



Over Lawyering Danger: Sometimes the “Belt” Interferes with the “Suspenders”

May 14, 2018

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Deal lawyers often seek to insure an outcome using multiple approaches simultaneously; this is colloquially labeled a “belt and suspenders” approach. Ohio’s Sixth Appellate District recently reminded us of the danger of over lawyering in an effort to secure a legal position.

“Lender” filed a foreclosure action on a purchase-money mortgage and included as a defendant an “Attorney” who was also a mortgagee. Defendant-mortgagee Attorney obtained his mortgage to secure payment of outstanding legal fees owed by the mortgagor. The fees were incurred by the property owner in litigation that was settled by the mortgagor’s purchase of the property using Lender’s funds.

Lender’s mortgage and the Attorney’s mortgage were presented to the county recorder at the same time and recorded on the same day. Apparently, the county Recorder’s stamp did not include the time of recording. But, the recording stamp on Lender’s mortgage showed a lower page number than the recording stamp on the Attorney’s mortgage leading to the conclusion that the Lender’s mortgage was recorded before the Attorney’s mortgage.

Perhaps recognizing that he might lose the “first in time first in right” mortgage priority race, Attorney asserted that he possessed a charging lien on the real property because the attorney fees arose from the litigation that resulted in the property owner’s purchase of the property and granting of the two mortgages. An attorney’s charging lien in Ohio is a powerful property interest. *Cuyahoga County Bd. Of Comm. V. Maloof Properties, Ltd.*, 197 Ohio App.3d 712 (Cuyahoga App. 2012) (“We also note that charging liens are generally superior to the claims of the client’s other creditors. Indeed, charging liens have been recognized as having a ‘superpriority’ that is superior even to federal tax liens.”) (citations omitted).

Recognizing his potential superpriority, Attorney asserted that his charging lien had priority over Lender's mortgage. Attorney based his argument on Ohio cases like [Cohen v. Goldberger](#), 109 Ohio St. 22 (1923), where the Ohio Supreme Court stated at paragraph one of the syllabus: "[t]he right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund." Since the mortgagor executed both mortgages to settle litigation related to mortgaged property, Attorney asserted that his charging lien had priority.

Attorney's mortgage explicitly stated that it was to be a second compared to the Lender's purchase-money mortgage and Attorney helped arrange for the Lender's mortgage so that the property could be transferred which resulted in the litigation settlement. The trial and appellate courts analyzed those facts after providing this introduction:

Given the equitable nature of charging liens, courts have held that an attorney will only be allowed to enforce such a lien in "proper" cases. [Garrett v. City of Sandusky](#), 6th Dist. Erie No. E-03-024, 2004-Ohio-2582, 2004 WL 1125157, ¶ 25. "The decision of what constitutes a proper case is left to the sound discretion of the court of equity, the exercise of which should be based on the facts and circumstances of the case." (Citation omitted.) [Id.](#)

Knowing that he faced the "proper" case requirement, Attorney insisted that his charging lien argument was supported by [Kerger & Hartman, LLC v. Ajami](#), 54 N.E.3d 682 (Ohio App. 6th Dist. 2015), in which the court allowed a charging lien to be placed on real property after an attorney provided legal work to help his client obtain an interest in that real property. In response, the appellate court said "[w]e are not persuaded that [Kerger](#) applies here given the unique facts and circumstances that were present in that case. In light of appellant's decision to obtain a mortgage on the property that was expressly understood to be subject to" Lender's first mortgage, Attorney lost. The appellate court used facts concerning Attorney's mortgage to make an equitable determination concerning Attorney's asserted charging lien. It appears, that

Attorney's effort to bolster his charging lien with a recorded mortgage was detrimental to Attorney's lien position.

The trial and appellate courts ruled against the Attorney based on the determination that in his mortgage, Attorney had agreed to subordinate his equitable interest in the mortgaged property. Therefore, the courts did not have to address the regular priority rule governing attorney's liens: "In allowing for enforcement by notice to the judgment debtor, Ohio law parallels the requirement articulated in the Restatement of the Law Governing Lawyers, i.e., that 'the lien becomes binding on a third party when the party has notice of the lien.'" *Cuyahoga County Bd. Of Comm. V. Maloof Properties, Ltd.*, 197 Ohio App.3d 712 (Cuyahoga App. 2012). The appellate decision has no discussion of when Lender knew about Attorney's asserted charging lien and the priority of Attorney's lien using that rule.

The direct lesson is this: Ohio applies its race notice statute (O.R.C. Section 5301.23(A)) quite strictly. Lienors who are asserting an equitable interest in property will face an analysis of the circumstances surrounding the creation of that equitable interest, and that analysis may include a discussion of circumstances related to other lien positions. The larger lesson is that lawyers must always try to anticipate future events and be careful that an effort to firmly secure some right does not ultimately damage that right.

The above-described decision is *Kaufman v. Horvath*, 2018 WL 679457 (6th Ohio App. Feb. 2, 2018). For more information, contact Vince Mauer at vmauer@fbtlaw.com.

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