

What Calif. Eviction Ruling Means For Defaulting Borrowers

By **Anne Beehler and Krystal Anderson** (April 30, 2024)

Can a defaulting borrower delay a lender or winning bidder at foreclosure from repossessing the property merely by filing a lis pendens, i.e., a notice of pendency of action?

On Oct. 12, 2023, the Court of Appeal of the State of California, Sixth Appellate District, initially answered yes, reversing a post-foreclosure unlawful detainer judgment in favor of the lender based solely on the borrower's filing of a lis pendens before the foreclosure sale.

On April 2, the Sixth Appellate District reconsidered and reversed that decision, on the grounds that the respective lis pendens was void as it was not properly served and thus could not cloud title.

However, in doing so, the Sixth Appellate District left open the question "whether a valid lis pendens would have prevented [the lender's] perfection of title under the sale within the meaning of [the unlawful detainer statute]."

In *Homeward Opportunities Fund I Trust 2019-2 v. Ilias Louie Taptelis*, the borrower, Taptelis, obtained a \$1.24 million loan to purchase a residential property. To secure the loan, he executed a deed of trust.

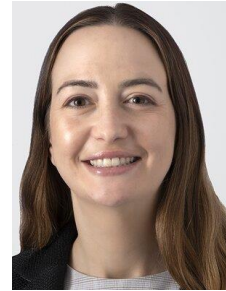
Taptelis defaulted in 2019, and as a result, the then-lender, Homeward Opportunities, initiated a nonjudicial foreclosure proceeding. Shortly thereafter, Taptelis filed his own lawsuit, including a claim of wrongful foreclosure. Just two days prior to the foreclosure sale, Taptelis recorded — but did not properly serve on Homeward — a lis pendens on the property. Nevertheless, the foreclosure sale proceeded. Homeward was the winning bidder.

Subsequently, Homeward attempted to secure possession of the property it purchased in the foreclosure sale by commencing an eviction proceeding. Homeward contended it had a right to commence an eviction proceeding because it perfected its title through the foreclosure sale.

In response, Taptelis attempted to prevent the eviction based on its lis pendens — filing an application in the trial court to consolidate the summary eviction proceeding with his wrongful foreclosure case. The trial court refused to slow the eviction based on the filing of the lis pendens and wrongful foreclosure action.

Ultimately, the trial court, the Santa Clara County Superior Court, found in Homeward's favor, finding that Homeward perfected title through nonjudicial foreclosure, and that issues concerning Taptelis' loan modification application, pending lawsuit and lis pendens were beyond the scope of or irrelevant to the unlawful detainer. Taptelis appealed.

The Oct. 12, 2023, opinion of the appellate court favored Taptelis, but more importantly, the court's opinion had potentially significant consequences for all lenders or foreclosure bidders attempting to repossess a property following a nonjudicial foreclosure.



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The crux of the appeal centered on whether the lender was required to take additional steps beyond recording the trustee's deed to duly perfect its title under the sale. The borrower argued that the lender needed to address the lis pendens the borrower filed, or resolve the wrongful foreclosure litigation, to perfect title and evict the borrower.

While the trial court rejected this argument, deeming evidence of the lis pendens irrelevant and excluding it, the Sixth Appellate District found this ruling an abuse of discretion.

Citing the precedent set by *Dr. Leevil LLC v. Westlake Health Care Center* in the California Supreme Court in 2018, the court held that the lender's failure to expunge the lis pendens or resolve the underlying litigation before serving the notice to quit rendered the eviction notice premature and void, emphasizing that an unresolved cloud on title, such as a lis pendens, must be cleared before initiating an unlawful detainer action.

Accordingly, it reversed and remanded the trial court's decision.

The initial decision of the Sixth Appellate District in *Homeward* raised concerns about unintended consequences, including that it could potentially encourage borrowers to file a lis pendens — whether in good faith or not — merely to delay repossession of the property and post-foreclosure eviction proceedings.

Taken to its extreme, it could mean that a borrower could tie up a property for years while the parties litigate the underlying issues leading to the filing of a lis pendens, thereby wholly undermining California's expeditious nonjudicial foreclosure and eviction proceedings.

Thus, even if the default on the loan is clear, if the borrower is able to concoct any basis to file an action and lis pendens, the borrower can stay in the property without seeking to enjoin a foreclosure sale.

Perhaps for these reasons, the Sixth Appellate District granted the lender, *Homeward's*, petition for rehearing, requesting that the parties submit simultaneous letter briefs addressing whether the lis pendens should delay the lender from recapturing the property post-foreclosure.

The court further allowed third-party defendants in similar litigation to file amicus curiae briefs in support of *Taptelis'* position, e.g. those in *Marie Jeremiah v. Wells Fargo Bank NA* et al. in the Court of Appeal of the State of California, Fourth Appellate District, Second Division. The Sixth Appellate District's final decision was entered on April 2.

In its final decision, the Sixth Appellate District revisited and essentially reversed its Oct. 12, 2023, decision. The court found that the trial court's decision not to consider *Taptelis'* lis pendens was harmless, as the lis pendens was void for lack of a proof of service.

Thus, the lis pendens did not cloud *Homeward's* title under the sale, and *Homeward's* recordation of the trustee's deed duly perfected title under the sale. While this is an improved decision for lenders and bidders, the Sixth Appellate District left open the question of whether a valid lis pendens may cloud title under these circumstances — a question that may soon be addressed in the litigation of those who filed amicus curiae briefs here.

Considerations for Lenders and Bidders at a Foreclosure Sale

Given the Sixth Appellate District's resistance to finding a valid lis pendens does not cloud title, the *Homeward* decisions could have the effect of causing a wave of borrowers to delay

post-foreclosure eviction proceedings by merely filing a lawsuit and properly serving a lis pendens to delay the perfection of title by the bidder at the sale.

Such a maneuver may then put the onus on the lender or the bidder to seek to remove, or expunge, the lis pendens or to resolve the lawsuit causing the lis pendens early. Even if successful, a motion to expunge is still likely to delay repossession of the property for several months while the issue of the validity of the lis pendens works its way through the trial court.

In short, the Homeward decisions identify a potential tool for borrowers to delay relief to the lender and the bidder at a foreclosure. However, borrowers should exercise caution before filing a lis pendens merely to stay in the property.

If a borrower loses a motion to expunge the lis pendens, it will often result in the borrower paying the fees of the lender or bidder seeking expungement. Furthermore, the consequences of filing a bad faith lis pendens could include subsequent claims of abuse of process against the borrower.

For lenders and foreclosure bidders, extra vigilance must be exercised with respect to litigious borrowers who may use the lis pendens rules to delay post-default relief.

A lender faced with a similar claim may seek to be proactive before foreclosing to weed out meritless lis pendens filings as quickly as possible either through a declaratory judgment action or an expungement motion. They should certainly ensure the lis pendens is procedurally sound and valid, as Homeward indicates that a void lis pendens cannot cloud title.

In any case, all lenders, bidders and borrowers should stay up to date on the similar ongoing cases and any progressions. In the similarly situated cases, the lis pendens at issue include a proof of service and appeal to be valid — thus, a firm decision on this outstanding question is soon anticipated.

Further, while the Homeward case concerns a residential loan, its reasoning may be equally applicable to the commercial context. In the commercial context, further complications arise — such as the triggering of a nonrecourse carveout resulting from the filing of an unmeritorious lis pendens designed solely to delay.

If the courts decide to stand by the analysis in Homeward's Oct. 12, 2023, decision where there is a valid lis pendens, Homeward's consequences could be long-lasting, spurring a body of law that commercial and residential lenders must navigate in order to exercise remedies upon a loan default.

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