

Apex, Inc. v. E & M Custom Homes, LLC, 012512 CTSUP, CV11-6008351S

APEX, INC. as Successor to TD Bank, N.A.

v.

E & M CUSTOM HOMES, LLC et al.

No. CV11-6008351S.

Superior Court of Connecticut, Judicial District of Waterbury.

January 25, 2012

MARK H. TAYLOR, J.

I

BACKGROUND

The court issued a memorandum of decision in this matter, dated January 3, 2012, regarding the plaintiff's Motion for Turnover Order, No. 180, seeking possession of certain bond funds held by the city of Waterbury. Also considered in the court's decision was Attorney Robert Ghent's Claim for Determination of Interests in Disputed Property, No. 189, in which he asserted a common-law attorney charging lien on the same bond funds, superior in right to the claim of Apex, the plaintiff in this case. The parties have filed cross motions for reconsideration of the court's decision and objections thereto. Apex has additionally included a motion for rectification on its pleading for reconsideration.

Both parties entered into written agreements with the debtor regarding the disputed bond funds. The debtor was a guarantor of a collateral assignment agreement with Apex, which was entered into in 2005. This agreement was prior in time to Attorney Ghent's fee agreement, which gave rise to his inchoate charging lien for successfully preserving the bond funds through litigation. Apex subsequently obtained a judgment lien against the debtor, now perfected by a UCC-1. Formal notice to third parties of the charging lien occurred upon Attorney Ghent's filing of his Claim for a Determination of Interests in Disputed Property. However, notice was implied by the earlier action filed by Attorney Ghent against the city of Waterbury to preserve the bond fund, in which all parties had legal interests.

The court found in favor of Attorney Ghent's claim of a charging lien, but limited his claim to attorneys fees related to the preservation of the bond fund. The court did not extend the priority of this inchoate lien for attorneys fees due for other, unrelated matters, despite his written agreement with the debtor. The result of this ruling is that the remaining funds are to be turned over to Apex, a judgment creditor with a direct and perfected interest in the same fund.

Apex disputes the existence of the charging lien and its priority. Attorney Ghent seeks the inclusion within the priority lien, all fees owed by the debtor and a related LLC in the amount of \$161,612.88. Alternatively, he seeks the inclusion within the priority lien of all attorneys fees owed by the debtor himself in the amount of \$59,502.57. The court notes that \$25,677.86 in fees awarded by the court is included within each of these amounts.

II

DISCUSSION

A. Motion for Rectification

Apex seeks the rectification and correction of certain aspects of the court's decision of January 3, 2012, as follows:

1. Certified Check

The court will clarify that the "certified check" referred to throughout the decision is, in fact, a cashier's check, as the drawer and drawee are Banknorth, N.A. See General Statutes § 42a-3-104(g); see also footnote three of the memorandum of decision.

2. Cancelled Check

The court acknowledges that the cashier's check, as indicated above, was admitted into evidence over Apex's objection. Critical to Apex's argument is that the bond fund is fungible. The court therefore opens the evidence to include cancelled check # 295589097 for \$75,450, payable to the city of Waterbury. This evidence is consistent with the court's conclusion that the check had likely been negotiated. Further, Attorney Ghent has not objected to the inclusion of the cancelled check into evidence.

3. Developer of Whispering Knowles

The court will clarify that E & M was the owner of the Whispering Knowles subdivision on August 27, 2010. On that date, the court found that "the \$75,450 [cashier's] check for the improvement bond was released by the city and exchanged for the maintenance bond, it is reasonable to imply from the facts that Edmund Thomas was either the authorized agent or developer of E & M, then the record owner of the subdivision."

4. Other Rectification Requests

As for the other affirmative findings requested by Apex, the court will rest upon its existing findings in the decision of January 3, 2012, as well as the facts in the record of these proceedings.

B. Reconsideration

Having reviewed the cross motions for reconsideration, the court denies both motions. In doing so, however, the court notes that charging liens are recognized by our courts and are clearly enforceable as between attorneys and their clients. However, the scope and priority of charging liens over third-party creditors has not been delineated fully under existing appellate authority.

One of our earliest cases involving the subject of attorney charging liens did not include enforcing the lien against third-party creditors. In *Gager v. Watson*, 11 Conn. 168 (1836), the Supreme Court did not enforce a charging lien on a judgment obtained on behalf of a debtor with a previously existing and enforceable judgment. In *Gager*, the court stated that: "We are of opinion, that no lien exists in favour either of attorneys or officer, in the present case, as against the present plaintiff. An attorney, *as against his client*, has a lien upon all papers in his possession for his fees and services performed in his professional capacity, as well as upon judgments received by him. But the attorney's lien upon judgments is subject to the equitable claims of the parties in the cause, as well as to the rights of third persons, which cannot be varied or affected, by such lien." (Emphasis added.) *Id.*, at 173.

As against his client alone, therefore, an attorney has the right to enforce a charging lien, which may also be extended by agreement to fees owed for other matters. The most recent statement by our Appellate Court of the nature of the charging lien has been in *D'Urso v. Lyons*, 97 Conn.App. 253, 903 A.2d 697 (2006), quoting *Cooke v. Thresher*, 51 Conn. 105 (1883). "If an

attorney has rendered services and expended money in instituting and conducting a suit and the [client] orally agrees that he may retain so much of the avails thereof as will pay him for his services and expenses therein *and for previous services in other matters*, and he thereafter conducts the suit to a favorable conclusion, he has, as against such [client], an equitable lien upon the avails for the services and expenses in the suit, and for the previous services embraced in the agreement ..." (Emphasis added; internal quotation marks omitted.) *Id.*, at 256.

In *D'Urso*, the facts involved a fund obtained by an attorney through litigation on behalf of a deceased client, pursuant to an hourly fee agreement. The fund was the sole asset of the deceased's estate and the plaintiff appealed from the trial court's decision to affirm a probate court decision to uphold the attorney's charging lien against statutory priorities pursuant to probate law. See General Statutes § 45a-365. The charging lien in *D'Urso* protected only "[t]hose fees ... wholly attributable to the litigation that [Attorney] Shaw had handled on behalf of [his client] Robert D'Urso prior to his death." *D'Urso v. Lyons, supra*, 97 Conn.App. at 255.

Therefore, the charging lien recovery in *D'Urso* was limited by its facts to the fund generated by the litigation successfully concluded by the attorney on behalf of his client. The claim did not include an agreement for fees from unrelated matters, as in the present case. The charging lien in *D'Urso* did, however, prevail to this limited extent over statutory liens, subsequently established through the probate process. The court finds *D'Urso* analogous to the present case in that the court has given priority to a charging lien over a subsequently perfected judgment lien, but only to the extent that Attorney Ghent's fees were generated to protect the bond.

The inclusion of other attorneys fees owed within a charging lien was established in the case of *Cooke v. Thresher, supra*, 51 Conn. at 105. In *Cooke*, the court extended protection of the charging lien against the claims of the client's trustee in insolvency, as follows: "If an attorney has rendered services and expended money in instituting and conducting a suit and the plaintiff orally agrees that he may retain so much of the avails thereof as will pay him for his services and expenses therein *and for previous services in other matters*, and he thereafter conducts the suit to a favorable conclusion, he has, *as against such plaintiff*, an equitable lien upon the avails for the services and expenses in the suit, and for the previous services embraced in the agreement; and *the trustee in insolvency* of the plaintiff, coming to the estate after the making of such agreement, *steps into the place of his assignor*, and takes the avails as assets burdened by such equitable incumbrance." (Emphasis added.) *Id.*, at 107.

The work by Attorney Ghent on behalf of the debtor preserved the bond for the benefit of all parties claiming an interest in the remaining fund. Attorney Ghent submits, therefore, that the bond should be available to him in its entirety to satisfy fees owed to him by the debtor. He claims this superior right for the debtor's fees owed in other cases, as well as fees also owed by the LLC in which the debtor is a member.

The court agrees, consistent with *Gager, Cooke* and *D'Urso*, that Attorney Ghent has a lien for all he claims, but only "as against his client[s]." *Gager v. Watson, supra*, 11 Conn. at 173. The requirement of an agreement with a client to extend the lien to fees owed for other matters is a logical and reasonable extension of the scope of an attorney charging lien, and clearly exists pursuant to *Cooke*. However, the question presented is whether, absent notice or possession, a

charging lien should be superior to perfected liens of other, third-party creditors or some limited class of them.

The bond fund in this case was a liquidated sum for many years and was not a fund created, but merely preserved by litigation, successfully conducted by Attorney Ghent. The fund is in the possession of the city of Waterbury. Apex's claim is based upon a written agreement with the debtor, executed prior in time and directly related to the deficiency judgment sought by Apex in the underlying cause of action for foreclosure. Therefore, the Apex claim does not involve a creditor seeking satisfaction of a judgment in an unrelated matter, for example, seeking to levy upon a judgment fund in an attorney's possession, such as a client's account or escrow.

This fund, by contrast, is not in the possession of Attorney Ghent, which would otherwise provide some notice to third parties of his interest in the fund. This alternative scenario appears to be a classical example of the circumstance under which a charging lien for the creation of the fund ought to apply. In a case decided before *Gager*, our Supreme Court stated the general principle " that an attorney has a lien for his services and expenses, on the papers and securities of the client, *in his hands*, of which he may avail himself in an action of *trover*; and that he is answerable to him in account, only for the balance of the avails, when collected." (Emphasis added.) *Rumrill v. Huntington*, 5 Day 163, 165 (1811).

Noticeably absent from the court's language in *Cooke* and *D'Urso* is a discussion of the scope and priority of charging liens over third-party lien holders, generally. In the present case, the parties have security interests in the same fund. Both parties have legal and equitable interests in the fund. The court has therefore limited the priority of the inchoate charging lien to the fees expended in preserving this fund. The remaining funds are to be distributed to Apex, a perfected judgment lien holder. To permit a charging lien to amass into an ever growing, undisclosed lien for past and continuing services, superior to all other perfected liens, seems inequitable in its scope to the court under the facts of this case. Otherwise, charging liens for development and litigation costs would always be superior to other perfected liens. In this case, the judgment lien claimed by Apex is subsequent to the work performed by Attorney Ghent, distinguishing the facts of this case from those in *Gager* - albeit more favorably- and making this case more analogous to *D'Urso*.

C. Reconsideration After Rectification

The court's decision of January 3, 2012, includes the consideration of a negotiated check, as follows: " Regardless of its form, however, the court concludes that Edmund Thomas has a property interest in the check and the money it represents as the remitter. See *Old Republic National Title Ins. Co. v. Bank of East Asia Ltd .*, 291 F.Supp.2d 60 (D.Conn.2003). The court further concludes, based upon the evidence presented, that his right to these funds is superior to that of E & M. Therefore, once the city as payee disclaims its right to the check or its proceeds, the check or the proceeds should belong to Edmund Thomas, subject to the claims of the secured parties in this case as his creditors."

The court therefore denies Apex's motion for reconsideration under the facts, as rectified.

SO ORDERED.