2017 IL App (2d) 170038-U
No. 2-17-0038
Order filed October 11, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CAMELOT, INC., TAEK KIM, M.D., YOUK LEE, M.D., and SANG IK KIM, M.D.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	
v.	)	No. 15-CH-1161
BURKE BURNS & PINELLI, LTD.,	)	Honorable Bonnie M. Wheaton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court was affirmed. The appellate court held that the defendant's statutory attorney's lien was not valid due to the failure to comply with the Attorneys Lien Act; the appellate court also determined that it did not have jurisdiction over the defendant's claim for an equitable lien.

¶ 2 Defendant, Burke Burns & Pinelli, Ltd. (BB&P), appeals an order of the circuit court of Du Page County granting partial summary judgment in favor of plaintiffs, Camelot, Inc. (Camelot), Taek Kim, M.D. (Kim), Youk Lee, M.D., and Sang Ik Kim, M.D. (Ik Kim). In that

order, the court directed BB&P to release a lien that it recorded against a 20-acre parcel of real estate in Du Page County (the property) owned by Camelot.[1] We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Underlying Litigation

¶ 5 In 1996, Kim, Lee, and Ik Kim (collectively the "clients") were involved in a dispute with their fellow shareholders in Camelot. The clients retained BB&P to represent them in the shareholder litigation. The scope of the litigation included vesting ownership of the property in Camelot. On June 20, 1996, Kim and Lee entered into a retainer agreement that provided, *inter alia*, as follows: BB&P would be entitled to "[t]wenty percent (20%) of any recovery by settlement or judgment," exclusive of the sum of $650,000, which represented the combined value of Kim's and Lee's spouses' shares in Camelot.

¶ 6 On May 28, 1997, Ik Kim signed a retainer agreement with BB&P that provided: (1) Ik Kim would pay a retainer of $7,500, against which attorney time would be billed at $200 per hour; (2) costs advanced and paralegal and clerk time would be billed monthly; and (3) BB&P's hours spent on the Camelot litigation would be "expended" equally among the clients.

¶ 7 On March 23, 2004, Ik Kim and BB&P cancelled the May 28, 1997, agreement. On that date, they signed a new agreement that provided, in pertinent part, that BB&P would be entitled to "a sum equal to 20% of any recovery by settlement or judgment," exclusive of $325,000, which represented the value of Ik Kim's shares in Camelot.

¶ 8 The shareholder litigation consisted of three consolidated lawsuits. The clients, together with one Suggie Kim and one Jung Lee, were plaintiffs in two of the lawsuits. On October 19, 2004, the shareholder litigation settled. Two "settlement agreements" of that date appear in the

[1] At oral argument, BB&P acknowledged that it has not released the lien.

record. Pertinent to this appeal, the parties to one of the agreements (the stock agreement) were Suggie Kim, Jung Lee, Ik Kim, and Camelot. The stock agreement provided, *inter alia*, that Camelot would own the property in fee simple,[2] and Suggie Kim, Jung Lee, and Ik Kim would own 100% of Camelot's stock. The pertinent parties to the second "settlement agreement" were Kim and Lee. That "agreement" acknowledged the existence of the stock agreement and provided for mutual releases and the dismissal of the shareholder litigation. What, if anything, Kim and Lee obtained in the settlement is not spelled out in that or any other document in the record.

¶ 9 On October 28, 2004, BB&P sent the clients a letter confirming that the "net effect" of the settlement resulted in Suggie Kim, Jung Lee, and Ik Kim owning 100% of Camelot's stock. The letter also confirmed that Camelot owned the property free of encumbrances. The letter requested payment of BB&P's fee in accordance with a "Final Settlement Statement." That statement reflected a net recovery of $5,186,310,[3] and it calculated a fee of $1,037,262 based on 20% of the net recovery. On September 27, 2005, the clients[4] and BB&P entered into an "addendum" to the retainer agreements, as follows: (1) BB&P acknowledged payment of $300,000; (2) the clients would pay another $100,000 if the property was not "sold and closed" by October 15, 2005; and (3) the remaining balance was "due and owing" on the "closing date" of the sale of the property. Camelot also signed this agreement. On October 15, 2005, the

[2] The record shows that Camelot became the grantee of record.

[3] This figure appears to be derived from the projected sale price of the property.

[4] The September 27, 2005, agreement also listed Suggie Kim and Jung Lee as "clients," but those individuals did not sign that agreement or any other fee agreement appearing in the record.

clients paid $100,000, leaving a balance of $637,262. BB&P thereafter regularly billed the clients for the unpaid balance.

¶ 10 On October 30, 2004, Camelot engaged BB&P to perform corporate work, excluding litigation, on its behalf.

¶ 11 B. The Present Litigation

¶ 12 As of 2014, the property had not been sold. In October 2014, BB&P learned through a tract search that the clients mortgaged the property to secure a loan in the amount of $301,500. On October 28, 2014, BB&P recorded a "Notice of Attorney's Lien" against the property, claiming that Camelot and the clients owed a fee in the amount of $637,262 in connection with the shareholder litigation. The lien purportedly was recorded pursuant to section 1 of the Attorneys Lien Act (Act) 770 ILCS 5/1 (West 2014). Upon recording the lien, BB&P threatened to foreclose if payment were not forthcoming. Camelot demanded that BB&P remove the lien, which BB&P refused to do.

¶ 13 On June 24, 2015, Camelot and the clients (collectively "plaintiffs") filed suit against BB&P. Count I of the complaint was titled "Quiet Title." The relief that Camelot requested was (1) a finding that the recorded lien constituted a cloud on the title and (2) a release of the lien. Counts II and III were for declaratory relief and an accounting, respectively. BB&P interposed certain affirmative defenses, including that plaintiffs granted it a security interest in the property, and it filed a counterclaim asserting, *inter alia*, an equitable lien in the property. On plaintiffs' motion, the trial court struck the affirmative defenses and the counterclaim, but it allowed BB&P to replead. BB&P repleaded its affirmative defenses and the counterclaim asserting an equitable lien. On June 23, 2016, the trial court struck the amended affirmative defenses and dismissed the amended counterclaim with prejudice. BB&P did not obtain a written finding pursuant to

Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), as a means to appeal the ruling.

¶ 14 On September 8, 2016, plaintiffs moved for partial summary judgment on count I of the complaint, arguing that BB&P's notice of the statutory lien was invalid. BB&P filed a cross-motion for partial summary judgment on count I, asserting that it was entitled to judgment on its statutory lien and on its defunct claim for an equitable lien in the property. On December 19, 2016, the court granted partial summary judgment in plaintiffs' favor, ordered BB&P to release the statutory lien, and included Rule 304(a) language. The court denied BB&P's motion to reconsider, and BB&P filed a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 BB&P contends that its statutory attorney's lien was properly recorded against the property. BB&P also maintains that each of the clients agreed to pay 20% of the settlement of the shareholder litigation as attorney fees, which created an equitable lien in the property. In contrast, plaintiffs maintain that (1) the Act does not provide a statutory basis for foreclosing a lien against the property, and (2) the fee agreements did not create an equitable lien in the property.

¶ 17 Parties may move for partial summary judgment, and major issues may be decided by partial summary judgment. *Vijuk Bindery Equipment, Inc. v. Transconex, Inc.*, 171 Ill. App. 3d 408, 410 (1988). Summary judgment should be granted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2016); *Storino, Ramello and Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 16. The trial court may grant summary judgment after considering the pleadings, depositions, admissions, exhibits, and affidavits on file and construing that evidence in favor of the nonmovant. *Storino*,

2015 IL App (1st) 142961, ¶ 16. We review the trial court's grant of summary judgment *de novo*. *Storino*, 2015 IL App (1st) 142961, ¶ 16.

¶ 18 A. Whether BB&P Can Foreclose a Statutory Lien

¶ 19 The Act creates a lien in favor of attorneys on all claims placed in their hands for suit or collection, and it requires a defendant, after notice, to respect the lien. 770 ILCS 5/1 (West 2014); *Brazil v. City of Chicago*, 315 Ill. App. 436, 439 (1942). To enforce the lien, the attorney must serve notice in writing upon the "party against whom" the attorney's client may have such "suits, claims or causes of action." 770 ILCS 5/1 (West 2014). The lien attaches to "any verdict, judgment or order entered and to any money or property which may be recovered." 770 ILCS 5/1 (West 2014). Once the attorney's lien is perfected, upon petition, any court of competent jurisdiction may adjudicate the lien. *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 95 (2001).

¶ 20 The lien is a statutory creature and must be strictly construed. *TM Ryan Co. v. 5350 South Shore, L.L.C.*, 361 Ill. App. 3d 352, 356 (2005). Noncompliance with the Act deprives attorneys of their lien rights. *TM Ryan*, 361 Ill. App. 3d at 356. An attorney's lien is perfected "from and after the time of service of notice on the party against whom the client has a claim." *TM Ryan*, 361 Ill. App. 3d at 356. The filing of notice of the attorney's lien during the existence of the attorney-client relationship is a prerequisite for perfecting the lien. *Department of Public Works v. Exchange National Bank*, 93 Ill. App. 3d 390, 394 (1981). An attempt to perfect a lien after the attorney-client relationship ceases to exist will be unsuccessful. *Rhoades v. Norfolk & Western R.R. Co.*, 78 Ill. 2d 217, 227 (1979) (by the time the law firm attempted to perfect its lien, there was no longer an underlying attorney-client relationship).

¶ 21 Plaintiffs argue that (1) Camelot was not BB&P's client at the time of the shareholder litigation and, therefore, the Act was never triggered; (2) BB&P did not serve notice of the lien

on Camelot or any other parties to the shareholder litigation; (3) the lien was not filed during the existence of any attorney-client relationship; and (4) the Act does not provide a mechanism for foreclosing on real property to enforce the lien. BB&P asserts that (1) plaintiffs lack standing to challenge the validity of the statutory lien; and (2) whether Camelot was its client is irrelevant, because the goal in the shareholder litigation was for Camelot to acquire the property and the clients retained BB&P for that purpose. Alternatively, BB&P argues that, in signing the September 27, 2005, agreement, Camelot retroactively "bound itself" to the terms of the clients' fee agreements. BB&P further maintains that the statutory lien attached to the stock and the property which BB&P recovered in the settlement of the shareholder litigation.

¶ 22 We dispose of BB&P's standing argument first. According to section 1 of the Act, enforcement of the lien is obtained by serving a notice of lien upon the party against whom the client may have a suit, claim, or cause of action. 770 ILCS 5/1 (West 2014). While BB&P agrees that Camelot, as the fee simple owner of the property, has general standing to object to a cloud on its title (see *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 52 (2009) (a plaintiff who actually has title can maintain action to remove a cloud from the title), BB&P asserts that Camelot cannot object on the specific grounds of noncompliance with the Act, because it was not a party "against whom" BB&P's clients were proceeding. We reject this argument as frivolous. BB&P placed into the record its own tract search showing that Camelot was in title to the property.

¶ 23 We turn now to the merits. It is undisputed that BB&P did not record the notice of attorney's lien until October 28, 2014, ten years after the shareholder litigation settled. Assuming, without deciding, that Camelot was BB&P's client during that litigation, the prerequisite that the lien be served during the existence of the attorney-client relationship has not

been met. It is also undisputed that the notice of lien was not served on the defendants in the underlying litigation, as required by the statute. At oral argument, BB&P conceded that it did not comply with the notice requirements, but it argued that the requirements do not apply, because every interested party had actual notice of the settlement. BB&P admitted that it has no authority for its position. The appellate court cannot rewrite a statute in a manner that is inconsistent with its clear and unambiguous language. *People v. Skillom*, 361 Ill. App. 3d 901, 908-09 (2005). Thus, we cannot write the notice requirements out of the statute.

¶ 24 Furthermore, we agree with plaintiffs that the Act does not provide a remedy of foreclosure. Plaintiffs rely on *Pedersen & Houpt, P.C. v. Main Street Village West, Part 1, LLC*, 2012 IL App (1st) 112971, ¶ 25. In *Pedersen*, the plaintiff attorneys unsuccessfully attempted to foreclose a statutory attorney's lien in mechanics lien litigation, and they appealed the trial court's ruling that the Act does not provide for foreclosure as a means to collect fees. *Pedersen*, 2012 IL App (1st) 112971, ¶ 1. The appellate court affirmed, noting that statutory liens are available and enforced only on such terms as the legislature provides. *Pedersen*, 2012 IL App (1st) 112971, ¶¶ 24, 48. The appellate court held that the Act "does not provide for a remedy of foreclosure on real property in the event the client does not pay his attorneys their fees." *Pedersen*, 2012 IL App (1st) 112971, ¶ 25.

¶ 25 BB&P attempts to distinguish *Pedersen* by arguing that *Pedersen* addressed only the timeliness of the statutory attorney's lien. While *Pedersen* addressed timeliness (*Pedersen*, 2012 IL App (1st) 112971, ¶¶ 18, 22, 43), the court also interpreted the Act to determine whether it permits the remedy of foreclosure. *Pedersen*, 2012 IL App (1st) 112971, ¶¶ 24-29. The court concluded: "As one can readily see from [the language] of the [Act], there is no statutory procedure for an attorney to commence an action to foreclose on a piece of real property."

Pedersen, 2012 IL App (1st) 112971, ¶ 29. We agree with *Pedersen*. Whether or not a statutory lien would have attached to the stock and property had BB&P complied with the Act, the Act plainly does not provide for the remedy of foreclosure.

¶ 26 At oral argument, BB&P conceded that the Act does not provide for foreclosure, but BB&P nevertheless argued that it was proper to record the lien against the property. We disagree. As noted, BB&P failed to perfect a statutory lien, and it follows that the recording was improper.

¶ 27 B. Whether This Court Has Jurisdiction Over the Claim for an Equitable Lien

¶ 28 BB&P also contends that it has a common law equitable lien in the property by virtue of the language in the fee agreements. As a threshold matter, we must examine whether we have jurisdiction to decide this claim. This court has a duty to consider its own jurisdiction, even though the parties have not raised the issue. *Daewoo International v. Monteiro*, 2014 IL App (1st) 140573, ¶ 72.[5]

¶ 29 We use the word "claim" purposefully in describing BB&P's assertion of an equitable lien, because it is a cause of action and not merely an ancillary issue to the claim concerning the statutory lien. (See *Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 18 (distinguishing an "issue" from a "claim")). The trial court dismissed with prejudice BB&P's amended affirmative defenses asserting a security interest in the property and the amended counterclaim for an equitable lien. "[A] dismissal with prejudice has the same effect as if the case had been completely tried on its merits resulting in [a] judgment adverse to [the] plaintiff." *Elder v. Robins*, 7 Ill. App. 3d 657, 661 (1972). Because BB&P did not obtain a Rule 304(a)

[5] We gave the parties advance notice to be prepared to address the jurisdiction issue at oral argument.

finding, it must wait until all of the claims have been resolved to appeal the dismissal. See *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990). In asking this court to hold in the present interlocutory appeal that it has an equitable lien, BB&P effectively seeks premature appellate review of the June 23, 2016, dismissal order.

¶ 30 At oral argument, BB&P asserted that its claim for an equitable lien was "embedded" in count I of plaintiffs' complaint, which was styled "Quiet Title." An action to quiet title in property is an equitable proceeding in which a party seeks to remove a cloud on his title to property. *Hoch v. Boehme*, 2013 IL App (2d) 120664, ¶ 41. Any instrument or proceedings in writing appearing of record and casting a doubt upon the validity of the record title constitutes a cloud on the title. *Allensworth v. First Galesburg National Bank & Trust Co.*, 7 Ill. App. 2d 1, 4 (1955). A suit to quiet title generally applies only to instruments or other proceedings in writing which appear of record and cast doubt on the validity of the record title. *Kile v. Swiney*, 413 Ill. 350, 354 (1952). Here, plaintiffs pleaded that the recorded notice of statutory lien clouded title because BB&P failed to comply with the Act, and the relief that plaintiffs sought and obtained was the release of the statutory lien.

¶ 31 Although BB&P filed affirmative defenses claiming that plaintiffs granted it a security interest in the property, that matter was not properly raised as an affirmative defense. An "affirmative defense" is one that gives color to the opponent's claim but asserts new matter which defeats the plaintiff's apparent right. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20. BB&P has never given color to plaintiffs' claim that the statutory lien was improperly recorded.

¶ 32 As important, BB&P's assertion of the right to an equitable lien was not necessary to defend against plaintiffs' contention that BB&P failed to comply with the Act. Whether BB&P

has a right to an equitable lien is not germane to the issue of the validity of its purported statutory lien. As noted above, the validity of the statutory lien depends upon BB&P's strict compliance with the Act. See *Philip Morris*, 198 Ill. 2d at 95 (attorneys who do not strictly comply with the Act have no lien rights). On the other hand, the elements of a cause of action for an equitable lien are (1) a debt, duty, or obligation owing by one person to another; and (2) a *res* to which it attaches. *Paine/Wetzel Assoc., Inc. v. Gitles*, 174 Ill. App. 3d 389, 393 (1988). Thus, the validity of the statutory lien has no relationship to the existence of an equitable lien. An attorney may establish an equitable lien even if he or she failed to perfect a statutory lien. *Wegner v. Arnold*, 305 Ill. App. 3d 689, 696 (1999).

¶ 33 An exception to the rule that a suit to quiet title applies only to instruments of record exists where a claim is asserted in a judicial proceeding. *Krile*, 413 Ill. at 354. BB&P asserted its claim to an equitable lien in the property in its affirmative defenses and counterclaim, but those pleadings were dismissed with prejudice. Under these circumstances, BB&P sought judgment on a claim that was no longer in the lawsuit. The only possible basis for this court's review of that issue is the order dismissing with prejudice the amended affirmative defenses and amended counterclaim. However, as noted, that order is not before us.

¶ 34 BB&P further asserts that the parties fully briefed the issue of the equitable lien, so it was before the trial court. That plaintiffs mentioned the dismissed claim for an equitable lien in their motion for partial summary judgment and argued that the trial court's dismissal was correct does not affect our jurisdictional analysis. The dismissal was with prejudice, meaning that it was on the merits. *Johnson v. Du Page Airport Authority*, 268 Ill. App. 3d 409, 418-19 (1994). Plaintiffs could not revive the claim by discussing it in their motion for partial summary judgment. Moreover, BB&P did not simply respond to plaintiff's discussion. Rather, BB&P

reasserted its dismissed claim to an equitable lien in its cross-motion for summary judgment. That was improper, because the court had already effectively granted judgment in plaintiffs' favor on the amended counterclaim. See *Elder*, 7 Ill. App. 3d at 661. It is well settled that this court's jurisdiction cannot be conferred by agreement of the parties. *E.J. De Paoli Co. v. Novus, Inc.*, 156 Ill. App. 3d 796, 798 (1987). Accordingly, we hold that the trial court properly granted partial summary judgment in plaintiffs' favor.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Du Page County. We order BB&P to release the statutory attorney's lien upon the issuance of this court's mandate.

¶ 37 Affirmed.