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G. Dale Flake and Cynthia R. Flake v. Duane A. Frandsen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

G. DALE FLAKE and CYNTHIA)
R. FLAKE, husband and wife,)
Plaintiffs-Respondents,)
vs)
DUANE A. FRANDSEN,)
Defendant-Appellant.)

Case No. 15309

APPELLANT'S BRIEF

Appeal from the Judgment of the
Seventh District Court for Carbon County
Honorable Edward Sheya, Judge

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vs)	
DUANE A. FRANDSEN,)	
Defendant-Appellant.)	Case No. 15309

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a civil case wherein the Appellant appeals the granting of Respondents' Motion for Summary Judgment, and also appeals the denial of Appellant's Motion for Summary Judgment.

DISPOSITION IN THE LOWER COURT

This matter came before the Honorable Edward Sheya, Judge of the Seventh Judicial District Court for Carbon County on Respondents' and Appellant's Motions for Summary Judgment on May 31, 1977. The Court granted Respondents' Motion and in doing so denied Appellant's Motion.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the lower Court's action

in granting Respondents' Motion for Summary Judgment, and ask this Court to order the Court below to grant Appellant's Motion for Summary Judgment.

Appellant has a valid common law retaining lien on the water stock in question because he rendered professional services for which he was not compensated, and he gained possession of the stock in the course of providing professional services.

Appellant also has a statutory charging lien on the water stock by virtue of his compliance with Utah Code Anno., Sec. 78-51-41 (1953 as amended), which provides for an attorney's lien upon a Judgment procured in his client's favor and the proceeds of the Judgment.

Thirdly, Appellant's Motion for Summary Judgment should have been granted because Respondents failed to comply with Rule 56(e) of the Utah Rules of Civil Procedure, which requires that a party must object to a Motion for Summary Judgment by filing responses to it, in order to prevent the Motion from being granted.

STATEMENT OF FACTS

Early in 1974 Appellant's clients, Maurice and Evie May L'Heureux, sued Ray and Maribelle Wareham over a dispute regarding a Sales Contract wherein Appellant's clients were purchasers and Warehams were sellers. The certificate of water stock at issue in the present case was among the proper

at issue in the Wareham suit. Judgment was granted in favor of Wareham by Seventh Judicial District Court Judge Edward Sheya, but later a Motion for a New Trial was granted. Before the new trial was heard, the parties negotiated a settlement, and Judgment was entered on December 20, 1974, in accordance with the terms of the settlement. That Judgment ordered Appellant's clients to deliver to the Warehams \$13,481.21 plus interest, and also ordered Warehams to deliver the subject water stock, which Wareham delivered to Appellant as attorney in the case. Appellant's clients did not pay for the Appellant's services in the Wareham suit, and Appellant retained possession of the water stock certificate asserting an attorney's lien until payment of Appellant's fee of \$3,000.05.

Appellant's clients then sold the farm which they had bought from Warehams to Respondents in this action. Included in this sale was the water stock which Appellant still held in his possession under an attorney's lien pending compensation for legal services rendered during the Wareham suit.

Appellant's clients moved to Missouri and have not paid him for his legal services. Respondents later sold the subject water stock to Utah Power and Light Company. Utah Power and Light paid for the stock and then demanded possession.

Appellant declined to deliver the stock to Utah Power and Light, and has at all times maintained possession of it and asserted an attorney's lien pending payment for legal

Respondents filed suit against Appellant on January 7, 1977, seeking to compel delivery of the stock. Appellant moved to dismiss on the ground that Respondents were not real parties in interest as required by Rule 17(a) of the Utah Rules of Civil Procedure, having sold the stock to Utah Power and Light, and having been paid therefore. The Motion was denied.

Appellant then filed an Answer alleging that Respondents were not real parties in interest, that Respondents had failed to join Appellant's former clients as indispensable parties, and asserting an attorney's lien on the stock. On April 25, 1977, Respondent moved for Summary Judgment and filed a supporting affidavit.

On May 6, 1977, Appellant filed an objection to Respondent's Motion for Summary Judgment as required by Rule 56(e) of the Utah Rules of Civil Procedure, and also moved for Summary Judgment in his favor, with a supporting affidavit. Respondent did not file any counter-affidavits and did not respond to Appellant's Motion for Summary Judgment, other than by oral argument at the hearing.

On June 2, 1977, the lower Court granted Respondents' Motion for Summary Judgment, and in so doing denied Appellant's Motion for Summary Judgment. Appellant now petitions the Utah Supreme Court to reverse the lower Court and order the granting of Appellant's Motion for Summary Judgment.

ARGUMENT

POINT 1

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE NO MATERIAL FACT WAS AT ISSUE AS TO APPELLANT'S COMMON LAW RETAINING LIEN ON THE WATER STOCK CERTIFICATE IN HIS POSSESSION.

It is well established within the law that attorney's liens are divided into retaining liens, founded upon possession, and charging liens, founded upon a Judgment. It is stated in 3 A.L.R. 2d at page 148:

"Attorneys' liens are divided, according to their nature, into two classes: (1) general, possessory, or retaining liens; and (2) charging or special liens. The former, which is generally a common law lien, attaches to all property, papers, books, documents, securities, and moneys of the client coming into the hands of the attorney in the course of his professional employment, and gives him the right to retain possession thereof as security for costs, disbursements, and charges not only in the particular cause in which they come into his possession, but for all costs, disbursements, and charges due him for other professional employment and business. This lien is, however, generally speaking, a passive one, and cannot ordinarily be actively enforced either at law or in equity. The special or charging lien, on the other hand, which is one given to the attorney for his services rendered in procuring a Judgment, Decree, or award for his client, may be actively enforced in appropriate proceedings therefore."

It is clear then that for a retaining lien to exist the client must owe the attorney for legal services or other business charges and the attorney must have in his possession some "property, papers, documents, securities" etc. which belong to the client, and which came into the attorney's possession in the course of professional employment. These tests are

plainly met in the instant case. Appellant provided valuable legal services for his client in the litigation with Mr. & Mrs. Wareham and was not compensated therefore. And the subject water stock, belonging to the client, came into Appellant's possession in the course of professional employment, namely in accordance with the settlement and Judgment in the Wareham suit.

The leading Utah case on retaining liens is Midvale Motor Inc. vs Saunders 21 U.2d 181, 442 P.2d 938 (1968). In that case the plaintiff lost at the trial level, but on appeal Judgment was reversed. Thereafter difficulties developed between the plaintiff and its attorney and the attorney withdrew. The attorney then asserted a charging lien on the files, pleadings and the property involved in the law suit pursuant to Utah Code Anno. Sec. 78-51-41, 1953 as amended. In holding that no charging lien existed because the attorney had not procured a Judgment in his client's favor as required by the statute, the Utah Supreme Court was careful to point out that a retaining lien may still exist even though the statutory requirements for a charging lien had not been met.

Speaking for an unanimous Court, Mr. Justice Ellett stated:

"The Court [below] attempted to declare a lien when the statute [U.C.A. 78-51-41] gave none. If counsel was justified in withdrawing from the case he had a common law retaining lien and still has it. . . but he has no charging lien on plaintiff's property". 442 P.2d at 940 (emphasis added)

Thus it is clear that Utah, like most states, has a common

charging lien. The Court realized that to rule otherwise would be to hold that an attorney has no remedy at all against the client who refuses to compensate him for services rendered, unless a Judgment is obtained. Such a holding would leave the attorney defenseless with regard to services rendered other than in actual litigation. For many attorneys most of their time is spent in advising clients in matters which do not involve litigation or Judgments. Estate planning, advising businesses, conducting real estate transactions and drafting contracts are just a few of many examples of vital and frequent attorney functions which do not necessarily involve litigation and Judgments. The attorney certainly must have recourse to a retaining lien in these situations if a client fails to pay. In fact one of the very purposes of a retaining lien is to provide a remedy against unjust enrichment in those cases where a charging lien does not apply.

It is equally clear that it is immaterial that someone other than the original client is seeking to deprive Appellant of his lien in this case. It is well settled in most jurisdictions that the mere attempted transfer of rights in the subject property by the client to a third party cannot serve to extinguish retaining liens altogether because they are possessory in nature and all a client would have to do to defraud his attorney would be to sell or give the subject property away whenever the attorney sought reimbursement for valuable services.

As early as 1927 Oklahoma faced this issue in Simpson vs Baker, 252 P. 834 (Okla. 1927). In that case an attorney was hired to recover 160 acres of his client's land. Before Judgment was rendered the client secretly compromised with the adverse party and conveyed the property to him. The Oklahoma Supreme Court held that the attorney retained his lien on the property for services rendered, despite the attempted conveyance. Likewise, Appellant in the present case has a valid retaining lien on the water stock which was not extinguished by Respondent's purchase of the same. The lien continues until the attorney has given up possession or until he has been compensated for his services.

It is also clear that the stock in question in this case is the type of property which is subject to a common law retaining lien. It is stated in 3 A.L.R. 2d at p. 148 as quoted above that retaining liens attach to "all property, papers, books, documents, securities, and moneys coming into the hands of the attorney in the course of his professional employment." In 7 C.J.S. Attorney and Client Sec. 210 at 1141 it is stated that retaining liens are an attorney's right to retain possession of "all documents, money, or other property of his client coming into his hands professionally."

While not distinguishing between a retaining lien and a charging lien Clark et al vs O'Donnell, 187 P. 534 (Colo. 1920) is illustrative of the majority rule that such attorney's

liens apply not only to pleadings and other papers actually

drafted by the attorney, but also to other property, securities or certificates of stock belonging to the client but in the possession of the attorney. In that case the attorney was retained to enforce a Sales Contract by which his client had bought 700,000 shares of stock in the Mexico-Wyoming Petroleum Company. The attorney was successful and the Court delivered the stock to the attorney for the sole purpose of transferring it to his client. Upon the client's refusal to compensate the attorney, the attorney asserted a lien and was upheld by the Colorado Supreme Court.

Likewise, in the instant case, Appellant asserts a retaining lien upon the water stock belonging to his client and which came into Appellant's possession in the course of professional employment, namely the stock certificate and other documents which were delivered upon the payment of the money to Warehams in satisfaction of the Judgment in the Wareham case.

Further it is well settled in Utah that a Motion for Summary Judgment must be granted where the pleadings, even if proved, would not provide a basis for recovery. Rule 56(c) of the Utah Rules of Civil Procedure states in part:

"The Judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatives, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to Summary Judgment as a matter of law."

An analysis of the Respondents' pleadings shows that there are no genuine issues of material fact which would bar

recovery under a retaining lien theory. The original Complaint

merely alleges that the Respondents purchased the stock after it came into Appellant's possession as a result of the Judgment in the Wareham suit. Assuming such to be true, a common law retaining lien takes precedence over the subsequent purchaser as a matter of law. To preserve the attorney's interest in the property in his possession is the very function of the retaining lien.

The affidavit in support of Respondents' Motion for Summary Judgment merely alleges that Respondents paid for the water stock, instructed Appellant to deliver possession, that Respondents desire to sell the stock, that Appellant was plaintiff's attorney in the Wareham suit and that there was no Judgment rendered in his clients' favor. Even if Respondents' affidavit were to be taken as factually correct in all respects, Appellant would still be entitled to Summary Judgment as a matter of law because the common law retaining lien does not rest upon a Judgment. Appellant has a common law retaining lien in the water stock as long as he retains possession and remains unpaid for services he rendered to his client.

POINT 2

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE NO MATERIAL FACT WAS AT ISSUE AS TO APPELLANT'S STATUTORY CHARGING LIEN ON THE WATER STOCK CERTIFICATE IN HIS POSSESSION.

At common law the attorney's special or charging lien is

an equitable right to have the fees and costs due to him for services in a suit secured to him out of the Judgment or recovery in that particular suit.

The lien is based on the principle of equity that plaintiff should not be allowed to appropriate the whole of a Judgment in his favor without paying thereout for the services of his attorney in obtaining such Judgment. The charging lien binds the award or Judgment which has been obtained through the attorney's efforts, and prevents a client from receiving the fruits of his attorney's labors without compensating him for his services.

For this common law charging lien to exist there must have been unpaid attorney's fees for legal services rendered in that particular cause of action, a Judgment, and appropriate notice. If these elements were present, a lien attached to the cause of action. However, this common law charging lien has been replaced by Utah Code Anno., Sec. 78-51-41 (1953 as amended), which reads in full as follows:

"The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an Answer containing a Counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or Counterclaim, which attaches to a verdict, report, decision, or Judgment in his client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after Judgment."

Several things are clear from the above statutory language. First, it is readily apparent that the statute only

applies to services performed in litigation. The statute says, "From commencement of an action, or the service of an Answer containing a Counterclaim, the attorney. . . has a lien. . ." This language indicates that Utah, like most states, has codified its charging lien but remains silent as to the common law retaining lien. It is Appellant's position that this statute does not exclude the other type of common law attorney's lien, namely the common law retaining lien.

Second, the statute only protects plaintiff's attorneys, and defendant's attorneys who have filed Counterclaims. This further narrowing of the statutory charging lien argues even more strongly for the retention of the common law retaining lien to protect attorneys who represent clients in capacities other than in litigation or where the litigant is a defendant not asserting a Counterclaim. It is also clear that Appellant is protected by the statute in spite of the narrow language because he represented the plaintiff in the Wareham suit.

Third, the statutory charging lien attaches to "verdict, report, decision or Judgment in his [the attorney's] client's favor and the proceeds thereof." For the statute to apply the attorney must have obtained a Judgment in his client's favor. That Appellant did so here is clear. It is at this point that the present case diverges from the Midvale Motors case, *supra*. In that case the plaintiff lost at the trial, and then the Judgment was reversed on appeal. It was immediately after that reversal that difficulties arose and the attorney

withdrew from the case. The Court reasoned that the attorney had left his client as he had found him, with a lawsuit yet to be tried, and that therefore there was no Judgment to which a charging lien could attach. The relevant language from the court's opinion is as follows:

"The statute I78-51-411 gives a lien to the attorney on the fruits of his labor so as to protect him against an unjust enrichment on the part of a nonpaying client. It is not intended to give a general lien on any other assets of the client. If the attorney's work is sterile and produces no fruit, then he has no lien. Here counsel for plaintiff produced no fruit from his labor. He lost the case in the Court below and then had to labor on an appeal to put his client back in status quo. When he withdrew from the case, he left the plaintiff practically as he found it, viz., with a lawsuit yet to be tried." 442 P.2d at p. 940.

Contrast the Midvale Motors case with what happened in the present case. Here the Court rendered a Judgment against the plaintiff and then granted a Motion for a New Trial upon certain issues. If the scenario had stopped there, this case would have been similar to Midvale Motors. But here Appellant took the additional step of negotiating a settlement to the satisfaction of his client which made the new trial unnecessary. The fruits of this settlement were included in the final Judgment, giving to the plaintiff, among other things, the water stock at issue here, in exchange for the stipulated price.

Thus it is clear that Appellant went beyond the facts of Midvale Motors and obtained, by a successful Motion for New Trial and by favorable negotiation, a Judgment favorable in part to his client. The water stock is the fruit of that Judgment and as such is subject to a charging lien under the

Utah statute, as well as being subject to the common law retaining lien. That such a holding complies with the policy behind this statutory lien is also clear. Mr. Justice Ellett in the above quoted language illuminates that statutory purpose. It is to protect the attorney against unjust enrichment on the part of the nonpaying client. As a direct result of Appellant's professional services, his client received title to certain land, livestock, and water stock at issue here. To allow the client to sell the proceeds of that Judgment without compensating Appellant for his legal services would clearly amount to unjust enrichment.

The last phrase of the charging lien statute resolves another issue. The statute is unequivocal in its affect on the present case, namely, that the lien continues in the stock, notwithstanding the fact that the Appellant's client attempted to transfer ownership. The language is as follows: "... The lien. . . attaches to the proceeds of the Judgment in whosoever hands they may come. . ." The express mandate of the statute is that an attempted assignment or sale of the proceeds of a Judgment cannot defeat an attorney's charging lien. At common law appropriate notice was necessary, but the Utah Legislature saw fit to dispense with that requirement. This same conclusion has been reached by other state courts which have interpreted similar statutes. In Anderson vs Star-Bair Oil Co. et al, 243 P. 394 (Wyo. 1926), the Wyoming Court held

hands was superior to the rights of an assignee, even without notice.

In City of Los Angeles vs Knapp et al, 60 P.2d 127 (Calif. 1936) the California Court reached the same conclusion. In that case the city attempted to condemn certain property, and then abandoned the attempt. The Court awarded costs and attorney's fees to the defendant, who assigned his rights to a third party. Defendant's attorney later assigned his rights to another party, and the Court held that the interest of the attorney's assignee was superior to that of the client's assignee.

The Arizona Court followed the same reasoning in Linder vs Lewis, Roca, Scoville and Beuchamp et al, 85 Ariz. 118, 333 P.2d 286 (1958). The relevant facts are as follows: Louis Marches hired attorney Harold Scoville to sue Jack Tolmachoff for malicious prosecution. Scoville won a Judgment in the amount of \$15,000.00, which Judgment Marches assigned to attorney Milton Linder for collection. Linder received payment in full and assigned it to Grace Thomas. The Arizona Supreme Court held that Scoville had a charging lien superior to Linder or Thomas because the attorney's interest, "as the person helping create the fund is paramount and superior to the rights of other persons." 333 P.2d at 289. Such is the majority rule and in accord with public policy. It would be sheer folly to enact a statute for protection against unjust enrichment and then allow circumvention of the statute by the mere transferring of the subject property.

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Appellant has a statutory charging lien on the water stock as proceeds of the Judgment he received as a result of the trial and his negotiations, in accordance with the Utah charging lien statute. The only way such a lien can be lost is by waiver or estoppel. Lundy vs Cappuccio, 181 P. 165 (Utah 1911).

It is clear that Appellant's Motion for Summary Judgment should have been granted because Respondents' pleadings raise no genuine issues as to any material fact. As discussed above the original Complaint merely alleges that Respondents purchased the subject stock after it came into Appellant's possession by order of the Court in the Wareham suit. Respondents' affidavit in support of their Motion for Summary Judgment alleges that Respondents paid for the stock and instructed Appellant to deliver possession, that Respondents desired to sell the stock, and that there was no Judgment in the plaintiff's favor in the Wareham suit. The only allegation affecting the validity of a statutory charging lien is the last one regarding a favorable Judgment. In spite of the language in paragraph one of the decree wherein the Court awards Judgment against the plaintiffs, examination of paragraph two reveals that in return for the amount stipulated, the defendants were ordered to convey to the plaintiff the subject water stock, as well as certain land and livestock. Certainly this Judgment was favorable in part to Appellant's client, ordering the defendant-vendor to deliver the very subject matter of both that suit and the present one to the plaintiff-vendee. It is clear then that

the favorableness of the Judgment in the Wareham suit is not a genuine issue. The final Judgment resolves the question on its very face. Therefore there are no genuine issues of fact alleged by Respondents which would bar the granting of Appellant's Motion for Summary Judgment, regarding the existence of a statutory charging lien. Appellant's statutory charging lien attached to the Wareham cause of action and to the Judgment rendered, favorable in part to Appellant's clients, the plaintiffs. Said lien also attaches to the water stock as proceeds of the Judgment in whosoever hands that stock may come. Thus Appellant's statutory charging lien would have been valid against the stock even if Appellant had relinquished possession.

Appellant also has a common law retaining lien on the water stock in his possession. That the charging lien statute was not intended to supplant the common law retaining lien is obvious from an examination of the consequences of such a holding. The charging lien statute has been narrowly drafted to protect only litigants' attorneys who make affirmative pleadings, as discussed above, and such lien attaches only to Judgment etc. from that litigation. If that were the exclusive protection an attorney had, he would have to render most of his services without the availability of recourse to an attorney's lien to prevent unjust enrichment on the part of an unpaying client. It is for this reason that this Court was careful to preserve the retaining lien in Midvale Motors discussed above.

likewise decided that their respective charging lien statutes do not affect retaining liens at common law. See 120 A.L.R. at p. 1247.

POINT 3

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE RESPONDENTS FAILED TO RESPOND TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT AS REQUIRED BY RULE 56(e) OF THE UTAH RULES OF CIVIL PROCEDURE.

Appellant is entitled to Summary Judgment because the Respondents failed to answer Appellant's Motion for Summary Judgment. Rule 56(e) of Utah Rules of Civil Procedure provides in part as follows:

"When a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but, in his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him."

The rule specifically provides that an adverse party must respond to a Motion for Summary Judgment, or else Summary Judgment must be entered against him. It is not enough to rest upon pleadings made up to the filing of the Motion for Summary Judgment. The Motion for Summary Judgment itself must be confronted and specifically dealt with.

The Eighth Circuit faced this issue in Jacobson vs Maryland Casualty Co. 336 F.2d 72 (1964). Maryland as surety filed

agreements insuring Jacobson's performance of government contracts. In February 1960, Maryland requested admissions, and in June 1960, Jacobson filed an Answer. Maryland moved for Summary Judgment in October 1960, supporting its Motion with "Suggestions in Support" and in February of 1961 Jacobson filed an amended Answer and an affirmative defense. Maryland's Motion for Summary Judgment was granted in part in March 1961, and in October of 1962, Jacobson moved for Summary Judgment, with "Suggestions in Support", which Motion was denied in December 1962, at which time Judgment was rendered in favor of Maryland.

The Eighth Circuit reversed the Judgment, holding that Maryland had never answered Jacobson's affirmative defense asserted in February of 1961. In discussing Rule 56(e) of the Federal Rules of Civil Procedure, which is identical to Utah's Rule 56(e), the Court stated:

"Maryland also contends that the assertions made in support of its Motion must be taken as true but makes no counter assertions with respect to Jacobson's affirmative defense. The assertions in the Motion are meaningless unless supported as provided for in Rule 56(e). True, the moving party may pierce the counter allegations contained in his opponent's pleadings, but in order to do so, he must discharge his burden and show by extraneous material that there is no triable issue of fact although one superficially appears from the pleadings. The record is devoid of anything contravening Jacobson's allegation of affirmative defense. It was not Jacobson's obligation, but Maryland's, to produce the necessary extraneous material to expose this defense as unmerited.

In spite of the protracted pleadings, requests for admissions, and motions lasting for nearly two years, a specific response

to Jacobson's affirmative defense was necessary, and Judgment was reversed for lack of such a specific response. So also in the present case, Appellant set forth an attorney's lien as an affirmative defense in his Answer and again asserted said lien in his affidavit in support of his Motion for Summary Judgment. Respondents' sole confrontation came in Respondents' affidavit in support of their Motion for Summary Judgment, made prior to Appellant's Motion for Summary Judgment. In that affidavit Respondents merely assert that Appellant did not obtain a Judgment in his client's favor in the Wareham suit, a contrary conclusion to which is indisputable upon the very face of said Judgment. Furthermore, this assertion came before Appellant's Motion for Summary Judgment and therefore cannot be considered a response to said Motion as required by Rule 56(e), and the assertion does not controvert Appellant's common law retaining lien in any way.

Rule 56(e) demands a specific response to an opponent's Motion for Summary Judgment, and Respondents have failed to make any response whatsoever. Absent such a response the Motion must be granted, unless a 56(f) affidavit is filed stating that the party cannot respond to the Motion and setting forth specific reasons therefore. No such affidavit was filed in the present case.

In Kaz Manufacturing Co. vs Chesebrough-Pond's Inc., 211 F. Supp. 815 (S.D.N.Y., 1962) the Court states:

"The proponent of a Motion for Summary Judgment has the burden of satisfying the Court that there is no substantial dispute as to questions of fact raised by the parties. Conversely, the opponent to prevail has the obligation of squarely and precisely raising triable issues of relevant facts." 211 F. Supp. 815 at 820.

In other words, the opponent to a Motion for Summary Judgment has the burden of "squarely and precisely" setting forth material facts which are at issue. If every fact in Respondents' pleadings were taken as true, a retaining lien would still exist, and there would be no material fact at issue.

Even if Respondents had responded to Appellant's Motion for Summary Judgment, it is nevertheless clear from the Wareham Judgment that the favorableness to Appellant's clients of paragraph 2 of that Judgment is not a genuine issue of fact, and therefore Respondents have not responded to Appellant's charging lien defense.

A similar interpretation of Rule 56(e) was reached in Gates vs Ford Motor Co. 494 F.2d 458 (10th Cir., 1974). In that case defendant moved for Summary Judgment where plaintiff had alleged that defendant's faulty design of its tractor was the cause of its overturning and killing plaintiff's husband. Plaintiff did not establish breach of duty, and in discussing the propriety of Summary Judgment, the Court said,

"Disposition of this case by Summary Judgment also is proper under Rule 56(e). Appellee supported its Motion for Summary Judgment with documents. Under the circumstances, the party opposing the Motion may not rest upon the mere allegations of his pleading but must respond

with specific facts showing a genuine issue for trial. Appellant, however, failed to do this." 494 F.2d at 460.

Respondents moved for Summary Judgment on April 25, 1977, and Appellant responded with written objections on May 6, 1977, in compliance with Rule 56(e). Appellant also moved for Summary Judgment in his favor on May 6th, thus obligating Respondents to comply with Rule 56(e) and specifically confront Appellant's Motion for Summary Judgment. Respondents' prior pleadings and affidavits are insufficient; an objection to Appellant's Motion is required.

Respondents failed to file any type of answer to Appellant's Motion, and, in accordance with Rule 56(e): "If he does not so respond, Summary Judgment, if appropriate, shall be entered against him."

Clearly Summary Judgment is appropriate in this case because of Respondents' failure to raise any genuine issues as to material facts regarding the validity of a common law retaining lien and a statutory charging lien. Therefore Respondents failed to comply with Rule 56(e) and Summary Judgment in Appellant's favor must be granted.

CONCLUSION

In summary, Appellant has done all within his power and all necessary not only to create a common law retaining lien, but also to comply with the charging lien statute. He has retained possession of "property, documents, securities, papers or moneys," namely the water stock, as security for payment for

valuable legal services. He therefore has a common law retaining lien. In addition, he has a charging lien under Utah Code Anno., Sec. 78-51-41 (1953 as amended). The water stock is proceeds of the Judgment directing the defendant in the Wareham case to convey that stock to Appellant's client. As the plaintiff's attorney in the Wareham suit, Appellant had a lien on the cause of action, which lien attached to the Judgment rendered, and the water stock as proceeds thereof.

Examination of plaintiffs' pleadings and affidavits show that a lien would be attached to the water stock even if all the pleadings and affidavits were true. Therefore, Appellant is entitled to Summary Judgment as a matter of law. Also, Respondents failed to respond to Appellant's Motion for Summary Judgment, as required by Rule 56(e) of the Utah Rules of Civil Procedure, thus requiring that Appellant's Motion be granted.

Appellant prays that the granting of Respondents' Motion for Summary Judgment be reversed as improvidently granted and that the lower Court be directed to enter Summary Judgment in favor of the Appellant.

DATED this 13th day of September, 1977.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the Respondents, Boyd Bunnell by delivering three (3) copies thereof to his office at Oliveto Building, Price, Utah 84501 on the / day of September, 1977.
