

2019 WL 1052407

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District Court of Appeal of Florida, Fourth District.

DELTA AGGREGATE, LLC, a Florida
Limited Liability Company, and Michael
Desimone, a Florida Resident, Petitioners,
v.
HERMES HIALEAH WAREHOUSE, LLC, a
Florida Limited Liability Company, Respondent.

No. 4D18-2252

|
March 6, 2019

Petition for writ of certiorari to the Seventeenth Judicial
Circuit, Broward County; Michael L. Gates, Judge; L.T.
Case No. CACE 17-013283 (12).

Attorneys and Law Firms

Robert A. Sweetapple and Cynthia J. Miller of
Sweetapple, Broeker & Varkas, P.L., Boca Raton, for
petitioners.

Paul DeCailly of DeCailly Law Group, P.A., Indian
Rocks Beach, for respondent.

Opinion

Per Curiam.

*1 Petitioners, Delta Aggregate, LLC (Delta) and
Michael DeSimone (DeSimone), seek certiorari review
of an order that denied their emergency motion to
discharge a lis pendens. We have jurisdiction and grant the
petition.¹

¹ This court exercises certiorari review over such
orders. See *Kennedy Real Estate Found. v. Goldberg*,
436 So.2d 1056 (Fla. 4th DCA 1983); *Cooper Vill.,
Inc. v. Moretti*, 383 So.2d 705 (Fla. 4th DCA 1980);
see also *Archer v. Archer*, 692 So.2d 1009 (Fla. 4th
DCA 1997). The third district exercises non-final

review but has recognized that certiorari review is
more appropriate. See *Villamizar v. Luna Capital
Partners, LLC*, 260 So.3d 355 (Fla. 3d DCA 2018);
see also *Rodriguez v. Guerra*, 254 So.3d 521, 521 n.1
(Fla. 3d DCA 2018) (recognizing that prior decisions
indicated that certiorari was appropriate to review
such orders); *Bankers Lending Servs., Inc. v. Regents
Park Inv., LLC*, 225 So.3d 884, 885 (Fla. 3d DCA
2017) (noting that prior non-final review was based
on Rule 9.130(a)(3)(B), associated with injunctions).
This court in *Archer* agreed with the third district
that non-final review would be the preferred method
of review but noted that Florida Rule of Appellate
Procedure 9.130 did not authorize it and urged the
appellate rules committee to consider the issue. 692
So.2d at 1009 n.1. The first district may decline
review. *Landmark at Crescent Ridge LP v. Everest
Fin., Inc.*, 219 So.3d 218, 220 (Fla. 1st DCA 2017)
(dismissing petition and holding that monetary harm
that may result from a lis pendens, such as loss
of value or ability to sell to a particular buyer, is
insufficient to allow for certiorari review).

While a claim for an equitable lien can support a lis
pendens, it must be founded either upon a duly recorded
instrument or a fair nexus between the apparent legal
or equitable ownership of the property and the dispute
embodied in the lawsuit. See *Chiusolo v. Kennedy*, 614
So.2d 491, 492 (Fla. 1993); *Lakeview Townhomes at
the Calif. Club, Inc. v. Lakeview of the Calif. Club
Homeowners Ass'n, Inc.*, 579 So.2d 290 (Fla. 3d DCA
1991). Respondent Hermes Hialeah Warehouse, LLC
(Hermes) has not demonstrated either basis to support the
lis pendens.

Delta operates a mining operation on real property that
it owns. Delta's interests were originally held equally
between DeSimone and Raelaur Realty LLC (Raelaur).
DeSimone sought to purchase Raelaur's fifty percent
interest in Delta. To facilitate the transaction, DeSimone
executed a promissory note for the full purchase price
in Raelaur's favor. As collateral to secure the note,
DeSimone also executed a security agreement for 100% of
his membership interest in Delta.

Raelaur received partial payment on the note and then
declared DeSimone in default. The parties thereafter
entered into a loan modification in which Delta was joined
as a party. Under the terms of the loan modification, Delta
was to pay Raelaur monthly, specified amounts of the
revenue realized from the sale of sand and stone excavated
from the property. Raelaur alleges that it was never paid

any money nor provided an accounting from Delta under the modification agreement.

*2 Raelaur later assigned its interest under the loan documents and modification agreement to Hermes. Hermes sued Delta and DeSimone for breach of contract and fraud. It filed a lis pendens which the trial court discharged.

Hermes amended the complaint to add a third count to impose an equitable or constructive lien on the real property, and filed the second lis pendens under review. Hermes alleged that Delta and DeSimone failed to make the payments due from its sales revenue. Therefore, it sought an equitable or constructive lien on the real property and the materials embedded therein.

In order to maintain a lis pendens not based on a duly recorded instrument or lien, the proponent must show a “fair nexus” between the property that is the subject of the lis pendens and the dispute embodied in the lawsuit. *Chiusolo*, 614 So.2d at 492. The amended complaint with its claim for equitable or constructive lien does not show the requisite “fair nexus.” Rather, it is based solely on Delta’s failure to pay those sums claimed to be due from the sale of the excavated materials as provided by the terms of the loan modification agreement. See *Roger*

Homes Corp. v. Persant Constr. Co., 637 So.2d 5, 6-7 (Fla. 3d DCA 1994). Delta did not grant Hermes, as Raelaur’s successor, an interest in or a lien against the property. *Hansen v. Five Points Guar. Bank*, 362 So.2d 962, 964 (Fla. 1st DCA 1978) (“An equitable lien results ... only when the intention to offer the land as security for the debt is clearly apparent.”) (citation and internal quotation marks omitted). Furthermore, Hermes can obtain complete relief without reference to the property. *Blue Star Palms, LLC v. LED Tr., LLC*, 128 So.3d 36, 39 (Fla. 3d DCA 2012) (holding that lis pendens could not be maintained where the plaintiff can be afforded complete relief without reference or connection to the property’s title).

Based on the foregoing, we grant the petition and quash the order that denied the motion to discharge the lis pendens.

Petition for writ of certiorari granted and order quashed.

Gerber, C.J., Gross and Forst, JJ., concur.

All Citations

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