SUMMARY
March 16, 2023

2023COA26

No. 21CA1881, *Carter Holdings Inc. v. Carter* — Family Law — Dissolution; Real Property — Lis Pendens — Spurious Liens and Documents

A division of the court of appeals considers whether a wife's recordation of lis pendens notices pursuant to section 38-35-110(1), C.R.S. 2022, on properties owned by a corporation of which her husband was the sole shareholder were "spurious documents" within the meaning of section 38-35-201(3), C.R.S. 2022.

The division holds that the notices of lis pendens were not spurious because wife claimed an interest in the properties as marital assets in the dissolution of marriage proceeding. In reaching this conclusion, the division reiterates that (1) in deciding whether a lis pendens notice is spurious, we focus on the relief the

recording party claims in the underlying action, *Pierce v. Francis*, 194 P.3d 505, 509-10 (Colo. App. 2008); and (2) a notice of lis pendens may be appropriate in the dissolution of marriage context. *See Clopine v. Kemper*, 140 Colo. 360, 365-66, 344 P.2d 451, 454 (1959).

COLORADO COURT OF APPEALS **2023COA26**

Court of Appeals No. 21CA1881
Mesa County District Court No. 20CV30056
Honorable Brian J. Flynn, Judge

Carter Holdings Inc., d/b/a Carter Homes,

Plaintiff-Appellant,

v.

Danene Nicole Carter,

Defendant-Appellee.

ORDER AFFIRMED

Division IV
Opinion by JUDGE FOX
Lipinsky and Schock, JJ., concur

Announced March 16, 2023

Wegener Lane & Evans, P.C., Benjamin M. Wegener, Tammy Tallant, Grand Junction, Colorado, for Plaintiff-Appellant

Brett R. Lilly, LLC, Brett R. Lilly, Wheat Ridge, Colorado; Wright Legal Services, PLLC, Brad R. Wright, Grand Junction, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Carter Holdings Inc. (CHI), appeals the trial court's order denying its claims related to lis pendens notices that defendant, Danene Nicole Carter, temporarily placed on properties owned by CHI. CHI claims the lis pendens notices amounted to "spurious documents" under section 38-35-201(3), C.R.S. 2022, and that Ms. Carter's recording of them constituted (1) abuse of process and (2) tortious interference with prospective business relations. We reject CHI's contentions and affirm the order.

I. Background

¶ 2 CHI is a Colorado corporation that specializes in residential property development. Corey Carter, Ms. Carter's ex-husband, is CHI's sole shareholder. Under its business model, CHI would purchase a vacant lot, build and sell a residence on the lot, pay off the debt it incurred to fund building costs, and pocket the remainder as profit.

¶ 3 Although Ms. Carter was not a shareholder of CHI, she was deeply involved in its operation. For example, she co-signed on numerous loans for CHI (which CHI then used to fund building costs); put up her personal residences as security for home equity

loans benefiting CHI; invested $70,000 of personal inheritance to fund CHI's operations; and worked for CHI in various capacities.

¶ 4 Consistent with her role, Ms. Carter co-signed with Mr. Carter two loans for CHI in early 2018. First, on January 10, 2018, she co-signed a loan for $286,000 with Home Loan State Bank (HLSB). CHI used the loan proceeds to complete construction of the "St. Peppin" home, one of CHI's properties. Second, on February 20, 2018, she co-signed a loan for $319,000 with HLSB. CHI used the loan proceeds to complete construction of the "Kiva Drive" home, another CHI property. Both loans provided that the Carters were jointly and severally liable — meaning that either could be held liable for the full unpaid amounts of the loans.[1]

¶ 5 On August 24, 2018, Mr. Carter filed for dissolution of marriage. Ms. Carter later testified that, over the next several

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[1] CHI suggests that, since HLSB held deeds of trust against both properties, Ms. Carter would not be held responsible for these loans because HLSB would foreclose on the property before suing her. But the trial court concluded that the language of the loan agreement allowed HLSB to seek repayment from CHI, Ms. Carter, or Mr. Carter. Because CHI does not squarely challenge that determination on appeal, we do not address it. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010) ("We will not consider a bald legal proposition presented without argument or development.").

weeks, Mr. Carter exhibited self-destructive and erratic behavior. For instance, he unilaterally transferred $178,000 out of their joint bank account — in apparent contravention of section 14-10-107(4)(b)(I)(A), C.R.S. 2022. He also said that he may leave Grand Junction (where they lived), attempted to sell some of CHI's tangible assets, and threatened to run CHI "into the ground." Ms. Carter further testified that she was unnerved by Mr. Carter's decisions to open a credit card account in her name — without her permission — and to live full-time in his van.

¶ 6 On September 18, 2018, Ms. Carter recorded notices of lis pendens on the St. Peppin and Kiva Drive properties. Based on her testimony, the trial court later determined that she recorded these lis pendens notices to protect her claimed interest in the properties. The court further concluded that her motivation stemmed from her fear that Mr. Carter would abscond with the sale proceeds, thereby leaving her solely responsible for repayment of the loans.

¶ 7 On October 29, 2018, CHI demanded that the lis pendens notices be removed. It argued that the notices were holding up the sales of the properties and depriving CHI of operating funds. The next day, Ms. Carter's divorce attorney released the notice of lis

pendens on the St. Peppin property on the condition that the sale proceeds be held in Mr. Carter's attorney's COLTAF account. The St. Peppin property sold the following day, and the sale proceeds were deposited into the COLTAF account.

¶ 8 On October 31, 2018, CHI moved to intervene in the divorce action, claiming that the two notices of lis pendens were "spurious" under section 38-35-201.[2]

¶ 9 On November 2, 2018, Ms. Carter's attorney released the notice of lis pendens on the Kiva Drive property under the same condition. That property soon sold and the proceeds were deposited into the same COLTAF account. Two months later, the parties stipulated to the release of the sale proceeds to CHI.

¶ 10 On February 21, 2020 (while the divorce proceedings continued, and more than a year after the lis pendens notices were released, the properties sold, and the funds disbursed), CHI sued Ms. Carter, claiming that she had "no reasonable factual basis" for recording the lis pendens notices and that her recordation of them

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[2] CHI also petitioned for a show cause hearing pursuant to section 38-35-204(1), C.R.S. 2022, but there is no evidence that the expedited hearing occurred as contemplated by section 38-35-204(1)(a) and C.R.C.P. 105.1(a)(1).

constituted abuse of process and tortious interference with prospective business relations. The trial court consolidated CHI's motion to intervene in the dissolution case — which, as noted, alleged that the lis pendens notices were spurious — with its tort lawsuit.

¶ 11 After a three-day bench trial, the court concluded that the lis pendens notices were not "spurious document[s]" for purposes of section 38-35-201. The court further concluded that CHI's abuse of process and tortious interference claims failed.

II. Discussion

¶ 12 On appeal, CHI contends the trial court erred by concluding that the notices of lis pendens were not "spurious documents." We disagree.

A. Applicable Law and Standard of Review

¶ 13 Section 38-35-110(1), C.R.S. 2022, authorizes the recording of a lis pendens "[a]fter filing any pleading" when the relief sought "affect[s] the title to real property." The purpose of recording a lis pendens notice under section 38-35-110 is to

> provide notice to anyone who may acquire an interest in the property during the pendency of the litigation [affecting title to real property] so

> that he or she will be bound by its outcome. . . . This insures that judgments affecting interests in real property are not undermined by transfers during litigation.

Thomas v. Lynx United Grp., LLC, 159 P.3d 789, 793 (Colo. App. 2006) (citation omitted).

¶ 14 The recording is proper if the claimant shows that the claim "relates to a right of possession, use, or enjoyment of real property." *Hewitt v. Rice*, 154 P.3d 408, 412 (Colo. 2007); *accord James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994). Our supreme court broadly interprets the phrase "affecting the title to real property." *Kerns v. Kerns*, 53 P.3d 1157, 1165 (Colo. 2002) (quoting § 38-35-110(1)); *Hammersley v. Dist. Ct.*, 199 Colo. 442, 444-46, 610 P.2d 94, 95-96 (1980) (expansively interpreting "affecting the title to real property" to include litigation that covered a determination of rights incident to ownership (quoting C.R.C.P. 105(f) (1980))).[3]

¶ 15 Conversely, a lis pendens notice can amount to a "spurious document" if it is "forged or groundless, contains a material

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[3] The phrase "affecting the title to real property" used to appear in C.R.C.P. 105(f), but it was relocated to section 38-35-110 in 1992. Ch. 295, sec. 1, § 38-35-110, 1992 Colo. Sess. Laws 2103.

misstatement or false claim, or is otherwise patently invalid." § 38-35-201(3).

¶ 16 The recording party may have a legally vested interest in the property when it records the lis pendens. *See, e.g.*, *Hammersley*, 199 Colo. at 443-46, 610 P.2d at 95-96 (owners of real property in subdivision possessed rights to enforce restrictive covenants). Sometimes, however, the recording party may not have a vested legal interest in the property at the moment of recordation but seeks to establish such an interest through litigation. In these circumstances, the propriety of a lis pendens turns on what relief the recording party claims in the underlying action. *See* § 38-35-110(1) (a party may file a lis pendens "wherein relief *is claimed* affecting the title to real property") (emphasis added).

¶ 17 *Pierce v. Francis*, 194 P.3d 505, 509-10 (Colo. App. 2008), illustrates this principle. There, the trial court found that the decedent's daughter's recordation of two lis pendens notices on the decedent's property was spurious because the daughter lacked an interest in the decedent's property. *Id.* at 507, 509. In reversing, a division of this court concluded that, because the daughter challenged the will, and because her challenge to the will could

ultimately vest her with an interest in the subject property, the lis pendens notices were not spurious — even though the daughter did not have an interest in the property when she recorded them. *Id.* at 509-10.

¶ 18 Accordingly, we determine whether the notices of lis pendens here were spurious by examining whether Ms. Carter claimed an interest in the properties at the time of recordation. *Id.*

¶ 19 We review de novo whether a notice of lis pendens is a spurious document. *Evans v. Evans*, 2019 COA 179M, ¶ 10. *But see Egelhoff v. Taylor*, 2013 COA 137, ¶ 9 (applying a mixed standard of review to a trial court determination that a lien was not a spurious under section 38-35-201).

B. Analysis

¶ 20 CHI contends that the lis pendens notices were spurious because Ms. Carter lacked a vested interest in the subject properties when she recorded the notices. But CHI misconstrues section 38-35-110(1), which authorizes the filing of a lis pendens notice if the recording party *claims relief* affecting the title to real property in the underlying action.

¶ 21 Even if Ms. Carter did not have a vested interest in the properties at the time of recordation, she sought to establish an interest in the properties through the dissolution of marriage proceedings.[4] *Cf. In re Questions Submitted by U.S. Dist. Ct.*, 184 Colo. 1, 9, 517 P.2d 1331, 1335 (1974) (concluding that wife's interest in husband's real property vested when the divorce action was filed). Her claim in those proceedings was based, in part, on her position that there was no legally significant distinction between their marital unit — of which Mr. Carter was a part — and CHI.

¶ 22 Her trial testimony illustrates this position. For instance, when CHI's attorney asked who held title to the two encumbered properties, she said,

> [Ms. Carter]: [I]t's Carter Holdings . . . *I guess I didn't really have a distinction between one or the other. I felt like we were purchasing it.*
>
> [CHI Attorney]: When these were . . . recorded with the Mesa County Clerk and Recorder's Office, you understood that neither of those

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[4] Mr. Carter, Ms. Carter, and CHI eventually stipulated in the dissolution of marriage proceedings that the St. Peppin and Kiva Drive properties were marital assets. *See Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 64 (appellate courts can "take judicial notice of the contents of court records in a related proceeding") (citation omitted); CRE 201.

> two properties were owned by either you or Mr. Carter individually, correct?
>
> [Ms. Carter]: I don't know that I knew that.

(Emphasis added.) Similarly, when CHI's attorney argued that, because businesses regularly sell assets, Ms. Carter should not have been frightened by CHI's sale of its assets, she responded,

> I know, but you see it's Carter Holdings, okay? I'm a Carter. I'm part of this Carter Holdings. We didn't divide it and say oh this is his and this is mine. It wasn't that way. . . *it was all intermingled in my mind. There weren't two separate entities.*

(Emphasis added.) Finally, when CHI's attorney quizzed her about the prior use of her inheritance and home equity loans on her and Mr. Carter's personal residences to capitalize CHI, she testified that

> I didn't think we were two separate entities. And I even think on those [initial projects], I didn't know it at the time, [but] those were under our personal names. The lot was under the personal names and so was the construction loan. And that's what I thought had gone on here. And then I noticed it was Carter Holdings. That was the only thing that was a little different and I didn't understand it.

¶ 23 Ms. Carter sought relief in the dissolution proceedings that could affect the title to CHI's assets. CHI's principal assets were the homes and the corresponding properties. Her claimed relief was

based on the position that CHI's corporate form should be disregarded for purposes of marital property division — that is, she thought the court should "pierce [CHI's] corporate veil," thus making its assets marital property. *See McCallum Fam. L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009). Ms. Carter's testimony demonstrates the basis for her good faith claim in the dissolution proceeding, based on her involvement with the business, that CHI's assets were in fact marital property even if nominally owned by CHI.

¶ 24 As noted, a document is "spurious" if it is "forged or groundless, contains a material misstatement or false claim, or is otherwise patently invalid." § 38-35-201(3). CHI does not argue that the lis pendens notices were "forged" or contained any "material misstatement[s] or false claim[s]," and we see no record support to so conclude. Rather, CHI asserts only that the notices of lis pendens were "groundless" or "patently invalid."

¶ 25 A "groundless" document is one for which "the proponent can present no rational argument based on the evidence or the law in support of his or her claim." *Better Baked, LLC v. GJG Prop., LLC*, 2020 COA 51, ¶ 18 (citation omitted). Yet Ms. Carter advanced a rational argument in support of her claim in CHI's two encumbered

properties in the dissolution proceeding. The lis pendens notices were therefore not groundless.

¶ 26 A "patently invalid" notice of lis pendens must be more than merely invalid. *Evans*, ¶ 40. Even if Ms. Carter did not have a vested interest in the encumbered properties at the time of recordation, she sought to establish — and ultimately did establish — that interest through the dissolution proceedings. Because she claimed relief in the dissolution proceedings that could affect the title to the subject properties, the notices of lis pendens were not patently invalid.

¶ 27 CHI contends that allowing the use of lis pendens notices in the dissolution of marriage context means they could be improperly used as a negotiating tool.[5] We reject this argument for two reasons.

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[5] In support of this proposition, CHI cites *James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994), where the division cited a Florida case concluding that the wife's use of a lis pendens notice to compel child custody negotiations could amount to abuse of process. *See Scozari v. Barone*, 546 So. 2d 750, 751-52 (Fla. Dist. Ct. App. 1989). But the division's citation to *Scozari* does not show that the use of lis pendens notices in the dissolution of marriage context is inappropriate; rather, it simply underscores that, if the lis pendens

¶ 28 First, section 38-35-110(1) permits recording a lis pendens notice "[a]fter filing any pleading in an action in any court of record of this state." The legislature did not include language forbidding the use of lis pendens notices in dissolution of marriage cases. We decline to read a limitation into the statute that is not there. *See Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16 ("[W]e must respect the legislature's choice of language, and we will not add words to a statute or subtract words from it.").

¶ 29 Second, our supreme court has recognized that lis pendens notices can be recorded in connection with dissolution proceedings. *See Clopine v. Kemper*, 140 Colo. 360, 365-66, 344 P.2d 451, 454 (1959). And other state courts that have addressed this issue have also concluded that the use of lis pendens in the dissolution of marriage context is appropriate. *See, e.g.*, *Di Iorio v. Di Iorio*, 603 A.2d 127, 136 (N.J. Super. Ct. Ch. Div. 1991); *Seligman v. N. Am. Mortg. Co.*, 781 So. 2d 1159, 1163 (Fla. Dist. Ct. App. 2001).

¶ 30 When Ms. Carter recorded the two notices of lis pendens, she had a reasonable factual and legal basis to claim (in the dissolution

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notice is used to further an ulterior purpose, its recordation can amount to abuse of process.

proceedings) a marital interest in CHI's properties. Because her claimed relief in that proceeding could affect the title to CHI's assets, the notices of lis pendens were not spurious within the meaning of section 38-35-201(3). *See Pierce*, 194 P.3d at 509-10.

C. Other Issues

¶ 31 CHI contends that Ms. Carter's recordation of the lis pendens notices amounted to (1) abuse of process and (2) tortious interference with prospective business relations. We are unpersuaded.

1. Abuse of Process

¶ 32 A claim for abuse of process requires the plaintiff

> to allege and prove the following elements: (1) an ulterior purpose for the use of a judicial proceeding; (2) willful action in the use of that process which is not proper in the regular course of the proceedings, that is, use of a legal proceeding in an improper manner; and (3) resulting damage.

Walker v. Van Laningham, 148 P.3d 391, 394 (Colo. App. 2006). The trial court concluded that, as a factual matter, Ms. Carter did not record the notices of lis pendens with an ulterior purpose. Rather, she recorded them to protect her claimed interest in the subject properties. We review such factual findings for clear error

and will only disturb them if they are not supported by the record. *See Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008).

¶ 33 There is record support for the court's factual finding. Because CHI did not prove that Ms. Carter invoked section 38-35-110(1) with an ulterior purpose when she recorded the lis pendens notices, its abuse of process claim fails. *Walker*, 148 P.3d at 394.

2. Tortious Interference

¶ 34 "While an underlying contract is not required for [the] tort [of tortious interference with prospective business or economic advantage], there must be a showing of improper and intentional interference by the defendant that prevented the formation of a contract between the plaintiff and a third party." *Omedelena v. Denver Options, Inc.*, 60 P.3d 717, 721 (Colo. App. 2002). The court concluded, again with record support, that in recording the lis pendens notices, Ms. Carter did not interfere with any contractual relation of CHI. For this reason, CHI failed to prove an essential element of this claim.

D. Attorney Fees

¶ 35 Ms. Carter requests appellate attorney fees and costs pursuant to C.A.R. 39, C.A.R. 39.1, and section 38-35-204(3),

C.R.S. 2022. But section 38-35-204 only provides for an award of attorney fees when the court concludes that an existing lis pendens notice is spurious (or not). *See Sifton v. Stewart Title Guar. Co.*, 259 P.3d 542, 543-45 (Colo. App. 2011). Here, Ms. Carter released both lis pendens notices nearly three years before the trial court concluded that neither were spurious under section 38-35-201(3). Accordingly, we deny that request.

III. Disposition

¶ 36 The order is affirmed.

JUDGE LIPINSKY and JUDGE SCHOCK concur.