



## Prejudgment Remedy Denial Isn't The Last Word

PJR rulings don't preclude different finding in summary judgment phase

BY DAVID DOBIN

**A** February 2011 decision of the Appellate Court of Connecticut sheds light on the substantial procedural disparity between a prejudgment remedy proceeding and a subsequent proceeding on the merits. The opinion by Judge Richard A. Robinson rejects collateral estoppel effect to a plaintiff's failure to prove the necessary facts to obtain a prejudgment remedy, and removes one barrier to bringing judgment remedy applications.

In *Gateway, Kelso & Co. v. West Hartford No. 1*, 126 Conn. App. 578 (2011), after a one-day prejudgment remedy hearing, the trial court denied the plaintiff's application for a prejudgment remedy. The plaintiff claimed to be owed a commission on a sale of real estate. The defendant argued that the plaintiff, an unlicensed real estate broker, was barred from bringing an action to collect a commission by Connecticut General Statutes § 20-325a. Finding that the plaintiff was an unlicensed real estate broker barred by statute from bringing a collection action against the defendant, the trial court denied the plaintiff's application for a prejudgment remedy.

One year later, the defendant moved for summary judgment, arguing that the trial court's factual finding on the prejudgment remedy application collaterally estopped the plaintiff from denying that it was "engaged in real estate business." The trial court denied that motion.

On appeal, the court described the three requirements of collateral estoppel: First, the issue must have been "fully and fairly litigated" in the first action. Second, the issue must have been "actually decided." Third, the deci-

sion must have been "necessary to the judgment." The Appellate Court held that the issue of fact decided in the application for a prejudgment remedy had not been "fully and fairly litigated," and affirmed the trial court's denial of the defendant's motion for summary judgment.

In its decision, released Feb. 15, the Appellate Court based its holding on the "substantial procedural disparity between the prejudgment remedy proceeding and a subsequent proceeding on the merits." In particular, the court highlighted two important reasons why the prejudgment remedy proceeding did not afford the plaintiff an opportunity to fully and fairly litigate the merits of its claim: First, the court explained the bases for the "firmly established" principle that a prejudgment remedy hearing "is not intended to be a full scale trial on the merits of the plaintiff's claim." (quoting *Fischel v. TKPK Ltd.*, 34 Conn. App. 22, 24, 640 A.2d 125 (1994)). "Prejudgment remedy proceedings are circumscribed by statute; General Statutes § 52-278d(a); and 'are not involved with the adjudication of the merits of the action brought by the plaintiff or with the progress or result of that adjudication. They are only concerned with whether and to what extent the plaintiff is entitled to have property of the defendant held in the custody of the law pending adjudication of the merits of that action.... The adjudication made by the court on [an] application for a prejudgment remedy is not part of the

proceedings ultimately to decide the validity and merits of the plaintiff's cause of action. It is independent of and collateral thereto..." (quoting *Morris v. Cee Dee LLC*, 90 Conn. App. 403, 411-12, 877 A.2d 899)

Second, the Appellate Court noted the "less demanding standard" of proof for a prejudgment remedy application, *i.e.*, "probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or setoffs, will be rendered in the matter in favor of the plaintiff."

### Full-Blown Trials?

Interestingly, in *Gateway*, the trial court denied the plaintiff's application for prejudgment remedy despite the significantly lower "probable cause" burden of proof. Therefore, according to the court's reasoning, even a finding that the plaintiff failed to meet the significantly lower "probable cause" burden



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of proof cannot be used against the plaintiff later in a proceeding on the merits.

Although the court seemed most concerned with prejudgment remedy hearings becoming full-blown trials, the decision also has the effect of removing a roadblock to plaintiff's filing prejudgment remedy applications. In the past, Superior Court decisions have applied collateral estoppel to preclude the re-litigation of factual issues decided in earlier prejudgment remedy proceedings. See, e.g., *Coveny v. Gagner*, No. CV054012466s (Conn. Superior Court, Dec. 28, 2006); *Dinnis v. Roberts*, No. CV90-296974 (Conn. Superior

Court, Jan. 15, 1992). These cases might have supported an argument that the earlier prejudgment remedy hearings had been fully and fairly litigated, but *Gateway* makes clear that such a conclusion would be wrong.

The lesson of *Gateway* is that lawyers should not shy away from filing an application for prejudgment remedy for fear of a collateral estoppel effect on subsequent fact-finding if that application is denied. More fundamentally, in light of the Connecticut Supreme Court's holding in *Margolin v. Kleban & Samor*, 275 Conn. 765, 782-783 (2005), that a failure to file an application for prejudg-

ment remedy may be grounds for malpractice, it is incumbent on all Connecticut litigators, when representing a claimant (plaintiff or defendant), to speak to their clients about exploring all options for attaching defendants' assets prior to the entry of judgment. See also the Connecticut Rules of Professional Conduct § 1.0(f), which requires the client's agreement to a proposed course of conduct "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ■