

March 8, 2017

Hon. Blake Hawthorne, Clerk
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Texas Land Title Association Amicus Curiae Letter Brief

Cause No. 15-0847, *Ron Sommers, as Chapter 7 Trustee for Alabama and Dunlavy, Ltd., Flat Stone II, Ltd. and Flat Stone, Ltd. and as Successor in Interest to Jay Cohen, Individually and as Trustee of the JHC Trust I and II v. Sandcastle Homes, Inc.*

Cause No. 15-0848, *Ron Sommers, as Chapter 7 Trustee for Alabama and Dunlavy, Ltd., Flat Stone II, Ltd. and Flat Stone, Ltd. and as Successor in Interest to Jay Cohen, Individually and as Trustee of the JHC Trust I and II v. Newbiss Property, LP*

Dear Mr. Hawthorne:

Please accept this amicus curiae letter brief submitted by the Texas Land Title Association (“TLTA”) pursuant to Texas Rule of Appellate Procedure 11, and provide a copy of this brief to the Justices in accordance with your custom. The TLTA writes to request that the Court affirm the majority decision of the First Court of Appeals at Houston in *Cohen v. Sandcastle Homes, Inc.*, 469 S.W.3d 173 (Tex. App.—Houston [1st Dist.] 2015) and ensure the effectiveness of lis pendens expungements under Texas Property Code § 12.0071.

The membership of the TLTA is composed of more than five hundred business entities and more than 1,700 individual members of the land title industry in the State of Texas. Its members live and do business in virtually every county in the State. Its members have been serving Texans to protect the orderly and reliable transfer of real property for over 100 years. TLTA members facilitate real estate commerce and safeguard real property rights through the issuance of title insurance. From time to time, cases come before the courts that have significant impact on real estate commerce in Texas and which impact the ability of TLTA’s members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of Texas real property laws and doctrines.

Of particular importance to purchasers of real estate in the State of Texas and the companies which research and insure their title is the ability to search the real property records and make clear determinations as to title based upon uniform standards. In the cases before the Court, the Petitioner’s interpretation of Texas Property Code § 12.0071 undermines those uniform standards regarding the effect of an expungement of a notice of lis pendens.

As the Court is aware, a notice of lis pendens filed in accordance with Texas Property Code § 12.007 gives notice to third parties of a legal action involving title to real property and prevents a purchaser of or lender on that real property from acquiring it free and clear of the alleged encumbrance. *See* TEX. PROP. CODE § 13.004(b). However, since 2009, Texas Property Code § 12.0071 has provided for the expungement of a notice of lis pendens upon a finding by the trial court that “the pleading on which the notice is based does not contain a real property claim [or] the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim.” *Id.* at § 12.0071(c)(1)-(2). After a certified copy of the order expunging the notice of lis pendens is recorded in the real property records:

[T]he notice of lis pendens and any information derived from the notice: (1) does not: (A) constitute constructive or actual notice of any matter contained in the notice or of any matter relating to the proceeding; (B) create any duty of inquiry in a person with respect to the property described in the notice; or (C) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value; and (2) is not enforceable against a purchaser or lender described by Subdivision (1)(C), regardless of whether the purchaser or lender knew of the lis pendens action.

Id. at § 12.0071(f) (emphasis added).

Petitioner narrowly interprets this statute and argues that only actual or constructive notice arising solely from the notice of lis pendens or from information directly derived from reading that notice is eliminated as a result of an expungement. Thus, any subsequent purchaser who learned of the claims regarding the property through direct knowledge of the underlying proceeding, as opposed to merely knowledge of the lis pendens, would not be entitled to bona fide purchaser status under § 13.004(b).

This interpretation is wholly incompatible with the need for uniform standards regarding the status of title because it requires an individual and fact-intensive analysis of whether a purchaser learned of the lawsuit, and if so, how. As explained by the Court of Appeals, “[u]nder this interpretation, whether an expungement can remove the cloud of a lis pendens does not turn on whether the party encumbering the real property can demonstrate a probable right of recovery on an underlying real-property claim, but instead on details about exactly how the purchaser seeking to rely on an expungement learns of the underlying claim.” 469 S.W.3d 173, 184. Consequently, a title insurer could rely on the existence of an expungement order in the chain of title to determine whether a subsequent purchaser could take title to real property without regard to any existing litigation over the property. Title examiners would then be forced to engage in fact-intensive analyses of a purchaser or lender’s knowledge (or knowledge that could be imputed to a purchaser or lender) of pending litigation. Such a task is completely at odds with the certainty intended to be created through the Texas real property records and destroys the goal of providing purchasers with secure title.

Conversely, the majority of the Court of Appeals held that an order of expungement eliminates all notice, constructive or actual, of the real property litigation regarding the subject property for any subsequent purchaser or lender, regardless of how the purchaser or lender came about such knowledge. This interpretation is in furtherance of the legislative intent of the expungement statute, as well as the statute's plain language, which provides that a notice of lis pendens "is not enforceable against a [bona fide] purchaser or lender, ***regardless of whether the purchaser or lender knew of the lis pendens action.***" TEX. PROP. CODE § 12.0071(f)(2) (emphasis added). The decision recognizes the reality that an expungement order issues only after an evidentiary finding that the claimant failed to establish by even a preponderance of the evidence that its claim to the real property had "probable validity," and thus the lis pendens should not continue to burden the real property. *Id.* at § 12.0071(c)(2). Moreover, it creates a "bright-line rule" that allows title examiners and insurers to confidently rely on an expungement order in determining whether a subsequent purchaser or lender takes title free and clear of the pending litigation. *See* 469 S.W.3d at 185. In sum, the Court of Appeals' decision upholds those uniform standards regarding the review and interpretation of title to real property in the State of Texas.

For these reasons, the TLTA respectfully requests that the Court affirm the decision of First Court of Appeals in *Cohen v. Sandcastle Homes, Inc.*, 469 S.W.3d 173 (Tex. App.—Houston [1st Dist.] 2015).

The TLTA has paid the fees, if any, for the preparation of this filing.

Very truly yours,

Aaron Day
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of March 2017, a true and correct copy of the foregoing was electronically filed with the Supreme Court of Texas and served via electronic mail on the attorneys of record listed below pursuant to the Texas Rules of Appellate Procedure:

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