

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

HIGH MESA GENERAL PARTNERSHIP,
a New Mexico general partnership,
JON McCALLISTER, DAVID W. HARPER,
and PLACITAS, INC., a New Mexico corporation,

Plaintiffs-Appellants,

v.

Ct. App. No. 28,802

WILLIAM J. PATTERSON III, JAMES LAWRENCE
SANCHEZ, and JAMES LAWRENCE SANCHEZ,
TRIAL LAWYER, P.C., a New Mexico professional
Corporation,

Defendants-Appellees.

An Appeal from the Thirteenth Judicial District Court, Sandoval County
Cause Number D-1329-CV-2008-231
Hon. Louis E. DePauli, Jr. (Eleventh Judicial District Court, McKinley County)
sitting by designation

**BRIEF IN CHIEF OF APPELLANTS HIGH MESA
GENERAL PARTNERSHIP, JON McCALLISTER,
DAVID W. HARPER, and PLACITAS, INC.**

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I. NATURE OF CASE

This appeal arises from a case involving approval of a subdivision plat for development in Placitas, New Mexico. Plaintiffs High Mesa General Partnership, Jon McCallister, David W. Harper, and Placitas, Inc. are owners and developers of land in Sandoval County. [RP 0001-0002] Defendant William J. Patterson opposed Plaintiffs' subdivision plat application to the Board of County Commissioners for Sandoval County ("BCC") and pursued an administrative appeal in district court following the BCC's decision approving Plaintiffs' subdivision plat application. [RP 0002-0003]

While the administrative appeal was pending, Defendants filed a Notice of Lis Pendens against Plaintiffs' property. [RP 0003-0004] In the administrative appeal, Defendants never sought a stay from the district court under Rule 1-074(S) NMRA (2007) to preclude Plaintiffs from proceeding with the sale of lots permitted by the BCC decision in Plaintiffs' favor. [RP 0003] As a result of the Notice of Lis Pendens being filed, several lot sales were cancelled by purchasers, and Plaintiffs were unable to effectively market the property, because the Notice of Lis Pendens clouded Plaintiffs' title to the real estate. [RP 0004]

Plaintiffs filed a complaint against Defendants William J. Patterson, III, James Lawrence Sanchez, and James Lawrence Sanchez Trial Lawyer, P.C. in February of 2008 for damages caused by Defendants' filing the Notice of Lis Pendens that clouded Plaintiffs' title and interfered with Plaintiffs' ability to sale lots in their subdivision. [RP 0001-0008] Defendants moved for judgment on the pleadings or, alternatively, for summary judgment. [RP 0052-0061] Defendants' motion was granted and Plaintiffs' claims were dismissed, giving rise to this appeal. [RP 0111, 0113]

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

Plaintiffs obtained preliminary subdivision plat approval of their land, the Wild Horse Mesa Subdivision, from the BCC in November of 2006. Plaintiffs were subsequently granted final plat approval by the BCC and recorded their subdivision plat on May 18, 2007. [RP 0002] Defendant Patterson resides in Sandoval County but has no title to, or ownership interest in, any part of Plaintiffs' land. [RP 0002, 0098]

On December 4, 2006, Defendant Patterson and his lawyer, Defendant Sanchez, and Sanchez's professional corporation filed a notice of appeal regarding Plaintiffs' preliminary plat approval by the BCC with the district court (the "Administrative Appeal"). [RP 0003] However, while pursuing the

Administrative Appeal, Defendants never sought a judicial order staying the effect of the BCC's preliminary approval of Plaintiffs' subdivision plat. [RP 0003] With no judicially granted stay in effect, the subdivision process proceeded to final approval of Plaintiffs' subdivision plat on May 18, 2007. [RP 0002-0003] Approximately five hours after the recording of the approved final plat of Plaintiffs' subdivision, Defendants prepared a Notice of Lis Pendens identifying the Administrative Appeal and recorded it against Plaintiffs' subdivision with the real property records of the Clerk of Sandoval County. [RP 0003-0004, 0018]

Prior to Defendants' recording the Notice of Lis Pendens, Plaintiffs had negotiated several lot sales within the Wild Horse Mesa Subdivision, and had expended money and labor in marketing the subdivision lots for sale, as permitted by the BCC decision granting subdivision plat approval. [RP 0004] In preparation for closing on the lot sales, the title company identified the Notice of Lis Pendens as a cloud on Plaintiffs' title to the real estate and reported on the title commitments that release of the Notice of Lis Pendens would be required to furnish marketable title to proposed purchasers. [RP 0004] As a result, the pending sales were canceled by the purchasers. [RP 0004]

Plaintiffs sued Defendants, alleging that Defendants' recording the Notice of Lis Pendens constituted malicious abuse of process and *prima facie* tort. [RP

0001-0008]¹ Plaintiffs asserted that, but for Defendants' filing the Notice of Lis Pendens, Plaintiffs' lot sales would have proceeded without impediment, and that the pendency of the Administrative Appeal alone did not bar lot sales. [RP 0004] Plaintiffs further claimed that, instead of filing the Notice of Lis Pendens, Defendants should have pursued the stay provisions of Rule 1-074(S) NMRA (2007)² expressly relating to administrative appeals, which require the appealing party meet certain requirements to stay enforcement of an agency decision. [RP 0003] Plaintiffs contended that Defendants' filing of the Notice of Lis Pendens improperly circumvented Rule 1-074(S) provisions, which included vesting the district court with authority to require the posting of a bond or other security to protect the non-appealing real party-in-interest from any loss or damage during the pendency of the appeal. [RP 0003] Plaintiffs asserted that Defendants' purpose and intent in filing the Notice of Lis Pendens was to impede or stop lot sales within the Plaintiffs' subdivision without the need to post a bond or other security, and/or to otherwise improperly disparage, harass, or cause damages to Plaintiffs. [RP 0004-0008]

¹ Plaintiffs' Complaint also included a count for slander of title [RP 0004-005], but Plaintiffs are not appealing the dismissal of that claim.

² Rule 1-074 NMRA (2007) was amended effective December 15, 2008. The version of Rule 1-074(S) in effect prior to that amendment applies to this appeal.

Defendants admitted filing the Notice of Lis Pendens and recording it with the Clerk of Sandoval County. [RP 0018] Defendants asserted that the Administrative Appeal was brought pursuant to NMSA 1978, § 47-6-15 and NMSA 1978, § 39-3.1.1, but denied that the Administrative Appeal was governed by Rule 1-074 NMRA. [RP 0019]

Defendants thereafter moved for judgment on the pleadings or, alternatively, for summary judgment, arguing that Plaintiffs' complaint failed to state a claim for which relief could be granted. [RP 0052-62] At the conclusion of the briefing, the district court granted Defendants' motion without hearing. [RP 0111] The district court held that the Administrative Appeal taken by Patterson "affected title to Plaintiffs' real estate," and, as a result, "the notice of lis pendens did not record or publish matter which was untrue about Plaintiff's (*sic*) real estate, Defendants did not act improperly by filing the notice of lis pendens and were reasonably justified under the circumstances to file the notice of lis pendens." [RP 0111] The district court entered judgment for Defendants and dismissed all counts of Plaintiffs' Complaint with prejudice. [RP 0111] Plaintiffs timely filed their notice of appeal [RP 0113] and this matter was assigned to the General Calendar.

III. ARGUMENT

A. **Because Patterson Had No Title Or Present Interest In Plaintiffs' Real Estate, Defendants' Filing The Notice Of Lis Pendens Was Improper And Circumvented The Judicial Oversight Provided Under Rule 1-074(S) NMRA For Staying An Agency Decision During An Administrative Appeal**

1. **Preservation of issue and standard of review**

This issue was preserved in the court below by Plaintiffs' response brief opposing Defendants' motion. [RP 0084-0085, 0087-0088]

Defendants moved for judgment on the pleadings for failure to state a claim or, alternatively, for summary judgment. [RP 0052] The only materials submitted by Defendants outside the pleadings were a copy of the Notice of Lis Pendens they had filed and the district court's decision from the Administrative Appeal. [RP 0059-0062] When matters outside the pleadings are presented to the district court and are not excluded for purposes of a motion to dismiss, the motion should be treated as one for summary judgment. Dunn v. McFeeley, 1999-NMCA-084, ¶ 11, 127 N.M. 513, 516.

Summary judgment is proper only when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Gormley v. Coca-Cola Enters., 2005-NMSC-003, ¶ 8, 137 N.M. 192, 194. On appeal, the Court examines, *de novo*, whether the movant is entitled to judgment as a matter of law.

Id. When reviewing a district court's grant of summary judgment, the appellate court "views the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party." Id. (quoted authority omitted).

However, Defendants' submissions outside the pleadings were irrelevant to the motion before the district court. Because Defendants had admitted to filing the Notice of Lis Pendens in their Answer [RP 0018], attaching a copy of the actual Notice of Lis Pendens was superfluous. Despite its title, the order's language indicates that the district court was concluding Plaintiffs had failed to state a legal claim for relief under the allegations in the Complaint. [RP 0111] The eventual outcome of the Administrative Appeal decision was wholly irrelevant to Plaintiffs' claims that Defendants' improper filing of the Notice of Lis Pendens was a malicious abuse of process or constituted a *prima facie* tort, which caused Plaintiffs harm for which they are entitled to compensatory and punitive damages.

For these reasons, Plaintiffs assert that Defendants' motion should be treated as a motion to dismiss for failure to state a claim. Accordingly, the more appropriate standard of review is whether Plaintiffs are entitled to relief under any state of facts provable under their claims for malicious abuse of process and/or *prima facie* tort. Dunn, at ¶ 10, 127 N.M. at 516.

2. Patterson had no legal standing to support filing the Notice of Lis Pendens against Plaintiffs' property because he did not have or assert any present interest affecting title to Plaintiffs' real estate

Under New Mexico's lis pendens statute, a notice of lis pendens may only be recorded by litigants in "actions ... affecting the title to real estate." NMSA 1978, § 38-1-14 (1965); see also Resolution Trust Corp. v. Binford, 114 N.M. 560, 567, 844 P.2d 810, 817 (1992) (noting that filing a notice of lis pendens is authorized only in actions "affecting the title to real estate in this state."); Superior Constr., Inc. v. Linnerooth, 103 N.M. 716, 719, 712 P.2d 1378, 1381 (1986) ("[A] notice of lis pendens may be properly filed *only if plaintiff pleads a cause of action* which involves or affects the title to, or any interest in or a lien upon, specifically described real property.") (Emphasis added and quoted authority omitted).

A notice of lis pendens is designed to provide constructive notice to subsequent purchasers and encumbrancers of litigation affecting title to real property. Title Guar. and Ins. Co. v. Campbell, 106 N.M. 272, 277, 742 P.2d 8, 13 (Ct. App. 1987). "If judgment is in favor of the one filing the notice, *the rights of that party* relate back to the date of the notice. Id. (Emphasis added and citation omitted). Thus, the notice is intended to preserve the property rights in existence

at the time the litigation commences, but does not create new or additional property rights.

For these reasons, to be eligible to record a lis pendens notice on a piece of real property, the party recording the notice must assert a present claim to the property's title or have some other present interest in the subject property. See 14 Richard R. Powell, *Powell on Real Property* § 82A.01[2], at 6 (M. Wolf ed., 2000) [hereinafter "Powell"]. "[P]ublic policy [underlying a lis pendens notice] requires that the property interests existing at the time the court action is initiated be preserved until the court's judgment can be enforced in favor of the prevailing party." Id.

Patterson never asserted that he had a present claim of title to Plaintiffs' property at any point during the administrative proceedings or Administrative Appeal. Indeed, Patterson admitted his lack of any ownership claim or interest in the real estate. See RP 0098 ("Defendant Patterson has never made a claim to any ownership interest in Plaintiffs' property") Patterson simply had no standing as a person with any actual or purported interest in title to Plaintiffs' real estate to support Defendants' filing the Notice of Lis Pendens that clouded the title.

Nor did Patterson have some other "present interest" in Plaintiffs' real estate to provide legal grounds for filing the Notice of Lis Pendens. In the recent

case of U.S. v. Jarvis, 499 F.3d 1196 (10th Cir. 2007), the federal government had filed a notice of lis pendens against the defendant's properties in a forfeiture action before obtaining any order of conviction. The properties were "substitute assets", that is, property that neither comprises the fruits of, nor is connected to, the defendant's alleged crime. The Tenth Circuit Court of Appeals construed New Mexico's lis pendens statute and found that the government had no interest in the title to, or a claim upon, the defendant's properties at the time it filed the notices of lis pendens, but only a potential and speculative future interest. Accordingly, the lis pendens notices were ordered removed. Jarvis, 499 F.3d at 1204-1206.

Defendant Patterson had even less interest in Plaintiffs' properties than the potential and speculative future interest the government had in the properties at issue in Jarvis. Regardless of the outcome, Patterson's Administrative Appeal would never ripen to a claim against Plaintiffs' title. Even a decision in Patterson's favor that the BCC erred in the manner in which it approved Plaintiffs' subdivision plat application would not affect title to Plaintiffs' real estate within the meaning and purpose of the lis pendens statute.

Plaintiffs' purpose in seeking preliminary and final subdivision plat approval was to obtain permission for subdividing their property into smaller lots or parcels under the New Mexico Subdivision Act, NMSA 1978, § 47-6-1 *et seq.*

(1995). The Subdivision Act grants counties broad regulatory power over approval of subdivisions to ensure that planned development is regulated by the applicable governmental entities. McGarry v. Scott, 2003-NMSC-016, ¶ 8, 134 N.M. 32, 35.

Plaintiffs prevailed in the subdivision approval process before the BCC, obtaining both the preliminary plat approval that was the subject of the Administrative Appeal and final plat approval. As the prevailing party before the BCC in both proceedings, Plaintiffs were lawfully entitled to proceed with selling lots in their subdivision at the time Defendants recorded the Notice of Lis Pendens.

Although the Subdivision Act contains remedies for violation of its provisions, Patterson's general standing as a member of the public challenging a land use decision by the BCC does not fall within the categories of persons entitled to seek those remedies. See e.g., NMSA 1978, § 47-6-23 (1996) (providing that a purchaser, lessee or other person acquiring an interest in the subdivided land has a right of personal inspection of subdivided land within six months of acquiring that interest, with right of rescission); NMSA 1978, § 47-6-27.1 (1996) (stating that sales, leases or other conveyances of land subject to the Subdivision Act within subdivisions which have not been approved by the board of county commissioners are voidable at the option of the purchaser, lessee or other person acquiring an

interest in the subdivided land, and such parties are also entitled to bring an action for actual damages and/or specific performance).

Patterson's general grievance as a member of the public challenging, via administrative appeal, the BCC's land use decision approving Plaintiffs' property for subdivision development, did not constitute a legal claim to, or interest in, Plaintiffs' land to vest Patterson with the right to file a Notice of Lis Pendens against the property. Although Plaintiffs have not located any New Mexico authority directly addressing the propriety of lis pendens in connection with appeals of land use decisions, courts from other jurisdictions have held that challenges to land use decisions asserted by members of the public having no claim or interest in the subject property are insufficient to sustain a lis pendens filing.

One such case was Moseley v. Superior Court, 223 Cal. Rptr. 116 (Cal. Ct. App. 1986). Moseley involved an action filed by a taxpayer and a low- and moderate-income renters' and potential first-time home purchasers' association to repeal a county Board of supervisors' lifting of resale controls on publicly financed units. Like Patterson, the Moseley petitioners had no direct claim of ownership or possession to the property at issue. 223 Cal. Rptr. at 118. The California appellate court noted the potential for abuse inherent in the use of lis pendens because it clouds the record title of affected property for the duration of the lawsuit and can

be used as leverage to force settlement for reasons having no relationship to a party's claim. Id. at 119. Moseley rejected the petitioners' proposed expansive application of the lis pendens statute and upheld expungement of a notice of lis pendens against the condominium units because the petitioners had no claim affecting an interest in the property. Id.

In McCarthy v. Hurley, 510 N.E. 2d 779 (Mass. Ct. App. 1987), Hurley sued to overturn a planning board's approval of a subdivision plan for a parcel of land abutting his own and filed a notice of lis pendens in connection with that suit. In a separate action filed by McCarthy to have the lis pendens vacated, the Appeals Court of Massachusetts reversed the trial court's denial of the motion to vacate lis pendens holding that, because Hurley asserted no interest in the subject property or any right to use or occupy it, he was not entitled to file a lis pendens. McCarthy, 510 N.E.2d at 781. The Massachusetts court noted that lis pendens was not justified merely because the subdivision control litigation may have a significant practical effect on the way in which McCarthy or any subsequent owner of the property may use it. Id. Hurley's lack of a claim of ownership or right to personally use or occupy the property still barred the lis pendens. Id.

Patterson's standing in the Administrative Appeal was, at most, as an "interested person" and resident of Sandoval County. See NMSA 1978, § 47-6-14

(1996) (providing "interested persons" the right to participate in public hearings on preliminary plats). Even if "interested persons" under § 47-6-14 is construed to include any member of the public for purposes of participating in public hearings, Title Guar. and Ins., Jarvis, Moseley, and McCarthy demonstrate that such participation would not give rise to a sufficient legal interest in the subject property to also give members of the general public lis pendens rights against property owners seeking subdivision plat approval.

Patterson asserted no ownership or possessory interests in Plaintiffs' land in the administrative proceedings and could not obtain any such interests via the administrative appeal process. Accordingly, he did not have a present claim to the property's title or some other present interest in Plaintiffs' property. Defendants' filing the Notice of Lis Pendens was improper and caused damages for which Plaintiffs properly pleaded claims for relief.

3. Defendants' filing the Notice of Lis Pendens effectively stayed the agency decision without meeting Rule 1-074(S) requirements and undermined the judicial oversight provided by the rule

This issue was preserved in the court below by Plaintiffs' response opposing Defendants' motion. [RP 0082-0083]

Patterson's pursuit of the Administrative Appeal did not automatically stay or prohibit lot sales pending decision on appeal. However, when Defendants filed the Notice of Lis Pendens, they clouded the title to Plaintiffs' property and interfered with Plaintiffs' ability to sell lots. [RP 0004]; see also Ruiz v. Varan, 110 N.M. 478, 479, 482, 797 P.2d 267, 268, 271 (1990) (wrongful filing of lis pendens constituted cloud on title). Defendants' conduct effectively stayed the agency decision during appeal without Defendants obtaining a judicial stay pursuant to Rule 1-074(S), which expressly governed the Administrative Appeal.

Rule 1-074(S) (2007) NMRA provided specific requirements governing Patterson's ability to stay the BCC's decision in Plaintiffs' favor on their application for subdivision plat approval:

A party appealing a decision or order of an agency may petition the district court for a stay of enforcement of the order or decision of the agency. Upon notice and hearing, the district court may grant a stay of enforcement of the order or decision of the agency upon showing by the appellant that:

- (1) it is likely that the appellant will prevail on the merits of the appeal;
- (2) the appellant will suffer irreparable harm unless a stay is granted; and
- (3) no substantial harm will result to other interested persons or the public if a stay is granted.

As a condition of granting a stay, the court may require the posting of a surety or other bond sufficient to assure the payment of any amount that may be owed to a party upon final determination of the appeal.

Defendants ignored Rule 1-074(S)'s express provisions and, instead, filed the

Notice of Lis Pendens. By doing so, Defendants deprived Plaintiffs of the judicial oversight protections afforded by Rule 1-074(S) and circumvented the power vested in the district court for determining whether a stay of the BCC's decision was proper and could be entered.

Rule 1-074(S)'s requirement of a judicial order to stay the BCC's preliminary plat approval is consistent with New Mexico's well-established policies of deferring to administrative agencies' decisions within the scope of their expertise, and avoiding placing courts in the position of micro-managing land use decisions of local governmental bodies. See Paule v. Santa Fe County Bd. of County Comm'ns, 2005-NMSC-021, ¶16, 138 N.M. 82, 88 (noting deferential standard of review afforded to decisions of administrative bodies like a board of county commissioners and recognizing that the standard reflects a respect for the governing body's legislative function).

Regardless of what showing, if any, Defendants could have made as to Patterson's likelihood of success on the merits in the Administrative Appeal, by filing the Notice of Lis Pendens, Defendants avoided Rule 1-074(S)'s other critical burdens of establishing "irreparable harm" to Patterson unless a stay was entered and no substantial harm to Plaintiffs if a request for stay was granted. The "irreparable harm" standard is a high burden to meet as noted in injunction cases.

“Injunctions are harsh and drastic remedies which should issue only . . . where there is a showing of irreparable injury for which there is no adequate and complete remedy at law.” Padilla v. Lawrence, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct. App. 1984). “The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm.” State ex. rel. State Highway and Transp. Dept. v. City of Sunland Park, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 157 (quoted authority omitted).

Defendants clearly could not have met the “irreparable harm to the appellant” element under Rule 1-074(S) given that Patterson was not asserting any title to, or ownership or possessory interest in, Plaintiffs’ land and was not even an abutting landowner to the subdivision property. Neither could Defendants have shown the absence of any substantial harm to Plaintiffs who would certainly suffer financial injury if enjoined from proceeding with sales of lots in their approved subdivision. Moreover, had the district court been inclined to enter a stay in the Administrative Appeal, it would have been authorized to require the posting of a bond or security by Patterson to protect Plaintiffs against financial losses incurred via the stay. See Allied Eastern Financial v. Goheen Enterprises, 71 Cal. Rptr. 126, 127-28 (Cal. Ct. App. 1968) (characterizing the filing of a notice of *lis pendens* when the action did not affect title or possession of real property as a

“practical blackjack”, enabling a recording party to secure much of the benefit of attachment without meeting the protective requirement of a bond).

Plaintiffs alleged that Defendants made a calculated decision to cloud Plaintiffs’ title by recording the Notice of Lis Pendens, thereby effectively “staying” the BCC decision approving Plaintiffs’ subdivision plat while avoiding the burdens of proof, judicial control, and bonding issue under Rule 1-074’s stay provisions. [RP 0002-0004] Defendants’ conduct undermined the purposes and policies served by Rule 1-074(S) – a court rule that directly governs how an administrative decision appellant may seek to stay enforcement of an agency decision. Under the circumstances, the district court erred in holding that Patterson’s Administrative Appeal affected title to Plaintiffs’ land to support Defendants’ filing the Notice of Lis Pendens and by entering judgment against Plaintiffs in concluding they had failed to state grounds for relief against Defendants.

B. Plaintiffs’ Complaint stated a cognizable claim for malicious abuse of process based on Defendants’ improper filing of the Notice of Lis Pendens

This issue was preserved in the court below by Plaintiffs’ response brief opposing Defendants’ motion. [RP 0085-0086, 0088-0089]

The elements of malicious abuse of process include:

(1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages. The second element -- misuse of process -- can be shown in one of two ways: (1) filing a complaint without probable cause, or (2) an irregularity or impropriety suggesting extortion, delay, or harassment.

(Internal quotes omitted). Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶ 12, 142 N.M. 150, 154 (quoted authority omitted).

New Mexico case law specifically recognizes the applicability of a malicious abuse of process claim in the context of wrongful filing of a notice of *lis pendens*. See, e.g., Ruiz v. Varan, 110 N.M. 478, 480, 797 P.2d 267, 269 (1990) (stating “we have specifically said that the wrongful filing of a notice of *lis pendens* may support an action for abuse of process.” (citing Superior Construction, Inc. v. Linnerooth, 103 N.M. 716, 720, 712 P.2d 1378, 1382 (1986))). See also Chapman v. Varela, 2008-NMCA-108, ¶¶ 53-54, 191 P.3d 567, 584-85 (upholding verdict on malicious abuse of process claim for filing of notice of *lis pendens* in a will contest proceeding).

Plaintiffs alleged that Defendants initiated the process by recording the Notice of *Lis Pendens*, that the use of this particular process was improper and was intended to accomplish an illegitimate end, and that Plaintiffs suffered damages in the form of lost sales resulting from Defendants’ improper filing of the Notice of

Lis Pendens. [RP 005-0006] Thus, Plaintiffs sufficiently stated allegations that would support a cause of action for malicious abuse of process under New Mexico law.

Moreover, by erroneously ruling that the Administrative Appeal “affected title” to Plaintiffs’ property, the district court prematurely decided the case on an insufficient record. Summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determining the central legal issues involved. Nat’l Excess Ins. Co. v. Bingham, 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct. App. 1987).

The district court entered judgment on the legal sufficiency of Plaintiffs’ malicious abuse of process claim without any evidence in the record from which it could find the absence of improper motive or intent. Defendants submitted no affidavits in support of their motion. No discovery in the case had even been completed. The only relevant record before the district court was Plaintiffs’ Complaint alleging that Defendants willfully filed the Notice of Lis Pendens to improperly bypass the stay procedures of Rule 1-074(S) and caused injury to Plaintiffs. [RP 0002-0006, 0082-0083]

The issue of misuse of process through an irregularity or impropriety suggesting extortion, delay, or harassment raises issues of motive or intent which is

not generally susceptible to determination on summary judgment. See Santillo v. N.M. Dept. of Public Safety, 2007-NMCA-159, ¶¶ 22-28, 143 N.M. 84, 91-92 (summary judgment dismissing malicious abuse of process action reversed and remanded for factual determination of defendant's motive in arresting plaintiff under procedural impropriety claim). Plaintiffs' malicious abuse of process claim was improperly dismissed on the record before the district court, particularly given that Plaintiffs were entitled to having all inferences of fact viewed in their favor. See Gormley, 2005-NMSC-003, ¶ 8, 137 N.M. at 194 (when reviewing a district court's grant of summary judgment, the appellate court "views the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party"); see also Pollard v. Westinghouse Elec. Corp., 119 N.M. 783, 785, 895 P.2d 683, 685 (Ct. App. 1995) (recognizing that summary judgment is inappropriate where the facts are reasonably susceptible to different inferences); S. Union Gas Co. v. N.M. Pub. Utility Comm'n, 124 N.M. 176, 184, 947 P.2d 133, 141 (1997) (in reviewing ruling on a motion to dismiss, the appellate court must accept all of the plaintiff's material factual allegations as true and view them, and all reasonable inferences therefrom, in the light most favorable to the plaintiff).

C. The district court erred in entering judgment against Plaintiffs on their claim for *prima facie* tort because Defendants did not move for judgment on that claim and Plaintiffs had stated a viable *prima facie* cause of action

Defendants' Motion to Dismiss was directed only to Plaintiffs' claims for slander of title and malicious abuse of process. Defendants did not address Plaintiffs' *prima facie* tort claim and, in fact, acknowledged that the *prima facie* tort claim was not within the scope of their motion. [RP 052-062, 0102] However, the district court granted summary judgment dismissal of all counts of Plaintiffs' Complaint. [RP 0111]

Rule 1-007.1(A) NMRA provides that all motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought. Rule 1-007(B)(1) NMRA similarly states that motions shall state with particularity the grounds therefor, and shall set forth the relief or order sought. These rules reflect a fundamental element of procedural due process: that, in motion practice, a litigant be given adequate notice of the claims or issues to be decided and an opportunity to be heard. Nat'l Excess Ins. Co., 106 N.M. at 327-28, 742 P.2d at 540. The district court improperly ruled on a matter that was outside the scope of the motion before it

despite acknowledgment by both Plaintiffs and Defendants that Plaintiffs' Third Cause of Action, *prima facie* tort, was not the subject of Defendants' motion.

The court also erred in dismissing the claim because Plaintiffs sufficiently stated a cause of action for *prima facie* tort in their complaint. *Prima facie* tort has been recognized as a cause of action for intentional torts that do not fit within the rigid contours of commonly accepted torts. See Schmitz v. Smentowski, 109 N.M. 386, 396, 785 P.2d 726, 736 (1990). To recover for this tort, a plaintiff must establish that the defendant intentionally committed a lawful act with injurious intent and injurious result, and that the act was done without sufficient justification. Id. at 394, 785 P.2d at 734. Balancing the intent to injure the defendant against both the justification for the injurious act and the severity of the injury is a necessary step in determining whether a *prima facie* tort has been committed. Lexington Ins. Co. v. Rummel, 1997-NMSC-043, ¶ 11, 123 N.M. 774.

Patterson admitted that he intentionally filed the Notice of Lis Pendens against Plaintiffs' property. [RP 0098] Because Patterson lacked any present claim of title or interest in Plaintiffs' property, Defendants acted without justification in clouding Plaintiffs' title to their real estate. Defendants' requisite injurious intent could be inferred from their conduct in bypassing the stay

provisions of Rule 1-074(S) NMRA that govern administrative appeals and the attendant burdens of proof they could not have met.

On this record, if the district court found the tort of malicious abuse of process was not supported, then *prima facie* tort would apply. “We also accept the view ... that *prima facie* tort may be pleaded in the alternative; however, if at the close of the evidence, plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted to the jury on that cause and not under *prima facie* tort.” Schmitz, 109 N.M. at 396, 785 P.2d at 736. Plaintiffs sufficiently pleaded *prima facie* tort in the alternative to their claim for malicious abuse of process [RP 0006], and it was improperly dismissed by the district court.

IV. CONCLUSION

Defendants unjustifiably clouded Plaintiffs' title by filing the Notice of Lis Pendens because Patterson had no present or potential claim of ownership, possession, or other interest in Plaintiffs' subdivision property based on Patterson's pursuit of an administrative appeal from the agency decision approving Plaintiffs' subdivision plat application. Therefore, the district court erred in concluding, as a matter of law, that Patterson's administrative appeal affected title to Plaintiffs' real estate and supported Defendants' filing the Notice of Lis Pendens.

Moreover, Defendants' conduct completely circumvented governing rule, and effectively nullified Rule 1-074(S)'s procedural safeguards, balancing of interests, and related judicial oversight. Defendants used the *lis pendens* to obtain a "stay" of the agency decision without establishing that Patterson could meet the Rule 1-074(S) requirements for entry of a valid stay via court order.

Plaintiffs stated legal grounds for relief under the theories of malicious abuse of process and *prima facie* tort. The district court erred in granting summary judgment on all claims in Plaintiffs' Complaint. For all the foregoing reasons, the district court's order granting judgment on Plaintiffs' claims for malicious abuse of process and *prima facie* tort should be reversed.

Respectfully submitted,

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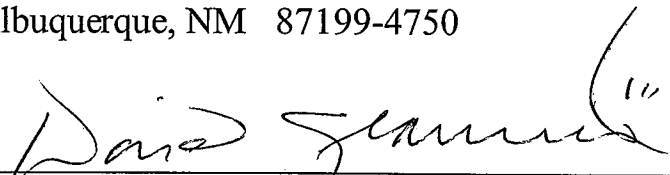
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief in Chief of Appellants High Mesa General Partnership, Jon McCallister, David W. Harper, and Placitas, Inc.* was mailed to the following persons on January 5, 2009:

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