IN THE SUPREME COURT OF MISSISSIPPI

Cause No.: 2010-CA-00522

ALL AMERICAN PROCESSING, INC. — APPELLANT

versus

LAWRENCE M. RUCKDESCHEL,
KATHERINE R. RUCKDESCHEL, and
TERRY MILLER, in his capacity of
Jackson County Chancery Clerk — APPELLEES

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE CHANCERY COURT OF
JACKSON COUNTY, MISSISSIPPI

SITTING AS APPELLATE COURT ON APPEAL
FROM THE COUNTY COURT OF
JACKSON COUNTY, MISSISSIPPI

(ORAL ARGUMENT IS NOT REQUESTED)

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I.

INTRODUCTION

This appeal focuses on the appropriate use of Miss. Code Ann. §11-47-3, the lis pendens statute. The Ruckdeschels[1] filed the Circuit Court Action seeking monetary damages resulting after they entered into a contract with Hurricane Homes for the manufacture of a modular home, which was never fulfilled. The Ruckdeshels asserted a Lis Pendens on the Subject Property, which was owned by All American Processing, the landlord of Hurricane Homes. The Lis Pendens was appropriately canceled by the County Court, the Court having found no substantial evidence that the Ruckdeschels' claims were tied to the property such that the lis pendens statute would apply. (County CP, 102-103). The Ruckdeschels appealed the County Court decision to the Jackson County Chancery Court, which reversed the County Court decision and reinstated the Lis Pendens.

II.

STATEMENT OF THE CASE

A. Nature of the Case

As a preliminary matter, All American Processing adopts by reference the Brief of Warren Paving, Inc., as Amicus Curiae. The only procedural matters requiring reply are clarification of several misleading statements as set forth by the Ruckdeschels.

The Ruckdeschels references to an "indicted defendant" were not directed to All American Processing. No shareholder of All American Processing was indicted for any

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1 All American Processing adopts by reference all defined terms as set forth in the Appellant's Brief and Brief of Amicus Curiae.

acts identified in the Circuit Court Action. Rather, the indicted defendant was a subcontractor to All American Processing, who then repaid $50,000.00 of the funds which he took from the Ruckdeschels.

All American Processing would further clarify that it leased property to Hurricane Homes, Inc. ("Hurricane Homes"), a builder of modular homes. Hurricane Homes manufactured its modular homes on property which it leased from All American Processing. This is the same property on which the Ruckdeschels filed the Lis Pendens. However, while construction of individual modules was undertaken on the Subject Property, no home was to be erected on this site. All American Processing simply seeks to ensure that the Ruckdeschels do not infer that the Lis Pendens is upon property which a home will be attached and thus become part of the property itself. These references include "All American, owner of the property on which Hurricane Homes was to build the modular home..." (Brief of Appellee, p. 3), "...The Plaintiffs are entitled to an equitable interest in any and all property or other assets of All American Processing, Inc., including the aforereferenced site upon which the Plaintiffs' home was to be constructed..." (Brief of Appellee, p. 12), and "All American concedes it owned the property upon which Hurricane Homes was to construct the Ruckdeschels' modular home...." (Brief of Appellee, p. 16). Although All American Processing submits that it is clear in their Appellant's Brief that they simply owned the Subject Property, leased it to Hurricane Homes, and Hurricane Homes then built individual modules on the Subject Property for delivery to their final destinations, the distinction is a critical one, as shall be discussed herein.

B. Procedural/Factual History

Although the timeline of events as set forth by the Ruckdeschels is not entirely

accurate, the documents proving otherwise are not in the record on appeal, in part because the transcript of the County Court proceedings, where oral testimony was taken, was not designated to be included in the record on appeal. Although All American Processing would prefer to have the correct sequence of events before this Honorable Court, the erroneous facts are not outcome determinative.

All American Processing will point out, however, that this is an equitable matter in which the Ruckdeschels filed a motion for new trial on July 9, 2008, then took no further action for four months, until after they had received a Default Judgment in the Circuit Court Action. Although they seek equity, they did not do equity.

SUMMARY OF THE ARGUMENT

The Ruckdeschels submit that they had a good faith belief that their funds were stolen and converted into real estate, i.e., the Subject Property, thus the filing of the Lis Pendens on the Subject Property was proper. However, their very own timeline of events demonstrates that their funds were not converted into the Subject Property. The Subject Property was purchased by All American Processing on January 4, 2006. (County CP, 32-38). The Ruckdeschels entered into a contract with Willie Kirsch, a subcontractor to Hurricane Homes, on August 9, 2007. (County CP, 90-94). This is not a matter wherein money was "stolen" and real property purchased with the stolen funds. All American Processing owned the Subject Property and leased it to Hurricane Homes for 19 months before the Ruckdeschels approached Mr. Kirsch.

The Ruckdeschels claim that if the Lis Pendens is not permitted to stand on the Subject Property, then the result would be to sanction a wrongdoer to "illegally convert money into real estate and subsequently sell the real estate before the victims underlying

litigation can be resolved." There are several fallacies in this argument. First, the wrongdoer here was Willie Kirsch, who had no affiliation to All American Processing, the owner of the Subject Property. Secondly, as discussed above, the money was not "converted into real estate." Presumably, the Ruckdeschels infer that Hurricane Homes paid rent to All American for leasing the Subject Property, but there is no evidence to that effect before the Court. Even assuming, *arguendo*, that such was the case, the Ruckdeshels argument, taken to its natural conclusion, would mean that if a friend of a residential tenant stole a bag of flour, the tenant made bread with the flour, sold the bread, and paid a portion of his rent with the proceeds, then a lis pendens would lie against the property owner since the funds were "converted" into real estate. Clearly such an absurd result is not what the Legislature envisioned when permitting the filing of a lis pendens to "...enforce a lien upon, right to, or interest in, any real estate...."

ARGUMENT

A. A Lis Pendens is not an appropriate tool when the underlying complaint does not affect the real property in issue.

All American Processing and the Ruckdeschels agree that Miss. Code Ann. §11-47-3 is at the "heart of this appeal," and further agree that this section is to be utilized "[w]hen any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to **enforce a lien upon, right to, or interest in, any real estate**...." (Emphasis added). From there, the parties hereto diverge on what constitutes a "right to" or "interest in" real estate.

As the Ruckdeschels point out, their numerous claims included allegations of misrepresentation, fraud, fraud in the inducement, conversion and conspiracy. What they cannot escape, however, is that all of their claims stem from a single incident which does

not pertain to a "right to" or "interest in" the Subject Property. Their causes of action, no matter how classified or pled, are for a breach of contract to manufacture modules to be used in residential construction on the Ruckdeschels' property.

The references to Ruckdeschels' home being "constructed on" the Subject Property are a misguided attempt to connect the wrongful acts to the Subject Property. *If*, in fact, the Ruckdeschels had contracted to purchase a parcel of real estate from Hurricane Homes on which their home was to be constructed, a lis pendens on *that* parcel would be appropriate as the subject matter of the suit would involve the real property. That, however, is not the case. What in fact transpired is that the Ruckdeschels entered into an agreement with Mr. Kirsch, a subcontractor to Hurricane Homes, and paid to Mr. Kirsch a deposit for the construction of a modular home which was to thereafter be moved to the Ruckdeschels' real property. (Chancery CP, 42). This modular home was to be manufactured by Hurricane Homes on the Subject Property, which Hurricane Homes leased from All American Processing. To allow the Ruckdeschels to file a lis pendens against the property of the landlord to a manufacturing facility because a tenant failed to complete an order would create absolute and complete chaos within our civil litigation system and would freeze commercial transactions. The legislature, being wise to the horrors created by such a rule, limited the lis pendens statute to issues related directly to the real property involved. Thus, a litigant who has no claim to an interest in real property cannot use the legal process of the lis pendens statute to extort a settlement from a property owner who has no interest in the claims of the litigants. Extortion by process is the best description for the situation created by the Ruckdeschels.

The Ruckdeschels attempt to use a "six degrees of separation" type of theory to connect Mr. Kirsch's wrongful act to the Subject Property owned by All American Processing, because the allegations in the Circuit Court Action simply do not "involve" the Subject Property. There simply is no direct relationship between the breach of contract and the Subject Property, and as a result, the Lis Pendens must fail.

The fact that the items purchased by the Ruckdeschels were modules for a home is of no relevance in determining the propriety of a lis pendens on the Subject Property. If the lis pendens is found to be valid, it would make no difference if the Ruckdeschels had contracted with Hurricane Homes for the construction of a bread box. The absurdity of this result is readily apparent, and clearly contradictory to the intent of Miss. Code Ann. §11-47-3. If the Lis Pendens filed by the Ruckdeschels is found to be valid, the next lis pendens filed may involve a controversy over a bread box. Such an expansion of §11-47-3 is not only contradictory to law, but as aptly pointed out in the Brief of Amicus Curiae, it will have a devastating impact on industries such as manufacturing, commercial leasing, commercial lending, and the availability of title insurance, to name a few.

The Ruckdeschels cite *Jones v. Jones*, 161 So.2d 640 (Miss. 1964) in support of their theory that the lis pendens is valid. Aside from the *Jones* facts being wholly distinguishable from the case sub judice, in *Jones*, the Mississippi Supreme confirmed that:

> The object of the doctrine of *lis pendens* is to keep the **subject in controversy** within the power of the court until final decree and make it possible for courts to execute their judgment. Id. at 643 (Emphasis added).

The Subject Property is not the "subject in controversy" in the Circuit Court Action. Rather, the subject in controversy is fraud, conversion, misrepresentation, etc., over funds paid for personal property which was not delivered.

Similarly, the Ruckdeschels quote Judge Griffith's Mississippi Chancery Practice, as cited in Jones, as follows:

> ...The doctrine of *lis pendens* is that every person, including a stranger to the suit and whether bona fide or not, who acquires from a party to the litigation any interest in property real or personal during the pendency of the **suit respecting a right, title or interest in such property** takes subject to, and is conclusively bound by, the decree in such litigation. Id. (Emphasis added).

To reiterate, the Circuit Court Action is not a "suit respecting a right, title or interest in such property." All American Processing has no quarrel with *Jones*, but the Ruckdeschels are not entitled to pick and choose portions of holdings therein and simply ignore the mandate that in order to be valid, a lis pendens must attach only to property which is the "subject in controversy" and involves a "suit respecting a right, title or interest in such property." The Circuit Court Action is not such an action, and therefore the Lis Pendens is invalid and was properly cancelled by the County Court.

Further, at the hearing before the County Court to cancel the lis pendens, the County Court received no evidence tracing the "converted" funds to All American Processing. In fact, by Mr. Kirsch repaying the vast majority of the funds[2], it is apparent that Hurricane Homes did not even receive the funds, rather, they were kept by Mr. Kirsch. There was simply not a shred of evidence before the County Court that the unfortunate events surrounding the Ruckdeschels in any way sufficiently touched the Subject Property owned by All American Processing such that a lis pendens could properly attach. As a result, the Lis Pendens was properly canceled and released by the County Court.

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Mr. Kirsch received $66,250.00 from the Ruckdeschels, and returned $50,000.00 to them. (Chancery CP, 52)

The Ruckdeschels claim that they filed the Lis Pendens simply to "give notice that due to fraud and conversation, they claimed an equitable interest/equitable lien in a parcel of property owned by All American...." (Brief of Appellant, pp. 12-13). Insodoing, they minimize the dangers associated with the improper use and expansion of §11-47-3.

Throughout the appellate process, the Ruckdeschels have relied upon *Aldridge v. Aldridge,* 527 So.2d 96 (Miss. 1988). As set forth in the Appellant's Brief, All American Processing does not dispute the contents of *Aldridge*. In addition to the parties' different interpretations of the meaning of a "right to or interest in real estate," the facts of *Aldridge* are entirely distinguishable, as in *Aldridge*, the subject matter of the dispute was indisputably "related" to the real property on which the lis pendens was placed. In fact, "notice" was the issue in *Aldridge*, rather than any claims on the propriety of the lis pendens in and of itself.

In spite of a hearing with live testimony in County Court, a motion for reconsideration in County Court, an appeal to Chancery Court (which did not provide the Chancery Court with the benefit of the County Court transcript), and a motion for reconsideration in Chancery Court, the Ruckdeschels argue for the first time that reinstatement of the Lis Pendens is proper because the Complaint to Cancel and Release Lis Pendens is "akin" to a motion for injunctive relief and All American did not proceed pursuant to Rule 65 of the Mississippi Rules of Civil Procedure. The Ruckdeschels cite one federal case which opted to use the four-step analysis. *Marett v. Scott*, U.S. Dist., LEXIS 5356 (No. Dist. of Miss., 2000). Aside from being stricken for failure to timely make this argument, All American Processing has found no authority which requires proceeding pursuant to Rule 65. To the contrary, there is Mississippi case law discussing the cancellation of a lis pendens without

utilizing the four-step analysis required for injunctive relief. (See, i.e., *Aldridge*, *supra; Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502 (1904); *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So.2d 749 (Miss. 1982)).

B. The Ruckdeschels' underlying claim has no direct relationship to the Subject Property.

The Ruckdeschels claim a "conspiracy" to defraud them and allege that All American's property was "a part of the conspiracy." (Appellant's Brief, pp.15-16). However, no facts are set forth which sufficiently link the "fraud" to All American's property. As the Ruckdeschels correctly point out, All American concedes to having owned the Subject Property" which it leased to Hurricane Homes. This concession does not morph the Ruckdeschels claims of fraud, misrepresentation, etc., into a viable interest in the Subject Property.

"The lis pendens statute was enacted for those who claimed to rightfully own an interest in the property." *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502 (1904). The Lis Pendens was filed by the Ruckdeschels without any such interest. The County Court, which was the "trial court" in this matter and the only court to hear witness testimony, found "[t]hat under the facts of this case there is no substantial evidence that the claims set forth by the Defendants are tied to the property in such a way that the lis pendens statute would apply." (County CP, p. 102).

The Ruckdeschels assert that the case of *W.H. Hopper and Associates, Inc. v. Dunaway,* 396 So.2d 43 (Miss. 1981)(herein "*Dunaway I*") is distinguishable in that Hopper was "a plain breach of contract case" where the property on which the lis pendens was filed was "not related in **any** way, shape or form to the litigation." (Appellant's Brief, p. 17). What the Ruckdeschels fail to accept is that the additional counts of conspiracy, fraud, or

conversion matter not, as those claims do not "involve" the particular property to which the doctrine is sought to be applied. Such involvement or relationship is an absolute necessity for the doctrine of lis pendens to be applicable.

> ....[I]t is clear that some form of identifiable "property" must be directly involved in the litigation, and, further, that the litigation to which the doctrine is sought to be applied must "involve" the particular property to which the doctrine is sought to be applied.... 51 Am.Jur.2d, *Lis Pendens*, § 17, as cited in *Dunaway I, supra,* at 45. (Emphasis added).

Despite the Ruckdeschels' best efforts to trace the alleged breach of contract, fraud, and conversion, to the Subject Property, the strained trail simply does meet the requirements for establishing a valid lis pendens.

C. The after acquired default judgment does not transform an invalid lis pendens into a valid instrument.

The County Court correctly canceled the Lis Pendens having found that All American Processing met its burden of proof. (County CP, 62-63). The Motion for Reconsideration was heard *after* the Ruckdeschels entered the default judgment in the Circuit Court Action. Thus, the County Court Judge had before it the Default Judgment and considered its effect on the Lis Pendens. However, the County Court Judge still found there was "no substantial evidence that the claims set forth the Defendants [the Ruckdeschels] are tied to the property in such a way that the lis pendens statute would apply...." (County CP, 102). The Circuit Court default judgment enables the Ruckdeschels to assert a lien against property owned by All American Processing after the date of the judgment. It does not retroactively convert an invalid lis pendens into a valid and proper lis pendens, because the Circuit Court Action was not "tied to the property in such a way that the lis pendens statute would apply."

D. The sole purpose of the filing of the Lis Pendens was indeed to impound a debt.

The Ruckdeschels claim that their purpose in filing the Lis Pendens was not to impound a debt. (Brief of Appellee's, 18-19). This statement is incredulous. The Ruckdeschels initiated the Circuit Court Action to recoup their deposit paid for fabrication of a modular home which they did not receive. They did not file the Lis Pendens to "give notice" of the pending Circuit Court Action. Rather, they wrongfully filed the Lis Pendens in a manipulative effort to tie up property which belonged to a corporation which they had no contractual relationship with, and which did not receive the Ruckdeschels' funds. The Ruckdeschels have availed themselves of the statutory Lis Pendens when the statute and case law are clear that a lis pendens may be used when the subject of a suit identifies a "right to" or "interest in" the property. The County Court correctly established that there was no sufficient nexus between the allegations in the Circuit Court Action and the Subject Property. The County Court reaffirmed this even after entry of the Default Judgment.

As established in the case of *Paxton v. First National Bank of Greenville*, 155 So. 185 (Miss. 1934), the filing of a lis pendens to impound a debt is improper:

> The lis pendens could not operate to establish any lien on the property for the reason that the bill was not to enforce any lien, right to, or interest in, any real estate. The bill in this case shows beyond cavil that the First National Bank of Greenville had no interest whatsoever in the Greenville property of Mrs. Paxton. It merely sought to impound it for the payment of its debt. *Id.* at 44.

The Ruckdeschels assert that they filed the lis pendens "to keep the subject in controversy within the power of the court until final decree and make it possible for courts to execute their judgment." The fallacy in this assertion is that the "subject in controversy" is not the Subject Property owned by All American Processing. The "subject in controversy"

is return of the deposit which the Ruckdeschels paid to Mr. Kirsch, a subcontractor for Hurricane Homes (less, of course, the $50,000.00 Mr. Kirsch himself paid back to them).

CONCLUSION

The County Court properly cancelled the Lis Pendens due to the existence of "no substantial evidence that the claims set forth by [the Ruckdeschels] are tied to the property in such a way that the lis pendens statute would apply." The Subject Property never was "involved in" or "related to" the claims set forth by the Ruckdeschels, and thus cancellation of the Lis Pendens was the appropriate remedy.

RESPECTFULLY SUBMITTED on this, the 23rd day of March, 2007.

ALL AMERICAN PROCESSING, INC.

BY: **DEUTSCH, KERRIGAN & STILES, PLLC**

BY: _____

JASON B. PURVIS, MSB No. [redacted]

CERTIFICATE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have caused to be delivered the original and three (3) true and correct copies of the above and foregoing Reply Brief, and that pursuant M.R.A.P. Rule 28(m), I further certify that I have caused to be delivered an electronic copy of the Reply Brief of Appellant stored on an electronic disk in Adobe Portable Document Format (PDF), all being hand delivered to:

Hon. Kathy Gillis
Clerk, Supreme Court of Mississippi
450 High Street
Jackson, Mississippi 39201

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellant *via* First Class U.S. Mail, to:

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THIS, the 20th day of December, 2010.

JASON B. PURVIS