STEVEN BERNBLUM *v.* THE GROVE COLLABORATIVE, LLC, ET AL.
(AC 44177)

Bright, C. J., and Prescott and Clark, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, B and G Co., for, inter alia, breach of contract relating to his negotiations with B over a potential lease of certain commercial property by G Co., B's limited liability company. The negotiations began in October, 2012, and several proposed lease agreements were drafted by the plaintiff's attorney and exchanged by the parties. All of the proposed leases listed G Co. as the sole tenant and C Co., a limited liability company that was not formed by the plaintiff until August, 2013, as the sole landlord. During the course of lease negotiations, B expressed a need for certain improvements to be made to the space, specifically, the construction of additional walls. The plaintiff paid for the construction of those additional walls on an assurance by G Co. that he would be reimbursed, and the final version of the proposed lease contained a provision pursuant to which the tenant would have been required to reimburse the landlord for the wall construction by way of additional rent. The plaintiff also made several additional repairs and improvements to the property. In February, 2013, the plaintiff delivered a final version of the proposed lease to B. Although B made an oral representation to the plaintiff that he intended to sign it once his accountant returned from a trip, the lease was never executed. Despite the absence of a finalized lease, the plaintiff provided G Co. with access to the property later in February, 2013, to conduct a grand opening event. Soon thereafter, G Co. removed items it had brought into the space and began operating its business out of another property, and the defendants never made any payments to the plaintiff. Following a bench trial, the court rendered judgment for the plaintiff on the counts of the revised complaint sounding in breach of contract, breach of lease, detrimental reliance, and negligent misrepresentation, and for the defendants on the fraud counts. The trial court subsequently denied the

defendants' motion to reconsider/reargue. On the defendants' appeal to this court, *held*:

1. The plaintiff lacked standing to bring the counts of the complaint sounding in breach of contract, breach of lease, and detrimental reliance: the plaintiff did not have a direct interest in the litigation with respect to those counts because no contractual relationship existed, or was ever contemplated, between the plaintiff in his individual capacity and the defendants, as the plaintiff was not a party to any of the underlying proposed lease agreements and the plaintiff was, instead, negotiating solely on behalf of C Co.; moreover, the plaintiff brought the underlying action not on behalf of C Co., as the real party in interest, but in his own name individually.
2. The trial court improperly rendered judgment for the plaintiff on the counts of the complaint sounding in negligent misrepresentation, the plaintiff having failed to meet his burden of proof on those counts: the plaintiff failed to establish that his asserted expenditures for improvements to the property were made to his detriment in reasonable reliance on B's statement, in February, 2013, that he would sign the lease once his accountant returned, because, although the trial court admitted into evidence copies of checks reflecting payments that the plaintiff attributed to the cost of the repairs and improvements to the space, the vast majority of those checks predated B's February, 2013 statement, and, therefore, it could not reasonably be inferred from the checks that the plaintiff made the improvements in reliance on the February, 2013 representation by B; moreover, although there was evidence that B made statements during negotiations about changes that he would have liked to have seen made to the property and entered into a contract for the construction of additional walls, which the plaintiff paid for, those requests by B were not alleged to be the negligent misrepresentation on which the plaintiff reasonably relied to his detriment.

Argued December 6, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *Baio, J.*; judgment in part for the plaintiff, from which the defendants appealed to this court. *Reversed in part*; *judgment directed.*

Robert M. Frost, Jr., with whom, on the brief, was *Erica A. Barber*, for the appellants (defendants).

Earle Giovanniello, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this action arising out of negotiations over a potential commercial lease, the defendants, The Grove Collaborative, LLC (The Grove), and its sole member, Slate Ballard, appeal from the judgment of the trial court, rendered following a bench trial, in favor of the plaintiff, Steven Bernblum, and from the court's denial of the defendants' motion to reconsider/reargue.[1] The defendants claim on appeal that the court improperly (1) concluded that the plaintiff had standing to bring those counts of the complaint sounding in breach of contract, "breach of lease," and "detrimental reliance" (contract counts), because he, individually, was not a party to any purported lease or the lease negotiations that underlie the allegations with respect to those counts[2] and (2) concluded that the plaintiff had estab-

[1] The Grid, a collection of various organizations in New Haven, including The Grove, that formed to strategize and apply for a state economic development grant, was also named as a defendant in the initial complaint, but the counts against it were dismissed. Because it has not participated in the present appeal, all references in this opinion to the defendants collectively are to Ballard and The Grove only.

[2] The defendants also claim with respect to the breach of contract and "breach of lease" counts that the court improperly determined that the parties entered into an enforceable contract that was not barred by the statute of frauds. The statute of frauds, which is codified at General Statutes § 52-550, provides in relevant part: "(a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is *made in writing* and *signed by the party*, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property; (5) upon any agreement that is not to be performed within one year from the making thereof . . . ." (Emphasis added.) Because we conclude that the plaintiff, in his individual capacity, was not a party to any lease agreement contemplated by the parties during negotiations and thus lacks standing to pursue any contractual or quasi-contractual remedies, we need not address the applicability of the statute of frauds to the facts of this case.

The defendants also claim that the court improperly rendered judgment in favor of the plaintiff on the "detrimental reliance" count because such an alternative theory of recovery should have been barred due to the court's finding that a valid and enforceable contract existed. Given our conclusion that the plaintiff lacked standing to assert any of the contract counts, it is unnecessary to address the merits of this claim.

lished those counts sounding in negligent misrepresentation.[3] We conclude that the plaintiff lacked standing to bring the contract counts and that he failed to meet his burden of proof with respect to the negligent misrepresentation counts. Accordingly, we reverse in part and affirm in part the judgment of the court.

The following procedural history and facts, which either were found by the court and set forth in its memorandum of decision or are undisputed in the record, are relevant to our resolution of the present appeal. Starting in October, 2012, the plaintiff and Ballard began negotiations regarding a potential lease by The Grove of certain commercial space located in a building at 770 Chapel Street in New Haven. The Grove operated a "coworking space" at another location in New Haven that subleased private office space to other businesses, provided dedicated desk space to individuals, and rented out space for events. The 770 Chapel Street property is a multistory building composed of various suites and, at the time of the lease negotiations, was owned by the plaintiff. Portions of the building were occupied by tenants, but other areas were not in rentable condition. The space at issue in the present case was located in the rear of the third floor.

Several proposed lease agreements were drafted by the plaintiff's attorney and exchanged by the parties.

Finally, the defendants claim that the court improperly awarded damages against Ballard in his individual capacity despite the fact that the uncontested evidence establishes that, at all times relevant, he was acting solely in his representative capacity on behalf of The Grove. Because we reverse the judgment of the court on other grounds, we do not reach this claim.

[3] The defendants also claim on appeal that the court rejected their argument that recovery for negligent misrepresentation, a tort theory of liability, was barred in the present case by the economic loss doctrine, "a [common-law] rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 469 n.41, 54 A.3d 1005 (2012). Because we conclude that the plaintiff failed to meet his burden of proof

Despite the fact that the plaintiff personally owned the 770 Chapel Street property at the time of the lease negotiations, all of the proposed leases listed The Grove as the sole tenant and 770 Chapel Street, LLC, an as yet to be formed limited liability company,[4] as the sole landlord. Printed under the signature lines on each of the proposed leases exchanged by the parties were the names of The Grove and 770 Chapel Street, LLC, only. The plaintiff quitclaimed title to 770 Chapel Street to 770 Chapel Street, LLC, on December 3, 2013.

with respect to the negligent misrepresentation counts, it is unnecessary to address the applicability of the economic loss doctrine.

[4] 770 Chapel Street, LLC, was formed on August 2, 2013. Its members are Bernblum and his daughter and business partner, Julie Bernblum. In *BRJM, LLC* v. *Output Systems, Inc.*, 100 Conn. App. 143, 917 A.2d 605, cert. denied, 282 Conn. 917, 925 A.2d 1099 (2007), this court, as an apparent matter of first impression, considered whether a contract entered into on behalf of a limited liability company *prior* to that company's formation was invalid. Id., 152. This court concluded that "a contract entered into prior to an entity's formation is not void ab initio due to *lack of capacity* because the individual entering into the contract on behalf of the unformed entity has the requisite capacity. It follows that, in the situation of an unformed entity, the individual serves as the party to the contract although the contract is entered into in the entity's name." (Emphasis added.) Id. Accordingly, this court held that "contracts entered into by individuals acting on behalf of unformed entities are enforceable." Id., 153.

This court's opinion in *BRJM, LLC*, however, is limited to the issue of whether a contract fails due to the lack of capacity of one of the contracting parties if, at the time the contract is executed, one of the parties to the contract is an unformed limited liability company. We do not read the opinion to stand for the proposition that, once a company named as a party to a contract has been duly formed, any individual member of that company retains standing to bring an action to enforce a contract executed only in the name of the company. As we note later in this opinion, even after this court's decision in *BRJM, LLC*, appellate courts clearly have rejected such a proposition. See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214–16, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013); *Padawer* v. *Yur*, 142 Conn. App. 812, 818, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); but see *Saunders* v. *Briner*, 334 Conn. 135, 181, 221 A.3d 1 (2019) (recognizing limited single member exception to general rule prohibiting members of limited liability companies from bringing direct actions to recover harms suffered by company only). Because 770 Chapel Street, LLC, is a two member company, the *Saunders* exception is inapposite.

During the course of lease negotiations, Ballard expressed a need for certain improvements to be made to the space—namely, the construction of some additional walls. Ballard entered into a separate contract with DiStasio Building & Remodeling (DiStasio) to construct those walls for $7300 (wall contract), which was paid for by the plaintiff on an assurance by The Grove that he would be reimbursed. During the time that the parties engaged in lease negotiations, the plaintiff also made additional repairs to the space and continued with ongoing improvements to the property, also utilizing DiStasio for these renovations. When asked at trial to describe these repairs/improvements, the plaintiff stated: "Any holes in walls were repaired and there were holes in the walls. The whole place was painted with several coats of paint. The ceiling, parts of the ceiling [were] replaced. Electrical was brought up to what he needed. We built a . . . large room for him called a—I think it was called a training room. . . . We put in a kitchenette. We totally recarpeted the place, changed the front door, a lot of minor repairs." The plaintiff estimated that these repairs/improvements cost him between $68,000 and $78,000.

The plaintiff was not able to produce invoices or payment records at trial with respect to the repairs/improvements because those invoices purportedly had been destroyed. Instead, the trial court admitted into evidence copies of checks reflecting payments that the plaintiff and his daughter/partner attributed to the cost of the repairs and improvements to the space. With respect to the condition of the premises that The Grove was offered to lease, all versions of the proposed lease indicated that the landlord, 770 Chapel Street, LLC, would "be responsible to furnish the [t]enant with a 'vanilla box' . . . ." The plaintiff testified at trial on cross-examination that this term meant that "everything is painted white, you have carpeting, and a ceiling, heat,

utilities, electric." Although the final version of the proposed lease contained a provision pursuant to which the tenant would have been required to reimburse the landlord by way of additional rent for the wall contract with DiStasio, none of the proposed leases provided for reimbursement related to any of the additional repairs/improvements referenced by the plaintiff, all of which were undertaken by him without his having obtained a signed lease or collecting any deposit from the defendants, and most of which arguably would have been required to conform the space to the so-called "vanilla box" he would have needed to provide any tenant.

In February, 2013, the plaintiff delivered a final version of the proposed lease to Ballard. The terms included the rental by The Grove of 6782 square feet of the property, which included approximately 404 square feet of common area. The duration of the proposed lease was for a stated period of five years. The base rent for the first year was to be $5500 per month plus an additional $608.33 per month as reimbursement for the construction of the additional walls built by DiStasio.[5] During the second year, rent was set to increase to $6782 per month. Rent would also increase by 3 percent in years three and five of the lease. The Grove also would pay as additional rent a pro rata share of the property's real estate taxes, fire and liability insurance, and utility costs.

The proposed landlord and tenant never executed this final proposed lease or any other written lease agreement, despite an oral representation by Ballard to the plaintiff after receiving the February, 2013 final proposed lease that he intended to sign it once his accountant had returned from a trip. Nevertheless, despite the absence of a finalized lease, later in February, 2013, the plaintiff provided The Grove with access

[5] $608.33 multiplied by twelve equals approximately $7300, the amount of Ballard's contract with DiStasio.

to the property to conduct a February 25, 2013 "grand opening" or ribbon cutting event that was highly publicized and well attended by other businesses and municipal leaders, including the mayor. Soon after that grand opening event, however, The Grove, without further discussions with the plaintiff, removed the items it had brought into the space prior to the event and began operating its business out of another property in the same neighborhood. The defendants never made any payments to the plaintiff.

After The Grove vacated the space, the plaintiff continued to advertise the space through brokers and the Internet in an attempt to lease it to another tenant. The space eventually was leased to SeeClickFix, which previously had been a client of The Grove.[6]

In January, 2014, the plaintiff commenced the underlying action in his name individually. The operative ten count revised complaint was filed on November 7, 2016. Counts one through five were against The Grove, and sounded in, respectively, breach of contract, "breach of lease," fraud, "detrimental reliance," and negligent misrepresentation.[7] Counts six through ten alleged iden-

[6] At trial, the plaintiff testified that he was able to rent the space for one year at $6500 per month for a total of $78,000. The court appears to have used this amount in its damages calculation as representing the plaintiff's mitigation of damages.

[7] The operative complaint is not a model of clarity with respect to the causes of action that the plaintiff sought to assert against the defendants. The defendants, however, never filed a request to revise or a motion to strike with respect to the operative revised complaint. The breach of contract counts assert that the defendants breached the terms of the final proposed written lease, which it is undisputed never was executed by the parties. The "breach of lease" counts also appear to assert a breach of the terms of the unexecuted written lease but also contains as an additional allegation that the defendants agreed orally to sign the proposed written lease. The counts labeled as "detrimental reliance" appear to assert a cause of action sounding in quasi contract or promissory estoppel. "[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A

tical counts against Ballard individually. The defendants filed an answer that effectively disputed the material elements of the complaint.

At trial, the defendants argued during summation that the parties never had reached a meeting of the minds as to all material terms of the proposed lease and no version of the proposed lease was ever signed by the parties. The defendants also argued that the plaintiff did not properly mitigate his damages. Finally, the defendants argued that 770 Chapel Street, LLC, was the entity listed as the landlord in the proposed lease, not the plaintiff, and that that entity had not been established at the time relevant to this matter.

Following the two day trial before the court, *Baio*, *J.*, the court issued a memorandum of decision on May 8, 2020, rendering judgment in favor of the defendants on the plaintiff's fraud count, but in favor of the plaintiff on all remaining counts of the complaint. The court analyzed the breach of contract and breach of lease counts together. It stated in relevant part: "In this matter, there was evidence to support that the parties had time to negotiate the terms and conditions of the lease and did engage in negotiations. The evidence demonstrates that the parties engaged in substantive discussions related to the lease agreement, the plaintiff was provided with ample opportunity to inspect the premises, engaged in business planning based upon the proposed lease and both proceeded to negotiate and finalize the agreement. *The lease, however, was never executed,*

fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor *could reasonably have expected to induce reliance*. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . . Additionally, the promise must reflect a present intent to commit *as distinguished from a mere statement of intent to contract in the future*. . . . [A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . and, therefore, is not sufficiently promissory." (Emphasis added; internal quotation marks omitted.) *T & M Building*

although the evidence supports that [Ballard] represented that he intended to sign the lease upon his accountant's return from a trip." (Emphasis added.) Rather than providing additional analysis regarding whether and on what legal theory an enforceable oral or written contract was formed and between whom, the court instead turned to the defendants' arguments that any claim of breach of contract or breach of lease would be barred by the statute of frauds. The court acknowledged that "[a]bsent a signed writing to establish the existence of this agreement, this action is barred by the statute of frauds."

The court, referencing the final proposed lease offered by the plaintiff in support of his contractual claims, concluded that "the document submitted by the plaintiff fails to satisfy the basic requirement of the statute of frauds that the written agreement be signed by the party, or the agent of the party to be charged. See [General Statutes] § 52-550. The document, therefore, upon initial examination, violates the statute of frauds, and any action brought on the contract would be barred unless any exception applies." (Internal quotation marks omitted.) The court agreed with the plaintiff's contention, however, that the parties' contract was "excepted from the statute of frauds on the basis of partial performance," explaining that "[a]cts on the part of a promisee may be sufficient to take an *oral contract* out of the statute of frauds" and that a "contract is enforceable, despite the statute, when, subsequent to the making of the contract, there has been conduct that amounts to part performance." (Emphasis added; internal quotation marks omitted.) The court agreed with the plaintiff that "the defendants' actions in requesting and directing various improvements and occupancy of the premises constitute[d] partial performance of the terms of the lease,

Co. v. *Hastings*, 194 Conn. App. 532, 553–54, 221 A.3d 857 (2019), cert. denied, 334 Conn. 926, 224 A.3d 162 (2020); see also footnote 10 of this opinion.

creating an exception to the statute of frauds." The court thus concluded: "[T]he evidence demonstrates by a fair preponderance of the evidence that there was partial performance of the lease agreement which would except it from the statute of frauds and render the agreement enforceable, *at least for the one year*." (Emphasis added.)

In addition to apparently concluding that the defendants had breached an oral lease agreement that was excepted from the statute of frauds, the court also concluded that "[t]he plaintiff has met the burden of proof on the claims against each of the two defendants based on detrimental reliance." The court stated: "Separate from the breach of lease claims, the plaintiff submits that the defendants benefitted at the expense of the plaintiff through [their] representation that they intended to lease the premises and the actions taken to support that representation resulting in the plaintiff making substantial improvements as requested by the defendants." The court agreed with the plaintiff, stating as follows: "[T]he plaintiff alleges that in reliance on the defendants' representations, the plaintiff began renovating the premises in order to tailor it to the defendants' specific needs, refrained from showing the premises to anyone else, and as a result of the defendants' representations, the plaintiff put his efforts into renovating the premises and suspended work on the common areas in order to get the premises ready for the defendant[s]. Renovation of the common area is necessary in order to have the building ready to show to other prospective tenants. . . . The plaintiff claims reliance on the defendants' statements, conduct and commitments and that the defendants moved into the premises and used it. . . .

"During the period at issue, the defendants were able to market their business, participate in a large, public grand opening event attended by business people and local leaders, and the plaintiff incurred expenses for

improvements all directed by the defendant[s], who vacated without notice. The defendants argue that the plaintiff benefitted as well, as the premises were in such a state of disrepair that the premises became marketable by the improvements. The defendants also submit that the grand opening event showcased the premises and provided advertising for the plaintiff, and the plaintiff did end up with a tenant for at least a one year term, and the tenant was one of the subtenants of the defendants. While each makes valid points, the fact remains that the plaintiff was not able to market the premises during the time when he thought in good faith that he had a lease agreement with the defendants. Hence, even if the grand opening event may have provided an advertising opportunity, the plaintiff could not use it as such for the premises in question. Additionally, while there is validity to the argument that the plaintiff may have benefitted from the improvements made, the fact remains that the improvements, or at least these specific improvements, may not have been made but for the arrangement with the defendants. The improvements were made based on the express understanding that this was part of the agreement with the defendants. To the extent there is any claim that the improvements were some benefit to the plaintiff, this argument is more appropriately considered in relation to the claim for damages if liability is found." (Citations omitted; internal quotation marks omitted.)

Finally, the court rejected the plaintiff's claim of fraud or intentional misrepresentation, but, in summary fashion, concluded that the plaintiff nevertheless had met his burden of proof with respect to the negligent misrepresentation counts. Without analysis or discussion, the court concluded that the evidence submitted had established that The Grove, through its representative Ballard, misrepresented that it would lease the space and

the plaintiff had relied on that representation to his detriment.

With respect to damages, the court awarded the plaintiff a total of $73,318.87. That total consisted of compensatory damages of $73,299.96, which is equal to the amount of base rent that the plaintiff would have been due for the first year under the final proposed lease plus reimbursement for the $7300 wall contract; plus an additional $78,018.91 as restitution for the "buildout" of the space; less the $78,000 in rent that the plaintiff collected in mitigation of his damages.

On May 28, 2020, the defendants filed a motion to reconsider and/or reargue. The defendants asserted that (1) no contract between the plaintiff in his individual capacity and the defendants existed, and, thus, the plaintiff lacked standing to prosecute the present action; (2) no judgment should have entered against Ballard individually on the contract counts because the plaintiff presented no evidence that Ballard had acted in his individual capacity rather than as a principal of The Grove; (3) recovery under the tort theory of negligent misrepresentation was barred by the economic loss doctrine; (4) the court incorrectly concluded that the plaintiff had proven the elements of negligent misrepresentation; (5) any recovery on a theory of detrimental reliance was unavailable given the court's finding of an enforceable contract; and (6) the court improperly calculated damages. The plaintiff objected to the defendants' motion, arguing, in relevant part, that the court's decision was supported by the evidence and that, as "the owner of the subject premises," he had "standing to assert his claims for breach of the lease agreement and negligent misrepresentation."

The court issued a decision denying the motion for reconsideration/reargument and sustaining the plaintiff's objection to the motion. The court stated in relevant part: "The court understands that the defendants

disagree with some of the court's decision, however, that is not a basis for a motion for reconsideration, nor is the desire to present arguments or evidence not presented at the time of trial. . . . As to the defense argument relating to the status of the plaintiff the same was disputed, with arguments and evidence on both sides. The court did not accept the defense argument." This appeal followed.

I

The defendants claim that the court improperly concluded that the plaintiff had standing to bring the underlying action despite the undisputed fact that he, individually, was not a party to any of the proposed lease agreements or the negotiations that form the basis of the allegations in the complaint. We agree with the defendants that the plaintiff lacked standing to prosecute the present action with respect to the contract counts of the complaint.

We begin with our standard of review and general legal principles. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 603,

193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018).

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [If], for example, the harms asserted to have been suffered directly by a plaintiff *are in reality derivative of injuries to a third party*, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Emphasis added; internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 540, 219 A.3d 948 (2019).

"The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. In order for a plaintiff to have standing, it must be a proper party to request adjudication of the issues." (Internal quotation marks omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347, 780 A.2d 98 (2001).

It is axiomatic that "[a] limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name . . . or may be a party to an action brought in its name by a member or manager. . . . *A member or manager*, *however*, *may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Kelly* v. *Kurtz*, supra, 193 Conn. App. 540; see also *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123,

138, 161 A.3d 1227 (2017) (member of limited liability company cannot recover for injury allegedly suffered by member's company and, accordingly, lacks standing to bring claim in individual capacity); but cf. *Saunders* v. *Briner*, 334 Conn. 135, 181, 221 A.3d 1 (2019) (recognizing limited exception applicable only to single member limited liability companies).

Furthermore, "[i]t is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract. . . . Under this general proposition, if the [nonparty] is neither a party to, nor a contemplated beneficiary of, [the] agreement, [it] lacks standing to bring [its] claim for breach of [contract]." (Internal quotation marks omitted.) *Nassra* v. *Nassra*, 180 Conn. App. 421, 431, 183 A.3d 1198 (2018).[8]

Turning to the present appeal, whether the plaintiff had standing to initiate the action in this case hinges on whether the facts in the record demonstrate that he had a direct interest in the litigation, meaning an interest that was not remote, indirect or simply derivative of

[8] "[T]he fact that a person is a *foreseeable* beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary." (Emphasis added.) *Grigerik* v. *Sharpe*, 247 Conn. 293, 317–18, 721 A.2d 526 (1998); see also *Hilario's Truck Center, LLC* v. *Rinaldi*, supra, 183 Conn. App. 605 ("Although . . . it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed [third-party] beneficiary . . . the only way a contract could create a direct obligation between a promisor and a [third-party] beneficiary would have to be . . . because the parties to the contract so intended. . . . [B]oth contracting parties must intend to confer enforceable rights in a third party . . . in order to give the third party standing to bring suit." (Citations omitted; internal quotation marks omitted.)); 2 Restatement (Second), Contracts § 302, comment (e), p. 443 (1981) ("Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . no duty to him is created."). Here, the plaintiff never asserted before the trial court that he was an intended beneficiary of the lease or any promise made by the defendants during negotiations, nor is there evidence in the underlying record that would support such an assertion.

an injury to another party.[9] On the basis of our review of the record and arguments of the parties, we conclude that the plaintiff did not have a direct interest in the litigation with respect to those counts of the complaint sounding in breach of contract, "breach of lease," or "detrimental reliance."[10]

No contractual relationship between the plaintiff in his individual capacity and the defendants existed or was ever contemplated.[11] The plaintiff was not a named party to the contract with respect to any of the underlying proposed lease agreements, and he was negotiating

[9] The plaintiff does not claim any statutory authority that would have conferred standing upon him to bring the underlying action nor is there evidence in the record from which to reach such a conclusion.

[10] We have concluded that, for the purpose of considering the plaintiff's standing to bring the various causes of actions raised in the complaint, the "detrimental reliance" count, which, as previously noted in footnote 7 of this opinion, we construe as sounding in promissory estoppel, is properly viewed through the same jurisprudential lens as those counts sounding in breach of contract. Promissory estoppel, after all, is a theory of recovery that permits courts to award damages incurred in reliance on a promise that is otherwise unenforceable as a contract; see *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 194, 90 A.3d 219 (2014); and thus is quasi-contractual in nature. See 1 Restatement (Second), Contracts § 90, p. 242 (1981); 3 A. Corbin, Contracts (Rev. Ed. 1996) § 8.12, pp. 58–59, 98–101. Logically, just as only a party to a contract or a contemplated beneficiary ordinarily has standing to bring an action to enforce a contractual promise; *Tomlinson* v. *Board of Education*, 226 Conn. 704, 718, 629 A.2d 333 (1993); only a promisee, as the party to whom a promise is addressed, has standing to seek damages for detrimental reliance on that promise under a theory of promissory estoppel. Here, because any possible promise to the plaintiff was made in the context of lease negotiations, and the plaintiff ostensibly was acting during those negotiations not in his individual capacity but on behalf of his contemplated limited liability company, he was neither a party to any contemplated contract nor the party to whom any promise was made during negotiations.

[11] Although the court acknowledged multiple times that no written contract was executed by the parties, it nevertheless proceeded to award damages on the basis of what it described as partial performance of an oral lease. The only parties to any enforceable oral lease agreement, if any, were 770 Chapel Street, LLC, the only landlord that the evidence presented at trial suggests was contemplated by the parties, and The Grove as the sole putative tenant.

solely on behalf of his contemplated and soon to be formed limited liability company, 770 Chapel Street, LLC. Each of the four proposed leases that were exchanged between the parties and admitted into evidence listed The Grove as the sole tenant and 770 Chapel Street, LLC, of which the plaintiff was one of two members, as the sole landlord. Indeed, from the virtual outset of the party's negotiations, it was evident that the lessor was to be 770 Chapel Street, LLC, and not the plaintiff individually. The plaintiff, however, did not commence the underlying action in a representative capacity in the name of 770 Chapel Street, LLC, but in his own name individually. The fact that it was 770 Chapel Street, LLC, as the then owner of the subject property, rather than the plaintiff, that later mitigated any potential contract damages by entering into a lease with SeeClickFix is further evidence that 770 Chapel Street, LLC, and not the plaintiff individually, was the proper party to pursue damages for any alleged harm resulting from the defendants' purported breach of their alleged contractual or quasi-contractual obligations.

Although not dispositive of the standing issue, this court's discussion in *Wasko* v. *Farley*, 108 Conn. App. 156, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008), is nonetheless instructive. In that case, the plaintiff, a dentist who had brought a personal injury action following a motor vehicle accident, appealed from the underlying judgment claiming, inter alia, that the trial court had failed to properly charge the jury on damages related to the cost of hiring an additional dental assistant to do work in her dental practice that her injuries prevented her from doing. Id., 167–68. This court agreed with the trial court that, because the dental practice was organized as a limited liability company, the costs associated with hiring the dental assistant were wholly attributable to the business, not to the plaintiff individually, and, therefore, those costs could

only be recovered by the business, which was not a party to the action before the trial court. Id., 170–71. This court recognized, as previously stated, that a limited liability company is a legal entity whose existence is separate and distinct from that of its members and that, as such, a member lacks standing to sue in an individual capacity to recover damages incurred by the limited liability company. Id., 170. The court concluded: "The plaintiff brought this action in her individual capacity—the limited liability company was not a party. Damages incurred by the limited liability company, therefore, were not at issue in the case. Accordingly, the court properly declined to instruct the jury on damages resulting from additional costs incurred by the plaintiff's dental practice." Id., 170–71. Thus, implicit in the court's holding in *Wasko* is that a plaintiff lacks standing to seek damages for harm suffered by a company associated with the plaintiff. See id.; see also *Scarfo* v. *Snow*, 168 Conn. App. 482, 497–504, 146 A.3d 1006 (2016).[12]

In short, the only contemplated parties to any potential lease, written or oral, underlying the breach of contract, "breach of lease" and "detrimental reliance" counts

[12] In *Scarfo* v. *Snow*, supra, 168 Conn. App. 496–97, the plaintiff, a member of a limited liability company, claimed he had standing individually to bring, inter alia, a claim of breach of fiduciary duty against another member of the company who allegedly had engaged in self-dealing and breached the company's operating agreement. The plaintiff argued that he had suffered "a direct rather than a derivative injury" and therefore had standing to prosecute the tort claim. Id., 496, 504. This court, however, "disagree[d] that th[o]se [we]re direct injuries, and . . . conclude[d] that the plaintiff did not have standing in his individual capacity . . . ." Id., 497. Relevant to the present action, the court stated that "[a]lthough the plaintiff contend[ed] that he suffered direct injury by the alleged action or inaction of [the alleged tortfeasor], any benefit he would have received . . . were it not for the alleged improprieties of [the alleged tortfeasor], would have flowed to him only through [the limited liability company] . . . . Accordingly, if there was an injury, that injury was sustained by [the limited liability company] and then sustained by the plaintiff. Thus, the plaintiff's injury is not direct, and he has no standing to sue in his individual capacity." Id., 504.

were The Grove and 770 Chapel Street, LLC. The plaintiff brought the underlying action not on behalf of 770 Chapel Street, LLC, as the real party in interest, but in his own name individually. Accordingly, the plaintiff lacked standing to prosecute those counts.[13] The court should have dismissed them on that basis and, therefore, improperly rendered judgment for the plaintiff and denied the defendants' postjudgment motion to reconsider/reargue, seeking to set aside the judgment.

II

The defendants next claim that the court improperly rendered judgment against them on those counts sounding in negligent misrepresentation because the plaintiff failed to satisfy his burden of proof with respect to all necessary elements of the tort. In particular, the defendants assert that the plaintiff failed to demonstrate that the repairs and improvements made to the space during lease negotiations were done on the basis of reasonable reliance on a factual misrepresentation made by the defendants. This, the defendants argue, is because the only asserted factual misrepresentation for which evidence was admitted was Ballard's statement in February, 2013, that he would sign the final proposed lease once his accountant returned. That representation, however, came after the repairs and improvements largely already were underway or completed as reflected in the dates on the checks submitted into evidence by the plaintiff as proof of damages. We agree with the

[13] We construe the defendants' standing claim, as it has been briefed, to be limited to the contract counts of the complaint. Nevertheless, because standing implicates subject matter jurisdiction and, thus, cannot be waived; see *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013); we also must consider whether the plaintiff lacked standing in his individual capacity to assert and prosecute the tort counts of the complaint. We are persuaded from our review of the pleadings and the record that, with respect to the tort counts, the plaintiff's allegations pose a colorable claim of direct injuries to the plaintiff individually sufficient to withstand a challenge to his standing to prosecute them.

defendants that, viewing the evidence in the light most favorable to sustaining the court's judgment, the plaintiff failed to establish that his asserted expenditures were made to his detriment in reasonable reliance on this representation, and this failure of proof requires reversal of the court's judgment with respect to the negligent misrepresentation counts.

"[Our Supreme Court] has long recognized liability for negligent misrepresentation. . . . The governing principles are set forth in . . . § 552 of the Restatement Second of Torts [1977]: One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . . [T]he plaintiff need not prove that the representations made by the [defendants] were promissory. It is sufficient . . . that the representations contained false information. . . . There must be a justifiable reliance on the misrepresentation for a plaintiff to recover damages." (Emphasis omitted; internal quotation marks omitted.) *Bellsite Development, LLC* v. *Monroe*, 155 Conn. App. 131, 151, 122 A.3d 640, cert. denied, 318 Conn. 901, 122 A.3d 1279 (2015).

"Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013). In other words, in addition to proving that a defendant negligently made

a misrepresentation of fact, a plaintiff must also demonstrate that any claimed demonstrable harm was a direct result of his reasonable reliance on that misrepresentation. It is the plaintiff's failure at trial to produce evidence to demonstrate this causal link that is at issue.

Although the court made no express findings with respect to each element of negligent misrepresentation, it is implicit in its judgment for the plaintiff that it found each element had been met. The defendants, in effect, claim that the court's implicit finding that the plaintiff reasonably relied on the alleged misrepresentation is clearly erroneous because the plaintiff failed to present evidence sufficient to support such a finding. "Under the clearly erroneous standard, we will overturn a factual finding only if there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 353, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021).

Here, the theory of the plaintiff was that it made significant changes and improvements to the premises in reliance on a false representation by Ballard. The only factual misrepresentation by Ballard identified by the plaintiff as a basis for his claim, however, was Ballard's assurance, made sometime in February, 2013, after he was presented with the final proposed lease, that he would sign the lease as proposed once his accountant had returned from vacation. The evidence presented at trial demonstrates that the plaintiff began the renovations, repairs and upgrades to his building, many of which would have been needed to restore the building to rentable condition, regardless of whether the negotiation with The Grove bore fruit, either prior

to or during the extended lease negotiations and before any assurance by Ballard in February, 2013, that he would sign the proposed lease. Although there was evidence presented that Ballard made statements during negotiations about changes that he would have liked to have seen made to the space and that he contracted with DiStasio for the building of the additional walls, which was paid for by the plaintiff, these requests for changes to the premises were not alleged to be the negligent misrepresentation on which the plaintiff reasonably relied to his detriment.

Further, the only evidence admitted to prove the plaintiff's asserted detrimental reliance on the defendants' alleged misrepresentation following receipt of the February, 2013 lease were copies of checks made to various vendors, thirty-four of which were related to improvements made to the space at issue. A summary of those checks was authenticated and entered into evidence through the testimony of the plaintiff's daughter, acting in her capacity as the plaintiff's partner and bookkeeper for the plaintiff's company. The dates on those checks, however, range from August 21, 2012, which was prior to the start of lease negotiations, through March 16, 2013. Accordingly, the vast majority of the checks predate Ballard's statement sometime in late February, 2013, that he would sign the plaintiff's latest proposed lease. Although two of the checks are dated in March, 2013, there was no evidence presented connecting the dates on the checks to when the plaintiff initiated the work associated with those payments. Thus, it cannot reasonably be inferred from the checks that the plaintiff elected to make the associated improvements in reliance on the February, 2013 representation by Ballard. Rather, the only reasonable inference to be drawn from this evidence was that the plaintiff's alleged expenditures on the space, whether by himself personally or on behalf of his soon to be formed

limited liability company, preceded rather than followed the only alleged misrepresentation.

In short, there simply was no evidence presented from which the court reasonably could have concluded that the plaintiff acted to his detriment in reliance on Ballard's alleged February, 2013 misrepresentation. Because the evidence presented was insufficient to establish this essential element, the court's implicit finding to the contrary was clearly erroneous. Accordingly, the court should have rendered judgment on the merits of the negligent misrepresentation counts, like the fraud counts, in favor of the defendants.

The judgment is reversed with respect to counts one, two, four, five, six, seven, nine and ten of the revised complaint and the case is remanded with direction to render judgment dismissing counts one, two, four, six, seven and nine for lack of standing and for the defendants on counts five and ten; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LOCH VIEW, LLC *v.* TOWN OF WINDHAM
(AC 44169)

Bright, C. J., Suarez and Vertefeuille, Js.

Syllabus

The plaintiff appealed from the trial court's denial of its motion to open the judgment dismissing its 2019 action against the defendant town regarding a municipal tax dispute, claiming that the court failed to exercise its discretion in ruling on that motion or, in the alternative, that it abused its discretion. The court had dismissed the 2019 action pursuant to the prior pending action doctrine, on the basis that the plaintiff had filed a previous action in 2016 against the defendant which had not been resolved and the two actions were virtually alike, both actions having been brought to adjudicate the same underlying rights and factual claims. Thereafter, the trial court in the 2016 action denied the plaintiff's request for leave to amend its complaint to add a count alleging the constitutional

violations that it had asserted in the 2019 action, and the court in the 2019 action denied the plaintiff's motion to open the judgment. *Held* that the trial court exercised its discretion in denying the plaintiff's motion to open, as it considered and rejected the change in circumstances identified by the plaintiff in its motion, and the court did not abuse its discretion in concluding that the court's denial of the plaintiff's request to amend its complaint in the 2016 action did not require that the judgment of dismissal in the 2019 action be opened; moreover, the plaintiff could still fully and fairly litigate its constitutional claims in the 2016 action, as the plaintiff raised an identical constitutional argument as a special defense to the defendant's counterclaim in the 2016 action and the fact that the plaintiff was forced to make its constitutional claim defensively instead of affirmatively did not affect the plaintiff's ability to litigate those arguments; furthermore, the court properly considered the interests of judicial economy and efficiency and the need to avoid duplicative litigation and conflicting results in denying the plaintiff's motion to open.

Argued November 18, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for the defendant's alleged violation of certain of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (plaintiff).

Eric W. Callahan, with whom, on the brief, was *Richard S. Cody*, for the appellee (defendant).

Opinion

BRIGHT, C. J. In this action that arose out of a municipal tax dispute, the plaintiff, Loch View, LLC, appeals from the judgment of the trial court denying its motion to open, modify, and vacate the judgment dismissing the

its action against the defendant, the town of Windham.[1] Specifically, the plaintiff contends that the court either failed to exercise its discretion or abused its discretion in denying its motion to open.[2] We affirm the judgment of the trial court.

The following facts, as summarized in the court's memorandum of decision, and procedural history are relevant to our disposition of this appeal. "On July 2, 2009, [the plaintiff] and [the defendant] entered into a written tax fixing agreement [agreement] whereby [the defendant] agreed to set municipal taxes on two parcels of property on Main Street in Windham at a discounted rate in exchange for [the plaintiff] taking over the properties and investing a certain amount of money into the redevelopment of those properties. To ensure that [the plaintiff was] meeting its obligations under the tax fixing agreement, the agreement require[d] [the plaintiff] to provide periodic reports and documentary evidence to [the defendant] demonstrating that [the plaintiff was] in fact making the required investments in the properties. The [agreement] provide[d] [the defendant] with the right to cancel the [agreement] and recoup any tax benefits provided to [the plaintiff] should [the defendant] determine that [the plaintiff was] not living up to its investment commitments. In 2016, [the defendant]

[1] In its initial complaint, the plaintiff also named Chandler Rose, town assessor, and Gay A. St. Louis, town collector of revenue, as defendants. According to the plaintiff, those defendants were "inadvertently omitted from the summons" that was filed in the action. The plaintiff states that both Rose and St. Louis were eventually made parties to the action but that they were never listed as parties on the electronic docket maintained by the Judicial Branch. In its memorandum of decision, the court did refer to Rose and St. Louis as defendants. Neither Rose nor St. Louis, however, has participated in this appeal. All references to the defendant in this opinion are to the town of Windham.

[2] The plaintiff also initially appealed the court's decision granting the defendant's motion to dismiss. That appeal, however, was dismissed by this court as untimely. Because the plaintiff does not challenge the merits of the dismissal in the present appeal, we do not address the merits of that ruling.

determined that [the plaintiff] was not living up to its obligations under the [agreement] and therefore [the defendant] sought to exercise what [it] viewed as its right to retroactively reassess the relevant properties in order to recoup the tax benefits provided to [the plaintiff] under the agreement."

Thereafter, in *Loch View, LLC* v. *Windham*, Superior Court, judicial district of Hartford, Docket No. CV-16-6149827-S, the plaintiff commenced an action challenging the defendant's termination of the agreement and its attempt to retroactively assess the relevant parcels and charge the plaintiff back taxes (2016 action). The plaintiff specifically alleged that (1) the defendant's tax assessments were "manifestly excessive," (2) the defendant failed to "apply uniform percentages to the present true and actual valuation of the properties," in violation of General Statutes § 12-64,[3] and (3) the valuation of the plaintiff's two parcels of property was grossly and manifestly excessive, in violation of the equal protection clause of the state constitution.

The plaintiff subsequently requested and was granted leave to amend its complaint five times in the 2016 action to add additional counts arising out of the defendant's retroactive adjustment of taxes with respect to additional tax years. Through those amended complaints,

[3] General Statutes § 12-64 (a) provides in relevant part: "All the following mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present true and actual valuation, not exceeding one hundred per cent of such valuation, to be determined by the assessors: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures, house lots, all other building lots and improvements thereon and thereto, including improvements that are partially completed or under construction, agricultural lands, shellfish lands, all other lands and improvements thereon and thereto, quarries, mines, ore beds, fisheries, property in fish pounds, machinery and easements to use air space whether or not contiguous to the surface of the ground. . . ."

the plaintiff also added counts that (1) alleged that the defendant breached the agreement, (2) alleged that the defendant breached the obligation of good faith and fair dealing with respect to its enforcement of the agreement, (3) demanded a declaratory judgment seeking to declare illegal and void the defendant's retroactive assessment, (4) sought injunctive relief arising out of the defendant's enforcement of the contract, and (5) alleged that, in the event that the defendant was permitted to retroactively assess the plaintiff's taxes, the plaintiff sought a refund for its overpayment of taxes.

On April 30, 2019, the defendant filed a counterclaim in the 2016 action, alleging that the plaintiff had breached the agreement and that the defendant was therefore "entitled to recapture a sum equal to the financial benefit the plaintiff received as a result of reduced tax levies . . . ." The defendant specifically alleged that the plaintiff had failed (1) to meet the financial requirements of the agreement, (2) to pay recaptured taxes pursuant to the agreement, (3) to accurately account for the cost of work done on the parcels, and (4) to provide the town with thorough and semiannual reports pursuant to the agreement. Thereafter, on October 21, 2021, the plaintiff filed an answer to the defendant's counterclaim and asserted eight special defenses, including a special defense that the defendant's actions in terminating the agreement deprived the plaintiff of its constitutional right to challenge the tax assessment and violated its procedural and substantive due process rights.

In 2019, while the 2016 action was pending,[4] the plaintiff filed the action underlying this appeal, alleging in a single count that it had been deprived of its constitutional rights, privileges, and immunities (2019 action). The 2019 action specifically alleged that the defendant's

[4] At the time of oral argument in this appeal, the 2016 action was still pending.

cancellation of the tax fixing agreement was "improper, illegal, arbitrary, and capricious," that it violated the plaintiff's state and federal due process rights, and that it constituted a taking under the United States and Connecticut constitutions. Given that the complaint alleged several federal law claims, the defendant removed the case to federal court. Shortly after its removal, however, the plaintiff filed an amended complaint in state court that alleged only state law causes of action, and the case was remanded back to state court. The defendant then moved to dismiss the 2019 action in its entirety, pursuant to the prior pending action doctrine, arguing that the plaintiff's claims in the 2019 action were duplicative of those in the pending 2016 action.

Thereafter, the court, *Budzik*, *J.*, issued a memorandum of decision in which it granted the defendant's motion to dismiss. In so ruling, the court concluded that "both cases require resolution of the same underlying rights and factual claims, specifically, whether [the defendant] properly exercised its rights under the [agreement]" and, consequently, concluded that the plaintiff's 2016 and 2019 actions were virtually alike, and that, "under the circumstances of this case," it was proper for the court to dismiss the 2019 action. In reaching that decision, the court reasoned: "First, there does not appear to be any prejudice to [the plaintiff] in having the terms of the [agreement] determined in the context of the 2016 case. Count three of [the plaintiff's] operative complaint in the 2016 case squarely alleges that [the defendant] violated the [agreement]. [The plaintiff] has offered no reason why the court hearing the 2016 case cannot properly adjudicate that issue, or that [the plaintiff] will not have a full and fair opportunity to litigate that issue as part of the 2016 case. Second, [the plaintiff] has not identified any relief that it is seeking in this case that it cannot receive in the 2016

case. . . . Finally, this case is in its early stages. Therefore, it would serve the interests of judicial economy, avoiding unnecessary litigation, and avoiding conflicting results from different courts to dismiss this case and have [the plaintiff] litigate its claims over the proper application of the [agreement] in the 2016 case."

Thereafter, the plaintiff filed a request for leave to amend its complaint in the 2016 action, so that it could add the constitutional count that it had asserted in the recently dismissed 2019 action. The court, *Cordani*, *J.*, denied that request as untimely. The plaintiff then filed a motion to open and vacate the judgment of dismissal in the 2019 action, alleging that the denial of its request to amend its complaint in the 2016 action constituted a good and compelling reason to open the judgment in the 2019 action. The court denied the plaintiff's motion to open, and this appeal followed. Additional facts and procedural history will be set forth below as necessary.

We first set forth our standard of review and the applicable law. "The principles that govern motions to open . . . a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . . The exercise of equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment." (Internal quotation marks omitted.) *Newtown* v. *Ostrosky*, 191 Conn. App. 450, 468, 215 A.3d 1212, cert. denied, 333 Conn. 925, 218 A.3d 68 (2019). If a court fails to exercise its discretion in ruling on a motion to open, that failure to do so is error. See *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998); see also *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion").

When a court exercises its discretion in ruling on a motion to open, we review the court's decision for an abuse of discretion. See, e.g., *Dimmock* v. *Allstate Ins. Co.*, 84 Conn. App. 236, 241, 853 A.2d 543, cert. denied, 271 Conn. 923, 859 A.2d 577 (2004). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *In re Travis R.*, 80 Conn. App. 777, 782, 838 A.2d 1000, cert. denied, 268 Conn. 904, 845 A.2d 409 (2004); see also *Hall* v. *Hall*, 335 Conn. 377, 396, 238 A.3d 687 (2020) (trial courts enjoy "broad discretion" in determining whether to grant motion to open).

"The prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second [action], and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 247 Conn. 196, 216, 719 A.2d 465 (1998). Under the prior pending action doctrine, the court must determine "whether the two actions are: (1) exactly alike, i.e., for the same matter, cause and thing, or seeking the same remedy, and in the same jurisdiction; (2) virtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies; or (3) insufficiently similar to warrant the doctrine's application. . . . If the two actions are exactly alike

or lacking in sufficient similarities, the trial court has no discretion. In the former case, the court must dismiss the second action, and in the latter instance, the court must allow both cases to proceed unabated. Where the actions are virtually, but not exactly alike, however, the trial court exercises discretion in determining whether the circumstances justify dismissal of the second action." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 397–98, 973 A.2d 1229 (2009); see also id., 403–404 (holding that, when actions are virtually alike, it is proper to dismiss later action if nonmoving party will not be prejudiced, nonmoving party will have opportunity to litigate claims in prior action, prior action provides remedy for claims, and dismissal of later action serves policy interests behind prior pending action doctrine).

On appeal, the plaintiff first claims that the court erred when it denied the plaintiff's motion to open because the court failed to exercise its discretion when it ruled on the motion. We disagree.

In its order denying the plaintiff's motion to open, the court stated: "The fact that the [court in the 2016 action] exercised its discretion to limit amendments and denied [the] plaintiff's request to amend as untimely because the plaintiff waited some [four] years to assert a purported constitutional claim *does not change* this court's analysis on the motion to dismiss that the same underlying facts are at issue in both the [2016 action] and this case and, thus, there is no basis to open the judgment resulting from this court's ruling on the motion to dismiss." (Emphasis added.)

On the basis of this order, we conclude that, contrary to the plaintiff's claim, the court's ruling reflects that it exercised its discretion when it denied the plaintiff's motion. By stating that the plaintiff's inability to amend

its complaint in the 2016 action *did not change* the court's analysis with regard to its judgment dismissing the 2019 action, the court was essentially saying that it had considered the change in circumstances identified by the plaintiff but that it did not conclude as a matter of law that the change provided a sufficient basis for the court to open the judgment. Thus, because the court considered, and rejected, the change in circumstances identified by the plaintiff in its motion, the court exercised its discretion in denying that motion.

The plaintiff next claims that, in the event that the court exercised its discretion when ruling on the plaintiff's motion, it abused that discretion when it denied the motion. We are not persuaded.

Initially, we observe that the court was not required to consider how the plaintiff chose to prosecute the 2016 action or the rulings made by the court in that case when deciding the plaintiff's motion to open. It is undisputed that both actions arose out of the same facts. For whatever reason, when the plaintiff filed its 2016 action it did not allege the constitutional claim that it later asserted in the 2019 action. It also did not seek to amend its complaint in the 2016 action to assert that claim before bringing the 2019 action. The litigation strategy the plaintiff pursued came with attendant risks, and the court in the 2019 action was not required to grant the plaintiff's motion to open to save the plaintiff from the consequences of those risks. Furthermore, the court in the present case was not required to effectively undo the denial of the motion to amend by the court in the 2016 action that was found to be untimely and prejudicial to the defendant.[5] Parties are not entitled

[5] When denying the plaintiff's request to amend its complaint in the 2016 action, the court stated in relevant part: "[T]he court finds that the sixth amended complaint was not timely filed and there is no suitable justification for its untimeliness. Further, the pleadings are closed and a further amendment to the complaint asserting a new count and new claims would be prejudicial to the defendant. As such, the court respectfully declines the plaintiff's request to file a sixth amended complaint."

to subvert the decisions of one court by going to a separate court for relief from those decisions, as would have been the case here had the court granted the plaintiff's motion to open. Finally, to the extent the plaintiff does not prevail in the 2016 action and believes that the court abused its discretion in denying its motion to amend, it can seek appropriate relief on appeal in that action.

We also are unpersuaded by the plaintiff's argument that the court's refusal to open the judgment dismissing the 2019 action constituted an abuse of discretion because that decision prejudiced the plaintiff by leaving it without a forum in which to adjudicate its constitutional claim. In the plaintiff's October 21, 2021 answer to the defendant's counterclaim, the plaintiff raised the same constitutional argument that it sought to raise in the 2019 action but as a special defense instead of an affirmative claim.[6] In that special defense, the plaintiff alleged that "the defendant's actions in retroactively terminating the contract and then simultaneously retroactively reassessing or imposing additional taxes for all the years covered by the contract deprived the plaintiff of its constitutional rights to challenge the amount of the tax reassessment, and was done in a way which violated both procedural and substantive due process." This language closely tracks with the constitutional arguments that the plaintiff asserted in its 2019 action, wherein it alleged that "[t]he actions and conduct of the [defendant] constituted a taking[7] [in violation of the

[6] As the plaintiff conceded at oral argument before this court, the constitutional arguments in both the 2016 and the 2019 actions are, in essence, the same. More specifically, in both actions the plaintiff argues that the application of a one year statute of limitations to its claims unconstitutionally bars the plaintiff from challenging the defendant's imposition of back taxes.

[7] The fact that the plaintiff's special defense to the defendant's counterclaim in the 2016 action does not explicitly mention a takings claim does not affect our analysis, as the plaintiff's claim in its special defense that the defendant's retroactive adjustments "deprived it of its constitutional right to challenge the amount of the tax assessment" is the functional equivalent of such a claim.

state constitution]" and "the [defendant's position] that the plaintiff is without recourse to take any action to seek review and determination by the courts in regard to [the defendant's] wrongful action, constitutes a violation of . . . due process of law. . . ." (Footnote added.)

We do not think that the fact that the plaintiff must make its constitutional claim defensively, instead of affirmatively, affects the plaintiff's ability to litigate its constitutional arguments in the 2016 action. Indeed, regardless of whether its constitutional argument is made as a defense or as an affirmative claim, the plaintiff will need to prove the same things to prevail. Additionally, the remedy sought—the nonpayment of the back taxes—is the same regardless of how, procedurally, the plaintiff's constitutional argument is raised. In fact, at oral argument before this court, the plaintiff was unable to explain how the affirmative claim that it sought to raise in the 2019 action was substantively different from the constitutional defense that it has alleged in the 2016 action.[8] Thus, because the plaintiff still can fully and fairly litigate its constitutional arguments in the 2016 action, we disagree with the plaintiff's contention that the court in the present case left it without a forum in which to make those arguments. Accordingly, there cannot be an abuse of discretion on that basis.

Finally, the policy concerns that the court considered when dismissing the 2019 action—including the interests in judicial economy and efficiency and the need

[8] Indeed, the plaintiff could identify only one difference between the constitutional arguments that it sought to make in the 2016 and 2019 actions, which was that, if it was allowed to assert an affirmative constitutional claim, it might be able to recover costs and attorney's fees, while if the claim was made defensively, such relief would be unavailable. We, however, do not think that the possibility for the plaintiff to recover costs and fees in the 2019 action provides a sufficient reason to conclude that the court abused its discretion when it denied the plaintiff's motion to open.

to avoid duplicative litigation and conflicting results—all remained relevant considerations when it considered the motion to open. Thus, the continued relevance of these policy concerns further supports our conclusion that the court's decision to deny the plaintiff's motion to open was not an abuse of discretion.

For these reasons, we conclude that the court did not abuse its discretion in concluding that the court's denial of the plaintiff's request to amend its complaint in the 2016 action did not require that the court open the judgment of dismissal in the 2019 action.

The judgment is affirmed.

In this opinion the other judges concurred.

HOUSING AUTHORITY OF THE CITY OF NEW BRITAIN *v.* CALVIN W. NEAL
(AC 44720)

Cradle, Suarez and Bear, Js.

Syllabus

The plaintiff housing authority sought, by way of a summary process action, to regain possession of certain premises leased to the defendant tenant. The plaintiff served a notice to quit possession for nonpayment of rent on the defendant and, thereafter, filed a summary process action. Subsequently, the plaintiff and the defendant entered into a stipulated agreement pursuant to which the trial court rendered a judgment of possession in favor of the plaintiff and a stay of execution. In accordance with the stipulated judgment, the plaintiff agreed to allow the defendant to remain in the premises provided that the defendant made reasonable use and occupancy payments to the plaintiff and satisfied other conditions. Thereafter, the plaintiff filed an affidavit of noncompliance requesting an order for execution for possession on the ground that the plaintiff had not received payment from the defendant in accordance with the terms of the stipulated agreement and for the alleged serious nuisance that he committed because he had been arrested for various drug offenses at the premises. The trial court denied the plaintiff's request following a hearing and sustained the defendant's objection thereto, and the plaintiff appealed to this court. *Held*:

1. The trial court's finding that the defendant was not a tenant at sufferance was clearly erroneous because it was unsupported by the facts in the record; the defendant, who continued to reside at the premises after the lease agreement was terminated as a result of the plaintiff having served on the defendant a notice to quit possession of the premises, recognized his change of status when he entered into the stipulated agreement and agreed to make use and occupancy payments instead of rent payments to the plaintiff so long as he continued to occupy the premises.
2. The trial court erred in holding that the requirements of the applicable statute (§ 47a-11) concerning the obligations of a tenant did not apply to the defendant because the stipulated agreement did not include an express condition to that effect; even in the absence of express language in the stipulation, a tenant at sufferance must fulfill all of the statutory obligations otherwise applicable to the tenant.
3. The trial court erred in concluding that an affidavit of noncompliance filed pursuant to the applicable rule of practice (§ 17-53) was not the proper method for the plaintiff to seek the issuance of an execution based on the alleged serious nuisance committed by the defendant because such proceeding would not allow for the defendant to be fully heard on that issue:

   a. The plaintiff was not required to institute a second summary process action to obtain an execution against the defendant for his alleged commission of a serious nuisance as such an action against the defendant would not have survived a motion to dismiss for lack of subject matter jurisdiction because the plaintiff had satisfied the statutory (§ 47a-15) requirement when it served on the defendant a valid notice to quit, which effectively terminated the lease between the parties, making the defendant a tenant at sufferance, and the court rendered judgment in favor of the plaintiff thereafter.

   b. The plaintiff's allegation that the defendant allegedly committed a serious nuisance was properly before the trial court and should have been considered at the hearing on the plaintiff's affidavit of noncompliance filed pursuant to Practice Book § 17-53: although the trial court expressed concerns about the defendant's due process rights, the hearing on the plaintiff's affidavit of noncompliance could have included evidence pertaining to the defendant's violations of § 47a-11 and/or the stipulation because of the separate obligations imposed on him pursuant to the stipulation and § 47a-11; moreover, although Practice Book § 17-53 does specifically reference a scenario in which the landlord seeks an execution based on a serious nuisance included in a statute but not included in a stipulation, Practice Book § 17-53 should be interpreted liberally where the court's narrow interpretation and misapplication of § 47a-11 and Practice Book § 17-53 denied the plaintiff recourse to address the serious nuisance allegedly committed by the defendant on the premises in violation of § 47a-11 and the ability to obtain relief by way of execution of possession; furthermore, the defendant had notice of the plaintiff's claim that he violated § 47a-11 because of his arrest for the sale and possession

of drugs; accordingly, the case was remanded for a new hearing at which the trial court should consider the plaintiff's affidavit of noncompliance in light of this court's conclusions that the defendant was a tenant at sufferance, the requirements of § 47a-11 applied to the defendant, and the serious nuisance issue was properly before the court.

Argued February 1—officially released April 19, 2022

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Britain, Housing Session, where the court, *Shah*, *J.*, granted the parties' motion for a stipulated judgment of possession in favor of the plaintiff subject to a stay of execution, and rendered judgment thereon; thereafter, the court, *Shah*, *J.*, denied the plaintiff's motion for execution and sustained the defendant's objection thereto, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Michael S. Wrona, for the appellant (plaintiff).

Opinion

BEAR, J. In this summary process action brought by the plaintiff, the Housing Authority of the City of New Britain, against the defendant, Calvin W. Neal, the plaintiff appeals from the judgment of the trial court rendered following a hearing, denying its affidavit of noncompliance with stipulation,[1] sustaining the objection of the defendant and requiring the parties to continue to perform their respective obligations pursuant to a stipulated agreement of the parties. On appeal, the plaintiff claims that the trial court erred (1) in finding that the defendant was not a tenant at sufferance, (2) in concluding that the requirements of General Statutes

[1] Practice Book § 17-53, which provides the basis for the use of an affidavit of noncompliance with stipulation, provides in relevant part that "[w]henever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, a hearing shall be required. . . ."

§ 47a-11[2] did not apply to the defendant, and (3) in concluding that the filing of an affidavit of noncompliance was not the proper vehicle for addressing the alleged serious nuisance[3] committed by the defendant after judgment was rendered in favor of the plaintiff, but before the plaintiff obtained possession of the premises occupied by the defendant.[4] We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

[2] General Statues § 47a-11 provides: "A tenant shall: (a) Comply with all obligations primarily imposed upon tenants by applicable provisions of any building, housing or fire code materially affecting health and safety; (b) keep such part of the premises that he occupies and uses as clean and safe as the condition of the premises permit; (c) remove from his dwelling unit all ashes, garbage, rubbish and other waste in a clean and safe manner to the place provided by the landlord pursuant to subdivision (5) of subsection (a) of section 47a-7; (d) keep all plumbing fixtures and appliances in the dwelling unit or used by the tenant as clean as the condition of each such fixture or appliance permits; (e) use all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, in the premises in a reasonable manner; (f) not wilfully or negligently destroy, deface, damage, impair or remove any part of the premises or permit any other person to do so; (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15; and (h) if judgment has entered against a member of the tenant's household pursuant to subsection (c) of section 47a-26h for serious nuisance by using the premises for the illegal sale of drugs, not permit such person to resume occupancy of the dwelling unit, except with the consent of the landlord."

[3] Pursuant to General Statutes § 47a-15, the definition of "serious nuisance" includes "using the premises . . . for . . . the illegal sale of drugs . . . ."

The plaintiff attached to its affidavit a statement that the defendant had been arrested on April 5, 2021, for the possession of a controlled substance and for the sale of a narcotic substance and a copy of the pending case detail from the Judicial Branch website, and, before the court, the plaintiff alleged that the defendant violated his responsibilities pursuant to § 47a-11 and committed a serious nuisance thereby by possessing and selling illegal drugs while on the premises.

[4] The defendant did not file an appellate brief. Therefore, pursuant to Practice Book § 70-4, this appeal will be considered on the basis of the plaintiff's brief, the plaintiff's oral arguments before this court, and the record only.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Pursuant to a lease agreement between the parties, the defendant resided at 67 Martin Luther King Drive, Apartment 504 in New Britain (premises). On January 13, 2020, the plaintiff served on the defendant a notice to quit possession of the premises stating that their lease agreement had been terminated for the following reasons: "(1) [The defendant] failed to keep [the premises] in a safe and sanitary condition. Such unsanitary conditions constitute a violation of [the] [l]ease [a]greement, the [defendant's] responsibilities pursuant to . . . § 47a-11, and constitute a nuisance and/or a serious [nuisance]; [and] (2) [the defendant has] broken a door at the . . . premises, which damage constitutes a violation of [the] lease [agreement] and . . . § 47a-11." On March 2, 2020, the plaintiff filed a complaint alleging that the defendant (1) violated § 47a-11, (2) violated the terms of their lease agreement, (3) committed a nuisance, and (4) committed a serious nuisance, and it sought judgment for immediate possession of the premises.

On October 22, 2020, the parties entered into a stipulated agreement. Pursuant to this agreement, judgment for possession would enter in favor of the plaintiff with a stay of execution through October 31, 2021, on the conditions that the defendant (1) pay a reasonable use and occupancy fee of $209 to the plaintiff on or before the tenth day of each month, (2) acknowledge owing the plaintiff a total arrearage in the amount of $718.50, and (3) make arrearage installment payments of $59.87 to the plaintiff on or before the tenth day of each month. The stipulated agreement also included the following additional conditions: "The defendant is to keep the [premises] clean and take out the trash [at] regular intervals. The parties agree [that] only the defendant is allowed to occupy the premises. The defendant is to

limit the [number of] individuals [on the premises] to two people at a time unless they are family members or caregivers. The parties agree to allow four inspections [of the premises] throughout the year [on] random dates."

On April 22, 2021, the plaintiff filed an affidavit of noncompliance requesting the issuance of a summary process execution for possession of the premises. In its affidavit, the plaintiff stated that it had not yet received payment from the defendant in accordance with the stipulation, and noted that the defendant was arrested on April 5, 2021, arising from his alleged possession and sale of illegal drugs and narcotics at the premises.[5] On April 26, 2021, the defendant filed an affidavit and objection to the plaintiff's affidavit of noncompliance. On May 13, 2021, the court held a hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto. During the hearing, the court concluded that the plaintiff's affidavit of noncompliance was not the appropriate vehicle for the plaintiff to seek the eviction of the defendant for the alleged serious nuisance that he committed because "[t]he sale of drugs . . . [was not] within the scope of the [original] complaint that [the plaintiff] filed or the stipulation." The court also stated that addressing that issue at the hearing would implicate the due process rights of the defendant because the issue would not be fully heard and addressed by the court. Finally, in concluding that the defendant's due process rights would be implicated, the court also found that the defendant was a tenant. After the hearing, in its order denying the plaintiff's affidavit of noncompliance and sustaining the defendant's objection thereto, the court found "that the plaintiff has not prove[n] the defendant's noncompliance with the terms

[5] Specifically, the defendant was arrested for possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1) and for the sale of a narcotic substance in violation of General Statutes § 21a-278 (b) (1) (A).

of the written stipulation. Therefore, the parties are still obligated to perform their respective obligations under the stipulated [agreement] entered on October 22, 2020."

We begin by setting forth the applicable standard of review. "It is well settled that we review the court's findings of fact under the clearly erroneous standard. We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Internal quotation marks omitted.) *Bozelko* v. *Statewide Construction, Inc.*, 189 Conn. App. 469, 471, 207 A.3d 520, cert. denied, 333 Conn. 901, 214 A.3d 381 (2019). "When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record." (Internal quotation marks omitted.) *ASPIC, LLC* v. *Poitier*, 208 Conn. App. 731, 742, 267 A.3d 197 (2021).

I

We first address the plaintiff's claim that the court erred in finding that the defendant was not a tenant at sufferance. We begin by setting forth the applicable legal principles. "A tenancy at sufferance arises when a person who came into possession of [property] rightfully continues in possession wrongfully after his right thereto has terminated. . . . After a notice to quit has been served . . . a tenant at sufferance no longer has a duty to pay rent. He still, however, is obliged to pay a fair rental value in the form of use and occupancy for the dwelling unit." (Internal quotation marks omitted.) *Brewster Park, LLC* v. *Berger*, 126 Conn. App. 630, 638,

14 A.3d 334 (2011). Accordingly, "use and occupancy payments . . . are paid to a landlord by a tenant at sufferance who occupies the [property] in the absence of a lease agreement. . . . They are most frequently associated with summary process proceedings to evict a tenant because, after a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance." (Citation omitted; internal quotation marks omitted.) *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, 340 Conn. 115, 122 n.8, 263 A.3d 87 (2021).

In the present case, on January 13, 2020, the plaintiff served on the defendant a notice to quit possession of the premises. The parties subsequently entered into the stipulated agreement on October 22, 2020, pursuant to which they agreed that a judgment of possession in favor of the plaintiff would enter, execution would be stayed, and the defendant would be permitted to reside at the premises so long as he made *use and occupancy payments* to the plaintiff and satisfied several other conditions. Accordingly, the defendant's status as a tenant at sufferance is clearly established by the facts that (1) the plaintiff served on the defendant a notice to quit possession and initiated a summary process action, (2) the defendant continued to reside at the premises after the termination of the lease agreement, and (3) the defendant recognized his change in status by agreeing to make use and occupancy payments instead of rent payments to the plaintiff so long as he continued to occupy the premises. We conclude, therefore, that the trial court's finding that the defendant is not a tenant at sufferance is clearly erroneous because it is unsupported by the facts in the record.

II

Having concluded that the defendant is a tenant at sufferance, we turn now to the plaintiff's claim that the

court erred in concluding that the requirements of § 47a-11 do not apply to the defendant. We begin by setting forth the applicable legal principles. "A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property [that] he occupie[s] in the form of use and occupancy payments . . . and to *fulfill all statutory obligations*." (Emphasis added; internal quotation marks omitted.) Id.

In the present case, the court held that the requirements of § 47a-11[6] do not apply to the defendant because the stipulated agreement does not include an express condition to that effect. This holding, however, is clearly at odds with the principle, as set forth by our Supreme Court in *Boardwalk Realty Associates, LLC*, that, even in the absence of language in a stipulation, a tenant at sufferance must still fulfill all of the statutory obligations applicable to a tenant. Id.; see also *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 473 n.18, 974 A.2d 626 (2009) ("[A]fter a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance. . . . A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property which he occupied in the form of use and occupancy payments . . . and to fulfill all statutory obligations." (Internal quotation marks omitted.)). Accordingly, we conclude that the court erred in holding that the requirements of § 47a-11 did not apply to the defendant.

III

Finally, we address the plaintiff's claim that the court erred in concluding that an affidavit of noncompliance, filed pursuant to Practice Book § 17-53, was not the proper method for the plaintiff to seek the issuance of

[6] See footnote 2 of this opinion.

an execution based on the alleged serious nuisance committed by the defendant in this case because such a proceeding would not allow for the defendant to be fully heard on that issue. The plaintiff argues that its affidavit of noncompliance was the appropriate means of addressing the alleged serious nuisance committed by the defendant because "[t]he service of the first notice to quit terminate[d] [the] existing rental agreement and . . . any subsequent notice to quit . . . cannot survive a motion to dismiss for lack of subject matter jurisdiction." (Citation omitted.) We agree with the plaintiff.

A

After concluding that the plaintiff could not use an affidavit of noncompliance to address the alleged serious nuisance created by the defendant's possession and sale of drugs, the court determined that a second summary process action was the plaintiff's only recourse to obtain a judgment of possession based on that statutory violation. Pursuant to § 47a-15, the plaintiff would have been required to serve on the defendant a second notice to quit and a new complaint.

We first address the plaintiff's argument that it could not serve the defendant a second notice to quit on the basis of such serious nuisance. We begin by setting forth the applicable legal principles. It is well established that where a notice to quit complies with all statutory requirements, it "serve[s] as the [landlord's] unequivocal act notifying the [tenant] of the termination of the lease." (Internal quotation marks omitted.) *Lyons* v. *Citron*, 182 Conn. App. 725, 734, 191 A.3d 239 (2018). Furthermore, when a notice to quit effectively terminates a lease agreement between parties, "a second notice to quit . . . cannot survive a motion to dismiss for lack of subject matter jurisdiction." *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, 133 Conn. App. 1,

24, 33 A.3d 848 (2012). The defendant has not challenged the validity of the January 13, 2020 notice to quit, so there is no need, or jurisdiction, for the plaintiff to serve on the defendant a second notice to quit.[7]

In the present case, during the hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto, the court erroneously concluded that the plaintiff could obtain an execution based on the alleged serious nuisance committed by the defendant only by instituting a second summary process action against the defendant pursuant to § 47a-15. Section 47a-15 provides in relevant part that, "[p]rior to the commencement of a summary process action . . . to evict based on . . . conduct by the tenant which constitutes a serious nuisance . . . the landlord shall deliver a written notice to the tenant specifying the acts . . . constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. . . ." This requirement, how-

[7] In *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 401–402, 158 A.3d 772 (2017), our Supreme Court explained that a notice to quit that is invalid because of a legal defect is ineffective to terminate a lease, in which case a second notice to quit could be served on a defendant: "Summary process is a statutory remedy which enables a landlord to recover possession of rental premises from the tenant upon termination of a lease. . . . It is preceded by giving the statutorily required notice to quit possession to the tenant. . . . Service of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease. The lease is neither voided nor rescinded until the landlord performs this act and, upon service of a notice to quit possession, a tenancy at will is converted to a tenancy at sufferance." (Internal quotation marks omitted.) "A legally invalid notice to quit is, however, considered 'equivocal' because of [a] legal defect and, therefore, does not operate to terminate a lease." *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, supra, 292 Conn. 473 n.18; see also *Bargain Mart, Inc.* v. *Lipkis*, 212 Conn. 120, 134, 561 A.2d 1365 (2009) ("it is self-evident that if the notice is invalid, then the legal consequence of 'termination' arising from the service of a valid notice [to quit] does not result"); *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 584, 548 A.2d 744 (first notice to quit was invalid as untimely served, thus requiring service of second notice to quit), cert. denied, 209 Conn. 826, 552 A.2d 432 (1988).

ever, has already been satisfied in the present case because the plaintiff, on January 13, 2020, served on the defendant a valid notice to quit. See *Lyons* v. *Citron*, supra, 182 Conn. App. 734 (effective notice to quit notifies tenant of termination of lease). Because the plaintiff terminated the lease agreement on January 13, 2020, making the defendant a tenant at sufferance who is occupying and using the premises without the existence of a lease agreement, and because of the court's rendering of judgment in this case in favor of the plaintiff, the plaintiff cannot bring a second summary process action against the defendant. See, e.g., *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 24 (if first notice to quit is valid and effective, second notice to quit cannot survive motion to dismiss for lack of subject matter jurisdiction).

The court, therefore, erroneously concluded that, although the lease agreement had been terminated and judgment of possession had entered in favor of the plaintiff by agreement of the parties, a second summary process action was required to obtain an execution against the defendant for his alleged commission of a serious nuisance while the effect of the judgment was stayed by agreement so long as the defendant performed his obligations pursuant to the stipulation.

B

Having concluded that the plaintiff cannot properly bring a second summary process action against the defendant, we turn now to the language of Practice Book § 17-53, which provides in relevant part: "Whenever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, a hearing shall be required. If the violation consists of nonpayment of a sum certain, an affidavit with service certified in accordance with Sections 10-12 through

10-17 shall be accepted in lieu of a hearing unless an objection to the execution is filed by the defendant prior to the issuance of the execution. The execution shall issue on the third business day after the filing of the affidavit. . . .''

At the hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto, the court expressed concern that allowing the plaintiff to use its affidavit of noncompliance, filed pursuant to Practice Book § 17-53, to address the alleged serious nuisance committed by the defendant would implicate the due process rights of the defendant. Specifically, the court stated: ''I absolutely understand the seriousness of the alleged criminal conduct. This is not a criminal trial, however. This is the eviction court and there needs to be proper notice and, I mean, there's many cases that I've written about a stipulation needing to have the exact terms that need to be follow[ed]. And if there isn't proper notice or a provision provided in the stipulation, then it's not the proper basis of an eviction action to go forward, especially when the underlying action didn't concern any allegations of drugs or serious nuisance based on that claim. . . . It's about due process and whether these issues are fully heard or not. So, if [the] serious nuisance claim is based on one issue and the stipulation doesn't incorporate the specific conduct that you're alleging is violated, then you're kind of skirting the entire eviction process by then bringing up some new issue.'' In response, the plaintiff's counsel argued: ''I think there is due process, Your Honor. [The defendant] has his due process today. And certainly he's known what the issue is [before the court] today. He's had a copy of the police report. Certainly he knows that the sale of drugs is illegal, and [that he] shouldn't be doing it. I don't think it needs to be in a [stipulation] . . . .''

The plaintiff also argues in its appellate brief that the court's concerns for the defendant's due process rights

are unfounded because "an affidavit of noncompliance . . . is an action . . . that requires the court to hold a hearing in which the right to possession is to be determined . . . [and therefore] provides . . . [the tenant] with the necessary procedural and substantive due process protections." (Citation omitted; internal quotation marks omitted.) We agree with the plaintiff.

Practice Book § 17-53 clearly provides that "[w]henever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, *a hearing shall be required*. . . ." (Emphasis added.) That hearing can include evidence pertaining to the defendant's violations of § 47a-11 and/or the stipulation because of the separate obligations imposed on him pursuant to the stipulation and § 47a-11. This court has long held that "[t]he statutory obligations of the landlord and tenant continue even when there is no longer a rental agreement between them. . . . A landlord also is required to fulfill his statutory obligations, even after a notice to quit has been served on the tenant and a summary process case is begun." (Citation omitted.) *Rivera* v. *Santiago*, 4 Conn. App. 608, 610, 495 A.2d 1122 (1985). By filing an affidavit of noncompliance, the plaintiff was seeking an execution as a result of the defendant's breach of his duties pursuant to either the stipulation and each applicable statute or both.

Although the language of Practice Book § 17-53 does not specifically refer to a scenario in which a landlord seeks an execution based on a serious nuisance involving conduct included in a statute but not included in a stipulation, we note that the Superior Court has previously applied Practice Book § 17-53 to a violation of § 47a-11 based on the alleged sale of drugs by a tenant. See *Housing Authority* v. *Russotto*, Superior Court, judicial district of Hartford, Docket No. HDSP-133755

(March 23, 2006) (41 Conn. L. Rptr. 56).[8] In *Russotto*, as in the present case, no statute was referred to in the stipulation between the parties, but the court, citing this court's holding in *Rivera* v. *Santiago*, supra, 4 Conn. App. 610, recognized the defendant's obligations pursuant to statute, even if those obligations were not delineated in the judgment or stipulation.[9] *Housing Authority* v. *Russotto*, supra, 59.

Additionally, our rules of practice should be "interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice." Practice Book § 1-8. In the present case, application of a narrow interpretation of the language of Practice Book § 17-53 would result in an injustice to the plaintiff because, pursuant to the court's ruling, the plaintiff would have no means of addressing the alleged serious nuisance committed by the defendant after the defendant had stipulated to a judgment of possession. The plaintiff would be left with no relief for the defendant's alleged violation because it would be unable to

[8] Although not binding on this court, we have on occasion considered Superior Court decisions that deal with the specific issues before us. See, e.g., *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 23.

[9] Specifically, the court in *Russotto* stated: "In deciding the proper procedure to address this matter, the court must consider the interplay between Practice Book [§] 17-53 and General Statutes [§§] 47a-11 and 47a-1. As previously stated, the language of [§] 47a-11 applies to a tenant at sufferance. [Section] 47a-1 (a) defines an 'action' under the Landlord Tenant Act as follows: '[a]ction includes . . . any . . . proceeding in which rights are determined, including an action for possession.' By filing an affidavit of noncompliance pursuant to Practice Book [§] 17-53, the [l]andlord is requesting a determination of rights as to whether an execution should issue. Under the circumstances, this matter is an 'action' under the Landlord Tenant Act that requires the court to hold a hearing 'in which rights [to possession] are determined.' . . . When an execution is requested because of a violation of an express term in a judgment or a statutory obligation of a tenant, Practice Book [§] 17-53 provides the tenant with the necessary procedural and substantive due process protections." (Citation omitted.) *Housing Authority* v. *Russotto*, supra, 41 Conn. L. Rptr. 59.

seek an execution because there is no reference in the stipulation to the possession or sale of illegal drugs or to Practice Book § 17-53, and the plaintiff also would be unable to initiate a second summary process action based on the alleged serious nuisance because the court would not have jurisdiction over such an action. See *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 23–24 (if first notice to quit is valid and terminates lease, second notice to quit cannot survive motion to dismiss for lack of subject matter jurisdiction). Furthermore, the court did not recognize that Practice Book § 17-53 guarantees a tenant the same opportunity to be heard in the Practice Book § 17-53 proceeding that the tenant would receive in a summary process action instituted pursuant to § 47a-15. We also note that, as the plaintiff's counsel pointed out to the court, the defendant had notice of the plaintiff's claim that he had violated § 47a-11 because of his arrest for the sale and possession of illegal drugs.

Because (1) the court's interpretation and misapplication of § 47a-11 and Practice Book § 17-53 to the facts of this case denies the plaintiff recourse to address the serious nuisance allegedly committed by the defendant on the premises in violation of § 47a-11 and the ability to obtain relief by way of execution of possession, (2) Practice Book § 17-53 provides for a hearing that safeguards the due process rights of the defendant, and (3) the defendant had notice of his alleged statutory violations, we conclude that the serious nuisance allegedly committed by the defendant was properly before the court and should have been considered at the hearing on the plaintiff's affidavit of noncompliance. Accordingly, the case must be remanded for a new hearing, in which the court should consider the plaintiff's affidavit of noncompliance in light of our conclusions that the defendant is a tenant at sufferance, that the requirements of § 47a-11 apply to the defendant,

and that the serious nuisance issue was properly before the court.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.