



1 FRIDAY, OCTOBER 9, 2009

DEPARTMENT 25

2 P-R-O-C-E-E-D-I-N-G-S

3 THE CLERK: Most Worshipful Prince Hall vs. Most  
4 Worshipful Prince Hall Arms, RG08-419261.

5 MR. PURCELL: Byron Purcell for Most Worshipful  
6 Grand Lodge.

7 MR. NJELITA: Maxwell Njelita for the defendants.

8 THE COURT: And this is also -- I appreciate both  
9 sides are here, unlike the last case, but you have to comply  
10 with the local rules. And there was inadequate notice to the  
11 Court.

12 MR. NJELITA: And to me, Your Honor. To that  
13 extent, I'll object to plaintiff's request that he be heard on  
14 the motion.

15 THE COURT: I guess there would be no prejudice in  
16 that you are present. This is a lengthy tentative.

17 Are you here to contest the motion to strike the demurrer  
18 or both?

19 MR. PURCELL: The motion to strike as well as the  
20 underlying expungement.

21 THE COURT: What can you add that's not already in  
22 your papers? This was a lot for the Court to read and analyze.

23 MR. PURCELL: Yes, Your Honor.

24 One of the major issues in this matter, Your Honor, is the  
25 issue with the City of Berkeley. As indicated in the  
26 opposition, the re' s an agreement, the re' s a loan agreement from  
27 1998 between the City of Berkeley and the Grand Lodge. Within  
28 that document there was proviso that the Grand Lodge not

1 transfer the property except to Prince Hall Arms, a limited  
2 partnership. As a basis for our fraud claim, as indicated in  
3 the opposition, the Grand Lodge, who is responsible to the City  
4 of Berkeley for maintaining the property and not further  
5 encumbering the property, was not aware of the fact that it was  
6 in violation of the city provision and agreement between the  
7 city not to transfer it to a corporation or any other entity  
8 except for the limited partnership. The Grand Lodge was  
9 unaware that the written consent was not obtained from the  
10 city, which was necessary.

11 As was indicated, there was correspondence dated August  
12 27th, 2009. In that correspondence is a letter from City of  
13 Berkeley attorney that was sent to the Grand Lodge basically  
14 informing the Grand Lodge of the fact that the written consent  
15 was not obtained and that this was a violation of the agreement  
16 that the Grand Lodge had with the city.

17 Now, obviously, the Grand Lodge is now threatened with a  
18 foreclosure proceeding on its property that, pursuant to the  
19 agreement, it had with the city.

20 Again, I think one of the issues that the Court addressed  
21 was that, whether there was authentication on that letter. At  
22 that time I was the attorney for the Grand Lodge and received  
23 this

correspondence THE COURT: You're not submitting anything new.

and have personally spoken to the City

24 Attorney, Mr. Ramisa (phonetic) and that's part of why I was  
25 able to put that in my declaration, the personal knowledge of  
26 these issues.

27 At this time the litigation had already been in place and  
28 I personally spoke with Mr. Ramisa with regard to the City's

1 position on this and he indicated to me, further provided me a  
2 copy of this correspondence, the letter dated August 27th,  
3 2009, from the City and confirmed it was a violation and that  
4 it needed to be handled. And so that was the issue, one of the  
5 major issues we had.

6           Secondary to that, Your Honor, we have attempted to try to  
7 get the transcript. I don't know if Your Honor recalls. We  
8 were here approximately a month ago on October 9th on an  
9 ex-parte. At that time prior counsel for defendant had had a  
10 heart attack and we were trying to substitute in new counsel.

11           There was also an issue on the foreclosure proceeding. We  
12 were trying to stop the foreclosure and trustee sale that was  
13 scheduled to take place last month. At that time, Mr. Buckley  
14 appeared from Buckley Real Estate. They own the second note  
15 and the \$600,000 loan.

16           I have documentation here for Your Honor, if I may submit  
17 it to the Court.

18           What subsequently happened --

          THE COURT: You're not submitting anything new.

          MR. PURCELL: I'm sorry.

          THE COURT: You're not submitting anything new.

          MR. PURCELL: Yes, Your Honor. Subsequent to the  
filing of our opposition, -- there was an agreement --

19           THE COURT: You're not submitting anything new.

20

25           MR. NJELITA: I object. He just handed me two  
26 declarations this morning.

27           THE COURT: No. It's too late.

28           MR. PURCELL: Yes, Your Honor.

1 Well, at the last hearing when we appeared on October 9th,  
2 this was an agreement put in in open court between Most  
3 Worshipful Grand Lodge, Prince Arms and Buckley and we agreed  
4 that by November 6th the parties were to set forth in writing,  
5 indicating that the Grand Lodge would pay the arrears owed on  
6 the property.

7 There's approximately \$70,000 worth of back mortgage  
8 payments that need to be paid. At that time there was an  
9 agreement in open court made before this Court. And subsequent  
10 to our filing of the opposition, my clients, the Grand Lodge,  
11 has made a commitment and satisfied the foreclosure proceeding.

12 There was a foreclosure. That sale that was supposed to  
13 take place on October 26th. My client has put forth the moneys  
14 to stop the foreclosure proceedings in the amount of \$68,000.  
15 Again, this was not part of the opposition simply because it  
16 hadn't happened at the time we had filed our opposition. We  
17 were still in negotiations with Mr. Buckley for resolution of  
18 the foreclosure.

19 A trustee sale was supposed to take place on November 10th  
20 of this month. And we, we stopped that proceeding and I have,  
21 again, the email from Mr. Buckley, dated November 10,  
22 indicating that he was satisfied that we had submitted a  
23 cashiers check, copy of cashiers check to him in the amount  
24 owed.

25 Having gotten that from my client, solely from my  
26 client -- the defendants have not put any money toward the  
27 arrears or the outstanding balance due. Solely based on my  
28 client's representation and agreement to pay, the trustee sale

1 was postponed from November 10th to December 22nd, 2009.  
2 Pursuant to our agreement in open court, we are to pay the  
3 \$70,000, to tender it on December 18th, 2009.  
4 Now, unfortunately, when we filed the opposition that had  
5 not been consummated yet so that's simply why it's not part of  
6 our opposition. We didn't have the documentation.  
7 I attempted to get try to get the transcript. We were  
8 unsuccessful getting transcript from that hearing date so I  
9 could present that one to you. That was an agreement made when  
10 we were here on October 9th, 2009 at the ex-parte hearing.  
11 Again, the basis of that, it's unjustified in this case to  
12 sanction my client or have them pay defendant's attorney's fees  
13 when it's actually my client who had to put forth the money to  
14 cure the foreclosure in this matter. The property would have  
15 already been lost under foreclosure and trustee sale if it  
16 wasn't for my client's agreement to step forward and pay the  
17 moneys outstanding. The defendants have indicated that they  
18 have no, they had no money.

19 MR. NJELITA: Objection. These are settlement  
20 communications and they are privileged. I don't know that you  
21 want us to - -

22 MR. PURCELL: Your Honor, he's objecting in the  
23 middle of my argument.

24 THE COURT: Finish your argument, please.

25 MR. NJELITA: I'm sorry.

26 MR. PURCELL: Thank you. Again, this statement was  
27 made in deposition. Mr. Young himself testified at deposition  
28 that they did not have the wherewithal to catch up the arrears.

1           As you can see in the documentation we provided, we  
2 provided the notice of default. There was clearly a notice of  
3 default in this case and we provided that exhibit and Your  
4 Honor has that before it. Both sides have presented that.  
5 That was sent in September. And we had to file the ex-parte  
6 and the lis pendens because there were encumbrances on this  
7 property that my client wasn't aware of. And, at the time that  
8 the foreclosure proceedings were taking place, the defendant  
9 did not have counsel because Mr. Thompson, the prior counsel,  
10 had been ill.

11           And so we put forth the effort to try to bring this  
12 matter, bring Buckley here and try to resolve the foreclosure  
13 proceeding. It's all on the plaintiffs to have done that. As  
14 you know as indicated in the code section regarding the lis  
15 pendens, it further states, if there's a justification or  
16 reason for having filed the lis pendens, then the Court can  
17 justify, justify not awarding attorney's fees. Clearly, I  
18 think in this case, considering that my client has protected  
19 the interest in the property. It would have been lost if it  
20 wasn't for my client moving forward and resolving the  
21 foreclosure proceedings and the trustee sale, this property  
22 would already be lost under the foreclosure sale.

23           THE COURT: Mr. Njelita.

24           MR. NJELITA: Njelita.

25           THE COURT: Mr. Njelita.

26           MR. NJELITA: Thank you, Your Honor.

27           I would like to object to counsel's discussion about the  
28 settlement communications between the parties, but also I want

1 to address the issue of attorney's fees and whether the  
2 plaintiff was justified in filing a lis pendens.

3           Those matters are not really before the Court as to the  
4 justification. The issue is whether they can establish,  
5 plaintiff can establish that its claims in the complaint have  
6 probable validity and, if not, the lis pendens should be  
7 expunged. I think the tentative ruling is correct to that  
8 extent.

9           With respect to the attorney's fees, the plaintiff now  
10 says, well, we've paid the arrears. The arrears accumulated  
11 because of the lis pendens. That much is in Mr. Young's  
12 deposition. With the lis pendens, all the funding for project  
13 dried up. We attached Exhibits showing the funders decided to  
14 suspended funding until the lis pendens was resolved. We asked  
15 plaintiff to remove the lis pendens and so we can get funding  
16 you can litigate your claims of fraud.  
17 They refused to do that and so we brought the motion. And  
18 now today, at the 11th hour, past the 11th hour, they bring two  
19 declarations before you saying they agreed to pay Buckley's  
20 arrears. Yes, they should pay Buckley's arrears because, one,  
21 nobody say that plaintiff doesn't have some form of interest in  
22 the property. Everyone agrees that -- at least plaintiff  
23 doesn't dispute that the lis pendens is what caused the arrears  
24 in the first place. So I don't think that that goes to the  
25 issue of whether the attorney's fees should be imposed because  
26 plaintiff had every opportunity to withdraw the lis pendens.  
27           Plaintiff knew it didn't have any evidence to sustain its  
28 claims for fraud. And now that the motion has been filed.



1 They didn't offer you any declaration from plaintiff's board or  
2 anybody from plaintiff saying anything to support their claims.  
3 So simply, it was just a tactic to put the lis pendens on to  
4 force my client to come to the table and do whatever plaintiff  
5 wants. I think the Court should affirm the tentative ruling.

6         Now, as to the comments that Mr. Purcell made that  
7 plaintiff was unaware of violation of city agreement, your  
8 tentative ruling already addresses that in two respects. One,  
9 this agreement that they're talking about was not alleged in  
10 the complaint. It's a violation of the agreement. There's no  
11 evidence before you that you can consider to find that there  
12 was even any violation. All you have is a letter purportedly  
13 written by an attorney for the city making contentions, not  
14 even statements of fact - we contend that there's been a  
15 violation.

16         Secondly, you pointed out correctly that plaintiff has no  
17 standing at this point to assert claims regarding a violation  
18 of an agreement that's purportedly between the city and the  
19 legal owner of the property at this point, which is Prince Hall  
20 Arms, Inc. Plaintiff's attempt to authenticate that letter  
21 fails because obviously simply a lawyer writes a letter,  
22 declaration, attaching the letter. They didn't do that. They  
23 had ample opportunity after the motion was filed.

24         Now in open court after the tentative ruling, Mr. Purcell  
25 tells you he had personal knowledge how the letter was received  
26 at his office. That's not proper authentication. What you  
27 have is absolutely no evidence before you on which you can find  
28 the plaintiff has a likelihood of prevailing on the fraud claim



1 just read paragraph 10.

2 MR. NJELITA: (Shows counsel the declaration.)

3 MR. PURCELL: I see what you're saying. I just

4 attached a copy of the letter. What I'm indicating to the Court, though, is that letter was received by me  
 from the city and that's why I attached it as part of my declaration. It's a true and correct letter. It was  
 received, it was submitted by the city and I'm indicating today that that's something that I

9 had personal knowledge of.

10 MR. PURCELL: If you want to know which section of the letter, it's page 2.  
 Actually, it starts on the bottom of --page 1

13 "Borrower specifically agrees not to transfer  
 14 title to the property."

15 of the letter, that bottom of that page onto the second paragraph.

17 THE COURT: What are you talking about? I'm sorry.

18 MR. PURCELL: Exhibit H.

19 THE COURT: Exhibit H is a one page letter.

20 MR. PURCELL: The second -- you do not.

21 THE COURT: Exhibit H attached to what I'm looking  
 22 at is a one-page letter.

23 MR. PURCELL: You don't have the city, the letter  
 24 dated August 27th, 2009?

25 THE COURT: H attached to your declaration, what I'm  
 26 looking at is a letter dated October 8, 2009.

27 MR. PURCELL: I'm sorry, Your Honor. It's

28 Exhibit D. The letter I'm referring to is exhibit D.

THE COURT: And where is that authenticated here in your declaration?

THE COURT: Paragraph 3?

MR. PURCELL: Yes.

THE COURT: Okay. So all right.

MR. PURCELL: Exhibit

THE COURT: Exhibit K.

MR. PURCELL: That's the letter from August 9, 2009

9 I was referring to.

10 THE COURT: Wait a minute. That's not to you,  
11 unlike H.

12 MR. PURCELL: Yes. This was sent to my client and I  
13 received it as well from the counsel. I had indicated to him  
14 that I was counsel, after receiving this, that there was a  
15 letter and could he send me the full copy of it.

16 THE COURT: You haven't done that in your  
17 declaration.

18 MR. PURCELL: Well, I submitted that was a true and  
19 correct copy of correspondence received by my client.

20 MR. NJELITA: That's not what he says. Just says  
21 true and correct copy of Grand Lodge Exhibit D.

22 THE COURT: As the attorney, you can't do that.  
23 That's not -- you can't authenticate it.

24 MR. PURCELL: I have Mr. Phillips here who can  
25 authenticate it.

26 THE COURT: You had your chance. Mr. Purcell. in  
27 your opposition. The Court looks at the evidence that is  
28 before it. Exhibit D was not properly authenticated.

1 MR. PURCELL: Under the lis pendens code section it  
2 allows for oral documents and evidence to be presented at the  
3 hearing.

4 MR. NJELITA: If the Court so requests.

5 THE COURT: Okay.

6 MR. PURCELL: It basically indicates that the Court  
7 shall allow that, shall allow oral presentation at the hearing  
8 because of the severity of undertaking of lis pendens. It's  
9 like a Motion For Summary Judgment, the actual section allows  
10 for oral argument to be presented and heard.

11 THE COURT: Did you give notice to Mr. Njelita --

12 MR. NJELITA: (Shakes head.)

13 THE COURT: -- that you were going to do that?

14 MR. NJELITA: No.

15 MR. PURCELL: I presented today the information.

16 THE COURT: Is there anything further?

17 MR. PURCELL: Yes, Your Honor. Additionally, two  
18 things: Counsel indicated that the foreclosure proceedings was  
19 due to the plaintiffs. There's no evidence of that. There's  
20 no documentation showing that there was any loan that wasn't  
21 funded or any money that wasn't funded due to the lis pendens.  
22 All there is is a letter from CD HDC that says they're no  
23 longer moving forward with the matter. There's no document  
24 from Wells Fargo or any bank or any institution indicating some  
25 loan was no longer going to be funded.

26 The one document that they do refer to is a document from  
27 Wells Fargo, which is actually dated 2000, and it was just an  
28 application at that point for the loan. Our motion didn't come

1 until a year after this application was even made. And that's  
2 actually -- just for clarification, as far as the letter from  
3 city, the letter is also attached as Exhibit 15 to plaintiff --  
4 to defendant's motion.

5 THE COURT: So?

6 MR. PURCELL: I'm just saying as far as  
7 authentication, it's something I received and they can  
8 authenticate the letter.

9 The document I'm referring to from Wells Fargo is dated  
10 November 15th, 2007. It's Exhibit 19 to the motion, to the  
11 declaration of Frederick Young. Again, it's an application for  
12 the loan and again that's November 15th, 2007. There's no  
13 evidence that somehow the filing of the lis pendens stalled or  
14 prohibited any funding to take place. There is no declaration  
15 to support that.

16 Also, to the contrary, the loan document from Wells Fargo  
17 and any information subsequent to that was not provided to the  
18 Grand Lodge. Hence, part of the reason we're here.

19 And, additionally to that is we had propounded discovery  
20 in this matter and much of the documentation that was produced  
21 in response to this motion was never produced in response to  
22 our discovery. And at this time only one deposition has  
23 started. We haven't even completed deposition of the  
24 principal, Mr. Young, and we would request additional time. If  
25 the Court is so inclined to grant the motion, we would request  
26 at this time additional time to conduct further discovery.  
27 Obviously, there's numerous parties involved. And you recall,  
28 Your Honor, we were kind of stalled in pursuing discovery

1 because the prior counsel had a heart attack and we weren't  
2 able to take the depositions as we initially agreed to and it  
3 was actually plaintiffs who had to come to court and bring it  
4 to the Court's attention that the prior counsel had a heart  
5 attack and it stalled the discovery process.

THE COURT: The case is over a year old.

MR. PURCELL: Yes, Your Honor .

THE COURT: So you're blaming a year's delay on  
counsel's heart attack?

MR. PURCELL: No, Your Honor. We simply did not get  
6 provided the documents we asked for. We asked for these  
12 documents and we can't get them. It wasn't until we took the  
13 deposition of Mr. Young, started the deposition of Mr. Young  
14 last month and then the motion was filed that we got the proper  
15 documentation and mentioned the documents that we were looking  
16 for .

17 There could be others out there, but again we didn't  
18 finish the deposition of Mr. Young or any of the other  
19 individuals that were involved. It is a board action. We  
20 would, at least, request an opportunity to depose the members  
21 of the board that are making the decisions. As indicated, we  
22 were kind of stalled in getting that information.

23 THE COURT: Anything else?

24 MR. NJELITA: No, Your Honor.

25 THE COURT: The Court is going to take this under  
26 submission. Thank you.

27 (Whereupon, proceedings were adjourned)

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'-----MARTHA GAR DIN E R , C 5 R 3293 -----'

1 STATE OF CALIFORNIA )

COUNTY OF ALAMEDA)

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I, MARTHA GARDINER, CSR 3293, do hereby certify that I am an Official Reporter of the Superior Court of the State of California, and that as such I reported the proceedings had in the above-entitled at the time and place set forth herein;

That my stenographic notes of said proceedings were transcribed into typewriting by me and that the preceding pages numbered 1 through 14, constitute a full, true and correct transcription of said notes.

Dated this 7th day of December, 2009, executed at Oakland, California.

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MARTHA GARDINER, CSR

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~-----MARTHA GARDINER, CSR 3293-----~