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

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

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I. ARGUMENT

A. Standard of Review.

The appropriate standard of review is that accorded a motion to dismiss for failure to state a claim. *Appellants' Brief In Chief,* Point A. 1. Appellees argue that a summary judgment standard of review should be applied [*Answer Brief of Sanchez,* p. 6; *Answer Brief of Patterson*, pp, 5. 9-10]; but that overlooks the record and posture of the case in the court below. First, the court ruled on Appellees' motion which was couched as a motion for judgment on the pleadings or, alternatively, for summary judgment. [RP 0052-0061] Second, the court below did not so much as hold a hearing on the motion. Third, as Appellants pointed out to the court below, the motion did not meet the requirements of a motion for summary judgment as it failed to include the numbered statement of alleged undisputed facts with citations to the record mandated by Rule 1-056(D)(2) NMRA. *Cf.* Richardson v. Glass, 114 N.M. 119, 835 P.2d 835 (1992). Appellee Patterson's attempt to raise factual issues numbered as required by Rule 1-056 NMRA in his Reply was too late, as no sur-reply was permitted. Thus, on issues of fact there was no sufficient showing to support a motion for summary judgment. "Summary judgment should not be granted when material issues of fact remain or when the facts are insufficiently developed for determination of the

central issues involved." Vieira v. Estate of Cantu, 1997-NMCA-42, ¶17, 123 N.M. 342. Until the movant makes a prima facie showing of entitlement to summary judgment, the nonmoving party need not make any showing as to factual issues. Steadman v. Turner, 84 N.M. 738, 740, 507 P.2d 799 (Ct. App. 1973); *see* Brown v. Taylor, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995). Finally, the court's ruling, while titled as a summary judgment, did not contain any findings of fact or statement of reliance on evidentiary matters as a reason for its ruling; rather, it made a legal conclusion that the Appellees' administrative appeal "affected titled (*sic*) to Plaintiff's property" and they were reasonably justified in recording a notice of lis pendens. [RP 0111] Therefore, the appropriate standard of review is as stated in Appellants' Brief in Chief – the standard applicable to a motion to dismiss, which is whether Plaintiffs are entitled to relief under any state of facts provable under their claims for malicious abuse of process ["MAP"] and/or *prima facie* tort. *Brief in Chief*, p. 7.

B. Appellants' not asking the district court hearing the administrative appeal to quash the lis pendens is not relevant in this case.

Appellees claim Appellants should have asked the district court hearing the administrative appeal to review the lis pendens and apply for its cancellation under Sec. 38-1-15 NMSA 1978, implying that failure to ask that court to "unshoot the

gun" somehow affects Appellants' right to sue for improper filing of the lis pendens in the present case. This argument reveals a confusion about the claims being made in the present case. If this Court were being asked to review the administrative appeal decision by the district court on a petition for certiorari review, then the Appellees' argument might be relevant to contend that Appellants had, perhaps, waived the right to seek review regarding how the filing of the lis pendens affected that administrative appeal. However, in the present case, this Court is not acting as a court of review on an administrative appeal. Instead, this case is an independently filed action asserting claims that Appellees' use of the lis pendens was legally improper and caused damages for which Appellants are entitled to compensation. It is entirely irrelevant to the present appeal that Appellants did not petition the administrative appeal court to lift the lis pendens.

Appellees criticize Appellants for not petitioning the district court to lift the lis pendens during the administrative appeal, but overlook the fact that the statute they cite, Sec. 38-1-15 NMSA 1978, permits any "person injured" to apply for cancellation of the lis pendens "at any time **after** the action shall be settled ..." (emphasis supplied). Thus, it appears the cited statute does not contemplate an application for cancellation until the case is concluded. Further, Appellees fail to advise this Court that they brought the administrative appeal on December 4,

2006, but did not record the notice of lis pendens until May 18, 2007, tellingly, just hours after Appellants recorded the subdivision plat with its final approval. Nor do they advise this Court that they did not serve a copy of the lis pendens on the Appellants in the underlying proceeding. The lis pendens bears no certificate of service. RP 0060. Appellants learned the lis pendens had been filed only weeks later, when a title company discovered it and listed it on title commitments, requiring its release as a condition to insuring Appellants' pending lot sales. *Complaint*, ¶17, RP 0004. On this record, Appellees have no room to argue that Appellants should have sought relief in the underlying action. Rather, the timing, the circumstances, and Appellees' secrecy in Appellees' filing the lis pendens – as well as their intentional disregard of the available stay procedure under Rule 1-074(S) NMRA – all support an inference of "an irregularity or impropriety suggesting extortion, delay, or harassment", a key element of malicious abuse of process. Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶ 12, 142 N.M. 150, 154.

C. Wrongful filing of a lis pendens may be subject to a "privilege" for slander of title purposes; it still constitutes malicious abuse of process and the trial court erred in dismissing the case.

Appellees rely on Superior Constr. Inc. v. Linnerooth, 103 N.M. 716, 712 P.2d 1378 (1986) for its holding that the filing of a lis pendens is absolutely

privileged and cannot support an action for slander of title. *Answer Brief of Sanchez,* pp. 6-7. The Appellants' slander of title claim was dismissed and is not being pursued by Appellants, see *Brief in Chief*, p. 4, fn. 1. But Linnerooth expressly recognized that persons who have been wronged by a filing of a notice of lis pendens may sue for abuse of process. Linnerooth, 103 N.M. at 720. In Ruiz v. Varan, 110 N.M. 478, 797 P.2d 267 (1990), the court upheld a damages award for abuse of process based on wrongful filing of a notice of lis pendens. The malicious abuse of process claim brought by Appellants is based on the current formulation of the previously separate and now combined torts of abuse of process as referred to in Linnerooth and malicious prosecution. *See* DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277 (filed 1997), abrogated on other grounds by Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶¶ 19-21, 142 N.M. 150, 164 P.3d 31. Accordingly, Linnerooth does not provide Appellees any comfort. Their argument of privilege for statements made in connection with judicial proceedings will not shelter the malicious abuse of a notice of lis pendens. The argument of Appellee Sanchez that "all of the claims fail as a matter of law if the underlying action upon which the notice of lis pendens is based does in fact affect the title to real property in New Mexico" (*Answer Brief of Sanchez,* p. 7) is thus a misstatement of the law

and blatantly disregards the express language of Linnerooth and Varan.

D. Appellees' lack of a claim of title means the underlying case did not "affect title to real property"; accordingly, the recording of the notice of lis pendens was wrongful.

The requirement of a showing of a claim of interest in land by a party filing a notice of lis pendens (whether ultimately successful or not) is implicit – it is the basis for notices of lis pendens in the first place. As noted in Appellants' *Brief in Chief*, p. 8, the purpose of the notice is to provide constructive notice to subsequent purchasers and encumbrancers of litigation affecting title to real property, and "(i)f judgment is in favor of the one filing the notice, the rights of that party relate back to the date of the notice." Title Guar. and Ins. Co. v. Campbell, 106 N.M. 272, 277, 742 P.2d 8, 13 (Ct. App. 1987).

New Mexico Courts have recognized that damages are available in New Mexico for the tort of abuse of process where a lis pendens is recorded but a "claim of title was never involved in the litigation"). Ruiz v. Varan, 110 N.M. 478, 479, 480, 797 P.2d 267, 268, 269 (1990).

Appellees do not contend, nor can they, that Appellee Patterson has or claims any interest in, or title to, the Appellants' property. Nor is there any claim that any rights of Patterson in the Appellants' property would be affected by his appeal of the preliminary plat approval. Appellees therefore fall back on a general

discourse on the New Mexico Subdivision Act and how plats of subdivisions can include easements, which are a species of real property interest (no rights to which were claimed by Appellee in any event). This wildly expansive interpretation of the lis pendens statute, unrestricted by a requirement that the litigant have or claim a right or interest in the property, would permit anyone, including persons or organizations with no connection whatsoever to the parcel of land for which subdivision approval is sought, to wreak havoc with land use decisions by local governments by simply filing a notice of lis pendens while an administrative appeal is pending. Nor, under this interpretation, would the person filing the notice of lis pendens have to be the appellant or even a party to the administrative appeal. Appellees' argument, taken to its logical conclusion, would permit anyone to file a notice of lis pendens any time there is any dispute about any interest in land. Appellees' interpretation would give officious intermeddlers free rein to throw a wrench in administrative appeal proceedings without consequence.

The lis pendens statute and underlying lis pendens doctrine are based on a practical need to bind third parties claiming an interest in property to the outcome of the pending litigation and thus protect the litigants' rights. Richard R. Powell, Powell on Real Property § 82A.01[2], at 5-6. (M. Wolf Ed., 2000). There is no policy reason to permit strangers to the title to file a lis pendens, for they have no

rights in the property to protect. This requirement for one filing a notice of lis pendens to claim an interest in the property goes to the standing of a party to bring litigation in the first place. Administrative appeals generally may be brought only by persons aggrieved by the final decision. Rule 1-074(C) NMRA. Appellees do not plead, and cannot show, any damages to themselves if the approved subdivision plan for Appellants' property were to go forward. With no interest in or claim of title to Appellants' property, Appellees did not and cannot show any direct injury -- their filing of a notice of lis pendens was therefore wrongful.

Appellees attempt to distinguish the authority of McCarthy v. Hurley, 510 N.E. 2d 779 (Mass. App. Ct. 1987), cited by Appellants for the proposition that appeal of a planning board's approval subdivision plan is not a proceeding "affecting the title to land or the use and occupation thereof" within the meaning of the Massachusetts lis pendens statute. Appellees claim the underlying Massachusetts lis pendens statute expressly excluded cases arising under land use statutes from the definition of a proceeding that "affects title" to real property. MGLA Chapter 184, Section 15(f). *Answer Brief of Sanchez*, p. 10. This is incorrect. The cited language was not part of the Massachusetts statute at the time of the McCarthy decision. It only became effective April 1, 2003. Mass. St. 2002, c. 496, § 2. Accordingly, the Massachusetts Court interpreting language similar to

the New Mexico lis pendens statute properly held that while subdivision control litigation may have a significant practical effect on the way in which the present owner or any subsequent owner of the property may use it, the fact that the party appealing the subdivision approval asserted no interest in the subject property or any right to use or occupy it meant that the appellant's filing of the lis pendens was improper. 510 N.E. 2d at 780.

E. An Attorney Is Not Automatically Immune from Liability for Malicious Abuse of Process.

Appellee Sanchez argues that an attorney at law is absolutely privileged to publish defamatory matter concerning another in communication during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. Assuming arguendo that such a rule may bar a claim for slander of title, that claim has been waived and is no longer pursued by the Appellants. Further, the language quoted by Appellee Sanchez from Guest v. Berardinelli, 2008-NMCA-144, ¶ 19, deals with the "probable cause" prong of a MAP claim, not with the "procedural impropriety" prong upon which Appellants rely.

Finally, this Court's decision in Durham v. Guest, 2007-NMCA-144, 142 N.M. 817, relied on in Guest v. Berardinelli, 2008-NMCA-144, *supra*, has now

been reversed by the Supreme Court. See Durham v. Guest, ____-NMSC-____, (No. 30,656, filed February 20, 2009). There, the Supreme Court noted the policy behind recognition of the tort of malicious abuse of process and its underpinnings:

> In any malicious abuse of process claim, the use of process for an illegitimate purpose forms the basis of the tort. See Richardson, 109 N.M. at 502, 787 P.2d at 421 ("Some definite *act* or threat not authorized by the process, or *aimed at an objective not legitimate in the use of the process, is required*[.]" (emphasis added) (quoting W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, Prosser and Keeton on the Law of Torts § 121, 898 (5th ed. 1984)). When the judicial process is used for an illegitimate purpose such as harassment, extortion, or delay, the party that is subject to the abuse suffers harm, as does the judicial system in general. Thus, the malicious abuse of process tort makes **the process abuser** liable to the other party for the harm caused by the abuse of process. See id. at 501, 787 P.2d at 420 (quoting the Restatement (Second) of Torts § 682 (1976)). (Emphasis supplied.)
>
> Durham v. Guest, ____-NMSC-____ (No. 30,656) at ¶ 31.

The plaintiffs Durhams had alleged that the attorney Guest maliciously issued one or more subpoenas for an illegitimate purpose when she sought the Durhams' employment and medical records in violation of a protective order issued by the arbitrators, and for purposes of harassment and coercion. Durham v. Guest, ____-NMSC-____, ¶ 5. The Supreme Court, in reinstating the MAP claim against the attorney, stated "We believe that the use of process in either a judicial or an arbitration proceeding to harass, extort, delay, or for any other illegitimate

end should subject a person to the same civil liability for the resulting harm." Durham, *supra* at ¶ 35.

As the signer and filer of the notice of lis pendens, Appellee Sanchez is the process abuser, as is his professional corporation ratifying his conduct, as is his client ratifying his conduct. This Court has held that "(w)e recognize that an agent may be held individually liable for his own tortious acts, whether or not he was acting for a disclosed principal. *See Restatement (Second) of Agency* § 348 (1958) (agent can be sued in tort for fraud and misrepresentation); *Restatement (Second) of Agency* § 350 (1958) (agent subject to liability for negligence)." Kreischer v. Armijo, 118 N.M. 671, 673, 884 P.2d 827, 829 (Ct. App., 1994). Thus, Sanchez's status as attorney and agent does not and should not insulate him from liability for his own torts.

F. The Subdivision was Approved and Final Plat Approval was Never Stayed – Appellants Showed Damage From Lost Sales.

Appellees argue that Appellants suffered no damage as the subdivision was void. This overlooks the fact that Appellants were granted final plat approval by the Board of County Commissioners for Sandoval County ["BCC"] and recorded their subdivision's final plat on May 18, 2007. [RP 0002]. Appellees did not apply to stay the preliminary plat approval. The sales negotiated by Appellants

could have proceeded without impediment. Also, the underlying action was not an appeal of the final plat approval. Appellees do not claim they obtained a stay of final plat approval. The final plat thus remained valid and approved at all times. In any event, over six (6) months elapsed between filing of the final plat and reversal of preliminary plat approval. Even if appeal of the preliminary plat approval affected the unstayed, unappealed final plat approval (which is not conceded), the lost lot sales could have proceeded. *See* 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). Such lot sales would therefore at most be voidable, not void, and only at the instance of the purchasers, not a stranger like Appellee Patterson.

Further, damages sustained by Appellants on account of the wrongful filing of the lis pendens were specifically pleaded, including lost sales that had been pending at the time of the lis pendens [RP 0004]. New Mexico law sets forth the measure of damages for a real property tort, see Ruiz v. Varan, 110 N.M. 478, 481, 797 P.2d 267, 270 (referring to Uniform Jury Instructions (Civil), 13-1802

(*Measure of damages; general*) and 13-1819 (*Real property*); also noting the power to substitute a "lost use" measure, damages for inability to discharge loan due to breach of contract, interest payments made while attempting to locate buyer for property, and lost use value of investment capital, as well as nominal damages of the kind associated with a trespass). Damages were pleaded and ample authority supports their award.

Appellees claim Appellants did not bring forth evidence of damages, and that failure to do so supports affirmance of the dismissal of the Complaint. The motion filed below did not specifically argue that Appellees were entitled to judgment in their favor simply because Appellants had not suffered any damages. The argument instead was that there were no damages because of the claim the application for subdivision approval was void and therefore the sales were void. This is erroneous, for the reasons cited above. The Appellants obtained approval of their subdivision. The final approved plat was recorded and Appellees did not seek a stay of the BCC's final plat approval during pendency of the appeal of the preliminary plat approval, as they could have under Rule 1-074(S) NMRA. In any event, with or without an approved subdivision, Appellants' title to their entire parcel was clouded. 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).

The argument of lack of evidence of damages is a red herring in the context of this case. As noted at Point A above, the motion filed below was not crafted in a way to engender a Rule 1-056(f) response. Appellees did not offer evidence or provide a statement of material facts supported by evidence in the motion granted by the district court -- they asserted pure legal arguments. For this reason, the review in the present appeal should be under a motion to dismiss standard (taking the facts in a light most favorable to Appellants, did the Complaint state causes of action).

The reversal and remand to the BCC of the preliminary plat approval in November 2007 did not lessen or affect the damages sustained by Appellants prior to that date. To claim that this later court action somehow undid or mitigated the damage caused by wrongful filing of the lis pendens is nonsensical. The damage was done.

G. Appellees' "Probable Cause" Argument Based on Outcome of the Administrative Appeal Misreads the Law of Malicious Abuse of Process; the "Procedural Impropriety" of Wrongful Use of the Notice of Lis Pendens Creates Appellees' Liability.

As stated in Fleetwood Retail Corporation of New Mexico v. Ledoux, 2007-NMSC-47,142 N.M. 150, one element of an MAP claim is an act by the defendant in the use of process other than such as would be proper in the regular prosecution

of the claim. "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 citations omitted)." Fleetwood, *supra* at ¶ 12.

Based on this authority, it is clear that Appellants stated a claim and the misuse of process can be established either by showing the complaint was filed without probable cause or by irregularity of process. Appellees' argument that Appellants had to prove the action was taken without "probable cause" to establish a prima facie case for the MAP claim is flat wrong.

> While a finding in favor of the original plaintiff on any single claim may be an absolute defense to a malicious abuse of process claim based on lack of probable cause, the same is not true for claims founded on procedural impropriety. The procedural impropriety theory of misuse of process retains the broader dimensions of the former tort of abuse of process, which recognizes that "'even in meritorious cases the legal process may be abused.'" *Richardson v. Rutherford*, 109 N.M. 495, 502, 787 P.2d 414, 421 (1990) (*quoting Mills County State Bank v. Roure,* 291 N.W.2d 1, 5 (Iowa 1980)). Unlike lack of probable cause, the existence of a procedural impropriety does not depend on the outcome of the underlying suit, and a verdict in favor of the original plaintiff is not dispositive of the procedural impropriety issue."
>
> Fleetwood, 2007-NMSC-047, ¶ 20, 142 N.M. at 157.

Appellees apparently overlooked this clear language of Fleetwood and the alternate prong of "procedural impropriety".

H. "SLAPP" Suit Claims Unfounded.

Appellants brought this action, not to discourage public participation in public hearings or quasi-judicial proceedings, but to enforce their rights in the face of Appellees' disregard for the procedural requirements of Rule 1-074(S). Sec. 38-2-9.1(E) NMSA provides that "(n)othing in this section limits or prohibits the exercise of a right or remedy of a party granted pursuant to another constitutional, statutory, common law or administrative provision, including civil actions for defamation or ***malicious abuse of process***." (Emphasis added.) That language covers Appellants' remedies too. The statute does not apply.

I. The Trial Court Erred in Dismissing Appellants' Claim *of Prima Facie* Tort

The *prima facie* tort claim was not the subject of the Motion For Judgment on the Pleadings or For Summary Judgment. It was therefore improperly dismissed (*Brief in Chief*, Point C). The Complaint alleged distinct facts different from the malicious abuse of process and (abandoned) slander of title claims, including that Appellees intended that the recording of the Notice of Lis Pendens would cause harm to the Appellants; in the alternative, the Appellees knew with certainty that the recording of the Notice of Lis Pendens would cause harm to the Appellants, actions that were not justifiable under the circumstances [RP 0006-7].

With this different factual predicate, in the event Appellees' conduct is found to be otherwise lawful, relief for their intentional infliction of harm will still be available to Appellants. *See* Guest v. Allstate Insurance Company, ¶ 35, ___-NMCA-___ (No. 27,253 decided 2-19-09).

J. The lis pendens was a blunt instrument, more restrictive than a stay under Rule 1-074(S); it had the effect of a stay without Appellees meeting the prerequisites and was wrongful.

Appellees argue the lis pendens did not stay the plat approval nor evade the requirements of Rule 1-074(S) NMRA, and characterize it as "less restrictive." It is still a cloud on the title, see Point E above. It stopped lot sales. [RP 0004].

Scholars have noted the blunt effect of a lis pendens. Roger Bernhardt, Professor of Law at Golden Gate University, San Francisco, has observed:

> The very convenience of the lis pendens - the ability to merely identify a piece of real estate in a complaint and then record against it – is what has now led it to backfire, and perhaps hurt more than it helps. What has brought about the backlash is that the lis pendens is not only a prejudgment remedy – available before the merits have been decided – it is also a self-help remedy, meaning that no official has taken the slightest look at it before it is recorded. No other litigational step is so easy and so powerful. As we all know, abuse in such cases is tempting and inevitable.
>
> Quoted in DIRT, a service of the American Bar Association Section on Real Property, Probate & Trust Law and the University of Missouri, Kansas City, School of Law. Http://dirt.umkc.edu/April2004/DD_04-13-04.htm (visited 3/10/09).

It is the availability of Rule 1-074(S) relief, with its detailed procedural protections for the real party in interest, and Appellees' intentional sidestepping of that rule, that proves the harassment and injury of the lis pendens.

II. CONCLUSION

When a party appeals an administrative agency decision, Rule 1-074 NMRA establishes the procedure. That rule contains thoughtful, carefully crafted provisions to be followed if the appealing party wants a judicial stay of the agency decision pending appeal. Those provisions require the appealing party to establish likelihood of prevailing on the merits, irreparable harm absent a stay, and no substantial harm to others if a stay is granted. They permit the court to require a bond as a condition of a stay. All these protections were intentionally sidestepped by Appellees, using the "poor man's injunction" of a lis pendens when they had no claim of interest that would affect the title to Appellants' property. They effectively rendered Rule 1-074 NMRA at best optional and at worst moot. This is malicious abuse of process. 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 COMPLIANCE

I hereby certify that in accordance with the provisions of Rule 12-213 NMRA 2009, paragraph F(3), this Brief uses the proportionally-spaced type style Times New Roman and it contains, including the headings, footnotes, quotations and all other text except the cover page, caption, table of contents, table of authorities, signature blocks and certificates, a total of 4,396 words.

_____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Appellants High Mesa General Partnership, Jon McCallister, David W. Harper, and Placitas, Inc.* was mailed to the following persons on March 11, 2009:

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