NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-06-1037-PaBK
SUE ANN ALTER,	Bk. No. SV 04-15464-GM
Debtor.	Adv. No. SV 05-01534-GM
LYNBERG & WATKINS,	
Appellant,	
v.	**M E M O R A N D U M**[1]
DAVID SEROR,	
Appellee.	

Argued and Submitted on July 14, 2006
at Pasadena, California

Filed – August 15, 2006

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Geraldine Mund, Bankruptcy Judge, Presiding.

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Before: PAPPAS, BRANDT and KLEIN, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

Law firm Lynberg & Watkins (the "Firm") appeals a summary judgment granted by the bankruptcy court in favor of chapter 7 trustee David Seror ("Trustee") determining that the Firm's lien in the proceeds of recovery from a state court action under a written fee agreement with Debtor Sue Ann Alter ("Alter") was unenforceable, and therefore, that the Firm's claim was unsecured. We AFFIRM.

FACTS

In early 2004, Alter retained both the Firm and the Coleman Law Group ("Coleman") to represent her in connection with a legal action stemming from her purchase and sale of a medical practice. Alter signed three retainer agreements with Coleman: one each on December 7, 2003, February 18, 2004, and April 14, 2004. She signed a separate retainer agreement with the Firm on April 19, 2004.

The Firm's retainer agreement, which was accompanied by a transmittal letter dated April 16, 2004, detailed the parties' arrangement that fees for the Firm's services would be billed on an hourly basis. At paragraph 8, entitled "Lien," the agreement provided:

> You [Alter] hereby grant us [the Firm] a lien on any and all claims or causes of action that are the subject of our representation under this Agreement. Our lien will be for any sums owing to us at the conclusion of our services. The lien will attach to any recovery you may obtain, whether by arbitration award, judgment, settlement or otherwise.

Although the agreement specified that the Firm would retain a lien in any settlement proceeds for unpaid billings, the

agreement contemplated that Alter would pay for charges incurred monthly.

The agreements Alter executed to retain Coleman contained similar terms and identical language granting Coleman a lien in any settlement proceeds. The lien language in all four agreements was identical to the language recommended by the California State Bar Association in its model fee agreement forms. However, the Coleman agreements included a cautionary introductory paragraph not found in the Firm's agreement. This language encouraged Alter "to consult with other counsel or advisors of your choice regarding these matters, and to consider fully the possible implications of our representation on the basis described."

The Firm and Coleman assisted Alter in ultimately negotiating a structured settlement resolving the litigation. Alter and the adverse parties executed a written settlement agreement on May 4, 2004. With Alter's consent, the settlement funds were paid to Coleman on Alter's behalf and deposited in its trust account.

On August 13, 2004, with the settlement money still held by her attorneys, Alter filed a petition seeking relief under chapter 13[2] of the Bankruptcy Code. Her bankruptcy case was later converted to a chapter 7 case on January 4, 2005, and Trustee was appointed. At this time, Coleman held $160,000 in

[2] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

Alter settlement proceeds in its trust account, which the bankruptcy court ordered turned over to Trustee on January 26, 2005.

The Firm filed a proof of claim in Alter's bankruptcy case on May 11, 2005, for unpaid fees and costs associated with the litigation in the amount of $59,758, asserting that, under the retainer agreement, its claim was secured by a lien in the settlement proceeds.

On October 17, 2005, Trustee commenced an adversary proceeding against the Firm, objecting to its status as a secured creditor and seeking declaratory relief from the bankruptcy court that the lien provision in the Firm's retainer agreement was unenforceable and therefore unsecured. Trustee commenced a separate adversary proceeding against Coleman for similar relief.

On November 15, 2005, Trustee filed a motion for summary judgment in the action against the Firm. He argued that, by not including a provision in the retainer agreement concerning Alter's right to consult independent counsel, the Firm had violated Rule 3-300 of the California Rules of Professional Conduct. As a result, under Fletcher v. Davis, 33 Cal. 4th 61 (2004), a recent California Supreme Court decision interpreting the Rule, Trustee argued that the Firm's lien was unenforceable.

The Firm argued that Fletcher, decided after the retainer agreement was signed, effectively created new law concerning attorney's charging liens in California and should not be applied to the Alter transaction. Alternatively, the Firm argued that because Alter signed the Coleman agreements at the same time as she executed the Firm's agreement, and because Coleman's

agreements advised her of her rights under Rule 3-300, the Firm's lien should not be invalidated. Finally, the Firm argued it also held a possessory lien in the litigation proceeds since Coleman received and held the settlement funds on its behalf.

Based upon a tentative ruling, and after issuing detailed findings and conclusions at a hearing held on December 21, 2005, the bankruptcy court granted Trustee's motion. The court concluded that Fletcher had not "created" new law, but had merely interpreted existing law. Applying Rule 3-300, the bankruptcy court concluded that the Firm's retainer agreement was defective for purposes of creating a lien in the settlement proceeds because neither the agreement nor the accompanying transmittal letter advised Alter that she could seek the advice of independent counsel. Absent compliance with the Rule, which the bankruptcy court observed was enacted to protect clients, it concluded that the Firm's lien was unenforceable, even if Alter may have understood her right to consult separate counsel at the time she executed the agreement.[3]

As for the Firm's claim to a possessory lien, the bankruptcy court determined that the Firm never had possession of any funds from the settlement. Therefore, the bankruptcy court concluded the Firm had no possessory lien in the funds turned over to Trustee.

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[3] The bankruptcy court reached an opposite conclusion regarding Coleman's consensual lien in the settlement proceeds because its retainer agreements contained the requisite advisory provisions concerning Alter's right to confer with independent counsel. Trustee has appealed this ruling, which is now pending before the district court. Seror v. Coleman Law Group, PC (In re Alter), No. CV 06-01872-RGK (C.D. Cal. filed March 29, 2006).

The bankruptcy court entered its order granting Trustee's motion for summary judgment on January 10, 2006; the Firm timely appealed on January 19, 2006.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (K). We have jurisdiction under 28 U.S.C. §§ 158(a)(1) and (b).

ISSUE

Whether the bankruptcy court erred by declining to recognize the validity of the Firm's lien under Rule 3-300 of the California Rules of Professional Conduct, as interpreted by Fletcher v. Davis, and by concluding that the Firm did not hold an enforceable possessory lien in the settlement proceeds.

STANDARD OF REVIEW

A bankruptcy court's decision to grant summary judgment is reviewed de novo to assess whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Thrifty Oil Co. v. Bank of Am. Nat. Trust & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003); Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999).

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DISCUSSION

A. Fletcher v. Davis and the charging lien.

State law governs the nature, extent and validity of a lien in bankruptcy proceedings. Diamant v. Kasparian (In re S. Cal. Plastics, Inc.), 165 F.3d 1243, 1248 (9th Cir. 1999). "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." CAL. CIV. CODE § 2872. Traditionally, attorneys' liens are of two types: charging liens and possessory, or "retaining," liens. Evans v. Stockton & Hing (In re Sw. Restaurant Sys., Inc.), 607 F.2d 1243, 1246 (9th Cir. 1979). A charging lien attaches to a specific fund or other property created or secured through the attorney's efforts; a possessory or retaining lien allows the attorney to retain a client's records or other property until the client pays for the legal fees owed. Id. at 1246 (citing RESTATEMENT OF SECURITY § 62(B) and cmt. (j); RESTATEMENT 2D OF AGENCY § 464(b)).

In California, liens may only be created by contract of the parties or by operation of law. CAL. CIV. CODE § 2881. However, attorneys are required to enter into a written contract with the client setting forth "[a]ny basis of compensation, including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case" in any case in which it is reasonably foreseeable that the client's expenses will exceed $1,000. CAL. BUS. & PROF. CODE § 6148(a)(1). As a result, an attorney's lien to secure payment for legal services of significant value may only be created by contract, either by an express provision in the attorney fee contract, or by

implication when the retainer agreement specifies that the attorney is to look only to the judgment for payment for legal services provided. Carroll v. Interstate Brands Corp., 121 Cal. Rptr. 2d 532, 536 (Cal. Ct. App. 2002) (citing Cetenko v. United Cal. Bank, 30 Cal. 3d 528, 531 (1982) and Wagner v. Sariotti, 133 P.2d 430, 432 (Cal. Ct. App. 1943)); Law Offices of Stanley J. Bell v. Shine, Browne & Diamond, 43 Cal. Rptr. 2d 717, 721 (Cal. Ct. App. 1995).

In addition to complying with these statutory requirements, California lawyers must satisfy the ethical obligations of their profession in their dealings with the clients who engage them. Rule 3-300 of the Rules of Professional Conduct ("Rule 3-300"), an ethics rule entitled "Avoiding Interests Adverse to a Client," provides:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
>
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
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> (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
>
> (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

CAL. RULES OF PROF'L CONDUCT R. 3-300 (emphasis added). This Rule is intended to apply to any agreement by which the attorney is retained by the client "if the agreement confers on the member

[attorney] an ownership, possessory, security, or other pecuniary interest adverse to the client." CAL. RULES OF PROF'L CONDUCT R. 3-300 discussion note. The Rule "is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's [attorney's] past due or future fees." Id. With the exception of a single change in the title not relevant to this appeal, the Rule has remained unchanged since 1989. CAL. RULES OF PROF'L CONDUCT R. 3-300 credits and historical notes.

The California Supreme Court decided Fletcher v. Davis, 33 Cal. 4th 61 (2004), on June 10, 2004, just two months after Alter signed the Firm's retainer agreement. In its opinion, the court applied Rule 3-300 to invalidate an attorney's charging lien against a client's future judgment to secure payment of the attorney's hourly fees. The attorney had argued that his lien arose by virtue of an oral agreement with his client. The California Supreme Court held that "a charging lien is . . . an adverse interest within the meaning of rule 3-300 and thus requires the client's informed written consent." Fletcher, 90 P.3d at 1221. In concluding that Rule 3-300 was intended to apply to an hourly fee agreement whereby the attorney claimed a lien to secure fees, the court relied upon the discussion notes quoted above, as well as several published ethics opinions all holding that it is unethical for an attorney to obtain a lien in the client's recovery unless the lawyer had complied with Rule 3-300. Fletcher, 90 P.3d at 1221.

The Fletcher court reasoned that because attorneys were statutorily required to put most client fee agreements in writing,

and to explain the terms of the agreement to the client, application of Rule 3-300 as a rule of substantive law in that case was not "unduly onerous" and not a "great deal more than is now required." Fletcher, 90 P.3d at 1222. Leaving no room for doubt, the court held that "an attorney who secures payment of hourly fees by acquiring a charging lien against a client's future judgment or recovery has acquired an interest that is adverse to the client, and so must comply with the requirements of rule 3-300." Fletcher, 90 P.3d at 1222. Because the attorney in that case did not comply with the Rule, the court held his lien could not be enforced against the client. Fletcher, 90 P.3d at 1223. See also BGJ Assocs., LLC v. Wilson, 7 Cal. Rptr. 3d 140, 147 (Cal. Ct. App. 2004) (invalidating an oral joint venture agreement between attorney and client when the attorney failed to comply with Rule 3-300 and provisions of the Probate Code, even though the client sought the advice of an independent attorney).

Although Fletcher is the first California Supreme Court decision employing Rule 3-300 to actually invalidate the terms of an attorney's contract with a client in a civil case, we do not believe any "new" law was created by the decision. As a result, nothing prevents the application of the principles announced in Fletcher to agreements executed beforehand.

When an appellate court judicially construes a statute, its construction is not regarded as "new" law, but rather as an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-313 (1994). Once the court has spoken, it is "the duty of

other courts to respect that understanding of the governing rule of law." Rivers, 511 U.S. at 312. Only the legislative branch may amend a statute that it believes the courts have misconstrued. Rivers, 511 U.S. at 313. Therefore, it is appropriate to apply judicial interpretations of existing law retrospectively. Rivers, 511 U.S. at 312 (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) and Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910)). See also McClung v. Employment Dev. Dep't, 34 Cal.4th 467, 474 (2004) (following Rivers, and stating that judicial construction of a statute expresses what the statute meant both before and after the decision, and may therefore be applied retroactively).

Nor is the holding in Fletcher limited in any material fashion to the facts in that case. The court's holding contained no restrictive language; its reasoning was applied in the context of a civil action wherein an attorney sought to enforce an oral contract. Fairly read, Fletcher's construction of the California statutes concerning attorney fee contracts requires that a lawyer comply with Rule 3-300 in any case where the attorney seeks to enforce a charging lien under an hourly fee agreement.

So, too, does the remedy for noncompliance adopted by the court apply here: the lien will be rendered unenforceable. Fletcher invoked that remedy despite prior applications of Rule 3-300 only in the context of disciplinary proceedings. See Hawk v. State Bar, 45 Cal. 3d 589 (1988) (disciplining an attorney for failure to comply with Rule 3-300); Ames v. State Bar, 8 Cal. 3d 910 (1973) (applying Rule 4, the predecessor to Rule 3-300, to discipline an attorney who acquired an adverse interest in his

client's property).[4] See also Cetenko v. United Cal. Bank, 30 Cal. 3d 528, 531-33 (1982) (enforcing an attorney's charging lien taken to secure hourly fees as against a third party, but not discussing rule 3-300); BGJ Assocs., LLC v. Wilson, 7 Cal. Rptr. 3d at 147 (commenting that a violation of the Rules of Professional Conduct subjects an attorney to disciplinary proceedings, "but does not in itself provide a basis for civil liability").

We therefore hold that the bankruptcy court did not err in its application of Fletcher to invalidate the Firm's charging lien in the Alter settlement funds asserted to secure its hourly fees. Even though the parties executed a written fee contract, Alter was not advised by the Firm in writing that she could seek the advice of an independent lawyer. The Firm's arguments that Alter's agreements with Coleman, signed at or near the same time, had such cautionary language are unavailing. Fletcher requires the attorney contracting with the client to comply with the Rule and to include such a provision in its written fee agreement, regardless of other facts. See also BGJ Assoc., LLC, 7 Cal. Rptr. 3d at 147 (finding a violation of Rule 3-300 even though the client actually sought the advice of independent counsel, and applying the rule literally); Interstate Brands Corp., 121 Cal. Rptr. 2d at 535 ("When the client enters into a retainer agreement with one particular attorney, a lien in favor of another, albeit

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[4] The California State Bar has opined, however, that Fletcher does not require compliance with Rule 3-300 when the attorney enters into a written contingent fee agreement. Cal. State Bar Form. Opn. No. 2006-170.

associated attorney is neither express nor implied and does not exist.").

The Firm's arguments that its use of the model form recommended at the time by the California State Bar for such fee agreements also lacks merit under Rivers. The lien language contained in the Firm's hourly fee agreement was identical to the form language in the available sample bar forms. However, the sample fee agreement forms are simply that: samples. The forms published by the bar contain an express disclaimer cautioning attorneys that the forms are intended to satisfy the "basic requirements" of Cal. Bus. & Prof. Code § 6148. While use of the sample forms may absolve an attorney from civil liability, they do not insulate counsel in this context, where the California Supreme Court has incorporated the terms of the Rule into the substantive law applicable to the enforceability of attorney-client contracts. That ethical considerations could be applied in the civil context to render a lien unenforceable is but one of the consequences of judicial decision-making: "it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation." Rivers, 511 U.S. at 312.

B. Possessory lien.

Although not elaborating on its ruling concerning the Firm's claim of a possessory lien, we hold the bankruptcy court correctly determined the Firm could not assert an enforceable possessory lien in the settlement proceeds under these facts.

As an initial matter, we question whether California would recognize the type of common-law possessory lien the Firm alleges

it held. See Acad. of Cal. Optometrists v. Super. Ct., 124 Cal. Rptr. 668, 670 (Cal. Ct. App. 1975) (noting that no statutory or judicial authority exists for a retaining lien in California); Spencer v. Taylor, 252 Cal. Rptr. 747, 753 (Cal. Ct. App. 1967) (noting that no reported California cases existed recognizing possessory, or retaining, liens, calling into doubt whether or not such liens actually could be asserted). Instead, Fletcher explains that, unlike in "most jurisdictions" where a lien may be imposed by operation of law, "in California, . . . an attorney's lien is created only by contract . . . ." Fletcher v. Davis, 33 Cal. 4th at 1219. See also Severdia v. Alaimo, 116 Cal. Rptr. 405, 411 (Cal. Ct. App. 1974) (calling into question whether a common law retaining lien exists in California, and noting that an attorney has no lien absent a contract containing an agreement for a lien). Indeed, Rule 3-300 expressly applies to contracts between an attorney and client to create a possessory interest in property adverse to the client, and retainer agreements asserting a lien in a future recovery to secure payment of hourly fees are considered to fall within the ambit of adverse interests.

Consequently, the Firm's argument that it held a possessory lien in any funds recovered in the Alter litigation to secure payment of its fees suffers from the same lack of compliance with Rule 3-300 discussed above. Failure to comply with Rule 3-300 renders the contractual lien provision in its retainer agreement unenforceable. Absent an enforceable written contractual lien agreement, the Firm's claim of a possessory lien fails.

Even if a non-consensual possessory lien is available to an attorney in California, the Firm could not acquire such a lien

under the facts of this case. A possessory lien may arise only when the attorney has a prior lien agreement with the client, successfully achieves a settlement for the client, and receives payment of the settlement funds "into the attorney's trust account." Bendon v. Andrade & Assocs. (In re Colt Eng'g, Inc.), 288 B.R. 861, 873 (Bankr. C.D. Cal. 2003). Recognition of such a retaining lien may be limited, however, to funds that come into an attorney's possession by way of a fee award, payment of a judgment in which the attorney asserts a lien pursuant to a contingent fee contract, a deposit on account of fees and costs, or similar situations. In re Winnett, 97 B.R. 7, 11 (Bankr. E.D. Cal. 1989). See also Bendon, 288 B.R. at 876 (finding the debtor's attorney held an enforceable possessory lien in settlement funds directly paid to the firm in express satisfaction of its attorney fees). Not only is a written contractual agreement crucial to create such a lien, but the attorney must also have actual possession of the funds in the attorney's client trust account when the client files bankruptcy. Bendon, 288 B.R. at 873, 876; In re Winnett, 97 B.R. at 10 ("Since the retaining lien is possessory, it is essential that the lienor have possession of the property.").

In this case, at the time Alter filed her bankruptcy petition on August 13, 2004, the Firm held no settlement proceeds. Those funds were held in Coleman's trust account and later turned over to Trustee. The Firm never had possession of the funds in question, and so under these facts, a possessory lien could not arise even if such a lien exists. Absent clear, adverse possession of the client's funds, we decline to recognize any possessory lien.

The Firm argues that Coleman held the proceeds on its behalf. However, Coleman's possession of the litigation proceeds under these facts is, at best, equivocal: Coleman also held the funds on Alter's behalf in its trust account, as trustee. "If a possessory lien or a common law retaining lien does exist in California it does not attach to property coming into an attorney's hands as trustee." Severdia v. Alaimo, 116 Cal. Rptr. at 412 (declining to find that an attorney, who deposited proceeds from the sale of his client's house during a divorce action into his trust account, held a possessory lien in the funds for payment of his claimed fees).

C. Equitable Lien.

In its briefs on appeal, the Firm argued the bankruptcy court should have imposed an equitable lien on the settlement funds to protect the Firm's claim for fees. At oral argument, the Firm insisted that Coleman raised the issue of an equitable lien in its briefs filed with the bankruptcy court, in which argument the Firm joined. Our review of the record has located no reference to any argument, written or otherwise, presented to the bankruptcy court that the Firm or Coleman asserted an equitable lien in the settlement funds. Because this argument was not raised before the bankruptcy court, we need not consider it on appeal. In re Roberts, 331 B.R. 876, 881 (9th Cir. BAP 2005) ("We normally decline to consider on appeal an argument that is not raised in the bankruptcy court" and citing Kontrick v. Ryan, 540 U.S. 443, 446 (2004)).

However, even if the Firm had timely asserted its equitable lien theory, it would fail in this context. An equitable lien is not created by contract, express or implied, but is rather a judicial remedy imposed by the court for equitable reasons. County of Los Angeles v. Constr. Laborers Trust Funds for S. Cal., 39 Cal. Rptr. 3d 917, 921–22 (Cal. Ct. App. 2006). Again, we question whether this equitable remedy is available in light of the California case law and ethical rules. See Wilkins v. Oken, 321 P.2d 876, 879 (Cal. Ct. App. 1958) (holding that in the absence of a contract creating a lien against money collected by an attorney, the attorney was not entitled to an equitable lien on any specific funds). But even if it is available as a remedy, an equitable lien will not be judicially recognized until a judgment is rendered declaring its existence. New v. New, 306 P.2d 987, 994 (Cal. Ct. App. 1957) (citing Hise v. Super. Ct., 21 Cal.2d 614, 627 (1943)). Upon recognition via a judgment, the lien will relate back to the time it was created. Hise, 21 Cal.2d at 627-28.

In this case, no judgment imposing an equitable lien had been rendered in favor of the Firm that the bankruptcy court could enforce. Although the Firm argued that the state court had issued an order arguably recognizing the lien, the state court's order simply stated that the parties "acknowledged" Alter's attorneys claimed a lien. The order lacked the imprimatur of judicial recognition in the form of specific findings and conclusions by the court. On this record, the bankruptcy court did not err in declining to recognize any equitable lien. Tr. of Hearing at 10-

14 (Dec. 21, 2005).[5]

Additionally, before a court can impose an equitable lien, "direct evidence of inducement or reliance or other facts from which either may reasonably inferred" must be presented. Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Ass'n, 55 Cal. Rptr. 884, 889 (Cal. Ct. App. 1966). Aside from the lack of argument below, there is no evidence in the record from which this Panel can infer inducement or reliance by the Firm. Instead, despite the lien language, the Firm's agreement indicated it expected Alter to pay its charges monthly.

Absent a proper evidentiary showing, we decline to find that an equitable lien existed, even if that remedy is available in California. Our disinclination is especially strong in this context because the Firm has not shown how the equities would favor payment of its claim over the claims of other unsecured creditors under these facts, all of which presumably provided valuable goods and services to Alter.

CONCLUSION

We AFFIRM the decision of the bankruptcy court.

[5] Coleman argued that the state court's order supported its claim of a possessory lien, not an equitable lien.