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Of Easements And Lis Pendens

By David. S White, Esq

A recent opinion of the Second District Court of Appeals, hearing cases arising from the Los Angeles County Superior Court, *Park 100 Investment Group II v. Gregory R. Ryan*, considered novel issues of interest to readers here concerning a dispute over an easement for use of a 15-foot wide alley between two buildings in downtown Los Angeles.

The Oviatt Building, named after its original owner, haberdasher James Oviatt, was built at 617 Olive St. in 1927. It was the first Art Deco building in Los Angeles. Designed by Albert Walker and Percy Eisen at the height of the late 1920's economic boom, the Oviatt Building was laden with French marble and contained more than 30 tons of Lalique art glass, which had the distinction of being the largest shipment of its kind ever to pass through the Panama Canal. Oviatt created the Penthouse as his "castle in the air," lavishly outfitted with Aliquot custom lighting, extraordinary floors and cabinetry made by the French firm, Saddier et Fils, with bi-level rooftop gardens, a swimming pool, tennis court, putting green, clock tower and even a "beach" of imported Riviera sand, and was the scene of memorable parties thrown by James and his wife Mary, with walls full of signed photos of everybody who was anybody in that era Hollywood.

Standing immediately north of the Oviatt Building is the Heron Building, a 12-story classic architectural design office building located adjacent to Pershing Square and the Los Angeles Biltmore Hotel. A 15-foot wide alley lies between the Oviatt Building and the Heron Building, but the alley is located on property owned by the Heron Building – this is the important part, so remember it.

The Oviatt Building located its trash bins and compactor in the alley because there was no other place to put them. Both owners and tenants of the Oviatt Building, as well as the garbage trucks who periodically collect the trash, could only access the trash compactor and bins through this 15-foot wide alley, so it was essential for the Oviatt Building to have this access through the alley owned by the Heron Building. In 1985, the owners of the two buildings entered into a 10-year non-exclusive

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easement agreement for payment of \$12,500 with no further monthly payments, nominally only for the Oviatt Building's emergency use of the Heron Building's alley and providing for a gate across the alley, but the Oviatt Building continued to use the alley for the trash collection and removal functions described above. In accordance with California Civil Code Section 803 ("The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement."), the Oviatt Building became the Dominant Tenement, and the Heron Building became the Servient Tenement, pursuant to the 10-year easement. After the term of the easement expired, the Oviatt Building continued to use the alley including when Park 100 Investment Group II bought the Oviatt Building in 2003. Sixth & Olive Inc. is the current owner of the Heron Building. From this point on, we will refer to the two buildings as "Oviatt" and "Heron" to make the rest of this story as clear as possible.

Oviatt's market value was \$15-19 million when it was listed for sale in January 2006. Earlier in 2005, Heron's attorneys had written to Oviatt's owner, threatening to deny any further access to the alley unless Oviatt agreed to sign a new easement agreement at a steep price - \$116,000 for the use of the alley from May 1996 through February 2006, and the payment of \$1,000 per month thereafter, beginning in March 2006. Oviatt promptly rejected Heron's demand. Similarly to the doctrine of adverse possession (by which one can acquire title to another's land by proving certain pre-requisite elements, including payment of taxes for five years), Oviatt claimed that he had established a prescriptive easement by his continued use of the alley after the original easement agreement had expired. In other words, Oviatt contended it had acquired the right to continue using Heron's alley without the necessity for further formal easement agreements, and most importantly, without the need to pay Heron for such use of its alley. Easements come in all kinds and flavors and this case featured both one created by written contract and then later, one claimed to have been created by prescriptive use. There is a long line of cases which established that a non-exclusive use of an alley or road for the requisite period of time (i.e., without the owner's permission) may establish a prescriptive easement by continued use of the property without the need to compensate the owner of the property for the use if certain legal requirements are established.

In rejecting Heron's demand, Oviatt's lawyers also informed Heron that Oviatt had its property on the market and that Heron risked serious liability to Oviatt if Heron's demand ruined a then pending sale of Oviatt's building. Thus the stage was set for much litigation, which, naturally (this being Los Angeles)

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ensued. Without going into all the gory details of multiple lawsuits going back and forth, Heron denied Oviatt further use of the alley (and thus, access to Oviatt's trash receptacles and compactor) in early March 2006. Heron filed a legal action against Oviatt asking for a judicial decree that Heron owned the alley free and clear of any uses by prescriptive easement by Oviatt. Heron's attorneys filed and recorded lis pendens against both properties (Heron and Oviatt) – a lis pendens is a recorded document that gives notice to the world in the title records of the county that litigation is pending which affects either title to or right to possession of the real property in question. More litigation ensued, this time Oviatt sued Heron and Heron's lawyers for slander of Oviatt's title to its property, wrecking its proposed sale. This suit alleged that the lis pendens was filed and recorded against the Oviatt property only for the purposes: 1) to extort \$116,000 from Oviatt for ten years' use of Heron's alley after the formal easement terminated; 2) to force a new and very expensive formal easement agreement on Oviatt, and; 3) to threaten to destroy Oviatt's chances to sell its property (which threat succeeded when Oviatt's buyer terminated the sale since few buyers want to buy real property with a cloud on its title – essentially considered as 'buying a lawsuit.').

Heron challenged Oviatt's newest suit, arguing that it had an absolute privilege under Civil Code Section 47 to record the lis pendens; the Superior Court Judge disagreed and ruled that Heron had no legitimate basis for recording the lis pendens, thus opening the door to significant monetary damages recoverable by Oviatt against Heron and even Heron's lawyers for ruining Oviatt's sale (at the height of the last boom real estate market – Oviatt sold in 2007, but only for \$13.5 million, a significant loss from the \$15-19 million value earlier). Thus, on appeal, the legal question posed was whether a lis pendens can be filed and recorded in a dispute over an easement, not only against the property burdened by the easement (the Servient Tenement – here, Heron), but also against the property enjoying the benefits of the easement (the Dominant Tenement – here, Oviatt) – up to now, a novel and previously unanswered legal question.

The Appellate Court considered all of the litigation and this painful factual story and made new law in holding that “in an easement dispute, a lis pendens may be recorded on the dominant tenement, here the Oviatt property.” Here's why. The Court examined the purpose of the lis pendens procedure which is to give notice to the world of a legal claim affecting real property. The Appellate Court concluded that a legal dispute over an easement, like this one where Oviatt was using Heron's alley for its trash receptacles and a compactor (since Oviatt had nowhere else to place these items for these purposes

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essential to maintaining and operating Oviatt's building), definitely qualifies as a real property claim that affects the title and right to possession of both the Dominant Tenement (Oviatt) and Servient Tenement (Heron) properties. Further, to determine whether a real property claim is at issue (such as would justify filing and recording lis pendens which will scare off potential buyers and lenders who might be considering a refinance, among other serious implications), the Court must only examine the allegations of the initial pleading in the lawsuit, the Complaint, and may make that determination without considering any evidence, such as would be the case at trial.

This opinion has very serious consequences for any real property owner who is involved in a dispute over an easement with another real property owner in California. In a significant number of situations such as this, the attorney for the person claiming an easement on another person's property immediately files a lawsuit and records a notice of lis pendens which ties up the ability of the other party to sell their property. The law in this situation appears to be fluid in that law seems to be continually established in this area, often times with decisions inconsistent with prior existing law. For this reason the analysis of all the cases and their trends must be considered in the latest cases reviewed to determine if it is appropriate to file a lis pendens. The filing of a lis pendens can have serious consequences in the sense that if you loose the lis pendens, it may very well result in significant attorney fees being awarded against you, with the possibility of the Court, in addition, allowing other damages for preventing the other person from selling their property. This is particularly serious if the purchase price of the property becomes depressed because of market conditions. While the filing of a lis pendens is generally considered to be "privileged", i.e., there are no legal consequences to filing it if you are filing it in good faith, there is always the possibility that the Court may determine that you are not filing the lis pendens in good faith and therefore these other damages may be incurred. The take-away lesson is that if you, or somebody you know, has an easement dispute right now, this case holding and all subsequent case holdings must be considered in planning strategies and one should not rely on our understanding of principles of law which we have all become familiar with over past decades, without first checking to see if those principles are still applicable.

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