SUMMARY
August 24, 2023

2023COA76

No. 22CA1619, *Bertoia v. Denver Gateway* — Real Property — Lis Pendens — Spurious Document — Colorado Uniform Fraudulent Transfer Act; Appeals — Supersedeas Bond

A division of the court of appeals holds, as a matter of first impression, that a district court has the authority under the lis pendens statute, § 38-35-110, C.R.S. 2022, to condition the continuation of a notice of lis pendens pending appeal on the posting of a supersedeas bond. The failure to post that bond, however, does not moot the appeal of the order expunging the notice of lis pendens where the district court awarded fees to the party seeking the expungement.

COLORADO COURT OF APPEALS **2023COA76**

Court of Appeals No. 22CA1619
City and County of Denver District Court Nos. 19CV33523 & 21CV30454
Honorable David H. Goldberg, Judge

Wanda Bertoia,

Plaintiff-Appellant,

v.

Denver Gateway LLC, a Colorado limited liability company,

Defendant-Appellee.

ORDER REVERSED

Division II
Opinion by JUDGE TOW
Furman and Johnson, JJ., concur

Announced August 24, 2023

Podoll & Podoll, P.C., Richard B. Podoll, Robert C. Podoll, Robert A. Kitsmiller, Jacqueline E.M. Hill, Greenwood Village, Colorado, for Plaintiff-Appellant

Chipman Glasser, LLC, Daniel W. Glasser, Jennifer M. Osgood, James A. Kin, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff-appellant, Wanda Bertoia, appeals the district court's order striking the notice of lis pendens, recorded as to real property titled to defendant-appellee, Denver Gateway LLC, as a spurious document pursuant to C.R.C.P. 105.1.

¶ 2 In resolving this appeal, we first address whether subsequent events rendered the appeal moot. Doing so, we determine — as a matter of first impression — that a district court has the authority under the lis pendens statute, § 38-35-110, C.R.S. 2022, to condition the continuation of a notice of lis pendens pending appeal on the posting of a supersedeas bond. Despite Bertoia's failure to post such bond, however, we conclude that this appeal is not moot. Turning then to the merits of the appeal, we reverse the district court's order.

I. Factual Background

¶ 3 The following facts are taken from Bertoia's two complaints filed in separate district court actions — one against Frisco Acquisition, LLC (Frisco) and other entities not parties to this appeal and one against Denver Gateway — that were originally assigned to different divisions of the Denver District Court.

¶ 4 WPB Hospitality, LLC (WPB), which Bertoia solely owned, received financing from American Lending Center, LLC (ALC) to construct a hotel near the Denver airport. In 2018, WPB filed for bankruptcy. While the bankruptcy proceeding was pending, WPB entered into two contracts with Frisco under which Frisco would purchase WPB and assume WPB's liability to ALC and the other creditors in the bankruptcy proceeding. WPB sought approval from the bankruptcy court to enter into these contracts, and Frisco represented that it was ready and willing to perform the contractual obligations, subject to some limited due diligence. But then, Bertoia alleges, Frisco "failed or refused to perform its contracts with WPB." Bertoia sued Frisco and its sole owner, Jagmohan Dhillon, for fraud and breach of contract.

¶ 5 Meanwhile, ALC submitted a successful bid for the property at a foreclosure sale. Frisco filed notices of intent to redeem the property based on mechanics' liens it had acquired during the WPB bankruptcy. ALC sued Frisco, alleging that the mechanics' liens had expired, were not timely enforced, and could not be used to redeem the property because they were junior to ALC's claims. ALC

and Frisco ultimately settled, with ALC agreeing to convey the property to Frisco.

¶ 6 Frisco and ALC executed a purchase and sale agreement (PSA) for the property as contemplated by their settlement agreement. Shortly thereafter, Frisco assigned the PSA to the recently formed Denver Gateway, an assetless company wholly owned by Dhillon's wife. Denver Gateway paid nothing for the assignment of the PSA. The assignment disposed of substantially all of Frisco's assets. Frisco then filed a "no-asset" bankruptcy petition in Texas.

¶ 7 During the creditors' meeting in Frisco's bankruptcy case, Bertoia learned about the PSA and its assignment to Denver Gateway. As a result, she amended her complaint to include a claim under the Colorado Uniform Fraudulent Transfer Act (CUFTA), §§ 38-8-101 to -112, C.R.S. 2022, against Frisco and Dhillon and a fraudulent omission claim against Dhillon. In addition, she filed a separate action against Denver Gateway and Dhillon's wife, also alleging a CUFTA claim. In both CUFTA claims, Bertoia sought avoidance of the assignment, among other relief. The two lawsuits were ultimately consolidated in the district court.

¶ 8 At the time she filed the complaint against Denver Gateway, Bertoia recorded a notice of lis pendens on the property at issue. Denver Gateway moved to expunge the notice of lis pendens pursuant to C.R.C.P. 105(f)(2).[1] After holding an evidentiary hearing, the district court found that Bertoia's CUFTA claim would not affect title to the property; so it struck and expunged the notice of lis pendens.

¶ 9 In addition, just before the hearing on the first notice of lis pendens, Bertoia recorded a second notice of lis pendens — the one at issue in this appeal — on the property under the caption of the Frisco litigation. At the same time, Bertoia filed a request to consolidate the two cases. Before either judge presiding over the cases had ruled on the request to consolidate, Denver Gateway filed — in its case — a C.R.C.P. 105.1 petition to strike the second notice of lis pendens as a spurious document. The judge presiding over the Denver Gateway action transferred the hearing on the

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[1] Denver Gateway had moved to expunge the notice of lis pendens before, contending that Bertoia did not have standing to bring the CUFTA claim; the district court found that this argument was moot because Bertoia bought the bankruptcy estate's claims from the bankruptcy trustee.

Rule 105.1 petition to the judge presiding over the Frisco action. The judge presiding over the Frisco action held a hearing on the Rule 105.1 petition. The court granted the request to consolidate the cases and, in a separate order, granted Denver Gateway's Rule 105.1 petition, declaring the second notice of lis pendens invalid for the same reason it found the first notice of lis pendens invalid and releasing the second notice. The district court's order also concluded that, pursuant to C.R.C.P. 105.1(d), Bertoia was obligated to pay the reasonable attorney fees and costs incurred by Denver Gateway in defending the action. Bertoia appeals this order.

¶ 10 The district court later entered an attorney fees and costs award of $20,000 against Bertoia pursuant to a stipulation by the parties. The order provided that (1) Denver Gateway shall not attempt to collect any attorney fees until the appeal in this case is resolved; and (2) if this court reverses the order striking the second notice of lis pendens, the attorney fees and costs order shall also be vacated.

¶ 11 After Bertoia initiated an appeal of the order expunging the first notice of lis pendens,[2] the district court entered an order requiring her to post a supersedeas bond of $25 million within ten days or else both notices of lis pendens would be released. No bond was posted, and the court clerk issued a certificate to be recorded with the county clerk and recorder's office, releasing both the first and second notices of lis pendens.[3]

¶ 12 This court then issued an order to show cause why Bertoia's appeal of the order striking the second notice of lis pendens should not be dismissed as moot because both notices of lis pendens were released. Resolution of this show cause order was deferred to the merits division.

¶ 13 During the pendency of this appeal, a jury trial was held in the district court, and the jury found against Bertoia on her breach of contract, fraud, and fraudulent omission claims. The district court then found that the CUFTA claim was moot and dismissed it.

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[2] Bertoia's appeal of the release of the first notice of lis pendens is a separate case.

[3] The district court also later denied Bertoia's motion to reconsider its order conditioning continuation of both notices of lis pendens on the posting of a supersedeas bond.

¶ 14 After laying out the relevant law, we address the deferred mootness issue and then turn to the merits of the appeal.

II. Applicable Law

¶ 15 After filing a pleading in an action wherein relief is claimed affecting the title to real property, any party to the action may record a notice of lis pendens against the real property in the county in which the real property is situated. § 38-35-110(1). "The notice of lis pendens is intended to provide notice of pending litigation to anyone interested in acquiring an interest in the subject property." *Pierce v. Francis*, 194 P.3d 505, 507 (Colo. App. 2008). "A lis pendens notice effectively renders title unmarketable and prevents its transfer until the litigation is resolved or the notice is expunged." *Id.* at 508.

¶ 16 If a notice of lis pendens is spurious, a person whose real property is affected by it may petition the district court in the county in which the notice was filed for an order to show cause why the document should not be declared invalid. § 38-35-204(1), C.R.S. 2022; C.R.C.P. 105.1(a). A "[s]purious document" is "any document that is forged or groundless, contains a material

misstatement or false claim, or is otherwise patently invalid." § 38-35-201(3), C.R.S. 2022.

¶ 17 In general, a notice of lis pendens automatically expires forty-nine days after the entry of final judgment in the underlying action. § 38-35-110(2). But if a timely appeal is filed, the notice of lis pendens remains in effect for the duration of the appeal unless the district court rules otherwise. § 38-35-110(3).

III. Mootness

¶ 18 Bertoia contends that this appeal is not moot because (1) the district court did not have authority to condition the continuation of her second notice of lis pendens during her appeal on her posting a supersedeas bond; and (2) even if it had the authority to do so, her failure to post the bond does not result in the appeal being moot. We disagree with her first contention but agree with her second.

¶ 19 Contrary to Bertoia's contention, the district court had the equitable authority to impose a supersedeas bond as a condition of the continued effectiveness of the notice of lis pendens during her appeal of the order striking it as spurious. *See Wellman v. Travelers Ins. Co.*, 689 P.2d 1151, 1154 (Colo. App. 1984), *rev'd on other grounds*, 721 P.2d 685 (Colo. 1986). In *Wellman*, a division of this

court concluded that the district court had equitable authority to condition the continuation of the notice of lis pendens through appeal on the posting of a supersedeas bond. *Id.* (citing C.R.C.P. 105(f)(4) (1984)). Bertoia argues that *Wellman* is no longer the operative law because Rule 105(f)(4) has since been repealed. But Bertoia neglects to acknowledge that this repeal resulted from the General Assembly's codification of the provision in section 38-35-110. *See* C.R.C.P. 105 cmt.

¶ 20 Prior to repeal, Rule 105(f)(4) provided, "If a timely notice of appeal is filed while a notice of lis pendens is in effect, such notice of lis pendens shall remain in effect until otherwise ordered by the court having jurisdiction." C.R.C.P. 105(f)(4) (1992). In 1992, the General Assembly overhauled the lis pendens statute. Ch. 295, sec. 1, § 38-35-110, 1992 Colo. Sess. Laws 2103-06. The relevant language of the statute (which has not been subsequently amended) provides that

> [i]f a timely notice of appeal is filed while a notice of lis pendens is in effect . . . such notice of lis pendens shall remain in effect until . . . [t]he court having jurisdiction over the action enters an order determining that the notice of lis pendens is no longer in effect.

§ 38-35-110(2)(c)(II). Though the language is not identical, there is no substantive difference between the two provisions. Thus, we may presume that the General Assembly intended that the statutory provision bear the same meaning as the rule did. *Cf. Rogers v. Indus. Comm'n*, 40 Colo. App. 313, 314, 574 P.2d 116, 117 (1978) ("[W]here a legislature re-enacts or amends a statute and does not change a section previously interpreted by settled judicial construction, it must be concluded that the legislature has agreed with the judicial construction." (quoting *Music City, Inc. v. Est. of Duncan*, 185 Colo. 245, 248, 523 P.2d 983, 985 (1974))).

¶ 21 Indeed, even if we were to write on a blank slate, unguided by the division in *Wellman*, we would discern no lack of authority. If the district court can simply enter an order "determining that the notice of lis pendens is no longer in effect," § 38-35-110(2)(c)(II), it surely can stop short of doing so by conditioning its decision not to enter such an order on the posting of a supersedeas bond.

¶ 22 We therefore turn to whether Bertoia's failure to post the bond, resulting in the release of the second notice of lis pendens, renders this appeal moot and conclude that it does not.

¶ 23 "We review de novo the legal question of whether a case is moot." *Colo. Mining Ass'n v. Urbina*, 2013 COA 155, ¶ 23. A case is moot if a judgment, when rendered, will have no practical legal effect on an existing controversy. *Mount Carbon Metro. Dist. v. Lake George Co.*, 847 P.2d 254, 256 (Colo. App. 1993). "Appellate courts will not render opinions on the merits of appeals when issues presented in litigation become moot because of subsequent events." *Campbell v. Meyer*, 883 P.2d 617, 618 (Colo. App. 1994).

¶ 24 The posting of the supersedeas bond was required to stay the execution of the district court's order releasing the notice of lis pendens, but it was not a prerequisite for filing and pursuing an appeal of the underlying order striking the notice as a spurious document. *See* C.R.C.P. 62(d); C.A.R. 8; *cf. FCC Constr., Inc. v. Casino Creek Holdings, Ltd.*, 916 P.2d 1196, 1198 (Colo. App. 1996) (concluding that although the defendant did not seek a stay of the foreclosure sale or redeem the property after the sale, its actions were not voluntary and did not render the appeal moot because its actions or inactions were consistent with its claims that the underlying order of sale was erroneous). The failure to post a bond

merely means that Bertoia's second notice of lis pendens is not in effect during the pendency of the appeal.

¶ 25 If we agree with Bertoia on the merits of her appeal, the remedy — reversing the order striking the notice of lis pendens as a spurious document — would render the underlying basis for the attorney fees and costs award invalid. Indeed, the parties stipulated that if this court reverses the order striking the notice of lis pendens, the attorney fees and costs order must be vacated. Accordingly, we conclude that Bertoia's failure to post the supersedeas bond does not render this appeal moot.

¶ 26 Nor, for similar reasons, does the ultimate dismissal of Bertoia's CUFTA claim on which the notice of lis pendens was predicated.[4] A notice of lis pendens "is not groundless merely because the underlying claim may fail." *Better Baked, LLC v. GJG Prop., LLC*, 2020 COA 51, ¶ 20. Put another way, "[t]he allowance or denial of a . . . lis pendens hinges on the nature of the claim, not

[4] To the contrary, the order expunging the first notice of lis pendens did not include an award of attorney fees. Thus, as essentially acknowledged by the parties at oral argument, the appeal of that order, pursued in a separate case, is duplicative of this claim and thus moot. That appeal will be dismissed by separate order.

the merits thereof." *Id.* at ¶ 21 (quoting *DeCroteau v. DeCroteau*, 65 N.E.3d 1217, 1220 (Mass. App. Ct. 2016)). (Bertoia's lack of success at trial also does not moot this appeal because she still has the opportunity to appeal that outcome.)

IV. Validity of the Notice of Lis Pendens

¶ 27 Turning to the merits of Bertoia's challenge to the district court's order striking the notice of lis pendens as spurious, we agree that the court erred.

A. Standard of Review

¶ 28 This case involves interpretation of the lis pendens and CUFTA statutes. We review de novo questions of statutory interpretation. *Evans v. Evans*, 2019 COA 179M, ¶ 10.

B. Analysis

¶ 29 As a threshold issue, we note that the fact that Bertoia's CUFTA claim was ultimately unsuccessful does not impact our analysis. The question is whether the notice of lis pendens was spurious when it was filed. *Platt v. Aspenwood Condo. Ass'n*, 214 P.3d 1060, 1068 (Colo. App. 2009). We turn, then, to whether Bertoia's CUFTA action, as filed, "affect[ed] the title to real property." § 38-35-110(1).

¶ 30 The recording of a notice of lis pendens 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); *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994). To promote the policies behind the statute, the supreme court broadly interprets what "affect[s] the title to real property." *Kerns v. Kerns*, 53 P.3d 1157, 1165 (Colo. 2002) (quoting § 38-35-110(1)); *see also Crown Life Ins. Co. v. April Corp.*, 855 P.2d 12, 14 (Colo. App. 1992). A "policy underlying a notice of lis pendens is to prevent a proceeding involving real property rights from being thwarted by transfers of property interests to persons not bound by the outcome of the proceeding." *Pierce*, 194 P.3d at 509-10. "Thus, even litigation that does not seek to change ownership in any way but does 'involve a determination of certain rights [and liabilities] incident to ownership' falls within the purview of the statute." *Kerns*, 53 P.3d at 1164 (quoting *Hammersley v. Dist. Ct.*, 199 Colo. 442, 446, 610 P.2d 94, 96 (1980)) (concluding that even though a demand for a constructive trust did not create an interest in real property, it

could ultimately change legal title and therefore the associated notice of lis pendens was valid).

¶ 31 Bertoia contends that Frisco's assignment of the PSA to Denver Gateway falls within CUFTA — and thus the notice of lis pendens was properly recorded — because if she had prevailed on this claim, it could have affected title to real property. She therefore contends that the notice of lis pendens was not spurious.

¶ 32 Denver Gateway contends that ALC sold the property to it and therefore CUFTA does not apply because it cannot be used to void a transfer between two non-debtors. But this argument misapprehends what Bertoia contends the alleged fraudulent transfer was: Frisco assigning the PSA to Denver Gateway. As Bertoia's claim was asserted, Frisco was a potential debtor, and we agree with Bertoia that this assignment at least arguably falls within CUFTA.

¶ 33 CUFTA prohibits a transfer by a debtor if it is made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." § 38-8-105(1)(a), C.R.S. 2022. A "[t]ransfer" under CUFTA includes "every mode, direct or *indirect*, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or

an interest in an asset." § 38-8-102(13), C.R.S. 2022 (emphasis added). An "[a]sset" means anything that may be the subject of ownership by a debtor. § 38-8-102(2), (11).

¶ 34 Moreover, section 38-8-107(1)(a)(I), C.R.S. 2022, provides that, for purposes of CUFTA, a transfer involves "an asset that is real property other than a fixture, but includ[es] the interest of a seller or purchaser under a contract for the sale of the asset." In other words, an "asset," for purposes of a CUFTA transfer, includes "the interest of a seller or purchaser under a contract for the sale of the asset." § 38-8-107(1)(a)(I); *see also In re Jones*, 184 B.R. 377, 382 (Bankr. D.N.M. 1995) (citing identical statutory provision in the New Mexico Uniform Fraudulent Transfer Act to mean that a purchaser's interest in a real estate contract may be an asset subject to fraudulent transfer).

¶ 35 In light of the statutory inclusion of the type of agreement transferred here, it is uncontroverted that Frisco — the alleged debtor — had an interest in the property as the purchaser under the PSA. This interest was an "asset" that could be fraudulently transferred under CUFTA. Thus, Bertoia's allegations in her complaint at least arguably fall within CUFTA's purview. We

therefore turn to whether her CUFTA claim, and the relief sought, may affect title to real property and conclude that it could.

¶ 36 We agree with Bertoia that the assignment of the PSA was an indirect transfer of title in real property. *See Ciccarelli v. Guar. Bank*, 99 P.3d 85, 88 (Colo. App. 2004) (Fraudulent transfer claims are equitable in nature, and "[e]quity looks to the substance of a transaction rather than its form."), *overruled on other grounds by Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008); *see also Crown Life Ins. Co.*, 855 P.2d at 15 ("[A] claim of fraudulent conveyance directly challenges the validity of the conveyance and, hence, title."); § 38-8-102(13). The execution of a PSA regarding real property vests equitable title to the property in the prospective purchaser. *Bent v. Ferguson*, 791 P.2d 1241, 1243 (Colo. App. 1990). Thus, upon entering into the PSA, Frisco held equitable title to the property, which it then transferred to Denver Gateway.

¶ 37 Consider the following two hypothetical scenarios:

- Scenario A:
    - (1) Company 1 enters into a PSA as purchaser;

    - (2) Company 1, intending to defraud a creditor, assigns the rights under the PSA to Company 2; and
    - (3) Company 2 exercises its rights under the PSA to purchase the property.
- Scenario B:
    - (1) Company 1 purchases the property; and
    - (2) Company 1, intending to defraud a creditor, transfers ownership of the property to Company 2.

There is no substantive difference between the two scenarios. There can be little dispute that the transfer in Scenario B would implicate CUFTA. We see no reason why the functionally equivalent transfer in Scenario A would not also fall within CUFTA's ambit.

¶ 38 Further, we do not agree with Denver Gateway's contention that the notice of lis pendens was improper because title to the property would not be returned to Bertoia if she prevailed on her CUFTA claim. Bertoia did not seek to have title returned to her, nor is the granting of title to her necessary to support the notice of lis pendens. *See Pierce*, 194 P.3d at 510. Rather, in the complaint, Bertoia sought avoidance of the assignment, among other relief. If

Bertoia had prevailed on her claims against Frisco, the district court could have treated the substance of the transaction as what Bertoia alleges it effectively was — a transfer of title from Frisco to Denver Gateway. Had the court done so, it would have been within the court's power to return title to Frisco, and thus put the property within reach of Bertoia as a potential creditor of Frisco. *See Miller v. Kaiser*, 164 Colo. 206, 211-12, 433 P.2d 772, 775 (1967) ("The primary remedy in an action for fraudulent conveyance is a declaration that the fraudulent conveyance is void . . . . In other words, the remedy sought is to return the property fraudulently conveyed to its prior status of ownership thereby bringing it within reach of the judgment creditor of the fraudulent transferor.").

¶ 39 Thus, Bertoia's CUFTA claim sought relief "affecting the title to real property," § 38-35-110(1), and therefore the notice of lis pendens was properly recorded. As it was proper, it could not have been spurious. We therefore reverse the district court's order striking the notice of lis pendens as a spurious document.

V. Disposition

¶ 40 The order is reversed.

JUDGE FURMAN and JUDGE JOHNSON concur.