

No. 47004-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FEARGHAL McCARTHY, et al.
Appellants,

v.

WEST PARK PARTNERS, LLC,
Respondent.

BRIEF OF RESPONDENT

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Table of Contents

	<u>Page</u>
Table of Authorities	ii
I. Introduction	1
II. Statement of the Case	4
III. Argument	9
A. McCarthy Failed to Allege or Aver Facts Sufficient to Support a Claim for Quiet Title	9
B. McCarthy’s Request for Imposition of a Constructive Trust Did not Warrant a Lis Pendens	20
C. McCarthy Failed to Provide any Valid Basis for Reconsideration	31
D. McCarthy’s Request to Stay was Moot	32
E. McCarthy Is Liable to West Park for its Attorney’s Fees	33
IV. Request for Attorney’s Fees	36
VI. Conclusion	36
Appendix to Respondent’s Brief	26
RCW 4.28.320	38
RCW 4.28.328	39
RCW 7.28.010	41

Table of Authorities

<u>Washington Cases</u>	<u>Page</u>
<i>Bavand v. Onewest Bank</i> , 176 Wn. App. 475, 502 309 P.3d 636 (2013)	11, 12
<i>Brown v. Bremerton</i> , 69 Wash. 474, 125 P. 785 (1912)	12
<i>City of Centralia v. Miller</i> , 31 Wn.2d 417, 197 P.2d 244 (1948)	12
<i>City of Spokane v. Sec. Savs. Soc'y</i> , 82 Wash. 91, 143 P. 435 (1914)	12
<i>Desimone v. Spence</i> , 51 Wn.2d 412, 318 P.2d 959 (1957)	12
<i>Eckley v. Bonded Adjustment Co.</i> , 30 Wn.2d 96, 190 P.2d 718 (1948)	12
<i>Gustafson v. Gustafson</i> , 47 Wn. App. 272, 734 P.2d 949 (1987)	16
<i>Lewis v. City of Seattle</i> , 174 Wash. 219, 24 P.2d 427 (1933)	12
<i>Marriage of Lutz</i> , 74 Wn. App. 356, 873 P.2d 556 (1994).	17
<i>Moon v. Phipps</i> , 67 Wn.2d 948, 411 P.2d 157 (1966)	16
<i>Moss v. Vadman</i> , 77 Wn.2d 396, 463 P.2d 159 (1969)	16
<i>Nyman v. Erickson</i> , 100 Wash. 149, 170 P. 546 (1918)	12
<i>Rohrbach v. Sanstrom</i> , 172 Wash. 405, 20 P.2d 28 (1933)	12
<i>Schwab v. City of Seattle</i> , 64 Wn. App. 742, 826 P.2d 1089 (1992)	19
<i>Westerbeck v. Cannon</i> , 5 Wn.2d 106, 104 P.2d 918 (1940)	16
<i>White v. White</i> , 33 Wn. App. 364, 655 P.2d 1173 (1982).	18

Non-Washington Cases

<i>BGJ Associates v. Superior Court</i> , 89 Cal.Rptr.2d 693, 75 Cal.App.4th 952 (1999)	22-24
<i>Burger v. Superior Court of Santa Clara County</i> , 151 Cal.App.3d 1013, 199 Cal.Rptr. 227, 230 (1984)	26
<i>Cap Care Group, Inc. v. McDonald</i> , 561 S.E.2d 578 (N.C. App., 2002)	30
<i>Heck v. Adamson</i> , 941 A.2d 1028 (DC, 2008)	29
<i>Katz v. Banning</i> , 617 N.E.2d 729 (Ohio App. 10 Dist., 1992)	28
<i>Levinson v. Eighth Judicial Dist. Court of State In and For County of Clark</i> , 857 P.2d 18, 109 Nev. 747, 750 (1993)	27
<i>Polk v. Schwartz</i> , 399 A.2d 1001 (N.J. Super. A.D., 1979)	29
<i>Ross v. Specialty Risk Consultants, Inc.</i> , 621 N.W.2d 669 (Wis. App., 2000)	29

Statutes

	<u>Page</u>
RCW 4.28.320	10, 20
RCW 4.28.328	3, 33-36
RCW 7.28.010	13

I. INTRODUCTION

Plaintiff's five assignments of error present the court with five distinct issues.

1. Valid Claim for Quiet Title? Plaintiff argues the trial court erred when it found that the Second Amended Complaint did not state a valid claim for quiet title. "It is a long-standing principle that the plaintiff in an action to quiet title must succeed on the strength of his own title and not on the weakness of his adversary."¹ But plaintiff's Second Amended Complaint does not allege that plaintiff ever owned the property, had a contract to purchase the property, made an offer to purchase the property, or paid a penny for the property. Instead, plaintiff merely alleges that he was a member of an LLC that once *considered* making an offer for the property. Did the trial court err in finding that plaintiff failed to allege a valid claim for quiet title?

¹ *Bavand v. Onewest Bank*, 176 Wn. App. 475, 502 309 P.3d 636 (2013) (citations and internal quotation marks omitted).

2. Lis Pendens Based on Constructive Trust?

Plaintiff further argues that—even if he did not state a valid claim to quiet title—he was still justified in recording a lis pendens on the subject property because his pleading requested the imposition of a constructive trust on the property. No reported decision in Washington has ever addressed whether requesting imposition of a constructive trust is sufficient to support a lis pendens. But the other jurisdictions that have considered the issue—based on similar fact patterns—have roundly rejected plaintiff’s argument. Did the trial court err in finding plaintiff’s constructive trust claim was insufficient to support a lis pendens?

3. Motion for Reconsideration. Plaintiff sought reconsideration of the order cancelling the lis pendens under Civil Rule 59, arguing that the trial court’s ruling was “contrary to law.” Plaintiff incorporated by reference all the materials he filed in opposition to the motion to cancel the lis pendens, and plaintiff cited to additional authorities that he could have cited

in his opposition. But plaintiff failed to provide the trial court with any controlling or persuasive authority to show that its decision was “contrary to law.” Did the trial court err by denying plaintiff’s motion for reconsideration?

4. Mootness. Plaintiff claims the trial court erred by not staying its order cancelling lis pendens. But the lis pendens was already cancelled on September 29, 2014, four days before plaintiff filed his motion for reconsideration, and more than a month before the court heard this motion. Had plaintiff’s request to stay the order canceling the lis pendens been rendered moot by the fact that the lis pendens had already been cancelled?

5. Attorney’s Fees. RCW 4.28.328(2) provides that a “claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens...for reasonable attorneys’ fees incurred in canceling the lis pendens.” In the case at bar, plaintiff was the claimant in an

action that the trial court found did not affect title to real property. Defendant West Park Partners, LLC (“West Park”) was aggrieved by plaintiff’s recording of a lis pendens on its property, and West Park prevailed on its motion to cancel the lis pendens. Is plaintiff liable to West Park for the attorney’s fees it incurred on its motion to cancel the lis pendens?

II. STATEMENT OF THE CASE

This lawsuit boils down to a business dispute between three individuals, Fearghal McCarthy, David Copenhaver, and Kevin DeFord. In June 2010, these three individuals came together as equal owners to form various entities under the banner of “Venia,” including Venia Development, LLC, Venia Asset Management LLC, Venia Holdings, Inc., and Venia RE Holdings, LLC. (CP 78-79, 202, 207) The purpose of their business relationship was to develop real estate. (CP 195) Within two years, however, the relationship broke down to the point that McCarthy sued Copenhaver and DeFord, along with

various related entities, in August of 2012. The Amended Complaint alleged that Copenhaver and DeFord had “breached agreements, duties, and fiduciary duties” to the Venia entities. (CP 64) One way in which they allegedly breached their duties was by “diverting business opportunities and investor opportunities” from the Venia entities. (CP 64) As a result, McCarthy alleged that the Venia entities had been “damaged in amounts to be proven at trial.” (CP 64-65) The Amended Complaint requested money damages, an accounting, and attorney’s fees. (CP 66)

After McCarthy sued them, Copenhaver and DeFord continued to develop real estate with each other, but without McCarthy. The development at issue in this case is an office building located at 610 Esther Street in Vancouver, Washington, just west of Esther Short Park. In October of 2013—more than a year after this lawsuit was filed—Copenhaver caused one of his other business entities to enter into a contract with the City of Vancouver for the purchase of

610 Esther Street. (CP 131) The purchase price for the property was roughly \$5.1 million. (CP 132-133) One month later, in November 2013, Copenhaver and DeFord joined with other individuals to form the Respondent, West Park Partners, LLC (“West Park”). (CP 189-193) Two months after that, in January 2014, the contract to purchase 610 Esther Street was assigned to West Park. (CP 187-188) West Park completed this transaction, purchasing the property from the City of Vancouver for roughly \$5.1 million.

After learning of West Park’s acquisition of 610 Esther Street, McCarthy amended his complaint to add West Park as a defendant in this lawsuit. The Second Amended Complaint alleged that the defendants “converted” the “real property and contractual rights to real property located at...610 Esther Street.” (CP 85)

McCarthy filed the Second Amended Complaint on July 14, 2014. That same day, without any prior notice, McCarthy recorded a lis pendens on 610 Esther Street.

Two months later, on September 19, 2014, West Park moved to cancel the lis pendens on 610 Esther Street. McCarthy opposed the motion and filed a declaration in support of his opposition. (CP 122) In his declaration, McCarthy sought to justify the lis pendens. But McCarthy's declaration does not state that the Venia entities ever owned 610 Esther Street, had a contract to purchase 610 Esther Street, made an offer to buy 610 Esther Street, or paid a single penny toward its purchase price. Instead, McCarthy's declaration merely states that "[t]he property at 610 Esther Street was a property that was *under consideration for acquisition* and development by the Venia LLCs." (CP 125 (emphasis added))

McCarthy then points out that Copenhaver and DeFord purchased the property, without him, through West Park. Based on these facts alone, McCarthy proclaims that "[t]he property at 610 Esther Street *rightfully belongs* to Venia RE Holdings LLC and/or Venia Development LLC." (CP 126) In other words, McCarthy asserts that Venia is the *rightful owner*

of 610 Esther Street merely because Venia once *considered* acquiring it. McCarthy acknowledges that “[t]his is the basis for the claim to quiet title in the Second Amended Complaint as to 610 Esther Street.” (CP 126)

In summary, McCarthy, Copenhaver and DeFord were once business partners in various Venia entities. While they were still working together through Venia, they considered acquiring 610 Esther Street, but they did not even make an offer on the property. Several years later, after their business relationship with McCarthy had soured, Copenhaver and DeFord—along with other unrelated individuals—joined to purchase 610 Esther Street. McCarthy claims this was a misappropriation of a business opportunity that belonged to Venia and that, as a result, 610 Esther Street “rightfully belongs” to one of the Venia entities. Based on these facts, McCarthy recorded a lis pendens on the property. The fundamental question for this court to decide is: are these facts enough to warrant a lis pendens?

III. ARGUMENT

A. McCarthy Failed to Allege or Aver Facts Sufficient to Support a Claim for Quiet Title

As an initial matter, it must be made clear that West Park did not bring any motion to dismiss McCarthy's Second Amended Complaint. The only motion brought by West Park was to cancel the lis pendens. Thus, the only order entered by the trial court was an order cancelling the lis pendens. One of the reasons the trial court cancelled the lis pendens was because it concluded that the operative pleading against West Park did not state facts sufficient to state a claim for quiet title.

Moreover, plaintiff never moved to amend his complaint, and plaintiff never identified what particular facts he would have included in an amended complaint to state a claim for quiet title.

Rather than considering a motion to dismiss under Civil Rule 12, the trial court was confronted with a motion to cancel a lis pendens. Thus, the controlling authority was found in

RCW 4.28.320, which provides the sole authority for recording a lis pendens in the State of Washington. That statute provides, in pertinent part, that a lis pendens may only be filed “after an action *affecting title to real property* has been commenced.”

(Emphasis added.) Consequently, the issue confronting the trial court was whether plaintiff’s Second Amended Complaint stated facts sufficient to qualify as “an action affecting title to real property.”

West Park demonstrated to the trial court that the lawsuit was not “an action affecting title to real property” because McCarthy had failed to allege any facts that—if proved—would warrant title to the property being vested in McCarthy or his related entities. Instead, the pleadings showed—and McCarthy did not dispute—that none of McCarthy’s related entities had ever owned the property, contracted to purchase the property, offered to purchase the property, or paid a penny for the property. The only basis for McCarthy’s claim that the

property “rightfully belonged” to the Venia entities was that they had once “considered” acquiring the property.

As West Park argued to the trial court, “it would be a bizarre world, indeed, if properties ‘rightfully belonged’ to every company that was considering acquiring them.” (CP 210) The true basis of plaintiff’s claim is that West Park was prohibited from acquiring 610 Esther Street because doing so allegedly violated a fiduciary duty to plaintiff. But a quiet title claim cannot be brought against the purchaser of a property simply by arguing that the purchaser had a legal duty not to purchase the property. To state a quiet title claim, a plaintiff must allege some facts showing that plaintiff is the legal or equitable owner of the property. As the courts have held many times: “an action to quiet title is an equitable proceeding that is designed to resolve *competing claims of ownership* to property. It is a long-standing principle that the plaintiff in an action to quiet title must succeed on the *strength of his own*

title and not on the weakness of his adversary.”² This has been the law in Washington for more than one hundred years.³

Thus, even if one assumed that West Park’s acquisition of 610 Esther were wrongful, the most McCarthy would have is a claim for damages—not a claim to own the property itself. According to the purchase documents, West Park paid more than five million dollars for the property. McCarthy, in contrast, does not allege that either he or any of the Venia entities have contributed one penny to the purchase of the property. In sum, there are no facts alleged in McCarthy’s Second Amended Complaint, or stated in his declaration, that could result in title in 610 Esther Street simply being transferred to McCarthy or any of the Venia entities.

² *Bavand v. Onewest Bank*, 176 Wn. App. 475, 502, 309 P.3d 636 (2013) (citations and internal quotation marks omitted, emphasis added).

³ See e.g., *Desimone v. Spence*, 51 Wn.2d 412, 415, 318 P.2d 959 (1957) (citing *City of Centralia v. Miller*, 31 Wn.2d 417, 197 P.2d 244 (1948); *Eckley v. Bonded Adjustment Co.*, 30 Wn.2d 96, 190 P.2d 718 (1948); *Lewis v. City of Seattle*, 174 Wash. 219, 24 P.2d 427 (1933); *Rohrbach v. Sanstrom*, 172 Wash. 405, 20 P.2d 28 (1933); *Nyman v. Erickson*, 100 Wash. 149, 170 P. 546 (1918); *City of Spokane v. Sec. Savs. Soc’y*, 82 Wash. 91, 143 P. 435 (1914); *Brown v. Bremerton*, 69 Wash. 474, 125 P. 785 (1912)).

As the discussion above demonstrates, McCarthy has failed to allege or aver any facts that meet the requirements of RCW 7.28.010, which sets forth the circumstances under which one can state a valid claim for quiet title. The statute provides, in pertinent part, that “[a]ny person having a *valid subsisting interest* in real property, and a *right to possession thereof*, may recover the same by action in the superior court of the property county...and may have judgment in such action quieting or removing a cloud from plaintiff’s title.” (Emphasis added.) McCarthy argues, correctly, that the phrase “valid subsisting interest” has been interpreted broadly, but it is not without its limits. And wherever the outer limit of this phrase lies, McCarthy remains beyond its border because no case has ever held that merely *considering* the purchase of a property entitles someone to own it.

Perhaps recognizing this deficiency in his claim, McCarthy uses artful but misleading language in an effort to contradict McCarthy’s own declaration and show that the Venia

entities did more than just consider purchasing 610 Esther Street.

For example, McCarthy argues that “Copenhaver and DeFord diverted project financing developed by and belonging to Venia.” (Appellant’s Amended Brief, p. 15.) But this allegation is not actually found anywhere in the complaint, and it is not found in McCarthy’s declarations filed in opposition to the motion to cancel the lis pendens. McCarthy merely declares that the “property at 610 Esther Street was a property that was under consideration for acquisition and development by the Venia LLCs.” (CP 125) Hence, even McCarthy does not declare that any “project financing” was ever obtained by Venia to purchase 610 Esther Street. Moreover, McCarthy has never denied that neither he nor any of the Venia entities contributed a penny to the \$5.1 million purchase price paid by West Park for the property.

Similarly, McCarthy carefully chooses his words to leave the impression that the Venia entities had some sort of

contractual right to buy 610 Esther Street. For example, McCarthy claims that his pleading “seeks an adjudication of rights incident to title to real property based on the factual assertions that Copenhaver and DeFord breached their fiduciary duties to Venia by *converting the contract rights to purchase the Property.*” (Appellant’s Amended Brief, p. 20.) This statement, however, is belied by McCarthy’s own declaration, which does not aver that any of the Venia entities had any contractual rights to purchase the property at 610 Esther Street. The most McCarthy was willing to attest is the property was “under consideration for acquisition and development by the Venia LLCs.” Thus, statements in his brief that are not supported by the record on appeal should be disregarded.

As shown above, McCarthy has not alleged any facts showing that he or the Venia entities ever acquired the property or paid anything towards its purchase. In a further effort to fill this gap in his position, McCarthy argues that the defendants’ alleged breach of their fiduciary duties is enough to give

McCarthy an equitable interest in the property. And while it is true that some plaintiffs have been able to acquire or regain title to property in cases involving breaches of fiduciary duties, in all the cases cited by plaintiff there were additional facts giving rise to plaintiff's claim to the property—facts that are not present in McCarthy's case. In *Westerbeck v. Cannon*, the real estate agent was found to have breached his fiduciary duty to the seller by not disclosing his true interest in the real property, warranting an action for rescission of the real estate contract by the seller.⁴ In *Moon v. Phipps*, the plaintiff was the owner of the property and sued to rescind an option agreement based on a breach of fiduciary duty by her agent.⁵ Similarly, in *Moss v. Vadman*, the case was brought by the current owners of the property in question.⁶ In *Gustafson v. Gustafson*, a “pledgee of the majority of shares in a close corporation brought a

⁴ 5 Wn.2d 106, 104 P.2d 918 (1940).

⁵ 67 Wn.2d 948, 411 P.2d 157 (1966).

⁶ 77 Wn.2d 396, 463 P.2d 159 (1969).

shareholder derivative suit to void the sale of real property *which the corporation indirectly owned.*⁷

In *Marriage of Lutz*, contrary to McCarthy's representations, the wife did have a claim to title to the property. The property was a house in which the wife lived with her husband. They had a contract to purchase the house from the husband's parents, and the couple made payments on that contract. The couple also made improvements to the property. After the couple separated, the husband purchased the property from his parents. But in an effort to keep the property away from his wife in a potential divorce, the husband transferred title to his sister with the understanding that she would give it back to him when he asked for it. When the husband asked his sister to convey the property back to him, she refused. "When [the wife] filed the petition for dissolution, she also named [the husband's] sister...as a party to that action in order to quiet title to certain real property claimed by both

⁷ 47 Wn. App. 272, 272, 734 P.2d 949 (1987) (emphasis added).

[the husband] and [the sister].”⁸ Based on these facts, it is disingenuous for McCarthy to argue the wife never had any “legal ownership or title” to the property—she clearly did have an ownership interest because she and her husband “had agreed before trial to treat the property as community property, and they had asked the court in the dissolution petition to quiet title in the marital community and grant an equitable distribution.”⁹

The same is true for *White v. White*. In that case, a mother and son lived together in the same property. The mother signed a deed conveying the property to her son, but reserved a life estate in the property. Some years later, however, the mother sued her son “to cancel the deed and quiet title in herself, alleging that transfer of title was the result of fraud, overreaching and undue influence by [the son].”¹⁰ Again, the plaintiff suing to quiet title was the former owner of

⁸ 74 Wn. App. 356, 358-359, 873 P.2d 556 (1994).

⁹ *Id.* at 361.

¹⁰ 33 Wn. App. 364, 655 P.2d 1173 (1982).

the property, so this case provides no helpful authority for McCarthy.

McCarthy's citation to *Schwab v. City of Seattle* is no more helpful to him. In that case, there was a disagreement between the dominant estates and the servient estate over the existence of an easement. The owners of the dominant estates had to travel across the servient estate to get to their properties. Accordingly, the owner of the servient estate sued to block what he considered a trespass across his property and to quiet title in his own property. To put potential subsequent purchasers of the dominant estates on notice of the dispute, the plaintiff also recorded a lis pendens on the dominant estates. The Supreme Court held this was proper because "the easement in question affects [the dominant owner's] access to its property or, in other words, its possession. Possession is certainly incident to title."¹¹

¹¹ 64 Wn. App. 742, 826 P.2d 1089 (1992).

In sum, the trial court did not err when it found in its order cancelling the lis pendens “that this lawsuit is not an action affecting tile to real property within the meaning of RCW 4.28.320.” (CP 216) Instead, the trial court correctly concluded that the plaintiff had failed to allege, attest to, or offer any facts that—if true—would have resulted in title to 610 Esther Street being taken away from West Park and handed to McCarthy or any of the Venia entities. Accordingly, the Court should reject McCarthy’s first assignment of error.

B. McCarthy’s Request for Imposition of a Constructive Trust Did Not Warrant a Lis Pendens

McCarthy argues in the alternative that—even if he had no claim for quiet title—his request for imposition of a constructive trust was sufficient to support the lis pendens. There is no reported decision in Washington that addresses the issue of whether seeking imposition of a constructive trust on a parcel of real property is sufficient to record a lis pendens

against that property. There are numerous reported decisions, however, outside of Washington that have addressed this issue.

Some of those decisions have allowed a lis pendens based on a request to impose a constructive trust on the property, and some have not allowed it. The reason for the different outcomes boils down to this—when the suit seeks primarily money damages, and the constructive trust is sought more as a means to secure payment for the judgment, no lis pendens is allowed; on the other hand, when the underlying facts show the claimant was already an owner of the property, or the claimant’s funds were used to purchase the property, a lis pendens is allowed.

The first category is epitomized by a series of decisions from California, which involved fact patterns very similar to the one presented on this appeal. Like Washington, California’s statutes allow a lis pendens to be recorded when there is a “cause or causes of action in a pleading which would, if

meritorious, *affect (a) title to ... real property.*”¹² In a case that mirrors the allegations in this case, the California Court of Appeals considered whether a complaint seeking to impose a constructive trust on real property was tantamount to an action that would “affect title to ... real property.” Like McCarthy, the plaintiffs in that case alleged that they had formed a joint venture with the defendants to purchase certain real property, but the defendants “in breach of their fiduciary duties, ... wrongfully acquired the properties for themselves, to the exclusion of plaintiffs.”¹³ Accordingly, the plaintiffs sought the imposition of a constructive trust on the property, and asked for orders compelling the defendants to convey to plaintiffs an interest in the property.

The court acknowledged that the plaintiffs may have a right to a constructive trust, but this did not mean they could record a lis pendens. “Plaintiffs’ entitlement to a constructive

¹² California Code of Civil Procedure Section 405.4 (emphasis added).

¹³ *BGJ Associates v. Superior Court*, 89 Cal.Rptr.2d 693, 697, 75 Cal.App.4th 952 (1999)

trust is not determinative of whether plaintiffs may maintain a lis pendens.”¹⁴ The court looked to the legitimate purposes of a lis pendens and balanced them against the potential for abuse. “Courts have long recognized that because the recording of a lis pendens place[s] a cloud upon the title of real property until the pending action [is] ultimately resolved..., the lis pendens procedure [is] susceptible to serious abuse, providing unscrupulous plaintiffs with a powerful lever to force the settlement of groundless or malicious suits.”¹⁵ Because of this risk, the court provided the following admonition: “We cannot ignore as judges what we know as lawyers—that the recording of a lis pendens is sometimes made not to prevent conveyance of property that is the subject of the lawsuit, but to coerce an opponent to settle regardless of the merits.”¹⁶ The court distinguished those cases truly affecting title to real property

¹⁴ *Id.* at 705.

¹⁵ *Id.* at 704 (internal quotations and citation omitted).

¹⁶ *Ibid* (internal quotations and citation omitted).

from those cases in which the property was merely being sought as security to collect money damages.

It must be borne in mind that the true purpose of the lis pendens statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for negotiating purposes.

Therefore, in approaching the constructive trust cases, the courts have consistently eschewed an approach which would transform lis pendens into a money-collection remedy without any of the protections of the attachment statutes.¹⁷

Based on these concerns, the court ultimately rejected the lis pendens:

In a case such as this where the pleading combines theories of liability for monetary damages and for a constructive trust, we hold that plaintiffs should not be able to maintain a lis pendens. The danger is too great that a lis pendens, which effectively renders the property unmarketable, will have the coercive effects condemned by the cases.¹⁸

¹⁷ *Ibid* (internal quotations and citation omitted).

¹⁸ *Id.* at 706.

The same is true here. McCarthy is primarily seeking the recovery of money damages. The Amended Complaint sought only money damages, and it did not seek any title to real property. It was not until McCarthy filed his Second Amended Complaint—nearly two years after filing the original complaint—that McCarthy appended a request for a constructive trust to his requests for money damages. Even if he were to prevail, however, he would not end up with ownership of the subject property.

By recording a *lis pendens*, McCarthy has cast a cloud on West Park's title to its property, and he has done so without having to meet any of the procedural safeguards—such as those inherent in seeking a prejudgment writ of attachment—that are required to ensure due process. Because a *lis pendens* is like a prejudgment writ of attachment—but one obtained *ex parte* without prior notice or opportunity to be heard—its use should be limited to the specific purposes for which a *lis pendens* is authorized. As another California court has observed:

Lis pendens is one of the few remaining provisional remedies available at its inception without prior notice to the adversary. Due process is said to be provided for by subsequent notice and an expungement procedure which casts the burden upon the proponent of the lis pendens, but a lis pendens may cause substantial hardship to the property owner before relief can be obtained. A commentator has expressed reservations as to ... broad endorsement of lis pendens in claimed constructive trust actions on the ground that it tends “to create a right substantially similar to an ex parte prejudgment writ of attachment of the defendant’s assets, a remedy disfavored in California and severely limited because of its due process problems.” Overbroad definition of “an action ... affecting the title or right of possession of real property” would invite abuse of lis pendens.¹⁹

California is not alone in its rejection of a lis pendens in the context of actions seeking imposition of a constructive trust. Nevada has looked to California’s case law and has adopted the same approach. In one Nevada case, the plaintiff sued the defendant for a fraudulent conveyance and requested a constructive trust be imposed on the real property that had been conveyed. The plaintiff also recorded a lis pendens against the

¹⁹ *Burger v. Superior Court of Santa Clara County*, 151 Cal.App.3d 1013, 199 Cal.Rptr. 227, 230 (1984) (citations omitted).

property. Similar to Washington, Nevada’s statute allows a lis pendens “in furtherance of an alleged action ... affecting the title or possession of real property.”²⁰ The trial court denied the defendant’s motion to expunge the lis pendens, and the defendant appealed. The Nevada Supreme Court observed that: “As a general proposition, lis pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments; rather, their office is to prevent the transfer or loss of real property which is the subject of dispute in the action that provides the basis for the lis pendens.”²¹ Based on these considerations, the Nevada court rejected the lis pendens:

The instant action is not of the type envisioned under this statute. ... To repeat, lis pendens is not available to merely enforce a personal or money judgment. There must be some claim of entitlement to the real property affected by the lis pendens, a condition wholly absent in the case before us.²²

²⁰ *Levinson v. Eighth Judicial Dist. Court of State In and For County of Clark*, 857 P.2d 18, 109 Nev. 747, 750 (1993)

²¹ *Ibid.*

²² *Id.* at 751.

A case in Ohio reached the same conclusion in a case that mirrors the facts involved in this appeal. In *Katz v. Banning*, the essence of the plaintiffs' claims was "the assertion that plaintiffs were wrongfully excluded from an alleged joint venture with the Banning defendants to purchase and develop the Muirfield real estate."²³ As the Ohio court put it: "The real estate in question essentially constituted a lost business opportunity."²⁴ The property itself was not the essence of plaintiffs' complaint." The court reasoned that "[a]ny wrongdoing resulting from this purchase would typically lead to an award of damages to compensate for this lost business opportunity."²⁵ As a result, the Ohio court found "that the allegations of the original complaint were insufficient to trigger application of the doctrine of lis pendens."²⁶

In sum, the non-Washington cases that have addressed this issue in the context of fact patterns most similar to this

²³ *Katz v. Banning*, 617 N.E.2d 729, 731 (Ohio App. 10 Dist., 1992).

²⁴ *Id.* at 733.

²⁵ *Ibid.*

²⁶ *Id.* at 734.

appeal have all held that the plaintiff's request for imposition of a constructive trust did not justify the recording of a lis pendens. McCarthy cites to a handful of other non-Washington cases dealing with lis pendens arising out of constructive trusts, but in all of those cases, the plaintiff was either already an owner of the property or the defendant used the plaintiff's money to purchase the property.

For example, in *Heck v Admonson*, the plaintiff alleged that his money was used to purchase the property upon which the lis pendens was recorded.²⁷ The same is true of *Ross v. Specialty Risk Consultants, Inc.*, in which the plaintiff alleged that the defendant had used funds embezzled from the plaintiff to purchase the property against which the lis pendens was recorded.²⁸ So it was in *Polk v. Schwartz*, in which the plaintiff alleged that the defendants purchased properties with funds that the defendants had misappropriated from the

²⁷ *Heck v. Adamson*, 941 A.2d 1028, 1029 (DC, 2008).

²⁸ *Ross v. Specialty Risk Consultants, Inc.*, 621 N.W.2d 669 (Wis. App., 2000).

plaintiff.²⁹ Finally, in *Cap Care Group, Inc. v. McDonald*, the court allowed the lis pendens because “plaintiffs showed that their money was used as part of the payment to purchase the property.”³⁰

In sum, plaintiff cannot cite to a single case in which a constructive trust warranted a lis pendens based purely on alleged misappropriation of a business opportunity. The courts faced with that fact pattern have rejected the lis pendens. The cases cited by plaintiff all include allegations that the defendant used the plaintiff’s money to purchase the subject property. Thus, plaintiff’s request for imposition of a constructive trust is not sufficient to justify the lis pendens, and the trial court did not err in rejecting plaintiff’s argument.

²⁹ 399 A.2d 1001 (N.J. Super. A.D., 1979).

³⁰ 561 S.E.2d 578, 583 (N.C. App., 2002).

C. McCarthy Failed to Provide any Valid Basis for Reconsideration

McCarthy sought reconsideration of the motion cancelling the lis pendens, under CR 59, on the grounds that the trial court's order was "contrary to law." First, in each of his briefs seeking reconsideration, McCarthy incorporated by reference all the materials he filed in opposition to the motion to cancel the lis pendens. (CP 222, 234) McCarthy then proceeded to rehash the same arguments that he had already made before. Finally, McCarthy added some additional arguments, all of which were available to him when he initially opposed the motion. The trial court considered McCarthy's additional 26 pages of briefing and entertained lengthy oral argument. But, in the end, the trial court remained unconvinced.

Moreover, while McCarthy assigns error to the trial court's denial of his motion for reconsideration, McCarthy does not provide the court with any briefing in support of this

assignment of error. But because the trial court was correct in cancelling the lis pendens, it cannot be said that it should have reversed this decision on the motion for reconsideration.

D. McCarthy's Request to Stay was Moot

McCarthy also assigns error to the trial court's denial of McCarthy's motion to stay the order cancelling the lis pendens. But the record on this appeal clearly demonstrates that McCarthy's request for a stay was moot. The order cancelling the lis pendens was entered on Friday, September 26, 2014. (CP 215) The following Monday, September 29, 2014, West Park recorded a Cancellation of Lis Pendens. Four days later, on October 3, 2014 McCarthy filed his motion for reconsideration and request for stay (CP 217), which was not heard until October 31, 2014. Thus, by the time the trial court heard McCarthy's request for a stay, the lis pendens had already been cancelled for more than a month. Thus, the motion to stay was already moot by the time the trial court addressed it. For

this reason, and the other reasons provided above, the trial court did not err by denying McCarthy's motion to stay the order cancelling the lis pendens.

E. McCarthy Is Liable to West Park for its Attorney's Fees

RCW 4.28.328(2) provides that a "claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens...for reasonable attorneys' fees incurred in canceling the lis pendens." In the case at bar, McCarthy was the claimant in an action that the trial court found did not affect title to real property. Defendant West Park Partners, LLC ("West Park") was aggrieved by plaintiff's recording of a lis pendens on its property, and West Park prevailed on its motion to cancel the lis pendens. Thus, McCarthy is liable to West Park for its attorney's fees, below and on this appeal.

McCarthy raises two arguments against the attorney fee award, but neither has merit. First, McCarthy argues that fees were not warranted under RCW 4.28.328(3). While this statement is true, it does not help McCarthy because the fees were sought and awarded under RCW 4.28.328(2). Subdivision (3) of the statute gives the court the discretion to award fees after the lawsuit is over, if the court finds there was no substantial justification for filing the lis pendens. But Subdivision (2) of the statute provides that a party in West Park's position can bring "a motion to cancel the lis pendens" before the action is over and—if the motion is successful—the party who recorded the lis pendens "is liable ... for reasonable attorneys' fees incurred in canceling the lis pendens." Thus, it is irrelevant whether McCarthy was "substantially justified" in recording the lis pendens, and it does not matter that the underlying lawsuit is ongoing.

Second, McCarthy argues that he should not be personally liable for these attorney's fees and that the Venia

entities should be liable. It would be quite unfair, however, for the Venia entities to pay the attorney's fees, as McCarthy suggests, because defendants David Copenhaver and Kevin DeFord are two-thirds owners of the Venia Entities, and they are also part owners of West Park. In essence, they would be paying the majority of the attorney's fees to themselves, which would be a bizarre and unjust result. It is undisputed that it was McCarthy's decision to record the lis pendens, and it should be McCarthy who bears the cost of his decision.

By the same token, there is no legal basis for McCarthy's request for an award of attorney's fees on this appeal. Even if McCarthy prevailed on this appeal, the only effect would be the reinstatement of the lis pendens. RCW 4.28.328 does not provide for any award of attorney's fees for the claimant who records a lis pendens, only for the aggrieved party who opposes it. The remainder of McCarthy's arguments do not apply unless and until McCarthy were to prevail in the underlying lawsuit. Thus, McCarthy's request for an award of attorney's fees is, at

worst, without any legal basis and, at best, premature. Thus, McCarthy's request for an award of attorney's fees should be denied.

IV. REQUEST FOR ATTORNEY'S FEES UNDER RAP 18.1.

Pursuant to RCW 4.28.328(2), and for the reasons set forth in this brief, West Park requests that it be awarded its attorney's fees on this appeal.

V. CONCLUSION

The right to file a lis pendens is an extraordinary right because it allows one party to cast a cloud over another party's title to property, without any prior notice, due process, or bond to guard against potential damages. Accordingly, the use of a lis pendens should be limited to cases that meet the Legislature's criteria for a quiet title action. McCarthy has not alleged or attested to any facts that would warrant the trial court

handing McCarthy title to 610 Esther Street—a property that West Park paid \$5.1 million to obtain. As a result, the trial court did not err in cancelling the lis pendens and, because that decision was not error, the trial court also did not err in denying McCarthy’s motion for reconsideration and in holding McCarthy liable for West Park’s attorney’s fees. For all these reasons, West Park respectfully requests that the judgment be affirmed in its entirety.

Respectfully Submitted
on August 17, 2015,

Steven E. Turner

Steven E. Turner
WSB No. 33840
*Attorney for Respondent
West Park Partners, LLC*

APPENDIX TO RESPONDENT'S BRIEF

RCW 4.28.320

Lis pendens in actions affecting title to real estate.

At any time after an action affecting title to real property has been commenced, or after a writ of attachment with respect to real property has been issued in an action, or after a receiver has been appointed with respect to any real property, the plaintiff, the defendant, or such a receiver may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: PROVIDED, HOWEVER, That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be evidenced by the recording of the court order.

RCW 4.28.328

Lis pendens — Liability of claimants — Damages, costs, attorneys' fees.

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

RCW 7.28.010**Who may maintain actions — Service on nonresident defendant.**

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his or her unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his or her grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the

heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of Respondent** on:

Charles J. Paternoster
1030 SW Morrison Street
Portland, OR 97205
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by the following indicated method or methods:

- E-mail.**
- Facsimile communication device.**
- First-class mail, postage prepaid.**
- Hand-delivery.**
- Overnight courier, delivery prepaid.**

DATED this 17th Day of August, 2015.

Steven E. Turner

Steven E. Turner, WSBA No. 33840
Attorney for Respondent
West Park Partners, LLC

STEVEN TURNER LAW PLLC

August 18, 2015 - 12:51 PM

Transmittal Letter

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Case Name: McCarthy v. West Park Partners, LLC

Court of Appeals Case Number: 47004-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Here again is the completed brief. Please confirm that it has been received. Thank you.

Sender Name: Steven E Turner - Email: steven@steventurnerlaw.com