

# MASSACHUSETTS LAWYERS WEEKLY

## For the unwary, lis pendens presents another trap to avoid

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Historically, recording a memorandum of lis pendens at the Registry of Deeds was an effective way to encumber title real property when seeking to enforce a land use restriction, easement or claim of ownership.

G.L.c. 184, §15 authorizes recording of the memorandum in litigation “that affects the title to real property or the use and occupation thereof or the buildings thereon ... .” That includes actions to enforce land use restrictions, *Wolfe v. Gormally*, 440

Mass. 699, 707 (2004), but does not include zoning or other land use regulation cases. *Siegemund v. Building Commissioner of Boston*, 263 Mass. 212, 214-215 (1928).

The Latin phrase lis pendens literally means “pending suit.” A recorded memorandum of lis pendens is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” Black’s Law Dictionary (10th ed. 2014).

Lis pendens history was summarized this way in *Wolfe v. Gormally*, 440 Mass. 699, 702-703 (2004) (citations omitted):

“The purpose of the statute [G.L.c. 184, §15] is to remedy a harsh common-law lis pendens rule by ensuring that prospective buyers have the benefit of recorded notice of certain lawsuits. Under the common law, if the subject property was sold ‘lis pendens,’ i.e., while the suit was pending, a buyer without notice of the litigation was nonetheless ‘bound by the judgment.’ The statute, first enacted by St. 1877, c. 229, §§ 1, 3, ‘ameliorated the harsh effects of the common law rule’ by providing that buyers acquiring interest in property subject to suit were not bound by the judgment unless ‘a memorandum of lis pendens was filed in the registry of deeds before the acquisition.’ The statute thus allowed courts to retain control over the subject matter of the litigation while the action was pending, and protected prospective buyers by enabling them to obtain ‘notice of pending litigation affecting title’ through the registry of deeds, in the same way that they searched for record encumbrances.”

G.L.c. 184, §15 was rewritten by 2002 Mass. Acts, c. 496, §2. The first paragraph was amended to frustrate efforts to create notice of pending litigation without judicial approval, by stating that nothing except a judicially approved memorandum of lis pendens would be effective for that purpose. G.L. c. 184, § 15(a).

The 2002 amendment also authorized dissolution of a memorandum of lis pendens by recording a “notice of voluntary dissolution.” G.L.c. 184, §15(a). Previously, a memorandum of lis pendens could be dissolved only by obtaining (from the clerk of the court in which the litigation was pending) and recording a certificate attesting to “judgment, decree, discontinuance, dismissal, final disposal or non-entry” of the litigation. G.L.c. 184, §16.

For litigators, the most dangerous part of the 2002 amendment was its authorization of a special motion to dismiss, based on the Anti-SLAPP Act (G.L.c. 231, §59H) special motion to dismiss. G.L.c. 184, §15(c) reads as follows (italics and bold face numbers in brackets added to aid in parsing the statutory language):

**[1]** *A party may also file a special motion to dismiss the claimant’s action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous.*

**[2]** The special motion to dismiss, unless heard at the time the claimant first applied for a judicial endorsement under subsection (b), shall be heard at the same time as the hearing on the motion to dissolve the memorandum of lis pendens.

**[3]** If the court determines that the action does not affect the title to the real property or the use and occupation thereof or the buildings thereon, it shall dissolve the memorandum of lis pendens.

**[4]** *The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because*

(1) it is devoid of any reasonable factual support; or

(2) it is devoid of any arguable basis in law; or

(3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds.

**[5]** In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure.

**[6]** If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorneys fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery.

**[7]** Nothing in this section shall affect the right of the moving party to any other remedy otherwise authorized by law.

**[8]** All discovery proceedings shall be stayed upon the filing of the special motion pursuant to this section; but the court, on motion and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Like its anti-SLAPP Act counterpart, the lis pendens statute's special motion to dismiss affords a defendant the opportunity to file a dispositive motion immediately after the case is commenced, before the plaintiff can conduct any discovery.

While called a motion to dismiss, it is more like a motion for summary judgment. The lis pendens statute specifically authorizes supporting "verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure." Presumably the latter reference is to Mass. R. Civ. P. 56(e), which provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In addition to the three numbered grounds for a special motion to dismiss set forth in subsection (c) of the lis pendens statute, omission of material facts from the verified complaint constitutes grounds for dismissal.

A memorandum of lis pendens must be supported by "a verified complaint ... to include a certification by the claimant made under the penalties of perjury that the complainant has read the complaint, that the facts stated therein are true and that no material facts have been omitted therefrom." G.L.c. 184, §15(b).

A fact is material if it is crucial to the plaintiff's case. *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006) ("Only those facts that, if true, provide a basis for a reasonable jury to find for a party are material."). A later case, *Dennis v. Kaskel*, 79 Mass. App. Ct. 736, 740-741 (2011), defines the term in a summary judgment context as follows:

"[A] dispute about a material fact is 'genuine' when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party,' and a fact is 'material' when it 'might affect the outcome of the suit under the governing law.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)."

The definitions quoted above are consistent with the definition applied to a special motion to dismiss under G.L.c. 184, §15(c) in *McMann v. McGowan*, 71 Mass. App. Ct. 513, 520 (2008). ("A 'material fact' is one that is 'significant or essential to the issue or matter at hand.' Black's Law Dictionary 629 (8th ed. 2004). See *Dagan v. Jewish Community Hous. for the Elderly*, 45 Mass. App. Ct. 511, 513-514 (1998) (in summary judgment context, material fact is one essential to element in plaintiff's case).")

Judge Peter M. Lauriat wrote in *485 Lafayette Street Acquisition, LLC v. Glover Estates, LLC*, Suffolk Superior Court Civil Action No. 2010-2350-BLS1, 2012 WL 3205801 at \*2-\*3 (2012) (Lauriat, J.) that "[g]rounds for the dissolution of the lis pendens include, inter alia, the failure of the Verified Complaint to reveal all material facts as required by G.L. c. 184, § 15(b). *Galipault*. 65 Mass. App. Ct. at 83."

*Galipault v. Wash Rock Investments, LLC*, 65 Mass. App. Ct. 73, 82-83 (2005), held that in the context of a lis pendens (especially one obtained ex parte), withholding material facts satisfies the statutory frivolousness requirement for allowance of a special motion to dismiss. A later case, *McMann v. McGowan*, 71 Mass. App. Ct. 513, 519-520 (2008), states that "[a] party's failure to include all material facts may result in the dismissal of that party's claims where the omitted facts establish that those claims are devoid of reasonable factual support or arguable basis in law. See, e.g., *id.* [citing *Galipault*, 65 Mass. App. Ct.] at 82-83."

*Galipault* affirmed the trial court order dissolving the memorandum of lis pendens awarding attorneys' fees, and awarded appellate attorneys' fees (65 Mass. App. Ct. at 86-87), noting that G.L.c. 184, §15(c) mandates an attorneys' fee award upon allowance of a special motion to dismiss. 65 Mass. App. Ct. at 85-86.

In conclusion, we recommend *not* recording a memorandum of lis pendens when it is practical to give all interested parties actual notice of litigation (e.g., by sending them copies of the filed court complaint). G.L.c. 184, §15(a) states that parties to the litigation, plus "their heirs and devisees and persons having actual non-record notice thereof" are subject to its outcome.

When property is listed for sale with a broker, one can send the agent a copy of the filed complaint with a succinct demand that it be provided to all prospective buyers pursuant to the agent's obligation under 940 C.M.R. 3.16(2), which states "[a]n act or practice is a violation of G.L. c. 93A, § 2 if: ... Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction."

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