

CAUSE NO. 495484

ESTAT OF ERNEST § IN THE PROBATE COURT
HEIMLICH, DECEASED § COURT NO. 1
§ HARRIS COUNTY, TEXAS

ANSWER TO MOTION TO EXPUNGE LIS PENDENS

EDMUND HEIMLICH (“Heimlich”), submits his Answer to Motion to Expunge a Lis Pendens filed by the administrator of the Estate of Ernest Heimlich, David Cook. Heimlich prays this Court will deny Cook’s motion to expunge Lis Pendens on the property located at 806 Comstock Springs, Katy Texas, because Edmund Heimlich is entitled to specific performance. Heimlich is entitled to specific performance of the contract. quantum meruit and promissory estoppel. The property cannot be disposed of until the Court resolves Plaintiff’s claims for specific performance. Consequently, the lien placed on the property must remain until trial of this case. Cook may not dispose of the property until Heimlich’s lawsuit concerning this property is decided. Thus, the motion to expunge must be denied.

BACKGROUND FACTS

On November 18, 2021, David Cook contracted with Edmund Heimlich and/or assigns on behalf of the Estate, to sell 806 Comstock Dr., Katy Texas for \$190,000. With the understanding that Heimlich intended to assign the contract to a third party, Heimlich notified Cook that he had contracted with DII fund to sell the property. Cook contracted to sell the property for \$269,500 in exchange for DII fund's agreement to pay Heimlich \$79,500 at closing. Cook admitted on the stand that he included Heimlich and assigns in the contract because ***"I believed he was going to broker the property. Take it, turn around and sell it for a profit to somebody else."***

Paragraph 8A of the Contract provided that Heimlich would have 60 days from the date of the Contract to find a buyer and assign the contract to, with paragraph 9A stating that Heimlich was granted an additional 30 days upon giving notice in exchange for an increase in the purchase price of \$1000. ***"The closing will be on or before January 19, 2022, or within 7 days after objections made under Paragraph 6D have been cured or waived, whichever date is later (Closing Date). If either party fails to close the sale by the Closing Date, the non-defaulting party may exercise the remedies contained in Paragraph 15."***

Heimlich paid \$1000 for an additional 30 days extension. The extension provided for in the contract in Paragraph 11, titled **SPECIAL PROVISIONS**: ***"Seller agrees to give the buyer a 30-day extension to closing for a fee of \$1,000 should that be needed."*** This extended the deadline to close until February 19, 2022 or 7 days

thereafter.¹

The contract required seller to allow Heimlich and/or agents access and/or inspect the property “at reasonable times,” in exchange for the Seller not having to provide a seller’s disclosure. While the contract states that Heimlich agreed to accept the property “as is,” it expressly states that Heimlich’s agreement to accept the property “as is” did not preclude him from being able to inspect or access the property at “reasonable times.”

On February 1, 2022, Mr. Heimlich informed Cook hat he had assigned the contract to DII fund. Mr. Heimlich informed On February 16, 2022, as they approached the closing date, but before the deadline, David Cook told Heimlich that he would not close if the closing did not occur by February 17, 2022. Since Heimlich had until the 19th of February 2022 (or thereafter), Cook’s notification that he would not close after February 17, 2022 was an anticipatory breach that entitled Heimlich to specific performance.

The contract also required seller to allow Heimlich and/or agents access and/or inspect the property “at reasonable times,” in exchange for the Seller not having to provide a seller’s disclosure. *See Section 7*. While the contract states that Heimlich

¹ It is standard practice in the industry to grant brief extensions based on the equities of the situation—to close. Given the fact that Cook knew that Heimlich intended to rehab and repair the property to fix and flip it and Cook agreed when the contract was signed and based upon the express language of the contract, Cook was required to provide at least until February 19, 2022 to close—if not a few days later.

agreed to accept the property “as is,” it expressly states that Heimlich’s agreement to accept the property “as is” did not preclude him from being able to access the property at “reasonable times.” This also constitutes anticipatory breach, entitling Heimlich to specific performance.

Heimlich is also entitled to specific performance based on unjust enrichment, promissory estoppel, and quantum meruit. Heimlich spent \$40,000 on repairs, increasing the value of the property for sale. Cook had a statutory duty to keep the property in good repair, which Heimlich assumed for Cook’s benefit. Cook had a duty to act in the best interest of the estate and comply with the contract and order approving the sale, and failed to do so. Whether under breach of contract, quantum meruit / unjust enrichment or promissory estoppel, Heimlich is entitled to specific performance.

Regarding default, the contract states, “if the Seller fails to comply with this contract, Seller will be in default and Buyer may (a) “enforce specific performance, seeking such other relief as may be provided by law...”

Cook was already in breach and refused to schedule the closing, with knowledge of Heimlich’s detrimental reliance and expenditures repairing the property. Cook had a statutory duty to keep the property in good repair, which Heimlich assumed for Cook’s benefit. Cook had a duty to act in the best interest of the estate and comply with the contract and order approving the sale. Heimlich has been financially harmed

to the tune of \$79,500 in lost profits he would have received but for Cook's breach, as well as attorneys' fees required to prosecute his claims. To protect Heimlich's right to specific performance, a lis pendens was filed concerning the property.

LEGAL AUTHORITIES

There is no authority for the court to expunge the lis pendens on the property because Plaintiff has asserted "real estate" claims for specific performance of the contract. Section 12.0071 of the Texas Property Code authorizes a party to file a lis pendens on any "real property" claim. Edmund Heimlich sued David Cook as Administrator of the Estate of Ernest Heimlich for breach of contract and specific performance concerning 806 Comstock Springs Dr., Katy Texas. This lawsuit clearly alleges "real property" claims as required by Section 12.0071 of the Texas Property Code. As such, there is no basis upon which the lis pendens should be expunged.

Section 12.0071 of the Texas Property Code states:

(a) A party to an action in connection with which a notice of lis pendens has been filed may: **(1)** apply to the court to expunge the notice; and **(2)** file evidence, including declarations, with the motion to expunge the notice. **(b)** The court may: **(1)** permit evidence on the motion to be received in the form of oral testimony; and **(2)** make any orders the court considers just to provide for discovery by a party affected by the motion. **(c)** The court shall order the notice of lis pendens expunged if the court determines that: **(1)** the pleading on which the notice is based does not contain a real property claim; **(2)** the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim; or **(3)** the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d). **(d)** Notice of a motion to

expunge under Subsection (a) must be served on each affected party on or before the 20th day before the date of the hearing on the motion.(e) The court shall rule on the motion for expunction based on the affidavits and counter affidavits on file and on any other proof the court allows.(f) After a certified copy of an order expunging a notice of lis pendens has been recorded:(1) the notice of lis pendens and any information derived or that could be derived from the notice: (A) does not: (i) constitute constructive or actual notice of any matter contained in the notice or of any matter relating to the action in connection with which the notice was filed;(ii) create any duty of inquiry in a person with respect to the property described in the notice; or(iii) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value...

Tex. Prop. Code § 12.0071

"[S]ubsection (c)(1) of Texas Property Code 12.0071 reflects the practice that existed prior to the enactment of that provision whereby a party could obtain cancellation of a lis pendens when the pleadings in the lawsuit to which the lis pendens relates did not contain an assertion of an interest in real property that fell within the categories for which the statute provides that a lis pendens may be filed.

In re Moreno, No. 14-14-00929-CV, 2015 WL 225049, at *2 (Tex. App.-Houston [14th Dist.] Jan. 15, 2015, orig. proceeding) (mem. op.) (internal citations omitted).

Because Heimlich's lawsuit involves "property claims" on the property in question and the merits of his claims have not been determined by this Court, there is no authority for the Court to expunge the lis pendens.

CONCLUSION AND PRAYER

David Cook, as administrator of the Estate of Ernest Heimlich, breached the contract

between the estate and Edmund Heimlich for the sale of 806 Comstock Springs Dr., Katy, Texas. The contract expressly provides Heimlich with the right of specific performance, which Heimlich has sued for. Cook committed two anticipatory breaches of the contract when he denied access to the property and when he notified Heimlich that he would cancel the contract if closing did not occur by February 17, 2022. The contract and equity (promissory estoppel, quantum meruit) demands that the Court grant Heimlich specific performance to rectify the harm caused by Cook's default. To protect his right to specific performance Heimlich filed a lien on 806 Comstock Springs Dr., Katy, Texas. This lien is required to prevent Cook from unilaterally disposing of the property. The lien must remain on the property until Heimlich's lawsuit against Cook is decided. For this reason, Heimlich prays that the Court deny Cook's motion to expunge lis pendens on 806 Comstock Springs Dr., Katy Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Candice Schwager certify that this Answer was served on all parties of record on the 6th day of December.

Candice Schwager

Candice Schwager