Apex, Inc. v. E & M Custom Homes, LLC, 010512 CTSUP, CV116008351

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

**v.**

**E & M CUSTOM HOMES, LLC et al.**

**No. CV116008351.**

**Superior Court of Connecticut, Judicial District of Waterbury.**

**January 5, 2012**

MARK H. TAYLOR, J.

I

BACKGROUND

The motions heard by the court in this case relate to an underlying foreclosure action, initiated against the defendants by TD Bank, N.A. (TD Bank) on December 29, 2010. The relevant defendants in this action are E & M Custom Homes (E & M), as well as its members, Edmund and Monika Thomas, as guarantors of E & M's debt in their individual capacities.

The property subject to the foreclosure action is known as the Whispering Knolls subdivision on Bucks Hill and Grassy Hill Roads in Waterbury, Connecticut. A judgment of strict foreclosure was granted in favor of TD Bank by the court, Trombley, J., on March 14, 2011. TD Bank then assigned its rights pursuant to the judgment to Apex, Inc. (Apex), as successor to TD Bank on March 30, 2011, which is now the named plaintiff in this case. As assignee, Apex filed a motion for a deficiency judgment in the amount of $161, 227.98 on April 25, 2011, and the court, Ozalis, J., granted the deficiency judgment in the amount of $145, 221.63 on July 1, 2011, from which cross appeals have been taken by Apex and E & M. On July 25, 2011, the appellate stay was terminated by the court, Ozalis, J., and the plaintiff has proceeded to enforce its judgment.

The city of Waterbury holds certain bond funds for the maintenance of a subdivision known as Whispering Knolls, originally subdivided by Whispering Knolls Development, LLC. It is important to note at the outset that Whispering Knolls Development, LLC has had no interest in this subdivision since December 15, 2004, and claims no interest in the bond funds now in dispute between the parties.

The bond was originally required for the improvement of, and is now held for the maintenance of, the Whispering Knolls subdivision project. On August 3, 2011, the plaintiff filed a motion for turnover order, number 180, to take possession of the remaining bond funds. In response to the plaintiff's motion, Attorney Robert Ghent claims a common-law attorney charging lien on the bond funds, superior in right to the claim of Apex. On August 16, 2011, Attorney Ghent filed a claim for determination of interests in disputed property, number 189, pursuant to General Statutes § 52-356c.[1] These motions were heard by the court on September 19, 2011. Additional evidence and arguments were heard by the court on November 21, 2011.[2]

II

ADDITIONAL FACTS

A. The Whispering Knolls Bond

The parties agree that the property in question is a fund of money in the possession of the city of Waterbury. The parties agree that Waterbury's claim to the bond proceeds is superior to

their own. One of the central questions in this action is to whom or what legal entity this fund is owed, in order to determine which of the two creditors has the superior claim. The money was originally accepted as a minimum improvements bond and is now held as a maintenance bond for the Whispering Knolls subdivision. The initial minimum improvements bond transaction occurred on February 23, 2005. The subsequent maintenance bond transaction occurred many years later on August 27, 2010.

1. The Minimum Improvements Bond

The court finds there is sufficient evidence to support the conclusion that one of the defendants herein, Edmund Thomas, originally transferred what has been described as a certified check in the amount of $75, 450 with the Waterbury city plan commission on February 23, 2005.[3] See Exhibits D and E. The payee identified on the face of the check is " Comptroller City of Waterbury" and the remitter is identified as " Edmund Thomas." The certified check was provided in lieu of a performance bond for minimum improvements to the Whispering Knolls subdivision, originally subdivided by Whispering Knolls Development, LLC. See Exhibit C in Court Filing No. 200. The court finds as a matter of fact that this money was provided by Edmund Thomas from personal funds in his joint account, which he owned with Monika Thomas. See Exhibit F. The evidence also supports the conclusion that $75, 000 of this money was received from his brother, Mark Thomas and Thomas Electrical Company, LLC. See Plaintiff's Exhibits A, B, C and F. The court nonetheless finds that Edmund Thomas owned the money that was provided as the minimum improvements bond to the city of Waterbury.[4]

The document evidencing this bond transaction, similarly dated February 23, 2005, indicates that a certified check was received, payable to the city of Waterbury, and is signed by Edmund and Monika Thomas on three lines. The first line is for the " Name of Applicant or Company." The next line signed is for the " Signature of Officer of Company." The third and fourth lines are provided for the " Owner(s)." Edmund and Monika Thomas signed the fourth line, leaving the third line blank.

However, neither Edmund nor Monika Thomas were officers of any relevant company at the time this document was signed, nor was Edmund Thomas on the title to the property. At the time these transactions occurred on February 23, 2005, Monika Thomas was the sole record owner of the Whispering Knolls subdivision when Edmund and Monika Thomas signed the document as applicants, officers and owners. Whispering Knolls Development, LLC was no longer the record owner of the subdivision. Instead, after obtaining the initial subdivision approvals, Whispering Knolls Development, LLC had conveyed the approved subdivision to Monika Thomas, individually, by warranty deed the previous year on October 5, 2004. See Exhibit A in Court Filing No. 200. [5]

Soon thereafter on April 5, 2005, E & M was organized and is now one of the defendants in this case. The members of E & M are Edmund and Monica Thomas. Later that year on September 26, 2005, Monika Thomas quitclaimed her interest in the Whispering Knolls subdivision to E & M. On the same day, E & M secured a loan from TD Bank in the cumulative amount of $625, 000, secured by an open end mortgage deed dated September 26, 2005, and filed in the Waterbury land records. Plaintiff's Exhibit 4. This document and a collateral assignment of agreements were signed by Monika Thomas, as a duly authorized member of E & M. Exhibit 4. The assigned

agreements include " [a]ll bonds securing payment performance under any construction of the Improvements ..." *Id.,* Schedule C. TD Bank then filed financing statements with the secretary of the state on September 27, 2005, identifying itself as the secured party and with E & M identified as the debtor. Exhibits 1 and 5. These financing statements were amended on several occasions during June 2010, and subsequently in April and July 2011.

The record also shows that Edmund and Monika Thomas individually guaranteed these debts. See, e.g., Complaint, paragraphs 12 and 13. Therefore, these parties appear in other pleadings as judgment debtors in this case in their individual capacities. Although E & M is also a judgment debtor in this case, the plaintiff's perfected liens against E & M relate back to its UCC-1 filings with the secretary of the state in 2005. However, financing statements regarding Edmund and Monika Thomas were not filed until June 9, 2011, and July 5, 2011. Exhibit 1.

Soon after the creation of E & M, it obtained an irrevocable letter of credit from TD Bank on April 6, 2006, in the amount of $192, 000. The letter of credit was issued for the benefit of the city of Waterbury as additional security for the Whispering Knolls improvements bond and was originally in effect for a period of one year. Notations on the face of the document indicate that it was renewed until April 5, 2011. See Exhibit D in Court Filing No. 200. Along with the cash portion of the bond, previously provided by Edmund Thomas on behalf of the Whispering Knolls subdivision, the total security held by the city of Waterbury in 2006 for the development of the subdivision totaled $267, 450.

2. Attorney Ghent's Claim

Attorney Ghent credibly asserts that work on the Whispering Knolls subdivision progressed slowly. On December 16, 2008, the city plan commission therefore adopted a resolution authorizing a call of the subdivision improvements bond. See Exhibit E in Court Filing No. 200. The resolution does not reflect a distinction between the certified funds provided by Edmund Thomas and the letter of credit from TD Bank, both of which were provided as surety for improvements to the Whispering Knolls subdivision. On or about January 5, 2009, Edmund Thomas and E & M Custom Homes, LLC authorized Attorney Ghent to appeal the action taken by the city plan commission and to enjoin and restrain the city plan commission from forfeiting the subdivision improvements bond. The matter is captioned *E & M Custom Homes, LLC v. City Plan Commission* bearing docket number CV 09 4018447. Exhibit 6.

For the appeal, Attorney Ghent claims to have entered into an hourly fee agreement on or about January 5, 2009, with E & M and Edmund Thomas personally. Exhibit 7. Paragraph fifteen of the agreement provides for an equitable charging lien on " any and all recoveries." It is upon this agreement and the common-law of charging liens that Attorney Ghent disputes the plaintiff's claim of a superior right to the bond proceeds held by the city.

The plaintiff correctly points out, however, that this document is not signed by anyone other than Attorney Ghent. Attorney Ghent claims that it is a valid agreement in that he received the retainer required by the agreement and that he has performed the contract. " It is well established that [p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated." (Internal quotation mark omitted.) *Ullman, Perlmutter & Sklaver v. Byers,* 96 Conn.App. 501, 505-06, 900 A.2d 602 (2006). Although Attorney Ghent's ledger reflects a deposit

paid of approximately $966, a smaller sum than the retainer recited in the agreement of $2, 500, the court finds that this is evidence of the agreement of the parties to the hourly fee arrangement and charging lien. In further support of the validity and enforceability of the attorney fee agreement, Edmund Thomas was called to the stand and testified that he owed his attorney money.

The appeal was successfully concluded with a positive outcome. Attorney Ghent credibly asserts that he was successful in securing an agreement between E & M and the city of Waterbury that the bond forfeiture be held in abeyance, pending completion of certain subdivision road improvements. On January 8, 2010, and in support of this assertion by Attorney Ghent, the city engineer recommended the acceptance of the improvements and release of the bond, subject to providing a further maintenance bond of $76, 500. See Exhibit F in Court Filing No. 200. Attorney Ghent also credibly asserts that Edmund Thomas planned to arrange for a third party to fund the subsequent maintenance bond and was instructed to prepare the documents related to this transaction. Instead of finding a third party to finance the new maintenance bond, Edmund Thomas unilaterally decided to roll the cash component of the original improvement bond into the new maintenance bond.

3. New Maintenance Bond Agreement

On May 12, 2010, the city plan commission adopted a resolution authorizing the release of the subdivision improvement bond to Whispering Knolls Development, LLC. See Exhibit G, paragraph 3, in Court Filing No. 200. Subsequently, on August 27, 2010, the city of Waterbury agreed that the $75, 450 cash bond be retained as surety to guarantee the maintenance and repair of the Whispering Knolls subdivision. *Id.* In light of the fact that the evidence shows the letter of credit was still in effect until April 5, 2011, the court finds that TD Bank's liability under the letter of credit was also discharged and released, in addition to the certified funds provided by Edmund Thomas. [6]

There is, however, a significant problem with this new bond agreement. Although Edmund Thomas signed this new bond agreement as an authorized representative of Whispering Knolls Development, LLC, he has never been associated with this business entity or its successor, Ashlar Historic Restoration, LLC, whose sole member is Anthony T. Stewart.[7] Moreover, Edmund Thomas has never been an authorized agent for Whispering Knolls Development, LLC. Exhibit 1, transcript of Anthony Stewart, p. 12. The court therefore concludes that any reference to Whispering Knolls Development, LLC as the entity providing or receiving bond funds for the Whispering Knolls subdivision is erroneous.[8]

Attorney Ghent credibly asserts that this transaction was accomplished by Edmund Thomas without notice to him and without his professional assistance. Instead, he asserts that the new maintenance bond was executed by Edmund Thomas on a form prepared in error by and under the supervision of representatives of the corporation counsel's office for the city of Waterbury. The error was in naming Whispering Knolls Development, LLC as the entity released and obligated under the new bond. In support of this conclusion, the court heard testimony from the Waterbury city planner, James Sequin, on November 21, 2011. Mr. Sequin credibly testified that he prepared the new bond document that was signed by the mayor and Edmund Thomas on August 27, 2010.

This was done because he mistakenly believed that Whispering Knolls Development, LLC was the proper name of the entity represented by Edmund Thomas, as the developer of the Whispering Knolls subdivision. Instead, E & M was the record owner of the property. [9] Mr. Sequin also testified that the developer of a subdivision typically addresses these transactions, based upon his experience as the Waterbury city planner.

Based upon these facts, it would be inappropriate for the court to consider Whispering Knolls Development, LLC or its successor to be the owner of the bond proceeds. The owner at the time the improvements bond was created was Monika Thomas, as discussed previously. The question presented is to whom or what legal entity the city of Waterbury should return the bond funds.

B. Waterbury Land Subdivision Regulations

The provisions of the land subdivision regulations of the city of Waterbury (regulations) are relevant to this question and these proceedings. Some of the relevant provisions of the regulations have been provided in paragraphs thirteen through sixteen of court filing number 183 and in exhibit 6 of court filing number 154. These regulations specifically address the requirements of improvement and maintenance bonds, along with their forfeiture and release. Generally speaking, these regulations refer to the responsibilities of the " applicant" to submit such bonds and to meet the compliance requirements for their release. The term " applicant, " however, is not defined in the regulations provided to the court.

For the release of any such bond, the regulations provide, in part, that: " Upon receipt of the Letter from the City Engineer as aforementioned the Commission may then vote its approval to authorize the Mayor to execute a release of the Irrevocable Letter of Credit or Certified Check. When the release is signed by the Mayor, the release will be sent to the Applicant and/or issuing Bank. Upon release of a Certified Check which has submitted the check, together with all interest accrued thereon, shall be returned to the Applicant, as the case may be." See Land Subdivision Regulations of the City of Waterbury, Section 6.14, paragraph 8.

The meaning of the term " applicant" is therefore important to the court's determination of the rightful recipient of the bond proceeds in this case. [10] Chapter II of the regulations is entitled " Definitions." Section 2.1 states that it is the intent of the regulations that " [t]he following terms shall have, throughout this text, the meaning given herein." Section 2.5 defines " applicant" as follows: " Applicant shall mean that person submitting a subdivision or resubdivision and in that instance shall be either the owner or his authorized agent. The term applicant will also include any person authorized to develop the subdivision." Section 2.6 defines " owner" as follows: " Owner shall mean the owner of record in the land records of the City."

III

DISCUSSION

A. Owner of the Bond Proceeds

The court's analysis of the competing claims of the creditors, Apex and Attorney Ghent, depends in part upon who is entitled to the proceeds of the bond. If the proceeds rightfully belong to E & M, the analysis is whether an attorney charging lien is superior to a previously perfected right pursuant to a UCC-1 filing with the secretary of the state. If the proceeds rightfully belong to

Edmund or Monika Thomas or both of them, the analysis shifts to the priority of a charging lien, if any, for an attorney's services rendered prior to the perfection of a judgment lien.

The factual problem in this case revolves around the absence of E & M's name on any document associated with either the minimum improvements bond or the later created maintenance bond. Edmund Thomas personally provided certified funds for the first bond. The bond agreement was signed by Edmund and Monika Thomas, at which time E & M did not exist. The second bond agreement, rolling the first bond into the second, was signed by Edmund Thomas in a capacity he had no right to claim and was admittedly executed in error. Although the bond was clearly for the benefit of E & M, and could have been drawn upon by the city for E & M's failure to perform the terms of either bond, the question here is whether E & M owns the right to the residual proceeds of the bond.

According to the regulations, the city is required to return the " certified check" to the applicant, as follows: " Upon release of a Certified Check which has (sic) submitted the check, together with all interest accrued thereon, shall be returned to the Applicant, as the case may be." See Land Subdivision Regulations of the City of Waterbury, Section 6.14, paragraph 8. Section 2.5 of the regulations states, in relevant part, that: " Applicant shall ... be either the owner or his authorized agent. The term applicant will also include any person authorized to develop the subdivision." Again, section 2.6 of the regulations defines " owner" as " the owner of record in the land records of the City."

At the time Edmund Thomas provided the original certified check for $75, 450 to the city, it is reasonable to imply from the facts presented that he was either the authorized agent or developer of the Whispering Knolls subdivision, then owned personally by Monika Thomas. However, at the time the $75, 450 certified 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. According to the regulations, therefore, the certified check should be released and returned either to E & M as the owner/applicant or to Edmund Thomas as the developer/applicant.

The court has evidence of the transfer of the certified check to the city in 2005. The court has further evidence of the transfer of the certified check, again in 2010. On May 12, 2010, when the city plan commission adopted the resolution authorizing the release of the subdivision improvement bond to Whispering Knolls Development, LLC in error, the document is entitled " Certified Check Release ..." Exhibit G, paragraph 3, in Court Filing No. 200. [11] The term " certified check" is used throughout this resolution. However, it is not clear whether the original certified check is held by the city or if, instead, the check has been negotiated and the proceeds of the certified check are held as the bond. Although the latter makes far more sense as a practical matter, this process is not in evidence. Ordinarily, the owner and developer of a subdivision would be the most likely person or entity to risk their own funds on the performance of the terms of a bond. However, as was true in this case, TD Bank also provided a letter of credit pursuant to a contract, risking its own funds on E & M's performance of the bond. Edmund Thomas should surely be able to do the same for E & M and expect the return of the bond balance, as does the plaintiff in this case.

In the court's view, the critical question presented is who holds the superior ownership interest in the funds represented by the certified check. The certified check identifies Edmund Thomas as the remitter of the check. See Exhibit D. The check has been transferred to the payee, identified as " Comptroller City of Waterbury." There is no evidence in the record that E & M is the owner of the money represented by the check. There is no evidence that the check was transferred to anyone other than the city. There is no evidence that the certified check was ever negotiated and transformed into a fungible sum, however much sense this makes.

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).[12] 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.

B. The Plaintiff's Claims

Essentially, the plaintiff's claim to the maintenance bond proceeds is twofold. First, it claims a security interest in the proceeds of the maintenance bond by virtue of its security agreement with E & M, and as perfected by a UCC-1 filing in 2005. It claims it has a superior lien because it is prior in time to Attorney Ghent's hourly fee agreement with Edmund Thomas and E & M to preserve the improvements bond in a case entitled *E & M Custom Homes, LLC v. City Plan Commission,* docket number CV 09 4018447. Exhibit 6. The plaintiff asserts that any work done by Attorney Ghent pursuant to the hourly fee agreement, resulting in his claim of a charging lien, was undertaken with prior legal notice of the plaintiff's lien and should therefore be subordinate.

In the alternative, the plaintiff otherwise claims a judgment lien against the proceeds of the maintenance bond by virtue of the deficiency judgment against E & M, as well as against Edmund and Monika Thomas personally as guarantors. Based upon the analysis of the court, the plaintiff's right to the proceeds of the maintenance bond is that of a judgment creditor as it relates to Edmund Thomas personally.[13] Therefore, the plaintiff's case rests upon the existence and nature of Attorney Ghent's charging lien.

C. Charging Liens

Attorney Ghent claims a charging lien against the proceeds of the maintenance bond held by the city, superior in right to the plaintiff's claims under either of the plaintiff's theories of priority. However, the plaintiff does not concede the existence, let alone the priority, of a charging lien in this case. The plaintiff asserts that the essential elements of an attorney charging lien have not been shown to exist by Attorney Ghent. Primarily, it asserts that there was no judgment in the administrative appeal filed by Attorney Ghent on behalf of Edmund Thomas and E & M. Instead, the matter was withdrawn upon an agreement with the city to release the earlier improvements bond provided personally by Edmund Thomas. Additionally, the plaintiff asserts that under its perfected security agreements with E & M, filed in 2005, its right to this asset is prior in time and therefore senior to Attorney Ghent's charging lien. In light of the court's conclusion that the plaintiff's claim is in the nature of a judgment lien, the decision of the court will therefore focus

upon the competing claims of priority between an attorney's charging lien for work rendered prior in time to the perfection of a judgment lien. Under either scenario, the plaintiff asserts that Attorney Ghent's claim is junior to its own.

1. Charging Liens in Connecticut

" Although not often litigated in the courts of Connecticut, the common-law charging lien has been recognized since 1836, when our Supreme Court noted that ‘ [a]n 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.’ *Gager v. Watson,* 11 Conn. 168, 173 (1836). In *Gager,* the court acknowledged the existence of an attorney's retaining lien, which is a possessory lien on a client's papers and files that the attorney holds until his fee has been paid, as well as a charging lien, which is a lien placed on any money recovered or fund due the client at the conclusion of the lawsuit ... The Supreme Court further discussed the existence of charging liens in *Cooke v. Thresher,* 51 Conn. 105 (1883), in which the court stated: ‘ 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.’ " (Citation omitted.) *D'Urso v. Lyons,* 97 Conn.App. 253, 256, 903 A.2d 697 (2006).

*D'Urso v. Lyons* is the only recent review of attorney charging liens at the appellate level in Connecticut. In *D'Urso,* attorney " Shaw represented Robert D'Urso in [a] foreclosure action against his sisters. As a result of that litigation, Shaw obtained a judgment in the amount of $40, 000. After Robert D'Urso died, Shaw received the funds pursuant to that judgment. Because he had not been paid for his services at that time, Shaw retained the funds and presented a claim to the Probate Court for attorneys fees ... Shaw, therefore, had a valid charging lien on the proceeds of the foreclosure action in the amount of the attorneys fees to which he was owed pursuant to the fee agreement signed by Lyons." *Id.,* at 257.

In states recognizing attorney charging liens, there are widely differing approaches.[14] Unlike in other jurisdictions, a charging lien in Connecticut is an equitable remedy deriving from the common-law; it is not created or regulated by statute. See *McNamara & Goodman v. Pink,* 44 Conn.Supp. 592, 601, 696 A.2d 1328 (1997). In addition, and contrary to the position of the plaintiff in this case, the source of the recovery may be a settlement as well as a judgment.[15] *Id.,* at 602.

As a common-law lien, Superior Court cases have given priority to attorney charging liens as an exception to other security interests in services and materials pursuant to article 9 of the Uniform Commercial Code, generally applicable to secured transactions. See *Intercity Development, LLC v. Rose,* Superior Court, judicial district of Waterbury, Docket No. CV 08 4016602 (February 11, 2010, Gallagher, J.); see also General Statutes § 42a-9-109(d)(2).[16] Interestingly, *Intercity Development* is a recent case decided within this jurisdiction, which involved Attorney Ghent and Anthony Stewart, the member of Whispering Knolls Development, LLC and its successor, Ashlar Historic Restoration, LLC.

An attorney's charging lien " is a lien placed upon any money recovery or fund due the client at the conclusion of suit." *Marsh, Day & Calhoun v. Solomon,* 204 Conn. 639, 643, 529 A.2d 702 (1987). " An attorney's charging lien on a judgment is intended to secure compensation for services rendered to the client ... At common-law, the lien gives an attorney the right to recover his fees and the money expended on behalf of the client from a judgment the attorney obtained for the client." (Citation omitted.) *Paine Webber, Inc. v. Chapman,* Superior Court, judicial district of Fairfield, Docket No. CV 290715 (September 7, 1994, McGrath, J.). " [The] lien is founded upon the equity of paying an attorney for fees and disbursements out of the judgment obtained through the attorney's efforts." *Butterworth & Scheck, Inc. v. Cristwood Contracting, Inc.,* Superior Court, judicial district of Fairfield, Docket No. CV 94 0318818 (June 18, 1999, Nadeau, J.) (25 Conn. L. Rptr. 130, 132).

" [T]he attorney is treated in regard to his lien, as the assignee of a chose in action ... who takes it subject to all the rights and equities attached to it." (Internal quotation marks omitted.) *Parmanand v. Capewell Components, LLC,* 289 F.Supp.2d 35, 37 (D.Conn.2003).[17] Although there is no appellate authority addressing the timing of the lien, this issue has been addressed by several trial courts in Connecticut. The lien remains technically inchoate unless and until there exists a judgment to which it may attach; *id.,* at 37-38; and the effectiveness of the lien " relates back" to, and takes effect from, the time of the commencement of the services by the attorney. See *Butterworth & Scheck, Inc. v. Cristwood Contracting, Inc., supra,* 25 Conn. L. Rptr. at 130; *Paine Webber, Inc. v. Chapman, supra,* at Superior Court, Docket No. CV 290715; see also *Kubeck v. Cossette,* Superior Court, judicial district of New Britain, Docket No. CV 97 0478533 (August 18, 2000, Shortall, J.) (28 Conn. L. Rptr. 35, 38) (determining that " [charging] lien ... became effective upon the commencement of services or, at the latest, upon the return of a verdict").

" In general, no notice is needed to effectuate a common-law charging lien ... A valid and enforceable fee agreement, however, is required for the lien to be created." (Citations omitted.) *Intercity Development, LLC v. Rose, supra,* at Superior Court, Docket No. CV 08 4016602.[18] In the present case, the court has found there to be an enforceable fee agreement. And although there is no evidence of actual notice to the plaintiff, both parties provided security for the improvement bond, which was resolved by the city to be called, but for Attorney Ghent's intervention on behalf of his clients. It therefore appears from the record that the letter of credit issued by the plaintiff's predecessor was in jeopardy at that time, as well as the certified check. The court also finds that the subsequent foreclosure action is related to the administrative appeal brought by Attorney Ghent, in that the resulting bond is the only Whispering Knolls Subdivision asset left for attachment. " The common-law rule regarding the priority of liens is that first in time is first in right ... It appears that this rule is followed in Connecticut, with the additional consideration that the effectiveness of the charging lien relates back to when services were first performed." (Citation omitted; internal quotation marks omitted.) *Intercity Development, LLC v. Rose, supra,* at Superior Court, Docket No. CV 08 4016602; see also *Kubeck v. Cossette, supra,* 28 Conn. L. Rptr. at 38; *Butterworth & Scheck, Inc. v. Cristwood Contracting, Inc., supra,* 25 Conn. L. Rptr. at 130. Based upon the facts of this case, the court finds that the plaintiff's judgment lien is

subsequent in time to Attorney Ghent's charging lien, whether it relates back to the time of the hourly fee and charging lien contract, the commencement of his services or the ultimate settlement of the administrative appeal.

In reviewing the case law in Connecticut, the court will follow the well researched and reasoned Superior Court decision in *Intercity Development,* in which the court summarized that " an attorney's charging lien is valid at the time it is created, but remains inchoate until there is a recovery to which it may attach. When it attaches, it relates back to the point in time at which the attorney began performing services. Any preexisting claims against the client as of this point in time will prevail over the charging lien but any claims arising after such time, even if the lien was still inchoate, will be subordinate to it." *Intercity Development, LLC v. Rose, supra,* at Superior Court, Docket No. CV 08 4016602. The court notes that this case was decided within this judicial district in 2010.

2. Related Cases

The court has found that the administrative appeal brought by Attorney Ghent in *E & M Custom Homes, LLC v. City Plan Commission;* see Exhibit 6; is related to this foreclosure action. This is an essential finding in that an attorney's charging lien should not attach with priority to any and all settlements or judgments obtained on behalf of a debtor. Although the administrative appeal was not the same action as the plaintiff's foreclosure action in this case, it is related in that the appeal preserved the specific asset now sought by the plaintiff. In addition, had Attorney Ghent sought the enforcement of his lien prior to the release of the bond by the city, his client would most likely have been in default for exposing the letter of credit. Under these related circumstances, the priority of the charging lien should be maintained, as opposed to cases involving circumstances less intertwined than the claims in this case.

This view is consistent with other Superior Court cases addressing this issue. In *Intercity Development, LLC v. Rose, supra,* at Docket No. CV 08 4016602, the court observed that " [t]here is no case in Connecticut where an attorney has attempted to apply a charging lien against the client's recovery to recoup unpaid fees from unrelated matters handled for related clients." [19]

D. The Charging Lien in this Case

In this case, Attorney Ghent states a claim for a charging lien. According to his affidavit of attorneys fees, the amount due as of September 8, 2011, was $25, 183.02. Pursuant to his fee agreement, the balance was subject to interest accumulating at 1 percent per month on account balances fifteen days past due. At the hearing on this matter on September 19, 2011, the account balance was then $25, 677.86.

The court finds that the charging lien has priority over the plaintiff's judgment lien for the deficiency judgment in the foreclosure action. The lien is found to be in the amount of $25, 677.86 plus interest since September 19, 2011 pursuant to his agreement. See *Cadle Co. v. D'Addario,* 131 Conn.App. 223, 245, 26 A.3d 682 (2011).

SO ORDERED.

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Notes:

[1] General Statutes § 52-356c(a) provides: " Where a dispute exists between the judgment debtor

or judgment creditor and a third person concerning an interest in personal property sought to be levied on, or where a third person claims that the execution will prejudice his superior interest therein, the judgment creditor or third person may, within twenty days of service of the execution or upon application by the judgment creditor for a turnover order, make a claim for determination of interests pursuant to this section."

[2] In support of these motions, the parties agreed to the court taking judicial notice of facts contained within numerous electronic filings in the court records of this case. The first of these electronic filings is number 166, filed with the court on July 11, 2011. The second is number 183, filed with the court on August 8, 2011. The third is number 193, filed with the court on August 19, 2011. The parties additionally agreed to the court's consideration of certain exhibits filed with the court on September 12, 2011, number 200, except that the plaintiff noted that Attorney Ghent's fee agreement with the defendants, contained therein, was not signed. These were admitted into evidence at the hearing on September 19, 2011, as well as other documentary evidence offered by the plaintiff, without objection. Absent objection, additional documentary evidence was identified for the court's consideration during the November 21, 2011 hearing, including a certified copy of the land subdivision regulations for the city of Waterbury, previously filed with the court electronically on June 2, 2011, as Exhibit number 6, within filing number 154. In addition, the transcript of a deposition was admitted into evidence as plaintiff's Exhibit 1. It is the deposition of Anthony T. Stewart individually and as member of Ashlar Historic Restoration, LLC, successor to Whispering Knolls Development, LLC.

[3] The check appears to be a cashier's check, as the drawer and drawee appear to be Banknorth, N.A. See General Statutes § 42a-3-104(g).

[4] See General Statutes § 36a-290. " The statute governing joint bank accounts is one that was written to provide joint access to money in these accounts and to protect the banks from claims when one joint account owner withdraws funds from the joint account. It does not, in and of itself, determine ownership interests in the disputed funds." (Internal quotation marks omitted.) *State v. Lavigne,* 121 Conn.App. 190, 203, 995 A.2d 94, cert. granted on other grounds, 298 Conn. 909, 4 A.3d 835 (2010); see also *Fleet Bank Connecticut, N.A. v. Carillo,* 240 Conn. 343, 349-50, 691 A.2d 1068 (1997).

[5] At the time the property was owned by Monika Thomas and the subdivision had been approved, the subdivision map was not recorded. Because the land subdivision regulations required that a subdivision improvement bond be provided as a condition of recording the map, Edmund Thomas delivered the cashier's check in the amount of $75, 450 to the city of Waterbury on February 23, 2005, and signed the bond document with Monika Thomas to complete performance of the work in accordance with approved plans and subdivision regulations.

[6] No evidence was presented indicating that TD Bank was ever called upon to satisfy the terms of the improvements bond pursuant to its letter of credit. In addition, there was no evidence presented that TD Bank was given notice of the city's decision to call the bond.

[7] Ashlar Historic Restoration, LLC was served on September 15, 2011, and did not appear in these property execution proceedings. Interestingly, Attorney Ghent is the agent for service of this business entity.

[8] The new bond agreement is that the $75, 450 cash improvement bond is, on the one hand, released to Whispering Knolls Development, LLC, and then retained by the city as the new maintenance bond on behalf of Whispering Knolls Development, LLC. The problems with this new transaction are multifaceted, as follows: Whispering Knolls Development, LLC has had no interest in the Whispering Knolls subdivision since December 15, 2004, which was before the first cash bond was provided to the city. Whispering Knolls Development, LLC never provided any funds to the city for this bond. Furthermore, Whispering Knolls Development, LLC no longer existed as a legal entity on the date of this transaction. See Exhibit 2 in Court Filing No. 183. Furthermore, Whispering Knolls Development, LLC claims no interest in the cash bond in dispute between the parties to this action. Exhibit 1, transcript of Anthony Stewart, pp. 12-31.

[9] As previously discussed, Edmund and Monika Thomas are the members of E & M. It was Monika Thomas who was the individual owner of the Whispering Knolls subdivision property at the time the first bond agreement was entered into by Edmund and Monika Thomas in a variety of either inaccurate or unclear capacities in 2005, none of which were Whispering Knolls Development, LLC, Ashlar Historic Restoration, LLC or E & M, which had not yet been formed as a business entity.

[10] The definition of this term has not been provided to the court through the parties, and so the court takes judicial notice of the most recent land subdivision regulations of the city of Waterbury, obtained from the city's website. These regulations indicate that they were last updated on March 22, 2007. From this fact, the court concludes that these regulations were in effect at the time the last bond transaction occurred on August 27, 2010.

[11] Edmund Thomas testified repeatedly at the September 19, 2011 hearing, that he does not read the documents he signs. Therefore, it is entirely possible that had he, instead, been handed a document to sign as a duly authorized representative of E & M, he would have done the same thing and signed it without reading the document. However, the court cannot speculate as to whether Edmund Thomas would have signed the new bond agreement with the city as an authorized representative of E & M.

[12] There are few cases in Connecticut addressing this point of law. The court therefore looks to the Connecticut District Court's interpretation of New York law, as follows: " For example, in *Kerr S.S. Co. v. Chartered Bank of India, Australia, and China,* 292 N.Y. 253, 54 N.E.2d 813 (1944), New York's highest court, after determining that the bank drafts at issue in that case were ‘ in all material respects' analogous to cashier's checks, held that ‘ [u]ntil title to the instrument is transferred to the payee the " remitter" or " purchaser" remains its owner and in some circumstances may sue upon the instrument as if named as payee.’ *Id.* at 262, 54 N.E.2d 813; see also *Bunge v. Manufacturers Hanover Trust Co.,* 37 A.D.2d 409, 415, 325 N.Y.S.2d 983 (1st Dept.1971) (recognizing that the payee of cashier's checks, ‘ as owner of the checks, had the absolute right of disposing of them as it saw fit, including the right to return them’ to the bank); *Menthor, S.A. v. Swiss Bank Corp., et al.,* 549 F.Supp. 1125, 1129 (S.D.N.Y.1982) (‘ Menthor, as owner of the checks, has standing to sue MHT for conversion under U.C.C. § 3-419’); *Gallery Garage Management Corp. v. Chemical Bank,* 226 A.D.2d 305, 642 N.Y.S.2d 217, 218 (1st Dept.1996) (in holding that a payee of an undelivered check does not have standing to sue, the

court stated that the ‘ situs of the funds plays no role in the Court's analysis of who is a true owner or holder with standing to sue’). Although these cases do not clearly delineate under what circumstances a remitter may be able to enforce a negotiable instrument, they do indicate that a remitter may, in some circumstances, be able to enforce the instrument because the remitter has a property interest in the negotiable instrument." *Old Republic National Title Ins. Co. v. Bank of East Asia Ltd., supra,* at 291 F.Supp.2d 65-66.

[13] This judgment lien was perfected with a UCC-1 filing on June 11, 2011, subsequent to Attorney Ghent's work on behalf of Edmund Thomas and E & M.

[14] See 27 A.L.R.5th 764 (1992); see also 1 Restatement (Third), Law Governing Lawyers § 43 (2000).

[15] In *McNamara & Goodman,* the court focused upon this issue, in light of the ancient Connecticut Supreme Court case of *Cooke v. Thresher,* 51 Conn. 105, 107 (1883). In *Cooke,* however, the charging lien agreement was limited by its terms to any judgments and the plaintiff had settled the case, pro se. The court noted, however, that the Supreme Court had more recently defined charging liens in the case of *Marsh, Day & Calhoun v. Solomon,* 204 Conn. 639, 643, 529 A.2d 702 (1987), as " a lien placed upon any money recovery or fund due the client at the conclusion of suit." *Id.,* citing 7 Am.Jur.2d, Attorneys at Law § 324 (1980).

[16] General Statutes § 42a-9-109(d) provides in relevant part: " This article does not apply to ... (2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials ..."

[17] The *Parmanand* case therefore suggests that the charging lien in this case would be junior to a prior claim secured by a UCC-1 financing statement, as is the case with E & M.

[18] In some states, pursuant either to statute or common-law, notice is required. In Florida, for example, notice is required. See *Daniel Mones, P.A. v. Smith,* 486 So.2d 559 (Fla.1986); see also *Brydger v. Wolfe,* 847 So.2d 1074 (Fla.App.2003). In New Mexico, four requirements must be met for an attorney to recover fees under an attorney's lien, including notice to all parties. See *Albuquerque Technical Vocational Institute v. General Meters Corp.,* 17 Fed.Appx. 870 (10th Cir.2001) (applying New Mexico law); also see *Thompson v. Montgomery & Andrews, P.A.,* 112 N.M. 463, 816 P.2d 532 (N.M.App.1991). In Colorado, implied notice may be sufficient. See *Davidson v. Board of County Commissioners,* 26 Colo. 549, 59 P. 46 (1899).

[19] A similar conclusion was reached in New York state in *Smith v. Cayuga Lake Cement Co.,* 107 App.Div. 524, 95 N.Y.S. 236 (1905). In *Smith,* the court noted that there was a growing trend toward preserving attorney's liens as against claims of setoffs. *Id.,* at 526. There is contrary authority in other state courts. For example, in *Dalton State Bank v. Eckert,* 135 Neb. 500, 282 N.W. 490 (1938), the Nebraska Supreme Court held that the attorney's lien for services rendered in securing the replevin judgment was subject to the right of the judgment debtor to set off its deficiency judgment, where both judgments arose out of the same subject matter involving a complicated set of transactions dealing with foreclosures on chattel mortgages. *Id.,* at 506. Also, in *State v. U.S. Fidelity & Guaranty Co.,* 135 Mo.App. 160, 115 S.W. 1081 (1909), the appellate court in Missouri determined that the setoff for the creditor's judgment was appropriate because it and the plaintiff-debtor's demand related to the same subject matter, belonged to the " same class, "

and were " but different parts of one piece of litigation." See *id.,* at 165-66.

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