

1975 S.C. Op. Atty. Gen. 136 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4059, 1975 WL 22356

Office of the Attorney General

State of South Carolina

Opinion No. 4059

July 25, 1975

\*1 Posting a statutory bond to release real property from a statutory lien does not give the clerk of court authority to cancel a lis pendens previously filed in conjunction with the same cause of action.

TO: T. Legare Rodgers  
Clerk of Court for Beaufort County

QUESTION PRESENTED:

Does a Notice of Lis Pendens filed in connection with a suit on an account and for foreclosure of a mechanics lien become ineffective once the lien has been released pursuant to the provisions of Section 45–261, so that the clerk of the particular court may release the lien and cancel the lis pendens simultaneously?

STATUTES, CASES INVOLVED:

Code of Laws of South Carolina, 1962, as amended, Section 10–501 et seq., 45–251 et seq. and 45–261; [Stephenson Finance Company v. Burgess](#), 225 S.C. 347, 82 S.E.2d 512; [Armstrong v. Carwile](#), 56 S.C. 463, 35 S.E. 196; 54 C.J.S. Lis Pendens § 28 and § 37; 51 Am.Jur.2d Lis Pendens, § 32 and § 37.

DISCUSSION OF ISSUE:

Code of Laws of South Carolina, 1962, as amended, Section 45–251 et seq. provides for statutory creation of mechanics' and material mens' liens on real property. Code Section 45–261 provides that the owner or any other person having an interest in or lien upon the property involved may secure the discharge of such property from such lien by filing a bond equal to the amount claimed in the statement served on the owner. The cash, securities or bond deposited shall take the place of the property upon which the lien existed.

Code Section 10–501 allows a notice of lis pendens to be filed in an action affecting the title to real property. Section 10–504 makes provision for cancellation of this notice by the court in which the action was brought at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved thereby.

In its simplest form the question presented here is whether, after a statutory lien has been removed from property by posting the requisite bond, the lis pendens filed on the same property becomes null and void and can be removed as a ministerial function of the clerk of court.

By its very nature lis pendens is only available in an action affecting title to real property. After payment of the § 45–261 bond, the action no longer involves real property and becomes an action for a money judgment. See [Stephenson Finance Co. v. Burgess, et al.](#), 225 S.C. 347, 82 S.E.2d 512.

In [Armstrong v. Carwile](#), 56 S.C. 63, 35 S.E. 196, it was held that the filing of a lis pendens against the property of a defendant in any ordinary action on a money demand, which in no way affects the title to real estate, is ineffective for

any purpose. However, in the instant fact situation there is a valid statutory lien against real property and the action is one affecting title when the lis pendens is filed. It is only upon subsequent posting of a bond that the validity of the lis pendens becomes questionable.

\*2 The status of a lis pendens once the underlying cause of action has shifted from in rem to in personam is considered tangentially at 51 Am.Jur.2d Lis Pendens, § 32. The general rule is therein put forth that once the doctrine of lis pendens comes into operation in connection with particular litigation, it remains in operation until the rendition of a final decision that puts a definite end to the litigation. One of several exceptions to the general rule is found in a 1912 Missouri case, Tate v. Sanders, 149 S.W. 485. There the court held that when an action originally involving specific property becomes merely an action in personam, a formal notice of lis pendens previously filed becomes functus officio, or of no further force or authority.

Such result would be an attractive argument if the issue were litigated in South Carolina, based on the Armstrong, *supra*, holding that a lis pendens filed in an action which in no way affects the title to real estate is ineffective for any purpose. If the action should become one which does not affect the title, the lis pendens should have no effect at that time.

But does this result necessarily invest the clerk of court with authority to remove the lis pendens without judicial authorization? Code Section 10-504 specifically provides a procedure for cancellation of notice of lis pendens. This section provides that the court in which the action was commenced may, in its discretion cancel the notice at any time after the action is settled, discontinued or abated. When such cancellation is granted the statute provides for an endorsement to be made to that effect on the margin of the record which shall refer to the order.

In both C.J.S. and Am.Jur.2d, cancellation of a lis pendens is done by the court only, often at its discretion. 51 Am.Jur.2d, § 37 indicates that where a lis pendens notice is filed in an action not contemplated in the statute under which the notice was filed, the court has the power, and in some jurisdictions the duty to expunge the notice. 54 C.J.S. Lis Pendens, § 37 states that generally a notice may be cancelled while the action is pending and undetermined, when the action ceases to affect the property. In neither cited authority does a clerk have the power to make such determination. Rather, the court must hear and decide the question.

Clearly § 10-504 allows no discretion in the Clerk of Court to cancel a notice of lis pendens when he deems it to no longer be of force and effect. A court order is required to make such change, and the grounds for such orders are spelled out in the statute. Based on the authorities cited in this opinion, the § 10-504 grounds could be broadly read to allow the court to cancel the notice in question. However, such action should also be warranted under the court's general equitable powers.

The specific language of § 10-504 should not be discounted or distinguished merely because of a potential inconvenience to real property owners who post bonds. This is especially true where an adequate remedy is apparently available through the court to effect cancellation of the lis pendens.

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