, is not a “process” reachable by the confines of the tort of malicious abuse of process.

Consequently, the Defendants’ demurrers and pleas in bar to such claim shall be sustained with prejudice.²

BACKGROUND

In October 2017, Plaintiffs Givago Growth, LLC, and Constanza Valdes, the legal title holders to the subject property, entered into a partnership agreement with Artifact, LLC, to renovate and sell a house located in McLean, Virginia. Artifact and iTech AG, LLC, entered into a side agreement, then unknown to Plaintiffs, whereby iTech would loan Artifact money for the project. Artifact used the loan proceeds for other projects and found itself unable to pay timely under the loan terms, which included an annual interest rate of

¹ “A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” *Lis Pendens*, BLACK’S LAW DICTIONARY (11th ed. 2019).

² The Court observes that a *lis pendens* ungrounded in proper fact or interposed for improper purpose might be characterized as an “other paper” subjecting the filer to sanctions under Virginia Code § 8.01-271.1. However, such remedy must be sought during the litigation to which the *lis pendens* applies. See *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 355 (2005) (“[T]he trial court is empowered to consider the sanctions motion either before the entry of the nonsuit order or within 21 days after the entry of the nonsuit order.”).

50%.³ To placate iTech, on July 11, 2018, Artifact assigned its share of the future proceeds of the sale of the home to iTech. On September 25, 2018, iTech, then represented by the Robbins Law Group, PLLC, filed a complaint in this Court against Givago Growth, LLC, and Constanza Valdes for specific performance of the joint venture agreement they had with Artifact to which iTech was never a party. On the same date, iTech also filed a *lis pendens* in the land records of the Fairfax Circuit Court, thereby notifying prospective purchasers of such house that there was litigation pending affecting the property. When the *lis pendens* was filed, the property was under contract for sale, and the purchasers refused to buy the property because of the *lis pendens*. On August 28, 2018, Artifact filed for bankruptcy protection. On November 30, 2018, the Bankruptcy Court Trustee filed a mechanic's lien against the property. Plaintiffs were able to sell the property on January 29, 2019, but the proceeds were escrowed in consequence of the mechanic's lien and *lis pendens*. The mechanic's lien was satisfied on August 2, 2019. On August 16, 2019, iTech nonsuited its case of which the *lis pendens* had provided notice.

On April 11, 2023, Plaintiffs Givago Growth, LLC, and Constanza Valdes filed the complaint in this cause against iTech and the Robbins Law Group, PLLC, alleging malicious abuse of process, slander of title, tortious interference with contractual relations, and civil conspiracy.⁴ On May 25, 2023, another judge of this Court dismissed

³ While this financial term may be usurious under Virginia Code § 6.2-303, unlike is the case for an individual, a limited liability entity like Artifact is not permitted to plead the defense of usury to defeat the contractual obligation to pay such interest. Va. Code § 6.2-308.

⁴ The Supreme Court of Virginia opinion in *Givago Growth, LLC v. iTech AG, LLC*, 300 Va. 260 (2021), pertains to a previous iteration of Givago Growth's suit, which was nonsuited on March 1, 2023, and reinstated by the filing of a new complaint, this suit, on April 11, 2023.

the slander of title and civil conspiracy counts with prejudice. On August 11, 2023, the undersigned judge overruled Defendants' demurrers to Count III (tortious interference with contractual relations) and sustained the demurrers on Plaintiffs' request for attorney fees with leave to amend the complaint within fourteen days. The demurrer with respect to Count I (malicious abuse of process) was taken under advisement.

Plaintiffs argue that the filing of the *lis pendens* is a "process" and thus can be the factual basis for a claim of malicious abuse of process. Defendants respond that the filing of a *lis pendens* is not a "process" under Virginia law, because the *lis pendens* merely republishes information contained in the complaint and cannot in turn be the factual basis for a claim of malicious abuse of process.

ANALYSIS

To withstand a demurrer to a claim for malicious abuse of process Plaintiffs must plead "(1) the existence of an ulterior purpose and (2) *an act in the use of the process* not proper in the regular prosecution of the proceedings." *Donohoe Constr. Co., Inc. v. Mount Vernon Assocs.*, 235 Va. 531, 539 (1988) (emphasis added). At issue in this case is not whether Plaintiffs properly pled their claim in terms of the elements averred. Rather, the question is whether, by relying solely on the filing of the *lis pendens* as the factual basis for such a claim, the tort of malicious abuse of process is barred as unsustainably pled.

Under Virginia law, a "process" is defined "in terms of 'the mandate of a court order under its seal, whereby a party or an officer of the court is commanded to do certain acts.'" *Ubl v. Kachouroff*, 937 F.Supp.2d 765, 770 (E.D. Va. 2013). A *lis pendens* is "merely a notice of the pendency of the suit to anyone interested and a warning . . . [to] examine

the proceedings therein to ascertain whether the title to the property was affected or not by such proceedings.” *Young-Allen v. Bank of America, N.A.*, 298 Va. 462, 471 (2020) (quoting *Harris v. Lipson*, 167 Va. 365, 372 (1937)). The filing of a *lis pendens* “merely republishes the key information from the complaint.” *Givago Growth, LLC v. iTech AG, LLC*, 300 Va. 260, 266 (2021) (an opinion in the prior round of litigation between the parties). “The notice of *lis pendens* [sic] is purely incidental to the action wherein it is filed and refers specifically to such action and has no existence apart from that action.” *Id.* (quoting *Ballard v. 1400 Willow Council of Co-Owners, Inc.*, 430 S.W.3d 229, 237 (Ky. 2013)).

The Supreme Court of Virginia has guided that the affirmative defense of absolute privilege applies to the filing of a *lis pendens*, because it “merely republishes the key information from the complaint,” and “[i]t would therefore be incongruous to extend the [applicable] privilege to [the] complaint but not to its associated *lis pendens* when confronted with the allegation that it has slandered a title.” *Givago Growth, LLC*, 300 Va. at 266. At the same time, the Supreme Court has never extended such privilege to non-defamation torts, such as malicious abuse of process, tortious interference with contractual relations, and civil conspiracy. *Id.* at 266-267. So, the question ensues whether though itself subject to privilege, the *lis pendens* can serve as the unprivileged factual predicate for the non-defamation tort of malicious abuse of process. Consistent with the aforesaid guidance in *Givago Growth, LLC*, it would thus similarly be incongruous to deny the viability of a malicious abuse of process claim that is based merely on the

filing of the complaint, but to allow such a claim solely based on the filing of a *lis pendens*.
See Id. at 266.

In *Smith v. Miller and Smith at Pembroke, LLC*, although not deciding whether a *lis pendens* is a “process,” the Court ruled the complaint lacked sufficient factual allegations to sustain an abuse of process claim because the complaint “lack[ed] any factual allegation of any acts other than the filing of the *lis pendens*.” 84 Va. Cir. 64, *6 (Fairfax 2011). The suggestion from the *Smith* case is that the filing of a *lis pendens* is to be viewed as just “the institution of legal proceedings.” *Id.*

The concept that a *lis pendens* is not a “process” contemplated as the proper sole basis for the tort of malicious abuse of process is also consistent with rulings in several other states, including West Virginia, Kentucky, and California. *See, e.g., Brass Ring, Inc. v. Johnson*, 2013 WL 5967039, *4 (W. Va. 2013) (“Notice of *lis pendens* commences no action, commands no act, and confers no obligation of appearance . . . From the time of the filing of the appropriate notice, prospective purchasers are warned regarding the acquisition of property that is affected by litigation. However, notice of *lis pendens* alone creates no lien or claim on the property. A notice of *lis pendens* is not process; it is merely notice of process.”); *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. Ct. App. 1980) (“The *lis pendens* [sic] is merely a notice required by statute to protect the interests of any subsequent purchasers. It is filed without intervention of the judicial authority and brings neither the property nor any parties before the court. Since there is no process, there can be no abuse of process.”); *Palmer v. Zaklama*, 109 Cal.App.4th 1367, 1381 (2003) (“The recordation of a notice of *lis pendens* [sic], even if done for an

improper purpose, is not a valid basis for a cause of action for abuse of process, entirely apart from whether the recordation is privileged.”).

In the instant case, the filing of a *lis pendens* is cast as the sole factual basis underlying Plaintiffs’ claim against Defendants for malicious abuse of process. A *lis pendens* is like a mechanic’s lien in being a notice that impacts property. A mechanic’s lien must be perfected to be enforced, and the mere filing of such a lien is insufficient to support an abuse of process claim. *Donohoe Constr. Co., Inc.*, 235 Va. at 538, 541. If a *lis pendens* were to be read to constitute a “process” as contemplated within the tort of malicious abuse of process, this would lead to the functionally inconsistent interpretation that absolute privilege applies to a complaint and to a *lis pendens* filed in notice thereof, but that the privileged *lis pendens* would be dispossessed of such an affirmative defense when recast as the basis for the tort of malicious abuse of process. A *lis pendens* is just a “filed declaration,” and like the recording of a mechanic’s lien, it is not a “process” reachable by the confines of the tort of malicious abuse of process. See *Ubl*, 937 F.Supp.2d at 771; *Givago Growth, LLC*, 300 Va. at 266. For these reasons, when a *lis pendens* is the sole basis for the claim, the same may not be miscast as a malicious abuse of “process,” thereby evading the absolute privilege afforded to a complaint and the associated *lis pendens* that has merely provided recordation notice thereof.

CONCLUSION

The Court has considered the question of apparent first impression whether the filing of a *lis pendens* can by itself constitute the “process” underlying the basis for a claim of malicious abuse of process. Because a *lis pendens* does not command an action but

instead merely republishes the information in the complaint, this Court finds that the filing of a *lis pendens* is not a “process.” The Court thus holds that a *lis pendens* is just a “filed declaration” and like the recording of a mechanic’s lien, is not a “process” reachable by the confines of the tort of malicious abuse of process.

Accordingly, the Court shall enter a separate order sustaining Defendants’ demurrers and pleas in bar to such claim, and this cause continues.

Sincerely,

A solid black rectangular redaction box covering the signature of David Bernhard.

David Bernhard
Judge, Fairfax Circuit Court