BUSINESS LITIGATION: 2015 IN REVIEW

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In 2015, Connecticut's appellate courts decided a number of noteworthy cases in the realms of business torts, foreclosure, contract, and construction law. Those courts also decided cases that addressed liability, remedies and defenses pertinent to business cases. Following is a summary of those leading cases.

I. BUSINESS TORTS

In *Landmark Investment Group, LLC v. Calco Construction and Development Company*,[1] a tortious interference and unfair trade practice case, the Supreme Court reversed the trial court's judgment for the defendant notwithstanding a jury verdict of $4 million for the plaintiff.

The plaintiff (Landmark) was a party to a purchase and sale agreement with Chung Family Realty Partnership, LLC (Chung, LLC) pertaining to a parcel of land in Plainville. Those parties had a falling out, and on October 27, 2006 (repudiation date), Chung, LLC sent a letter to Landmark purporting to terminate their contract.[2] Landmark then sued Chung, LLC seeking to enforce the agreement (Chung litigation). Meanwhile, the defendant John Senese, through his company Calco Construction and Development Company (Calco), entered into a backup agreement with Chung, LLC for the purchase of the property. Senese played additional angles as well, purchasing the existing mortgages on the parcel, and funding Chung, LLC's legal fees in connection with the Chung litigation.[3]

Landmark prevailed in the Chung litigation, obtaining an order, affirmed by the Appellate Court, of specific performance directing Chung, LLC to convey the property to Landmark.[4] But Landmark was unable to capitalize on its

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1 318 Conn. 847, 124 A.3d 847 (2015).

2 *Id.* at 855.

3 *Id.* at 856.

4 *Id.* at 857 (citing Landmark Inv. Grp., LLC v. Chung Family Realty P'ship, LLC, 125 Conn. App. 678, 10 A.3d 61 (2010), *cert. denied*, 300 Conn. 914, 13 A.3d 1100 (2011)).

victory, because the town had meanwhile commenced foreclosure of tax liens on the property, which eventually went to auction. The high bidder was a company formed by Senese.[5]

Landmark sued Senese and Calco, asserting claims of tortious interference and unfair trade practice. Landmark sought a prejudgment remedy, but following a three-day hearing, the trial court denied its application, finding "no evidence that Senese enticed or manipulated Chung, LLC, into terminating its agreement with the plaintiff" or that "Senese and/or Calco made any misrepresentations or committed any other tort in the course of conduct which ultimately injured [the plaintiff]."[6] The plaintiff appealed, but the Appellate Court, deferring to the trial court's findings of credibility and weighing of the evidence, affirmed the judgment below.[7]

Undeterred, Landmark soldiered on, and proceeded to trial by jury. The jury found for the plaintiff on both claims of tortious interference and unfair trade practice, awarded damages of $4 million, and made a finding that the defendants had acted with reckless indifference to Landmark's rights, justifying punitive damages in an amount to be determined by the court.[8] But the trial judge, who had issued the earlier ruling denying Landmark's application for PJR, granted the defendants' motion for judgment notwithstanding the verdict, characterizing the defendants' conduct as "nothing more than aggressive business practices."[9]

On appeal, Landmark argued that the trial court erred in holding that, for purposes of the tortious interference claim, the jury could consider only conduct of the defendants that predated the repudiation date, the trial court's logic being that "conduct after the breach could not have *induced* Chung, LLC to breach the contract."[10] The Supreme Court

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5 *Id*. at 858, 859.

6 Landmark Investment Group, LLC v. Calco Construction and Development Company, 141 Conn. App. 40, 47, 48, 60 A.3d 983 (2015).

7 *Id*. at 52-55.

8 318 Conn. at 859, 860.

9 *Id*. at 861.

10 *Id*. at 865.

agreed with Landmark. "[T]he mere fact that a contract is breached does not necessarily mean that the contractual relationship between two parties has terminated. … As is relevant in this case, even a total repudiation of a contract may not terminate contractual relations when the non-breaching party elects to insist on specific performance of the agreement, and specific performance is so ordered."[11] Thus, all of the defendant's conduct before and after the repudiation date, continuing until judicial confirmation of the tax foreclosure sale of the subject property, could and should have been considered by the jury.

As for the tortious nature of the defendants' conduct, the Supreme Court found that the trial court improperly substituted her view of the evidence for that of the jury. "Economic pressure is a common means of inducing persons not to deal with another," the wrongfulness of which is determined by "the circumstances in which it is exerted, the degree of coercion involved, the extent of the harm that it threatens, and the general reasonableness and appropriateness of this pressure as a means of accomplishing the actor's objective."[12] As applied to the case at hand, "[t]he jury reasonably could have found that [the defendants'] conduct constituted extreme economic pressure that went beyond the normal industry practice of competition between rival developers."[13]

Writing separately in concurrence, Justice Zarella opined that Landmark could not and should not have obtained a judgment against the defendants for tortious interference with its purchase contract with Chung, LLC, because all rights under the contract merged into the judgment of specific performance that Landmark had obtained against Chung, LLC. "Any tortious interference claims a plaintiff may have …merge into the specific performance decree because the plaintiff has obtained relief for the breach through specific performance. … [A]ny future remedy con-

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[11] *Id*. at 866.

[12] *Id*. at 870.

[13] *Id*. at 870, citing 4 Restatement (Second), Torts, Interference with Contract § 767, comment (c), p. 31 (1979). (Internal punctuation omitted.)

cerning the parties' obligations under the decree must come from the court's contempt power or an action on the judgment."[14] But because none of the parties, nor the trial court, ever raised this issue, Justice Zarella was constrained to join the judgment of the majority.

In *Artie's Auto Body, Inc. v. Hartford Fire Insurance Company*,[15] a class action seeking relief under the Connecticut Unfair Trade Practices Act ("CUTPA"),[16] the Supreme Court reversed the trial court's judgment for the plaintiffs in excess of $34 million.

The plaintiffs, independent auto body repair shops, alleged that The Hartford violated CUTPA by requiring its staff damage appraisers to use hourly labor rates negotiated by the repair shops and The Hartford based on volume work. The plaintiffs alleged that in so doing, The Hartford forced the appraisers to breach a state regulation requiring them to perform their work "without prejudice against, or favoritism toward, any party involved."[17]

The Supreme Court disagreed, "unable to discern why appraisers, when negotiating for the cost of auto repairs on behalf of their employers, would ever owe a duty of impartiality to the auto body repair shops with whom they are negotiating."[18]

In *Milford Paintball, LLC v. Wampus Milford Associates, LLC*,[19] the Appellate Court affirmed the judgment of the trial court that negligent misrepresentation, if accompanied by sufficient aggravating factors, may support a claim under CUTPA.

The parties entered into a lease by which the defendant would construct an indoor paintball facility to be occupied and operated by the plaintiff. By contract, the landlord's improvements were required to be completed by July 26, 2004. In the parties' communications the plaintiff repeatedly

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14 *Id.* at 887.
15 317 Conn. 602, 119 A.3d 1139 (2015).
16 CONN. GEN. STAT. §42-110a et seq.
17 *Id.* at 610, quoting Regulations of Connecticut Agencies, Section 38a-790-8.
18 *Id.* at 627.
19 156 Conn. App. 750, 115 A.3d 1107 (2015).

emphasized the importance of having the operation up and running by September, the start of the indoor paintball season, which runs only through April. Throughout the spring and summer, the defendant repeatedly reassured the plaintiff that the work would be completed in time, while making little or no effort to actually perform it.[20]

The trial court found that the defendant's repeated promises to perform the work in a timely manner were a material misrepresentation of fact, and constituted negligent misrepresentation. Furthermore, those misrepresentations were "immoral, unethical, oppressive or unscrupulous practices" and thus also in violation of CUTPA.[21]

The Appellate Court noted that simple negligence ordinarily will not support a CUTPA violation, but that under existing law, the trial court's finding of substantial aggravating factors supported its judgment for the plaintiff under CUTPA.

The decision is noteworthy in that "aggravated" negligent misrepresentation seems to lend itself to the label of recklessness. But the court did not use that nomenclature. This is significant because reckless misrepresentation is considered a species of fraud;[22] and therefore requires proof by clear and convincing evidence. Negligent misrepresentation, aggravated or otherwise, does not. Thus through artful pleading, a plaintiff may be able to get the best of both worlds by framing a misrepresentation claim as negligent, requiring only the fair-preponderance standard of proof, and aggravated, supporting a claim for punitive damages.

II. Foreclosure

The securitization of residential mortgage notes is a relatively new phenomenon, and has vastly complicated the question of who is the holder of a note and who is entitled to enforce it. The result has been a blizzard of cases in recent years on who does and who does not have standing to fore-

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[20] *Id*. at 755.
[21] *Id*. at 756.
[22] *See Sturm v. Harb Development, LLC*, 298 Conn. 124, 142 (2010).

close a residential mortgage, when the original lender no longer holds the paper.

In *U.S. Bank v. Schaefer*,[23] the Appellate Court succinctly summarized the principles that govern this issue, distinguishing between the holder of a note and a nonholder who is authorized to enforce it. A holder needs to produce the note and either an endorsement in blank to bearer, or a specific endorsement to the holder. Upon that showing, the burden shifts to the defendant to rebut the presumption that the holder owns the note. In such a case "the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party…. It is not sufficient to [point] to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt…Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note."[24]

A nonholder, on the other hand, must "demonstrate by way of proper documentation that it has the right to enforce the note. It may, for example, produce documents showing a valid transfer of the right to enforce the note between the original holder and the foreclosing party."[25]

III. Contracts

In *RBC Nice Bearings, Inc. v. SKF USA, Inc.*,[26] the Supreme Court reversed the Appellate Court on an issue of continuing waiver in connection with a multi-year contract for the sale of goods. The parties had entered into an agreement by which the plaintiff bought the defendant's ball-bearing manufacturing operation, with the defendant then serving as the plaintiff's distributor. Under their second distribution agreement, which took effect in 2000, the defendant was required to purchase at least $6 million in product per year, over a nine-year period. In contract years three

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[23] 160 Conn. App. 138, 125 A.3d 262 (2015).
[24] *Id.* at 150.
[25] *Id.* at 150, 151.
[26] 318 Conn. 737, 123 A.3d 417 (2015).

through five, the defendant fell short of its purchase obligations. Rather than declare a default, in each of those years the plaintiff negotiated a new figure with the defendant, based on market conditions. Although the plaintiff repeatedly "reminded" the defendant about its contract obligations, the plaintiff refrained from formally declaring a default or taking legal action.[27]

The plaintiff presented the defendant with a shortfall invoice at the end of year five, but continued doing business with the defendant through year six. When the defendant again fell short, the plaintiff invoiced the defendant for the deficiency, and commenced suit, based on the shortfalls in years five and six and an anticipatory breach for the balance of the contract term.[28]

The trial court found that the plaintiff had waived the minimum-sales requirement for both year four and year five, giving rise to a continuing waiver that continued through the following years.[29] On that basis, the court entered judgment for the defendant. The Appellate Court reversed, finding that the trial court's finding of waiver with respect to year six was clearly erroneous.[30] The Appellate Court relied upon the absence from the record of, as the Supreme Court put it, "fresh evidence of waiver in the sixth contract year."[31]

The Supreme Court reversed the ruling of the Appellate Court, finding error in its requirement of evidence that the plaintiff "repeatedly indicate anew its intent to waive its rights." Rather, once an initial waiver had been established, "the onus [fell] on [the plaintiff] to demonstrate that it retracted its waiver as to the executory portion of the contract."[32] The plaintiff could have done so by simply notifying the defendant, when accepting the defendant's defective performance in the earlier years of the contract, that it was doing so "without prejudice" or "under protest."[33] But the

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[27] *Id*. at 743.
[28] *Id*. at 744, 745.
[29] *Id*. at 745, 746, 747.
[30] *Id*. at 746. The Appellate Court decision is reported at 146 Conn. App. 288, 78 A.3d 195 (2013).
[31] *Id*. at 755.
[32] *Id*.
[33] *Id*. at 766.

plaintiff had never done so.

In *Connecticut Light & Power Co. v. Proctor*,[34] the Appellate Court explained the difference between contracts implied in fact and those implied in law. The defendant, an employee of a new business proprietorship, arranged for the plaintiff to provide electrical service to the enterprise. He did so in a telephone conversation in which he provided his personal contact information and agreed to assume responsibility for all electrical services provided.[35] He never filled out the written application that the plaintiff subsequently sent him.

In the plaintiff's suit for unpaid electrical service, the trial court found that that the parties had entered into an implied contract, and entered judgment for the plaintiff on that count of its complaint. Having found the existence of an actual contract, the court entered judgment for the defendant on the plaintiff's alternate claim for unjust enrichment.

Affirming the judgment below, the Appellate Court explained "An implied in fact contract is the same as an express contract, except that assent is not expressed in words, but is implied from the conduct of the parties... On the other hand, an implied in law contract is not a contract, but an obligation which the law creates out of the circumstances present, even though a party did not assume the obligation ... [A]n implied in law contract is another name for a claim for unjust enrichment."[36]

IV. Construction

The Appellate Court's decision in *Coppola Construction Co. v. Hoffman Enterprises Ltd. Partnership*,[37] contains a useful discussion of principles that apply to construction projects gone bad. The defendant hired the plaintiff to perform a paving project on property owned by the defendant.

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[34] 158 Conn. App. 248, 118 A.3d 702 (2015).
[35] *Id.* at 250.
[36] *Id.* at 255.
[37] 157 Conn. App. 139, 117 A.3d 876 (2015).

A dispute arose over charges for extra work, prompting the plaintiff to refuse to complete the project until it had received full payment for work performed.[38] The defendant refused to remit payment, and hired one of the plaintiff's subcontractors to complete the project.

The Appellate Court found that the defendant's conduct constituted a termination of the contract without providing the formal five-day notice required thereby, and therefore a breach of contract.[39] Ordinarily, a contractor must prove that it has substantially performed the agreement in order to recover payments under the contract, but where, as here, the owner has breached the contract, the contractor is excused from making that proof and may seek contract damages, including lost profits.[40] The plaintiff was entitled to damages measured by the full contract price minus any costs that it saved by not having to complete its performance.[41]

The same approach applies with respect to validly executed change orders, which constitute amendments to the contract.[42] As for extras not covered by a valid written change order, the proper measure of recovery is under the theory of unjust enrichment.[43]

The Appellate Court affirmed the trial court's finding that the plaintiff's recordation of a mechanic's lien in a deliberately inflated amount, aimed at obtaining leverage, constituted abuse of process, supporting the defendant's counterclaim for breach of the implied covenant of good faith and fair dealing and a violation of CUTPA.[44]

The Appellate Court's decision in *Burns v. Adler*[45] contains a detailed discussion about the "bad faith" exception that allows a home improvement contractor to recover restitution from a homeowner despite noncompliance with the Home Improvement Act. The parties entered into a home

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38 *Id*. at 154.
39 *Id*. at 172.
40 *Id*. at 161-162.
41 *Id*. at 173.
42 *Id*. at 174.
43 *Id*. at 175.
44 *Id*. at 188-189.
45 158 Conn. App. 766, 120 A.3d 555 (2015).

improvement contract, on a "time and materials" basis, pursuant to a writing that admittedly did not comply with the act. The trial court found that the defendant homeowner, an attorney, strung the contractor along with false promises of payment, knowing that the contractor was financially stretched and desperate to pay his subcontractors.

The homeowner ultimately refused to pay the final $200,000-plus claimed by the contractor, taking refuge in the act. The contractor, as a matter in avoidance of the homeowner's invocation of the act, claimed bad faith.

The homeowner argued for a narrow construction of the bad faith exception, claiming it should be limited to instances in which the homeowner specifically knew about the requirements of the act and used that knowledge to obtain work he did not intend to pay for.[46] The trial court rejected that narrow approach, rendering judgment for the contractor, and the Appellate Court affirmed.

In *Morgillo v. Empire Paving, Inc.*,[47] the Appellate Court clarified the shifting burden of proof of damages in cases involving the defective performance of a construction contract. Under established law, the basic measure of damages is diminution in the value of the property, or alternatively, cost to repair the damage, so long as the cost of repair does not result in economic waste.[48]

The Appellate Court held that the plaintiff property owner, who sought the cost to repair, was not required also to present evidence of diminution of value.[49] The court further held that the defendant construction company bore the burden of proof on the issue of economic waste.[50]

In *State v. Bacon Construction Company*,[51] the state brought suit against a contractor, alleging negligent construction work on a prison project. The contractor had previously obtained an arbitrator's award against the state for

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[46] *Id.* at 797.
[47] 158 Conn. App. 399, 118 A.3d 760 (2015).
[48] *Id.* at 415, 416.
[49] *Id.* at 416.
[50] *Id.* at 418.
[51] 160 Conn. App. 75, 124 A.3d 941 (2015).

payment of its unpaid contract balance, and claimed that under res judicata and/or collateral estoppel, the state's negligence suit should be barred.

The trial court disagreed with the contractor's contention, and denied its motion for summary judgment. The Appellate Court noted that the arbitrator, in finding that the contractor had completed the contract and was thus entitled to payment, had made no determination as to the quality of the work; thus the arbitration award "was based on entirely different claims than those asserted by the plaintiff in this action."[52] The Appellate Court affirmed the decision below.

V. LIABILITY

In *Joseph General Contracting, Inc. v. Couto*,[53] the Supreme Court reversed a decision of the Appellate Court[54] that had blurred the distinction between corporate and individual liability for breach of contract.

The plaintiff and defendant were parties to a home construction contract. The home buyers pursued breach of contract claims against not only the contractor, a corporation, but also the contractor's owner/president, Anthony Silvestri. The trial court found, and the Appellate Court agreed, that in their course of dealing, Silvestri "did not clearly inform the Coutos that he continued, at all times, to be acting in a representative rather than in an individual capacity,"[55] thus giving rise to a modified contract to which he was a party.

The Supreme Court disagreed, finding an absence of "facts evidencing a clear intention on the part of the parties to modify the original construction contract."[56] The Court reversed the judgment against Silvestri for breach of contract. The Supreme Court, however, affirmed the judgment below imposing personal liability upon Silvestri for viola-

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[52] *Id*. at 89.
[53] 317 Conn. 565, 119 A.3d 570 (2015).
[54] 144 Conn. App. 241, 72 A.3d 413 (2013).
[55] *Joseph General Contracting, Inc.*, 317 Conn. at 573.
[56] *Id*. at 581.

tions of CUTPA, finding the corporate shield ineffective to protect one who "knowingly or recklessly engage[s] in unfair or unscrupulous acts."[57] The Court emphasized that Silvestri personally had engaged in the wrongful conduct at issue, and was not being held vicariously liable under CUTPA for wrongdoing on the part of others affiliated with the company.

In *Zuvic, Carr & Associates, Inc. v. Morande Brothers, Inc.*,[58] a creditor of the first-named defendant, a dissolved corporation, brought suit against a director of the corporation pursuant to General Statutes Section 33-887b. That statute requires the directors of a dissolved corporation to "discharge or make reasonable provision for the payment of claims."

The trial court entered judgment for the director-defendant, on the grounds that the plaintiff's claim was disputed and in litigation on the effective date of the corporate defendant's dissolution.[59] The Appellate Court reversed, holding that the disputed nature of the claim did not exonerate the director defendant from liability.

VI. Remedies and Defenses

In *Brennan v. Brennan Associates*,[60] the Supreme Court addressed issues relating to the valuation of the partnership interest of a dissociated partner. In a previous action (first action), the plaintiff was expelled from the partnership upon the court's determination that the plaintiff had "engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner."[61] The judgment in the first action was affirmed by the Supreme Court.[62]

The plaintiff commenced a second action, pursuant to General Statutes Section 34-362, to have his interest in the

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57 *Id.* at 592.
58 157 Conn. App. 297, 116 A.3d 358 (2015).
59 *Id.* at 304.
60 316 Conn. 677, 113 A.3d 957 (2015).
61 Conn. Gen. Stat. § 34-355(5) (C).
62 Brennan v. Brennan Associates, 293 Conn. 60, 977 A.2d 107 (2009).

partnership, which owned a shopping center in Trumbull, valued and bought out by the partnership. The statute provides that the dissociated partner's interest should be valued as of the "date of dissociation." The trial court in the second action valued the plaintiff's interest as of the date in 2006 that the trial court in the first action entered judgment, and also awarded the plaintiff interest running from that date.[63] The court awarded the plaintiff the principal sum of $6,937,600 plus interest, payable in four installments over four years.[64]

The Supreme Court reversed. The Court determined that, by operation of the automatic appellate stay in the first action, the plaintiff's expulsion and dissociation from the partnership did not become operative until the Supreme Court's decision in the first action had been issued and the time to file a motion for reconsideration had expired.[65] Accordingly, for purposes of valuation, the trial court should have used the date in 2009 upon which the appellate proceedings in the first action were concluded.[66]

As for the running of interest, the Court noted that under normal circumstances, a dissociated partner is entitled to immediate payment of his partnership interest pursuant to General Statutes Section 34-362(b) and that accordingly, interest should run from the date of dissociation.[67] But in a case of wrongful dissociation, the operative subsection of 34-362 is (h), not (b), in which case the partnership has the option of making deferred payments.[68] Under these circumstances, the plaintiff was entitled to interest only from the date of each of the court-ordered deferred payments, not the date of dissociation.[69] The Supreme Court remanded the case for further proceedings on the valuation of the plaintiff's partnership interest, and the award of interest.[70]

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63 316 Conn. at 680.
64 *Id*. at 694.
65 *Id*. at 689.
66 *Id*. at 693.
67 *Id*. at 693, 697.
68 *Id*. at 696.
69 *Id*. at 699.
70 *Id*. at 706.

In *Canton v. Cadle Properties of Connecticut, Inc.*,[71] the Supreme Court considered the scope of the powers of a receiver of rents appointed pursuant to General Statutes Section 12-163a, when municipal property tax payments are delinquent. The Court held that the receiver could sue not only for rents accruing after its appointment, but also for back rents. That statute, however, does not empower the receiver to sue for eviction or enter into new leases. Justice Zarella, joined in dissent by Justice Eveleigh, opined that the receiver had the authority to sue for eviction.

In *Geremia v. Geremia*,[72] the Appellate Court explained the jurisdiction of the Superior Court and Probate Court, respectively, over claims pertaining to a decedent's property. Although the two courts have concurrent jurisdiction to *decide title* to property in which a decedent's estate claims an interest,[73] only the Superior Court can compel the *transfer* of property, such as through an award of damages. Thus, claims for the conversion or theft of a decedent's property should be brought only in Superior Court.[74]

The Appellate Court and Supreme Court issued a pair of decisions on the issue of statutory interest, prejudgment and post-judgment. In *Nelson v. Tradewind Aviation, LLC*,[75] a case in which the plaintiff sued his former employer for defamation and tortious interference, based on false statements made to a prospective employer, the Appellate Court considered the trial court's refusal to charge the jury on the plaintiff's demand for prejudgment interest pursuant to General Statutes Section 37-3a.

The Appellate Court agreed that the trial court had acted properly. Drawing on prior case law, the court noted that prejudgment interest is properly a jury question when "the underlying claims were for liquidated sums due for services or services and materials or for reimbursement of specific sums. Section 37-3a provides a substantive right that

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71 316 Conn. 851, 114 A.3d 1191 (2015).
72 159 Conn. App. 751, 125 A.3d 549 (2015).
73 *Id.* at 772.
74 *Id.* at 773, 774.
75 155 Conn. App. 519, 111 A.3d 887 (2015).

applies only to certain claims. It does not allow prejudgment interest on claims that are not yet payable, such as awards for punitive damages or on claims that do not involve the wrongful detention of money, such as personal injury claims."[76]

The Court found that the plaintiff's tort claims were akin to personal injury claims unsuited for an award of prejudgment interest, and affirmed the judgment below.[77]

In *Sikorsky Financial Credit Union v. Butts*,[78] the Connecticut Supreme Court ruled that, when a loan agreement does not expressly disclaim the lender's entitlement to post-maturity interest, such interest automatically accrues on the judgment until payment, pursuant to General Statutes Section 37-1. Under that statute, post-judgment interest accrues either at the contract rate, if the contract specifies a post-maturity rate, or 8% *per annum* if it does not.

The Court reversed the Appellate Court, which had agreed with the trial court that the award of post-judgment interest was entirely within the discretion of the trial court pursuant to General Statutes Section 37-3a. The Supreme Court held that the latter statute, which governs awards of interest as damages for the wrongful detention of money or property, does not apply to actions for repayment of a loan.

The *Sikorsky* decision should be read in tandem with its 2012 decision in *Ballou v. Law Offices Howard Lee Schiff, P.C.*[79] In *Ballou*, which involved two credit card balances, the Court ruled that an award of post-judgment interest was discretionary pursuant to General Statutes Section 37-3a. The Court thus draws a distinction between extensions of credit, in which post-judgment interest is discretionary pursuant to General Statutes Section 37-3a, and loans, in which such interest is automatic pursuant to Section 37-1.

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76 *Id*. at 547. (Citations and internal punctuation omitted.)

77 *Id*. at 548.

78 315 Conn. 433, 108 A.3d 228 (2015).

79 304 Conn. 348, 39 A.3d 1075 (2012). The word "of" does not appear in the defendant's name as reported.

In *North Star Contracting Corporation v. Albright*,[80] the Appellate Court affirmed the trial court's dismissal of a derivative action on the grounds that the nominal plaintiff had a conflict of interest and therefore lacked standing to prosecute the suit.

The plaintiff owned shares in nominal defendant UIL Holdings Corporation (company), parent of United Illuminating Company, and the defendants were members of the company's board of directors. The plaintiff was owned by J. William Foley, who also owned a separate business involved in separate litigation against the company.[81] Foley, on behalf of the plaintiff, issued a written demand to the defendants that they investigate the acts at issue in the separate action. Dissatisfied with the response, he had the plaintiff bring a derivative action against the company's board members.[82]

The trial court granted the defendants' motion to dismiss. Applying the well-established test of whether the shareholder can fairly and adequately represent the interests of the company and its other shareholders, the court concluded that Foley's dual role gave rise to a significant conflict of interest, making the plaintiff an unsuitable representative. The Appellate Court affirmed.

In *Old Colony Construction, LLC v. Town of Southington*,[83] the plaintiff building contractor contended that the defendant town's cancellation of the parties' contract "for convenience" barred the town from enforcing a provision for liquidated damages in the event of delay in completing the project. The Supreme Court rejected that argument. Declining to address the argument as an abstract proposition, the Court relied on language in the contract allowing the town to terminate "without cause and without prejudice to any other right or remedy."[84] The Court deemed this language broad enough to preserve the town's right to claim liquidated damages.

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80 156 Conn. App. 311, 112 A.3d 216 (2015).
81 *Id.* at 313.
82 *Id.* at 314.
83 316 Conn. 202, 113 A.3d 406 (2015).
84 *Id.* at 214.

In another liquidated damages case, *Peterson v. McAndrew*,[85] the plaintiff, who breached a contract to purchase real estate from the defendant for the sum of $2,550,000, sued for return of his 10% deposit, claiming that the defendant's retention of the same as liquidated damages under their contract constituted unjust enrichment. The evidence at trial indicated that the actual loss suffered by the defendant seller amounted to a little over $130,000, slightly in excess of half the $255,000 deposit retained by the seller.[86] The trial court entered judgment for the plaintiff, relying on language from a 1980 decision of the Connecticut Supreme Court that a liquidated damages provision may be nullified if the breach "caused the seller no damages *or damages substantially less than the amount stipulated* as liquidated damages."[87]

The Appellate Court reversed, relying heavily on general principles favoring the enforcement of liquidated damages provisions. The Court brushed aside the "substantially less" issue, declaring without analysis that the trial court "erred in concluding that the actual damages in this case were so substantially less than that provided as liquidated damages that the provision was unenforceable."[88] We can thus discern that 50% is not "substantially less," but without guidance as to what the percentage may be.

The Appellate Court's decision in *Perez v. Carlevaro*[89] underscores the fact that the entry of a default does not automatically entitle a plaintiff to relief. The plaintiff sued the defendant for breach of contract, alleging inter alia that an indemnity clause entitled her to attorneys' fees. The plaintiff obtained a default against the defendant for noncompliance with a discovery order, and proceeded to a hearing in damages, after which she obtained her requested award of attorneys' fees.

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85 160 Conn. App. 180, 125 A.3d 241 (2015).

86 *Id*. at 192.

87 *Id*. at 192, 197, citing *Vines v. Orchard Hills, Inc*., 181 Conn. 501, 435 A.2d 1022 (1980). Emphasis added by the author.

88 *Id*. at 201.

89 158 Conn. App. 716, 120 A.3d 1265 (2015).

The Appellate Court reversed. The Court noted that a default conclusively determines the liability of a defendant, but "only when the allegations in the well pleaded filing are sufficient on their face to make out a claim for judgment or relief."[90] Here, the contract term in question unambiguously did not entitle the plaintiff to the relief that she sought, and so even upon a default, she could not obtain it.

In *Youngman v. Schiavone*,[91] the plaintiffs, two of the three members of a limited liability company, brought suit in their own names against the third member for claims arising from company business. The defendant replied with a special defense asserting that the LLC, not the individual plaintiffs, had standing to pursue the claims at issue. Conceding the point, the plaintiffs moved to substitute the LLC as plaintiffs; the defendant promptly countered with a motion to dismiss, based on lack of subject-matter jurisdiction. The trial court granted the motion to dismiss, and denied the motion to substitute.[92]

The Appellate Court held that General Statutes Section 52-109 gave the trial court the authority to consider the plaintiffs' motion to substitute, notwithstanding the pendency of a motion to dismiss based on lack of jurisdiction.[93] But the trial court has broad discretion in this regard, and the Appellate Court ruled that the trial court did not abuse its discretion in dismissing the case rather than permitting substitution.[94] Judge Gruendel dissented, asserting that the plaintiffs had had good cause to believe that they personally were proper plaintiffs when they filed suit, and that the interests of justice required that the substitution be permitted.[95]

The Appellate Court's decision in *AJJ Enterprises, LLP v. Jean-Charles*[96] contains an exhaustive discussion about the doctrine of equitable subrogation of mortgages. The doc-

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[90] *Id.* at 725.
[91] 157 Conn. App. 55, 115 A.3d 516 (2015).
[92] *Id.* at 61.
[93] *Id.* at 64.
[94] *Id.* at 68.
[95] *Id.* at 75-78.
[96] 160 Conn. App. 375, 125 A.3d 618 (2015).

trine is typically invoked when a property is encumbered by two mortgages, A and B; first-position mortgage A is refinanced and released; the refinancing lender is unaware of second-position mortgage B; and the refinancing lender, once it realizes to its horror that its recorded mortgage is behind B, seeks to be subrogated to the lien priority of A.

The Appellate Court considered, and rejected, the argument that several recent decisions of that Court had established a bright-line rule that a lender with constructive notice of an intervening lien may not invoke the doctrine. The Court concluded that "constructive notice of an intervening interest in the property is not a per se bar to the application of the doctrine of equitable subrogation; rather, whether to apply this doctrine is left to the sound discretion of the trial court following a careful balancing of the equities in each particular case."[97] Such constructive notice may in some cases "tilt the scales in favor of denying an equitable remedy such as subrogation," but does not create an automatic bar.[98]

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[97] *Id*. at 395.
[98] *Id*. at 409.