

No. A06-1879

OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

APR 20 2007

In Supreme Court

FILED

St. Croix Development, LLC, and Montanari Homes, Inc.,

Respondents,

vs.

Mark David Gossman; Stephanie Rae Gossman;
Commercial Equity Partners, Inc.; Tamhills Funding, LLC;
Tamhills, LLC; Maple Leaf Holdings, LLC
Pointe West Holdings, LLC; Point West Holdings One, LLC;
Centura Development, Inc.; Office Condos, Inc.;
XXX Corporation; John Doe; and Mary Row,

*Appellants.***RESPONDENTS' BRIEF**

FLYNN, GASKINS &
BENNETT, LLP
Steven E. Rau (#147990)
Jodi F. Colton (#386395)
333 South Seventh Street, Suite 2900
Minneapolis, Minnesota 55402
Tel: (612) 333-9500
Fax: (612) 333-9579

Attorney for Appellants

BENJAMIN S. HOUGE LAW
OFFICES
Benjamin S. Houge (#47387)
13481 North 60th Street, Suite 201
Oak Park Hgts, Minnesota 55082
Tel: (612) 868-1947

Attorney for Respondents

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STATEMENT OF LEGAL ISSUES

1. Is an Order denying an application to discharge a lis pendens immediately appealable under any provisions of Minn. R. App. Proc. 103.03 or under the collateral order doctrine?

Decision Below: Court of Appeals decided in the negative in a case of first impression in Minnesota.

STATEMENT OF CASE

Respondent filed a lawsuit and lis pendens against Appellant seeking, among other things, the recovery of title to a home that Appellant obtained from Plaintiffs by acting as an imposter and by false pretenses and swindle. Respondent agrees with Appellant's procedural history as set forth in Appellant's Statement of the Case. Respondent disagrees with Appellant's argument that the Trial Court's Order is a "final resolution" in a "special proceeding". Respondent agrees that a lis pendens affects a substantial right; i.e., the alienation of real property. Respondent disagrees that the denial of a motion to vacate a lis pendens "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from the final judgment" as argued by Appellants. Since Respondent's lis pendens is inextricably intertwined with the merits of the underlying lawsuit, an interlocutory appeal is futile and a waste of judicial resources. Respondent believes rights of the Appellant can be adequately protected by Trial Courts by means other than an interlocutory appeal, such as, an accelerated summary judgment hearing or an accelerated the trial on the merits.

STATEMENT OF FACTS

As the Trial Court notes in its Memorandum, St. Croix Development, LLC is seeking recovery of the real estate at issue because Appellant Mark David Gossman obtained the property by fraud and breach of his fiduciary duty. (Trial Court Memorandum, Page 2). Respondent was a successful homebuilder in the Stillwater area for over Twenty-Three (23) years. Appellant was an imposter who swindled Plaintiff by posing as a successful businessman and competent manager, when, in fact, he had

bankrupted seven (7) businesses in Iowa, with over \$3.6 Million in discharged debt and had a long history of business failures.

Appellant used a series of fraud and false pretenses to gain employment as Plaintiff/Respondent's General Manager and then used his position, false financial statements and false pro forma to obtain over \$482,194.00 in cash and title to a new home (at cost) during his brief period of employment. Appellant destroyed both Plaintiff/Respondent's companies, leaving them with over 100 lawsuits and claims by sub-contractors and vendors. Since title to the new home was obtained by Appellant's swindle, including submission of false financial statements, false pro forma and false representations, Respondents filed a lis pendens against the home when they filed their lawsuit seeking recovery of the home.

Ownership and title to the real property is a central issue in the lawsuit for which the lis pendens has been filed. Therefore, the Trial Court correctly refused to discharge the lis pendens before conclusion of the trial on the merits. Appellants did not avail themselves of other remedies, such as moving to accelerate the summary judgment hearing or the trial on the merits before seeking an interlocutory appeal.

LEGAL ARGUMENT

In Kastner v. Star Trails Ass'n 646 NW2d 235 (Minn. 2002), the Minnesota Supreme Court outlined the jurisdictional issue for interlocutory appeals as follows:

In Cohen [Cohen v. Beneficial Indus Loan Corp, 337 U.S. 541 (1949)], the Court defined a framework for identifying 'that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause of action itself to require that appellate consideration be deferred until the whole case is adjudicated.'" Kastner v. Star Trails Ass'n

646 NW2d 235, at page 240, quoting Cohen v. Beneficial Indus Loan Corp., at page 546-547.

The Minnesota Supreme Court then went on to establish a three part test for allowing the interlocutory appeal of collateral orders, such as the present Order denying the discharge of lis pendens, stating the rule as follows:

For the collateral order doctrine to apply, the order at issue must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action, (3) be effectively unreviewable on an appeal from a final judgment. Kastner v. Star Trails Ass'n 646 NW2d 235, at page 240

The present appeal does not meet any part of this three part test for permitting an interlocutory appeal from Judge Martin's Order.

First, Judge Martin's Order does not conclusively determine the disputed question, which is whether Appellant obtained title to the property by fraud or breach of fiduciary duty. Second, although the issue decided by Judge Martin is important to the parties, it is plainly not "*completely separate* form the merits of the action." (emphasis added). In fact, the issue upon which the lis pendens is based is a central issue in the merits of the action. Third, the issue will clearly be effectively reviewable on an appeal from the final judgment where all issues can be raised on appeal. Under the facts at issue in this case, Appellate clearly does not have the right to an interlocutory appeal of Judge Martin's Order denying discharge of the lis pendens under the collateral order doctrine.

There is no jurisdictional basis for an appeal of Judge Martin's Order under Minn. Rule of Civil App. P. 103. First, the order did not involve an injunction or order of attachment (Minn. Rule of Civil App. P. 103 (b) and (c)). Second, Judge Martin's Order does not determine the action and prevent an appeal (Minn. Rule of Civil App. P. 103 (e)).

Third, Judge Martin's Order was not made in an administrative or other special proceeding (Minn. Rule of Civil App. P. 103 (g)). Fourth, Judge Martin did not certify the question as important or doubtful. (Minn. Rule of Civil App. P. 103 (i)). Fifth, there are no statutes or decisions of the Minnesota appellate courts that permit the appeal. (Minn. Rule of Civil App. P. 103 (j)). The Court of Appeals decision is correct in holding that it does not have jurisdiction to consider the appeal of the September 18, 2006 Order under Minn. Rule of Civil App. P. 103.

There are a number of important policy considerations in determining whether this interlocutory appeal or any interlocutory appeal should be permitted from orders denying the discharge of a lis pendens. First, and most importantly, it will be obvious in most cases, as in the present case, that the merits of the underlying lawsuit are so closely intertwined with the issue of discharging the lis pendens, that most appeals will be futile because they will only result in a remand back to the trial court to decide the merits of the underlying lawsuit. The present case is a good example. If a discretionary appeal is ordered by this Court, the Appellate Court will have no choice but to remand the case back to Judge Martin for the factual determination of whether Mr. Gossman did, in fact, obtain title to the real estate by fraud or breach of fiduciary duty, as alleged by Respondent. If Mr. Gossman did obtain the real estate by fraud or breach of fiduciary duty, Respondent is plainly entitled to maintain the lis pendens and recover the real property. If the trial court finds Mr. Gossman did not obtain the real estate by fraud or breach of fiduciary duty, then Mr. Gossman will not be liable to St. Croix and the lis pendens will be discharged. A decision on the merits, either by Summary Judgment or

Trial, will in all such cases be required to determine if the lis pendens was properly filed, so permitting an interlocutory appeal in all such cases will be an exercise in futility.

Second, allowing interlocutory appeals under the facts of the present case will only unnecessarily delay the underlying lawsuit, which is required to determine the discharge of lis pendens issue. St. Croix is willing to expedite the trial of this matter and it is probable that Mr. Gossman has filed this appeal only to avoid discovery and to delay a decision on the merits of the underlying lawsuit. If the right to appeal is denied, it is likely the trial can be completed in most cases before Court of Appeals could receive the parties' briefs, hear oral argument and render a decision on the interlocutory appeal issue. Thus, permitting interlocutory appeals in such cases will just create a vehicle for unnecessary delay and waste of judicial resources.

Third, in considering whether to allow interlocutory appeals, this court should consider the criteria embedded in the three part test adopted by the Minnesota Supreme Court as the "collateral order doctrine" discussed above. Kastner v. Star Trails Ass'n 646 NW2d 235, at page 240. Since Appellant cannot meet any of the three tests for an interlocutory appeal under the "collateral order doctrine", this Court should also deny Appellant's right to appeal and remand the case back to the trial court to determine all the issues on the merits. If the Supreme Court does decide in general that under limited circumstances interlocutory appeals should be allowed, this case should be remanded directly back to the trial court because the propriety of the lis pendens is wholly dependent of the facts of the underlying lawsuit.

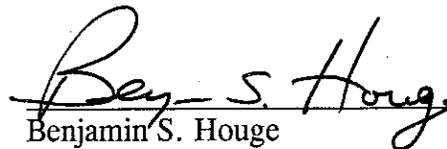
Fourth, refusing to discharge a lis pendens is substantially different from an order discharging a lis pendens. When a lis pendens is ordered discharge it truly is a decision

on the merits, since the Plaintiffs ability to recover the property is lost forever. The trial court can protect a party subject to a lis pendens that is not discharged by expediting the summary judgment hearing or trial or taking other steps to insure that both party's rights are protected pending the outcome of the trial.

CONCLUSION

The decision of the Court of Appeals was correct. Since the issue of discharging the lis pendens in this case is inextricably intertwined with the merits of the underlying action, allowing an interlocutory appeal would only result in unnecessary delay. If the Supreme Court does decide that under limited circumstances interlocutory appeals should be allowed from orders denying discharge of a lis pendens, the case at bar should still be remanded directly back to the trial court, because the propriety of the lis pendens is wholly dependent on the facts of the underlying lawsuit.

Dated: *April 19, 2007*



Benjamin S. Houge
Attorney Reg. No. 47387
Attorney for Respondents
Suite 201
13481 60th Street No.
Oak Park Heights, Minnesota 55082
(612) 868-1947 Tele.
(651) 439-3742 Fax

Certification

Benjamin S. Houge hereby certifies that the above Brief was prepared in Micro
Soft Word and consists of 137 lines and 1503 Words of regular font type.

Dated: *April 19, 2007*

Ben S. Houge

Benjamin S. Houge