STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INFINITY-810 LOFTS, LLC,

Plaintiff/Counter-Defendant,

v

Case No. 14-144266-CK
Hon. Wendy Potts

BACKEREI, LLC,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER RE: BACKEREI, LLC'S MOTION TO CANCEL NOTICE LIS PENDENS

At a session of Court
Held in Pontiac, Michigan
On
OCT 15 2015

Defendant/Counter-Plaintiff Backerei, LLC moves the Court to cancel a lis pendens that Plaintiff/Counter-Defendant Infinity-810 Lofts, LLC filed on Backerei's property. Backerei owns a building on South Washington in Royal Oak that is subject to a mortgage granted to People's State Bank in 2003 and subsequently acquired by Talmer Bank. In May 2014, Infinity purchased property adjacent to Backerei's property. Infinity demolished the existing building on its property and hired Third-Party Defendant Wm. R. Curtis, Inc. to perform excavation work related to the demolition. Backerei claims that during the excavation on September 29, 2014, Curtis damaged Backerei's foundation and wall, causing the building to partially collapse onto Infinity's property. Infinity filed this action in November 2014 claiming that the footings of Backerei's building encroached on Infinity's property and asserting claims for private nuisance and trespass. Infinity also sought a declaratory judgment regarding the encroachment.

On January 30, 2015, Infinity recorded a notice of lis pendens on Backerei's property. Backerei demanded that Infinity discharge the lis pendens on the ground that there was no legal basis for recording it. On March 17, 2015, Talmer assigned Backerei's mortgage to Infinity, which Talmer had already declared in default. Infinity reassigned the mortgage to a related entity, Infinity Acquisitions, LLC, which began foreclosure by advertisement. The foreclosure sale took place on May 5, 2015, and the redemption period expires on November 5. According to Backerei, Infinity's lis pendens prevents Backerei from refinancing its loan and redeeming the property.

Backerei asserts that Infinity improperly recorded the lis pendens because Infinity's claims in this case will not affect Backerei's property. A lis pendens warns persons who intend to purchase or acquire an interest in property that it is in litigation and they would take the property subject to the outcome of the litigation. MCL 600.2701(1); *Backowski v Solecki*, 112 Mich App 401, 412; 316 NW2d 434 (1982). In order for Infinity to have properly recorded the lis pendens, Infinity's claims in this action would have to affect title, possession, or an interest in Backerei's property. *Ruby & Assocs., P.C. v Shore Fin. Servs.*, 276 Mich App 110, 114; 741 NW2d 72 (2007), reversed on other grounds, 480 Mich 1107; 745 NW2d 752 (2008).

Backerei asserts, and the Court agrees, that Infinity's nuisance and trespass claims do not affect title, possession, or an interest in Backerei's property. Infinity cites no case law holding that assertion of nuisance or trespass claim is a sufficient basis for recording a lis pendens. All of the cases cited by Infinity involve a claim of an interest in property or a dispute over the transfer of an interest in property. Infinity also fails to explain how the outcome of its claims would give it any rights or interest in Backerei's property. Because Infinity has not asserted any claim to

title, possession, or an interest in Backerei's property, it had no basis for recording the lis pendens.

Even if Infinity was asserting a claim affecting title, possession, or interest in Backerei's property, this Court has equitable authority to set aside a properly recorded lis pendens "if in the discretion of a trial judge the benefits of the notice are far outweighed by the damage it causes." *Altman v Lansing*, 115 Mich App 495, 507; 321 NW2d 707 (1982). Backerei argues that the lis pendens is preventing it from refinancing the loan on its property and redeeming it from foreclosure. Infinity contends that Backerei presented no evidence that the lis pendens is actually preventing it from refinancing. However, common sense dictates that a lender would be reluctant to extend a mortgage loan on property where title is clouded by a lis pendens. Given that Infinity has no legal basis for recording a lis pendens, and the continuing presence of the lis pendens precludes Backerei from exercising its redemption rights, the equities favor discharging the lis pendens.

For all of these reasons, the Court grants the motion and discharges Infinity's lis pendens.

IT IS SO ORDERED.

Dated: OCT 15 2015

Hon. Wendy Potts