



How Does a Lis Pendens Affect Title?

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In the course of preparing a title search a Lis Pendens may be discovered affecting the premises to be insured. The words “Lis Pendens” is Latin, meaning a “suit pending”. It is a written notice that a lawsuit has been filed affecting the title to real property or claiming an interest in the real property. Historically, under the common law, the whole doctrine of Lis Pendens rested on the notion that the mere commencement of litigation affecting title to real property resulted in constructive notice to a potential purchaser or lender and therefore resulted in such parties being subject to the result of the litigation even though they were not party to it. It is easy to envision the difficult burden that this imposed on parties about to enter into a real estate transaction; they would literally have to search the complete court records to ensure that in fact there was no ongoing litigation affecting title to the land parcel in question. In the modern era the doctrine of Lis Pendens has been modified by statute (Article 65 of the CPLR in New York) to require a specific filing in order to provide constructive notice to subsequent buyers or lienors.

A Lis Pendens is filed in the Office of the County Clerk where the affected property is located. The Lis Pendens will secure a plaintiff's (individual or company commencing the litigation) claim on or to the property and alerts anyone with an interest in the property such as a potential purchaser or a potential lender, that title to the property is in question, therefore creating a “cloud” on title. Please note that a Lis Pendens is statutorily in effect for a period of three years unless continued by court order.

There are different situations in which a Lis Pendens is properly filed. Over the years court cases have established that the filing of a Lis Pendens is appropriate in cases involving partition of real property, specific performance, to impress a lien or trust upon real property, to establish and enforce a mechanics' lien on real property or to establish the plaintiff's interest in real property. One situation where filing a Lis Pendens is not only proper but mandatory is in the case of a borrower who fails to make payments on his/her mortgage and subsequently defaults pursuant to the terms of the loan resulting in the commencement of a foreclosure action by the lender.

The lender will do a Foreclosure Search to determine the additional interests affecting the collateral that can be cut off during the proceeding of the mortgage foreclosure. One specific requirement affecting the filing of Lis Pendens concerning an action to foreclose a mortgage is that the filing of the Lis Pendens must be filed at least twenty days prior to a Judgment of Foreclosure and Sale. (RPAPL section 1331) Upon the filing of the Lis Pendens there will also be a filing of a Summons and a Complaint that will outline the reason why the Lis Pendens has been filed. Additional parties in interest, whose interests in the property were subsequent to the date the mortgage was recorded, will be served with a Summons and have the opportunity to waive their interests, or request an accounting of the final funds after the actual foreclosure and make a request for reimbursement if there are surplus funds after the foreclosure.

If the foreclosure process proceeds to conclusion, a Judgment of Foreclosure and Sale will be filed, a Referee will be appointed and the property will go to a public auction and sale. If we are asked to insure the refinance of the borrower in an attempt to settle the transaction and pay off the defaulted loan or the sale by the owner of the property being foreclosed, we will require that the Judgment be vacated and the action dismissed to enable us to insure clear title.

If a building is declared “unsafe” for occupancy, an Unsafe Building Lis Pendens will be filed by the City of New York. To this end, if there is an Unsafe Building Lis Pendens on a property being sold or refinanced, the owner of the premises must contact the Department of Housing Preservation and Development (HPD) to determine if there are any “hidden liens” which would result in money due—possibly in the tens of thousands—to relocate tenants and/or for intervention by the City to correct the conditions that render the property unsafe. Typically the title company will require that the Lis Pendens be vacated before agreeing to insure the transaction. Also of note is the fact that HPD Lis Pendens’ have traditionally been held to have no expiration date and no requirement that it may be continued to remain viable. This view has recently been challenged in court and the full ramifications have yet to be settled.

From a title company perspective Lis Pendens are a subject of considerable concern and risk when attempting to clear a title. A missed Lis Pendens, for example, would almost certainly result in a potential claim in a way that a missed judgment might not. The parties filing a Lis Pendens have already obviously taken the fateful steps to commence an action thereby demonstrating their strong commitment to enforce their rights. It is up to the title company to carefully analyze the particulars of every transaction involving a Lis Pendens to be sure that we are insuring a clean title.