DXR FINANCE PARENT, LLC *v.* THERAPLANT, LLC (AC 46769)

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

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property of the defendant, T Co. The plaintiff alleged that certain lenders entered into a credit agreement with G Co. as the borrower, T Co. and N Co. as guarantors, and the plaintiff acting as the lenders' agent. The credit agreement provided that the lenders would make certain financial accommodations to G Co. T Co., as a guarantor, was liable for all payment obligations if G Co. defaulted, and, subsequently, T Co. entered into a mortgage deed with respect to the subject property to secure its obligations under the credit agreement and guaranty. Following several

events of default, the plaintiff commenced this action. The trial court granted the parties' motion for entry of a stipulated judgment of strict foreclosure and rendered judgment thereon. T Co. waived its rights to appeal and to an appraisal, and the parties stipulated to a fair market value of the property based on records of the municipal tax assessor. On the law day assigned by the court, S Co., a nonparty, filed a postjudgment motion to intervene as a party defendant, asserting that it was the plaintiff in a separate action against G Co., which owned T Co., and that it had filed an application for a prejudgment remedy seeking to attach T Co.'s assets, including the subject property. S Co. claimed that the property was substantially undervalued in the foreclosure judgment because the valuation was not based on an appraisal and that its ability to collect a judgment against G Co. would be impaired in the absence of its involvement in the foreclosure action. The trial court denied the motion to intervene after the law day had passed, and S Co. appealed to this court. The plaintiff thereafter filed a motion to dismiss the appeal as moot. *Held* that, because the appeal was moot, this court lacked subject matter jurisdiction and, accordingly, the appeal was dismissed: there was no appellate stay affecting the running of the law days because S Co., as a nonparty, could not file an appeal from the judgment of strict foreclosure, and, although S Co. filed a motion to intervene, it did not also file a motion that, if granted, would have rendered the judgment ineffective, such that a new appeal period from the judgment would have been created, and, therefore, the denial of S Co.'s motion to intervene, in the absence of the granting of a discretionary stay, which S Co. did not request, did not stay this foreclosure action; moreover, no practical relief could be granted to S Co. because title had already vested in the plaintiff by the time the trial court denied S Co.'s postjudgment motion to intervene, the right of redemption by T Co. had been extinguished, and the rare exception in which fact-specific relief could be granted to a would-be intervenor did not exist here, as the granting of the motion to intervene would have necessitated opening the foreclosure judgment, which would have required further proceedings by the trial court; furthermore, there was no colorable claim implicating this court's equitable authority to open the foreclosure judgment as established in *U.S. Bank National Assn.* v. *Rothermel* (339 Conn. 366), as S Co. did not file a motion to open the judgment along with its motion to intervene, and, even if it had, S Co. did not raise any colorable claims of the type that would have caused this court to determine that equity required opening the judgment after title had vested in C Co., and, notwithstanding S Co.'s argument that T Co.'s waiver of an appraisal and the parties' stipulated property value based on the tax assessor's records were improper and unlawful, the valuation was part of the stipulation, was based on a municipal tax assessor's valuation, and was accepted by the trial court in its order rendering the judgment of strict foreclosure, and, thus, T Co.'s waiver of an appraisal, without additional factual allegations

to establish the rare and exceptional circumstances of fraud, accident, mistake or surprise, did not convert S Co.'s disagreement with the stipulated valuation of the property into a claim sufficient to invoke this court's continuing equitable authority, particularly given that S Co. had no direct interest in the property that could be foreclosed in the underlying action.

Considered October 11, 2023—officially released January 23, 2024

Procedural History

Action to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Spader*, *J.*, rendered a judgment of strict foreclosure in accordance with the parties' stipulation; thereafter, the court denied the motion to intervene filed by Shareholder Representative Services, LLC, and Shareholder Representative Services, LLC, appealed to this court; subsequently, the plaintiff filed a motion to dismiss the appeal. *Motion to dismiss granted and appeal dismissed.*

Jonathan A. Kaplan, *James T. Shearin*, and *Dana M. Hrelic*, in support of the motion.

Jeffrey J. Mirman, in opposition to the motion.

Opinion

CRADLE, J. In this foreclosure action, Shareholder Representative Services, LLC (SRS), a nonparty, appeals from the denial of its motion to intervene that was filed after the judgment of strict foreclosure was rendered but before the law days passed. Because an automatic appellate stay did not apply, title to the subject property has vested in the plaintiff, and there is no basis for this court to invoke its continuing equitable authority to afford practical relief to the proposed intervenor. We therefore grant the plaintiff's motion to dismiss this appeal as moot.

The following facts and procedural history are relevant to our review. On April 6, 2023, the plaintiff, DXR Finance Parent, LLC, filed a one count complaint for strict foreclosure of a guaranty mortgage to which it had been assigned the rights. The defendant, Theraplant, LLC (Theraplant), is the owner of the subject mortgaged property located at 856 Echo Lake Road in Watertown (property). A cannabis facility occupies the property that includes buildings, equipment, and inventory used to grow, manufacture, and package cannabis products. SRS, the proposed intervenor, alleges that the property hosts "one of the largest growers of cannabis in Connecticut," and that "the Department of Consumer Protection . . . relied upon [Theraplant] in approving the [recreational cannabis] program . . . ."

The complaint alleges that, on November 26, 2021, a group of lenders entered into a credit agreement, that was subsequently amended, with The Greenrose Holding Company, Inc. (Greenrose), as the borrower and Theraplant and GNRS CT Merger Sub, LLC (GNRS) as guarantors. In this transaction, the plaintiff acted as the lenders' agent. Greenrose, which is a nonparty to this action, wholly owns Theraplant. Also of relevance and discussed subsequently in this opinion, SRS brought a separate action against Greenrose for breach of the merger agreement through which Greenrose purchased Theraplant.

The underlying credit agreement provides that the lenders would make certain financial accommodations available to Greenrose, up to $105,000,000, pursuant to its terms and conditions, and included a maturity date and acceleration provision. Theraplant, as a guarantor, was liable for all payment obligations if Greenrose failed to pay. On or about January 21, 2022, Theraplant, to secure its obligations under the credit agreement and guaranty, granted and executed a mortgage deed, an

assignment of rents, a security agreement and a fixture filing with respect to the property in favor of DXR Finance, LLC, as agent for the lenders (mortgage).

Following several events of default without cure, the plaintiff accelerated the obligations under the credit agreement and declared all principal, interest, and fees to be immediately due and payable. On March 22, 2023, the plaintiff made a demand on Theraplant pursuant to the guaranty agreement.

On April 6, 2023, after the lenders assigned their rights to the plaintiff under the credit agreement, the plaintiff filed a complaint against Theraplant seeking a judgment of strict foreclosure, possession of the property, and damages. Also on April 6, 2023, the plaintiff filed in the trial court a notice of lis pendens that it had recorded on the Watertown land records.

On July 24, 2023, the plaintiff and Theraplant jointly filed a motion for entry of a stipulated judgment of strict foreclosure. The stipulation provided that the trial court may render a judgment of strict foreclosure of the guaranty mortgage in favor of the plaintiff and that Theraplant waived its right to appeal. Theraplant also waived an appraisal, as the parties stipulated to a fair market value of the property of "$4,107,400.00 pursuant to the Watertown Tax Assessor's Records," and that the "debt owed . . . as secured by the mortgage, is $155,390,197.17 . . . ." The parties requested a law day of July 31, 2023, and expressly agreed that the law day may run "within the [twenty] day appeal period."

On July 26, 2023, the trial court, *Spader*, *J.*, rendered a judgment of strict foreclosure in accordance with the parties' stipulation. Its order set the law day for "July 31, 2023, for the owner of the equity of redemption, and subsequent days for subsequent encumbrances in the inverse order of their priorities."

On the July 31, 2023 law day, SRS filed a postjudgment motion to intervene as a party defendant under General Statutes §§ 52-102[1] and 52-107,[2] and Practice Book § 9-18.[3] SRS asserted that it is the plaintiff in a related action, *Shareholder Representative Services, LLC* v. *The Greenrose Holding Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-22-6073236-S (SRS action), in which it is acting "in its capacity as the representative of the selling security holders of Theraplant . . . . " SRS alleged that its action arose from a merger agreement between Greenrose and SRS, in which "Greenrose purchased 100 [percent] of Theraplant." SRS also asserted that, on August 4, 2022, it filed an application for a prejudgment remedy in the SRS action seeking to attach Theraplant's assets, including the subject property. SRS further argued that the property was substantially undervalued in the foreclosure judgment because that valuation was not based on an appraisal, and that SRS's ability to collect a judgment against Greenrose would be impaired significantly in the absence of its involvement in this action.

[1] General Statutes § 52-102 provides in relevant part: "Upon a motion made by any . . . nonparty to a civil action . . . the nonparty so moving . . . (1) may be made a party by the court if that person has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or (2) shall be made a party by the court if that person is necessary for a complete determination or settlement of any question involved therein . . . ."

[2] General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

[3] Practice Book § 9-18 provides: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title while the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party."

The plaintiff filed an opposition to the motion to intervene, emphasizing that SRS "is an out of the money creditor of nonparty [Greenrose]," which "does not have any claim against [Theraplant]." The plaintiff argued that (1) SRS's motion was untimely filed postjudgment, (2) SRS possessed no legal or equitable right to the property that was at risk of diminution, (3) SRS is—at most—a potential judgment creditor of Greenrose, and not of Theraplant, and (4) the proposed intervention would not affect the disposition of the judgment of strict foreclosure.

On August 1, 2023, the trial court, *Spader*, *J.*, denied SRS's postjudgment motion to intervene. It concluded that SRS did not "allege sufficient facts . . . to make the requisite showing of its right to intervene."[4] (Internal quotation marks omitted.) On August 7, 2023, SRS filed this appeal. The plaintiff filed a motion to dismiss the appeal as moot and SRS timely filed an opposition.

This matter presents us with a novel question, namely, whether relief may be granted in an appeal of the denial of a postjudgment motion to intervene in a strict foreclosure action where title has already vested. For the following reasons, we conclude that the appeal must be dismissed as moot because no appellate stay applied to the running of the law day, no practical relief can be granted to the proposed intervenor, and there is no colorable claim implicating this court's equitable authority.

[4] The court reasoned that SRS's pending prejudgment remedy application, even "if it is granted, is subsequent to the mortgage" and, therefore, would be "undisturbed by this foreclosure." The trial court found that "[t]he motion is also untimely when considering General Statutes § 52-325 (a)," which "authorizes intervention after a notice of lis pendens is filed when the motion to intervene is filed prior to the date when the judgment . . . is rendered." (Internal quotation marks omitted.) Moreover, the court found that SRS "still has remedies available to it" but "has no standing to litigate" the foreclosure and underlying issues, such as "whether an attorney made proper representations to the court about the authority to stipulate on behalf of his client . . . ."

I

We first consider whether an appellate stay affected the running of the law day. SRS, as a nonparty, could not file an appeal from the judgment of strict foreclosure rendered on July 26, 2023. Although SRS filed a motion to intervene, it also did not file a motion "that, if granted, would render the judgment . . . ineffective," such that a new appeal period from the judgment would be created. See Practice Book § 63-1 (c) (1).

There is no automatic appellate stay of *trial proceedings* that goes into effect upon the denial of a motion to intervene. See, e.g., *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 386, 394, 28 A.3d 288 (2011) (defendants claimed appeal by proposed intervenors stayed further proceedings in trial court; trial court denied defendants' motion for stay; and this court dismissed defendants' motion for review). A motion to intervene typically is filed prior to the trial court rendering judgment on the dispute between the existing parties. If the trial court has determined that the proposed intervenor does not have a sufficient interest in the litigation to be made a party, the parties should be able to proceed with the litigation unless, in the trial court's discretion, the matter is stayed while the proposed intervenor appeals. See, e.g., *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 647, 81 A.3d 200 (2013) (noting that trial court granted discretionary stay of trial proceedings pending proposed intervenor's appeal from trial court's denial of its motion to intervene). Consequently, the denial of SRS's motion to intervene, in the absence of the granting of a discretionary stay, which SRS did not request, did not stay the present foreclosure case.

An appellate stay typically applies to proceedings that "enforce or carry out the judgment . . . ." Practice Book § 61-11 (a). Law days "carry out" the judgment

of strict foreclosure. *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 683–84, 899 A.2d 586 (2006); see also id. ("the law days are ineffective pending the stay because to treat them otherwise would carry out the judgment in violation of the stay"). Where "there was no appellate stay in effect when the law days began to run . . . absolute title to the property transferred to the plaintiff as a matter of law after all law days expired." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 50, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020).

In the present case, the trial court denied SRS's postjudgment motion to intervene, and SRS did not move the court for a discretionary stay of the law days pending its appeal. We conclude that, where a proposed intervention was denied postjudgment but before the running of the law days, an appellate stay of the judgment does not automatically arise. There also was no action taken by the parties that would reset or stay the running of the law days. Accordingly, the running of the law day on July 31, 2023, carried out the judgment of strict foreclosure.

II

We next address the question of mootness, which is the basis for the plaintiff's motion to dismiss. This case presents, for the first time, an opportunity for this court to consider whether any practical relief may be granted from a postjudgment denial of a motion to intervene in a strict foreclosure action where title has already vested. We conclude that such an appeal is moot and must be dismissed for lack of subject matter jurisdiction.

In its motion to dismiss, the plaintiff argues that this court cannot afford SRS any practical relief in this appeal. SRS is separately litigating its claims against

Greenrose, which is not a party to this action. Theraplant's equity of redemption in the subject property was extinguished by the running of the law day, and it is not within the power of appellate courts to disturb the absolute title of the redeeming encumbrancer. Accordingly, the plaintiff maintains that considering this appeal on the merits "would amount to a purely academic discussion of the propriety of the trial court's responses to the parties' postjudgment motions . . . ." (Internal quotation marks omitted.)

In response, SRS relies heavily on the proposition that, "[b]ecause foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done." (Internal quotation marks omitted.) As such, SRS argues that "Connecticut courts have continuing jurisdiction in foreclosure cases after the passage of the law days . . . ." SRS further submits that our Supreme Court has "previously . . . concluded that opening a judgment after title has vested in a strict foreclosure case is permissible if equity so requires." (Internal quotation marks omitted.) SRS also contends that this court should similarly exercise its equitable jurisdiction to conclude that this appeal is not moot because SRS has challenged the trial court's valuation of the property as having been "improperly, and unlawfully, determined . . . ." (Footnote omitted.) SRS underscores that, although its motion to intervene was filed postjudgment and concurrent with the law day, this appeal was filed within twenty days from the trial court's denial of its motion to intervene. See Practice Book § 63-1 (a). Additionally, SRS maintains that it "should not be penalized because the trial court set the law days within the twenty day" appeal period by the agreement of the parties. We are not persuaded.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court

to dismiss a case if the court can no longer grant practical relief to the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, supra, 197 Conn. App. 39. "Our review of the question of mootness is plenary." Id.

We have routinely dismissed appeals by defendants in foreclosure actions as being moot once title to the property had vested in the plaintiff. The dispositive question in those contexts "is whether the law days have run so as to extinguish the defendant's equity of redemption and vest title absolutely in the plaintiff." (Internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 324, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006). If the law days have run, "no practical relief [could] follow from a determination of the merits of [the] case . . . ." (Internal quotation marks omitted.) Id. Accordingly, with limited exceptions discussed in part III of this opinion, "it is not within the power of appellate courts to resuscitate the mortgagor's right of redemption or otherwise to disturb the absolute title of the redeeming encumbrancer." (Internal quotation marks omitted.) Id. "Simply put, once title has vested absolutely in the mortgagee, the mortgagor's interest in the property is extinguished and cannot be revived by a reviewing court." Id.; see also *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.5, 150 A.3d 675 (2016) ("an appeal from a judgment of strict foreclosure is moot when the law days pass, the rights of redemption are cut off, and title becomes unconditional in the plaintiff" (internal quotation marks omitted)).

"[I]f a favorable decision necessarily could not afford the practical relief sought, the case is moot." *State* v. *Jerzy G.*, 326 Conn. 206, 221, 162 A.3d 692 (2017). As it applies to the denial of a motion to intervene, this court has observed that "[m]ost postjudgment appeals filed by would-be intervenors will be moot because the relief sought, i.e., intervention into the underlying action, cannot be granted once the action has gone to judgment." *Wallingford Center Associates* v. *Board of Tax Review*, 68 Conn. App. 803, 806 n.3, 793 A.2d 260 (2002); see also, e.g., *Jones* v. *Ricker*, 172 Conn. 572, 576–77, 375 A.2d 1034 (1977) (appeal from denial of motion to intervene dismissed as moot where underlying matter had gone to judgment and "the only relief sought by the plaintiffs in [that] action [had] been granted and executed").

However, there are narrow exceptions possible where fact specific relief may exist in a postjudgment motion to intervene. Unlike "[m]ost post judgment appeals filed by would-be intervenors"; *Wallingford Center Associates* v. *Board of Tax Review*, supra, 68 Conn. App. 806 n.3; a "rare" exception; id., 804 n.1; can exist if relief could be granted, for example, by directing the trial court to amend the judgment. Id., 804–805.[5] In addition to practical relief being available, the relief

[5] *Wallingford Center Associates* involved an appeal of a municipal tax assessor's property revaluation to the trial court. *Wallingford Center Associates* v. *Board of Tax Review*, supra, 68 Conn. App. 804–805. The trial court in that case had already rendered judgment lowering the valuation when a nonparty filed a motion to intervene as the new titleholder to whom the previously overinflated valuation would apply in the absence of intervention. Id., 804. The trial court denied the motion, and the would-be intervenor appealed to this court. Id., 804–807. Although the previous owner's tax appeal was no longer pending before the trial court, this court determined that the appeal from the denial of the motion to intervene was not moot because relief was possible by directing the trial court to amend the judgment to extend the lower valuation to the new titleholder of the property. Id., 804–805.

must also be capable of being "given by this court without further trial court proceedings." Id., 804 n.1.

This narrow exception does not apply to the present case. SRS filed its postjudgment motion to intervene as a party to the underlying action, the granting of which would necessitate opening the stipulated judgment of strict foreclosure and would require further proceedings by the trial court. Moreover, the law day ran on July 31, 2023, which vested title absolutely in the plaintiff as the foreclosing mortgagee and extinguished Theraplant's right of redemption as the mortgagor. This court cannot grant the relief sought by SRS because the underlying matter has gone to judgment, the judgment has been fully executed, and the plaintiff's title to the property cannot be disturbed. Accordingly, there is no practical relief available to SRS and, therefore, this appeal is moot.

III

Finally, this appeal does not present the facts and circumstances that would cause this court to extend its continuing equitable authority as established in *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 260 A.3d 1187 (2021).

Our Supreme Court in *Rothermel* concluded that there is "a limited exercise of jurisdiction over a narrow class of equitable claims raised in postvesting motions to open," despite the general prohibition of such jurisdiction by General Statutes § 49-15 (a) (1).[6] Id., 373. The category of claims that fall within this class of cases sound in " '[f]raud, accident, mistake, and surprise . . . .' " Id., 379; see, e.g., id., 370–71 (finding continuing

[6] General Statutes § 49-15 (a) (1) provides in relevant part: "Any judgment foreclosing the title to real estate by strict foreclosure may . . . be opened and modified . . . provided no such judgment shall be opened after the title has become absolute in any encumbrancer . . . ."

equitable jurisdiction where movant relied on misrepresentations by loan servicer that caused her to fail to file motion to open before passage of law day); *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 260, 708 A.2d 1378 (1998) (concluding that there was continuing jurisdiction where motion to open filed after running of law days sought "to correct an inadvertent omission in a foreclosure complaint"); *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 3–4, 85 A.3d 1 (2014) (concluding there was continuing equitable authority where plaintiff misrepresented to court that it had sent notice of judgment to movant prior to law day but, in fact, did not actually provide notice until law day). These are rare exceptions, applicable only in unusual circumstances. See, e.g., *U.S. Bank, National Assn.* v. *Fitzpatrick*, 206 Conn. App. 509, 510–13, 515 n.5, 260 A.3d 1240 (2021) (holding in *Rothermel* inapplicable to extend this court's postvesting equitable authority to appellant's challenge to order waiving newspaper advertisements for foreclosure sale where sale was advertised elsewhere).

Notably, SRS did not file a motion to open the foreclosure judgment along with its motion to intervene. Even if it had, however, SRS did not raise any colorable claims of the type that would cause this court to determine that equity requires the opening of the judgment after title vested in the plaintiff.

Nevertheless, on appeal, SRS attempts to invoke a *Rothermel*-like argument that Theraplant's waiver of an appraisal and the parties' stipulated property value based on the tax assessor's records is improper and unlawful. The property valuation was part of the parties' stipulation, was based on a municipal tax assessor's valuation and was accepted by the trial court in its order rendering the judgment of strict foreclosure. Theraplant's waiver of an appraisal, without any additional specific factual allegations regarding the "rare

and exceptional" circumstances of fraud, accident, mistake or surprise, does not convert SRS's disagreement with the parties' valuation of the property into a claim sufficient to invoke this court's continuing equitable authority. SRS's failure to file a motion to open alleging facts that satisfy the very narrow class of claims eligible for *Rothermel* treatment leads us to determine that this court does not have jurisdiction to reach the merits of this otherwise moot appeal. This is especially true given that SRS has no direct interest in the property that can be foreclosed in the underlying action.

For the foregoing reasons, this appeal is moot because an automatic stay did not stay the running of the law days, no practical relief can be granted on the denial of the motion to intervene because title has vested in the plaintiff, and there does not appear to be any basis for this court to invoke its continuing equitable authority after title in the subject property has vested in the plaintiff. The plaintiff's motion to dismiss this appeal as moot is therefore granted.

The appeal is dismissed.

In this opinion the other judges concurred.

E. I. DU PONT DE NEMOURS AND COMPANY *v.* CHEMTURA CORPORATION (AC 45707)

Bright, C. J., and Alvord and Cradle, Js.

Syllabus

The plaintiff, D Co., sought, inter alia, to recover damages from the defendant for breach of contract in connection with D Co.'s purchase of the defendant's fluorine chemical business and related equipment, located in Arkansas. The parties had previously entered into an asset purchase agreement, pursuant to which the defendant agreed to indemnify D Co. for any losses arising from a breach of the defendant's representations and warranties in the agreement. The defendant's representations and warranties related to the facility's prior and ongoing compliance with

various laws in connection with the operation of the defendant's plant and to the good repair and condition of the transferred assets. Following the purchase of the business, D Co. requested reimbursement, pursuant to the agreement's indemnification provisions, to cure several alleged deficiencies relating to, inter alia, four fire protection systems that were allegedly in violation of the standards set by the National Fire Prevention Association and incorporated by reference into the Arkansas State Fire Code, and two refrigeration units that were allegedly leaking refrigerant at an unacceptable rate. The parties ultimately were unable to settle their differences, and D Co. brought its claims to the trial court. Thereafter, C Co. was substituted as the plaintiff. The court rendered judgment for the defendant on C Co.'s breach of contract claims, and C Co. appealed to this court. *Held*:

1. C Co. could not prevail on its claim that the trial court failed to determine the applicable law and apply that law to the evidence to determine whether the fire protection systems at issue violated the Arkansas State Fire Code: the court's determination that the evidence was unclear as to which Arkansas State Fire Code applied to each fire protection system was not clearly erroneous, as, although C Co. argued that testimony from one of the defendant's former employees established time frames for the installation of each of the systems at issue, no evidence showed the actual installation date of any of the systems, the time frames provided could have implicated any of four different versions of the Arkansas State Fire Code, and the court correctly determined that the applicable law would be the state fire code in effect at the time the systems in question were installed; moreover, C Co. failed to supply the court with a clear understanding of the Arkansas State Fire Code, which was the foreign law applicable to its claims, as C Co. provided only portions of certain National Fire Prevention Association standards and only one portion of one edition of a potentially applicable version of the Arkansas State Fire Code to the court, and it was not clear from the record which provisions of the state fire code C Co. alleged the defendant had violated as to the fire prevention systems at issue; furthermore, C Co. provided the court with no analysis as to whether the defendant's alleged failure to comply with National Fire Prevention Association standards constituted a violation of the Arkansas State Fire Code.
2. C Co. could not prevail on its claim that the trial court erred in concluding that federal regulations did not require the replacement of certain refrigeration units that allegedly leaked ozone depleting substances at rates exceeding the regulatory (40 C.F.R. § 82.156) threshold: although there was evidence in the record that the refrigeration units in question were not in compliance with federal regulations in 2006 and 2007, which was within three years prior to closing as required by the agreement, C Co. failed to provide evidence addressing the reasons the units were replaced in 2012 and 2015 or to prove that the replacement damages resulted from the contractual violations, as there was testimony that

repair efforts undertaken by the defendant may have been successful, and the regulations set forth the option to repair a leaking refrigeration unit, rather than requiring that the unit be replaced; moreover, C Co.'s claim that the court erred in finding that it failed to prove that the 2006 and 2007 leak rates were the exclusive cause of the replacement of the refrigeration units, rather than a proximate cause, was unsupported by a fair reading of the court's decision, as nowhere in its decision did the court hold, explicitly or implicitly, that the plaintiff was required to prove that the leak rates were the exclusive cause of the eventual replacement of those units in 2012 and 2015; furthermore, C Co. failed to provide expert testimony establishing that the 2006 and 2007 leaks, rather than the faulty performance of the units in subsequent years, led to the need for their replacement, as the evidence presented at trial indicated that refrigeration units were to be selected for replacement on the basis of type of refrigerant used, system maintenance costs, remaining life and system capacity considerations.

Argued October 17, 2023—officially released January 23, 2024

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where The Chemours Company FC, LLC, was substituted as the plaintiff; thereafter, the case was tried to the court, *Brazzel-Massaro, J.*; judgment for the defendant, from which the substitute plaintiff appealed; thereafter, the Supreme Court reversed the trial court's judgment and remanded the case to that court for further proceedings; subsequently, the court, *Schuman, J.*, rendered judgment for the defendant, and the substitute plaintiff appealed to this court. *Affirmed.*

Daniel J. Krisch, with whom were *Jennifer L. Morgan*, and, on the brief, *Julie A. Lavoie* and *Joy C. Fuhr*, pro hoc vice, for the appellant (substitute plaintiff).

Brian J. Wheelin, with whom, on the brief, was *Joseph L. Clasen*, for the appellee (defendant).

Opinion

CRADLE, J. This breach of contract case, which was commenced by the plaintiff, E. I. du Pont de Nemours

and Company (DuPont),[1] in 2014, was first tried to the trial court in 2018, after which the court rendered judgment in favor of the defendant, Chemtura Corporation, on the ground that DuPont failed to strictly comply with the notice provisions of an asset purchase agreement (APA) between the parties. Our Supreme Court reversed the judgment of the trial court and remanded the case for further proceedings on the breach of contract claims. See *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, 336 Conn. 194, 218, 244 A.3d 130 (2020). Following its review of the record from the first trial and further briefing from the parties, the court rendered judgment in favor of the defendant. On appeal, the plaintiff claims that (1) the court erred in rejecting its breach of contract claims as to certain fire protection systems in that it failed to determine the applicable law and apply that law to the evidence to determine whether those fire protection systems violated the Arkansas State Fire Code, and (2) the court misinterpreted the applicable federal regulations and improperly concluded that those regulations did not require the replacement of certain refrigeration units that leaked ozone depleting substances at rates exceeding the statutory threshold for several consecutive years.[2] We affirm the judgment of the trial court.

[1] DuPont was the original plaintiff in this action. In 2017, The Chemours Company, FC, LLC, was substituted as the sole plaintiff. We hereinafter refer to the substitute plaintiff as the plaintiff throughout this opinion.

[2] The plaintiff also claims that it did not "receive the trial to which it was entitled on remand [in that] the trial court, *Schuman*, *J.*, neglected to examine all of the evidence anew, neglected to make the required legal determinations and adopted factual findings from the initial trial court, *Brazzel-Massaro*, *J.*, in spite of General Statutes § 51-183c, which provides that a case cannot be tried again by the same judge where there has been a reversal by our Supreme Court."] The plaintiff argues that the court's "multi-page block quote [consisting of] approximately five pages of factual findings from the Supreme Court's decision in this case, which actually were factual findings of the original trial court judge" was "entirely improper and patently inconsistent with the rights conferred by § 51-183c." The plaintiff asserts that the court "abdicated both its role to determine and apply the law and its role as fact finder." Despite the gravity of these allegations, counsel for

The following undisputed facts and procedural history, as set forth by our Supreme Court, are relevant to the plaintiff's claims on appeal. "In 2007, the parties, DuPont and the defendant, negotiated the purchase of the defendant's fluorine chemical business and related equipment located in El Dorado, Arkansas. On behalf of DuPont, Brian Engler negotiated the terms of the APA with Arthur Fullerton, the defendant's associate general counsel, and Arthur Wienslaw, the defendant's director of strategy and licensing. The parties ultimately entered into the APA on December 14, 2007. Because the parties were competitors in this field, DuPont's precontractual ability to inspect the defendant's plant and equipment and to conduct other due diligence was limited. Officials of DuPont conducted only one brief, afterhours tour of the plant prior to signing the APA. As a result, the defendant made certain representations and warranties in the APA, including that the transferred assets were in good repair and condition and were sufficient to conduct business as of the closing date, and that the business had been and was currently being operated in accordance with applicable laws.

"To further protect DuPont, given its limited ability to inspect the plant, the parties also entered into a side letter dated January 31, 2008, which confirmed 'additional understandings' of the parties. The side letter included the disclosure and discussion of all potential violations of codes and regulations that controlled the operation of the plant and its products, including potential violations of the ozone depleting substances

the plaintiff, at oral argument before this court, acknowledged that the facts quoted by the trial court from the Supreme Court's decision are undisputed historical facts and conceded that the plaintiff simply is arguing that the court's other factual findings as to the dates of installation of the fire equipment and the applicable fire codes were clearly erroneous. Our resolution of the plaintiff's first enumerated claim identified herein addresses this argument. Consequently, the plaintiff's claim based on a purported violation of § 51-183c warrants no further discussion.

regulations.[3] The side letter primarily addressed any past deficiencies or violations that continued to impact the operation of the plant at the time of closing that DuPont would not have been able to discover given its limited inspection of the plant. The parties closed the sale on January 31, 2008.

"The APA contains two provisions, §§ 3.16 and 3.17, that set forth a number of representations and warranties by the defendant related to the facility's prior and ongoing compliance with various laws in connection with the operation of the plant. Under article 8 of the APA, the defendant agreed to indemnify DuPont from any losses arising from any breach of those representations or warranties.[4] Section 8.4 (a) of the APA provides a four year time period for indemnification as a result of a breach of the representations or warranties contained in §§ 3.16 and 3.17 and requires that DuPont notify the defendant in writing within four years of the closing date, 'specifying the amount and factual basis of that claim in reasonable detail to the extent known.' The APA's notice provision, § 11.4, provides in relevant part: 'All notices, consents, waivers and other communications under this [a]greement must be in writing and will be deemed given to a party when (a) delivered to the appropriate address by hand or by nationally

[3] "The ozone depleting substances regulations regulate the leakage rates of ozone depleting substances, such as chemicals used in industrial process refrigeration equipment. See 40 C.F.R. § 82.156 (2019)." *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, supra, 336 Conn. 197 n.2.

[4] "Specifically, § 8.8 of the APA provides: 'A claim for indemnification for any matter not involving a third-party claim may be asserted by notice to the party obligated to indemnify under this [a]greement. Such notice must be provided by the [i]ndemnified [p]erson to the [i]ndemnifying [p]erson promptly in writing describing the [l]oss incurred by the [i]ndemnified [p]erson, the amount or estimated amount thereof, if known or reasonably capable of estimation, and the method of computation of such [l]oss, all with reasonable specificity and containing a reference to the provisions of this [a]greement in respect of which such [l]oss will have occurred.' " *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, supra, 336 Conn. 198–99 n.3.

recognized overnight courier service (costs prepaid), (b) sent by facsimile or e-mail with confirmation of transmission by the transmitting equipment or (c) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the following addresses, facsimile numbers or e-mail addresses and marked to the attention of the individual (by name or title) designated below (or to such other address, facsimile number, e-mail address or individual as a party may designate by notice to the other parties) . . . .' To properly notify the defendant, § 11.4 of the APA provides that the notice shall be sent to the defendant's general counsel 'with a simultaneous copy' to the defendant's outside counsel, Baker & McKenzie, LLP.

"Following the closing, the parties remained in regular contact because DuPont purchased only a portion of the Arkansas facility and the defendant continued to operate the remainder. Specifically, DuPont's plant manager, Donald Kuhlmann, communicated with Fullerton, the defendant's associate general counsel, and Frank DiCristina, one of the defendant's plant managers. DuPont did not communicate with the defendant's general counsel. DuPont subsequently discovered that certain areas of the plant required repair or replacement, and DuPont requested reimbursement pursuant to the defendant's indemnification obligations. Namely, DuPont asserted that certain refrigeration units were leaking refrigerant at an unacceptable rate, and the fire suppression systems were not operating within applicable laws at the time of the purchase. From the closing in 2008 until 2011, the parties held discussions and corresponded to resolve those deficiencies.[5] During this

[5] "Specifically, in 2008, a site wide survey of the facility was completed, addressing various compliance issues. A copy of the audit report was forwarded to DiCristina. The report stated that the purpose was to 'inform [the defendant] of [a] preliminary estimate of expenses which DuPont plans to incur between now and the end of 2009, which will be invoiced to [the defendant] per the [APA] and the January 31, 2008 [s]ide [l]etter . . . .' In August, 2008, Kuhlmann and James Scroggins, one of the defendant's plant

time, in March, 2009, the defendant filed for Chapter 11 bankruptcy. For the reorganized company to assume the APA, the defendant had to cure any prebankruptcy defaults under the APA. See 11 U.S.C. § 365 (b) (2006). This led to extensive negotiations between the parties over 'cure claims.'[6] Ultimately, the parties summarized their positions on various items in a claims list, which included, among other things, the refrigeration and fire suppression system claims. These discussions did not resolve all of the claims, and the present action followed.

"DuPont commenced this action in June, 2014, asserting two claims sounding in breach of contract against the defendant. The complaint alleged violations of the side letter and §§ 3.16 and 3.17 of the APA. DuPont alleged that, in accordance with the APA and the side letter, the defendant is obligated to repair or replace refrigeration units that either are not properly working or violate applicable regulations, as well as certain fire suppression systems that did not comply with the applicable laws at the time of the sale. Specifically, in count one, DuPont alleged that the defendant breached the

managers, also communicated about the refrigeration units. In September, 2008, correspondence between DuPont and the defendant outlined the scope of work required for the refrigeration units. Throughout 2009 and 2010, the parties continued to exchange e-mails and other correspondence about expenditures reimbursable to DuPont." *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, supra, 336 Conn. 199 n.4.

[6] "In an e-mail to DiCristina and Kuhlmann, Fullerton explained what the term 'cure claim' meant in the claims list he created: 'I've tried to . . . use the following criteria for putting something in the "cure claim" category for purposes of resolving this: assuming there is a tie-in to a reimbursement obligation under the [APA], has work been done for which either (a) an invoice has been generated and sent to [the defendant] or (b) the issuance of an invoice to [the defendant] is a [pro forma] step at this point [because] the amount that would appear on the invoice is [un]known? . . . [T]he fact that something may not be in the "cure claim" category does not mean it never gets paid; it just means that the claim is handled per the [APA] terms as if there had never been a [Chapter] 11 filing.' " *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, supra, 336 Conn. 199 n.5.

APA because, at the time of closing, the defendant had been operating nine areas of the plant in violation of applicable fire safety laws and regulations. Count two alleged that multiple refrigeration units were leaking refrigerant at rates impermissible under applicable environmental law.

"After three and one-half years of pretrial litigation, the case was tried in January, 2018. On the last day of trial, the defendant claimed—for the first time, in a motion for a directed verdict—that DuPont failed to provide notice in accordance with the terms of the APA. The defendant argued that DuPont did not comply with the APA's notice provision because it had been communicating with the defendant's associate general counsel rather than the general counsel. The court requested briefing on the issue, and the plaintiff and the defendant submitted posttrial briefs. The plaintiff and the defendant agreed that, under § 11.16 of the APA, New York law governs this dispute. The defendant argued that New York law requires strict compliance with notice provisions in a contract and that the plaintiff failed to prove all the elements of breach of contract. The plaintiff disagreed and argued that New York law did not require strict compliance, and that the claims list and the correspondence between the parties to the APA satisfied New York law because they provided the defendant actual notice.

"The trial court determined that at no time after the closing did DuPont provide notice in accordance with § 11.4 of the APA. The court noted that a number of the plaintiff's exhibits submitted as proof of actual notice did not rise to the level of actual notice of a violation of the contract purchase provisions." (Footnotes in original.) *E. I. du Pont de Nemours & Co.* v. *Chemtura Corp.*, supra, 336 Conn. 196–201. Our Supreme Court reversed the judgment of the trial court on the

notice issue and remanded the case for further proceedings on the plaintiff's breach of contract claims. Id., 217–18.

On remand, the parties agreed to submit the case to a different judge for adjudication based on the record from the first trial, including all testimony and exhibits. Following its review of that record, in addition to briefs filed by both parties, the court, *Schuman*, *J.*, issued a memorandum of decision wherein it rendered judgment for the defendant on both of the plaintiff's breach of contract claims. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in rejecting its breach of contract claim as to the fire protection systems in that it failed to determine the applicable law and apply that law to the evidence to determine whether those fire protection systems violated the Arkansas State Fire Code. We disagree.

The following additional procedural history is relevant to our consideration of this claim. In count one of its complaint, the plaintiff alleged that, in 2008, following the transfer of ownership of the subject property, DuPont conducted a fire assessment to determine whether the plant was compliant with applicable fire protection laws. The assessment and associated report (FPA report) concluded that the defendant had been operating the business in violation of applicable fire safety laws at the time of the sale.[7] The plaintiff alleged

[7] The Fire Protection Assessment (FPA), which was prepared by members of DuPont's Safety Fire Protection and Environmental Engineering Group, indicated that, "[a]t the time the site was built, the fire protection code to be used was the 1982 Southeast Fire Protection Code. This version of the code required the use of [National Fire Protection Association (NFPA)] fire codes. Process additions, modifications and changes were made to a number of manufacturing processes at the site over time, including the installation of the TFPII process in 1998. Each project should have followed the NFPA code in place at the time of the respective project. . . . Below are detailed

that the assessment revealed "at least nine violations of the National Fire Protection Association (NFPA) codes" in that the fire protection systems "did not comply with NFPA §§ 13 (Standard for Installation of Sprinkler Systems), 24 (Standard for Installation of Private Fire Service Mains), 45 (Standard on Fire Protection for Laboratories Using chemicals),[8] 58 (Liquefied Petroleum Gas Code) and 101 (the Life Safety Code) . . . . These provisions of the NFPA, which Arkansas has adopted as its Fire Prevention Code, have been in place since 1982."

At trial, the plaintiff sought damages for money spent replacing four fire protection systems that allegedly were in violation of the standards set by the NFPA and incorporated by the Arkansas State Fire Code: (1) the deluge valve house for the ethylene storage tank; (2) the deluge valve house for the TFP process;[9] (3) the deluge sprinkler system for the FM 200 Therminol 66 heater and tank;[10] and (4) the safety equipment for the TFP railcar loading station.

On January 14, 2022, following remand from the Supreme Court, the plaintiff filed a motion in limine asking the court to take judicial notice of NFPA 13 (1989), NFPA 58 (1989) and NFPA 101 (1988), which were incorporated by reference into the 1992 edition

reviews and the recommendation for each of the respective areas, based on the Southeast Fire Protection Code and applicable NFPA fire codes. A Building Life Safety Code review is highly recommended if it has not already been performed. A building code review would cover construction requirements, egress, emergency lighting, access, fire walls/doors, etc." Neither the 1982 Southeast Fire Protection Code nor a Building Life Safety Code were ever submitted to the court.

[8] No portions of NFPA 24 or 45 were presented to the court.

[9] As set forth in the trial court's memorandum of decision, TFP stands for trifluoropropene, a flammable chemical.

[10] The trial court's memorandum of decision noted that the Therminol 66 heater and tank are used in a flammable process to manufacture FM 200, a liquified gas.

of the Arkansas State Fire Code that had been admitted into evidence at the first trial. In that motion, the plaintiff also asked the court to take judicial notice of "the 1965 Arkansas Fire Prevention Code and NFPA Codes 13 [1964] and 101 [1963] incorporated therein," purporting to demonstrate that "the applicability of NFPA Codes to the fire safety equipment at the plant and that the principles material to the issues in this case pertaining to NFPA 13 and NFPA 101 have remained constant since 1965." Finally, the plaintiff asked the court to take judicial notice of NFPA 13 (1978), NFPA 58 (1974) and NFPA 101 (1973). After hearing argument from both parties, the court, *Pierson*, *J.*, granted the plaintiff's motion in the "limited sense" that it took judicial notice only of "the 1992 Arkansas State Fire Code, which adopts and incorporates certain NFPA provisions . . . ." The plaintiff had introduced into evidence, at the 2018 trial, thirty-two pages from the 1992 Arkansas State Fire Code. The plaintiff attached to its motion in limine four pages from NFPA 13 (1989), six pages from NFPA 58 (1989) and seven pages from NFPA 101 (1988).[11]

On April 29, 2022, the plaintiff filed with the trial court a document titled "Plaintiff's Statement of Law and Legal Theories of the Case," wherein it alleged, inter alia, that "[t]he 1992 Arkansas State Fire Code incorporates by reference NFPA 13 (1989), NFPA 58 (1989) and NFPA 101 (1988), all of which were in effect at the time that [the defendant] installed and established the TFP and FM200 fluorine businesses acquired by DuPont."

On June 28, 2022, the plaintiff filed a posttrial brief setting forth, inter alia, its claimed violations of the

[11] Although the plaintiff submitted pages from the 1965 Arkansas Fire Prevention Code and additional editions of the NFPA, the court declined to take judicial notice of them.

NFPA as to each of the four fire protection systems at issue.[12] The plaintiff attached to its posttrial brief five additional pages from NFPA 13 (1989),[13] five pages from NFPA 101 (1988) and four pages from NFPA 58 (1989).[14]

In its July 18, 2022 memorandum of decision, the court began its consideration of the plaintiff's fire protection claims by noting that the "parties agreed, and the court finds, that the 'applicable law' is the state fire code in effect at the time that the system in question was installed." The court explained, however, that "[t]he initial difficulty for the plaintiff is that the evidence ranges from unclear to completely missing as to when the defendant installed each of the four systems at issue. The testimony was that the defendant installed the TFP process . . . 'around 1998' . . . or that the plaintiff authorized the project in 1998 and installed it 'shortly thereafter.' . . . For the FM 200 Therminol 66 heater and tank . . . the evidence is that the defendant installed the system some undefined time after it ceased making the chemical halon at the end of 1994. . . .

"The related problem in these two cases is that it is not clear what Arkansas [State] Fire Code applies. There is a 1992 Arkansas [State] Fire Code in the record, which might have been applicable at the time of the installation of these two systems. . . . But there were subsequent Arkansas [State] Fire Codes promulgated in 1999, 2002, and 2007, all of which predated the APA

[12] For example, the plaintiff claimed that the deluge valve violates NFPA 13 § 5-3.2 (1989). That subsection of § 5-3 (Preaction and Deluge Systems) is titled "Description" and provides in relevant part: "Preaction and deluge systems are normally without water in the system piping. The water supply is controlled by an automatic valve operated by means of fire detection devices and provided with manual means for operation that are independent of the sprinklers. . . ."

[13] The pages appended to the posttrial brief were completely different from those submitted with the motion in limine.

[14] The plaintiff attached to its posttrial brief two pages from NFPA 13 (1964) and five pages from NFPA 13 (1978).

and some or all of which could, alternatively, have been the applicable code at the time of installation of each of these two systems. . . .

"Without knowing what version of the state fire code applies, the court cannot determine the applicable NFPA standards. The 1992 code refers to the 1989 NFPA standards for the installation of sprinkler systems, but it is not clear that the 1992 code applies. . . . And it is uncertain whether subsequent codes refer to the 1989 standards or later standards, the contents of which are unknown.

"The final difficulty is that a violation of NFPA standards is not necessarily a violation of the state fire code. The 1992 Arkansas [State] Fire Code provides: 'Where provisions of this Code do not apply to specific situations involving the protection of life and property from the hazards of fire, smoke and explosion, compliance with nationally recognized standards or publications listed in this chapter, when not in conflict with provisions of the Building Code, shall be evidence of compliance with this Code.' . . . The plaintiff provides no analysis or evidence addressing the questions of whether provisions of the code apply to the specific situations at issue, whether the NFPA standards are in conflict with the Code, and whether a violation of the standards is automatically a violation of the Code, rather than merely evidence of noncompliance. For all these reasons, the plaintiff has failed to prove, with respect to the deluge valve house for the TFP process and the FM 200 Therminol 66 heater and tank system, that the defendant violated 'applicable law' and therefore breached its contract.

"This conclusion is even more obvious for the remaining two systems: the deluge valve house for the ethylene storage tank and the railcar loading station.

There is no evidence at all concerning when the [defendant] installed these two systems. Thus, the applicable law is simply unknown." (Citations omitted; footnotes omitted.)

On appeal, the plaintiff argues that the trial court "had the necessary information to determine and apply the applicable law and was statutorily required to do so" and, alternatively, that the fire systems at issue violated all potentially applicable editions of the Arkansas State Fire Code. We address each of these arguments in turn.

In arguing that the court had the necessary information to determine the applicable law, the plaintiff argues that, "[w]hile the defendant failed to produce evidence establishing with particularity when it constructed each system, there is sufficient evidence in the record to establish the time frames for construction such that the court can determine which Arkansas [State] Fire Code applies to each system." The plaintiff contends that the court's determination that the evidence was unclear was clearly erroneous. "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.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

In support of its argument that the evidence adduced at trial demonstrated that the 1992 Arkansas State Fire Code applies to each system at issue, the plaintiff addresses separately each of the four fire systems at issue: the deluge valve house for the ethylene storage tank, the deluge valve house for the TFP process, the TFP railcar loading station and the FM200 Therminol 66 heater and tank. As to the deluge valve house for

the ethylene storage tank, the deluge valve house for the TFP process and the TFP railcar loading station, the plaintiff cites to the same two or three pages of deposition or trial testimony of Gregory Barron, a former employee of the defendant. In the portion of testimony cited by the plaintiff, Barron testified that he could not remember exactly when those systems were installed but that it would have been sometime after 1998. The court cited to this very testimony in finding that the evidence as to the dates of construction was unclear. Likewise, as to the FM200 Therminol 66 heater and tank, the plaintiff cites to Barron's testimony indicating that it was installed sometime after 1994. The court also cited to that testimony in finding that the evidence as to the date of construction was unclear. Although the plaintiff is correct in that the evidence established "time frames" for the installation of the fire protection systems at issue, the court aptly noted that those time frames could have implicated any of four different editions of the Arkansas State Fire Code, 1992, 1999, 2002 or 2007. Because the evidence did not assist the court in ascertaining the dates of installation of those systems, and, thus, identifying the applicable law, the court's characterization of that evidence as unclear was not erroneous.

The plaintiff nevertheless contends that the court erred in rejecting its fire protection claims because the fire protection systems at issue violated every potentially applicable version of the Arkansas State Fire Code. It is well settled that, "if a party wants the court to take judicial notice of foreign law, it is that party's responsibility not only to bring the statutory law to the attention of the court in the proper manner, but also to inform the court, through proper means, of the meaning or construction of the law by courts of that foreign jurisdiction. Matter which it is claimed the court should judicially notice should be called to its attention by the

party seeking to take advantage of the matter so that, if there is ground upon which it may be contradicted or explained, the adverse party will be afforded an opportunity to do so. . . . Where another jurisdiction's law is applicable, it is the duty of counsel to supply the court with a clear understanding of that foreign law." (Citations omitted; internal quotation marks omitted.) *Pagliaro* v. *Jones*, 75 Conn. App. 625, 634–35, 817 A.2d 756 (2003).

Our thorough review of the record reveals that the plaintiff failed to supply the court with a clear understanding of the foreign law that is applicable to its claims—the Arkansas State Fire Code.[15] The flaws of the plaintiff's argument that the fire protection systems at issue violated every potentially applicable edition of the Arkansas State Fire Code are multifold and can be gleaned by examining the portion of the 1992 Arkansas State Fire Code that the plaintiff introduced into evidence. As noted previously, the plaintiff submitted to the court thirty-two pages of the 1992 Arkansas State Fire Code. Those thirty-two pages include fifteen pages from Chapter 3, which is titled "Recognized Standards

[15] The plaintiff argues: "To the extent the court wanted to verify the parties' evidence that the NFPA standards have not materially changed during the relevant time frame, it should have reviewed the text of the NFPA provisions before it. Indeed, the court, *Pierson*, *J.*, expressly took judicial notice of the relevant NFPA standards incorporated into the 1992 Arkansas Fire Code (i.e., NFPA 13 (1989), NFPA 58 (1989) and NFPA 101 (1988)) . . . as well as earlier versions of these NFPA standards (i.e., NFPA 13 (1964 and 1978), NFPA 58 (1974) and NFPA 101 (1963)), incorporated into earlier editions of the Arkansas [State] Fire Code." (Citations omitted.) This representation of the record is not accurate. The court did not grant the plaintiff's motion in limine "insofar as it would take judicial notice of the requested materials, as the plaintiff represents." The record reflects that the court, *Pierson*, *J.*, took judicial notice only of "the 1992 Arkansas State Fire Code, which adopts and incorporates certain NFPA provisions . . . ." It did not take judicial notice of any earlier versions of the Arkansas State Fire Code or NFPA provisions. Furthermore, the court found that it was uncertain as to whether any versions of the code *after 1998* applied, and the plaintiff never asked the court to take judicial notice of such later versions of the code.

and Publications." Section 301, titled "General," provides: "Where provisions of this Code do not apply to specific situations involving the protection of life and property from the hazards of fire, smoke and explosion, compliance with nationally recognized standards or publications listed in this chapter, when not in conflict with provisions of the Building Code, shall be evidence of compliance with this Code."[16] Following that explanation is the list of those standards or publications, which includes specific NFPA provisions, the year of enactment of those specific provisions and the corresponding section of the Arkansas Fire Code to which each of those NFPA provisions applies. For example, the list includes "[NFPA] 13 Installation of Sprinkler Systems, 1989," and the corresponding sections of the Arkansas State Fire Code are §§ 2203.1.15.1, 2203.12.2.3 and 2204.1.17. The plaintiff did not submit for the record those sections of the Arkansas State Fire Code. The list also includes "[NFPA] 58 Storage and Handling of Liquified Petroleum Gases, 1989," and the listed corresponding sections of the Arkansas State Fire Code are §§ 1701.4.1, 1701.4.4 and T2201.2.2. The plaintiff did not submit for the record those sections of the Arkansas State Fire Code. The list also includes "[NFPA] 101 Life Safety Code, 1988," and the listed corresponding section of the Arkansas State Fire Code is § 801.2. The plaintiff did not submit for the record this section of the Arkansas State Fire Code. Rather, the only substantive portions of the 1992 Arkansas State Fire Code submitted by the plaintiff is a portion of Chapter 6, specifically §§ 601.1 through 603.19.5. Nowhere in those sections, which comprise ten pages, are NFPA 13, 58 or 101 expressly referenced. It is therefore not clear from the record which provisions of the Arkansas State Fire

[16] The plaintiff never disclosed or addressed this prefatory language of the Arkansas State Fire Code and provided no evidence or argument that would support a determination that the NFPA provisions on which it relied were not in conflict with the Building Code.

Code the plaintiff is alleging the defendant violated as to the fire protection systems at issue. Moreover, because the Arkansas State Fire Code does not incorporate all NFPA standards, each edition may have incorporated different NFPA standards. Without examining all of the potentially applicable versions of the Arkansas State Fire Code, which were not provided to the court, there was no basis on which the court could have determined that the fire protection systems at issue violated all of them.

Moreover, the trial court was correct in that it is not clear, on the basis of the record in this case, that a failure to comply with an NFPA provision constituted a violation of the Arkansas State Fire Code. For instance, in its complaint, the plaintiff cited to the violation of NFPA 13 cited in the FPA report as to the deluge valve. According to the FPA report, "NFPA 13 states the following requirement: 'With deluge systems, the deluge valve should be located as close as possible to the hazard protected, outside any fire or explosion hazard area.' " That language on which the FPA report relies[17] is contained in § B-5-1.2 of Appendix B to NFPA 13. It is clearly stated in NFPA 13, however, that "[t]he Appendix is not a part of this NFPA Standard for the Installation of Sprinkler Systems but is included for information purposes only."[18] The plaintiff provided the court with no analysis as to whether a failure to comply

[17] In its January 14, 2022 motion in limine asking the court to take judicial notice of certain NFPA provisions, the plaintiff cited to those same pages of the FPA report as the basis of its claimed violation of NFPA 13. The plaintiff cited to the same pages of the FPA report in its April 29, 2022 "Statement of Law and Legal Theories of the Case."

[18] The plaintiff did not provide to the court the portion of NFPA 13 that explained this; nor did the plaintiff inform the court that this language was contained in the Appendix and that it was not a part of the NFPA standard. This information was presented by the defendant through its introduction into evidence of a complete version of NFPA 13 (1978), which consists of more than 200 pages.

with this language, which explicitly was not a part of the NFPA standard, constituted a violation of the Arkansas State Fire Code.[19]

The court explained: "The court can and will take judicial notice of the existence of these subsequent state fire codes. See General Statutes § 52-163a (a). But it is the plaintiff's burden to prove the 'applicable law' under the APA, and the court will not speculate as to which code applies or attempt to determine the provisions of that code on its own. . . . The parties dispute whether the standards vary over the years. The court cannot resolve this dispute without seeing the actual standards that apply." We agree with the court's determination that the plaintiff failed to supply it with a clear understanding of the law on which its claims are based. Throughout the course of this litigation, the "applicable law" that the plaintiff has alleged that the defendant failed to abide has been a proverbial moving target, ultimately ending with the plaintiff's "catchall" position that the defendant violated every potentially applicable version of the Arkansas State Fire Code. The plaintiff, however, did not provide the court with those versions, leaving the court to figure that out for itself. The plaintiff submitted to the court only portions of certain NFPA standards on which it, at times, has relied and only one version of a portion of one edition of the Arkansas State Fire Code. As this court has explained, "[a]t bottom, [i]t is not the court's duty, unaided by the [plaintiff], to scour the annals of the law of [foreign jurisdictions] . . . in an effort to locate or to fashion a hook upon which [the plaintiff's claim] can be hung." (Internal quotation marks omitted.) *Olson* v. *Olson*, 214 Conn. App. 4, 19, 279 A.3d 230, cert. denied, 345 Conn. 918,

[19] Additionally, the testimony at trial revealed that there are exceptions to the requirement that certain systems comply with the NFPA in that the "authority having jurisdiction" may consider exceptions as to the design and location of deluge valve houses.

284 A.3d 299 (2022). On the basis of the foregoing, we cannot conclude that the court erred in rejecting the plaintiff's fire protection claims.

II

The plaintiff also claims that the court erred in rejecting its claim for damages to replace the refrigeration units at the plant. Specifically, the plaintiff argues that the court misinterpreted the federal regulations and improperly concluded that it was not necessary to replace refrigeration units that leaked ozone depleting substances at rates exceeding the statutory threshold.[20] We are not persuaded.

In rejecting the plaintiff's refrigeration claims, the court reasoned: "The plaintiff claims a breach of contract because two refrigeration [units] leaked refrigerant regularly and excessively despite numerous repairs

[20] The plaintiff also challenges the court's determination that it failed to comply with the side letter's requirement that the parties "select a nationally recognized independent industrial refrigeration appliance expert" to mutually determine retrofit or replacement. The court explained: "It is undisputed that there was no 'mutual determination of the parties' on retrofit or replacement. Thus, the issue is whether there was compliance with the requirement that the parties 'select a nationally recognized independent industrial refrigeration appliance expert . . . .' The plaintiff hired Terry Dyer, a . . . refrigeration design expert [formerly employed by the defendant], for advice on refrigeration issues. Although it may seem that hiring an expert from the opposing party would conform to the opponent's wishes, there was no evidence to that effect and no indication that the defendant even participated in the selection process. Further, it is not clear that Dyer met the criteria of a 'nationally recognized independent industrial refrigeration appliance expert . . . .' The plaintiff's failure to comply with the side letter's procedural requirements in this respect provides an additional reason why it cannot recover for replacement of the refrigeration units."

In challenging the court's determination that it failed to comply with the requirements of the side letter, the plaintiff additionally argues that the court erred in requiring that it strictly comply with those requirements and, instead, should have employed a substantial compliance analysis. The plaintiff argues that it substantially complied by retaining Dyer. Even assuming, arguendo, that the proper standard is whether the plaintiff substantially complied with the requirements of the side letter, we are not persuaded by the plaintiff's substantial compliance argument. We instead conclude that

and ultimately required replacement in 2012 and 2015 at [a] total cost of $508,698.68. The plaintiff's brief, however, is not clear on precisely what contractual provision the defendant allegedly breached. It appears from a generous reading of the brief that the plaintiff is claiming that the refrigerant leaks violated United States Environmental Protection Agency (EPA) regulations, which in turn constituted a breach of the defendant's warranty in the January, 2008 APA that '[t]he Business and Transferred Assets, are, and for the last three years have been, in compliance with, and are not subject to any liability under, any Environmental Law.' . . .

"There is, in fact, evidence that the defendant's refrigeration units were not in compliance with federal regulations during the three years prior to closing. In a January, 2008 letter to the EPA, Great Lakes Chemical Company (GLCC), a subsidiary of the defendant, disclosed 'its discovery of violations under the ozone depleting substances regulations, 40 CFR § 82 ("ODS regulations")' at the 'South Plant.'[21] The letter admitted that GLCC had 'failed to follow the recordkeeping requirements in the ODS Regulations and that there have been, or may have been, other instances of failure to verify repairs under the ODS Regulations.' The letter noted 'some instances in which leak rates exceeded 35 [percent]' and acknowledged that there may have been 'emissions above permitted levels.' . . . There was also testimony confirming that these violations occurred in the refrigeration units. . . . An exhibit showed that refrigeration machine RU-86-802 had an annual leak rate of 52.08 percent in 2006 and that

the court's analysis was correct, whether the standard is strict or substantial compliance.

[21] "The APA identifies 'Plant Site' as the 'manufacturing site of Seller or GLCC known as 'Chemtura South Plant' with an address of 324 Southfield Cutoff, El Dorado, AR . . . .' "

machine RU-86-807 had leak rates of 172.44 percent in 2006 and 152.24 percent in 2007. . . . Under the regulations, '[r]epairs must bring the annual leak rate to below 35 percent.' 40 C.F.R. § 82.156 (i) (1). . . . Therefore, the evidence does establish a probable violation of the defendant's warranty that its units 'are, and for the last three years have been, in compliance with, and are not subject to any liability under, any Environmental Law.'

"The more difficult question is whether the plaintiff proved that the replacement of these two units in 2012 and 2015 stemmed from the regulatory violations in 2006 and 2007. Under New York law, it is the plaintiff's burden to prove that 'the breach resulted in damages to the party claiming breach.' *Van Wie Chevrolet, Inc.* v. *General Motors, LLC*, 145 App. Div. 3d 1, 11, 38 N.Y.S.3d 662 (2016), leave to appeal denied, 28 N.Y.3d 913, 73 N.E.3d 358 (2017).

"An exhibit showed that these two units had annual leak rates that frequently exceeded 35 percent from 2008 on. . . .[22] But federal regulations generally do not require replacement of a leaking refrigeration unit. Instead, in the first instance, '[t]he owners or operators of industrial process refrigeration equipment normally containing more than 50 pounds of refrigerant must have leaks *repaired* if the appliance is leaking at a rate such that the loss of refrigerant will exceed 35 percent of the total charge during a 12-month period . . . .' (Emphasis added.) 40 C.F.R. § 82.156 (i) (2). Only if the first round of repairs are unsuccessful do the regulations create a qualified obligation on the owner to 'retrofit or retire the equipment.'[23] The qualification is that,

[22] "For unit RU-86-802, annual leak rates were 100 percent in 2008, 45.42 percent in 2009, and 101.25 percent in 2011. For unit RU-86-807, annual leak rates were 100 percent in 2009, 115.38 percent in 2011, and 110.26 percent in 2012."

[23] "40 C.F.R. § 82.156 (i) (3) (ii) provides [in relevant part]: 'If the follow-up verification test indicates that the repairs to industrial process refrigeration equipment, federally-owned commercial refrigeration equipment, or feder-

if the owner successfully repairs the unit on a second try,[24] or establishes that the annual leak rate will not exceed 35 percent,[25] the regulations relieve the owner of the obligation to replace.

"The plaintiff's brief states that it replaced the two refrigeration [units] because they 'leaked R22 refrigerant at annual rates in excess of 35 percent,' they were 'undersized,' and 'attempts to repair the machine[s] so that [they] could be operated in accordance with ODS regulations were unsuccessful.' . . . A review of the authorities cited by the plaintiff for this proposition reveals that they do not support it. To the extent that there is any evidence addressing the reasons that the plaintiff replaced these two units, that evidence does not include leakage from 2006 and 2007 as a reason.[26] And there was no evidence that repairs were unsuccessful. On the contrary, the testimony was that the repair efforts worked, if not on the first try, then on the second. . . .

"More specifically, it is simply unclear whether the need to replace these two units stemmed from the leaks

ally-owned comfort cooling appliances have not been successful, the owner or operator must retrofit or retire the equipment . . . .' "

[24] "40 C.F.R. § 82.156 (i) (3) (iv) provides [in relevant part]: 'The owner or operator is relieved of the obligation to retrofit or replace the industrial process refrigeration equipment as discussed in paragraph (i) (6) of this section if second repair efforts to fix the same leaks that were the subject of the first repair efforts are successfully completed within 30 days or 120 days where an industrial process shutdown is required, after the initial failed follow-up verification test. . . .' "

[25] "40 C.F.R. § 82.156 (i) (3) (v) provides [in relevant part]: 'The owner or operator of industrial process refrigeration equipment is relieved of the obligation to retrofit or replace the equipment in accordance with paragraph (i) (6) of this section if within 180 days of the initial failed follow-up verification test, the owner or operator establishes that the appliance's annual leak rate does not exceed the applicable allowable annual leak rate . . . .' "

[26] "A 2012 memo from [DuPont] states that the [units] in question 'were to be selected for replacement based on (in order of priority) type of refrigerant used (HFC vs. HCFC), system maintenance costs and remaining life, as well as system capacity considerations.' "

in 2006 and 2007, which were the basis for the contractual breach, rather than the faulty performance of these units in subsequent years. The plaintiff did not present an expert on causation to establish this connection. Thus, the state of the record is that federal law did not require the plaintiff to replace these units, that the replacement decision could well have stemmed from the regular history of leakage after the closing, and that the real reason that the plaintiff replaced these units is unknown. Based on all [of] these factors, the court concludes that the plaintiff did not meet its burden to prove that the replacement damages resulted from the earlier contractual violations." (Citations omitted; footnotes added; footnotes altered; footnotes in original.)

On appeal, the plaintiff first claims that the court misinterpreted the federal regulations when it held that "federal regulations generally do not require replacement of a leaking refrigeration unit." In so claiming, the plaintiff ignores the court's explanatory sentences that follow, which set forth the option to repair such units prior to triggering the requirement to replace them, an option that the regulations clearly provide.[27] A full reading of the court's opinion reveals that the court did not misinterpret the federal regulations.

The plaintiff also challenges the court's determination that the plaintiff failed to prove that its replacement of the refrigeration units at issue was caused by the excessive leak rates in 2006 and 2007. "In order to prove a breach of contract cause of action, the plaintiff must prove that a defendant's breach was the proximate cause of its damages. . . . The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. . . . In the law of contracts, as in torts, causation in fact is established if the defendant's breach of

[27] See footnote 23 of this opinion.

duty was a substantial factor in producing the damage. . . . This test is satisfied if the defendant's actions would be thought of by people generally as having operated to an important extent in producing the harmful result. . . . It is not necessary that the breaches be the exclusive cause or the *sole* cause of the damages. . . . Damages must nevertheless be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Federal Housing Finance Agency* v. *Morgan Stanley ABS Capital I Inc.*, 59 Misc. 3d 754, 783–84, 73 N.Y.S.3d 374 (2018). "Generally, it is for the trier of fact to determine the issue of proximate cause. However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts . . . ." (Internal quotation marks omitted.) *Lola Roberts Beauty Salon, Inc.* v. *Leading Ins. Group Ins. Co., Ltd.*, 160 App. Div. 3d 824, 826, 76 N.Y.S.3d 79 (2018).

"The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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.) *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, 221 Conn. App. 256, 279–80, 301 A.3d 1111, cert. denied, 348 Conn. 924, 304 A.3d 442, and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023).

In challenging the court's causation analysis, the plaintiff claims that the court erred in finding that the plaintiff failed to prove that the 2006 and 2007 leak

rates were the exclusive cause of the replacement of the refrigeration units at issue and that, instead, it should have considered whether they were a proximate cause of the replacement of those units. This argument is not supported by a fair reading of the court's decision. Nowhere in its decision does the court hold, expressly or implicitly, that the plaintiff was required to prove that the 2006 and 2007 excessive leak rates were the exclusive cause of the eventual replacement of those units in 2012 and 2015. Accordingly, the plaintiff's claim that the court erred by applying the wrong legal standard is without merit.

The plaintiff also argues that "there is no question that the need to replace [the refrigeration units at issue] was a consequence that 'ordinarily and naturally flowed' from the fact that, when the defendant transferred the units, they had been leaking in excess of the statutory threshold for at least one or two years prior to the closing, without appropriate repairs (or records thereof), and continued to leak in excess of the statutory threshold for multiple years after the closing despite repair efforts." The plaintiff contends that, "[i]f the machines had not been perpetually leaking when DuPont acquired them, they would not need to be replaced." As the court noted, the plaintiff did not present expert testimony in support of these assertions. Indeed, as the court also noted, there was evidence presented at trial indicating that the refrigeration units "were to be selected for replacement based on (in order of priority) type of refrigerant used (HFC vs. HCFC), system maintenance costs and remaining life, as well as system capacity considerations." Accordingly, we cannot conclude that the court's determination that the plaintiff failed to prove that the excessive leaking of refrigerant in 2006 and 2007 caused the 2012 and 2015 replacement of the refrigeration units was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

JESSICA ROMAN *v.* A&S INNERSPRINGS USA, LLC (AC 46206)

Alvord, Elgo and Prescott, Js.

Syllabus

The plaintiff sought to recover damages for the alleged wrongful termination of her employment by the defendant, which she claimed was the result of pregnancy discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The plaintiff, who previously had worked for the defendant, was rehired in November, 2017, in a quality assurance position that required her to work on the defendant's manufacturing floor. In January, 2018, the plaintiff notified the defendant that she was pregnant and, consequently, could no longer work in a manufacturing position. Pursuant to the defendant's policy, as set forth in its employee handbook, any employee who was disabled as a result of pregnancy was entitled to an unpaid leave of absence and the defendant was required to make a reasonable effort to transfer the employee to any suitable temporary position that was available at the time it received notice of the employee's pregnancy. The plaintiff signed paperwork to take maternity leave on January 25, 2018. She alleged that, although there was an open administrative position in February, 2018, the defendant told her that no such position was available and encouraged her to "stay home and take care of the baby." Between October, 2017, and October, 2018, the defendant experienced a significant downsizing of its business, reducing its workforce from approximately thirty-three employees to fourteen. In September and October, 2018, the plaintiff reached out to M, the defendant's chief executive officer, asking for a status update. M informed the plaintiff that the defendant was planning to hire a new administrative worker and that she could apply for the position, however, it was not yet being advertised. He encouraged her to reach out to her former supervisor, S, for additional information. In November, 2018, the plaintiff contacted S, who informed her that she could not return to her prior position, as the department it was in had closed and the position no longer existed. He noted, however, that an administrative position was available and that she could apply for it or meet with him to discuss it further. There was no evidence in the record indicating that the plaintiff thereafter applied to the position or contacted S for additional

information. On May 31, 2019, the plaintiff filed an employment discrimination complaint with the Commission on Human Rights and Opportunities. Thereafter, the commission issued a release of jurisdiction over the complaint, and the plaintiff commenced the present action against the defendant, claiming that it had discriminated against her by failing to transfer her to an administrative position in February, 2018, by terminating her employment effective October 30, 2018, and by failing to rehire her. The defendant filed a motion for summary judgment, arguing that the complaint was untimely pursuant to the applicable statute ((Rev. to 2017) § 46a-82 (f)) because none of the alleged acts of discrimination occurred within 180 days of the filing of the plaintiff's complaint with the commission. The trial court granted the defendant's motion, and the plaintiff appealed to this court. *Held:*

1. The trial court properly rendered summary judgment for the defendant because it did not err in determining that the plaintiff's claims of three distinct acts of pregnancy discrimination failed: the plaintiff's claims that the defendant discriminated against her by failing to transfer her to an open administrative position in February, 2018, and by terminating her employment effective as of October 30, 2018, were barred by the statute of limitations because they were outside of the 180 day limitation period contained in (Rev. to 2017) § 46a-82 (f), as they occurred prior to December 2, 2018; moreover, although any claim that the defendant engaged in pregnancy discrimination by failing to rehire the plaintiff on or after December 2, 2018, was not barred by the statute of limitations, the trial court properly found that no genuine issue of material fact existed as to whether the plaintiff had met her burden of establishing a prima facie case of discrimination with respect to such failure in accordance with the framework established in *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792), because, even when viewed in the light most favorable to the plaintiff, nothing in her email exchange with M, which she relied on to support her claim, demonstrated that she suffered an adverse employment action on or after December 2, 2018, as there was no evidence in the emails that the defendant had any open positions in January or February, 2019, or that the plaintiff had applied for any open positions with the defendant, and the plaintiff admitted that she had never asked M if she could return to work for the defendant nor did she apply for a job with any employer between October 30, 2018, and June, 2019, when she returned to school.
2. Contrary to the plaintiff's claim, the continuing course of conduct doctrine did not operate to toll the limitation period set forth in (Rev. to 2017) § 46a-82 (f) for the acts of discrimination that allegedly occurred prior to December 2, 2018: the doctrine did not apply to the plaintiff's claims that the defendant improperly failed to transfer her to an administrative position that was open in February, 2018, and terminated her employment effective October, 2018, because that doctrine does not recognize an act or omission that is discrete and attributable to a fixed point in

time and, accordingly, the plaintiff was required to file a complaint with the commission within the statutory limitation period that commenced after each act occurred; moreover, the doctrine did not apply to the plaintiff's failure to rehire claim, even though her pleadings relating to that claim were general in nature and, when broadly construed, encompassed conduct that transpired before and after December 2, 2018, because the failure to rehire was not a continuing violation and the plaintiff failed to establish that an adverse employment action occurred on or after December 2, 2018.

Argued November 6, 2023—officially released January 23, 2024

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sicilian, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Melinda B. Kaufmann, for the appellee (defendant).

Opinion

ELGO, J. In this employment discrimination action, the plaintiff, Jessica Roman, appeals from the summary judgment rendered by the trial court in favor of the defendant, A&S Innersprings USA, LLC. On appeal, the plaintiff claims that the court improperly determined that (1) no genuine issue of material fact existed as to whether certain claims of pregnancy discrimination were time barred, as they occurred outside the 180 day limitation period contained in General Statutes (Rev. to 2017) § 46a-82 (f),[1] (2) the plaintiff failed to establish a prima facie case of discrimination on her claim that

[1] General Statutes (Rev. to 2017) § 46a-82 (f) provides in relevant part that "[a]ny complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination . . . ." Hereinafter, all references in this opinion are to the 2017 revision of the statute.

the defendant failed to rehire her on or after December 2, 2018, and (3) the continuing course of conduct doctrine did not toll the statute of limitations contained in § 46a-82 (f) with respect to any untimely claims. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to this appeal. The defendant is a small business located in Windsor Locks that manufactures innersprings for mattresses. It employed the plaintiff as an office assistant from April, 2016, to June, 2017, when she was dismissed for cause.[2] The defendant rehired the plaintiff in November, 2017, for a quality assurance position. That position involved various responsibilities on the manufacturing floor, including quality inspection.

On January 23, 2018, the plaintiff notified the defendant that she was pregnant. Her pregnancy disabled her from working in a manufacturing position. Per company policy, as documented in the defendant's employee handbook, "[a]ny employee who is disabled [as] a result of pregnancy is entitled to an unpaid leave of absence of a reasonable duration. . . . In addition, the [defendant] will make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available when the employee gives written notice of her pregnancy . . . ." In her complaint filed in this action, the plaintiff alleged that, although the defendant had an open administrative position in February, 2018, it told her that no such position was available and encouraged her to "stay home and take care of

[2] Appended to the defendant's memorandum of law in support of its motion for summary judgment were a disciplinary report dated June 27, 2017, regarding a written warning that the defendant issued to the plaintiff for insubordination, poor attitude, and "not performing assigned duties," and a document memorializing the plaintiff's termination of employment with the defendant as of June 29, 2017.

the baby."[3] The plaintiff signed paperwork to take a maternity leave of absence on January 25, 2018.

It is undisputed that, at the time of the plaintiff's pregnancy, the defendant experienced a significant downsizing of its business. As the defendant's plant manager, Hernando Calle, stated in a sworn affidavit dated January 31, 2022, the defendant "reduced its workforce from approximately 33 employees in October 2017 to 14 employees in October 2018."

On September 5, 2018, the plaintiff sent an email to Dominik Meyer, the defendant's chief executive officer, in which she stated: "Hello, Hope all is well. Hope you guys didn't forget about me? What's going on these days?" In his September 7, 2018 email reply, Meyer stated that he was "on vacation right now. Let us have a chat end of September. How is everything at your side? Hopefully you and your little one are doing [good]." The plaintiff sent another email to Meyer on September 17, 2018, in which she informed him that she gave birth to her child on September 14, 2018, and that "she and I are great . . . . I had [a] cesarean section done and need time to recover . . . but yes I'll be looking forward to speaking with you and I'm glad you are doing well yourself."

On October 30, 2018, the plaintiff again emailed Meyer and asked: "Can I please get an update of what's going on?" By email dated November 1, 2018, Meyer replied in relevant part: "[F]irst of all congratulations and thank you [for] still remembering [the defendant] . . . . Hopefully you all are doing great. . . . We do intend

[3] The defendant submitted portions of the plaintiff's December 23, 2021 deposition testimony in support of its motion for summary judgment. In that testimony, the plaintiff stated that, at the time that she informed the defendant of her pregnancy, there were no administrative positions available with the defendant. She further conceded that, although an office manager position opened in February, 2018, she was not fully qualified for that position.

to hire a new employee for office stuff and customer relations. But part of this job will be [Q]uick [B]ooks work and a lot of [E]xcel tasks. In addition the new employee needs to be present (8 hours a day and this [is a] very constant and stable [position]). I am not sure if you could [fulfill] the [E]xcel tasks and if you are able to be in . . . [this] very stable [position]. Maybe much more difficult for you with your newborn. But of course you could send an application to [the defendant] and [I] am sure that they will consider you. I will be more and more out of [the defendant] so this is the best information [I] could give to you at this time. Job offer *is not on* [*the Indeed website*] *right now* [as] we are in a very early stage."[4] (Emphasis added.) Meyer also encouraged the plaintiff to contact Max Schreiner, an employee of the defendant who previously was her quality assurance supervisor, if she had any further questions. The plaintiff then visited the Indeed website and found no job posting by the defendant.

On November 14, 2018, the plaintiff sent a text message to Schreiner and the following exchange ensued:

"[The Plaintiff]: . . . I emailed [Meyer] and I was told to apply for an office position that's coming up . . . but I told him I was confused, wondering why would I need to apply if I was on leave of absence?

"[Schreiner]: That sounds good. [The defendant does] not have a quality assurance position any more. The department has been closed. Yes. Correct. You would have to apply for the administrative position, it is a full time job and posted on [the Indeed website].

"[The Plaintiff]: . . . [S]o I no longer have a job?

[4] "Indeed.com is a website designed to be a resource for job seekers. It includes job postings, salary averages, and a forum where employees and applicants can discuss a company's work environment." *Alaska Structures, Inc.* v. *Hedlund*, 180 Wn. App. 591, 595, 323 P.3d 1082 (2014), review denied, 184 Wn. 2d 1026, 364 P.3d 119 (2016).

"[Schreiner]: . . . [The defendant] can not offer the same job to you as already informed, this position/department has been cancelled/closed. I am sure you remember the [defendant's] situation. We only have one position at the moment and it would be a job, 5 days a week 8 hours each day. If you want to apply or come and visit to talk about this position it is arrangeable."

There is nothing in the record before us indicating that the plaintiff further contacted Schreiner regarding that position or filed an application with the defendant. In fact, the plaintiff testified at her deposition that, following that text message exchange with Schreiner on November 14, 2018, she neither contacted the defendant, submitted an application, nor visited the defendant's office to discuss that position. The plaintiff also has not alleged or provided any evidence that she visited the Indeed website at any time following that November 14, 2018 exchange.

On May 31, 2019, the plaintiff filed an employment discrimination complaint with the Commission on Human Rights and Opportunities (commission), in which she alleged three distinct acts of pregnancy discrimination stemming from (1) the defendant's purported failure to transfer her to an open administrative position in February, 2018, (2) its termination of her employment "effective October 30, 2018," and (3) its failure to rehire her. On October 16, 2019, the commission issued a release of jurisdiction over that complaint.

On January 14, 2020, the plaintiff commenced the present action against the defendant. Her complaint contains one count alleging pregnancy discrimination in violation of General Statutes § 46a-60 (b) (7), a provision of the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq. The allegations of that complaint mirror those set forth in the complaint that the plaintiff filed with the commission and aver

that the defendant failed to transfer her to an open administrative position in February, 2018, and that it "terminated [her] employment effective October 30, 2018." The plaintiff also broadly alleged that the defendant "failed to rehire [her]." In response, the defendant filed an answer and several special defenses. In its first special defense, the defendant alleged that the plaintiff's complaint to the commission "was not timely filed as required under [§] 46a-82 (f) as it does not allege actionable conduct occurring within the 180 days preceding the filing of the complaint with the [commission] . . . ."

On January 31, 2022, the defendant filed a motion for summary judgment. In its accompanying memorandum of law, the defendant argued, inter alia, that "not a single alleged act of discrimination occurred within 180 days" of the filing of the plaintiff's complaint with the commission, rendering it untimely. Appended to that memorandum were several exhibits, including copies of (1) the complaint and corresponding affidavit that the plaintiff filed with the commission, (2) portions of the plaintiff's December 23, 2021 deposition testimony, (3) portions of the defendant's employee handbook, (4) the sworn affidavit of Calle, (5) a series of emails between the plaintiff and Meyer, and (6) the November 14, 2018 text message exchange between the plaintiff and Schreiner.

The plaintiff filed an objection to the motion for summary judgment, as well as a memorandum of law and exhibits that included portions of her deposition testimony, the November 14, 2018 text message exchange with Schreiner, and a series of emails between the plaintiff and Meyer. The defendant filed a reply to that objection on June 3, 2022.

After hearing argument from the parties, the court issued a memorandum of decision in which it concluded

that the plaintiff had not filed a timely complaint with the commission regarding her claims that the defendant improperly failed to transfer her to an open administrative position in February, 2018, and that it improperly terminated her employment on October 30, 2018. The court further concluded that the plaintiff had failed to meet her burden under the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to make out a prima facie case of discrimination with respect to her claim that the defendant failed to rehire her on or after December 2, 2018.[5] Accordingly, the court rendered summary judgment in favor of the defendant, and this appeal followed.

As a preliminary matter, we note the well established standard that governs our review of a trial court's decision to grant a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that

[5] December 2, 2018, was 180 days before May 31, 2019, the date the plaintiff filed her complaint with the commission. In the absence of any tolling, her complaint, therefore, would be untimely as to any acts of discrimination that occurred prior to December 2, 2018.

demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

Pursuant to General Statutes (Rev. to 2017) § 46a-82 (f), any person claiming to be aggrieved by an alleged discriminatory practice is required to file a complaint with the commission "within one hundred and eighty days after the alleged act of discrimination . . . ." As our Supreme Court has held, compliance with that time limit is mandatory unless "waiver, consent, or some other compelling equitable tolling doctrine applies." *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 284, 777 A.2d 645 (2001). In the present case, the plaintiff filed her complaint with the commission on May 31, 2019. She concedes that, for purposes of calculating the limitation period contained in § 46a-82 (f), the operative date is December 2, 2018.

Our analysis, therefore, is twofold in nature. We first determine whether any of the acts of discrimination alleged by the plaintiff occurred within the limitation period circumscribed by § 46a-82 (f) and, if so, whether the plaintiff established a prima facie case of discrimination. We then consider the plaintiff's claim that the continuing course of conduct doctrine operated to toll that statute of limitations with respect to any acts that occurred outside that limitation period.[6]

I

We begin with the material allegations asserted by the plaintiff. In her complaint, the plaintiff alleged three distinct acts of pregnancy discrimination on the part

[6] At no time has the plaintiff alleged that waiver, consent, or some other equitable tolling applies in the present case. Rather, her claim is that the continuing course of conduct doctrine applies.

of the defendant: (1) its failure to transfer her to an administrative position that "was open" in February, 2018; (2) its termination of her employment "effective October 30, 2018"; and (3) its failure to "rehire" her.

A

The first two alleged acts of discrimination occurred prior to December 2, 2018, and, thus, plainly are outside the time limitation of § 46a-82 (f). The plaintiff does not argue otherwise in this appeal. Accordingly, her claims with respect to the defendant's failure to transfer her to an open administrative position in February, 2018, and its termination of her employment "effective October 30, 2018," are barred by that statute of limitations.

B

More nuanced is our analysis of the third act of discrimination alleged by the plaintiff. The plaintiff did not specify any date on which that act allegedly occurred but, rather, simply stated in paragraph 27 of her complaint: "The defendant failed to rehire the plaintiff."[7] To the extent that the defendant's purported failure to rehire the plaintiff occurred prior to December 2, 2018, the plaintiff's claim is time barred.

At the same time, we are mindful that "a court, in deciding a motion for summary judgment, must view the facts in the light most favorable to the nonmoving party . . . ." *Peek* v. *Manchester Memorial Hospital*, 342 Conn. 103, 114, 269 A.3d 24 (2022). We therefore cannot presume that the plaintiff intended to confine her failure to rehire allegation to events occurring prior to December 2, 2018, but, rather, must construe her

[7] In paragraphs 22 and 23 of her complaint, the plaintiff alleged that she "contacted the defendant in October, 2018, about returning to work" and that, "[i]n October, 2018, the defendant told [her] that she could apply for a job."

allegation broadly to also encompass events occurring *on or after* that date. To the extent that the plaintiff alleges that the defendant failed to rehire her on or after December 2, 2018, we conclude that her claim is not barred by the statute of limitations contained in § 46a-82 (f).

C

The question, then, is whether a genuine issue of material fact exists as to whether the plaintiff met her burden under the framework established in *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802–804, to make out a prima facie case of discrimination with respect to her claim that the defendant failed to rehire her on or after December 2, 2018. We conclude that the trial court properly answered that question in the negative.

"The framework this court employs in assessing . . . discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, [supra] 411 U.S. 792 . . . . Under the *McDonnell Douglas Corp.* burden shifting analysis, the employee must first make a prima facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citation omitted; internal quotation marks omitted.) *Rossova* v. *Charter Communications, LLC*, 211 Conn. App. 676, 684–85, 273 A.3d 697 (2022).

With respect to the initial burden under that framework, "a plaintiff establishes a prima facie case of intentional discrimination by showing that (1) [she] is a member of a protected class; (2) [she] was qualified for

the position [she] held; (3) [she] suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to [an] inference of discrimination." (Internal quotation marks omitted.) *Reynolds* v. *Barrett*, 685 F.3d 193, 202 (2d Cir. 2012); see also *Sosa* v. *Robinson*, 200 Conn. App. 264, 290, 239 A.3d 1228 (2020). We focus our attention on the question of whether the plaintiff suffered an adverse employment action on or after December 2, 2018.

In her objection to the motion for summary judgment, the plaintiff argued that, although the defendant had "terminated [her] employment effective October 30, 2018," she "continued to communicate with the defendant about being brought to work following her maternity leave of absence. In January, 2019, [she] was communicating with the defendant about returning to work. . . . The communication continued into February, 2019." (Citation omitted.) As evidence of that communication, the plaintiff attached a series of emails between her and Meyer as an exhibit to her objection. As the court noted in its memorandum of decision, "[d]uring oral argument on the motion for summary judgment, the plaintiff's counsel acknowledged that the only evidence the plaintiff claims to give rise to a disputed issue of fact as to the plaintiff's claim that she continued to seek employment through February, 2019, is a series of email communications contained in [an exhibit] attached to the plaintiff's objection to the motion for summary judgment. Counsel acknowledged that there is no deposition testimony, affidavit, or other evidence relevant to that issue." Those emails, therefore, require close scrutiny.

The email exchange between the plaintiff and Meyer began when Meyer reached out to the plaintiff on January 24, 2019, to inquire on her "status right now."[8] When

[8] The full email from Meyer states: "[H]ow is everything and how is your little baby girl doing? Hopefully everything is fine and you recovered well from your cesarean section. As [I] have written [Schreiner] left [the defendant] end of December. Did you [speak] together or did something happened

she responded on January 28, 2019, the plaintiff stated: "I am very well recovered from the cesarean section, [my daughter] and I are doing great, thanks for asking. Nothing happened between [Schreiner] and I? My status lately is that I am currently seeking employment and considering going back to school. Congratulations! That's exciting. . . . Costa Rica huh, nice choice. I will definitely consider it."

Meyer replied to that email the next morning and the following exchange transpired:

"[Meyer]: . . . [Y]ou did not speak with [Schreiner]? Why not? But nevertheless: What are you looking for? Full-Time, Halftime, Working times? Maybe [I] can help. . . .

"[The Plaintiff]: . . . Are you currently in the [United States]? I'm looking for full time but, I would like to speak with you in person. . . .

"[Meyer]: . . . [I] will be in the [United States] in two weeks . . . . Of course we can speak in person - as always [I] am quite sure that we will figure out something . . . . You said back to school. What in specific you were thinking of? . . .

"[The Plaintiff]: I actually wanted to move towards growing on the experience I already have, I was looking into bookkeeping because I would train in administrative work and also accounting. What do you think? . . .

"[Meyer]: . . . [L]et's speak in detail about this when [I] am back . . . . Maybe you can prepare something and [I] can give you feedback. Until then keep [your]

between you two before he left? [Calle] could not tell me, as he seems to have not been in contact. For your information: I will (need to) take over again the operations in [the defendant] from now on. So please keep me updated what is the / your status right now? Btw.: I have been married in August and was on honeymoon in December 2018 to Costa Rica. If you ever have the chance to go to Costa Rica - you should. Lovely country."

head high and all the best for your kids and especially the newborn."

On February 12, 2019, Meyer again reached out to the plaintiff and stated: "I am here this week. So if good for you to meet. Let's discuss." The plaintiff and Meyer then agreed to meet on Friday, February 15, 2019. On that date, the plaintiff emailed Meyer and stated: "I will not be able to see you today, would Monday be okay to meet?" The following exchange then occurred through email:

"[Meyer]: . . . [I] have an appointment on [M]onday and fly out on [Monday] as well. Will be back in [M]arch otherwise. . . .

"[The Plaintiff]: . . . Until what time will you be there today? . . .

"[Meyer]: 16:30 approximately.

"[The Plaintiff]: Okay.

"[Meyer]: [O]therwise Sunday. Nobody is working today (in production) anyhow."

The plaintiff did not respond further to Meyer that Friday.

On the afternoon of Saturday, February 16, 2019, the plaintiff emailed Meyer and stated: "I'll meet you tomorrow, what time works for you?" In an email sent at 5:44 p.m. the next day, Meyer stated: "[I] was in Boston today. So not in the office. I was waiting on Friday as I expected you to come in. What happened?" No further correspondence between the plaintiff and Meyer is included in the materials submitted by the plaintiff.

Even when viewed in a light most favorable to the plaintiff, nothing in the foregoing email exchange demonstrates that she suffered an adverse employment action on or after December 2, 2018. In those emails,

the plaintiff indicated that she was contemplating both a return to work and "going back to school" and that she would welcome Meyer's feedback in this regard. In his responses, Meyer expressed a willingness to meet with the plaintiff and confirmed a date on which to do so. Those emails further indicate that the plaintiff did not attend the meeting scheduled on Friday, February 15, 2019, and did not respond to Meyer when he asked "[w]hat happened?"

There also is no indication in those emails—or any of the materials submitted in connection with the motion for summary judgment—that the defendant had any open positions in January or February, 2019, or that the plaintiff applied for any positions with the defendant. To the contrary, the plaintiff admitted, in her December 23, 2021 deposition, that she never asked Meyer if she could come back to work for the defendant and that she did not apply for a job with *any* employer between October 30, 2018, and June, 2019, when she returned to school.

In light of the foregoing, we conclude that no genuine issue of material fact exists as to whether the plaintiff met her burden of establishing a prima facie case of discrimination by showing that she suffered an adverse employment action with respect to the defendant's failure to rehire her on or after December 2, 2018.

II

The plaintiff also claims that the continuing course of conduct doctrine applies in the present case and operates to toll the statute of limitations contained in § 46a-82 (f) for acts of discrimination that occurred outside its limitation period. We do not agree.

Our decisional law recognizes that "[t]he question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews

de novo. . . . The issue, however, of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact." (Internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 754–55, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021). Whether the continuing course of conduct doctrine properly may be applied in a given context is a legal question distinct from the factual question of whether a party engaged in such conduct in a particular instance. Our review of that question of law is plenary. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 477 n.11, 180 A.3d 882 (2018).

"The continuing course of conduct doctrine operates to delay the commencement of the running of an otherwise applicable statute of limitations." *Tunick* v. *Tunick*, 201 Conn. App. 512, 535, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021); see also *Handler* v. *Remington Arms Co.*, 144 Conn. 316, 321, 130 A.2d 793 (1957) ("[w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed"). The doctrine "reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied."[9] (Internal

[9] As this court has observed, "the continuing course of conduct doctrine is one classically applicable to causes of action in tort . . . ." *Fradianni* v. *Protective Life Ins. Co.*, 145 Conn. App. 90, 100 n.9, 73 A.3d 896, cert. denied, 310 Conn. 934, 79 A.3d 888 (2013). Our Supreme Court likewise has "recognized the continuing course of conduct doctrine in many cases involving claims sounding in negligence. For instance, we have recognized the continuing course of conduct doctrine in claims of medical malpractice. . . . [It] has also been applied to other claims of professional negligence in this state." (Citations omitted.) *Watts* v. *Chittenden*, 301 Conn. 575, 583–84, 22 A.3d 1214 (2011); see also id., 596 (holding that continuing course of conduct doctrine applies to intentional infliction of emotional distress claim).

In addition, our Supreme Court has explained that, when a plaintiff's complaint adequately apprises a defendant that the plaintiff is alleging a

quotation marks omitted.) *Martinelli* v. *Fusi*, 290 Conn. 347, 356, 963 A.2d 640 (2009).

As our Supreme Court has explained, "the continuing course of conduct doctrine recognizes that the act or omission that commences the limitation period may not be discrete and attributable to a fixed point in time. [T]he doctrine is generally applicable under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury or where the negligence consists of a series of acts or omissions and it is appropriate to allow the course of [action] to terminate before allowing the repose section of the [limitation period] to run . . . ." (Internal quotation marks omitted.) *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 503, 205 A.3d 534 (2019); cf. *Watts* v. *Chittenden*, 301 Conn. 575, 588–89, 22 A.3d 1214 (2011) (alleged violation "would not be deemed continuing" when acts of discrimination are discrete and "readily calculable without waiting for the entire series of acts to end" (internal quotation marks omitted)).

"Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008). The courts of this state thus "look to federal law for guidance in interpreting state employment discrimination law, and analyze claims under [the act, the state counterpart to Title VII] in the same manner as federal courts evaluate federal

theory of "continued discrimination" on the part of the defendant, "discrete incidents occurring during a continuum of discriminatory employment practices may constitute fresh violations" of the act. (Emphasis omitted; internal quotation marks omitted.) *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 473, 559 A.2d 1120 (1989). In this appeal, the defendant has not argued that the continuing course of conduct doctrine does not apply to employment discrimination claims pursuant to § 46a-60 or that the plaintiff's complaint did not provide adequate notice that she was pursuing a continuing course of conduct claim.

discrimination claims." (Internal quotation marks omitted.) *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 426, 438 n.5, 238 A.3d 716 (2020); see also *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 160, 140 A.3d 190 (2016) ("[w]e . . . have recognized that our legislature's intent, in general, was to make [the act] complement the provisions of Title VII"); *Pik-Kwik Stores, Inc.* v. *Commission on Human Rights & Opportunities*, 170 Conn. 327, 331, 365 A.2d 1210 (1976) ("[a]lthough the language of [Title VII] and that of the [act] differ slightly, it is clear that the intent of the legislature . . . was to make the Connecticut statute coextensive with the federal"). Significantly, the United States Supreme Court has held that federal law "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 105, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); see also *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 706 n.12, 900 A.2d 498 (2006) (quoting *National Railroad Passenger Corp.* v. *Morgan*, supra, 114, for proposition that each discrete incident of discrimination constitutes separate unlawful employment practice).

The United States Supreme Court has further explained that a discrete discriminatory act is one that " 'occurred' on the day that it 'happened.' A party, therefore, must file a [complaint] within [the statutory limitation period] or lose the ability to recover for it." *National Railroad Passenger Corp.* v. *Morgan*, supra, 536 U.S. 110. Accordingly, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The [complaint], therefore, must be filed within the [statutory limitation] period after the discrete discriminatory act occurred." Id., 113.

Discrete acts in the employment discrimination context include "termination, failure to promote, denial of transfer, or refusal to hire . . . ." Id., 114; accord *Hurley* v. *Naugatuck Board of Education*, Superior Court, judicial district of Waterbury, Docket No. CV-15-6029009-S (July 22, 2016) ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are individual acts that occur at a fixed time . . . . Accordingly, plaintiffs alleging such discriminatory action must exhaust the administrative process regardless of any relationship that may exist between those discrete claims and any others." (Internal quotation marks omitted.)).

In her complaint, the plaintiff alleged two discrete discriminatory acts with specificity—that the defendant failed to transfer her to an administrative position that "was open" in February, 2018, and that it terminated her employment "effective October 30, 2018." Those pleadings demonstrate that, with respect to both acts, it was not "impossible to pinpoint the exact date of a particular negligent act or omission that caused injury . . . ." (Internal quotation marks omitted.) *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, supra, 331 Conn. 503. Accordingly, to properly exhaust her administrative remedies, the plaintiff was obligated to file a complaint with the commission within the statutory limitation period after each of those discrete discriminatory acts occurred. See *National Railroad Passenger Corp.* v. *Morgan*, supra, 536 U.S. 113. We therefore conclude that the continuing course of conduct doctrine has no application with respect to those discrete acts.

The continuing course of conduct doctrine likewise does not apply to the plaintiff's failure to rehire claim. We recognize that her pleadings as to that alleged act of discrimination are general in nature and, broadly construed, encompass conduct that transpired both before and after December 2, 2018. See part I B of this

opinion. While an employer's failure to rehire a plaintiff can constitute an adverse employment action, it "does not constitute a continuing violation . . . . Each alleged discriminatory [act] constitutes a separate and completed act by the defendant." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, supra, 278 Conn. 706 n.12; see also *Morris* v. *Cabela's Wholesale, Inc.*, 486 Fed. Appx. 701, 704 (10th Cir. 2012) (concluding that "[the defendant's] alleged retaliatory failure to rehire [the plaintiff] was a discrete act"); *Boge* v. *Ringland-Johnson-Crowley Co.*, 976 F.2d 448, 451 (8th Cir. 1992) ("[A]n employer's failure to recall or rehire does not constitute a continuing violation . . . . Each alleged discriminatory recall constitutes a separate and completed act by the defendant, which triggers a new [statutory limitation] period." (Internal quotation marks omitted.)); *Berry* v. *Board of Supervisors of L.S.U.*, 715 F.2d 971, 980 (5th Cir. 1983) (defendant's "failure to rehire was a discrete act which was not part of a continuing violation"); *Everett* v. *357 Corp.*, 453 Mass. 585, 606–607, 904 N.E.2d 733 (2009) ("the failure to rehire an employee is considered a discrete, separate act that does not draw other allegedly discriminatory acts into its scope").

As the United States Supreme Court has held, "discrete acts that fall within the statutory time period do not make timely [those] acts that fall outside the time period." *National Railroad Passenger Corp.* v. *Morgan*, supra, 536 U.S. 112. In applying the continuing course of conduct doctrine, the Connecticut Supreme Court likewise has held that "at some point there must be a limitation on the ability to file an action to recover for such conduct. Therefore, in such cases, if no conduct has occurred within the [statutory limitation period], the plaintiff will be barred from recovering for the prior actions . . . ." *Watts* v. *Chittenden*, supra, 301 Conn. 596; see also *Burnam* v. *Amoco Container Co.*, 755 F.2d

893, 894 (11th Cir. 1985) (per curiam) ("a failure to rehire subsequent to an allegedly discriminatory firing, absent a new and discrete act of discrimination in the refusal to rehire itself, cannot resurrect the old discriminatory act"). For that reason, the plaintiff's invocation of the continuing course of conduct doctrine is unavailing with respect to her failure to rehire claim, as she has not established that an adverse employment action occurred on or after December 2, 2018. See part I C of this opinion.

We conclude that the continuing course of conduct doctrine does not operate to toll the statutory limitation period of § 46a-82 (f) for acts of discrimination that allegedly occurred prior to December 2, 2018. The court, therefore, properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

HIGH WATCH RECOVERY CENTER, INC. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF KENT (AC 45972)

Prescott, Clark and Seeley, Js.*

Syllabus

The plaintiff appealed to this court from the trial court's judgment dismissing its appeal from the decision of the defendant town planning and zoning commission denying the plaintiff's special permit application to construct a greenhouse on its farm property in Kent. Since 1939, the plaintiff has operated a residential treatment program for individuals with substance abuse disorders, which includes a residential facility with an onsite kitchen, on real property located across the street from the farm property. In 2017, the plaintiff purchased the seventy acre farm property that had been used for farming at the time the plaintiff purchased it.

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Both the farm property and the residential property are located in the town's rural residential district. The regulations for the rural residential district in place at the time the plaintiff purchased the farm property in 2017 permitted, subject to special permit review and approval, a privately operated hospital, clinic, nursing home, or convalescent home. In early 2018, the plaintiff filed with the defendant a special permit application and a site plan application seeking approval to conduct therapeutic activities on the farm property in conjunction with the residential treatment program, including equine therapy, a ropes course and climbing wall, and a therapeutic agricultural program and accompanying kitchen facility. The defendant subsequently approved the plaintiff's applications for the farm property for therapeutic activities in conjunction with a privately operated hospital, clinic, nursing or convalescent home or similar institution. In February, 2020, the town's zoning regulations were amended to prohibit, by special permit, a privately operated hospital, clinic, nursing home or convalescent home in the rural residential district. In August, 2020, the plaintiff applied for a special permit to add a hoop house style greenhouse to the existing garden/pasture area of the farm property in order to enhance its existing farming capacity. The plaintiff's application stated, inter alia, that the use of a greenhouse was consistent with its special permit application from 2018 and that the intention of the use of the greenhouse was not to expand its therapeutic work but to expand its capacity to provide fruits and vegetables to the residential facility. After a public hearing, the defendant denied the plaintiff's application, finding that the proposed greenhouse was an impermissible expansion of a nonconforming use. The plaintiff appealed to the Superior Court, claiming, inter alia, that the proposed greenhouse was within the scope of the prior approved special use permit issued to the plaintiff in 2018, that the greenhouse was a permissible intensification of that prior approved, but now nonconforming, therapeutic agricultural or farm use, and that the substantial evidence in the record did not support the defendant's stated reasons for its denial. After briefing and oral arguments, the court rendered judgment dismissing the plaintiff's administrative appeal, concluding that the nonconforming use of the farm property was limited to the precise terms of the 2018 special permit and the site plan that the plaintiff submitted in support of its application for that permit and that the plaintiff could not, as a matter of law, intensify the use of the farm property in accordance with the test set forth in *Zachs* v. *Zoning Board of Appeals* (218 Conn. 324), in which the Supreme Court set forth three criteria for determining whether a valid nonconforming use of property has been permissibly intensified or impermissibly expanded, including the extent to which the current use reflects the nature and purpose of the original use, any differences in the character, nature and kind of use involved, and any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property. The court also

held that a reasonable interpretation of the defendant's first stated reason for its denial was that the greenhouse constituted an impermissible expansion of the nonconforming use, that, even if the use of the farm property could have been intensified, the addition of a greenhouse to an approved special permit accompanied by a site plan that did not include a greenhouse would be an impermissible expansion rather than a permissible intensification, and that the defendant's first stated reason for the denial was supported by substantial evidence in the record. After a grant of certification, the plaintiff appealed to this court. *Held*:

1. The trial court erred as a matter of law in concluding that the plaintiff's valid nonconforming use of the farm property could not be intensified in accordance with the criteria set forth in *Zachs* because it arose from a special permit: the case on which the defendant primarily relied in claiming that the unique nature of special permits supported the court's conclusion that the plaintiff could not intensify its valid nonconforming use of the farm property that was approved by the 2018 special permit, *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission* (222 Conn. 607), did not involve a valid nonconforming use or discuss the interplay of a use approved by special permit and the important rights a property owner has in a use that later becomes nonconforming; moreover, a review of the case law addressing nonconforming uses led this court to conclude that a use approved by special permit may be intensified in accordance with the *Zachs* criteria, as the Supreme Court has made clear that the right to continue a valid nonconforming use includes a right to intensify that use, and to limit a valid nonconforming use to the exact specifications of a site plan that was submitted with the application for the special permit approving what subsequently becomes a valid nonconforming use would invade the constitutional guarantees of due process that brought the nonconforming principle into being; furthermore, the trial court's per se rule prohibiting any intensification of a valid nonconforming use that originated from a special permit on the basis that the special permit was approved in conjunction with a site plan, if accepted, would prohibit the intensification of any nonconforming use that arose from any of the host of other uses approved in conjunction with a site plan, including any activity designated in the regulations as requiring site plan approval, whereas the very nature of the analysis required under *Zachs*, on the other hand, ensures that any proposed intensification of a valid nonconforming use is consistent with the nature and scope of that nonconforming use, and, unlike a per se rule prohibiting the intensification of a use approved by way of a special permit, the *Zachs* approach balances an owner's protected interest in the reasonable use of his or her property with a local government's valid interest in ensuring that the property continues to be used in a manner that is consistent with the zoning regulations.

2. The trial court erred in concluding that there was substantial evidence in the record to support the defendant's finding that the addition of the proposed greenhouse would constitute an illegal expansion of the plaintiff's valid nonconforming use of the property:

a. On the basis of its review of the record, this court concluded that the use of the proposed greenhouse reflected the nature and purpose of the existing, original use of the farm property, given that it would be placed on the existing garden and pasture area on the farm property where plants were already grown, it would be in close proximity to the existing house and barn on the farm property, and it would permit the plaintiff to continue to grow fruits and vegetables in order to feed and support the residents and staff residing on the residential property, activities that it already performed.

b. This court concluded that the proposed greenhouse simply provided an improved and more efficient way to grow fruits and vegetables and to provide therapeutic agricultural services, and the fact that the greenhouse may have increased the fruit and vegetable yield already used to support the residents and staff on the residential property could not reasonably be said to involve differences in the character of the nonconforming use rather than increases in the volume of business within the scope of the original use; moreover, the defendant's argument that the addition of a structure to a nonconforming use was a per se change in the character of the use, constituting an illegal expansion, found no support in the case law, and, although some courts had concluded that the addition of a new structure or the expansion of an existing building constituted an illegal expansion of a nonconforming building or use, the legality of a proposed change to a nonconforming use was a fact intensive inquiry that must be conducted on a case-by-case basis; furthermore, although a proposal to extend a nonconforming use into an additional season or seasons may, under certain circumstances, constitute an illegal expansion of the nonconforming use, the defendant relied on a highly technical and overly narrow characterization of the existing use of the farm property in support of its argument that the proposed greenhouse would impermissibly allow activities over a substantially additional period of the year, and this court could not conclude on the basis of the record that the addition of the greenhouse, which would simply allow the plaintiff to increase its fruit and vegetable yield, constituted an illegal expansion when the farm property was already being used year-round for related activities.

c. Contrary to the defendant's arguments, the plaintiff's proposed use of the greenhouse was consistent with the permitted as of right uses and accessory uses in the zoning district in which the farm property was located, and the relevant provisions of the town zoning regulations undercut the defendant's contention that there would be a substantial effect on the neighborhood by the use of the proposed greenhouse;

moreover, there was no evidence in the record that the proposed greenhouse would be seen from the road, and, although the defendant made conclusory arguments on appeal suggesting that the greenhouse may be seen from the road and that the site plan showed that the proposed greenhouse would be quite close to surrounding properties, these arguments did not, without more, demonstrate that there would be a substantial effect upon the neighborhood; furthermore, although numerous neighbors spoke at the hearings held by the defendant and voiced their displeasure with the plaintiff's expansion in the town over the years, most of the statements were not specific to the application and site plan under consideration but, instead, constituted general grievances about the plaintiff and the construction on the residential property that the defendant had previously approved, and, because the comments by the neighbors amounted to general concerns, speculation, and mere worry, such comments did not qualify as substantial evidence and therefore provided little, if any, evidence concerning the proposal's effect on the neighborhood.

Argued September 21, 2023—officially released January 23, 2024

Procedural History

Administrative appeal from the decision of the defendant denying the plaintiff's special permit application to build a greenhouse on its property, brought to the Superior Court in the judicial district of Litchfield, where the court, *Hon. John W. Pickard*, judge trial referee, rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Christopher J. Smith, for the appellant (plaintiff).

Michael A. Zizka, for the appellee (defendant).

Opinion

CLARK, J. In this certified zoning appeal, the plaintiff, High Watch Recovery Center, Inc., appeals from the judgment of the Superior Court dismissing its administrative appeal. The plaintiff brought the underlying appeal to the Superior Court from a decision of the defendant, the Planning and Zoning Commission of the Town of Kent (commission), denying its special permit application that proposed the addition of a thirty foot

by seventy foot greenhouse to its property located at 47 Carter Road in Kent. The commission denied the plaintiff's application because it determined that the plaintiff's proposed greenhouse was an illegal expansion, rather than a permissible intensification, of its valid nonconforming use of the property. On appeal, the plaintiff claims that the court erroneously concluded that (1) the plaintiff could not, as a matter of law, intensify its valid nonconforming use of the property because the intensification doctrine recognized by our Supreme Court in *Zachs* v. *Zoning Board of Appeals*, 218 Conn. 324, 332, 589 A.2d 351 (1991),[1] does not apply to a nonconforming use that arises out of a previously issued special permit and (2) the substantial evidence in the record supported the commission's determination that the plaintiff's proposed greenhouse was an illegal expansion of its valid nonconforming use. For the reasons that follow, we agree with the plaintiff and reverse the judgment of the Superior Court.

The following facts and procedural history are relevant to our resolution of this appeal. Since 1939, the plaintiff has operated a residential treatment program on real property known as 62 Carter Road in Kent (residential property) for individuals with substance abuse disorders. Located on the residential property is a seventy-eight bed residential facility that includes an onsite kitchen.

On June 23, 2017, the plaintiff purchased property located across the street from the residential property.

[1] In *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 324, our Supreme Court identified three criteria for determining whether a nonconforming use has been permissibly intensified or impermissibly expanded: "(1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." Id., 332.

That property is known as 47 Carter Road and is the subject of this appeal (property). The property spans approximately seventy acres and was used for farming up until the time the plaintiff purchased it in 2017. Both the property and the residential property are located in Kent's Rural Residential (RU-1) district.

Kent adopted zoning regulations for the first time in or about 1965. In the RU-1 district, the Kent Zoning Regulations (regulations) in place at the time the plaintiff purchased the property permitted, subject to special permit review and approval, "[a] privately operated hospital, clinic, nursing home, or convalescent home . . . ." Kent Zoning Regs., c. 3200, § 3224 (2018). Because the plaintiff had operated its residential treatment program on the residential property prior to the adoption of the regulations, the plaintiff was not required to obtain a special permit for the residential property. To the extent the plaintiff wished to engage in such activities on the subject property located across the street from the residential property, however, the regulations required it to obtain a special permit.

In February, 2018, the plaintiff filed with the commission a special permit application and a site plan application seeking approval to conduct therapeutic activities on the property in conjunction with the treatment program that it operated on the residential property. The special permit application stated in relevant part: "[The plaintiff] has the opportunity to incorporate into its existing program additional therapies that have proven effective in the treatment of substance use disorders. These new therapies would include equine therapy, a ropes course and climbing wall, and a therapeutic agricultural program and accompanying kitchen facility. In fact, [the plaintiff] purchased the property as a working farm in part to continue its agricultural use. . . . The therapies at [the property] will be offered as part of the [plaintiff's] existing . . . treatment plan, not

as a standalone program; the residents that participate in the therapies offered at [the property] will be the same residents living at the [residential property] across the street." In March, 2018, the commission adopted a resolution approving the plaintiff's applications for the subject property for "therapeutic activities in conjunction with a privately-operated hospital, clinic, nursing or convalescent home or similar institution . . . ."

On February 16, 2020, the regulations were amended to prohibit the plaintiff's addiction treatment services in the RU-1 district. Specifically, the amendment eliminated language from the regulations that permitted, by special permit, "[a] privately operated hospital, clinic, nursing home, or convalescent home . . . ." Compare Kent Zoning Regs., c. 3200, § 3224 (2018), with Kent Zoning Regs., c. 3200, § 3224 (2020).

On August 20, 2020, the plaintiff applied for a special permit to add a thirty foot by seventy foot "hoop house" style greenhouse[2] to the "existing [g]arden/pasture area" of the property. The plaintiff stated that it sought to add the greenhouse in order "to enhance [its] existing farming capacity." The application further stated, inter alia, that "[t]his is consistent with our special permit application from 2018 which stated, '[The plaintiff] purchased the property as a working farm in part to continue its agricultural use.' We remain true to that intention and we seek to further continue that pre-existing use. The intention of this application for a hoop house is not to expand our therapeutic work but to expand our capacity to provide fruits and vegetables to [the residential property]."

[2] The parties and the trial court use the terms "greenhouse" and "hoop house" interchangeably. As we discuss in greater detail later in this opinion, the type of greenhouse the plaintiff proposed to construct is commonly referred to as a "hoop house." A hoop house consists of a series of hoops covered with plastic that creates a tunnel in which plants can be grown. We, like the parties and the trial court, employ the terms "greenhouse" and "hoop house" interchangeably in reference to the plaintiff's proposal.

The commission held a public hearing on the plaintiff's special permit application on multiple days in September and October, 2020. On November 12, 2020, the commission, by a vote of four to two, denied the plaintiff's application. The commission's stated reasons for its denial were as follows: "a. With regard to [§ 10440 (3)], which states: '*Whether the proposed use will have a detrimental effect on neighboring properties or the development of the district*', the [c]ommission finds that based on the representations made by the applicant, it is unclear whether or not this proposed structure and its use would increase the intensity of a use that is pre-existing, non-conforming as a result of its affiliation with the use of 62 Carter Road.

"b. With regard to [§ 10440 (11)], which states: '*Whether adequate provisions have been made to moderate or mitigate neighborhood impacts by limiting the intensity of use of the property (including, without limitation, such considerations as the area devoted to the use, the number of people involved in the use, the number of events or activities proposed, the hours of operation, etc.) or by modifying the location or configuration of the proposed use*', the [c]ommission finds that conflicting information indicates that the proposal could not meet the requirements of this section."[3] (Emphasis in original.)

Following the commission's denial of the plaintiff's application, the plaintiff appealed to the Superior Court. See General Statutes § 8-8 (b).[4] The plaintiff raised three

[3] Chapter 10400, § 10440, of the zoning regulations sets forth eleven factors that the commission is required to evaluate when considering a special permit application. See Kent Zoning Regs., c. 10400, § 10440 (2020). The regulations recognize that the commission may determine that some factors may not be applicable to certain types of applications. Id. The commission denied the plaintiff's application citing to § 10440 (3), titled "Overall Neighborhood Compatibility," and § 10440 (11), titled "Mitigation." See id. The commission did not make reference to the other nine factors.

[4] General Statutes § 8-8 (b) provides in relevant part: "Except as provided in subsections (c), (d) and (r) of this section and sections 7-147 and 7-147i,

claims. First, it claimed that the substantial evidence in the record established that the plaintiff's proposed greenhouse constituted a permitted accessory agricultural or farm use, as provided by the operative regulations. It therefore argued that a special permit was not actually required to construct its proposed greenhouse. Second, the plaintiff claimed that the proposed greenhouse was within the scope of the commission's prior approved special use permit that it issued to the plaintiff in 2018. Accordingly, the plaintiff argued that the greenhouse was a permissible intensification of that prior approved, but now nonconforming, therapeutic agricultural or farm use and that no special permit was required. Last, the plaintiff claimed that the substantial evidence in the record did not support either of the commission's stated reasons for its denial. The parties filed briefs and oral arguments were held by the court.

On July 5, 2022, the Superior Court, *Hon. John W. Pickard*, judge trial referee, issued a memorandum of decision dismissing the plaintiff's administrative appeal. The court rejected the plaintiff's first claim that the plaintiff did not need a special permit in order to construct and maintain the greenhouse because an agricultural or farm related greenhouse constitutes a permitted, as of right, farm use.[5]

The court also rejected the plaintiff's claim that the addition of its proposed greenhouse is a permissible intensification of its valid nonconforming use. The court concluded that the current nonconforming use of the property is limited to the precise terms of the 2018

any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8-3 or a special permit or special exception pursuant to section 8-3c, may take an appeal to the superior court for the judicial district in which the municipality is located, notwithstanding any right to appeal to a municipal zoning board of appeals under section 8-6. . . ."

[5] The plaintiff does not challenge that determination on appeal.

special permit and the site plan that the plaintiff submitted in support of its application for that permit and that the plaintiff could not, as a matter of law, intensify the property in accordance with the test set forth in *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332. The court reasoned that "the plaintiff's use of the subject property was a permitted use in connection with their program but one which existed by special permit only. That special permit had its own terms. Those terms were that the property could be used for an agricultural or farm use as therapy for program participants. The approval of the special permit was accompanied by a site plan which did not include a greenhouse. . . . [T]his fact distinguishes this case from typical nonconforming use cases where the issue is whether the proposed use is an intensification or an expansion. The plaintiff is limited by the terms of the 2018 special permit and is not permitted to intensify that approved use. It would be very odd if the law permitted a special permit applicant to obtain a permit and site plan approval showing no buildings and [then] proceed to build a building on the grounds that it is merely a permissible intensification."

The court nevertheless went on to hold that a reasonable interpretation of the commission's first stated reason for its denial was that the greenhouse constituted an impermissible expansion of the nonconforming use. The court concluded that, even if the use of the property could have been intensified, "[t]he addition of a greenhouse to an approved special permit use without a greenhouse would be an impermissible expansion rather than a permissible intensification." The court also found that the commission's first stated reason for the denial was supported by substantial evidence in the record. See footnote 7 of this opinion.

On August 15, 2022, the plaintiff filed a petition for certification with this court requesting review of the

Superior Court's July 5, 2022 decision dismissing its zoning appeal. See General Statutes § 8-8 (o); Practice Book § 81-1. On October 19, 2022, this court granted the plaintiff's petition. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred as a matter of law in holding that the plaintiff's valid nonconforming use of the property may not be intensified in accordance with the criteria set forth in *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332. In particular, the plaintiff claims that the court improperly concluded that a nonconforming use that arises from a special permit is forever limited to the strict terms of the special permit and the site plan that accompanied the special permit application. The plaintiff contends that it has a vested and constitutionally protected right to intensify the use of its property notwithstanding the fact that its valid nonconforming use was initially approved by special permit. We agree with the plaintiff.

Whether the court applied the correct legal standard in determining whether the plaintiff could intensify its valid nonconforming use is a question of law over which our review is plenary. See *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 586–87, 170 A.3d 73 (2017); *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App. 406, 435, 77 A.3d 904 (2013).

We begin with a brief overview of the legal principles at play. "A nonconformity is a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations are adopted." *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988). "For a use to be considered nonconforming . . . [it] must possess

two characteristics. First, it must be *lawful* and second, it must be *in existence* at the time that the zoning regulation making the use nonconforming was enacted." (Emphasis in original.) *Helicopter Associates, Inc.* v. *Stamford*, 201 Conn. 700, 712, 519 A.2d 49 (1986).

Connecticut law recognizes and protects the right to continue valid nonconforming uses. Indeed, General Statutes § 8-2 (d) (4) provides in relevant part that municipal zoning regulations shall not "[p]rohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations . . . ." This means that a property owner has the right to continue "the same use of the property as it existed before the date of the adoption of the zoning regulations" that made the use nonconforming. *Helbig* v. *Zoning Commission*, 185 Conn. 294, 306, 440 A.2d 940 (1981). Our law therefore "precludes a municipality from amortizing or altogether eliminating such nonconformities through the enactment or amendment of its zoning regulations." *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 684, 111 A.3d 473 (2015).

A valid nonconforming use can arise in a number of different ways. For example, a valid nonconforming use of a property may arise when a property is used lawfully prior to the enactment of town zoning regulations. See, e.g., *Petruzzi* v. *Zoning Board of Appeals*, 176 Conn. 479, 482–83, 408 A.2d 243 (1979) ("[t]he lot and building in question" qualified as legally protected nonconforming uses because they were lawful and in existence prior to enactment of zoning regulations). Or, like in the present case, the zoning regulations could have permitted the use (e.g., by right or special permit), but a subsequent amendment to the regulations later made that permitted use nonconforming. See *Helicopter Associates, Inc.* v. *Stamford*, supra, 201 Conn. 712 ("[u]ntil the amendment was passed, heliports were allowed under Stamford zoning regulations in the zone

where the [property] is located"). Irrespective of how a valid nonconforming use comes into being, a property owner may continue the same use of the property as it existed prior to the enactment of zoning regulations making the use nonconforming.

Our appellate courts have recognized that "[t]he right to a nonconforming use is a property right and . . . any provision of a statute or ordinance which takes away that right in an unreasonable manner, or in a manner not grounded on the public welfare, is invalid. A lawfully established nonconforming use is a vested right and is entitled to constitutional protection." (Internal quotation marks omitted.) *Petruzzi* v. *Zoning Board of Appeals*, supra, 176 Conn. 483–84, citing 2 E. Yokley, Zoning Law and Practice (3d Ed. 1965) § 16-3, p. 219. A property owner's right to continue a nonconforming use, however, does not include a right to expand that use. See, e.g., *Parker* v. *Zoning Commission*, 209 Conn. App. 631, 655, 269 A.3d 157, cert. denied, 343 Conn. 908, 273 A.3d 694 (2022). Our courts have observed that "[z]oning regulations in general seek the elimination of nonconforming uses, not their creation or enlargement"; *Planning & Zoning Commission* v. *Craft*, 12 Conn. App. 90, 96, 529 A.2d 1328, cert. denied, 205 Conn. 804, 531 A.2d 937 (1987); and that "it is the indisputable goal of zoning to reduce nonconforming to conforming uses with all the speed justice will tolerate." (Internal quotation marks omitted.) *Woodbury Donuts, LLC* v. *Zoning Board of Appeals*, 139 Conn. App. 748, 761, 57 A.3d 810 (2012).

But not every change to a nonconforming use is an impermissible expansion. See, e.g., *Raymond* v. *Zoning Board of Appeals*, 76 Conn. App. 222, 257, 820 A.2d 275, cert. denied, 264 Conn. 906, 826 A.2d 177 (2003). Our Supreme Court has held, for instance, that, although a nonconforming use may not be expanded, it may be intensified. See *Zachs* v. *Zoning Board of Appeals*,

supra, 218 Conn. 332–33. In *Zachs*, the court identified three criteria for determining whether a change to a nonconforming use constitutes a permissible intensification or an impermissible expansion: "(1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property." Id., 332.

With these principles in mind, we turn to the court's memorandum of decision in this case. The court concluded that the commission properly denied the plaintiff's application for a special permit to place a greenhouse on the subject property because the 2018 special permit and the site plan that accompanied the application for that permit did not include the proposed greenhouse. The court held that the "current use of the subject property in accordance with the 2018 special permit is limited to the terms of the special permit and the site plan approved at the same time" and that "the current nonconforming use cannot be intensified in accordance with the *Zachs* standards."

The plaintiff claims that the court's conclusion is erroneous as a matter of law because it deprives it of the right to intensify its valid nonconforming use of the property. It claims that there is no precedent or valid rationale for excluding its property from the class of nonconforming uses that may permissibly be intensified solely because the nonconforming use was initially approved by a special permit. The commission counters that the nature of special permits supports the court's conclusion that the plaintiff may not intensify its valid nonconforming use of the property that was approved by the commission in 2018. The commission argues that, because the 2018 special permit application included a

site plan, the plaintiff is precluded from using the property in a manner that would cause the property to differ from what was depicted in the initial site plan that was submitted with the approved special permit application.

In order to address the question before us, we begin with an overview of the statutes governing special permits. Section 8-2 (a) (3) provides in relevant part that municipalities may enact regulations that "provide that certain classes or kinds of buildings, structures or use of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values." This court has explained that a "function of a special permit is to allow a property owner to use his property in a manner expressly permitted under the zoning regulations, subject to certain conditions necessary to protect the public health, safety, convenience, and surrounding property values." (Internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, supra, 176 Conn. App. 585. Indeed, "[t]he basic rationale for the special permit [is] . . . that while certain [specially permitted] land uses may be generally compatible with the uses permitted as of right in particular zoning districts, their nature is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site." (Internal quotation marks omitted.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 612, 610 A.2d 1205 (1992) (*Barberino Realty*), quoting T. Tondro, Connecticut Land Use Regulation (1979), p. 78.

It also is common for zoning regulations to require the submission of a site plan in conjunction with a special permit application, as the regulations required in the present case. See Kent Zoning Regs., c. 10300, § 10320 (2) (2020) ("[a] [s]ite [p]lan application shall be submitted . . . [f]or any activity designated in the [r]egulations as requiring [s]pecial [p]ermit approval"); see also *International Investors* v. *Town Plan & Zoning Commission*, 344 Conn. 46, 68–70, 277 A.3d 750 (2022) (discussing interplay between special permits and site plans). Our Supreme Court has explained one reason for this practice. "[B]efore the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. The commission, therefore, must be allowed to examine the suggested proposal closely. The details of the proposal are laid out in the site plan, which is a physical plan showing the layout and the design of the site of a proposed use . . . . It generally should indicate the proposed location of all structures, parking areas and open spaces on the plot and their relation to adjacent roadways and uses. . . .

"When considering an application for a special permit, the commission is called upon to make a decision as to whether a particular application . . . would be compatible with the particular zoning district, under the circumstances then existing. That determination can only be made after a thorough examination of the specific site plan submitted. . . . [R]eview of a special permit application is necessarily dependent on a thorough review of the proposed site plan because, in fact, the grant of the special permit is usually contingent [on] approval of the site plan." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks

omitted.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 613–14.

Once an agency approves a special permit, however, that "[a]pproval *confers a right*, albeit one that may be subject to conditions." (Emphasis added.) *International Investors* v. *Town Plan & Zoning Commission*, supra, 344 Conn. 69. The nature of that right once the specially permitted use becomes nonconforming has not been addressed thoroughly by our case law.

Pointing to *Barberino Realty*, the commission claims that the unique nature of special permits supports the court's conclusion that the plaintiff may not intensify its valid nonconforming use of the property that was approved by the 2018 special permit. Although we recognize that there are some unique features to the special permit process, we are not convinced that *Barberino Realty*, including its description of the special permit process, compels the conclusion that a nonconforming use that was initially approved by special permit may never be intensified.

First, *Barberino Realty*, the case on which the commission principally relies, did not involve a valid nonconforming use or discuss the interplay of a use approved by special permit and the important rights a property owner has in a use that later becomes nonconforming. See *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 614–15. The plaintiff in *Barberino Realty* had not commenced construction on the project approved by a special permit and therefore never used the property in accordance with the special permit. Id., 610. Instead, it returned to the commission several years after the special permit had been approved with an application for a revised site plan that materially altered the original proposal for its elderly housing project. Id. The plaintiff

argued that, once a site plan has been approved in conjunction with a special permit application, any subsequent revision to the site plan is required to conform to the criteria set forth only in the site plan regulations rather than the special permit regulations. Id., 611.

On appeal to our Supreme Court, the court addressed "whether, after approval of such a permit and site plan, a subsequent revision to the site plan must conform to the zoning regulations governing approval of such a special permit." Id., 608. The court held that "any application to revise such a site plan must be evaluated in light of the conditions set out in the special permit regulations." Id., 614. The court reasoned that "a contrary holding would render a zoning commission helpless if a developer first obtained a special permit on the basis of a site plan that was particularly well suited to the neighborhood, but then decided to substitute for that site plan one that eradicated the very features that motivated the commission to grant the special permit. By allowing the commission to take into account all special permit zoning regulations when a developer seeks a revision to its site plan, the commission can further the purposes of a town's zoning regulations." Id., 615.

It is clear, therefore, that the court in *Barberino Realty* did not address the issue raised in this appeal: whether a nonconforming use initially approved by special permit may be intensified. That question requires a court to weigh the important property rights one holds by virtue of a valid nonconforming use with the important governmental interests identified in *Barberino Realty*.

A review of the case law addressing nonconforming uses leads us to conclude that a use approved by special permit may be intensified in accordance with the *Zachs* criteria. Our Supreme Court has made clear that the

right to continue a valid nonconforming use includes a right to intensify that use. See, e.g., *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 331–33. That is because certain changes to a nonconforming use fall within the scope of the valid nonconforming use. See *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 243, 662 A.2d 1179 (1995) ("we have recognized that certain changes in nonconforming uses represent permissible intensifications within the scope of the valid nonconforming use"). To limit a valid nonconforming use to the exact specifications of a site plan that was submitted with the application for the special permit approving what subsequently becomes a valid nonconforming use "would invade the constitutional guarantees of due process which indeed brought the nonconforming principle into being." (Internal quotation marks omitted.) *State* v. *Szymanski*, 24 Conn. Supp. 221, 225, 189 A.2d 514 (1962); see also *Upper Darby Township Appeal*, 391 Pa. 347, 353–54, 138 A.2d 99 (1958) ("[o]nce it is determined . . . that a nonconforming use existed, natural development and growth cannot be paralyzed by an overly-technical appraisement of the existing use").

Furthermore, *Zachs*, which is Connecticut's principal authority on whether a change is a permissible intensification of a nonconforming use or an illegal expansion of it, speaks broadly about nonconforming uses (irrespective of how the valid nonconforming use originated) and instructs courts to apply three criteria to help determine whether the activity in question is a permissible intensification or an impermissible expansion. See *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332 ("[i]n deciding whether the current activity is within the scope of *a nonconforming use* consideration should be given to three factors" (emphasis added)). Our Supreme Court recently reiterated this requirement: "[W]hether a nonconforming use has been

expanded . . . *requires application of the criteria* set forth in *Zachs* . . . ." (Emphasis altered.) *Pfister* v. *Madison Beach Hotel, LLC*, 341 Conn. 702, 728, 267 A.3d 811 (2022).

The Superior Court's per se rule prohibiting any intensification of a valid nonconforming use that originated from a special permit on the basis that the special permit was approved in conjunction with a site plan runs headlong into statutory and constitutional prohibitions. See General Statutes § 8-2 (d) (4); *Petruzzi* v. *Zoning Board of Appeals*, supra, 176 Conn. 483. Further, the court's holding, if accepted, would have far reaching ramifications for a host of other uses approved in conjunction with a site plan. Indeed, many other permissible uses under Kent's zoning regulations, as is true in other towns, require the submission of a site plan. Under the regulations, a site plan application is required "[f]or any activity designated in the [r]egulations as requiring [s]pecial [p]ermit approval"; "[i]n a residential zone, for any construction, development, expansion, or major alteration of a multi-family use or any non-residential use"; "[i]n a non-residential zone, for any construction, development, expansion, or major alteration of any use including any alteration in site improvements such as parking, pedestrian or vehicle circulation, public utilities or reduction of landscaping"; and "[f]or any activity designated in the [r]egulations as requiring [s]ite [p]lan approval."[6] See Kent Zoning Regs., c. 10300, § 10320

[6] The regulations require as part of an application for a general zoning permit certain "plans and/or other information." Kent Zoning Regs., c. 10100, § 10120 (2) (2020). For example, "[a] sketch plan may be submitted with the [z]oning [p]ermit application for all single-family and two-family dwellings, and for additions, or accessory buildings and structures, and accessory uses thereto except that, if the [z]oning [e]nforcement [o]fficer finds that a sketch plan does not provide sufficient information to determine whether the proposed building, structure or use would comply with these regulations, he or she may require the submission of a site plan or survey, prepared, signed and sealed by a Connecticut licensed land surveyor." Id., § 10120 (2) (c). Additionally, "[a] site plan or survey shall be required for any exterior alteration, renovation or improvement of existing commercial, industrial or

(2020). The court's per se rule would prohibit the intensification of any nonconforming use that arose from any of these approvals, including "any activity designated in the [r]egulations as requiring [s]ite [p]lan approval." Id.

The very nature of the analysis required under *Zachs*, on the other hand, ensures that any proposed intensification of a valid nonconforming use is consistent with the nature and scope of that nonconforming use. In the case of a nonconforming use that was approved by way of special permit, *Zachs* requires a court to closely examine the terms of the special permit to determine the extent to which the change in use reflects the nature and purpose of the approved use, any differences in the character, nature and kind of use involved, and any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property. Unlike a per se rule prohibiting the intensification of a use approved by way of a special permit, the *Zachs* approach balances an owner's protected interest in the reasonable use of his or her property with a local government's valid interest in ensuring that the property continues to be used in a manner that is consistent with the zoning regulations. For these

campground premises or facilities and for any other proposed structure or use other than those for which a sketch plan may be provided." Id., § 10120 (2) (a).

Further, in Kent's Village Commercial District, site plan approval is required for "[r]etail stores"; "[r]estaurants"; "[b]akeries, delicatessens, ice cream parlors, coffee shops and similar food retail and serving establishments"; "[f]armers market"; "[a]rtists' studio and/or art gallery"; "[p]ersonal service establishments including but not limited to nail salons, day spas, yoga studios, barber shops, beauty shops"; "[o]ffices"; "[b]anks and other financial institutions"; "[m]edical or dental offices or out-patient clinics"; "[h]ousehold service establishments including but not limited to plumbing or electrical stores"; "[m]ixed residential and commercial use within the same building"; and "[a]n accessory residential unit (attached) in accordance with Section 6200." Kent Zoning Regs., c. 4100, § 4123 (2020). These are only a few examples of the kinds of activities that require the submission of a site plan in Kent.

reasons, we conclude that a valid nonconforming use arising out of a previously issued special permit may be intensified in accordance with our Supreme Court's decision in *Zachs*.

II

Having concluded that a nonconforming use initially approved by way of a special permit may be intensified in accordance with *Zachs*, we must next determine whether there was sufficient evidence in the record to support the commission's stated reasons for its denial of the plaintiff's proposed greenhouse. The commission denied the plaintiff's special permit on the basis that the use of the proposed greenhouse would be an illegal expansion of the plaintiff's valid nonconforming use of the property.[7] The plaintiff claims that the court erred in concluding that there was substantial evidence in the record to support the commission's finding that the addition of its proposed greenhouse would constitute an illegal expansion of a nonconforming use. We agree with the plaintiff.

"In reviewing a decision of a zoning [commission], a reviewing court is bound by the substantial evidence rule, according to which . . . [c]onclusions reached by

[7] Before the Superior Court, the commission argued that, although its reasons for denial were " 'perhaps inelegantly stated,' " they were " 'consistent with the notion that the plaintiff was proposing an unlawful expansion of a nonconforming use.' " See footnote 3 of this opinion. The court agreed with the commission that a reasonable interpretation of the commission's first reason for denial was that the plaintiff's proposed greenhouse was an impermissible expansion of a valid nonconforming use. The court indicated that, in light of its conclusion, it did not need to address the commission's second stated reason for denial. Upon our review, however, it is clear that the commission's first and second reasons for denial must be read together, as they both are based on the commission's conclusion that the plaintiff was proposing an unlawful expansion of its valid nonconforming use. Indeed, in its briefing before the trial court, the commission acknowledged that both of its stated justifications for denial were predicated on its determination that the greenhouse was an impermissible expansion.

[a zoning] commission must be upheld . . . if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the [reviewing court] would have reached the same conclusion, but whether the record before the [commission] supports the decision reached." (Internal quotation marks omitted.) *McLoughlin* v. *Planning & Zoning Commission*, 342 Conn. 737, 751–52, 271 A.3d 596 (2022); see also *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 329–30 (board's finding that nonconforming use was illegally expanded is reviewed for "whether that finding is supported by substantial evidence"). "If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 427, 941 A.2d 868 (2008).

The "substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to

correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Internal quotation marks omitted.) *Putnam Park Apartments, Inc.* v. *Planning & Zoning Commission*, 193 Conn. App. 42, 54, 218 A.3d 1127 (2019). "When a zoning commission has stated a reason for denying a special permit application . . . the question for the court to pass on is simply whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations [that] the commission is required to apply under the zoning regulations." (Internal quotation marks omitted.) *McLoughlin* v. *Planning & Zoning Commission*, supra, 342 Conn. 752–53.

As previously explained, in *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 332, our Supreme Court held that "[i]n deciding whether the current activity is within the scope of a nonconforming use consideration should be given to three factors: (1) the extent to which the current use reflects the nature and purpose of the original use; (2) any differences in the character, nature and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from differences in the activities conducted on the property."

We begin with the first *Zachs* criterion, which requires us to examine the scope of the use of the property at the time it became nonconforming in order to determine whether the proposed greenhouse reflects the nature and purpose of the original use. The evidence reveals that, in 2018, the commission adopted a resolution approving the plaintiff's special permit application for "therapeutic activities in conjunction with a privately-operated hospital, clinic, nursing or convalescent home or similar institution." It is undisputed that the

plaintiff's 2018 application sought to use the property for therapeutic and agricultural purposes, including for the operation of an equine therapy program; a ropes course and climbing wall; and various agricultural activities, including a therapeutic agricultural program. The activities proposed for the property were intended to support the residents residing on the residential property.

Following the approval of the plaintiff's 2018 special permit application, the uncontroverted evidence reveals that the plaintiff began using the property in conformity with its approved special permit application by operating an equine therapy program, which included the use of a barn on the property to house the program's horses; a ropes course and climbing wall; and agricultural activities, including the farming of vegetables and a horticulture therapy program for some of the residents of the treatment program. Much of the farming of vegetables on the property and the care of the horses for the equine program was done by the plaintiff's staff. Some residents living on the residential property also assisted with the agricultural activities as part of their therapy program. The vegetables produced on the property were used to feed the residents and staff on the residential property.

The parties do not dispute that the use approved by the 2018 special permit became a valid nonconforming use in 2020 after the amendment to the regulations eliminating language that permitted "[a] privately operated hospital, clinic, nursing home, or convalescent home" in the RU-1 district. Although the plaintiff claims that a property owner may permissibly intensify a valid nonconforming use of its property as of right without approval from the commission, the record reflects that the plaintiff nevertheless filed a special permit application and a site plan application with the commission in 2020 seeking approval to add a greenhouse on the

property. Thus, the plaintiff's 2020 special permit application and site plan essentially amounted to a prophylactic request for an order from the commission confirming that its use of its proposed greenhouse would be considered a permissible intensification of its valid nonconforming use.

The evidence from the record before the commission shows that the plaintiff proposed adding a "hoop house" style greenhouse. The hoop house would consist of a series of hoops covered with plastic that creates a tunnel in which plants could be grown. Because the ground on which the plaintiff proposed to construct the greenhouse is already flat, there would be no need for concrete work or any excessive ground disturbance. The plaintiff's representative explained at the hearing before the commission that the plaintiff only proposed putting down some stone dust or pea gravel to make walking more comfortable. There would be no bathrooms or habitable space in the hoop house. The plaintiff proposed that a water line and electrical connection be continued from the adjacent, preexisting barn on the property to the hoop house in order to water the plants.

On the basis of our review of the record, we conclude that the use of the proposed hoop house reflects the nature and purpose of the existing, original use of the property. The proposed thirty foot by seventy foot hoop house on the plaintiff's approximately seventy acre property would be placed on the existing farm garden and pasture area on the property where plants are already grown. The greenhouse also would be in close proximity to the existing house and barn on the property and close to the previously approved equine activities, ropes course, and wall climbing areas. The greenhouse would permit the plaintiff to continue to grow fruits and vegetables in order to feed and support the plaintiff's residents and staff residing on the residential property—activities that it already does.

We next consider the second *Zachs* factor, which requires us to consider any differences in the character, nature and kind of use involved. The plaintiff proposes to add a single, rudimentary hoop house to an area already devoted to growing plants. The proposed hoop house simply provides an improved and more efficient way to grow fruits and vegetables and to provide therapeutic agricultural services. See *Zachs* v. *Zoning Board of Appeals*, supra, 218 Conn. 334 ("[t]he fact that improved and more efficient instrumentalities are utilized in pursuit of the use does not exclude it from the category of an existing use, provided these are ordinarily and reasonably adapted to make that use available to the owner, and the original nature and purpose of the undertaking remain unchanged" (internal quotation marks omitted)). The fact that the hoop house may increase the fruit and vegetable yield already used to support the residents and staff on the residential property "cannot reasonably be said to involve differences in the character of the nonconforming use rather than increases in the volume of business within the scope of the original use." Id., 332–33.

The commission makes two arguments in support of its position that the plaintiff's proposed hoop house constitutes a change in the character of its nonconforming use and, therefore, constitutes an illegal expansion. First, the commission contends that the addition of a structure to a nonconforming use is a per se change in the character of the use, asserting that "[t]he [c]ommission has not found any case in which a court has held that the addition or expansion of a structure for a nonconforming use may be deemed to be a mere intensification." Second, it claims that the addition of the hoop house constitutes a change in character because it would allow, for the first time, the plaintiff to grow fruits and vegetables into the winter season. We are not persuaded by the commission's arguments.

First, the commission's contention that the addition of any structure to a nonconforming use is a per se illegal expansion finds no support in our case law. Although it is true that some courts have concluded that the addition of a new structure or the expansion of an existing building constituted an illegal expansion of a nonconforming building or use, the legality of a proposed change to a nonconforming use is a fact intensive inquiry that must be conducted on a case-by-case basis. See, e.g., *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 708, 784 A.2d 354 (2001) ("[t]he legality of an extension of a nonconforming use is essentially a question of fact" (internal quotation marks omitted)).[8]

Second, although a proposal to extend a nonconforming use into an additional season or seasons may, under certain circumstances, constitute an illegal expansion of the nonconforming use; see, e.g., *Planning & Zoning Commission* v. *Craft*, supra, 12 Conn. App. 99; the commission in this case relies on a highly technical and overly narrow characterization of the existing use of the property in support of its argument that the proposed greenhouse would impermissibly allow activities over a substantially additional period of the year. The plaintiff's approved use of the property is not limited to vegetable farming. It is broader than that. It includes use of the property for therapeutic and agricultural purposes, including for the operation of an equine therapy program; a ropes course and climbing wall; and

[8] We note that at least one Superior Court has concluded that the addition of a structure to a nonconforming use was a permissible intensification of that use. See *Laviana* v. *Zoning Board of Appeals*, Docket No. CV-95-055119-S, 1996 WL 761474, *1, 4 (Conn. Super. November 26, 1996) (proposed construction of 28 foot by 100 foot pole barn on property was permissible intensification of nonconforming lumber yard); but see *McKosky* v. *Planning & Zoning Commission*, Docket No. CV-13-6039112-S, 2014 WL 6996359, *1, 16 (October 31, 2014) (site plan application seeking approval for construction of large " 'staging and storage area and structure' " to be used for " 'existing trucking and hauling business' " was illegal expansion of nonconforming use).

various agricultural activities, including a therapeutic agricultural program. The 2018 special permit did not purport to limit these activities to the time of year during which vegetables may be grown outdoors and the commission does not contend that all of the plaintiff's lawful activities on the property since the issuance of the special permit have been confined to that period of time. See id., 100 (preexisting use "extended to every period of the year, through winter, spring, summer and fall" and, thus, increase in use was not illegal expansion or extension). We cannot conclude, on the record before us, that the addition of the hoop house, which will simply allow the plaintiff to increase its fruit and vegetable yield, constitutes an illegal expansion when the property is already being used year-round for related activities. See *Helicopter Associates, Inc.* v. *Stamford*, supra, 201 Conn. 716 ("a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use").

That brings us to the final *Zachs* criterion: whether there would be a substantial difference in effect upon the neighborhood resulting from the use of the plaintiff's proposed hoop house. The commission first claims that there "was substantial testimony from neighbors about the negative impacts the plaintiff's existing traffic had already caused." Second, it argues that, although the plaintiff claims that the hoop house would be at least 1000 feet from the road and completely invisible to passersby, the plaintiff offered no photographs or other visual demonstrations. Third, the commission claims that the proposed hoop house would be "quite close" to surrounding properties. We conclude that there is not substantial evidence to support the commission's contentions.

First, the plaintiff's proposed use of the hoop house is consistent with the permitted as of right uses and accessory uses in the RU-1 district. For example, the

regulations already permit as of right (with no additional zoning authorization required) the principal use of "[a]griculture/farm in accordance with generally accepted agricultural practices as promulgated by the Connecticut Department of Agriculture." Kent Zoning Regs., c. 3200, § 3221 (1) (2020). "Farm" is defined as "[l]and used primarily for agricultural activities including . . . farm buildings and accessory buildings thereto including barns, silos, *greenhouses*, *hoop-houses* and other temporary structures or other structures . . . ." (Emphasis added.) Kent Zoning Regs., c. 2200 (2020). The regulations also permit as of right various accessory uses, including, inter alia, "[a]gricultural uses accessory to a residence such as . . . [g]ardening and the raising of crops or fruit," "[a]gricultural uses accessory to a farm," and "[a]n accessory use not listed [in the regulations]" if "such use is customarily incidental and directly related to the permitted principal use" and "no part of the accessory use is located in the area between the principal building and a public street unless visually screened from the view from the street and from adjacent premises." Kent Zoning Regs., c. 3200, § 3231 (2020). These provisions undercut the commission's contention that there would be a substantial effect upon the neighborhood from the plaintiff's use of the proposed hoop house.

Second, there is no evidence in the record that the proposed hoop house would be seen from the road. Although the commission claims that the plaintiff did not provide any photographs or visual demonstrations, the plaintiff did submit a brochure for its proposed hoop house, which included numerous photographs of the type of greenhouse it wished to construct. It also submitted a site plan showing the proposed location of the hoop house. The plaintiff's application to the commission represented that the hoop house would be more than 1000 feet from the road. At the hearing,

Vincent Roberti, Jr., the plaintiff's representative, testified that he used "Google Earth," an Internet mapping program, to plot the proposed hoop house, stating, inter alia, that "[i]t's not visible at all from Carter Road." Although the commission makes conclusory arguments on appeal suggesting that the hoop house may be seen from the road and that the site plan shows that the proposed hoop house would be "quite close" to surrounding properties, these arguments do not, without more, demonstrate that there would be a substantial effect upon the neighborhood.

Finally, although numerous neighbors spoke at the hearings and voiced their displeasure with the plaintiff's expansion in Kent over the years, most of the statements were not specific to the application and site plan under consideration but, instead, constituted general grievances about the plaintiff and the construction on the residential property that the commission had previously approved.[9] See *McLoughlin* v. *Planning & Zoning Commission*, supra, 342 Conn. 763 ("in the absence of specific evidence about the detrimental effects of the proposed facility, a generalized 'not in my backyard' . . .

[9] For example, the members of the public commented that the plaintiff is an "omnivorous beast that just won't stop" and that it was time "to stop feeding the High Watch . . . beast"; "Why load up Kent. Uh it's enough. Let them go somewhere else. . . . It's a different neighborhood than when . . . they came in 1939 when there were no houses. Now there are many houses. Um somebody has to be firm with these people; if you're not firm they are going to be back to you time and again and they'll be well represented by legal people and they'll continue what they do. So, my point is let's stop them now. Let them go somewhere else for their expansion and live happily ever after in Kent"; the plaintiff "belong[s] in a bigger town because to have [the plaintiff] now building on two sides of Carter Road is setting a precedent that [is] really going to be horrible for the road"; the plaintiff is a "Trojan horse"; "[s]o we know that they are in the middle of building new beds [on the residential property] and the construction and the trucks and the coming and going; it used to be peaceful, charming, family oriented; now it's busy, highly trafficked, a noisy commercial area"; and "[t]hey've been building [on the residential property] for a long time now. It looks like a big gravel pit and now they are going to start building and tearing up the other side of the road . . . ."

reaction cannot, by itself, serve as substantial evidence for denying the plaintiffs' application" (footnote omitted)). Indeed, a review of the comments by the neighbors shows that they amounted to "general concerns, speculation, and mere worry," which do not qualify as substantial evidence. Id., 760; see also *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 349–50, 207 A.3d 1053 (2019) ("[P]ublic testimony is not to be considered substantial evidence when it is not supported by anything other than speculation and conjecture on the part of those objecting to the [party's] proposed activities. . . . While the commission could take into consideration the neighbors' concerns and observations as to current road conditions, the neighbors' remarks as to the adequacy of the streets to accommodate traffic and prospective hazards or congestion addressed matters of professional expertise." (Citations omitted; internal quotation marks omitted.)). The comments by the neighbors therefore provided little, if any, evidence concerning the proposal's effects upon the neighborhood.

In sum, the commission did not have substantial evidence before it to support its reasons for denying the plaintiff's application. Consequently, the only reasonable conclusion for the commission was to grant the application with reasonable conditions. See *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, supra, 189 Conn. App. 353.[10]

[10] Although we conclude that the proposed hoop house constitutes a permissible intensification under *Zachs*, we note that, in addition to permissible intensifications, "[s]ome jurisdictions recognize a right to expand a nonconforming use, despite the general rule that such expansion is not permitted, to allow for the natural development and growth of the nonconforming use. This right has been called the 'natural expansion doctrine' and permits the augmentation of a nonconforming business use to meet the demands of normal growth. Under the doctrine, a nonconforming use may be extended in scope, as the business increases in magnitude, over ground occupied by the owner of the business at the time of the enactment of the zoning ordi-

The judgment is reversed and the case is remanded to the Superior Court with direction to sustain the plaintiff's appeal and to remand the case to the commission with direction to approve the plaintiff's application for a special permit application with reasonable conditions.

In this opinion the other judges concurred.

DESSA, LLC *v.* PETER RIDDLE ET AL.
(AC 45072)

Cradle, Suarez and Flynn, Js.

Syllabus

The defendant J appealed to this court from the judgment of the trial court, which found that J and his father, P, were jointly and severally liable for unpaid rent and other expenses in connection with the plaintiff landlord's lease of an apartment to P. J testified at trial that he had never resided at the apartment and had never seen or known of the lease until he was served with process when the plaintiff commenced suit. P testified that, after the plaintiff had informed him that his credit was insufficient to rent the apartment, he used J's Social Security number and identity to acquire the lease, told the plaintiff that J would also be a tenant at the apartment and forged J's signature on the lease and placed utilities in J's name, all without J's knowledge. The court, *Spader*, *J.*, found that, although P and J were "largely credible," it also stated that it did not believe J had known nothing about P's actions and credit

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nance. The doctrine gives a landowner the right to expand the nonconforming use as required to maintain economic viability or to take advantage of increases in trade. Natural expansion, however, is subject to limitation where the expansion is inconsistent with the public interest, or the imposition of limitations is necessary to prevent excessive expansion, and a municipality thus may impose reasonable restrictions on the natural expansion of a nonconforming use. Furthermore, a natural expansion must not be substantial, and it cannot be in actuality an addition of a new use rather than the expansion of an old one." (Footnotes omitted.) 83 Am. Jur. 2d 549–50, Zoning and Planning § 559 (2023); see also *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 241 (referencing natural expansion doctrine); *Connecticut Resources Recovery Authority* v. *Planning & Zoning Commission*, 225 Conn. 731, 745, 626 A.2d 705 (1993) (same). Because neither party raised or briefed the doctrine of natural expansion in this appeal, we leave for another day the question of whether or to what extent that doctrine applies in Connecticut.

issues. Judge Spader stated that, "[s]peaking personally, as a son," he would have let his father use his name and credit in similar circumstances, and that, even if J had not given explicit permission to P, "as a dutiful son," permission to do so was implied. *Held*:

1. This court was unpersuaded by J's claim that newly discovered evidence demonstrated that the plaintiff had commenced this action with unclean hands and without probable cause under fraudulent premises: J's failure to raise those issues at the time of trial or by way of an appropriate posttrial motion undermined his ability to raise those issues on appeal; moreover, whether the plaintiff's conduct amounted to the misconduct J had alleged was an issue of fact that had to be decided by the trial court in the first instance, and, even if the court had found that wilful misconduct on the part of the plaintiff had been proven, the issue of an appropriate sanction had to be determined in the trial court's sound discretion and was not an issue for this court to decide in the first instance.
2. This court concluded that the trial judge's statements that he would have permitted his father to use his name and credit in similar circumstances and that doing so was the obligation of a dutiful son left it with the definite and firm conviction that a mistake had been committed: the trial judge appeared to have relied on those beliefs, rather than on the evidence, in finding that J had guaranteed the debt P incurred with respect to the lease; moreover, regardless of whether there was a rational view of the evidence that might have supported the court's findings of fact, the court's decision was difficult to reconcile in key respects, as the finding that P and J were largely credible was difficult to reconcile with the court's determination that it was "hard to believe" J's testimony as to whether he was aware that he was guaranteeing P's debts; furthermore, because the court concluded that J acted both explicitly and implicitly, it was unclear what legal theory the court relied on to impose joint and several liability; accordingly, because the court's decision was apparently based in part on improper considerations, the judgment was reversed and the case was remanded for a new trial.

Argued September 20, 2023—officially released January 23, 2024

Procedural History

Action to collect unpaid rent, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk; where the court, *Spader*, *J.*, denied the motion to dismiss filed by the defendant Jonathan Riddle; thereafter, the case was tried to the court; judgment for the plaintiff, from which the defendant Jonathan Riddle appealed to this court. *Reversed*; *new trial.*

Jonathan Riddle, self-represented, the appellant (defendant).

Thomas C. C. Sargent, for the appellee (plaintiff).

Opinion

SUAREZ, J. The plaintiff landlord, Dessa, LLC, commenced the underlying action against the defendants, Peter Riddle (Peter) and his son, Jonathan Riddle (Jonathan), to collect unpaid rent pursuant to a written lease agreement that was allegedly entered into between the parties.[1] Jonathan appeals from the judgment of the trial court finding the defendants jointly and severally liable for damages in the amount of $11,113.06. Jonathan claims that (1) newly discovered evidence demonstrates that the plaintiff interfered with the court's ability to be impartial and equitable in this case, and (2) the court's findings are clearly erroneous. We reverse the judgment of the trial court.

In its two count complaint, the plaintiff alleged that it owned and leased the subject property in Stamford and that, on September 4, 2016, the defendants signed a written lease agreement requiring them to pay $2350 in rent each month, with a $150 late fee if not paid in full by the tenth of each month. The plaintiff alleged that the defendants failed to pay rent from April through August, 2017, and from September 1 through 15, 2017, leading to an arrearage of $12,925 in unpaid rent and $900 in late fees. Additionally, the plaintiff alleged that the written lease agreement required the defendants to pay utility bills, $538.06 of which were unpaid. The plaintiff further alleged that the defendants were jointly and severally liable for damages in the amount of $14,363.06. The plaintiff sought the damages alleged, attorney's fees as permitted under the terms of the lease

[1] The defendants were self-represented before the trial court. Jonathan is self-represented in this appeal. Peter has not participated in this appeal.

agreement, and any other form of relief that the court may find just and proper.

In his answer, Peter agreed that he had entered into the written lease agreement but disagreed that he failed to pay any moneys due under the lease. In his answer, Jonathan disagreed with every allegation in the plaintiff's complaint.

A bench trial was held on May 20, 2021, by means of a remote hearing, before the court, *Spader*, *J.* The court heard testimony from Janine Cloutier, the sole member of the plaintiff limited liability company, as well as both defendants. In an order dated May 23, 2021, the court set forth its decision: "On the surface, this is a straightforward collections matter. [Peter] took possession of the plaintiff's premises located at 35 West Broad Street #205 in Stamford . . . pursuant to a lease dated September 4, 2016. [Peter], with his daughter, Jessica [Riddle], resided in the premises from October 1, 2016, through mid-September, 2017. Monthly rent was $2350. The defendants were late on [their] payments and do not contest the bulk of the debt due to the plaintiff . . . .

"The issue in the case is that the second defendant, [Jonathan] is also on the lease, and the plaintiff claims he is jointly and severally liable for the debt due to it.

"Following the denial of [Jonathan's] motion to dismiss, this matter went to trial remotely . . . on May 20, 2021. The court heard from the parties and found them largely credible. The plaintiff advised [the defendants] that [Peter's] credit was insufficient to make [the plaintiff] consider renting the apartment to him. He was, and is, in debt to the [United States Internal Revenue Service] as well as other creditors. The plaintiff required additional security guaranteeing payment of monthly rent before renting to him. Peter alleges [that], at that point, he used his son's Social Security number to essentially steal his son's financial identity to acquire the

lease. He provided the plaintiff with an electronic transfer of his son's Experian credit report and advised [the plaintiff that] his son would also be a tenant. When the lease was drawn up, including Jonathan's name, Peter forged his son's signature on the lease.

"The plaintiff's concerns with Peter ended up being well founded when Peter defaulted on his rental obligations.

"The plaintiff commenced this action for payment of past due amounts against both Peter and Jonathan. Jonathan alleged [that he had] no knowledge that his name was used to obtain the apartment. He alleges that he never resided there and never saw the lease or knew of its existence until being served with this action. Peter admits the debts due herein and admits to fraudulently inducing the plaintiff to rent to him with his forgery and theft of his son's financial identity. If judgment enters, Peter believes it should only be as to him, personally, based on his admitted dishonesty involving his son.

"The plaintiff's manager admits she never saw Jonathan at the unit, nor provided him with keys but indicates [that the plaintiff] . . . would not have rented the apartment to the Riddles without Jonathan being liable on the rental payments. She advised the court that at least one [limited liability company] operated by the Riddles indicated this property address as Jonathan's residence and indicated that the electric bills were also in Jonathan's name. The [limited liability company] issue is not relevant; although Jonathan's residence is listed as this address, he never resided there, his sister was the secretary [for the limited liability company], and she completed the [limited liability company's] paperwork using this address. The testimony of the parties regarding the interconnectivity of the [family's] business affairs, however, makes it difficult

for the court to believe Jonathan knew nothing of his father's credit issues and his involvement with their obtaining this premises.

"Peter advised that he was also unable to obtain credit to open utility accounts, so he also defrauded those creditors by placing utilities in Jonathan's name.

"As the court noted [previously], at trial, the parties were largely credible. Peter wouldn't call his actions 'fraud,' but he admitted to misusing his son's Social Security number and placing debts in his son's name. Jonathan was also credible; however, the court does not believe that he had no knowledge of his father's actions. Speaking personally, as a son, the undersigned would have allowed my father to use my name and credit if he was in a position where he had to. The defendants 'knew what they were doing,' as they needed to obtain an apartment, and [Peter] was not creditworthy. It doesn't matter that Jonathan did not occupy the premises; he was on the lease, and if there was not explicit permission from Jonathan for him to do so, as a dutiful son, the permission was implied. The defendants just did not expect this matter to get to the point where the plaintiff would pursue them in court for their nonpayment.

"When coupled with the utilities also being in Jonathan's name, it is hard to believe that Jonathan was not aware that he was guaranteeing Peter's debts. Jonathan can seek legal remedies against his father criminally or civilly if he truly believes his father acted without his consent. He has not done so since 'learning' of his [signature] being included on the lease when this action was commenced last year.

"The court finds that both of the defendants, Peter AND Jonathan . . . are jointly and severally liable for the debt due to the plaintiff. ([Jonathan's sister, Jessica] would also be responsible were she made a party.) The

court finds that the surrender of the premises was not until at least September 15, 2017, as the access keys/fobs were not fully returned to the plaintiff until at least that date. The court is not allowing late fees that were requested by the plaintiff for reasons stated on the record. The court finds for the plaintiff in the amount of $11,113.06, detailed as follows:

"Unpaid back rent: $12,925

"Unpaid water/sewer/utilities: $538.06

"Less: Security deposit balance: $2350

"Legal fees are awarded in the amount incurred to date of $1350. This amount is less than 15 percent of the debt pursuant to General Statutes § 47a-4 and [is] allowed under paragraph 16 of the lease.

"The plaintiff can submit a bill of costs to request an award of costs.

"The court awards judgment interest at 10 percent."

This appeal followed.

I

Jonathan first claims that newly discovered evidence demonstrates that the plaintiff interfered with the court's ability to be impartial and equitable in this case.[2]

[2] With respect to the allegedly newly discovered evidence, Jonathan asserts that "(1) the alleged lease supporting the complaint was fabricated; (2) [t]he case transcripts show beyond a reasonable doubt [that] the plaintiff committed perjury under oath at trial; (3) [t]he complaint contains several false and fraudulent misrepresentations by relying on the fabricated evidence; (4) the plaintiff's counsel submitted motions containing false statements and maliciously misrepresented the facts to the court, causing manifest injury and inequity; (5) the plaintiff gave knowingly false testimony and showed a reckless disregard for the truth; [and] (6) [t]he facts provided will conclude clearly and convincingly [that] the plaintiff and the plaintiff's counsel fraudulently took action against Jonathan knowing he was not a proper party to the action."

He argues that "[n]ewly discovered evidence establishes [that] the plaintiff commenced this action with unclean hands [and] without probable cause under fraudulent premises." Although Jonathan's claim is not framed with legal precision, Jonathan appears to argue that this court should either sanction the plaintiff for having wilfuly abused the judicial process or rely on the doctrine of unclean hands to dismiss the plaintiff's action or preclude the plaintiff from recovering damages. We are not persuaded by this claim.

Jonathan essentially asks this court to find that the plaintiff engaged in a wide range of actions, including engaging in fraud, "maliciously" misrepresenting facts, fabricating evidence, testifying falsely, and showing a reckless disregard for the truth that undermined the trial court's ability to fairly adjudicate the case. Jonathan, however, is unable to demonstrate that the factual or legal issues he raises on appeal, in connection with this claim, were either raised before or ruled on by the trial court. "It is well known that this court is not bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. Practice Book § 60-5. The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Emphasis omitted; internal quotation marks omitted.) *Ochoa* v. *Behling*, 221 Conn. App. 45, 50–51, 299 A.3d 1275 (2023).

Jonathan's failure to have raised these issues either at the time of trial or by way of an appropriate posttrial motion undermines his ability to raise these issues in the present appeal. This is because the issues of whether

the plaintiff, through its sole member, Cloutier, acted in a fraudulent manner in connection with the present litigation or acted wilfuly to abuse the judicial process in connection with the underlying action are not only related to what Cloutier's actions were but depend on a finding concerning her state of mind.[3] Whether the plaintiff's conduct amounts to the misconduct Jonathan alleges is an issue of fact that, in the first instance, must be decided by the trier of fact, not an appellate tribunal. It is axiomatic that "[an appellate] court does not try issues of fact or pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Wasniewski* v. *Quick & Reilly, Inc.*, 292 Conn. 98, 103, 971 A.2d 8 (2009). Moreover, even if the court had found that wilful misconduct on the part of the plaintiff had been proven, the issue of an appropriate sanction is left to the sound discretion of the trial court; it is not an issue to be decided in the first instance by this court.

For similar reasons, Jonathan's reliance on the doctrine of unclean hands, for the first time in this appeal, does not fare any better. "Our jurisprudence has recognized that those seeking equitable redress in our courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show

[3] To the extent that Jonathan argues that Cloutier engaged in fraudulent conduct, we observe that, in basic terms, a finding of "fraud" requires a subordinate finding of an intent to deceive. "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Citations omitted; internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 217, 595 A.2d 1377 (1991).

that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Citation omitted; internal quotation marks omitted.) *Ridgefield* v. *Eppoliti Realty Co.*, 71 Conn. App. 321, 334–35, 801 A.2d 902, cert. denied, 261 Conn. 933, 806 A.2d 1070 (2002).

Our Supreme Court has stated that "[a]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. *A & B Auto Salvage, Inc.* v. *Zoning Board of Appeals*, 189 Conn. 573, 578, 456 A.2d 1187 (1983); accord *Cohen* v. *Cohen*, 182 Conn. 193, 196, 438 A.2d 55 (1980) ([i]t is clear that [the doctrine of unclean hands] is to be applied . . . by the court in the exercise of its sound discretion); *DeCecco* v. *Beach*, 174 Conn. 29, 35, 381 A.2d 543 (1977) ([t]he maxim should be applied in the trial court's discretion). The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . *The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion.*" (Emphasis added; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 308, 777 A.2d 670 (2001).

For the foregoing reasons, we are not persuaded by Jonathan's first claim.

II

Next, Jonathan essentially challenges the court's findings as being clearly erroneous. Jonathan argues that

the court "ignored relevant factors" and "considered irrelevant factors" in resolving the factual issues before it. We agree with Jonathan.

Jonathan challenges the court's decision on several grounds. First, he argues that the evidence contradicted the court's findings. He relies on his testimony that he did not authorize his father to use his credit history to enter into the lease agreement, that he had not seen the lease agreement until the plaintiff commenced the present action, and that he did not sign the lease agreement. Jonathan testified that he "had no understanding that [he] was connected to this address in any way legally or credit wise." Jonathan also relies on Peter's testimony that Peter had used Jonathan's credit history in order to enter into the lease agreement and had forged Jonathan's signature on the lease agreement without his knowledge.

Second, Jonathan argues that the court erroneously found that the address of the subject property was his residence rather than the address of a limited liability company owned by Jonathan, Peter, and Jessica.

Third, Jonathan argues that Judge Spader's findings were impacted by the judge's own personally held inclination to let his father use his name and credit, which Jonathan characterizes as a personal bias that "is legally incorrect and would establish an entirely new and erroneous, generalized legal principle as it pertains to sons of fathers." Specifically, Jonathan refers to the portion of the court's decision in which Judge Spader stated that he "would have allowed [his] father to use [his] name and credit if he was in a position where he had to" and that "if there was not explicit permission from Jonathan for [Peter] to [use his name and credit], as a dutiful son, the permission was implied." Jonathan argues that the court "is asserting that all sons, no matter the relationship to the father or circumstances,

would allow the father to use their name and credit no matter the consequences, with or without consent." Jonathan also argues that it was improper for the court to have based its findings on the fact that he had not pursued any legal remedies against Peter for having used his name and credit without his knowledge or permission.

Finally, Jonathan argues that the court's factual findings cannot be reconciled. Noting that he testified at trial that he lacked any knowledge of Peter's fraudulent conduct until after the plaintiff commenced the underlying action, Jonathan argues that the court's initial finding that his testimony was "largely credible" cannot be reconciled with its subsequent finding that he and Peter " 'knew what they were doing' " in terms of using Jonathan's credit and identity to enter into the lease agreement.

"Our review is limited to a determination of whether the decision made is logically consistent and supported by the evidence." *Capmar Construction, Inc.* v. *Coyle*, 4 Conn. App. 579, 580, 495 A.2d 1115 (1985). "[W]here the factual basis of the [trial] court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . 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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did. . . . In reviewing factual findings, [w]e do not examine the

record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 629–30, 289 A.3d 609 (2023).

At the outset, we agree with Jonathan that the court's decision is somewhat difficult to reconcile in key respects. It suffices to observe that Jonathan's testimony was brief, focused on the central issue of whether he knew of Peter's actions concerning the lease. It is difficult for this court to reconcile the trial court's finding that Jonathan and Peter were "largely credible" with its finding that Jonathan's testimony about the principal issue on which he testified—whether he was aware that he was guaranteeing Peter's debts—was "hard to believe." It is also unclear what legal theory the court relied on to impose joint and several liability because it concluded that Jonathan acted both explicitly and implicitly. On the one hand, the court stated that the defendants acted jointly in using Jonathan's name and credit, as the court found that they "knew what they were doing" in order to obtain an apartment for Peter, who was not creditworthy. On the other hand, the court stated that Jonathan did not give Peter explicit permission to use his name and credit but that, "as a dutiful son, permission was implied."[4]

More importantly, however, we agree with Jonathan that the court's decision appears to have been based, in part, on improper considerations. Regardless of whether there was a rational view of the evidence that

[4] This inconsistency in the court's decision is further clouded by the fact that, in finding that the defendants were jointly and severally liable, the court did not state whether it ultimately determined that Jonathan held Peter out as his agent or whether the court ultimately determined that Jonathan permitted Peter to exercise apparent authority on his behalf.

might have supported the court's findings of fact, it appears that the court was swayed in its fact-finding by its own attitudes garnered from personal life experience. "[Triers of fact] are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life"; (internal quotation marks omitted) *In re Kristy A.*, 83 Conn. App. 298, 316, 848 A.2d 1276, cert. denied, 271 Conn. 921, 859 A.2d 579 (2004); "[n]evertheless, attitudes garnered from personal life experience cannot serve as a substitute for properly admitted evidence at a hearing where the court's mandate is to ascertain the intent of the parties. Judicial impartiality is the hallmark of the American system of justice. . . . The background and experience of a trial judge are disqualifying only if they prevent that judge from assessing the evidence fairly and impartially. It is assumed that judges, regardless of their personal backgrounds and experiences in life, will be able to set aside any biases or predispositions they might have and consider each case in light of the evidence presented." (Citation omitted; internal quotation marks omitted.) *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 402, 186 A.3d 739 (2018).

In the present case, the trial judge explicitly interjected his personal observations and beliefs into the decision. The judge stated that, in similar circumstances, he would have permitted his father to use his name and credit. The judge also expressed his belief that doing so was the obligation of "a dutiful son." Regardless of whether the court found that Jonathan acted explicitly or implicitly, it appears to have relied on the aforementioned personal beliefs, rather than the evidence, in finding that Jonathan had guaranteed the debt that Peter incurred with respect to the lease. Therefore, we are left with the definite and firm conviction

that a mistake has occurred, for which the proper remedy is to reverse the judgment of the trial court and remand the case for a new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.