

#D-300

8/27/80

First Supplement to Memorandum 80-67

Subject: Study D-300 - Enforcement of Judgments (Lien in Pending
Action or Proceeding)

Attached is a revised version of Article 5 (Lien in Pending Action or Proceeding) of Chapter 6 of Division 2. This version is the result of further staff consideration of the relationship between a lien in a cause of action and a creditor's suit.

This article should be considered in connection with the First Supplement to Memorandum 80-61 (methods of levy).

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Lien in Pending Action or Proceeding

Existing law¹ permits a judgment creditor to apply on noticed motion for an order granting a lien in a pending action or proceeding on a cause of action of the judgment debtor that is the subject of the action or proceeding and upon any moneys subsequently recovered by the judgment debtor in such action or proceeding. All parties to the action or proceeding must be given notice of the application for the lien. The court may also authorize the judgment creditor to intervene in the action or proceeding. The consent of the judgment creditor having the lien is required before a compromise, settlement, or satisfaction is entered into by or on behalf of the judgment debtor unless the lien is sooner satisfied or discharged.

The proposed law continues the existing procedure with some significant modifications:

(1) A lien is created when the judgment creditor files in the action or proceeding a notice of lien and an abstract or certified copy of the judgment creditor's money judgment.² The requirement of a prior court hearing authorizing the creation of a lien is not continued. The court hearing serves no useful purpose since it has been held under existing law to be an abuse of discretion for the court to refuse to order the lien on the ground that it would impede settlement negotiations.³ Thus, the proposed law leaves to the judgment creditor the

1. Section 688.1.

2. This makes clear when the lien is created. The general rule under existing law is that the priority of the lien is determined as of the time the lien is granted. See *Takehara v. H.C. Muddox Co.*, 8 Cal.3d 168, 170, 501 P.2d 913, 104 Cal. Rptr. 345 (1972); Civil Code § 2897 (priority based on time of creation of lien, other things being equal). But the equitable rule granting priority to the one who first applies for the lien was also invoked. See *Del Conte Masonry Co. v. Lewis*, 16 Cal. App.3d 678, 681, 94 Cal. Rptr. 439 (1971).

3. Existing law provides no standard for denial of the application for a lien. In *Atiya v. DiBartolo*, 63 Cal. App.3d 121, 133 Cal. Rptr. 611 (1976), the court held that it was an abuse of discretion to deny the lien on the ground that the lien would impede settlement negotiations but in dictum stated that a substantial showing that other assets were available might justify denial of a lien.

choice of what assets to pursue in satisfaction of the judgment and is consistent with the freedom the judgment creditor has to select assets of the debtor when levy of execution is the method of collection used. If the judgment debtor wishes to avoid the lien, he or she may do so by voluntarily applying other available assets, if any, to the satisfaction of the judgment.

(2) The requirement that notice be given to all parties to the action is continued, but failure to give notice to one or more of the parties does not affect the validity of the lien. However, the proposed law makes clear that the rights of a party who makes a settlement, dismissal, compromise, or satisfaction without notice of the existence of the lien are not affected if that party does not have notice of the lien.⁴

(3) The lien extends to all rights of the judgment debtor to recover money or property under the judgment in the pending action or proceeding. The former law may have limited the lien to the judgment debtor's right to money under the judgment.⁵ The expansion of the lien is consistent with the scope of a creditor's suit which may be brought against a person indebted to or holding property of the judgment debtor.

(4) The proposed law specifies the contents of the notice of lien. This notice is filed in the pending action or proceeding and is served on the parties to the action or proceeding. The notice will inform the parties of the relevant facts and the consequences of the lien (such as the prohibition against compromise, dismissal, settlement, or satisfaction without the judgment creditor's consent).

(5) The proposed law permits the court to make an order permitting a compromise, dismissal, settlement, or satisfaction without the consent of the judgment creditor. This will prevent the judgment creditor from

4. This principle of protecting obligors without notice is consistent with comparable general provisions. See Civil Code § 955.1; Com. Code § 9318.

5. See *Abatti v. Eldridge*, 103 Cal. App.3d 484, 163 Cal. Rptr. 82 (1980).

proceed with the action or proceeding when the court concludes that it is in the best interests of the parties to settle. The court has no such authority under existing law.

(6) Under existing law, it appears that an action to foreclose the lien is necessary in order to reach the amount represented by the judgment.⁶ The proposed law permits a party or the judgment creditor to apply for an order from the court applying the money or property to the satisfaction of the lien in the same manner as property may be applied in a creditor's suit. This enables the defendant in the action, for example, to obtain an early determination of whom to pay upon the conclusion of the action. If no order to apply the property is sought, the judgment debtor may employ any appropriate remedy after final judgment, such as levy under a writ of execution on a final money judgment. These remedies will be more effective and efficient than an equitable action to foreclose a lien.

(7) The proposed law provides for a determination of the judgment debtor's exemption claim before judgment in the main proceeding, analogous to determination of exemptions in a creditor's suit. Exemption claims not made within 30 days after creation of the lien are waived. Existing law makes no provision for claiming or determining exemptions.

6. See *Roseburg Loggers, Inc. v. Plywood-Champion Papers, Inc.*, 14 Cal.3d 742, 748, 537 P.2d 399, 409, 122 Cal. Rptr. 561, 571 (1975) (dictum).

Article 5. Lien in Pending Action or Proceeding

§ 708.410. Judgment creditor's lien in pending action or proceeding

708.410. (a) A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien under this article, to the extent required to satisfy the judgment creditor's money judgment, on both of the following:

(1) Any cause of action of such judgment debtor for money or property that is the subject of the action or proceeding.

(2) The rights of such judgment debtor to money or property under any judgment subsequently procured in the action or proceeding.

(b) To obtain a lien under this article, the judgment creditor shall file a notice of lien and an abstract or certified copy of the judgment creditor's money judgment in the pending action or proceeding.

(c) At the time of the filing under subdivision (b) or promptly thereafter, the judgment creditor shall serve a copy of the notice of lien on all parties who, prior thereto, have made an appearance in the action or special proceeding. Service shall be made personally or by mail. Failure to serve all parties as required by this subdivision does not affect the lien created by the filing under subdivision (b), but the rights of a party are not affected by the lien until the party has notice of the lien.

Comment. Sections 708.410-708.480 supersede former Section 688.1. A lien under this article reaches the judgment debtor's right to money under the judgment in the pending action or proceeding as permitted by former law. See *Abatti v. Eldridge*, 103 Cal. App.3d 484, 163 Cal. Rptr. 82 (1980). The lien also reaches any right of the judgment debtor to property under the judgment.

The purpose of this lien is to establish and preserve the judgment creditor's priority until the judgment is final and nonappealable. Upon motion of any party to the action including the judgment debtor who has obtained a lien, the money or property to which the judgment debtor is entitled upon judgment in the action may be applied to the satisfaction of the judgment creditor's judgment as ordered by the court. See Section 708.470. If no motion is made by a party, the judgment creditor may seek to reach the judgment subject to the lien by some other enforcement procedure if no settlement is agreed upon. See Section 708.480 and Comment thereto. The lien is ineffective after the time for enforcement of the judgment creditor's money judgment has expired. See Section 683.020. The duration of the lien may be extended as provided in Section 683.190.

If property that is the subject of a pending action or proceeding is real property or tangible personal property in the possession of the judgment debtor, the judgment creditor may levy on the property under a writ of execution. See Section 700.180. This remedy can be used as an alternative to the lien or in addition to the lien.

The lien obtained by filing pursuant to this section is subject to any prior liens of the same type or another type, such as an attorney's charging lien. See *Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc.*, 14 Cal.3d 742, 748-51, 537 P.2d 399, 403-05, 122 Cal. Rptr. 567, 571-73 (1975). Cf. *Haupt v. Charlie's Kosher Mkt.*, 17 Cal.2d 843, 846, 121 P.2d 627 (1941) (attorney's lien prevails over subsequent attachment lien under former statute).

Subdivision (b) of Section 708.410 provides for the creation of the lien by the filing, in the pending action or proceeding, of a notice of lien and an abstract or certified copy of the judgment creditor's money judgment. The requirement of a prior court hearing authorizing the creation of the lien under former Section 688.1 is not continued. Although former Section 688.1 required a hearing on noticed motion before the court could order that a lien be created, the section provided no standard for denial of such an order. It was held under former law to be an abuse of discretion for the court to refuse to order the lien on the ground that it would impede settlement negotiations. *Atiya v. DiBartolo*, 69 Cal. App.3d 121, 133 Cal. Rptr. 611 (1976). Section 708.410 avoids the need for a court hearing before a lien can be created. Although a dictum in the *Atiya* case stated that a substantial showing that other assets were available might justify denial of the lien, Section 708.410 leaves to the judgment creditor the choice of which assets to pursue in satisfaction of the judgment. This is consistent with the judgment creditor's freedom to select assets of the debtor when levy of execution is the method of collection used. If the judgment debtor wishes to avoid the lien under this article, he or she may do so by voluntarily applying other available assets, if any, to the satisfaction of the judgment.

Former Section 688.1 required that all parties to the action or proceeding be given notice of the application for the lien. Under Section 708.410, the lien is created by the filing in the action or proceeding. Notice to all parties who have appeared in the action or proceeding is required by subdivision (c) of Section 708.410, but this subdivision makes clear that failure to give notice to one or more of the parties does not affect the validity of the lien. Subdivision (c) also makes clear that the rights of a party who makes a settlement, dismissal, compromise, or satisfaction without notice of the existence of the lien are not affected. This principle of protecting obligors without notice is comparable to other provisions. See, e.g., Civil Code §§ 954.5, 955.1; Com. Code § 9318.

CROSS-REFERENCES

Abstract of judgment § 674

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

Liens generally § 679.010 et seq.

Manner of service §§ 684.010-684.080

State tax lien in pending action or proceeding, see Gov't Code § 7173

§ 708.420. Contents of notice of lien

708.420. The notice of lien under Section 708.410 shall contain all of the following:

(a) A statement that a lien has been created under this article and the title of court, cause, and number of the pending action or proceeding in which the notice of lien has been filed.

(b) The name of the judgment debtor.

(c) The name and mailing address of the judgment creditor.

(d) The date of entry of the judgment creditor's judgment and where entered in the records of the court.

(e) The date the notice of lien was filed in the action or proceeding.

(f) The amount required to satisfy the judgment creditor's judgment at the time the notice of lien was filed in the action or proceeding.

(g) A statement that the lien attaches to any cause of action of the judgment debtor that is the subject of the action or proceeding and to the judgment debtor's rights to money or property under any judgment subsequently procured in the action or proceeding.

(h) A statement that no compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or any of the judgment debtor's rights to money or property under any judgment procured therein may be entered into by or on behalf of the judgment debtor, and that no writ may be issued in favor of the judgment debtor to enforce the judgment debtor's rights to money or property under any judgment procured in the action or proceeding, unless one of the following requirements is satisfied:

(1) The prior approval by order of the court in which the action or proceeding in pending has been obtained.

(2) The written consent of the judgment creditor has been obtained or the judgment creditor has released the lien.

(3) The judgment of the judgment creditor has been satisfied.

(1) A statement that the judgment debtor may claim an exemption for all or any portion of the money or property within 30 days after the judgment debtor has notice of the creation of the lien. If the exemption is not claimed within the time allowed, the exemption is waived.

Comment. Section 708.420 is new and is designed to advise the parties to the pending action or proceeding of the relevant facts and of the consequences of the filing of a notice of lien under this article.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

Exemptions § 703.010 et seq.

7832

§ 708.430. Intervention; judgment creditor deemed a party for certain purposes

708.430. (a) The court in which the action or proceeding is pending may permit a judgment creditor who has obtained a lien under this article to intervene in the action or proceeding pursuant to Section 387.

(b) For the purposes of Sections 708.450 and 708.470, a judgment creditor shall be deemed to be a party to the action or special proceeding even though the judgment creditor has not become a party to the action or proceeding under subdivision (a).

Comment. Subdivision (a) of Section 708.430 continues the substance of a portion of the first sentence of former Section 688.1(a). Subdivision (b) permits a judgment creditor who has not intervened to oppose a claim of exemption pursuant to Section 708.450 or to seek an order applying the property to the satisfaction of the judgment creditor's judgment pursuant to Section 708.470.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

§ 708.440. Compromise, dismissal, settlement, satisfaction

708.440. (a) Except as provided in subdivision (c) of Section 708.410, unless the judgment creditor's judgment is first satisfied or the lien is released, no writ may be issued in favor of the judgment debtor to enforce the judgment recovered in the action or special proceeding, and no compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or the judgment procured therein may be entered into by or on behalf of the judgment debtor, without the written consent of the judgment creditor or authorization by order of the court obtained under subdivision (b).

(b) The court in which the action or special proceeding is pending or the judgment is entered may, in its discretion, after a hearing, make an order described in subdivision (a) which may include such terms and conditions as the court deems necessary. An order under this subdivision may be obtained on motion, notice of which has been given to the judgment creditor.

Comment. Section 708.440 supersedes a portion of the second sentence of former Section 688.1. The provision permitting compromise, dismissal, settlement, or satisfaction pursuant to court order despite the opposition of the judgment creditor is new and has been added to prevent, for example, the judgment creditor from forcing the judgment debtor to proceed with the action when the court concludes that it is in the best interests of the parties to settle. The introductory clause of subdivision (a) recognizes that, notwithstanding this section, the rights of a party who settles without notice of the lien are unaffected by the lien. See Section 708.410(c).

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

Manner of service §§ 684.010-684.080

Satisfaction and discharge §§ 724.010-724.260

§ 708.450. Judgment debtor's claim of exemption

708.450. (a) If a lien is created under this article, the judgment debtor may claim that all or any portion of the money or property that

the judgment debtor may recover in the action or special proceeding is exempt from enforcement of a money judgment. The claim shall be made by application to the court in which the action or special proceeding is pending on noticed motion, filed and served on the judgment creditor not later than 30 days after the judgment debtor has notice of the creation of the lien. The judgment debtor shall execute an affidavit in support of the application that includes all the matters set forth in subdivision (b) of Section 703.520. No notice of opposition to the claim of exemption is required. The failure of the judgment debtor to make a claim of exemption under this section constitutes a waiver of the exemption.

(b) Unless continued for good cause shown, the court shall determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding and may consolidate the exemption hearing with the hearing on a motion pursuant to Section 708.470. The court's determination of the exemption claim is as conclusive as an exemption determination made pursuant to Chapter 4 (commencing with Section 703.010).

(c) If the judgment debtor establishes to the satisfaction of the court that the right of the judgment debtor to money or property under the judgment in the action or special proceeding is all or partially exempt from enforcement of a money judgment, the court shall order the termination of the lien created under this article on the exempt portion of the money or property.

Comment. Section 708.450 provides the procedure for the making and determination of any exemption claimed for the judgment debtor's prospective recovery that is subject to a lien created under this article. This procedure is drawn from Sections 708.260 and 708.280 (creditor's suit). The judgment creditor is deemed to be a party for the purposes of this section. See Section 708.430(b).

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

Exemptions § 703.010 et seq.

§ 708.460. Endorsement of lien on judgment and abstract

708.460. (a) If a lien is created pursuant to this article, the court clerk shall endorse upon the judgment recovered in the action or special proceeding a statement of the existence of the lien and the time it was created.

(b) Any abstract issued upon the judgment shall include a statement of the lien in favor of the judgment creditor.

Comment. Section 708.460 supersedes the third sentence of former Section 688.1. Section 708.460 is consistent with the last two sentences of subdivision (b) of Section 700.190 (execution lien on final money judgment).

CROSS-REFERENCES

Abstract of judgment § 674

Judge to perform duty where no court clerk § _____

§ 708.470. Orders in action or special proceeding to enforce lien

708.470. (a) If the judgment debtor is entitled to money or property under the judgment in the action or special proceeding and a lien created under this article exists, the court may, upon motion of any party to the action or special proceeding with notice to all other parties, order that the judgment debtor's rights to money or property under the judgment be applied as ordered by the court to the satisfaction of the lien created under this article.

(b) If the judgment determines that the judgment debtor has an interest in property, the court may order the party having custody or control of the property not to transfer the property until it can be levied upon or otherwise applied to the satisfaction of the lien created under this article.

(c) If the court determines that a party other than the judgment debtor has transferred property that was subject to a lien created under this article, or that the party having notice of the lien created under this article has paid the amount owing to the judgment debtor, the court

shall render judgment against the party in an amount equal to the lesser of the following:

- (1) The value of the judgment debtor's interest in the property or the amount paid the judgment debtor.
- (2) The amount of the judgment creditor's lien created under this article.

Comment. Section 708.470 is drawn from subdivisions (b)-(d) of Section 708.280 (creditor's suit). The judgment creditor is deemed to be a party for the purposes of this section. See Section 708.430(b).

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.340

Judgment debtor § 680.350

8328

§ 708.480. Enforcement of lien after final judgment

708.480. After the judgment subject to a lien created pursuant to this article is entered as a final judgment and the time for appeal from the judgment has expired or, if an appeal is filed, after the appeal is finally determined, the lien may be enforced by any applicable procedure.

Comment. Section 708.480 makes available a variety of remedies for the enforcement of a lien created under this article, such as levy on the judgment under a writ of execution (see Section 700.190 relating to levy on final money judgment) and sale or collection pursuant to such levy (see Section 701.510), appointment of a receiver to collect the judgment (see Section 708.620), application for an assignment order (see Section 708.510), and collection from a public entity owing money to the judgment debtor (see Sections 708.710-708.795). If, for example, the judgment creditor obtains a writ of execution and levies on a money judgment obtained by the judgment debtor in the action or proceeding, the execution lien on the judgment obtained by the levy of execution relates back to the lien created under this article. See Section 697.020. If the property that is the subject of the pending action or proceeding is real property or tangible personal property in the possession of the judgment debtor, the property may be levied upon prior to the final judgment in the action or proceeding. See Section 700.180.

Under former law, it appeared that where the judgment debtor of the judgment debtor did not voluntarily pay the judgment creditor to discharge the lien and the judgment debtor took no steps to enforce the judgment, the judgment creditor had to bring an action to foreclose the

lien in order to reach the amount represented by the judgment. See *Roseburg Loggers, Inc. v. Plywood-Champion Papers, Inc.*, 14 Cal.3d 742, 748, 537 P.2d 399, 409, 122 Cal. Rptr. 561, 571 (1975) (dictum). Section 708.460 expands the remedies available to the judgment creditor and provides remedies that will be more effective than an equitable action to foreclose a lien.