

TYPES NOT MAPPED YET April 12, 2024 | TTR not mapped yet | Jeffrey N. Brown, Aya Elalami

# Get It Right The First Time: The Implications of Recording a Defective Lis Pendens

In [De Martini v Superior Court](#), the California Court of Appeal recently held that a claimant cannot record a subsequent *lis pendens* on the same property in a separate legal proceeding without obtaining permission from the court that expunged the first *lis pendens*. A *lis pendens* gives notice of a pending lawsuit and can impact title to the property.

In January 2020, Loring De Martini (the seller) and Puja Gupta (the buyer) entered into a commercial purchase/sale agreement for the site of The Van's Restaurant in Belmont, California. In 2021, the buyer filed a petition to confirm the arbitration award in connection with a dispute between the parties regarding paying an additional deposit for the property. In connection with the petition, the buyer recorded a *lis pendens* on the property, and the seller moved to expunge it. The trial court found the petition was a civil proceeding solely to confirm an arbitration award and did not involve a real property claim. California requires that a *lis pendens* is only available in actions "in which a real property claim is alleged," which means a claim which would, if meritorious, "affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading" other than an easement with respect to a regulated public utility. Code Civ. Proc., § 405.4. On that basis, the trial court expunged the *lis pendens*.

Shortly thereafter, the buyer filed another action against the seller requesting the seller execute the development application documents, and that the seller complete the terms of the sale under the purchase agreement. The buyer then recorded another *lis pendens* in connection with the second action. The seller moved to expunge the *lis pendens* on the basis that the buyer did not seek leave of court before recording the second *lis pendens*.

The trial court denied the seller's motion to expunge, however, the Court of Appeal reversed the ruling, finding the expungement should have been granted because, although the second *lis pendens* did involve a real property claim, the buyer was required to seek leave of court since the initial *lis pendens* for the property had been expunged. In other words, where a claimant's *lis pendens* is expunged, the same claimant cannot record a second *lis pendens* involving the same property in another legal proceeding without court permission. The plain language of Cal. Civ. Proc. § 405.36 supports the court's decision. Cal. Civ. Proc. § 405.36 states "once a notice of pending action has been expunged, the claimant may not record another notice of pending action as to the affected property without leave of the court in which the action is pending."

When evaluating whether to grant leave to permit the recording of a second *lis pendens*, courts may look to whether there is a sufficient change in the circumstances that led to the expungement of the initial *lis pendens*. For example, in *Ranchito Ownership Co. v. Superior Ct.* (1982) 130 Cal. App. 3d 764, the court expunged the first *lis pendens* because the parties that recorded it failed to show that they prosecuted the action for a proper purpose and in good faith. The court found the plaintiff was not entitled to record a second notice of *lis pendens* because the recording parties could have raised those same arguments at the time of opposing the initial motion to expunge.

Given that a party only has one opportunity to record a *lis pendens* on a property without requesting permission from the court, to avoid potential pitfalls, parties should ensure they are adhering to the laws and procedures governing recording a *lis pendens*, including that the underlying claim is a real property claim.

Remember, you only get one chance to record a *lis pendens* correctly without seeking court permission, so make it count.



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