BUSINESS LITIGATION: 2022 IN REVIEW

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In 2022, Connecticut's appellate courts decided numerous cases of interest to business litigators. The following is a summary of the year's most noteworthy decisions.

I. Contracts

A. *Government COVID restrictions did not excuse performance of restaurant lease under doctrines of impossibility and frustration of purpose.*

In *AGW Sono Partners, LLC v. Downtown Soho, LLC*,[2] the Connecticut Supreme Court weighed in, for the first time, on the impact of COVID-19 public-safety orders on the enforceability of a restaurant lease. The defendant restaurant asserted that, because of certain of those orders, the legal doctrines of impossibility and frustration of purpose relieved it of its payment obligations. Relying in significant part on the language of the lease, the court concluded otherwise.

The defendant operated a fine-dining restaurant, called Blackstones Bistro, in Norwalk. The defendant's lease called for it to use the leased premises "for the operation of a restaurant and bar selling food, beverages, and related accessories, together with uses incidental thereto, and for no other purpose…."[3]

Following the issuance of pandemic-related operational and crowd-density orders, the restaurant closed completely between March 11 and May 27, 2020. Although takeout and delivery service were not forbidden either by the government orders or by the lease, the restaurant was unable to conduct such operations profitably, and brought in no income during that timeframe. The restaurant then obtained a permit for outdoor dining, and eventually for limited indoor dining, but operated at a loss. The restaurant made no rental payments

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[1] Of the Hartford Bar.
[2] 343 Conn. 309, 273 A.3d 186 (2022).
[3] *Id*. at 313.

after March of 2020, received an eviction notice, and vacated the premises by September 11, 2020.[4]

In November of that year, the landlord re-let the property to another restaurant, called Sono Boil. The new lease had a ten-year term commencing in January of 2021, at rents lower than those that had been charged to the defendant. The landlord then sued the defendant restaurant, as well as its principal, who had signed a guaranty, for damages.

Following a brief courtside trial, the trial court entered judgment for the plaintiff. The court rejected the defendants' defenses of impossibility and frustration of purpose. The court's damages award included unpaid rent, use and occupancy through December of 2020, up to the point that the plaintiff's lease with its replacement tenant took effect.

The trial court credited the plaintiff for mitigating its damages by lining up a new tenant so quickly, but noted an absence of evidence about the lease negotiations, or about the possibility that the landlord could have obtained a better deal. Accordingly, the court did not award damages based on the lower rents to be paid by the replacement tenant.

On appeal, the defendants argued that the trial court had erred in rejecting their special defense of impossibility. The Supreme Court disagreed, noting that the impossibility doctrine applies only in extremely rare cases. "[O]nly in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated."[5] Here, "as the trial court found, even under the most restrictive executive orders, use of the premises for restaurant purposes was not rendered factually impossible insofar as restaurants were permitted to provide curbside or takeout service, and the lease agreement did not prohibit curbside or takeout service."[6] The government restrictions "raised the cost of performance for the defendants in a manner that ren-

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4 *Id*. at 318.
5 *Id*. at 326. (Citation and internal punctuation omitted.)
6 *Id*. at 329.

dered it perhaps highly burdensome, but not factually impossible."[7]

Furthermore, to sustain a defense of impossibility, "the event [on] which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract. …If an event is foreseeable, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of the event makes performance impracticable."[8]

Here, "the language of the lease agreement suggests that events of the magnitude of the COVID-19 pandemic were not entirely unforeseeable."[9] For one thing, the lease lacked a *force majeure* clause – a provision that, had it been included, typically would "relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."[10]

But more importantly, the lease's section 4(d) "squarely tasks the defendants with the obligation of complying with all governmental 'laws, orders and regulations ...."[11] That section provided, in relevant part, that the defendants, at their "expense, shall comply with all laws, orders and regulations of [f]ederal, [s]tate and municipal authorities and with any direction of any public officer or officers, pursuant to [l]aw, which shall impose any violation, order or duty upon [l]andlord or [t]enant with respect to the use or occupancy thereof by [t]enant…"[12] Accordingly, the trial court had acted properly in rejecting the defendants' special defense of impossibility.

As for frustration of purpose, the court noted that, similar to the impossibility doctrine, this defense applies only under rare circumstances. "[T]he establishment of the defense re-

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7 *Id*. at 330.
8 *Id*. at 327. (Citation and internal punctuation omitted.)
9 *Id*. at 331.
10 *Id*. at 331, fn. 21.
11 *Id*. at 332.
12 *Id*. at 320, fn. 13.

quires convincing proof of a changed situation so severe that it is not fairly regarded as being within the risks assumed under the contract. ... The doctrine of frustration of purpose is given a narrow construction so as to preserve the certainty of contracts ...."[13] As applied here:

> Given the narrowness of the frustration of purpose doctrine, we conclude that the purpose of the lease agreement was not frustrated by the pandemic restrictions imposed by the executive orders, even those that barred indoor dining entirely. The language of the lease agreement was not limited to a certain type of dining and … did not preclude the takeout and subsequent outdoor dining that the defendants sought to provide. Put differently, the lease terms did not by themselves render the lease agreement valueless in light of the executive orders.[14]

Accordingly, the Supreme Court held that the trial court had acted properly in rejecting this defense as well.

B. *Defaulting commercial tenant had burden of proving inadequacy of landlord's effort to mitigate damages.*

In a cross-appeal in *AGW Sono Partners, LLC*, the plaintiff landlord claimed the trial court should have included, as an element of its damages award, "the full difference in value between the defendants' lease agreement and the new lease that the plaintiff entered into with Sono Boil, the replacement tenant."[15] More particularly, the plaintiff argued that the court had "improperly charged it with the burden of presenting evidence relating to its negotiations with Sono Boil to show an inability to mitigate its damages by obtaining the same lease or better terms than it had with the defendants, because the defendants, as the breaching party, bear the burden of proof as to failure of mitigation…"[16]

The Supreme Court agreed with the plaintiff that "when a tenant has breached a lease agreement, that tenant bears

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[13] *Id*. at 334, 335. (Citation and internal punctuation omitted.)
[14] *Id*. at 336.
[15] *Id*. at 339.
[16] *Id*.

the burden of proving that the landlord failed to undertake commercially reasonable efforts to mitigate its damages."[17] Here, the trial court had observed that "no evidence of the negotiations with [Sono Boil] was presented in detail *by the plaintiff*. The court can only speculate if further negotiations with [Sono Boil] could have resulted in a lease with the same terms the defendants' lease had."[18] From this language, it was apparent that "the trial court improperly cast the burden of proof onto the plaintiff."[19] The Supreme Court reversed this part of the judgment below, and remanded the case for a hearing in damages.

C. *Supreme Court finds implied contract right to notice and cure of alleged breach.*

The Connecticut Supreme Court's decision in "the Hartford baseball stadium case," *Centerplan Construction Company, LLC v. City of Hartford*,[20] focused on which party – the city, or the developer and builder – "controlled" the project architect during various phases of the design and construction process, and therefore bore responsibility for any mistakes in, and changes to, the stadium's design.

Following various pretrial rulings concerning the interpretation of the relevant contracts, a jury assigned responsibility to the developer and builder, and rendered judgment for the city. The Supreme Court reversed, finding error in certain of those pretrial rulings, and remanded the case for a new trial.

The court's decision turned in large part on an analysis of the contract language, and generally did not rely on novel or noteworthy principles of broader application. But one notable exception can be found in the court's discussion of an issue likely to arise following the remand: whether the builder had been entitled to notice of alleged default, and an opportunity to cure.

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[17] *Id.* at 345.
[18] *Id.* at 346. (Emphasis added by the court.)
[19] *Id.* at 345.
[20] 343 Conn. 368, 274 A.3d 51 (2022).

The court observed, "[u]nder our common law, when a contract is silent as to notice and cure rights, the right to cure is implied in every contract as a matter of law unless expressly waived."[21] Characterizing this principle as part of "our well established common law,"[22] the court cited a Tennessee Court of Appeals decision and a construction-law treatise as its authority for the proposition. The court added, "[t]hus, under our common law, silence in a contract regarding notice and cure rights does not create ambiguity. Rather, it supports a presumption in favor of common-law notice and cure rights."[23]

The court went on to note that a party claiming a breach may be excused from providing notice and an opportunity to cure upon a showing of futility, or that the breach is truly incurable. The party claiming breach bears the burden of proof on these exceptions.[24]

D. *Liquidated damages clause did not bar all claims for actual damage.*

In *Town of New Milford v. Standard Demolition Services, Inc.*,[25] a construction case, the Appellate Court held that a contract's liquidated damages clause, although enforceable, did not foreclose the plaintiff from also seeking actual damages for certain types of loss.

The plaintiff had acquired, through a tax lien foreclosure, a vacant brass factory contaminated with polychlorinated biphenyls (PCBs) and asbestos. The plaintiff issued a notice to bidders, inviting bids for demolition of the building. The bid form indicated that the winning bidder would be entitled to keep, for scrap value, any structural steel recovered from the building.[26] The defendant tendered the winning bid.

After commencing work, the defendant claimed that the

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[21] *Id.* at 412.
[22] *Id.*
[23] *Id.* at 413.
[24] *Id.* at 418, 419.
[25] 212 Conn. App. 30, 274 A.3d 911, *cert. denied* 345 Conn. 908, 283 A.3d 506 (2022).
[26] *Id.* at 36.

bidding materials had contained misleading information about the structural steel, which understated the likelihood that the steel was environmentally contaminated and therefore could not be salvaged profitably.[27] The dispute led to the defendant's demobilization from the site, and the plaintiff's issuance of a notice of termination.[28] The plaintiff hired a replacement demolition contractor, Costello Dismantling Company, Inc. (Costello), at a bid price about $250,000 more than the bid the plaintiff had previously accepted from the defendant.

In the ensuing litigation, the plaintiff claimed delay damages as well as "three categories of alleged nondelay damages: (1) the difference in the contract price between what the plaintiff agreed to pay the defendant and what it agreed to pay Costello allegedly for similar work; (2) additional costs associated with rebidding the job and the engineering support that went with it after the contract between the defendant and the plaintiff was terminated; and (3) additional costs to complete the job beyond Costello's accepted bid."[29]

After a lengthy courtside trial, the trial court rendered judgment for the plaintiff, but ruled that its damages were limited by a liquidated damages provision in section 2.1.1 of the contract. That clause provided, "[f]ailure of the Contractor to meet [the] established timeframe will result in liquidated damages being assessed in the amount of $2,000/day for each and every calendar day beyond the contract time limit."[30]

On appeal, the plaintiff claimed that the court erred in holding that the liquated damages provision was the exclusive measure for calculating the damages. The Appellate Court agreed.

The court acknowledged the general principle that a party "may not retain a stipulated sum as liquidated damages and

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[27] *Id*. at 44.
[28] *Id*. at 43, 46.
[29] *Id*. at 93, 94.
[30] *Id*. at 85.

also recover actual damages."[31] But it is also true that "[a] contract will not be construed to limit remedial rights unless there is a clear intention that the enumerated remedies are exclusive."[32]

Here, the liquidated damages clause, section 2.1.1 of the contract, was immediately followed by section 2.1.2, which provided in relevant part, "[i]n the event the Contractor fails to perform the work in a timely manner due to the Contractor's poor planning, financial status, errors in construction or any other reason directly attributed to the Contractor's circumstances, the [plaintiff] may institute default proceedings against the Contractor to recover *damages* and *losses*."[33] The court found this language to be very significant.

> Notably, § 2.1.2 of article 2 does not reference "liquidated damages"; instead, it refers to "damages and losses." Because § 2.1.1 of article 2 of the contract specifically references "liquidated damages," the fact that § 2.1.2, instead, references "damages and losses" is evidence of a contractual intent to allow for the recovery of nondelay damages and losses, in addition to the liquidated damages due to delays allowed in § 2.1.1. To construe the contract otherwise would render that provision in § 2.1.2 superfluous.[34]

The court found this contract language to be not inconsistent with the general principle that a party may not recover both liquidated damages and actual damages. "When, as here, a liquidated damages provision is limited in its application to damages resulting from delays and does not expressly provide that liquidated damages are the exclusive remedy, it does not prevent the recovery of actual damages for items to which the liquidated damages provision does not apply, i.e., nondelay damages."[35]

The Appellate Court reversed the judgment below, and remanded the case for a hearing in damages.

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[31] *Id*. at 86.
[32] *Id*. at 87.
[33] *Id*. at 85, 86 (emphasis added by court).
[34] *Id*. at 88.
[35] *Id*. at 89.

E. *Unsigned draft agreement gave rise to binding contract.*

In *Downing v. Dragone*,[36] the Appellate Court affirmed the trial court's finding that the plaintiff had proven a written contract between herself and the defendant, even though the defendant never countersigned the draft agreement that she had prepared. The trial court found, and the Appellate Court agreed, that the defendant had implicitly accepted the proposed written contract by knowingly accepting her performance and failing to object to its written terms.

The plaintiff, a professional auctioneer, met with principals of the defendant, Dragone Classic Motorcars, Inc., to discuss the possibility of her conducting a classic automobile auction for the defendant. At that meeting, as found by the trial court, the parties agreed on the tasks that the plaintiff would perform, and on the terms of her compensation. They further agreed that she would prepare a written agreement to memorialize the agreed-upon terms.[37] She did so, and at a follow-up meeting a week later, she delivered the document to the defendant's principal Emanuel Dragone. At his instruction, she left it on his desk.

Over the course of the ensuing months, the plaintiff "worked some hundreds of hours in connection with the auction, advised [the defendant] on the technology required for the auction, established Auction Flex software on [the defendant's] computers, revised [the defendant's] written history for brochures, and helped prepare advertising and marketing materials, revise the auction documents, [and] establish the technical and physical set up for the auction, thereby accomplishing and performing [her] obligations [pursuant to] the agreement."[38] The auction was held, bringing in more than $4 million in gross receipts, but the defendant refused to pay the plaintiff for her work.

The trial court found that the parties had entered into a

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[36] 216 Conn. App. 306, 285 A.3d 59 (2022), *cert. denied* 346 Conn. 903, ___A.3d ___(2023).

[37] *Id.* at 310, 311.

[38] *Id.* at 312.

written contract, observing "the parties may be bound by an unsigned contract where [assent] is otherwise indicated."[39] The court credited the plaintiff's testimony that all the terms of the proposed written agreement had been previously discussed between the parties. The court found that the defendant never "rejected the agreement or attempted to make any changes or additions. Instead, they accepted the plaintiff's services to plan the auction in accordance with exhibit 1 and did not pay her."[40] The trial court entered judgment for the plaintiff on her breach of contract claim.

Applying the "clearly erroneous" standard of review, the Appellate Court found no error in the trial court's finding that a contract had been created. "Whether the parties intended to be bound without signing a formal written document is an inference of fact [to be made by] the trial court … [M]anifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined. ... Parties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated."[41] The court affirmed the judgment below.

F. *Where purchase and sale agreement expressly provided "no knowledge of easements" on the part of seller, parol evidence rule barred evidence of actual knowledge.*

In *Sargent, Sargent & Jacobs, LLC v. Thoele*,[42] an escrow agent holding a deposit for the purchase of certain property in Westport brought an interpleader action against the prospective purchaser, Merwin, LLC and the prospective seller, Alan Thoele. The defendants filed crossclaims against each other, asserting, among other claims, breach of contract.

The purchaser had sought to cancel the transaction, relying on section 9(b) of the subject purchase and sale agreement (cancellation provision). The cancellation provision allowed

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[39] *Id*. at 313.
[40] *Id*. at 315.
[41] *Id*. at 317. (Citations and internal punctuation omitted.)
[42] 214 Conn. App. 179, 280 A.3d 514 (2022).

the purchaser to cancel the deal based on an undisclosed and uncured encumbrance "that arise[s] after the date of Purchaser's title search which either party become[s] aware of … prior to the Closing Date."[43] The encumbrance at issue was a sewer easement that was associated with, but not explicitly mentioned in, a notice recorded in the land records.[44]

A 2016 letter of intent between the parties had noted that a "Sewer Easement for Cottage Lane is in place on the property and runs with the land…"[45] But their purchase and sale agreement, executed two years later, did not mention the easement, and provided at section 16(m), "Seller's Representations and Warranties," that the "Seller is not aware of any claims for rights of passage, easements or other property rights over, on or to the Premises, other than as set forth herein."[46]

When the purchaser later invoked the cancellation provision, citing the sewer easement, the seller pointed to the letter of intent as evidence that the purchaser had had actual knowledge of the encumbrance, and therefore could not escape the contract. The purchaser countered by pointing to the "no easements" language in section 16(m), and argued that "this provision establishes its knowledge at the time the purchase and sale agreement was signed, meaning that any evidence offered to alter its knowledge is impermissible under the parol evidence rule."[47]

The trial court agreed with the purchaser that the seller's argument was precluded by the parol evidence rule. The Appellate Court affirmed. "The purchase and sale agreement signed in 2018 contained no reference to any potential easement on the property. … [T]he court correctly concluded that the 2016 letter of intent was not proper evidence regarding what the parties agreed to in 2018."[48]

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[43] *Id*. at 185.
[44] *Id*. at 184.
[45] *Id*.
[46] *Id*. at 185.
[47] *Id*. at 193.
[48] *Id*. at 194, 195.

G. *Where payment from building owner to general contractor was stated as a condition precedent to subcontractor's entitlement to payment, claim by subcontractor against unpaid general contractor was barred.*

In *Electrical Contractors, Inc. v. 50 Morgan Hospitality Group*,[49] the plaintiff, an electrical subcontractor on a commercial construction project, sued the defendant, the general contractor, for nonpayment. The subcontract provided that payment from the property owner to the general contractor was a condition precedent to the defendant's obligation to pay the plaintiff. Given that contractual language, and undisputed evidence that the owner had not yet paid the general contractor, the trial court entered summary judgment for the defendant.

On appeal, the plaintiff sought to equate the contract language at issue with the "pay when paid" language often found in construction contracts, and argued that a clause of that type "merely postpones a general contractor's obligation to pay its subcontractors for a reasonable period of time."[50] But the Appellate Court disagreed, finding the "condition precedent" language clear and unambiguous, and distinguishable from cases involving "pay when paid" clauses. The court affirmed the judgment below.

H. *Implied covenant of good faith and fair dealing cannot contradict contract.*

The Appellate Court's decision in *D2E Holdings, LLC v. Corporation for Urban Home Ownership*[51] illustrates the principle that "the implied covenant of good faith and fair dealing cannot be applied to achieve a result contrary to the clearly expressed terms of a contract."[52]

The plaintiff contracted with the defendant to purchase 73 residential housing units in New Haven. Their contract

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[49] 211 Conn. App. 724, 273 A.3d 726 (2022).

[50] *Id.* at 732.

[51] 212 Conn. App. 694, 277 A.3d 261, *cert. denied* 345 Conn. 904, 282 A.3d 981 (2022).

[52] *Id.* at 706 (citation and internal punctuation omitted).

required the defendant to provide the plaintiff with a variety of financial statements "[t]o the extent such documents are existing and available."[53] The plaintiff asked the defendant for certain documents to allow the plaintiff to pursue bank financing. The defendant supplied those documents that it had on hand, but did not provide certain requested documents that did not yet exist and could not be created by the closing date.

The lack of adequate documentation prevented the plaintiff from submitting a full mortgage application, and accordingly the plaintiff was unable to move forward with the purchase. The defendant declared a default, and retained the plaintiff's $100,000 deposit.

The plaintiff brought suit, claiming the defendant "breached the covenant of good faith and fair dealing implied in the real estate contract by failing to provide D2E Holdings with the necessary documents for it to secure mortgage financing and by retaining D2E Holdings' initial deposit without actual intent to transfer title to the subject units."[54] Following a courtside trial, the trial court rendered judgment for the defendant.

The Appellate Court affirmed. The court observed, "[t]here is no language in … the real estate contract, mandating that CUHO create nonexistent documents and provide them to D2E Holdings. Rather, [the contract] mandates the precise opposite: that CUHO must provide D2E Holdings with documents that "are *existing* and *available* ...."[55] Because the implied covenant cannot override express contract terms, the plaintiff's claim was unavailing.

I. *Appellate Court enforces reaffirmation of expired lease guaranty.*

The Appellate Court's decision in *Tolland Meetinghouse Commons, LLC v. CXF Tolland, LLC*,[56] in which the guar-

[53] *Id.* at 699.
[54] *Id.* at 700.
[55] *Id.* at 706.
[56] 211 Conn. App. 1, 271 A.3d 1118 (2022).

antor of a commercial lease appealed a summary judgment rendered against him, illustrates the principle that "[p]arties ordinarily do not insert meaningless provisions in their agreements."[57]

The plaintiff's predecessor in interest, as landlord, and the defendant CXF Tolland, LLC d/b/a Cardio Express, as tenant, entered into a lease in 2007. The defendant Peter Rusconi signed a guaranty agreement, which provided in relevant part that his obligations as guarantor "shall terminate at the expiration of the initial five (5) years of the initial Lease term."[58]

Nine years later, after a default by the tenant, the parties entered into a lease modification, which included the tenant's agreement to pay a rent arrearage upon an agreed schedule. That agreement, also signed by Rusconi personally, provided at paragraph 5, "[t]he Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect."[59] When the tenant defaulted in its restructured obligations, the landlord brought suit against both the tenant and Rusconi.

Relying on the five-year sunset provision in the original Guaranty, Rusconi filed a special defense, claiming the guaranty agreement "previously expired on its own terms, and is therefore unenforceable."[60] The plaintiff countered that at the time of the restructure, "Rusconi reaffirmed his obligations in the second lease agreement as Cardio Express' guarantor and agreed that the guaranty shall remain in full force and effect."[61]

Following argument of the parties' cross-motions for summary judgment, the trial court entered judgment for the landlord. The court noted, "[t]he intention of the parties to

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[57] *Id*. at 15, quoting Connecticut Co. v. Division 425, 147 Conn. 608, 617, 164 A.2d 413 (1960).

[58] *Id*. at 3.

[59] *Id*. at 4.

[60] *Id*. at 6.

[61] *Id*.

a contract is to be determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction."[62] Here, the circumstances were undisputed: "The arrearages that accumulated prior to the execution of the second amendment began accumulating after the original guaranty expired. They do not constitute obligations that were ever within the scope of the original guaranty agreement."[63] In order for Rusconi's reaffirmation of the Guaranty to have any meaning, "it must refer to obligations under the Cardio Express lease as to which Rusconi had no responsibility under the original guaranty agreement, but which are now made subject to the terms of that guaranty."[64]

The trial court thus concluded, the "only reasonable construction of paragraph 5 [of the second amendment to lease] that gives that provision any practical meaning is that Rusconi agreed to guarantee Cardio Express' remaining obligations under the lease at the time the second amendment was executed."[65] Adopting the trial court's memorandum of decision as its own, the Appellate Court affirmed.

II. Creditors' Rights

A. *Bank's foreclosure thwarted by carelessly drafted loan documents.*

In *JPMorgan Chase Bank v. Virgulak*,[66] the Connecticut Supreme Court affirmed the decision of the Appellate Court in favor of the defendant, Theresa Virgulak, in a residential foreclosure action.[67]

The defendant's husband, Robert Virgulak, executed a $533,000 note to the plaintiff bank. Theresa did not co-

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[62] *Id.* at 18, quoting Barnard v. Barnard, 214 Conn. 99, 110, 570 A.2d 690 (1990).

[63] *Id.* at 19.

[64] *Id.*

[65] *Id.* at 19.

[66] 341 Conn. 750, 267 A.3d 753 (2022).

[67] The Appellate Court decision is reported at 192 Conn. App. 688, 218 A.3d 596 (2019).

sign the note, nor did she sign a guaranty of the obligation. She did execute a mortgage of residential property that she owned. The mortgage properly recited the date and amount of the loan, but erroneously identified Theresa as maker of the note. The mortgage did not reference Robert. Based on the discrepancy in the loan documents, Theresa denied liability and pled special defenses.

The plaintiff argued that it could foreclose the mortgage as written, or alternatively that the court should order reformation of the note and/or mortgage, and then a judgment of foreclosure. The trial court denied both forms of relief, and entered judgment for the defendant. The Appellate Court affirmed. Following a grant of certification to appeal, the Supreme Court affirmed the judgment below.

As for the bank's attempt to reform the loan documents to conform to the alleged intent of the parties, this claim was undermined by "gaps in the factual record":

> Principal among those gaps is that the mortgage deed identifies a '[n]ote' but does not explicitly identify the note signed by Robert. In other words, the plaintiff failed to produce clear and convincing evidence of the particular debt obligation that was being secured by the mortgage deed executed by the defendant. Indeed, in its posttrial brief, the plaintiff conceded that the parties never intended the mortgage deed to secure a note signed by the defendant. There was no evidence produced or elicited by the plaintiff that required the trial court to find that the defendant intended the mortgage as security for Robert's loan.[68]

The court recognized that "the fact the mortgage deed and note have matching dates and refer to matching amounts could have allowed the trial court to infer that the transactions are related."[69] But the court was not required to draw that inference. The Supreme Court took note of "the absence of any direct evidence that either party did intend the mortgage deed to secure a note executed by Robert,"[70] such as "tes-

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[68] *Id*. at 764.
[69] *Id*. at 769.
[70] *Id*.

timony regarding whether JPMorgan Chase itself intended the defendant's signature on the mortgage deed to secure the note signed by Robert."[71] Thus, the Supreme Court "[could not] conclude that the absence of a finding by the trial court that the parties intended the mortgage deed signed by the defendant to secure Robert's note was clearly erroneous."[72]

The court also rejected the bank's alternative claim that the mortgage could be foreclosed even without a reformation of the loan documents. The court adopted the Appellate Court's reasoning that "the mortgage [deed], as executed, was a nullity because it secured a nonexistent debt."[73]

B. *In foreclosure of mortgage insured by the FHA, bank must plead and prove compliance with applicable HUD regulations.*

In *Wells Fargo Bank, N.A. v. Lorson*,[74] the Connecticut Supreme Court held that, in an action to foreclose a residential mortgage that is insured by the Federal Housing Administration (FHA), the lender's compliance with applicable Housing and Urban Development (HUD) regulations is a condition precedent to foreclosure, which the lender has the burden of pleading and proving.

In *Lorson*, the loan was insured by the FHA, and the note stated on its face, "[t]his [n]ote does not authorize acceleration when not permitted by HUD regulations."[75] Among the HUD regulations concerning troubled loans are ones that prescribe "conditions of special forbearance," mortgage modifications, and "a requirement that [c]ollection techniques must be adapted to individual differences in mortgagors and take account of the circumstances peculiar to each mortgage."[76]

The trial court entered judgment of strict foreclosure. On appeal to the Appellate Court, the defendants asserted that

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[71] *Id.*
[72] *Id.* at 765.
[73] *Id.* at 771.
[74] 341 Conn. 430, 267 A.3d 1 (2022).
[75] *Id.* at 434.
[76] *Id.* at 442, 443.

compliance with HUD regulations is a condition precedent to acceleration and foreclosure, and that the plaintiff failed to establish this at trial.[77] The Appellate Court rejected this argument and affirmed the judgment of foreclosure, holding that the defendants had the burden of pleading and proving the lender's noncompliance with the applicable regulations, as a special defense.[78]

But the Supreme Court reversed, finding that compliance with applicable HUD regulations is a condition precedent to suit, which the plaintiff must affirmatively plead in its complaint. If the defendants deny this allegation, they have "the burden of pleading that the plaintiff has not complied with specific regulations that are applicable. In that event, the burden would then shift back to the plaintiff to prove compliance with the specific regulations alleged by the defendants."[79] The court remanded the case to the trial court for a new trial limited to the compliance issue.[80]

C. *Default provision in mortgage deed that specifically authorized foreclosure by sale thwarted borrower's claim that judgment should be for strict foreclosure.*

In *Toro Credit Company v. Zeytoonjian*,[81] the Connecticut Supreme Court affirmed a judgment of foreclosure by sale, as to two parcels encumbered by a blanket mortgage, despite the borrowers' protest that strict foreclosure as to one of the parcels would have fully satisfied the debt.

The obligation was a commercial note secured by a mortgage on two undeveloped parcels, denominated parcels A and B, in Enfield. The mortgage deed contained a remedies provision, which authorized the plaintiff, following default by the defendants, to exercise state foreclosure procedures, specifically including "the full authority to sell the [p]remises at public auction…"[82]

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77 *Id*. at 437.
78 Wells Fargo Bank, N.A. v. Lorson, 183 Conn. App. 200, 192 A.3d 439 (2018).
79 *Id*. at 439.
80 *Id*. at 462.
81 341 Conn. 316, 267 A.3d 71 (2022).
82 *Id*. at 319.

The loan went into default. The trial court found the debt to be $902,447.12, and ordered foreclosure by sale, with both parcels to be sold, either bundled together or sequentially, at the defendants' choice. Both sides' appraisers valued parcel A at $950,000, and the appraisers for the plaintiff and defendants found values of $850,000 and $840,000, respectively, for parcel B.[83]

In ordering foreclosure by sale, the trial court found that "the plaintiff 'successfully bargained for the right to select [that] remedy.'"[84] Accordingly, the court "rejected the defendants' request that it order a strict foreclosure as to only parcel A because that would '[rob] the plaintiff of a measure of the security which it was granted,' namely, a mortgage on both properties."[85] The court "was concerned that strict foreclosure of parcel A would 'leave the risk of a shortfall entirely' on the plaintiff after taking title to the property and then selling it."[86]

The defendants appealed, claiming strict foreclosure of parcel A would have satisfied the debt, foreclosure by sale exposes them to a deficiency judgment if parcel A sells for less than the appraised value, and the court should not have considered the remedies provision in the mortgage.[87] Applying the "abuse of discretion" standard of review, the Supreme Court affirmed.

The court observed, "[t]he plaintiff specifically bargained for, and the defendants agreed to, a blanket mortgage on both parcels and for the remedy of foreclosure by sale. … As a result, although strict foreclosure might technically satisfy the debt if the plaintiff took title to parcel A, it would leave the plaintiff in the position it specifically had bargained *not* to be in: holding title to real estate."[88] Furthermore, if the trial court ordered strict foreclosure of only parcel A, "and

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[83] *Id*. at 320.
[84] *Id*.
[85] *Id*. at 321.
[86] *Id*.
[87] *Id*. at 323.
[88] *Id*. at 325, 326. (Emphasis in original.)

if the plaintiff is later unsuccessful at selling parcel A at its appraised value, the plaintiff will lose the ability to foreclose as to parcel B."[89]

The trial court acted properly when it factored the mortgage deed's "remedies" provision into its decision without deeming that provision binding on the court.[90] "The trial court reasonably considered that it would be inequitable to place the parties in a position they did not contemplate when entering into this agreement."[91]

D. *Appellate Court rejects borrower's collateral estoppel defense.*

In *Wilmington Trust, National Association v. N'Guessan*,[92] the trial court rendered a judgment of strict foreclosure after an interlocutory summary judgment on the issue of liability. On appeal, the defendant argued that under the doctrine of collateral estoppel, the court had erred in rendering summary judgment for the plaintiff.

The defendant noted that in an earlier case, the plaintiff's predecessor in interest had sought to foreclose the same mortgage. In that case, which was ultimately dismissed for failure to prosecute with diligence, the trial court had denied the plaintiff's motion for summary judgment, finding the existence of a genuine issue of material fact. The defendant argued that because the court had "determined that issues of material fact existed that prevented the granting of summary judgment as to liability in the [first] foreclosure action, the doctrine of collateral estoppel barred the plaintiff, as the 'successor mortgagee,' from 'relitigating the same issue of summary judgment on liability in this case.'"[93]

The Appellate Court was unconvinced. The court framed the issue as "not whether the defendant had a defense to the [first] foreclosure action, but whether he had a defense to

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89 *Id*. at 326.
90 *Id*. at 327.
91 *Id*.
92 214 Conn. App. 229, 279 A.3d 310 (2022).
93 *Id*. at 235.

the action instituted six years later."[94] In that earlier case, the defendant had avoided summary judgment by submitting evidence "linking his failure to make his mortgage payments to the plaintiff's conduct."[95] But six years intervened between the two cases, during which the defendant continued to render no payments. He "submitted no evidence with his objection to the plaintiff's motion for summary judgment setting forth any equitable defense for his failure to make payments during those six years. Consequently, he cannot rely solely on the [earlier] court's conclusion that there was a genuine issue of material fact in 2011 as binding the court in the present action to conclude that such an issue of fact still exists."[96]

E. *Heir of borrowers' probate estate, seeking discovery from bank while defending against foreclosure, hurdles bank-privacy laws.*

In *CIT Bank, N.A. v. Francis*,[97] the plaintiff, the holder of a reverse annuity mortgage on a residence in New Canaan, brought a foreclosure action against the decedent borrowers' granddaughter, heir of their estate. The defendant suspected that her father, who had been arrested for stealing $500,000 from his mother's home equity account, had fraudulently orchestrated the loan. She pled special defenses to that effect, and sought relevant discovery from the plaintiff bank.

The bank sought a protective order against the defendant's discovery requests, relying on provisions in Connecticut General Statutes section 36a-42; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(b); and the Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. § 6802, limiting financial institutions and debt collectors from disclosing financial information to nonparties to the transaction. The trial court granted the bank's motion for protective order. Barred from developing her special defenses, the defendant

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[94] *Id.* at 240.
[95] *Id.*
[96] *Id.* at 241.
[97] 214 Conn. App. 332, 280 A.3d 485 (2022).

was unable to muster a defense to the bank's motion to strike her special defenses and subsequent motion for summary judgment. The bank ultimately obtained a judgment of strict foreclosure.

The Appellate Court reversed, finding that the trial court had erred in entering the protective order. The court noted that each of the privacy statutes relied upon by the bank contained an exception that allowed disclosure upon the consent of the customer. Here, the defendant, in her opposition to the bank's motion for protective order, had attached a letter from the executor of her grandmother's estate confirming his consent to her request for information. There was no suggestion that the defendant was pursuing her discovery in bad faith, and the bank never contended that the requested discovery was unlikely to lead to the discovery of relevant and admissible evidence.

Concurring separately, Judge Bright noted that litigants have broad latitude to plead claims and defenses even before they have developed the relevant evidentiary support, and that "the denial of a discovery request typically will not justify a failure to plead a legally sufficient cause of action or special defense."[98] But here, "the defendant Johanna Francis was not a party to the underlying transaction that gave rise to the plaintiff's foreclosure action and, therefore, lacked knowledge of those events. … Under these circumstances the defendant's discovery requests were reasonable because the best source of information relevant to the plaintiff's possible involvement, if any, in James M. Francis' alleged scheme was the plaintiff itself."[99] It followed that "the court's improper ruling depriving her of that discovery was not harmless."[100]

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98 *Id*. at 354.
99 *Id*.
100 *Id*.

III. Business Torts

A. *Litigation privilege barred claim for tortious interference and unfair trade practice.*

In *Deutsche Bank AG v. Vik*,[101] the Appellate Court held that the litigation privilege barred claims under the theories of tortious interference with business expectancy, and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA).

The plaintiff held a judgment of $235,646,355 that it had obtained in the courts of England against nonparty Sebastian Holdings, Inc. (SHI), allegedly a shell company controlled by defendant Alexander Vik.[102] The plaintiff alleged that Alexander had used various tactics to thwart collection of the judgment against SHI, including concealing assets, fabricating documents and orchestrating approximately $1 billion in fraudulent transfers.[103] Among those assets was shares in a Norwegian software company, Confirmit AS (Confirmit), which Alexander allegedly transferred initially to his personal account, then to that of his father.

A key allegation was that Alexander fabricated and backdated a document that purported to give his daughter, defendant Caroline Vik, a right of first refusal to acquire the Confirmit shares, as part of a scheme to thwart a liquidation of those shares ordered by a Norwegian court. She then used that document as the basis to bring an action in the federal court in Connecticut to enjoin the sale. The court granted a temporary restraining order but denied Caroline's request for a preliminary injunction, after which she withdrew the case and then commenced injunction proceedings in the Norwegian court.[104]

The plaintiff relied on these allegations, and the claim that "the defendants brought 'frivolous,' 'meritless' or 'baseless'

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[101] 214 Conn. App. 487, 281 A.3d 12, *cert. granted* 345 Conn. 964, 285 A.3d 388 (2022).
[102] *Id*. at 489, 490, 493.
[103] *Id*. at 489, 490.
[104] *Id*. at 492.

legal claims or appeals in an effort to undermine or reverse the sale of Confirmit shares," in support of a claim for tortious interference with business expectancy. The plaintiff argued, "the English judgment formed a business relationship between the plaintiff and SHI insofar as the English court determined that SHI owed the plaintiff $235,646,355."[105]

The plaintiff also asserted a claim under CUTPA, repeating the same allegations and alleging "the defendants engaged in unfair methods of competition and unfair and deceptive acts to interfere with the sale of the Confirmit shares by filing for injunctions in both Connecticut and Norway on the false premise that Caroline genuinely sought to exercise her purported [right of first refusal]."[106]

The Appellate Court agreed with the defendants that these claims were barred by the litigation privilege. The court observed that in its most basic form, the litigation privilege provides that "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. This includes statements made in pleadings or other documents prepared in connection with a court proceeding."[107] The privilege may apply "regardless of whether the action is against an attorney, party opponent or witness."[108]

The court noted that claims for vexatious litigation and abuse of process represent exceptions to the privilege, but declined to further extend those exceptions, holding "the litigation privilege is applicable to claims of tortious interference with business expectations if the claim is premised on communications or statements made in the course of prior judicial or quasi-judicial proceedings."[109]

The plaintiff tried to make the distinction that "its claims are based on the defendants' alleged wrongful *conduct* of fil-

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[105] *Id*. at 493.
[106] *Id*. at 494.
[107] *Id*. at 497. (Citations and internal punctuation omitted.)
[108] *Id*. at 499, fn. 4.
[109] *Id*. at 501.

ing frivolous and meritless actions and appeals, not any communications or statements in a judicial proceeding."[110] But the court disagreed, saying "we can think of no communication that is more clearly protected by the litigation privilege than the filing of a legal action. The filing of a legal action, by its very nature, is a communicative act."[111] In any event, "our case law does not speak about the privilege solely in terms of communications, but also in terms of *conduct* in the course of judicial or quasi-judicial proceedings."[112]

Applying a similar analysis to its review of the tortious interference claim, the Appellate Court rejected the plaintiff's CUTPA claim as well.

The Connecticut Supreme Court subsequently granted the plaintiff's petition for certification, limited to the question, "Did the Appellate Court correctly conclude that the trial court improperly had declined to dismiss the plaintiff's complaint on the ground that the plaintiff's claims were barred by the litigation privilege?"[113]

B. *Unsuccessful bidder lacked standing to sue rival for unfair trade practice.*

In *Jefferson Solar, LLC v. FuelCell Energy, Inc.*,[114] the Appellate Court held that a bidder for the right to develop a clean-energy project lacked standing to sue a rival bidder, under the Connecticut Unfair Trade Practices Act (CUTPA),[115] for making an allegedly false representation in its bid package.

In response to a request for proposals issued jointly by Eversource Energy and the United Illuminating Company, the plaintiff and defendants submitted bids for the right to build a clean-energy facility, pursuant to a shared clean energy facility program established by statute. The request

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[110] *Id.*
[111] *Id.* at 502.
[112] *Id.*
[113] 345 Conn. 964, 285 A.3d 388 (2022).
[114] 213 Conn. App. 288, 277 A.3d 918 (2022).
[115] CONN. GEN.STAT. § 42-110a et seq.

for proposals included a requirement that each bidder certify that it had control, or the unconditional right to acquire control, of its proposed generation site (control certification). The defendants submitted a bid for a fuel-cell facility in Derby, within the territory of United Illuminating, and that bid was selected.

The plaintiff brought suit, alleging the defendants had submitted a false control certification, and that this conduct amounted to a violation of CUTPA. The plaintiff asserted it had suffered an ascertainable loss, as required to establish standing under the statute, because it stood to "lose the revenue from the [shared clean energy facility program] that it would have received but for [the] defendants' submission of a false bid certification."[116]

The trial court granted the defendants' motion to dismiss, in which they asserted the plaintiff lacked standing to prosecute its claim. The Appellate Court agreed.

The court noted that for a plaintiff to establish standing, it must make "a colorable claim of direct injury"[117]; injuries that are "remote, indirect or derivative" will not suffice.[118] The court agreed with the trial court's observations that the "direct recipient of any injury resulting from false certification would be [United Illuminating], the beneficiary of the project," and the "plaintiff's claims are remote and indirect."[119] The Appellate Court also observed that in the utility companies' request documents, they had expressly reserved the right to reject all bids.[120] It followed that "the plaintiff's purported injuries are purely speculative."[121]

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[116] 213 Conn. App. at 295, 296.
[117] *Id*. at 294. (Citation and internal punctuation omitted.)
[118] *Id*.
[119] *Id*. at 296.
[120] *Id*. at 296, 297.
[121] *Id*. at 297.

IV. Closely Held Businesses

A. *Lack of internal authority deprived limited partnership of standing to sue.*

In *Fischer v. People's United Bank*,[122] the Appellate Court ruled that a limited partnership's claims had been properly dismissed due to lack of standing, arising from a lack of institutional authority to bring suit.

The plaintiffs sued People's United Bank under various theories, stemming from the bank's recission of a commitment to refinance an existing mortgage. Co-plaintiff 1730 State Street Limited Partnership (1730 LP) was managed by a general partner called AJC Management, LLC (AJC). Under 1730 LP's partnership agreement, AJC had "'full, exclusive and complete discretion' to manage and control 1730 LP," including the right to "'[c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP].'"[123]

AJC, in turn, had three members: co-plaintiff Alan Fischer, Jefferson Scinto and Christian Scinto. AJC's operating agreement allowed the members collectively to "delegate to ... an individual Member ... any management responsibility or authority except as set forth in this Agreement to the contrary."[124] Fischer claimed to be "the sole management authority for the property by unanimous agreement of AJC's members," and "the sole member of AJC that has carried out operations on behalf of 1730 LP."[125]

But the agreement also required unanimous consent of the members for certain matters, including "[a]ll decisions affecting the policy and management of [AJC]" and authorizing the company to "borrow or lend money, make, deliver, accept or endorse any commercial paper, execute any mortgage, security instrument, bond or lease, or purchase or con-

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[122] 216 Conn. App. 426, 285 A.3d 421 (2022), *cert. denied* 346 Conn. 904, ___A.3d.___ (2023).

[123] *Id.* at 429.

[124] *Id.* at 443.

[125] *Id.* at 444.

tract to purchase any property ... or sell or contract to sell any assets of the Company, all other than in the ordinary course of the Company business…"[126]

It was undisputed that, of the three members of AJC, only one of them, Fischer, had authorized the company as general partner of 1730 LP to bring suit on behalf of the latter. The issue presented was whether that decision was an "ordinary course" decision that AJC could delegate to a single member, Fischer, or the opposite, in which case unanimity among the members would be required.

The Appellate Court observed that, according to AJC's operating agreement, "[t]he business to be conducted by the Company shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties ...."[127] It followed that "the commencement of litigation on behalf of 1730 LP against its mortgage lender is not an act that is within the scope of AJC's ordinary course of business and is, instead, a decision that affects the policy and management of AJC."[128] The company's operating agreement "clearly requires that such actions must be made with the unanimous consent of all of AJC's members."[129]

As a result, 1730 LP failed to satisfy its "burden of establishing that its action was brought with proper authority."[130] Absent such authority, 1730 LP lacked standing to pursue its claims, which deprived the court of jurisdiction and supported dismissal.

B. *Prospective business owner who negotiated a contract on behalf of not-yet-created entity lacked standing to sue personally for breach.*

In *Bernblum v. Grove Collaborative, LLC*,[131] the Appellate Court considered whether a person who conducted lease

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[126] *Id*.
[127] *Id*.
[128] *Id*. at 444.
[129] *Id*. at 445.
[130] *Id*. at 446.
[131] 211 Conn. App. 742, 274 A.3d 165, *cert. denied* 343 Conn. 925, 275 A.3d 626 (2022).

negotiations on behalf of a limited liability company that had not yet been formed would have standing, personally, to prosecute claims arising from the failure to consummate the lease.

The plaintiff, Steven Bernblum, who owned a commercial building at 770 Chapel Street in New Haven, conducted extensive negotiations with the defendant, a prospective tenant in the building. The parties exchanged multiple versions of a proposed lease, each of which identified the prospective landlord as 770 Chapel Street, LLC, an entity that Bernblum intended to create. Not until after the negotiations broke down did Bernblum form 770 Chapel Street, LLC, and quitclaim the property to it.

Shortly thereafter, Bernblum brought suit, alleging, among other things, breach of contract and breach of lease. The plaintiff also asserted a claim styled "detrimental reliance," based on improvements he made to the property allegedly in reliance on the defendant's promise to lease the space. After a courtside trial, the trial court entered judgment for the plaintiff.

On appeal, the defendant contended that the plaintiff lacked standing individually to prosecute these claims, and that accordingly they should have been dismissed. The Appellate Court agreed. "No contractual relationship between the plaintiff in his individual capacity and the defendants existed or was ever contemplated. The plaintiff was not a named party to the contract with respect to any of the underlying proposed lease agreements, and he was negotiating solely on behalf of his contemplated and soon to be formed limited liability company, 770 Chapel Street, LLC."[132]

The Appellate Court had previously ruled, in a 2007 case called *BRJM, LLC v. Output Systems, Inc.*,[133] that "contracts entered into by individuals acting on behalf of unformed entities are enforceable."[134] Here, 770 Chapel Street, LLC, was

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[132] *Id*. at 758, 759.

[133] 100 Conn. App. 143, 917 A.2d 605, *cert. denied*, 282 Conn. 917, 925 A.2d 1099 (2007).

[134] 211 Conn. App. at 746, fn. 4

the real party in interest, and should have been named as the plaintiff. As to the counts at issue, the Appellate Court reversed the trial court, with instructions to enter a judgment of dismissal.

V. Settlement Agreements

A. *Ambiguous settlement agreement leaves uncertainty in the wake of its breach.*

In *307 White Street Realty, LLC v. Beaver Brook Group, LLC*,[135] the Appellate Court addressed whether the parties' settlement agreement, never performed, barred the plaintiff from pursuing its original claims.

The plaintiff, a commercial tenant, sued its landlord for breach of an option under the lease to purchase the property. While the case was pending, the parties entered into a new purchase and sale agreement for the property, but that agreement was never carried out.

The defendant moved to dismiss the plaintiff's complaint, asserting that the action had become moot. The defendant argued that the negotiated purchase and sale agreement "replaces and supersedes the option to purchase in the lease. ... Because the instant action seeks interpretation and enforcement of a lease option that is no longer of any force or effect, the instant action is moot, thereby depriving [the court] of subject matter jurisdiction."[136] The trial court granted the motion, and dismissed the case.

The Appellate Court reversed, finding the doctrine of mootness did not apply. "[T]he proper inquiry with regard to mootness is not whether some change in circumstances has occurred after the claim or cause of action is asserted that forecloses any chance of success on the merits but, rather, whether that change would prevent the court from granting any and all practical relief *even assuming that the proponent is able to prevail on the merits, no matter how unlikely*."[137]

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[135] 216 Conn. App. 750, 286 A.3d 467 (2022).
[136] *Id*. at 758.
[137] *Id*. at 768. (Emphasis supplied by the court.)

Here, the plaintiff contended that "the purchase and sale agreement was executed as part of the parties' efforts to settle the current litigation and was intended to have no legal effect unless the sale actually closed. If the plaintiff is correct, then there remains a possibility that the plaintiff could prevail and obtain practical relief."[138] That is, if the court accepted the plaintiff's theory that the settlement agreement was a complete nullity if not performed, then the plaintiff could obtain relief under its complaint as originally presented. Accordingly, the defendant's motion to dismiss did not implicate mootness.

The Appellate Court further noted that, even if the motion did properly raise the issue of mootness, the trial court erred by deciding the issue without conducting an evidentiary hearing. Specifically, the parties were entitled to be heard with respect to their intent when they entered into the settlement agreement. It was an issue of fact "whether the parties agreed that the settlement agreement itself constituted satisfaction of the original cause of action, or whether the performance of the agreement was intended to be the satisfaction."[139] Framing the issue another way, "whether a settlement agreement constitutes an executory accord or a substitute agreement turns upon the intent of the parties."[140]

B. *Ambiguous term in settlement agreement resolved based on one party having good reason to know the opposing party's likely understanding.*

In *Reiner v. Reiner*,[141] the meaning of a hotly contested term in a settlement agreement was decided by applying an obscure rule of construction from the Restatement (Second) of Contracts (Restatement).

The parties had resolved previous litigation by entering into a written agreement, by which the plaintiff agreed to buy out the defendant's interest in various properties. The

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[138] *Id.* at 769.
[139] *Id.* at 773.
[140] *Id.*
[141] 214 Conn. App. 63, 279 A.3d. 788 (2022).

agreement provided that the buyout price would be "based on the fair market value" of the properties.

When the time came to implement the transactions, the parties reached an impasse. The plaintiff contended that the buyout price should be based on the defendant's equitable interest in the properties, starting with fair market value but deducting the balance owing on any mortgages. The defendant countered that a price "based on the fair market value" should not consider the mortgage balances. The plaintiff brought suit, seeking, among other things, a declaratory judgment adopting his interpretation of the contract language.

Following a courtside trial, the trial court did just that. In reaching its conclusion, the court was guided by Section 201(2) of the Restatement, which provides in relevant part:

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made ... (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Applying that provision here, the trial court found no basis to conclude that the plaintiff had "'reason to know' that [the defendant] believed that 'interest' meant percentage of the fair market value. On the other hand, [the defendant] did have reason to know that [the plaintiff] … believed that 'interest' meant equitable interest."[142]

In reaching that conclusion, the trial court noted that the defendant was an experienced real estate attorney, who presumably "[knew] that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages. Thus, he could not convey a full legal interest in his share of the fair market value of the three properties."[143] In addition, the court noted that

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[142] *Id*. at 73.
[143] *Id*. at 74.

"logically, [the plaintiff] would only want to pay the lesser of the two possible prices for the property."[144]

Applying the "clearly erroneous" standard of review, the Appellate Court affirmed the judgment below.

VI. Miscellaneous

A. *Case that failed due to lack of personal jurisdiction could not be rescued by Accidental Failure of Suit statute.*

In *Kinity v. US Bancorp*,[145] the Appellate Court addressed the issue of when the accidental failure of suit statute, General Statutes Section 52-592 (saving statute), will save, and when it will not save, a case that failed for lack of proper service. The saving statute provides, in relevant part, "[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service … or because the action has been dismissed for want of jurisdiction … [the plaintiff] may commence a new action … for the same cause at any time within one year after the determination of the original action…"

In *Kinity*, the plaintiff attempted to sue his mortgage lender, under various theories, arising from the bank's procurement of force-placed insurance for the plaintiff's house. A marshal attempted to make service upon the defendant via certified mail, but sent the papers to an incorrect address. No return receipt was provided to the court. The plaintiff obtained a default judgment against the bank, but the bank succeeded in opening and vacating the judgment, and obtaining a judgment of dismissal, based on the failure of service.

The plaintiff then reasserted his claims in a new action. By the time he commenced suit, the limitations period for his claims had expired, but he proceeded under the purported authority of the saving statute. The bank moved for summary judgment, asserting that the plaintiff's claims were time barred, and that the saving statute did not apply. The trial

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[144] *Id.*
[145] 212. Conn. App. 791, 277 A.3d 200 (2022).

court agreed, and granted the bank's motion.

The Appellate Court affirmed. Critical to the court's analysis is the fact that the saving statute applies only if the initial, failed action was "commenced within the time limited by law." That is, the initial action must, in some sense, have commenced. "Without the commencement of an original action, no action exists for the statute to save."[146]

For purposes of the saving statute, timely "commencement" is effectuated "when the defendant receive[s] clear and unmistakable notice of [the] action upon delivery of the summons, complaint and related materials."[147] A plaintiff must establish that the defendants "actually received the summons and complaint, and thereby got actual or effective notice of the action within the time period prescribed by the applicable statute of limitations"[148] – even though the method of delivery did not comport with the requirements of formal service.

In *Kinity*, "the plaintiff failed to provide the court with any evidence that the bank itself had actual or effective notice of the original action by way of receipt of the summons and complaint."[149] Accordingly, the plaintiff did not establish an earlier, "commenced" action for the saving statute to save, and could not rely on the statute.

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[146] *Id*. at 840. (Citation and internal punctuation omitted.)
[147] *Id*. at 851. (Citation and internal punctuation omitted.)
[148] *Id*. at 848.
[149] *Id*. at 852.