Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Week of December 15, 2015

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

Supreme Court Advance Release Opinions:

• SC19481 - JP Morgan Chase Bank, N.A. v. Mendez

After a foreclosure sale auction took place, the defendant property owner appeared for the first time and filed a motion to open and vacate the judgment of foreclosure pursuant to C.G.S. § 49-15, claiming that at all times she had a good faith intent to pay off the mortgage with anticipated forthcoming settlement proceeds from an unrelated lawsuit. The Trial Court denied the motion to reopen, noting that C.G.S. § 49-15 applies to strict foreclosures, not foreclosure by sale, and that the proper statute is C.G.S. § 52-212, and that there was no justification to open the judgment as the defendant's delay was due to her own inattention under either statute.

The Court concluded that despite the defendant's arguments to the contrary, C.G.S. § 49-15 only applies to the opening of judgments of strict foreclosure before title vests, not foreclosures by sale. In any event, the Trial Court found that it did not matter whether C.G.S. § 52-212 or C.G.S. § 49-15 applied because there was no equitable basis to grant a motion to reopen under either. Therefore, even of C.G.S. § 49-15 did apply, the appeal was deemed moot.

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• SC19325 - E & F Associates, LLC v. Zoning Board of Appeals

This was another decision that required a zoning boards of appeals to find a true hardship for a variance. In this particular case, the ZBA granted a variance to a property owner within the business district who owned a small lot with a small nonconforming, single-story business on it, constructed before zoning regulations. The setbacks for the property were only six inches verses the ten feet required under the regulations. The owner applied for a variance to add a second floor to establish a "quality restaurant." The abutting property owner objected, claiming that nothing rendered the applicant's property as unusable or subject to a unique hardship. Nonetheless, the ZBA voted to approve the variance, and the Trial Court upheld it.

The Supreme Court reversed noting that financial considerations are relevant to the question of whether a variance should be granted only if the application of the regulations practically destroys the value of the property for any use to which it may be put. Financial disadvantages to the property owner, however, do not constitute legal hardships. The ZBA, having failed to state its reasons, the Supreme Court undertook a search of the record and concluded it revealed no such basis for the ZBA to have granted the variance.

The decision even went so far as to criticize the earlier Stillman decision of the Appellate Court, which held that a variance can be justified when an unusual characteristic of the property would have negative economic impact of the owner's particular use of the property. In the Stillman case, the location of the well and the septic system prevented maximum economic use of the property. • The Supreme Court suggested that the Stillman decision was wrong to suggest that the inability to add to an existing structure constitutes a legal hardship.

• SC19097, SC19098 - State v. Jones

• SC19097, SC19098 Dissent - State v. Jones

Appellate Court Advance Release Opinions:

• AC35768 - State v. Terry

In this foreclosure action the defendant property owner moved to dismiss for lack of standing and pursued an unsuccessful appeal of the denial of that motion. The defendant claimed that Chevy Chase did not have standing when it commenced the action, because it was merged into Capital One prior to the commencement of the action, and therefore was not the holder of the mortgage and note. The defendant purported to prove its allegation by attaching newspaper articles . Chevy Case objected to the motion claiming it was not merged into Capital One until after the foreclosure was commenced and had witnesses testify to that effect and submitted a document entitled, "Certificate of Merger," issued by the Comptroller of the Currency.

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The Appellate Court refused to set aside the Trial Court's determination that the official date of the merger was represented by the document from the Comptroller of the Currency. The Appellate Court also upheld the Trial Court's refusal to allow the defendant to file an answer and special defenses when it was already in default and forty-five months had passed since the action had been started. In deciding whether to allow a late answer, a trial court may consider the presence of mistake, accident, inadvertence, misfortune or other reasonable causes such that allowed the default to enter, as well as prejudice to the non-defaulting party if it is allowed.

- AC36873 - Chevy Chase Bank, F.S.B. v. Avidon
- AC37236 - Vorlon Holding, LLC v. Commissioner of Energy & Environmental Protection

In this case, the plaintiffs claimed the LLC was entitled to the "Blameless Landowner" exception to liability for maintaining a source of pollution of the waters of the State of Connecticut. • The plaintiffs also claimed that the Court should not have found corporate officers personally and jointly liable for the violations per C.G. S. § 22a-432 and C.G.S. § 22a-6a(b). The site was originally owned by a Trust and operated as a tank farm by a tenant that had a 500 gallon spill of the solvent Toluene in 1988. The DEP issued an abatement order, but neither the company occupying the site nor the Trust that owned it complied. Thereafter, Vorlon LLC acquired the property, but Vorlon's sole member was a creditor of the Trust, and the transfer of the property was in satisfaction of the debt the Trust owned to the individual.

The Court found that not only was the corporate officer the sole member and president of the LLC that took title, but that she knew that the site was contaminated. The member then spent $500,000 of her personal funds to convert the site into a self-storage facility, and, leased the site to LLC solely controlled by her, or her husband. Showing how slowly things can proceed on the contaminated dirt front, in 2005, the U.S. EPA finally got involved and inspected the property and ordered remediation. The husband managed the remediation of the property, but by 2012, it was found to still be contaminated.

In 2012, the DEEP stepped back in and ordered the plaintiffs to hire an LEP, monitor the ground water and remediate the pollution. A department hearing officer found that Vorlon, LLC, its owner Jody Smith, and her husband Richard Smith, were all jointly and severally liable for maintaining the condition likely to cause pollution of the State of Connecticut's waters and that no one was entitled to the Innocent Landowner Exception.

The Superior Court adopted the findings of the Hearing Officer, and the Appellate Court agreed. First, the Appellate Court rejected the argument, but because the Vorlon leased out the operation of its property as a storage facility to other LLCs, it somehow became a "passive owner," and could not be held liable for the contamination. When the Statute refers to "maintaining" a site that is polluting the waters, the Legislature meant that word to be interpreted liberally, applying to one who has failed to abate pollution existing on their land.

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All agreed that the Innocent Landowner provision of C.G.S. § 22a-452d-e did not apply to this case, so the owner argued in the alternative, that the case based "Blameless Owner" exception should apply. This exception was enunciated in the Starr decision, and applies to a landowner who is not, in fact, in possession of their property, but who leased it to a tenant, and the pollution did not exist when the lease was entered into, and it was not anticipated that the Tenant's use would create a pollution condition. Under such circumstances, the tenant, rather than the landlord, would be considered the person who had created the pollution. But here, Vorlon was not a blameless owner. The LLC's president and sole member knew of the pollution of the property prior to taking title and leasing it out to other entities which, in turn, were under her control.

The Court also rejected the suggestion that the LLC's sole member should not be held personally liable because she asserted she had a limited role in the LLC's business operations, and that, in fact, her husband and the entities who leased the property had full control and assumed responsibility for abating the pollution. The fact of the matter is that in her capacity as sole member of the LLC, she had complete authority to determine the policies and actions of the title owner. A corporate officer who is in control may, by their inaction to remediate pollution, may be found personally liable. One cannot get off the hook by claiming they are nothing more than a titular head of a passive entity when, in fact, the entity owns the property and does not take steps to remediate the pollution.

A corporate officer cannot abdicate their responsibility that way. C.G.S. § 22a-432 is a strict liability statute, and it does not require a finding that the corporate officer directly participated in the violation before imposing personal liability. Finally, the Court also disagreed that all of the defendants should not have been found jointly liable. This is specifically authorized by C.G.S. § 22(a)-6(b). The plaintiffs failed to present any evidence that would have allowed the hearing officer to reasonably apportion liability.

- AC36908 - State v. Joseph
- AC37580 - State v. Daley
- AC36991 - Forgione v. Forgione

Three and one-half years after a judgment of dissolution was entered, the ex-wife filed a motion to reopen the judgment, claiming that the ex-husband had fraudulently concealed significant commissions earned just before the decree. Ultimately, the defendant and the plaintiff entered into a joint stipulation to allow the Court to reopen the judgment for the limited purpose of re-determining all financial matters. The defendant, however, never conceded that there had been any fraud perpetrated in the entry of the judgment.

The Trial Court accepted the Joint Stipulation, held a hearing and issued a memorandum of decision, reissuing financial orders and reallocating assets. The defendant ex-husband then appealed, claiming that the Trial Court erred in re-dividing the assets, but the Appellate Court asked for supplemental briefs addressing whether or not the Trial Court lacked subject matter jurisdiction entirely to reopen the judgment.

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In his supplemental brief, the defendant claimed that the Trial Court lacked subject matter jurisdiction because he had not conceded that he committed a fraud.

The plaintiff, on the other hand, asserted that the defendant's stipulation to allow the judgment to reopen was a concession that he had committed fraud, and then in the alternative, if not, then her original motion to open the judgment based on fraud needed to be restored to the docket.

The Appellate Court held that a stipulation is a contract, and parties cannot confer jurisdiction upon the Court by contract, absent it having contained a concession that the defendant was agreeing to or conceding the allegations of fraud. C.G.S. § 46b-86(a) deprives the Superior Court of continuing jurisdiction over the assignment of property once the dissolution becomes final, absent a finding of fraud. All orders following the original judgment in this case were deemed void.

The Appellate Court did order the matter remanded to the Trial Court to restore the plaintiff's original motion to reopen to the docket.

- AC36746 - Brewer v. Commissioner of Correction
- AC36698 - Kendall v. Commissioner of Correction
