AVOIDING MALPRACTICE

LIS PENDENS

By Harold I. Levine

A lawyer representing a client in a chancery action involving an interest in real property has a difficult problem.

If a *lis pendens* is not filed with the filing of the complaint or counterclaim, the property may be sold to a third party for value because the required statutory notice of the suit has not been filed.

If a *lis pendens* is filed, the client may be sued for slander of title.

As a further complication, all lawyers are subject to new Rule 2-611 (*Ill.Rev. Stat.*, c. 110, ¶2-611) which is described in Robert Clifford's article in the Chicago Daily Law Bulletin as follows:

> An attorney, as well as the client, is subject to being directly sanctioned under the Act. In every case where a client is represented by counsel, each pleading must be signed by an attorney in his individual capacity, who may himself be subject to individual liability if the pleading is found to be offensive. Nor is the attorney able to escape involvement by having his clients sign their own pleadings; if a client is represented, then an attorney must sign. A pleading not so signed is subject to being stricken. No less radical a change is that the sanctions are not limited to intentional factual misstatements, but also unwarranted statements of law. Additionally, it is violative to interpose the pleading for an improper purpose, such as delay.

So how does the lawyer proceed considering these three problems?

First and foremost, the lawyer must realize that filing a lawsuit which clouds title or which interferes with the transferability of real estate is serious business. The lawyer must do his homework and be fully prepared on the facts and the law to properly assert a claim. This is especially true in light of Rule 2-611. However, if the lawyer has satisfied himself and files a suit affecting real property, a *lis pendens* must be filed. *Ill.Rev. Stat.*, c. 110 ¶2-1701 provides:

> *Lis Pendens* — Operative date of notice: Every condemnation proceeding, proceeding to sell real estate of decedent to pay debts, or other action seeking equitable relief, affecting or involving real property shall, from the time of the filing in the office of the recorder of deeds in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it is brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given the defendant or defendants, either by service of summons or publication as required by law, then such notice shall cease to be such constructive notice until service of summons or publication as required by law is had.

If the notice is not filed, the plaintiff's claim may be defeated or diminished by subsequent interests in the property, which interests should have been cut off by the *lis pendens* notice, and the lawyer may well be subject to malpractice claims.

What about the risk of slander of title by the defendant-property owner? While the risk is always present, the case law seems to give comfort to the plaintiff who has filed the *lis pendens* with his lawsuit. The case of *Newkirk v. Bigard*, 125 Ill.App.3d 454, 80 Ill.Dec. 791, 466 N.E.2d 243 (1984), is helpful to plaintiffs. There, a counterclaim was filed for slander of title on the grounds that the original plaintiff had filed a complaint asserting a claim to certain oil and gas interests in land. The publication relied upon to render the alleged slander actionable consisted of the filing of the complaint in court, and the accompanying notice by publication of the lawsuit. The court borrowed from the general precepts embodied in the absolute privilege accorded to statements made in connection with legal proceeding to find that a slander of title action would not lie:

> *To allow a complaint for slander of title to rest upon the institution of judicial proceedings and the publication of notice required by those proceedings would place too great a price on resorting to the courts to settle disputed titles.* Accordingly, Count I of the counterclaim was properly dismissed with prejudice. *Supra*, 466 N.E.2d at 249 (emphasis added).

The earlier case of *Nolin v. Nolin*, 68 Ill.App.2d 54, 215 N.E.2d 21 (1966), relied upon in *Newkirk v. Bigard*, further supports the proposition that slander of title cannot be sustained when the publication called upon to support such an action is a privileged utterance made in a judicial proceeding. *Supra*, 215 N.E.2d at 24.

An additional and significant basis precludes maintenance of a slander of title suit. In Illinois, public policy dictates that the only two actions for the wrongful filing of a lawsuit are malicious prosecution and abuse of process. *Lyddon v. Shaw*, 56 Ill.App. 3d 815, 14 Ill.Dec. 489, 372 N.E.2d 685 (1978); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, (7th Cir. 1983). In *Havoco of America, Ltd. v. Hollobow, supra*, the court rejected an attempt by a litigant to circumvent this rule by alleging a cause of action for tortious interference with a lawsuit. In strictly following the precepts enunciated in *Lyddon v. Shaw*, the court in *Havoco of America, Ltd. v. Hollobow* held that:

> It is obvious that Havoco cannot allege the elements of a cause of action for malicious prosecution or abuse of process and Illinois law prohibits it from basing a cause of action for tortious interference with business opportunity on the wrongful filing of a lawsuit.

One of the most overlooked defenses to a *lis pendens* is the last paragraph of *Ill.Rev.Stat.*, c. 110 ¶2-1701, which provides as follows:

> At any time during the pendency of a suit or proceeding initiated after July 1, 1959 which shall be constructive notice as aforesaid, the court, upon motion, may for good cause shown, provided a finding of specific performance is not necessary for final judgment in the suit or proceeding, and upon such terms and conditions, including the posting of suitable bond, if any, as it may deem equitable, authorize the making of a deed, mortgage, lease or other conveyance of any or all of the real estate affected or involved, in which event the party to whom the deed, mortgage, lease or other conveyance of the real estate is made and those claiming under him shall not be bound by such suit or proceeding. Appeal shall lie from any order which either authorizes or denies the making of a deed, mortgage, lease or other conveyance of real estate.

The resourceful lawyer will try to get out of the *lis pendens* in this fashion.

EXCESSIVE DEFAULT JUDGMENT DECLARED VOID

The Illinois Appellate Court recently overturned a judgment award to grantees who sued grantor for breach of covenants in a warranty deed because the damages awarded were in excess of the relief requested. Defendant-grantor conveyed some real estate to plaintiff-grantees by warranty deed. Part of the land covered by the warranty deed was claimed by a third party under the doctrine of adverse possession. Plaintiffs filed a two-count complaint. Count one prayed to quiet title against the third party; count two sought damages from the defendant for breach of covenants contained in the warranty deed. In count two, the plaintiffs prayed for judgment in the amount of $1,440 plus costs and other general relief.

The trial court entered summary judgment against plaintiffs on count one. Plaintiffs moved for summary judgment on count two. Defendant answered the complaint and filed affidavits and a memorandum in opposition to summary judgment. The trial court granted summary judgment in favor of plaintiffs on count two. Trial was ordered on the issue of damages alone, and a damages hearing was set. Defendant objected to the date of the hearing; the court denied defendant's objections. Neither the defendant nor his attorney was present at the damages hearing. The court heard plaintiffs' evidence on damages and entered judgment for plaintiffs in the amount of $6,415.88, including $2,626.59 as attorney's fees and $193.90 as costs.

Defendant appealed, claiming the trial court erred in granting plaintiffs damages in excess of the *ad damnum* clause in plaintiff's complaint, citing ¶2-604 of the Civil Practice Law. *Ill. Rev.Stat.*, c. 110, ¶2-604. Defendant argued that he was in default because he was not present at the damages hearing and that therefore, the award to plaintiffs violated ¶2-604. Plaintiffs answered that defendant was not technically in default, that the prayer for general relief complied with ¶2-604, and that the award granted was not excessive.

The appellate court held that the trial court erred in granting damages in excess of plaintiffs' *ad damnum* clause. The court stated that specific prayers for relief are required in order to allow defendant to meet the demand or permit a default judgment to be taken against him, stating that a general prayer for relief does not adequately inform the defendant that such additional relief has been sought so as to protect the defendant from surprise. Protecting defendant from surprise is the underlying rationale of ¶2-604, which limits relief in case of default to the amount specifically prayed for, absent notice.

Addressing plaintiffs' argument that the defendant was not in default, the court stated that "default" can refer to a failure to appear or plead and it can also refer to situations like the present one where the defendant has appeared and defended the action but failed to appear at trial. The court held that ¶2-604 applies to this situation and that the notice requirements of ¶2-604 were not satisfied here. Therefore plaintiffs' award in excess of the *ad damnum* clause is void and subject to attack in a motion to set aside the judgment.

The court also held, over defendant's objections, that attorney's fees are properly recoverable in this suit despite the absence of a statute or contract providing for such recovery. The court noted a long-standing exception to the prohibition against recovering attorney's fees absent a statute or contract where, as here, a land grantor breaches the duty owed to a grantee under a warranty deed. Where such a breach has occurred, the grantor is liable for attorney's fees and costs that his grantee reasonable incurs in maintaining an unsuccessful defense against the outstanding interest holder. The appellate court held that plaintiffs are entitled to recover attorney's fees incurred in defending title against the third party claimant.

Rauscher v. Albert, 145 IllApp.3d 40, 99 Ill.Dec. 84, 495 N.E.2d 149 (1986).

BILL ANAYA JOINS ATG AS STAFF ATTORNEY

William J. Anaya has recently joined the staff of Attorneys' Title Guaranty Fund, Inc. as Staff Attorney in the Champaign Office. Bill will share the responsibiilty of handling underwriting questions and claims with Jerry Gorman and Mike Brandt, Champaign Corporate Counsels. Bill will also be actively involved in downstate promotion.

A graduate of the Indiana University School of Law in Bloomington, Indiana, Bill received his degree in 1981. He did his undergraduate work at Purdue University where he graduated with honors in 1978.

Although originally from Pueblo, Colorado, Bill grew up in Champaign and has practiced in Danville since 1981, most recently with the firm of Anaya & Zeleznikar. Bill was a Fund member prior to joining the staff and also acted as Examining Attorney for Chicago Title Insurance Company. Bill comes to The Fund with a great deal of legal and practical experience in the issuance of title insurance.

Bill is a member of several bar associations including the American Bar Association, the Illinois and Indiana State Bar Associations, the Vermillion County Bar, and the American Trial Lawyers Association.

Bill and his wife of 15 years, Ann, reside in Danville with their children Andy, 9; Matt, 4; and Emily, 6 weeks.