

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-002277

American Star Development SC, LLC; KKMC Investments, LLC; and
211, LLC Plaintiffs,

v.

PulteGroup, Inc.; Pulte Home Corporation, n/k/a Pulte Home Company, LLC;
and JW Homes, LLC Defendants,

Of which American Star Development SC, LLC is the Appellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN RULING THAT A DECLARATORY JUDGMENT ACTION TO ESTABLISH A SELLER'S INTEREST IN FUTURE CONDMENATION PROCEEDS DOES NOT AFFECT THE TITLE TO REAL PROPERTY UNDER S.C. CODE ANN. § 15-11-10?

- II. DID THE CIRCUIT COURT ERR IN RULING THAT A BREACH OF CONTRACT ACTION SEEKING SPECIFIC PERFORMANCE OF A CONTRACTUAL OBLIGATION TO CONSTRUCT AN ACCESS ROAD OVER DEFENDANT'S PROPERTY DOES NOT AFFECT THE TITLE TO REAL PROPERTY UNDER S.C. CODE ANN § 15-11-10?

STATEMENT OF THE CASE

Appellant American Star Development SC, LLC (“American Star”)¹ filed causes of action against the subsequent purchasers of property it once owned seeking (1) specific performance of a contractual obligation to construct an access road to American Star’s adjacent property and (2) a declaration of American Star’s interest in expected proceeds from a future condemnation of a portion of the property by the Town of Mount Pleasant.

To protect its interest and rights, American Star filed a lis pendens on the property it sold, placing all prospective buyers on notice of the pending litigation and American Star’s asserted rights and interests. (R. pp. 009-013.) The lis pendens was filed on April 6, 2018, and the complaint was filed within twenty days, on April 26, 2018. (R. pp. 009-013; R. pp. 014-051.) American Star filed an amended complaint on May 1, 2018, adding two of American Star’s affiliated entities as plaintiffs. (R. pp. 052-089.)

On June 22, 2018, the current owner of the property, Defendant Pulte Home Corporation, n/k/a Pulte Home Company, filed a motion to cancel the lis pendens. (R. pp. 106-108.) Thereafter, a final plat subdividing the property into residential lots was approved by the Town of Mount Pleasant. (R. p. 129.) On August 28, 2018, Plaintiffs filed an amended lis pendens covering the lots in the project area and subject to possible condemnation and the lots over which the access road could be built. (R. pp. 120-122.) As a result, Defendant Pulte Home Corporation filed an amended motion to cancel the amended lis pendens on September 17, 2018. (R. pp. 123-125.)

¹ As set forth in the amended complaint and motion to substitute parties, American Star’s affiliated entities were assigned interests and rights under the underlying purchase agreement. (R. p. 055; R. pp. 174-185.) In addition, American Star’s affiliated entity owns adjacent property. (*Id.*) Those affiliated entities have assigned their rights and interests in the litigation and underlying agreement to American Star SPE-2, LLC, and Plaintiffs have moved to substitute American Star SPE-2, LLC as the sole plaintiff in this case. (*Id.*) For the sake of clarity, “American Star” is used to refer collectively to all entities and their assigns.

The motion to cancel the lis pendens was heard before the Honorable Judge R. Lawton McIntosh on September 21, 2018. (R. pp. 193-217.) On October 1, 2018, Judge McIntosh issued a Form 4 order granting the motion to cancel the lis pendens and directing Defendants' counsel to prepare a formal order consistent with briefing and oral arguments. (R. pp. 001-002.) The formal order prepared by Defendants' counsel was issued by Judge McIntosh on November 16, 2018, and written notice of its issuance was received on November 20, 2018. (R. pp. 003-008.)

Judge McIntosh ruled that American Star's action did not meet the statutory requirements of S.C. Code Ann. § 15-11-10. (*Id.*) According to the order, the action for specific performance to construct the access road did not affect the title to real property because it did not seek to establish an easement, enforce an encumbrance, or establish an equitable interest in real property. (R. pp. 006-007.) The order further stated that the action for declaratory judgment of American Star's interest in future condemnation proceeds did not affect the title to real property because it asserted an interest in personal property and not real property. (R. pp. 007.)

American Star appealed the order canceling the lis pendens by serving a notice of appeal on December 20, 2018. (R. pp. 161-170.) While the appeal was pending, Plaintiffs assigned their interests and rights in the litigation and underlying contract to an affiliated entity, American Star SPE-2, LLC. (R. pp. 187-190.) On March 5, 2019, Plaintiffs filed a motion to substitute parties and amend the amended complaint, whereby American Star SPE-2, LLC would become the sole plaintiff. (R. pp. 171-190.) That motion remains pending.

STATEMENT OF FACTS

In February 2015, American Star and JW Homes, LLC, through an affiliate,² entered into an agreement for American Star to sell JW Homes property located off of 6 Mile Road in the Town of Mount Pleasant, South Carolina (the “Primus Property”). (R. p. 054.) American Star, through a wholly-owned affiliate company, also owns property adjacent to the Primus Property. (R. p. 054; R. pp. 174-185.)

The Primus Property is located within the Billy Swails Boulevard Phase 4B Project Area as designated by the Town of Mount Pleasant. (R. p. 127; R. pp. 158-160.) The Town has designated this area for future road expansion to complete what was originally named the Hungryneck Boulevard corridor. The current schedule for the project anticipates the final design to be completed in 2019 and for construction to begin in 2020. (*Id.*)

Section 13(a) of the Primus Property purchase agreement provides that if a portion of the property is condemned to complete the Hungryneck Boulevard extension, the condemnation proceeds will be shared equally between the buyer and American Star. (R. p. 071.) That section also provides that American Star’s interest in the condemnation proceeds shall be memorialized in an instrument to be recorded at closing.³ (*Id.*) Specifically, Section 13(a) of the agreement provides:

The parties are aware of the potential that a portion of the Property may be taken by eminent domain for the extension of Hungryneck Boulevard. If any portion of the Property is taken for this purpose by eminent domain or by an agreed-upon sale in lieu of eminent domain proceedings, whether before or after the Closing, the parties agree that

² The original agreement was entered into between American Star and JWH Acquisitions, LLC, which is an affiliate of JW Homes, LLC. (R. p. 054; R. pp. 062-084.) Before the closing, JWH Acquisitions assigned its rights, obligations, and interest under the agreement to JW Homes, LLC, and the Primus Property was subsequently conveyed to JW Homes in July, 2015. (R. p. 055.)

³ For reasons that are still the subject of discovery and dispute in the litigation, American Star’s interest in the condemnation proceeds was not memorialized or recorded at the closing.

any proceeds paid by the governmental authority to Buyer or Seller will be distributed first to Buyer or Seller, as the case may be depending on which party then owns the portion being taken, in an amount equal to the costs and expenses (including attorney's fees) incurred by such party in connection with the taking or agreed-upon sale. Any amounts remaining after paying such costs and expenses will be divided evenly between Buyer and Seller. The parties shall memorialize Seller's interest in the condemnation proceeds by means of a recordable instrument, the form of which is to be agreed upon during the Buyer's Inspection Period, and such instrument shall be signed by the parties and recorded at the Closing.

(*Id.*)

The purchase agreement additionally provides the buyer a right of first offer to negotiate to purchase certain parcels later purchased by American Star, including parcels adjacent to the Primus Property. (R. p. 076.) In consideration of the right of first offer, the buyer agrees to design and construct an access road through the Primus Property to provide vehicular and pedestrian access to connect the Primus Property to American Star's adjacent property:

In consideration for the granting of this Right of First Offer, and regardless of whether Buyer and Seller execute a contract for the purchase and sale of the ROFO Parcels, Buyer agrees the access road ("Access Road") through the Property (not including the ROFO Parcels) to be constructed by Buyer on the Property shall be designed and constructed under standards applicable to public roads to provide vehicular and pedestrian access to connect the Property to the ROFO Parcel 578-00-00-005 (the "Connection"). Buyer agrees this Connection will be depicted on Buyer's Sketch Plan for the Property (as distinguished from any Sketch Plan applicable to the ROFO Parcels) that is ultimately approved by the Town and shall be designed and constructed as a continuation of the Access Road serving the Property to the point it touches the common boundary line between the Property and ROFO Parcel 578-00-00-005. Buyer's obligation to design and construct the Connection survives the Closing.

(R. pp. 076-077.)

The Primus Property purchase agreement includes a section binding each party's successors and assigns to the agreement. (R. pp. 075.) Specifically, Section 23 provides, "All covenants, agreements, warranties, and provisions of the Agreement shall be binding upon and

inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal representatives, **successors and assigns.**” (*Id.*) (emphasis added).

Later in 2015, Defendant PulteGroup, Inc. entered into an asset purchase agreement (the “APA”), whereby PulteGroup would acquire substantially all assets of JW Homes, including the Primus Property. (R. p. 055.) Pursuant to the APA, PulteGroup agreed to assume and discharge certain liabilities and obligations of JW Homes, including the obligations to design and construct the access road and to share condemnation proceeds. (*Id.*)

In January 2016, PulteGroup acquired substantially all of JW Homes’s assets pursuant to the APA. (*Id.*) On that same day, JW Homes conveyed the Primus Property to Pulte Home Corporation, which is an affiliate or subsidiary of PulteGroup.⁴ (*Id.*)

Under the APA and the related transactions conveying the Primus Property to Pulte, Pulte expressly agreed to assume responsibility for the obligations under the Primus Property purchase agreement, including the obligations to design and construct the access road and share condemnation proceeds. (R. p. 056.) In addition, American Star alleges that Pulte assumed JW Homes’s obligations under the Primus Property purchase agreement because the circumstances surrounding Pulte’s acquisition warrant a finding of a consolidation or merger. (*Id.*) American Star has made repeated demands for Pulte to design and construct the access road, but Pulte has refused American Star’s demands. (*Id.*)

As a result of the dispute regarding Pulte’s obligations to construct the access road and share condemnation proceeds, American Star filed a lis pendens on the Primus Property on April 6, 2018, providing notice of potential litigation regarding the Primus Property. (R. pp. 009-013.) American Star subsequently filed the complaint on April 26, 2018, seeking specific performance

⁴ Hereafter, PulteGroup and Pulte Home Corporation will be referred to collectively as Pulte.

for Pulte to construct the access road and a declaratory judgment establishing American Star's right to share proceeds from future condemnation of the Primus Property. (R. pp. 014-051.)

Following commencement of the action, Pulte obtained approval of the final plat for residential development of the Primus Property, resulting in a subdivision of residential lots. (R. p. 129.) Thereafter, Plaintiffs filed an amended lis pendens on the subdivided lots subject to possible condemnation and the lots which could serve as the site of the access road. (R. pp. 120-122.)

Pulte moved to cancel the lis pendens, and the circuit court issued an order canceling the lis pendens on November 16, 2018. (R. pp. 003-008.) According to the circuit court, the lis pendens did not meet the statutory requirements of S.C. Code Ann. § 15-11-10 because the actions asserted by American Star did not "affect[] the title to Pulte's real property." (R. p. 006)

STANDARD OF REVIEW

"[A] lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation." *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). However, if the court finds that the lis pendens does not "affect the title to real property" as required under S.C. Code Ann. § 15-11-10, the lis pendens is not authorized by the statute, and the statute does not limit the court's power to cancel it. *Id.*

In this case, the circuit court ruled as a matter of law that American Star's action did not meet the statutory requirements of S.C. Code Ann. § 15-11-10 to support a lis pendens. (R. pp. 006-007.) Because this appeal depends on the construction of a statute, it presents a question of law subject to de novo review. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011) ("The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 42 (2008) ("Determining the proper interpretation of a statute is a

question of law, and this Court reviews questions of law de novo.”); *see also Carolina Park Assocs.*, 400 S.C. at 6, 732 S.E.2d at 878 (applying de novo standard of review to whether circuit court erred in canceling a lis pendens).

ARGUMENT

I. Actions affecting title to real property include actions to establish rights and liabilities incidental to ownership of real property, to enforce encumbrances against real property, to establish easements over real property, and for specific performance relating to real property.

Under S.C. Code Ann. § 15-11-10, a lis pendens may be filed “[i]n an action affecting the title to real property.” The purpose of a lis pendens is to inform potential purchasers that a particular piece of real property is subject to pending litigation. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002). “A properly filed lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation.” *South Carolina Nat’l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562 (1987). Therefore, “an action ‘affecting the title to real property’ clearly allows the filing of a lis pendens by an interested party in order to protect their ownership interest in the property subject to the litigation.” *Pond Place Partners*, 351 S.C. at 17, 567 S.E.2d at 889.

In determining what actions “affect the title to real property,” South Carolina courts have not limited a lis pendens to only those actions in which title to or ownership of real property is directly claimed. Rather, the “doctrine of lis pendens applies to all suits or actions which directly affect real property, and not only those which involve the question of title, but also those which are brought to establish an equitable estate, interest, or right in specific real property or to enforce any lien, charge, or encumbrance against it...” *Finley v. Hughes*, 106 F. Supp. 355, 356 (D.S.C. 1952); *see also* 54 C.J.S. *Lis Pendens* § 10 (“[A] lis pendens generally applies not only to those actions which involve the question of title, or a possessory interest, but also to litigation that does

not seek to change the ownership of land in any way but does involve a determination of certain rights and liabilities incident to ownership.”). As such, the South Carolina Court of Appeals has recognized that actions affecting the title to real property include, among others, actions to establish the existence of an easement, for specific performance, to establish a constructive trust, to quiet title, and to reform deeds. *Pond Place Partners*, 351 S.C. at 17-18, 567 S.E.2d at 889.

II. The declaratory judgment action seeking to establish American Star’s right to condemnation proceeds affects title to real property because it seeks to establish a right incident to ownership of real property and to enforce an encumbrance against real property.

It is axiomatic that a right incident to the ownership of property includes the right to sell such property and to receive the proceeds. *See Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) (stating that “property consists not merely in its ownership and possession but an unrestricted right to use, enjoyment, and disposal”); *Huguenot Mills v. Jempson & Co.*, 68 S.C. 363, 365, 47 S.E. 687 (1904) (declaring that an incident of ownership is the power to sell); 73 C.J.S. *Property* § 48 (“The right to own and enjoy property includes the right to sell it . . . and the price.”). Thus, an action to establish rights and liabilities as to the disposition of real property and the resulting proceeds involves a determination of rights and liabilities incident to ownership and, therefore, affects title to real property.

Here, American Star’s action for declaratory judgment seeks a determination of its and Pulte’s rights incident to ownership of the Primus Property that run with the land. (R. pp. 057-058.) Specifically, American Star seeks a judicial declaration that if a portion of the Primus Property is later sold to the Town of Mount Pleasant through condemnation, then American Star is entitled to share in the condemnation proceeds. Because this determination involves the disposition of real property and the ownership of the proceeds from such disposition, it necessarily

involves incidents of ownership and affects the title to real property. Therefore, the lis pendens on the lots within the project area is proper under S.C. Code Ann. § 15-11-10.

Also, American Star's declaratory judgment action seeks determination of restrictions and liabilities regarding the disposition of the Primus Property through condemnation as to Pulte and subsequent purchasers of the subdivided lots. It seeks not only a declaration of American Star's positive rights as to the Primus Property but also a restriction on Pulte's and its successors' right to enjoy the proceeds from the disposition of the Primus Property through condemnation. Thus, American Star's declaratory judgment action seeks a determination that it has an encumbrance on the Primus Property.

“An encumbrance is a right or interest in the land granted ‘which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.’” *Truck South, Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428-429 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)). In other words, an encumbrance is “[a] claim or liability that is attached to property or some other right that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest.” *Id.* (quoting *Black's Law Dictionary* 547 (7th ed. 1999)).

Here, American Star's asserted right in the condemnation proceeds is an encumbrance because it is both a claim and liability attached to the Primus Property that lessens its value, especially in the event of a condemnation. For example, if a lot in question has a fair market value of \$200,000, it will only be worth \$100,000 to the lot owner if it is condemned because of the requirement to split condemnation proceeds with American Star. Similarly, the fair market value of such a lot may be reduced because of the risk purchasers incur based on the potential need to share condemnation proceeds. And because American Star's action seeks to establish an

encumbrance on the Primus Property through its claim to future condemnation proceeds, it affects title to the Primus Property and meets the statutory requirements of § 15-11-10. *See Finley*, 106 F. Supp. at 356 (stating that doctrine of lis pendens applies to all suits or actions brought to enforce any encumbrance against it).

Although American Star's action for judicial determination of its right to future condemnation proceeds arises from an interest tied to real property, the circuit court erroneously found that the action did not affect title to real property because it asserts an alleged contractual right to money. In so doing, the circuit court oversimplified the nature of American Star's claim. American Star does not merely request a contractual right to money. It also seeks a judicial declaration that it has an equitable interest in the Primus Property with respect to proceeds from the property's disposition.

Based on its characterization of American Star's action as a claim for money, the circuit court wrongly ruled that American Star's alleged right to share in condemnation proceeds "concerns personal property, not real property." (R. p. 007.) In support of this ruling, the circuit court relied on *Earle v. Maxwell*, 86 S.C. 1, 67 S.E. 962 (1910), and *Caulk v. Orange County*, 661 So. 2d 932 (Fla. 5th Dist. App. 1995), neither of which is applicable for multiple reasons.

The circuit court relied on *Earle* based on the proposition that a contingent interest in the proceeds from the sale of land is an interest in personal property and not in real property. However, *Earle* has little, if any, applicability to this case because it does not involve a lis pendens in any manner.

In that case, a trust beneficiary had a contingent interest in proceeds of land owned by a trust, which was to be sold upon the death of the beneficiary's mother. *Id.* at 2, 67 S.E. at 963. The trustee filed an action to remove a cloud of title on the beneficiary's contingent interest in the

proceeds from a future sale of the property upon the mother's death. *Id.* at 5, 67 S.E. at 963. The beneficiary moved for demurrer of the complaint, arguing that an action to remove a cloud on title to proceeds from a future sale of real property could not be maintained because his contingent interest in the proceeds of the sale was an interest in personalty. *Id.* The circuit disagreed with the beneficiary's argument and overruled the demurrer. *Id.* at 2, 67 S.E. at 963.

On appeal, the Supreme Court affirmed the circuit court's ruling and held that an action to remove cloud of title on proceeds from the sale of real estate could be maintained. *Id.* at 7-8, 67 S.E. at 964. While the Supreme Court agreed that the beneficiary's contingent interest in the proceeds of the land was personalty, it nevertheless rejected the beneficiary's argument because "[a]ny distinction between real estate and personal property in this respect must be purely artificial and tend to hinder the practical administration of justice." *Id.* at 7, 67 S.E. at 964. As a result, the Supreme Court's recognition of an interest in the proceeds of a land sale as personalty is dicta.

The issues addressed in *Earle* are distinct from those presented here. Most significantly, the *Earle* court did not address whether an action to establish a contingent interest in the proceeds from the sale of real property "affect the title to real property" or support a lis pendens. In fact, it does not appear that a lis pendens was filed in that case, much less canceled. As a result, *Earle* does not support the circuit court's determination that American Star's action for a determination of its rights to share proceeds from the condemnation of the Primus Property fails to meet the requirements of § 15-11-10.

Regardless, the test of whether an action "affects the title to real property" does not turn on whether the asserted interest is one in real property or personal property. Even if American Star's interest in the condemnation proceeds is an interest in personal property, it nevertheless affects the title to real property because it arises from, attaches to, and runs with the Primus Property.

Similarly, *Caulk* fails to support the circuit court's cancellation of the lis pendens because it does not involve a lis pendens. In that case, the plaintiff filed an action seeking apportionment of a condemnation award based on a covenant in a deed conveying title in real property from her deceased husband. 661 So.2d at 933. The trial court denied the plaintiff's request for apportionment, ruling that the specific covenant in question did not run with the land. *Id.*

Although not specifically stated in the circuit court's order below, the circuit court presumably relied on *Caulk* to support the proposition that the agreement's requirement to share proceeds from the condemnation of the Primus Property created an interest in personal property that did not run with the land. (R. p. 007.) However, like the court in *Earle*, the court in *Caulk* did not address whether a lis pendens had been properly filed.

In any case, *Caulk* does not hold that an agreement to share condemnation proceeds can never run with the land. In fact, other courts have reached different conclusions. Most significantly, in *J. H. Williams Oil Co. v. Harvey*, 872 So. 2d 287 (Fla. Dist. Ct. App. 2d Dist. 2004), the court distinguished *Caulk* and ruled that a reservation agreement regarding the receipt of condemnation proceeds arising from the sale of land did run with the land. In that case, a trust sold land to Chevron Oil Company and executed a reservation agreement as part of the transaction. *Id.* at 288. The reservation agreement provided that if a portion of the land was later taken by eminent domain, the trust would receive the proceeds. *Id.* The reservation agreement, which was recorded in the official county records, included a provision that bound the parties as well as their successors and assigns. *Id.* Chevron later transferred the property to another buyer. *Id.* And after the Florida Department of Transportation commenced condemnation proceedings, the trust filed a cross-claim against the subsequent purchaser seeking to enforce the reservation agreement. *Id.* at 289.

The circuit court entered judgment in favor of the trust, and the Florida Court of Appeals affirmed by ruling that the subsequent purchaser was bound by the reservation agreement. *Id.* The court rejected the purchaser's argument that *Caulk* dictated that the agreement regarding the ownership of the condemnation award was a personal covenant that did not run with the land. *Id.* According to the court, *Caulk* was distinguishable because the language in the deeds and reservation agreement at issue in *J.H. Williams Oil Co.* "clearly indicates that the parties intended to bind all successors and assigns and that the subsequent conveyance was subject to this reservation." *Id.*

Although *Caulk* and *J.H. Williams Oil Co.* neither bind this Court nor address the central issue presented in this case, *J.H. Williams Oil Co.* presents the more persuasive precedent of the two cases for resolving this appeal. As in *J.H. Williams Oil Co.*, the parties to the Primus Property purchase agreement expressly established the seller's entitlement to condemnation proceeds. (R. p. 071.) And just as the parties recorded the reservation agreement in the official county records, the parties to the Primus Property purchase agreement agreed to memorialize American Star's interest in future condemnation proceeds through a recordable instrument. (*Id.*) Most importantly, the language in the Primus Property purchase agreement clearly indicates the parties' intent to bind their successors and assigns, such as Pulte, to the covenants in the agreement just as the reservation agreement did in *J.H. Williams Oil Co.* (R. p. 075.) Thus, to the extent that the Court is inclined to follow Florida law, it supports the determination that the agreement to share condemnation proceeds in this case is a covenant running with the land. And this determination further demonstrates that American Star's declaratory judgment action affects the title to real property.

Yet the Court need not look beyond South Carolina law to reach that conclusion. Under South Carolina law, a "covenant runs with the land . . . if the covenanting parties intended that the

covenant run with the land, and the covenant touches and concerns the land.” *West v. Newberry Elec. Coop.*, 357 S.C. 537, 542, 593 S.E.2d 500, 503 (Ct. App. 2004). “A party seeking to enforce a covenant must show that the covenant applies to the property either by its express language or by a plain and unmistakable implication.” *Id.*

These principles demonstrate that the agreement to share condemnation proceeds runs with the Primus Property and, therefore, affects the title to real property. Section 13(a) of the purchase agreement concerns the land because its obligations are triggered only if the land is condemned through eminent domain. And the parties expressed their intention for the agreement’s obligations and covenants to run with the land and bind their successors in three unmistakable ways.

First, Section 13(a) requires the parties to memorialize American Star’s interest in future condemnation proceeds by a recordable interest, thereby putting the condemnor and subsequent purchasers on notice of the obligation to share proceeds with American Star. (R. p. 071.) Second, Section 13(a) expressly states that its obligations survive the closing and apply to a condemnation “whether before or after the Closing.” (*Id.*) Third, and perhaps most importantly, Section 23 provides that “[a]ll covenants, agreements, warranties, and provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal representatives, successors and assigns.” (R. p. 075.)

As a result, the agreement to share condemnation proceeds runs with the land, and American Star’s action to establish its interest in such proceeds necessarily affects title to real property. Therefore, the *lis pendens* meets the statutory requirements of S.C. Code Ann. § 15-11-10, and the circuit erred in canceling it.

III. The claim for specific performance to construct the access road and establish an easement over the Primus Property affects title to real property.

The lis pendens on the lots of the Primus Property which could serve as the site of the access road is appropriate because it arises from an action seeking specific performance of Pulte's obligation to construct the access road, which would be used to access American Star's adjacent property. The specific performance action seeks to compel the use of the Primus Property for a specific purpose and by implication limit certain uses that would prevent American Star from using the Primus Property to access its adjacent property. The incidents of ownership of real property include the unrestricted right to use and enjoy it. *See Painter*, 231 S.C. at 60, 97 S.E.2d at 73 (1957) (stating that "property consists not merely in its ownership and possession but an unrestricted right to use, enjoyment, and disposal"). Because the specific performance action affects Pulte's and subsequent purchasers' use and enjoyment of certain lots in the Primus Property, it affects the title to real property. The lis pendens is, therefore, appropriate under S.C. Code Ann. § 15-11-10.

This conclusion is supported by well-established law in South Carolina and other jurisdictions. As stated in *Pond Place Partners*, actions "to establish the existence of an easement" and "for specific performance" are actions affecting the title to real property. 351 S.C. at 17-18, 567 S.E.2d at 889 (citing *Procacci v. Zacco*, 402 So.2d 425 (Fla. Dist. Ct. App. 1981)). Other jurisdictions similarly have acknowledged the propriety of a lis pendens in actions involving disputes over an easement or construction of an access road. *See, e.g., Schwab v. Seattle*, 64 Wn. App. 742, 826 P.2d 1089 (Wash. Ct. App. 1992) (ruling that a dispute concerning an easement affected title to land and the filing of lis pendens was proper); *Stinnet v. Dodson*, 575 So.2d 1350 (Fla. Ct. App. 1991) (reversing discharge of lis pendens filed in an action to enforce an easement); *Curry v. Orwig*, 429 N.E.2d (Ind. Ct. App. 1981) (declaring that lis pendens was justified in an

action involving dispute over an easement); *Kendall-Brief Co. v. Superior Court*, 60 Cal. App.3d 462 (Cal. Ct. App. 4th App. Dist. 1976) (affirming refusal to cancel lis pendens because pending action concerning easement of right-of-way affected title);

The case of *Smith v. Miller & Smith at Pembroke, LLC*, 84 Va. Cir. 64 (Cir. Ct. Fairfax Cty. 2011), provides the most comparable facts to the present case. In *Smith*, the plaintiff and defendant, who owned adjacent property, entered into an agreement requiring the plaintiff to construct a roadway over the defendant's property that would provide access to plaintiff's property. *Id.* at 65. When the plaintiff failed to construct the road, the defendant brought suit for specific performance for delivery of the deed of trust establishing the easement and filed a lis pendens on the plaintiff's property. *Id.* at 66. Later, the plaintiff filed suit for slander of title and abuse of process against the defendant for filing the lis pendens. *Id.* The *Smith* court dismissed the claims because the defendant had the right to secure the plaintiff's promise to construct the road and, therefore, had an "absolute right to file a lis pendens notifying potential purchasers about the pendency of the action." *Id.* at 68-69.

Like the defendant in *Smith*, American Star has the right to seek specific performance to establish the easement and have the access road constructed. Moreover, like the lis pendens in *Smith*, the lis pendens filed on the Primus Property serves the important function of providing notice to potential purchasers of the pendency of the action affecting the property and the road to be constructed. Therefore, like the defendant in *Smith*, American Star has the absolute right to file a lis pendens regarding its action to construct the access road.

However, in canceling the lis pendens, the circuit court adopted Pulte's argument that American Star's action for specific performance did not affect title because American Star did not expressly request relief establishing an easement. (R. pp. 006-007.) This argument places too

much weight on the terminology used in the complaint and ignores the substance of the relief sought. Simply put, American Star seeks the construction of an access road over Pulte's property, which will serve as an easement over a portion of the Primus Property. (R. pp. 057-058.) Regardless of whether the term "easement" is stated in the complaint, there can be no doubt that is exactly what American Star seeks in this case.

"An easement is a right to which one person has to use the land of another for a specific purpose." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578 (2009). By seeking construction of the access road, American Star is expressly seeking to use Pulte's property for a specific purpose of accessing its property. This is the very definition of an easement, regardless of whether that term is stated in the complaint.

On this point, the case of *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012), is instructive. In that case, the plaintiff brought an action for a judgment declaring that her right to use an access road was an appurtenant easement. *Id.* at 567-69, 730 S.E.2d at 360-62. The operable language in the deed in question provided "that an access road" would be maintained between certain properties. *Id.* at 568, 730 S.E.2d at 361. Although the deed did not use the express terminology of "easement," this Court ruled that the language in the deed requiring the maintenance of access road showed the grantor's intent of establishing an easement that ran with the land. *Id.* at 574, 730 S.E.2d at 364. According to the Court, "the grant of an 'access road' describes the way to access the property that all current and future owners of the property may enjoy." *Id.*

Proctor demonstrates that American Star's specific performance action seeks the establishment and construction of an easement regardless of what words are used in the request for relief. It is an action which necessarily affects the title to real property, and the omission of

the term “easement” in the complaint cannot alter this conclusion. Therefore, the lis pendens meets the statutory requirements of S.C. Code Ann. § 15-11-10.

IV. American Star’s rights and interests asserted in the action are affected by the transfer of land, which further demonstrates that the action affects the title to real property.

The practical ramifications of whether the lis pendens remains or is canceled demonstrates that American Star’s action affects the title to real property and, therefore, meets the statutory requirements to file a lis pendens under S.C. Code Ann. § 15-11-10. With respect to both the specific performance and declaratory judgment actions, the lis pendens is necessary to protect American Star’s interests and rights that run with the Primus Property.

First, the lis pendens on the lots subject to possible condemnation is necessary to protect American Star’s right to share condemnation proceeds with future purchasers and to inform potential purchasers that the Primus Property is subject to pending litigation. Because the Primus Property is being developed and sold to homebuyers, purchasers of lots in the project area during the pendency of the underlying litigation will be required to share future condemnation proceeds with American Star only if the lis pendens remains in effect. And if the lis pendens is cancelled, American Star will lose its interest in condemnation proceeds to purchasers who buy lots during the litigation.

Second, the lis pendens on the lots which could serve as the site of the access road is necessary to ensure that those lots remain available for future access to American Star’s adjacent property. The lis pendens places prospective buyers on notice that the lots in question are subject to litigation regarding whether an access road will be built. Those buyers will either choose not to purchase a lot because of the pending litigation or will buy that lot subject to American Star’s right

to have an access road constructed if it prevails in the litigation. Either way, the lis pendens protects American Star's interests in the property and access road.

To ensure that American Star's rights and interest in the Primus Property are preserved, the lis pendens must remain in place for purchasers to take the property subject to American Star's rights and interests that it seeks to establish in its action. *See Osteen v. Bultman*, 94 S.C. 496, 500, 78 S.E. 445, 446 (1913) (stating that lis pendens related to action to enforce lien for costs incurred by grantor in constructing shared wall fixed the rights of parties so that subsequent conveyance was subject to those rights). Because American Star's rights and interests that it seeks to protect and enforce in the underlying action are affected by the transfer of land within the Primus Property, the action affects title to real property. Therefore, the lis pendens meets the statutory requirements of S.C. Code Ann. § 15-11-10, and the circuit court erred in ruling to the contrary.

CONCLUSION

For the foregoing reasons, American Star respectfully requests that the Court reverse and vacate the circuit court's order to cancel the lis pendens and reinstate such lis pendens during the pendency of the litigation.

Respectfully submitted,



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August 6, 2019
CHARLESTON, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

RECEIVED
AUG 07 2019
SC Court of Appeals

Appellate Case No. 2018-002277

American Star Development SC, LLC; KKMC Investments, LLC; and
211, LLC Plaintiffs,

v.

PulteGroup, Inc.; Pulte Home Corporation, n/k/a Pulte Home Company, LLC;
and JW Homes, LLC. Defendants,

Of whom American Star Development SC, LLC is the Appellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the Respondent.

CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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