Appellate Notes

PULLMAN & COMLEY

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Week of January 12, 2016

Welcome to our Supreme and Appellate Court summaries webpage. On this page, I provide abbreviated summaries of decisions from the Connecticut appellate courts which highlight important issues and developments in Connecticut law, and provide practical practice pointers to litigants. I have been summarizing these court decisions internally for our firm for more than 10 years, and providing relevant highlights to my municipal and insurance practice clients for almost as long. It was suggested that a wider audience might appreciate brief summaries of recent rulings that condense often long and confusing decisions down to their basic elements. These summaries are limited to the civil litigation decisions. I may from time to time add commentary, and may even criticize a decision's reasoning. Such commentary is solely my own personal opinion.. Pullman & Comley's Appellate Practice Group of which I am a member includes experienced appellate advocates in almost every area of the law. Should you have a need to consult about a potential appeal, please email me at emccreery@pullcom.com I hope the reader finds these summaries helpful. – Edward P. McCreery

Posted January 22, 2016

Appellate Court Advance Release Opinions:

• AC36214 - Goodwin v. Colchester Probate Court

Decedent died in Pennsylvania, leaving two sisters, a brother and a nephew. Several years before, the nephew prepared a will for her and she signed it. It was not witnessed and left most of her estate to the nephew. Claiming he forgot about the will until it was found in her messy house, the nephew tendered the will to the Pennsylvania Probate Court. The Connecticut relatives objected to the admission of the will in Pennsylvania, but subsequently withdrew their objections. The nephew then sought to admit the will in Connecticut to probate the distribution of the aunt's share in a 130-acre farm. The Connecticut relatives renewed their objection to the admission of a will claiming undue influence and denying the decedent would have ever acted so informally or so unfairly. The CT Probate Court declined to admit the instrument as a will on an ancillary basis, finding "sufficient objection" per C.G.S. § 45a-288.

During the appeal in the Superior Court, the nephew testified that he was raised by his mother and his aunt, and that after he left the house at thirty-five and got married, he and his wife and his children would visit frequently, and the decedent often gave financial gifts to his children. He claimed that after the decedent suffered a stroke, she asked him to write her will. He claimed that he abided by her request and hand wrote it

out, and she signed it there, and he forgot about it until she died six years later, when someone else found it in her cluttered house.

The Superior Court reversed the Probate Court findings, saying there was no direct evidence of undue influence, and that the nephew appeared to have written down exactly what the decedent dictated to be her last will and testament. Accordingly, the Superior Court found no sufficient evidence against the admission of the will, and therefore C.G.S. § 45a-288 is not applicable. The Superior Court further found that the Pennsylvania Court decision was entitled to full faith and credit, where the parties had a full opportunity to present any evidence they wished about the admissibility of the will.

The Connecticut relatives appealed to the Appellate Court. The Appellate Court noted that the Trial Court had not determined whether the will was legally sufficient, but only whether there was sufficient objection to its admission, and to that inquiry the answer was, "no."

First, the Connecticut relatives argued that since the will was not executed in accordance with Connecticut formalities, it could not pass title to the Connecticut real estate. The Appellate Court rejected that argument and noted that while a will must be attested to by two witnesses in Connecticut to pass title to real property, any will executed in accordance with the laws of another state may be admitted in probate in this state to pass title. The objection sufficient under C.G.S. § 45a-288 so as to prevent the filing of a foreign will, would be evidence that the will was not proved and established in a foreign jurisdiction, or that the copy was not authenticated or that the decedent did not own property in Connecticut, or that the death has not yet occurred. Here, the Trial Court correctly found that the Connecticut relatives presented no evidence that the decedent's will did not comply with the laws of the state of Pennsylvania. Accordingly, there was no sufficient objection. The PA could admit it, so it must have complied with PA law. Therefore it will be sufficient to pass title in CT.

• AC36953 - Bongiorno v. J & G Realty, LLC

A father and his daughter initiated proceedings against other family members to dissolve and wind up a series of limited liability companies pursuant to C.G.S. § 34-207 and C.G.S. §34-208, and sought to appoint a receiver and dissolve a general partnership in accordance with C.G.S. § 34-375(5) and C.G.S. § 52-509(a). The defendants filed a motion to dismiss for lack of subject matter jurisdiction, claiming that neither the father nor his daughter had an ownership interest in any of the corporate entities so as to confer standing. They then agreed to stay the action pending arbitration, with the stay entered as an order by the Superior Court through a specific date. The father then assigned all his interests in the entities to his daughter and withdrew from the lawsuit, but the assignments were parked with their attorney and never delivered to the companies.

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The defendants then renewed their motion to dismiss, which the Trial Court granted. The Trial Court made a finding that the daughter did not have any membership interest in any of the corporate entities.

The daughter appealed, first claiming the Court should not have considered the motion to dismiss while the matter was stayed pending arbitration. The Appellate Court rejected this argument on the grounds that a lack of subject matter jurisdiction cannot be waived, may be raised at any time, and must be brought to the attention of the Court. Here, the daughter did not have standing regardless of the purported assignments because the documents were never delivered to the corporate entities. The LLC operating agreement specifically provided that a transfer of interest is only effective once the company has received notice, and shall otherwise be deemed null and void. The first time the companies received notice of the assignments was through discovery in the litigation. For the one LLC that did not have an operating agreement, the assignment was still inadequate because she would not become a member until she notified the other members and they consented to the assignment in accordance with C.G.S. § 34-172(a). As to the partnership, it, too, lacked any type of partnership agreement but C.G.S. § 34-348(e) required notice to the other partners in order to give effect to a transfer.

Accordingly, there was no standing when the lawsuit was filed, and the Court was obligated to dismiss it. Further, such a motion is not a pendent lite under C.G.S. § 52-422, and therefore is not governed by that Statute. Finally, neither the agreement to participate in arbitration, nor filing pleadings in the litigation to the effect that the plaintiff had abandoned certain positions due to the agreement to arbitrate, did not amount to "judicial estoppel" to prevent the Court from acting upon the defendants' motion to dismiss.

Asserting that a plaintiff abandoned a certain position in a motion is not inconsistent with renewing a pending motion to dismiss. The latter is a proceeding of an entirely different nature, and a defendant cannot be estopped from pursuing it in Court, because the power to determine jurisdiction is an inherent power of the Court.

• AC36454, AC36874, AC37424, AC37425 - Pryor v. Pryor

Husband's post-dissolution appeal of the Trial Court's order on how real property was to be sold with automatic price reductions was rendered moot once the property was sold to a third party. Challenged issues such as a refusal to decrease alimony and child support, refusal to disqualify the presiding Judge, and awarding the wife her counsel fees – were not reviewed because of inadequate briefing. Parties may not merely cite to legal principles without analyzing the relationship between the facts of the case and law cited. Assignments of error, which are merely mentioned but not briefed beyond a statement of the claim asserted, will be deemed abandoned and not reviewed by the Court. Here, the ex-husband's brief made multiple allegations of fact without citing to any pages of a transcript nor to any exhibits provided to the Trial Court, Similarly, the motion to disqualify was void of any citation to any motions that were improperly or unfairly decided.

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The Appellate Court said it was not its function to comb through the Trial Court's record of over three hundred entries to determine whether or not the defendant's claim was supported. [Note that the defendant was himself an attorney, and claimed the Trial Judge was prejudiced against him for that reason.]

• AC37001 - TD Bank, N.A. v. Doran

Homeowner defendants claimed that the bank took too long in foreclosing its mortgage, and had it prosecuted the foreclosure when the loan first went into default, there would have been no deficiency. When the bank started its foreclosure, they appeared but offered no defenses until the hearing for deficiency judgment. By that time, the value of the property had dropped significantly, exposing the defendant homeowners to a significant deficiency judgment.

The Trial Court found that the plaintiff had not exercised undue delay in prosecuting its foreclosure, and therefore rejected the newly asserted defense of laches to the deficiency claim, and granted the deficiency judgment. The Appellate Court sustained the decision, but noted that defenses such as laches must be raised during the foreclosure proceeding, and may not be raised in the deficiency hearing for the first time. That is because by the time the parties reach a deficiency hearing, all defenses to the foreclosure should have been resolved, judgment has entered in favor of the lender, the valuation of the property and all issues surrounding it have already been decided. A deficiency hearing governs the limited issue of ascertaining the value of the property on the date the lender took title so as to ascertain the difference between that valuation and the lender's debt. It is too late by that point in time to assert any laches claim.

• AC37667 - Summerhill, LLC v. Meriden

Developer disputed a municipality's designation of his property as being restricted from most development under its ridgeline protection zone. Developer claimed that he had a meeting with the city manager, and claims they agreed that the developer would hire a geologist to convince the city that his property did not belong within the ridgeline protection zone. The developer then turned around and sued the city and its manager, claiming he had an oral contract which the city breached arising out of that meeting. After the plaintiff rested at trial, the City and Manager renewed their motion for a directed verdict, claiming lack of evidence of any agreement, along with the Fennell Doctrine, which provides that all who contract with a municipal corporation are charged with notice of the extent of the powers the officers with whom they contract, and therefore there is no liability if such officer had no power to bind the municipality.

The Trial Court granted the City's and the manager's motion for directed verdict under the Fennel doctrine, and as for a personal liability of the manager, held that there was insufficient evidence to submit the matter to the jury as to whether an agreement existed.

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The developer appealed only the personal liability of the manager, and the Appellate Court upheld the Trial Court's Ruling. The Appellate Court agreed that there was insufficient evidence to infer a contract had been formed. Plaintiff's only documentary evidence was the self-serving undated letter purportedly sent after the meeting, claiming that the city manager agreed that if it could be shown the project was not, in fact, ridge-top, he would recommend the property be removed from the ridgeline protection zone. The city manager never responded to that letter. Thus, the Appellate Court said, even if viewed in a light most favorable to plaintiff, the letter does not prove a meeting of the minds. Nor does it show any consideration to support the formation of a contract.

Further, at trial, the manager rebutted the suggestion that an agreement had been reached, and claimed that the letter bore no resemblance to what actually took place at the meeting. A Footnote adds that there was no evidence of any consideration to the manager for allegedly agreeing to support the developer's arguments before City commissions. [Hmmmm - seems like a frivolous suit indeed.]

The facts and holdings of any case may be redacted, paraphrased or condensed for ease of reading. No summary can be an exact rendering of any decision, however, so interested readers are referred to the full decisions. The docket number of each case is a hyperlink to the Connecticut Judicial Department online slip opinion.
