Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Week of February 19, 2018

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 February 20, 2018

Appellate Court Advance Release Opinions:

• AC39520 - Stratek Plastics, Ltd. v. Ibar

Remember the case that held you could not recover your attorney fees in a mechanic lien foreclosure as the plaintiff unless there had been a (contested) hearing? This case applying the same statute, 52-249(a)*, to a judgment lien foreclosure, put a spin on that holding. Here the defendant and plaintiff's attorneys went to court and stipulated to a judgment of strict foreclosure and agreed that the plaintiff could later apply for attorney fees and the defendant said he would intend to object to the amount when requested. Thinking he had avoided a "hearing" on the foreclosure by stipulating to everything needed to enter the judgment, the defendant later objected to **any** award of attorney fees claiming there was no "hearing" on the foreclosure. The Appellate court disagreed holding that merely showing up in court and agreeing to a stipulation is a ***hearing*** and upheld the award of attorney fees. The Court distinguished the *Burns* decision because there the parties actually stipulated there would be "no hearing." This case also by implication resolves the issue whether the "hearing" has to be contested - not - and that the party is entitled to all their fees - not just the fees for the actual hearing.** [*The statute allows for the recovery of attorney fees by a plaintiff for a "foreclosure," not to be confused with a mortgage foreclosure where the recovery of fees is governed by the note & mortgage language. **For some unexplained reason here, the claim for attorney fees was >$200k and the court only awarded $50k.]

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• AC39301 - ASPIC, LLC v. Poitier

Limited Partnership owned a rental apartment. The partnership agreement provided that all partners would be personally liable for any debt owed by the partnership. One of the three general partners owned a management company which has a contract for the building. He in turn executed a promissory note on behalf of the partnership, as the only signatory, for over $2 million, in favor of the management company, allegedly for management fees owed. He then had his management company borrow $2 million from a third party and pledged the promissory note as collateral. When he defaulted on the third party loan, the lender foreclosed on the promissory note and bought it at auction. The third party lender then turned around and sued only one of the three partners who claimed there was no debt owed to the management company and the other two partners had no idea what the third was up to, so the note was procured by fraud. Most importantly, he alleged in a special defense that the third partner owed a fiduciary duty to Limited Partnership as well as to his partners and the plaintiff had a burden to now show by clear and convincing evidence that the note had been obtained only after fair dealing. Despite this later defense, the trial court granted a PJR in favor of the plaintiff while at the same time questioning if there had been fair dealing, but concluding there were just too many unknowns to resolve that issue until trial. The Appellate Court reversed holding that 52-278d requires the trial court to take into account any defenses asserted. Here, once the defense of fiduciary duty was asserted, the first step was for the court to determine if there was a fiduciary duty. Here the trial court concluded there would have been such a relationship. That finding in turn should have switched the burden upon the plaintiff to show by probable cause that at trial it could meet its burden of clear and convincing evidence that the promissory note pledged as collateral had been procured as a result of fair dealing. The fact that there is a higher burden of proof for trial on this issue may in turn impact whether the lighter burden of probably cause has been met at the PJR hearing. Here the trial court's dithering on the issue clearly showed that it had not properly switched the burden of proof upon the plaintiff and did not reach a conclusion that the plaintiff had met its probable cause burden that it would be able to show at trial (by clear and convincing evidence) that there had been fair dealing. The PJR ruling was reversed.