CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

GERIATRICS, INC. *v.* HELEN MCGEE ET AL. (SC 20047)

Palmer, McDonald, Robinson, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to a provision of the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552e [a] [1]), a transfer by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made and if the debtor made the transfer with actual intent to hider, delay or defraud any creditor of the debtor.

The plaintiff, a nursing home operator, sought to recover damages for, inter alia, the alleged breach of a residency agreement executed by the named defendant, H, upon her admission to one of the plaintiff's nursing homes. Before H was admitted to the plaintiff's facility, H's son, the defendant S, began to manage her finances under a power of attorney that she had given to him, which included access to her bank accounts. Under the residency agreement, to which S was not a party, H agreed to pay for the costs associated with her residency and related care. The plaintiff alleged, with respect to H, breach of contract and unjust enrichment owing to her failure to pay for services rendered to her by the plaintiff. With respect to S, the plaintiff alleged unjust enrichment and a violation of CUFTA on the basis that H had transferred assets to S, those transfers

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* This appeal originally was argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn. Thereafter, Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

left H with insufficient assets to pay her debts, the transfers were made with the intent to hinder H's creditors, and S had provided nothing in exchange for the assets he received. At trial, the plaintiff introduced checks issued after H had been admitted to the nursing home that were payable to S or his wife. The checks totaled about $73,000 and were drawn on H's bank accounts and signed by S with the designation for power of attorney. S also exercised his power of attorney to pay some of H's past and present expenses directly to other creditors. S's deposition testimony, which was admitted at trial, indicated that he had a verbal agreement with H to receive payment for his power of attorney services in the amount of $600 per month and that H had agreed that he could allocate money to himself for the care that he provided to her in her home before she was admitted to the nursing home. There was no claim by H's counsel that S lacked authority to make the transfers to himself on H's behalf or that he otherwise engaged in any wrongdoing in connection with those transfers. The trial court rendered judgment for the plaintiff on its breach of contract claim against H and for S on both the CUFTA and unjust enrichment counts against him. The court reasoned that CUFTA did not apply to the transfers made by S because S was not a debtor of the plaintiff, and CUFTA did not apply to third-party transferors, such as S. The court also determined, with respect to the plaintiff's unjust enrichment claim against S, that both the plaintiff and S had a right to H's assets but that the plaintiff had failed to prove that the plaintiff had the better legal or equitable right to H's assets than S did. On the plaintiff's appeal from that portion of the trial court's judgment relating to the plaintiff's claims against S, *held*:

1. The trial court improperly rejected the plaintiff's fraudulent transfer claim on the ground that S's transfers of H's assets pursuant to a power of attorney were not transfers made by a debtor, and, accordingly, the trial court's judgment as to the plaintiff's CUFTA claim was reversed and the case was remanded for a new trial on that claim at which the court must determine whether such transfers were fraudulent under any of the theories advanced by the plaintiff: the trial court improperly failed to consider the agency relationship between H and S created by the power of attorney and to apply agency principles when it determined that H's assets had been transferred by a third party rather than by the debtor; moreover, this court's review of the relevant provisions of CUFTA, including the provision (§ 52-552k) providing that the law relating to principal and agent supplements the provisions of CUFTA, unless displaced by its provisions, led it to conclude that the requirement in § 52-552e (a) that the fraudulent transfer be made "by a debtor" encompasses a transfer made by a person authorized by a power of attorney to make such a transfer on behalf of the debtor, there having no basis to conclude that the application of agency principles in this context was inconsistent with the provisions of CUFTA or conflicted with its policies of protecting creditors and suppressing fraud.

2. The trial court properly rendered judgment for S on the plaintiff's unjust enrichment claim: the trial court's finding that S, as well as the plaintiff, had an interest in H's assets was not clearly erroneous, as the court was free to consider the absence of a claim by H that S improperly transferred assets to himself and to credit S's deposition testimony, which was admitted into evidence by the parties' mutual agreement, that he used the money from H's accounts to compensate himself for the care he had provided to H before she was admitted and for the continued management of her personal and financial affairs; moreover, the trial court did not abuse its discretion in determining that the plaintiff had failed to prove that it, rather than S, had the better legal or equitable right to H's assets.

(*Three justices concurring in part and dissenting in part in one opinion*)

Argued April 4, 2018—officially released June 18, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Morgan, J.*; judgment in part for the plaintiff, from which the plaintiff appealed. *Reversed in part*; *new trial.*

Andrew P. Barsom, for the appellant (plaintiff).

Jeremy S. Donnelly, for the appellee (defendant Stephen McGee).

Opinion

McDONALD, J. The Connecticut Uniform Fraudulent Transfer Act (CUFTA or act), General Statutes §§ 52-552a through 52-552*l*, provides relief to unsecured creditors when there has been a transfer of a debtor's assets and the circumstances establish that the transfer was fraudulent. The principal issue in this appeal is whether it would be improper to impute to the debtor a transfer of the debtor's assets by the debtor's agent under the law of agency. The act directs courts to apply the law of principal and agent unless such law is "displaced by" the provisions of the act. General Statutes § 52-552k.

The defendant Stephen McGee used a power of attorney granted to him by his elderly mother, the named defendant, Helen McGee (Helen), to transfer to himself funds from Helen's checking account, claiming that Helen had authorized him to reimburse himself for various services that he had provided or was continuing to provide to her. As a consequence of those transfers, Helen had insufficient assets to pay her debt to the plaintiff, Geriatrics, Inc., the owner and operator of a nursing home in which Helen resided for a period of time. The plaintiff appeals from the judgment of the trial court insofar as it rendered judgment in the defendant's favor on counts alleging fraudulent transfer under CUFTA and unjust enrichment. We conclude that the trial court, in rejecting the plaintiff's CUFTA claim, improperly failed to consider and apply agency principles when it decided that Helen's assets had been transferred by a "third party," the defendant, and not by the debtor, Helen. We further conclude that, in light of certain unrebutted evidence, the trial court did not abuse its discretion in rejecting the plaintiff's unjust enrichment claim. Therefore, we reverse in part and affirm in part the trial court's judgment.

The record reveals the following undisputed facts. In late 2012, the defendant began to manage Helen's finances under a power of attorney.[1] In February, 2013, Helen was admitted to Bel Air Manor, a skilled nursing home operated by the plaintiff, and she agreed to pay for residency and related care. The defendant was not a party to this agreement. Although Medicare and private insurance paid Helen's expenses for the first

[1] The defendant testified that there was a power of attorney agreement, but that agreement was never produced at trial, or at the defendant's deposition, which served as the only source of his testimony. As we explain later in this opinion, the defendant's authority to execute the transfers pursuant to the power of attorney was never disputed by the parties. The trial court expressly found that the transfers were executed pursuant to that authority.

nine months at Bel-Air Manor, she began accumulating debt once those benefits were exhausted.[2]

In June, 2015, the plaintiff commenced the present action against Helen[3] and the defendant. In the counts brought against Helen, the plaintiff alleged that Helen had breached the residency agreement and had been unjustly enriched by her failure to pay in excess of $153,000 for services provided to her to date. In the counts against the defendant, the plaintiff alleged that Helen had transferred assets to the defendant, an "insider" under CUFTA; that those transfers left Helen with insufficient assets to pay her debts; that those transfers were made with the intent to hinder Helen's creditors; and that the defendant had provided nothing in exchange for the funds he received. The plaintiff alleged that this conduct constituted a fraudulent transfer in violation of CUFTA and resulted in the defendant's unjust enrichment.[4] The defendant admitted in his answer that Helen had transferred assets to him but denied the other substantive allegations.

At trial, the plaintiff introduced checks drawn on bank accounts in Helen's name, signed by the defendant with the designation "POA" (power of attorney). Some of the checks named various businesses as payees;

[2] The trial court credited the defendant's testimony that the plaintiff refused to assist the defendant in reapplying for Helen's Medicare benefits, and that the defendant unsuccessfully applied for Medicare benefits on his mother's behalf three times during her stay. At the time of her death, Helen owed the plaintiff approximately $208,000.

[3] The plaintiff named Helen as a defendant individually and in her capacity as trustee of the Helen C. McGee Revocable Trust. Discussion of the matters relating to the trust, which involved the disposition of certain real property, is not necessary to the resolution of this appeal.

[4] The plaintiff also advanced a claim of misrepresentation against the defendant for statements regarding Helen's assets made in a personal financial information form that the defendant signed and submitted to the plaintiff. The trial court rendered judgment in favor of the defendant on this count, finding that he did not know that his statements were false. The plaintiff does not challenge that holding on appeal.

forty-eight of the checks, issued over a three year period and totaling approximately $73,000, named the defendant or his wife as payee.[5]

The defendant did not testify at trial. He was unavailable due to illness, and his deposition was admitted into evidence by stipulation. In that deposition, the defendant testified that, in late 2012, he began to manage Helen's finances under a power of attorney agreement that Helen had given. He testified that various checks likely had been or were issued as payment for his power of attorney services, for which he charged $600 a month.[6] The defendant testified that he and Helen had made a verbal agreement that he would receive monthly fees for such services, and that the power of attorney agreement reflected that he could charge fees. The defendant also testified that he had cared for Helen before she was admitted to Bel Air, and that he and Helen had a verbal agreement that he could take "whatever's due [to him]" for the personal care that he had provided. The defendant estimated the value of that care to be approximately $230 per day, based on the rate for comparable professional services.

No testimony was received from Helen. She died a few months before trial commenced in September, 2016, and was never deposed.[7] However, Helen's interests were represented by counsel throughout the pro-

[5] According to the defendant's deposition testimony, many of the checks intended to compensate him were made payable to his wife because he did not maintain a checking account at that time. It appears that the plaintiff's CUFTA claim was based on the transfers issued in the names of both the defendant and his wife. The defendant's wife was not named as a defendant.

[6] The defendant's testimony was inconsistent on this point. He later testified that his fees were $1200 per month.

[7] According to the defendant's deposition testimony, Helen was exhibiting signs of dementia when he lived with her, and that condition became more constant when she entered into the nursing home.

ceedings.[8] No cross claim was made on Helen's behalf against the defendant asserting either that he lacked authority to make the transfers to himself on her behalf or that he otherwise engaged in any wrongdoing in connection with these transfers.

After the parties filed posttrial briefs, the court issued an order directing the plaintiff to file a supplemental brief clarifying the specific provisions of CUFTA on which it was relying and the factual and legal basis for each such claim. The court permitted the defendant to file a responsive supplemental brief. The plaintiff's supplemental brief asserted that the evidence at trial satisfied four statutory grounds—General Statutes §§ 52-552e (a) (1) and (2), and 52-552f (a) and (b). The court did not ask the parties to address, and neither party's brief did address, the significance, if any, of the fact that the transfers had been executed by the defendant pursuant to a valid power of attorney.

The trial court rendered judgment in favor of the plaintiff on the breach of contract count against Helen on the basis of a stipulation in which Helen's counsel conceded liability on that count. The court rendered judgment for the defendant on all counts brought against him.

In its memorandum of decision, the trial court made the following findings of fact, which were based solely on the defendant's deposition testimony.[9] When Helen's

[8] In its memorandum of decision, the trial court noted Helen's death and the fact that the plaintiff did not apply to the trial court for an order to substitute the executor of Helen's estate after Helen died. The trial court found that Helen's and the defendant's interests "were represented by their counsel at trial." Neither the trial court nor the parties otherwise addressed the significance of Helen's death with respect to the action proceeding against her or judgment rendered against her.

[9] Counsel for the defendant and Helen did not call any witnesses to testify, and the only exhibit offered was a statement from Bel Air Manor, dated March 1, 2016, showing a balance due of $166,758.08.

health first began to deteriorate, the defendant moved into her home to provide twenty-four hour a day care. He mainly offered physical aid, such as cooking and ordering groceries, bathing her, dressing her, and dealing with her incontinence. The defendant's wife assisted with Helen's care. This arrangement lasted for approximately two years. At that point, the defendant was no longer able to care for Helen because of his own debilitating disease and hired private caretakers to provide home care for her.

After Helen was admitted to Bel-Air Manor in early 2013, the defendant and his wife continued to provide care to Helen in the form of managing her personal and financial affairs. At this time, the defendant held power of attorney for Helen and the power of attorney provided the defendant with access to the bank accounts in which Helen's Social Security and pension benefits were electronically deposited. The defendant exercised the power of attorney to pay some of his mother's past and present expenses directly to her creditors. From March, 2013 to March, 2016, the defendant, "acting under the power of attorney for Helen," also wrote checks to himself and to his wife totaling approximately $73,000. The defendant and his wife used those funds to compensate themselves for the care that they had provided to Helen before and after her admission to Bel Air, to pay the defendant $600 a month for services as power of attorney, and as reimbursement for money loaned to Helen or spent on her behalf.[10]

[10] Had the defendant paid himself the $230 daily rate to which he claimed he was entitled for the two years of personal care he had provided to Helen before her admission to Bel Air, that sum would have been $167,900. Payment for the $600 monthly fee for power of attorney services over the approximately three year period Helen resided at Bel Air would have been $21,600. The checks that the defendant issued to himself and his wife over that three year period were for widely varying amounts that did not reflect a clear relationship to these two sums: fifteen were for amounts in excess of $1000; seventeen were for amounts in excess of $2000; and two were for $3000.

On the basis of these facts, the court reached the following conclusions. With regard to the fraudulent transfer claim, although all of the parties' filings and argument to the court proceeded from the view that Helen transferred the assets, the trial court on its own initiative raised the issue of whether the defendant himself was the transferor was with regard to these transactions in light of his testimony.[11] The court noted that it was not Helen, the debtor, who had actually executed the transfers, but instead it was the defendant, a "third party transferor." The court raised the issue because of language in CUFTA that provides for recovery when there is a transfer "made . . . by a debtor"; General Statutes §§ 52-552e and 52-552f; and which defines "[d]ebtor" as "a person who is liable on a claim." General Statutes § 52-552b (6). The court then reasoned "that the act does not apply to the alleged transfers at issue in this case because [the defendant] is not a debtor of the plaintiff as that term is defined in the act, and the plain and unambiguous language of the act does not apply to third-party transferors." The court did not appear to consider whether the defendant's status as Helen's attorney-in-fact distinguished him from third parties generally. The court cited cases reasoning that the act could apply to a transfer made by a third party if the debtor "participated" in the transfer but found

[11] We point out that the court raised the issue of who the transferor was, sua sponte, because it seems the likely explanation for the fact that the defendant did not produce, and the plaintiff made no effort to obtain production of, the power of attorney agreement. We also note, however, that we have admonished our courts to give the parties a fair opportunity to provide briefing and/or argument on any issue that the court raises on its own initiative. See *State* v. *Connor*, 321 Conn. 350, 372, 138 A.3d 265 (2016) ("[I]t is clear that, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a meaningful opportunity, in order to satisfy concerns of fundamental fairness. . . . The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response." [Citation omitted; emphasis omitted.]).

no evidence that Helen had "participated in any fashion in the claimed fraudulent transfers . . . ." Accordingly, the trial court held that the plaintiff had failed to make out a claim under CUFTA.

With regard to the unjust enrichment claim, the trial court agreed that the plaintiff had a right to Helen's assets because of its contract with her, but it found that the defendant also had a right to those assets because of the services and loans he had provided to Helen before and after the debt to the plaintiff arose. On the basis of these facts, the court concluded that the plaintiff had failed to prove it had "a better legal or equitable right" to Helen's assets than did the defendant. The trial court therefore held that the plaintiff had not established that the defendant was unjustly enriched at the plaintiff's expense.

The plaintiff appealed from the judgment of the trial court with regard to the CUFTA and unjust enrichment counts rendered in the defendant's favor. We transferred the appeal from the Appellate Court to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

I

We begin with the fraudulent transfer claim. The plaintiff advances several arguments as to why the trial court improperly determined that there was not a transfer by Helen, as debtor, and therefore no liability under CUFTA. We need only reach one of those arguments, namely, that the trial court improperly failed to consider the defendant's status as Helen's attorney-in-fact and to apply agency principles in its analysis of the plaintiff's claim.[12]

[12] The plaintiff also argues that (1) the defendant's admission in his answer that Helen transferred the assets was binding on the trial court, and (2) CUFTA permits liability against a transferee for receipt of those assets, irrespective of who fraudulently transferred them.

Whether CUFTA's requirement that the fraudulent transfer be "made by the debtor" encompasses a transfer made by a debtor's attorney-in-fact presents a question of statutory interpretation, to which we apply well established rules of construction and exercise plenary review. See General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

CUFTA provides relief to an unsecured creditor when there has been a "transfer made . . . by a debtor" and that transfer is "fraudulent . . . ." General Statutes §§ 52-552e and 52-552f. Although the present case turns on the first requirement—the trial court never reached the second—statutory meaning is always contextual. See General Statutes § 1-2z (directing court to consider related statutes to ascertain meaning). Therefore, we consider the framework of the entire act before turning to the specific question raised on appeal.

To establish that a transfer is fraudulent, the creditor may, but need not, prove actual fraudulent intent. See General Statutes § 52-552e (a) (1) and (b) (transfer made with "actual intent to hinder, delay or defraud any creditor").[13] Liability also can be established on

[13] General Statutes § 52-552e provides in relevant part: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . .

"(b) In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred,

the basis of constructive fraud when a transfer of the debtor's assets occurs after the creditor's claim arose and other circumstances are present, including that the debtor has not received reasonably equivalent value in exchange for the transfer, that the transfer renders the debtor insolvent (i.e., greater debts than assets), and/or that the transfer is made to an insider, such as the debtor's relative.[14] See General Statutes § 52-552e (a) (2); General Statutes § 52-552f (a) and (b); see generally *Badger State Bank* v. *Taylor*, 276 Wis. 2d 312, 328, 688 N.W.2d 439 (2004) ("[I]ntent is difficult to prove, and the drafters of the [Wisconsin] Uniform Fraudulent Transfer Act included provisions addressing transactions that might be considered wrongful toward creditors even if a debtor's intent to hinder, delay, or defraud is not proven. The focus in constructive fraud shifts

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

[14] General Statutes § 52-552e (a) provides in relevant part: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation . . . (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

General Statutes § 52-552f provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

"(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent."

from a subjective intent to an objective result. Proof of constructive fraud simply entails proof of the requirements of the statute." [Footnotes omitted; internal quotation marks omitted.]). When a creditor proves that a fraudulent transfer has occurred, the court may order avoidance of the transfer to the extent necessary to satisfy the creditor's claim, or may order various remedies to secure the asset from being dissipated. See General Statutes § 52-552h. Defenses and various other protections are available to a transferee who has taken the assets in good faith and under certain other circumstances. See General Statutes § 52-552i.

Significantly for purposes of the present case, the act makes clear that its provisions are not the exclusive source of law governing fraudulent conveyances. General Statutes § 52-552k provides in relevant part: "Unless displaced by the provisions of [this act], the principles of law and equity, including . . . the law relating to principal and agent . . . supplement the provisions of said sections."[15] That common-law principles and defenses supplement CUFTA is consistent with our recognition that CUFTA "is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances]," except that the act's remedies are broader than those available under the common law. (Emphasis omitted; internal quotation marks omitted.) *Robinson* v. *Coughlin*, 266 Conn. 1, 9, 830 A.2d 1114 (2003).

This supplementary provision is relevant to the present case because a grant of a power of attorney creates a principal-agent relationship. "Under our common law,

[15] General Statutes § 52-552k provides: "Unless displaced by the provisions of sections 52-552a to 52-552*l*, inclusive, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency or other validating or invalidating cause, supplement the provisions of said sections."

a power of attorney creates a formal contract of agency between the grantor and his [attorney-in-fact]. *Long* v. *Schull*, 184 Conn. 252, 256, 439 A.2d 975 (1981). Under our statutory law, this agency relationship encompasses a variety of transactions that the grantor presumptively has authorized his [attorney-in-fact] to undertake on his behalf. General Statutes [(Rev. to 2009)] § 1-42 et seq."[16] *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 167, 7 A.3d 919 (2010); see also 2A C.J.S. 589–90, Agency § 23 (1972) ("An attorney-in-fact is one who is given authority by his principal to do a particular act not of a legal character; a person appointed by another by a letter or power of attorney to transact any business for him out of court. . . . [A]ttorneys-in-fact created by formal letters of attorney are merely agents, and their authority and the manner of its exercise are governed by the principles of the law of agency." [Footnotes omitted.]). Our statutory law recognized that, when an attorney-in-fact undertakes transactions in that capacity, he is acting as the "alter ego of the principal . . . ." General Statutes (Rev. to 2015) § 1-55.

In light of the agency relationship created between Helen and the defendant pursuant to the power of attorney, under which the law of agency generally would impute to Helen the defendant's transfers of Helen's assets, we must consider whether this application of agency law is displaced by the provisions in the act. Guidance as to what the phrase "displaced by" means is available in a comment to an identical provision in the Uniform Commercial Code (UCC) incorporating common-law principles and defenses. See General Statutes § 42a-1-103 (b); see also General Statutes § 50a-64 (incorporating same supplementary principles for

[16] The Connecticut Statutory Short Form Power of Attorney Act, General Statutes § 1-42 et seq., was repealed in 2016, after the events at issue in the present case. See Public Acts 2016, No. 16-40, § 9.

Uniform Foreign-Money Claims Act, General Statutes § 50a-50 et seq.). That comment explains that these common-law principles would be displaced if they were inconsistent with a provision of the UCC or the UCC's principles and policies. See comment (2) to Uniform Commercial Code § 1-103, Conn. Gen. Stat. Ann. § 42a-1-103 (b) (West 2009) p. 21.

The policy underlying the act—protecting unsecured creditors from debtors who place assets beyond the reach of their unsecured creditors[17]—undoubtedly is best served by applying the law of agency to the matter at hand. See *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 330 ("The Uniform Fraudulent Transfer Act [(1984), 7A U.L.A. 274 (1999)] reflects a strong desire to protect creditors and to allow for the smooth functioning of our [credit based] society. It is a creditor-protection statute. Without such protection for creditors, [c]reditors would generally be unwilling to assume the risk of the debtor's fraudulent transfers." [Footnotes omitted; internal quotation marks omitted.]). The words of this court regarding our original fraudulent conveyance statute apply equally to CUFTA: "As the statute was enacted for the suppression of fraud, the advancement of justice and the promotion of the public good, it should be liberally and beneficially construed to suppress the fraud, abridge the mischief and enlarge the remedy. . . . [T]he common law . . . supplements

[17] Although our court has not expressly addressed the purpose of the act, many other jurisdictions have recognized that the purpose of a fraudulent transfer statutory scheme is to prevent debtors from placing assets out of the reach of unsecured creditors. See, e.g., *In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998); *In re Demitrus*, 586 B.R. 88, 92 (Bankr. D. Conn. February 27, 2018); *Lewis* v. *Superior Court*, 30 Cal. App. 4th 1850, 1873, 37 Cal. Rptr. 2d 63 (1994); *Northwestern Memorial Hospital* v. *Sharif*, 22 N.E.3d 1217, 1223 (Ill. App. 2014); *Leighton* v. *Fleet Bank of Maine*, 634 A.2d 453, 458 (Me. 1993); *Thompson* v. *Hanson*, 168 Wn. 2d 738, 750, 239 P.3d 537 (2009); *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 330. This intent is also self-evident in the terms of the act itself.

the statute to the end that justice may be done." (Citations omitted; internal quotation marks omitted.) *Allen* v. *Rundle*, 50 Conn. 9, 32 (1882). Given that the failure to apply the law of agency would create an easy end run around the act, and frustrate the ability of creditors to secure payment for debts owed to them, application of agency principles is manifestly consistent, not inconsistent, with the policies underlying the act. We cannot hypothesize a single adverse consequence that would arise from applying agency law under these circumstances.

Despite the fact that application of agency law would advance the policies underlying the act, we are bound to consider whether its application would be inconsistent with any specific provisions of the act. To this end, we observe that, even in the absence of this supplementary provision, this court has recognized "the general rule that [*u*]*nless a statute provides to the contrary* . . . principals may act through agents . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996); see, e.g., id., 620–21 ("Applying the law of agency to the tax statutes, we conclude that the plaintiff, concededly acting as the city's agent when purchasing materials and services for the parking garage, is not liable for use taxes on purchases made within the scope of its authority. . . . [General Statutes §] 12-412 [1] does not abrogate the [common-law] rule of agency that the actions of an agent, who is acting for a disclosed principal, are, as a matter of law, the actions of the principal." [Citation omitted.]). There is no provision in CUFTA that explicitly or even implicitly provides that acts of the debtor's agent shall not be imputed to the debtor.

Nor do we infer any inconsistency from the fact that the act applies to "[a] transfer made or obligation

incurred by a debtor"; General Statutes §§ 52-552e and 52-552f; and defines a debtor, unsurprisingly, as "a person who is liable on a claim." General Statutes § 52-552b (6). It would make no sense for the act to define debtor to include the debtor's agent, because an agent is not liable for the principal's debt. See *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, supra, 236 Conn. 619 ("the agent is not liable where, acting within the scope of his authority, he contracts with a third party for a known principal" [internal quotation marks omitted]); see also 2 Restatement (Third), Agency §§ 6.01 through 6.04, pp. 3–55 (addressing principal and agent liability for contracts executed by agent). It would similarly be illogical to include the debtor's agent in the substantive provisions of the act (i.e., "transfer made or obligation incurred by a debtor *or the debtor's agent*" [emphasis added]). Agency law dictates when an agent's acts shall be imputed to the principal and the limited circumstances under which an agent can be liable for a principal's debt. See, e.g., 2 Restatement (Third), supra, §§ 6.02 through 6.04, pp. 28–55 (addressing agent's liability when principal is unidentified or undisclosed or lacks capacity to be party to contract). Surely, we would not disregard agency principles and hold that the *debtor* was not liable on the claim simply because the obligation was executed by the debtor's authorized agent. See, e.g., *Hallas* v. *Boehmke & Dobosz, Inc.*, 239 Conn. 658, 673, 686 A.2d 491 (1997) ("[a] principal is generally liable for the authorized acts of his agent" [internal quotation marks omitted]).

It is important to be clear that the CUFTA claim in this appeal does not allege that the defendant/agent is personally *liable* on the claim (i.e., the debt for Helen's nursing home services) and hence *legally is the debtor*. Rather, the claim is that the defendant's act of transferring Helen's assets made under the lawful authority of

a power of attorney is an act *imputed to her*. Had the defendant fraudulently transferred Helen's assets to a third party, for example, the CUFTA action would have had to have been brought against that third party, not the defendant. See 37 Am. Jur. 2d 705–706, Fraudulent Conveyances and Transfers § 162 (2013).[18] The plaintiff is not claiming that it has the right to recover from the defendant those assets that were paid to Helen's other creditors, only those assets that he transferred as Helen's attorney-in-fact to himself as transferee.[19] Cf.

[18] "In all actions brought by creditors to subject property which it is claimed was fraudulently transferred, the person to whom the property has been transferred is a necessary party. The fraudulent grantee is a necessary party defendant in an action to set aside a conveyance as fraudulent since he or she has an interest in the subject matter of the suit which should not be affected by a decree unless he or she has been given the right to be heard. While a grantee who has parted with possession of the property is a necessary party in some jurisdictions, it is usually the case that he or she no longer has any interest in the subject matter and therefore is not a necessary party. In addition, a grantee who is merely a straw person through which the title is conveyed to another is not regarded as having a sufficient interest in the property to necessitate making him or her a party to the action." (Footnotes omitted.) 37 Am. Jur. 2d, supra, § 162, pp. 705–706.

"In the case of a debtor who has retained no legal interest in the property conveyed, there is a conflict of authority as to whether that person is a necessary party defendant to an action to set aside a fraudulent conveyance. In some jurisdictions, apparently on the theory that having parted with all interest in the property the grantor can no longer be affected by any decree pertaining to the property, the debtor is not a necessary party to the action although the debtor may be a proper party. Under other authority, the debtor, as the originator of the fraudulent conduct complained of, and as the person directly involved in the fraud in the first instance, is a necessary party to the action. Of course, where it appears that the debtor has retained some interest in, or control over, the property conveyed, the debtor is a necessary party to any suit involving such property.

"Where the creditor has not reduced its claim to judgment, the debtor is an indispensable party since, in such circumstances, the debtor has the right to be heard in regard to the validity or amount of the claim. Conversely, it has been found that where the plaintiff's claim has been reduced to judgment, it is not necessary to make the debtor a party." (Footnotes omitted.) 37 Am. Jur. 2d, supra, § 163, p. 707.

[19] The trial court's legal error in the present case may have stemmed from a misunderstanding of the basis of the plaintiff's CUFTA claim. The plaintiff's complaint makes clear that it sought to recover under CUFTA for the funds

Abbott Terrace Health Center, Inc. v. *Parawich*, 120 Conn. App. 78, 79, 88, 990 A.2d 1267 (2010) (concluding that allegations stated valid cause of action for fraudulent transfer against defendant when complaint alleged, inter alia, that defendant's aunt "acting *through the defendant as her* [*attorney-in-fact*], transferred certain moneys in her bank accounts to the defendant" just before entering into nursing home, transfer of assets rendered aunt unable to meet her financial obligations, and aunt conveyed assets without adequate consideration [emphasis added]).

Additional evidence that application of agency principles would not be inconsistent with the provisions of the act is reflected in the act's definition of "transfer." The term could hardly be defined more broadly: "every mode, direct *or indirect*, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." (Emphasis added.) General Statutes § 52-552b (12); see *In re Neri Bros. Construction Corp.*, 593 B.R. 100, 141 (Bankr. D. Conn. 2018) (describing identical definition of transfer in federal Bankruptcy Code being "as broad as possible" [internal quotation marks omitted]). This sweeping definition was in fact derived from the United States Bankruptcy Code; see Unif. Fraudulent Transfer Act (1984) § 1, comment (12),

transferred to the defendant only (directly or indirectly through his wife). An exhibit submitted by the plaintiff listed only those transfers made to the defendant or his wife. The trial court, however, stated in its analysis of the CUFTA claim: "[The defendant], acting as attorney-in-fact for Helen McGee, transferred various funds to himself, his wife, *and others* beginning in August, 2012, and continuing throughout this litigation. The plaintiff asserts its fraudulent transfer claims against [the defendant], the third party *transferor*, and not Helen McGee, the debtor. Consequently, the court must first consider whether the act applies to the transfers at issue in this case." (Emphasis added.) It appears that the trial court failed to recognize that the CUFTA claim was based on the defendant's status as transferee, not transferor, and was limited to transfers made to himself and his wife.

7A U.L.A. 261 (2017); which has a fraudulent conveyance provision similar to the one in CUFTA. See 11 U.S.C. § 548 (2012). In bankruptcy cases in which a transfer has been executed pursuant to a power of attorney, the transfer is imputed to the debtor, such that the case turns exclusively on the question of whether fraud (actual or constructive) has been established under the facts. See, e.g., *In re Simione*, 229 B.R. 329, 330, 335 (Bankr. W.D. Pa. 1999) (trustee for creditors was entitled to judgment in case seeking to avoid transfer executed by debtor's relatives under power of attorney on basis of constructive fraud because "[t]he [t]ransfer caused the [d]ebtor to become insolvent and no reasonably equivalent value was given to the [d]ebtor in exchange for the [t]ransfer"); see also *In re Gordon*, 293 B.R. 817, 822–23 (Bankr. M.D. Ga. 2003) (discussing different approaches taken by courts as to whether fraudulent *intent* of agent may be imputed to debtor in various contexts, including agency in spousal context, and noting that "[o]ne reason courts are hesitant to impute intent is that the marital relationship, by itself, does not always give rise to a legal partnership or agency.").[20] Therefore, we see no basis to conclude

[20] Some bankruptcy cases require additional facts beyond the mere agency relationship when the question is whether the agent's *intent* may be imputed to the principal to prove actual, rather than constructive, fraudulent intent. Although there is no universal rule, several bankruptcy cases hold that actual fraudulent intent by the debtor's agent may be imputed to the debtor if the agent is the transferee of the assets and retains substantial control over the debtor. See, e.g., *In re Tribune Co. Fraudulent Conveyance Litigation*, Docket No. 11-MD-2296 (RJS), 2017 WL 82391, *5 (S.D.N.Y. January 6, 2017); *In re Elrod Holdings Corp.*, 421 B.R. 700, 711 (Bankr. D. Del. 2010). Surely, if the mere act could not be imputed, there would be no need to consider whether intent could be imputed. See generally 6 A. Resnick & H. Sommer, Collier on Bankruptcy (16th Ed. 2009) § 727.02 [4], p. 727-23 ("A transfer of the debtor's property by an agent or employee with general authority upon the subject will bar the debtor's discharge if the transfer was made within the statutory period with intent to hinder, delay or defraud creditors. If the fraud is not perpetrated by the debtor or the debtor's authorized agent, it cannot be the basis of an objection to the debtor's discharge."). We note that the facts in the present case might meet this standard in any event,

that application of agency principles would be inconsistent with the provisions of the act.

The propriety of imputing a transfer made by the debtor's agent to the debtor has even greater force in a case like the present one. The debtor, Helen, was a represented party in this action, and she did not challenge the legality or propriety of the transfers. In effect, Helen's acquiescence ratified the transfers made by the defendant.[21] See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 561–62, 698 A.2d 245 (1997) ("Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances. . . . [S]ilence, as well as affirmative acts, may imply an intent to ratify." [Citations omitted; internal quotation marks omitted.]).

Finally, we are mindful that a provision in the act directs the court not only to apply and construe its

given Helen's dementia. See footnote 7 of this opinion. As we previously indicated, the trial court in the present case never addressed the question of whether the transfer was fraudulent because it concluded that there was no transfer subject to the act.

[21] What the trial court meant when it found that Helen did not "participate" in the transfers is unclear. The trial court did not address in any manner the legal implications arising from the power of attorney agreement, and, therefore, we must assume that its references to participation meant some other facts, presumably specific direction from Helen for the defendant to make particular transfers or to take payment for a specific service rather than Helen's grant of general authority to issue checks and to take compensation/reimbursement. Insofar as the trial court relied on cases applying this participation exception to third-party transfers, without regard to agency, we do not find these cases relevant to the present case. We observe, however, that the adoption of this exception in response to policy concerns is in tension with any purported "plain meaning" of the provisions.

We similarly do not view cases from this court addressing third-party transfers under the Uniform Fraudulent Conveyance Act, the predecessor to the current act, helpful. In those cases, the court attributed the third-party transfer to the debtor and did not indicate whether different facts would warrant such attribution. See, e.g., *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 433 and n.1, 429 A.2d 908 (1980).

provisions "to effectuate their general purpose," but also "to make uniform the law" among other states enacting them. General Statutes § 52-552*l*. No court, however, has expressly addressed the question before us. Courts in three jurisdictions have treated a transfer by an attorney-in-fact as a transfer subject to the act, as we do here, but without any analysis of that issue. See *Schempp* v. *Lucre Management Group, LLC*, 18 P.3d 762, 765 (Colo. App. 2000), cert. denied, Colorado Supreme Court, Docket No. 00SC667 (February 26, 2001); *Aristocrat Lakewood Nursing Home* v. *Mayne*, 133 Ohio App. 3d 651, 662–67, 729 N.E.2d 768 (1999); *Rosier* v. *Rosier*, 227 W. Va. 88, 101 n.5, 705 S.E.2d 595 (2010). We surmise that the parties in these cases were operating under the same logical assumption reflected in the parties' pleadings in the present case, that the act of the agent would be imputed to the principal as a matter of law. On the other hand, courts in two jurisdictions have applied the same "plain meaning" analysis that our trial court did, and reached the same conclusion as did the trial court here, but they too did not acknowledge the supplementary provision incorporating agency law, let alone the defendant's status as the debtor's agent. See *Folmar & Associates, LLP* v. *Holberg*, 776 So. 2d 112, 116–18 (Ala. 2000), overruled in part on other grounds by *White Sands Group, L.L.C.* v. *PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009); *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066, 1074 (Pa. Super. 2003).

One court has rejected a creditor's claim that the Uniform Fraudulent Transfer Act provided for recovery against the debtor's attorney-in-fact under agency principles but under materially different circumstances. See *Methodist Manor Health Center, Inc.* v. *Py*, 307 Wis. 2d 501, 514–15, 746 N.W.2d 824 (App. 2008). *Py* addressed a claim of conversion against the debtor's granddaughter, who, pursuant to a power of attorney, executed checks

as specifically directed by her grandmother to other persons. Id., 504, 506. The granddaughter was neither the debtor nor the transferee, but the creditor nonetheless sought to recover from her. It was in this context that the Wisconsin Appellate Court expressed the concern that "strictly applying agency principles in this scenario would disfavor unknowing and, in many cases, unsophisticated agents who were doing nothing more than attempting to assist an elderly parent or grandparent with their finances." (Internal quotation marks omitted.) Id., 517; cf. *Badger State Bank* v. *Taylor*, supra, 276 Wis. 2d 322 (citing supplementary provision in context of transfer by president and principal shareholder of corporation acting as agent to principal corporation and stating that "[n]othing in [the applicable fraudulent conveyance provision] indicates that it displaces the law relating to principal and agent").

The facts in *Py* clearly supported the court's determination that no recovery could be had under those circumstances. Nothing in our decision means that an attorney-in-fact can be personally liable on the principal's debt simply because he or she executed the transfers, even if the attorney-in-fact knew that the debtor may thereby be rendered insolvent. See *In re M. Blackburn Mitchell, Inc.*, 164 B.R. 117, 123–24 (Bankr. N.D. Cal. 1994) (citing case law from Seventh and Ninth Circuit Courts of Appeals for propositions in bankruptcy case that "[a] party who acts as a conduit and who merely facilitates the transfer from the debtor to a third party, is not an 'initial transferee,'" and that court must "examine whether the party receiving the funds exercised dominion or control over the money for its own account, that is, not merely as an agent for a third party").

In sum, applying the law of agency is not inconsistent with the provisions or policies of the act. Not applying the law of agency would, in fact, undermine the pur-

poses of the act without providing any commensurate benefit. If any innocent transferee is the recipient of funds fraudulently transferred by the debtor's agent, the same defenses are available as would have been available to the transferee if the debtor personally executed the transfer. See General Statutes § 52-552i.

We therefore conclude that the trial court improperly rejected the plaintiff's fraudulent transfer claim on the ground that the defendant's transfers of Helen's assets pursuant to a power of attorney were not transfers made by the debtor. On remand, the trial court must determine whether such transfers were fraudulent under any of the theories advanced by the plaintiff.

II

The plaintiff also claims that the trial court improperly rendered judgment for the defendant on the count alleging unjust enrichment. The plaintiff asserts that the trial court incorrectly determined that the plaintiff failed to show it had a better legal or equitable right to Helen's assets than the defendant. The crux of the plaintiff's argument is that the trial court clearly erred when it credited the defendant's testimony establishing his right to the funds he transferred. Because we cannot conclude that the challenged findings were clearly erroneous, the court's determination that the plaintiff failed to establish a superior right to the transferred funds necessarily stands.

A plaintiff may recover for unjust enrichment when a contract remedy is unavailable, to the extent that the defendant has unjustly profited at the plaintiff's expense. *Horner* v. *Bagnell*, 324 Conn. 695, 707–708, 154 A.3d 975 (2017). "Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy. . . . Plaintiffs seeking recovery . . . must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the

benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) Id., 708.

"Although unjust enrichment typically arises from a plaintiff's direct transfer of benefits to a defendant, it also may be indirect, involving, for example, a transfer of a benefit from a third party to a defendant when the plaintiff has a superior equitable entitlement to that benefit." *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 468, 970 A.2d 592 (2009). In an indirect benefit scenario, the plaintiff must prove that it has "a better legal or equitable right" to the disputed benefit than the defendant. 2 Restatement (Third), Restitution and Unjust Enrichment § 48, p. 144 (2011). This standard is "highly restrictive." Id., comment (i), p. 159. It "refer[s] to a paramount interest of a kind recognized in law or equity—not to the personal merit or desert of the persons involved, or to considerations of fairness independent of preexisting entitlements." Id., comment (a), p. 145. Specifically, the plaintiff must prove that its right "is both recognized, and accorded priority over the interest of the defendant, under the law of the jurisdiction." Id., comment (i), p. 159.

Because the trial court's equitable determinations "depend on the balancing of many factors," we review its ultimate decision as to whether the defendant was unjustly enriched for abuse of discretion. (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, supra, 291 Conn. 452. Any subsidiary factual determinations by the trial court, however, are reviewed for clear error. *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 258–59, 152 A.3d 470 (2016). A finding is clearly erroneous (1) if there is no evidence in the record to support it, or (2) when, although the record provides some support, the weight of the evidence in the record leaves the

reviewing court with a "definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 259.

The trial court made two relevant findings on this issue. First, it found that the plaintiff had an interest in Helen's assets. Stemming from Helen's breach of the residency agreement, the plaintiff had been undercompensated for more than two years, resulting in unpaid bills of $208,193.

Second, the court found that the defendant also had an interest in Helen's assets. In arriving at this conclusion, it relied on the defendant's deposition testimony, which, as we previously noted, was admitted into evidence by the parties' mutual agreement. For example, the defendant testified that he "lived with [Helen] for over two years and took care of her . . . [twenty-four] hours a day," cooking for her, bathing her, dressing her, and changing her adult diapers until he could no longer do so; that he paid for an in-home care provider and for "all the expenses that were required to keep up the house," such as property tax, oil, utilities, and snow removal; and that he prepared her litigation documents, scheduled her medical appointments, and applied for her financial assistance. The trial court credited this "unrefuted evidence." It found that the defendant used the money from Helen's accounts to compensate himself for the care he had provided before she was admitted to the plaintiff's facility and for the continued management of her personal and financial affairs, and to reimburse himself for money he had spent on her behalf.

Critically, the trial court concluded: "As between the plaintiff and [the defendant], the plaintiff has not proven that it has a better legal or equitable right to the funds of Helen . . . that were paid to [the defendant] and/or his wife." In other words, although the plaintiff proved that it had a "recognized" interest in Helen's

assets, it did not prove that its interest should be "accorded priority over the interest of [the defendant], under the law of the jurisdiction." 2 Restatement (Third), Restitution and Unjust Enrichment, supra, § 48, comment (i), p. 159. The plaintiff could have met this burden by presenting evidence to discredit the defendant's testimony or by pointing to substantive law or equitable factors that would have given its interest priority over that of the defendant. See, e.g., *Nile* v. *Nile*, 432 Mass. 390, 402, 734 N.E.2d 1153 (2000) (beneficiary of contractual agreement with third party accorded priority over recipients of testamentary gift from third party); *Peirce* v. *Peirce*, 994 P.2d 193, 200 (Utah 2000) (party with contractual right to third party's assets accorded priority over recipient of inter vivos gift from third party). It declined, or neglected, to do so. Indeed, implicit in the court's findings is the recognition that the defendant's interest accrued in large part before the plaintiff's interest began to accrue.

The plaintiff contends, however, that "no evidence" supports the trial court's factual finding that the defendant had an interest in Helen's assets. More particularly, it asserts that the defendant's deposition testimony was "self-serving," vague at points, and uncorroborated by a written contract, a promissory note, receipts, or witnesses.

The plaintiff's claim founders under well settled law. The plaintiff is bound by its stipulation that the deposition testimony could be submitted for the court's consideration. Once in evidence, the trial court was permitted to rely on it to the same extent as if the defendant was present and testifying. See Practice Book § 13-31. Undoubtedly there are facts in the record and evidentiary gaps that reasonably could lead another trier of fact to find the defendant's testimony in whole or part not credible. This court, however, "cannot retry the facts or pass upon the credibility of the witnesses.

. . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . [I]t is within the province of the trier of fact to accept or reject parts of the testimony of a single witness." (Citations omitted; internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015). The trial court therefore was free to credit the defendant's deposition testimony, as well as to take into account the absence of a cross claim by Helen alleging that the defendant improperly transferred assets to himself.

In sum, it was the plaintiff's burden to prove that its rights were superior to those of the defendant. The trial court's factual finding that the defendant had an interest in Helen's assets was supported by the record and, therefore, was not clearly erroneous. As such, the trial court did not abuse its discretion in concluding that the plaintiff failed to prove it had "a better legal or equitable right" to Helen's assets.

The judgment is reversed with respect to the count of the plaintiff's complaint alleging a violation of CUFTA and the case is remanded for a new trial on that count; the judgment is affirmed in all other respects.

In this opinion PALMER, ROBINSON and ECKER, Js., concurred.

D'AURIA, J., with whom MULLINS and KAHN, Js., join, concurring in part and dissenting in part. Although I agree with part II of the majority's opinion, I disagree with part I. I would affirm the judgment of the trial court on both the Connecticut Uniform Fraudulent Transfer Act (CUFTA or act); General Statutes § 52-552a et seq.; and unjust enrichment counts of the complaint, and therefore respectfully dissent in part.

The issue we are asked to determine is whether CUFTA applies to a transfer of a debtor's assets made by the debtor's attorney-in-fact with no participation by the debtor. Under CUFTA, a transfer can only be fraudulent "as to a creditor"; General Statutes § 52-552e (a); if it is "made by a debtor . . . ." General Statutes § 52-552f (b). Relying on this language and decisions from out of state interpreting identical statutes, the trial court concluded that CUFTA did not apply to a transfer made solely by a third party, such as the attorney-in-fact of a debtor, with no participation from the debtor. Because the trial court found that "all of the transfers at issue were made by [the defendant Stephen McGee (Stephen)]" and that "[n]one were made by [Stephen's mother, the named defendant, Helen McGee (Helen)]," and because the court found no evidence that Helen "participated in any fashion in the claimed fraudulent transfers," it concluded that the plaintiff, Geriatrics, Inc., had failed to make out a claim under CUFTA.

The majority reverses the trial court's judgment in favor of Stephen on this count. I disagree and instead would affirm.

I

With few exceptions, which I will note, I have no quarrel with the majority's factual recitation. The trial court's findings are sparse, at least in part, because the live testimony in the case was brief (it was a one-half day trial) and because the trial court's ruling on the CUFTA count (that Stephen was not a "debtor") is ultimately a legal issue. Another explanation for the sparse record could be the plaintiff's failure to develop its case, including by failing to present a clear legal theory for proceeding against Stephen.[1]

[1] For this reason, I do not think it is fair to blame the trial court for addressing an essential element of the plaintiff's CUFTA claim that the plaintiff had failed to address. Nothing the plaintiff ever submitted to the trial court cited General Statutes § 52-552k, on which the majority principally relies. The plaintiff's complaint based the CUFTA claim on General Statutes

To many dispassionate readers, the facts of this case might resemble a familiar family experience. An elderly parent is in failing health. Rather than move the parent immediately to a nursing facility, a child chooses to care for the parent himself, eventually moving into her

§ 52-552h, which is merely a remedial provision. The plaintiff's pretrial and posttrial briefs reference General Statutes § 52-552 only generally—a statute that was repealed in 1991—without citation to a specific provision of CUFTA. After pretrial briefing, a trial and posttrial briefing, the trial court issued an order indicating that it was still "unclear" about "which specific provision" of CUFTA "the plaintiff claims the defendant Stephen McGee violated." It therefore ordered the plaintiff to file a supplemental brief clarifying its position. The plaintiff complied, and for the first time, cited General Statutes §§ 52-552e and 52-552f, which are CUFTA's provisions on liability. In its motion to reargue to the trial court, the plaintiff again failed to mention any provisions of CUFTA.

Nor in its briefing to this court did the plaintiff mention § 52-552k. It did, however, mention the concept of agency, asking this court to accept its argument under the plain error doctrine. See Practice Book § 60-5. I take its invocation of the plain error doctrine, which provides an avenue for reviewing *unpreserved* claims, as a concession that this claim was not preserved. See *State* v. *Darryl W.*, 303 Conn. 353, 372, 33 A.3d 239 (2012) (plain error is a "doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal" of a trial court's judgment [internal quotation marks omitted]).

The majority does not explain how this legal theory, never raised during trial, qualifies for plain error review. See id., 373 ("party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal" [internal quotation marks omitted]). As I will discuss, the position the majority adopts today is hardly "obvious and indisputable." It is at best a minority view.

Regardless, the majority is entitled to reach this issue if it has concluded that the parties have had an opportunity to brief the issue. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–62, 84 A.3d 840 (2014); id., 162 ("if the reviewing court would have the discretion to review the issue if raised by a party . . . the court may raise the claim sua sponte, as long as it provides an opportunity for all parties to be heard on the issue"). However, it is at least ironic (and in my view unfair) to scold the trial court for not ordering yet another round of supplemental briefing, given that the trial court provided the plaintiff with ample briefing opportunities; the plaintiff only belatedly landed on a theory of agency before this court, and has still never cited the statute the majority holds to govern.

home. This choice comes at significant cost to the child. As the parent's health worsens, the parent and child agree that to continue this arrangement and keep the parent at home as long as possible, the child must assume greater charge of the parent's needs—health and financial. No one begrudges the caregiver some compensation for his efforts to keep the parent in the home or for reimbursement for food, bills and other necessities paid out of his own pocket. Record keeping, however, is spotty at best and the timing of payments varies. Of course, no one knows how long the parent will live or how long the child will be able to provide the care. Eventually, though, the parent's needs exceed what the child can provide, the parent is moved to a nursing home, and the parent's remaining assets are "spent down" to qualify for government assistance. If at any point there is a gap in the payments to the nursing home or a delay in routing the government benefits to the nursing home—even due to the nursing home's own actions—the parent will become a debtor of the nursing home.

Stephen's case resembles this fact pattern. In February, 2013, after caring for Helen for several years, Stephen's own health deteriorated, and Helen was admitted to the plaintiff's skilled nursing home, Bel Air Manor, where she agreed to pay for residency. Medicare initially covered much of her expenses. It is fair to assume that Helen and Stephen (and perhaps the plaintiff) believed she would remain eligible for Medicare throughout her stay. But two efforts to qualify for continued benefits failed, and the plaintiff refused to assist Stephen in applying, despite his requests. Finally, a third application was granted, but only with a penalty. Throughout those delays, debt to the plaintiff accumulated, and at the time of her death, Helen owed the plaintiff about $208,000. Stephen was not a party to

Helen's contract with the nursing home and was not liable to the nursing home for Helen's debt.

Given the trial court's finding that Helen began accumulating debt once government benefits were stopped, it is perhaps fair to assume she had other creditors at the end of her life. This appeal involves only one creditor, her nursing home. The count on which I disagree with the majority involves that creditor's allegations of fraud. Because the case was tried to judgment, there is no need to construe the facts in the light most favorable to the plaintiff. See *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017) ("[i]n reviewing factual findings [of a trial court] . . . we make every reasonable presumption . . . in favor of the trial court's ruling" [internal quotation marks omitted]). In fact, the trial court found that the plaintiff had failed to prove "that it has a better legal or equitable right to the funds of Helen" and therefore refused to find that Stephen had been unjustly enriched at the plaintiff's expense. Although the trial court agreed that the plaintiff had a rightful claim to Helen's assets because of its contract with Helen, it also found that Stephen had a rightful claim to those assets because of the services and loans he had provided to Helen before and after her debt to the plaintiff arose. The court made no findings that the payments Stephen received were somehow illegitimate. Rather, the trial court specifically found that on this record the plaintiff had failed to demonstrate that its claim was superior to Stephen's.

Therefore, Stephen's compensation and reimbursement, which the trial court found that he was entitled to, is only potentially subject to CUFTA because of its timing. Had he received these funds before his mother's debt began to accumulate or had her Medicare coverage never lapsed, there would be no claim. Indeed, the plaintiff did not appear to argue to the trial court that Helen was even aware of—much less colluded with Stephen in making—the transfers.

II

CUFTA permits creditors to set aside or void certain transfers of a debtor's assets when those transfers are made with the purpose of frustrating the creditor's ability to collect its debt. General Statutes § 52-552a et seq. Not all transfers that frustrate creditors are fraudulent transfers under CUFTA, however. Instead, CUFTA sets out four distinct bases for fraudulent transfer liability, each with its own distinct elements. See General Statutes §§ 52-552e and 52-552f.

One basis for liability requires proof of actual fraudulent intent. General Statutes § 52-552e (a) (1) (transfer made with "actual intent to hinder, delay or defraud any creditor"). The other three require only constructive fraud, in which fraud is presumed under the circumstances. See General Statutes § 52-552e (a) (2) (transfer made without debtor "receiving a reasonably equivalent value in exchange," leaving debtor with few assets or inability to pay debts); General Statutes § 52-552f (a) (transfer made while debtor was insolvent or causing debtor to become insolvent and debtor did not receive reasonably equivalent value); General Statutes § 52-552f (b) (transfer to insider of debtor when insider had reason to believe debtor was insolvent).

A transfer does not, however, fall within any of these four bases for liability unless it was "made by a debtor . . . ." General Statutes § 52-552f (b); see also General Statutes § 52-552e (a).[2] The transfers at issue in the

[2] General Statutes § 52-552f provides: "(a) *A transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

"(b) *A transfer made by a debtor* is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent." (Emphasis added.)

case before us were actually carried out by Stephen, pursuant to a power of attorney executed by Helen, and the trial court found that Helen did not participate in any of them. On these facts, I agree with the trial court that the transfer at issue was not "made by a debtor" within the meaning of CUFTA.

A

To determine the meaning of the statute at issue, we look first to its text, giving any undefined term its ordinary meaning. See General Statutes §§ 1-1 (a) and 1-2z. Neither the plaintiff nor the majority contend that the term "debtor" in §§ 52-552e and 52-552f is ambiguous. Therefore, extratextual evidence of the legislature's intent is not relevant. Neither under § 1-2z is it relevant whether the majority's conclusion "best serve[s]" the "policy underlying the act . . . ." Finally, although it might be expedient to call CUFTA a "creditor-protection" statute, in my view such shorthand is no more useful to the exercise of statutory construction than calling the Bankruptcy Code a "debtor-protection" statute. In truth, like many acts—including uniform acts—CUFTA reflects a legislative balance of policies. Our challenge is not to advance policy, but to divine the legislative will from the statutory text.[3]

General Statutes § 52-552e provides in relevant part: "(a) *A transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ." (Emphasis added.)

[3] Although in construing legislative language it is sometimes useful to draw on related or analogous statutes, one statutory scheme that the majority relies on as analogous, the Uniform Commercial Code (UCC), General Statutes § 42a-1-101 et seq., contains a specific legislative admonition, missing in CUFTA, to "liberally [construe]" that title. General Statutes § 42a-1-103 (a). This can perhaps be explained by the fact that the UCC governs all commercial transactions while CUFTA creates a cause of action for fraud.

We are admonished by the legislature to construe the provisions of this uniform act "to effectuate their general purpose to make uniform the law . . . among states enacting them." General Statutes § 52-552*l*. Although, admittedly, not many courts have confronted the issue before us, those that have addressed it in any detail have uniformly taken a position contrary to the majority. See *Folmar & Associates, LLP* v. *Holberg*, 776 So. 2d 112, 116–18 (Ala. 2000), overruled in part on other grounds by *White Sands Group, L.L.C.* v. *PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009); *Methodist Manor Health Center, Inc.* v. *Py*, 307 Wis. 2d 501, 505, 746 N.W.2d 824 (App. 2008); *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066, 1074 (Pa. Super. 2003). Although the majority's reasoning is plausible, its conclusion is not so obvious that any other court—or the plaintiff itself—has made the argument.

The act defines a "debtor" as "a *person* who is *liable* on a *claim*." (Emphasis added.) General Statutes § 52-552b (6). The term "person" extends to "an individual, partnership, corporation, limited liability company, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity." General Statutes § 52-552b (9). "Liable" is not defined in the act, but means "[r]esponsible or answerable in law; legally obligated"; Black's Law Dictionary (10th Ed. 2014) p. 1055; or "obligated according to law or equity"; Merriam-Webster's Collegiate Dictionary (11th Ed. 1993) p. 715. And a "claim" is defined as "a right to payment . . . ." General Statutes § 52-552b (3).

The phrase "made by"—modifying "a debtor"—is also relevant, signaling that the debtor caused the transfer and that the debtor was not passively acted on by the transfer (e.g., "a transfer involving a debtor"). It also specifies that we are to focus on who made the transfer. The subject is the actor, rather than the status

of the property (e.g., "a transfer of the debtor's assets") or the result (e.g., "a transfer for the debtor's benefit"). Thus, construed according to its plain meaning, the act in my view refers only to transfers actually made, in some capacity, by the party who owes the debt. See General Statutes § 1-2z.

Nor does the definition of "transfer" change this. I agree with the majority that CUFTA's definition of "transfer" is unquestionably expansive. See General Statutes § 52-552b (12). But that definition is informed by the qualifiers—"made by a debtor"—that follow. Even for "indirect" transfers, which the majority asserts occurred in this case, participation by the debtor is an essential predicate: "An example of an indirect transfer is when A has a claim against B, and instead of B paying A directly for the claim, *A directs B to pay C*. . . . In such a scenario, the debtor never has possession of the funds, but *directs a third party to transfer* those funds to a recipient." (Citations omitted; emphasis added.) *In re FBN Food Services, Inc.*, 175 B.R. 671, 683 (Bankr. N.D. Ill. 1994) (describing indirect transfer under 11 U.S.C. § 548 [2012]), aff'd, 185 B.R. 265 (N.D. Ill. 1995). Nothing in CUFTA expressly extends its reach to transfers of the debtor's assets made solely by a third party, including a debtor's agents.

Indeed, a number of other courts have declined to find liability for transfers of a debtor's assets made by various third parties, including spouses; see, e.g., *SPQR Venture, Inc.* v. *Robertson*, 237 Ariz. 270, 273, 349 P.3d 1107 (App. 2015); subsidiary companies; see, e.g., *Crystallex International Corp.* v. *Petroleos de Venezuela, S.A.*, 879 F.3d 79, 85–89 (3d Cir. 2018); and contractual parties; see, e.g., *Ford-Torres* v. *Cascade Valley Telecom, Inc.*, 374 Fed. Appx. 698, 700 (9th Cir. 2010).

As mentioned previously, courts that have analyzed at all this provision of the uniform act as it applies to

agents and attorneys-in-fact have concluded that the plain language the legislatures in their jurisdictions have chosen simply does not accomplish what the majority holds today and declined to permit liability in a creditor's favor under the Uniform Fraudulent Transfer Act on the basis of a transfer made by an attorney-in-fact of a debtor. The few Connecticut trial courts to address similar issues have also followed this approach. See *Peterson* v. *Hume*, Superior Court, judicial district of Hartford, Docket No. CV-11-5035394-S (May 14, 2013) (56 Conn. L. Rptr. 133, 135–36) (relying on language originating in *Folmar & Associates, LLP*, and holding that "[CUFTA], by its plain language, does not apply to claims against third-party transferors" [internal quotation marks omitted]); *Coan* v. *Geddes*, Superior Court, judicial district of Waterbury, Docket No. CV-09-4020994 (January 30, 2013) (55 Conn. L. Rptr. 458, 462) (relying on *Folmar & Associates, LLP*, and holding that "definition of 'debtor' under [CUFTA] [cannot] be expanded to bring third-party transferors equitably owned by the debtor within its scope"); *Ferri* v. *Powell-Ferri*, judicial district of Middlesex, Docket No. CV-11-6006351-S (July 30, 2012) (54 Conn. L. Rptr. 414, 416) (Relying on *Folmar & Associates, LLP*, the trial court rejected the defendant's argument urging the court "to adopt a more expansive view of 'debtor' to include anyone who was acting on the behalf of the debtor." The court ruled that the defendant had "not alleged that the debtor-beneficiary . . . participated in the claimed fraudulent transactions [executed by the trustees of two trusts in her husband's name]. Though the court agrees that there are strong policy arguments for extending the definition of a debtor under these circumstances, the court cannot ignore the plain language of the statute.").

In the leading out-of-state case, *Folmar & Associates, LLP* v. *Holberg*, supra, 776 So. 2d 116–18, the defendant

was an attorney-in-fact for the debtor, her husband, and transferred funds in her husband's name to herself. The court rejected the creditor's claim, stating: "Even if we accepted [the creditor's] argument that [the third-party transferors] engaged in a conspiracy to defraud her, the Alabama Uniform Fraudulent Transfer Act, by its plain language, does not apply to claims against third-party transferors." (Internal quotation marks omitted.) Id., 118. "Even a liberal construction of the statute requires some demonstration that *the debtor* has put his property beyond the reach of a creditor." (Emphasis in original.) Id., 117. "While there may be valid policy arguments for extending the [a]ct to apply to transferors who are in control of the debtor's assets, it is not for the [j]udiciary to impose its view on the [l]egislature." (Internal quotation marks omitted.) Id., 118.

Methodist Manor Health Center, Inc. v. *Py*, supra, 307 Wis. 2d 501, involved facts similar to the present case. The debtor had unpaid bills from a nursing home. Id., 505. Under a power of attorney, the debtor's granddaughter had written checks and transferred the debtor's assets on her behalf, thereby preventing the nursing home from collecting those assets for itself. Id., 505–506. The court rejected the nursing home's argument that ruling against it would permit a debtor to avoid fraudulent transfer liability "by simply having the fraudulent transfers performed by an agent under a durable power of attorney." (Internal quotation marks omitted.) Id., 515. The court reasoned that "[i]f there are any perceived shortcomings in the statutes, and we do not conclude that there are in this instance . . . it is the function of the legislature, not this court, to resolve them." Id. Instead, the court acknowledged that strictly applying agency principles in this scenario would disfavor "unknowing and, in many cases, unsophisticated agents who were doing nothing more than attempting to assist an elderly parent or grandparent with their

finances." (Internal quotation marks omitted.) Id., 517. Although the attorney-in-fact in that case was not also a transferee, as Stephen is here, the court's decision did not turn on that fact. It overtly relied on the plain language of the statute and the practical impact that strict application of agency law not included in the statute would have on unsophisticated agents.

In *Presbyterian Medical Center* v. *Budd*, supra, 832 A.2d 1066, again on facts similar to this case, the court rejected a nursing home's fraudulent transfer claim against a debtor's attorney-in-fact. Id., 1074. There, the debtor had unpaid bills that were owed to a nursing home, and, under a power of attorney for the debtor, the debtor's daughter transferred the debtor's assets to herself, thereby preventing the nursing home from collecting these assets for itself. Id., 1069. Citing no evidence that the debtor otherwise participated in the transfers at issue, the court rejected the nursing home's fraudulent transfer claim under Pennsylvania's version of the Uniform Fraudulent Transfer Act. Id., 1074. While it acknowledged that "under certain circumstances, an attorney-in-fact of a debtor may also qualify as a 'debtor' under [Pennsylvania's Uniform Fraudulent Transfer Act]," the court held that the nursing home had failed in that case to plead sufficient facts to establish such a connection. Id.[4]

[4] As the majority admits, the authorities it relies on reach their results "without any analysis . . . ." The majority "surmise[s]" that "the parties in these cases were operating under the same logical assumption reflected in the parties' pleadings in the present case, that the act of the agent would be imputed to the principal as a matter of law."

In my view, this assumption is a logical stretch, both in the present case and in the cases "without any analysis . . . ." In the present case, the plaintiff's complaint never mentions the terms agent, principal or impute. In fact, as discussed previously, the plaintiff never mentioned principles of agency until its brief before this court, in which it invoked the plain error doctrine; see Practice Book § 60-5; and it has never mentioned the supplementary provisions of CUFTA, General Statutes § 52-552k. See footnote 1 of this concurring and dissenting opinion. Given that the cases that provide any analysis whatsoever (*Folmar & Associates, LLP*, *Methodist Manor*

This is not to say that under some circumstances, as the court in *Presbyterian Medical Center* suggests, courts might not consider a transfer made by a third party to be a transfer "made by a debtor . . . ." General Statutes § 52-552f (b). For example, while CUFTA requires a transfer to be "made by a debtor," it does not require that the debtor actually execute it himself. As stated previously, a "transfer" may be "indirect." See General Statutes § 52-552b (12). Thus, a debtor may execute a transfer in a variety of ways, including through the use of a third-party intermediary, although the statute is clear that *the debtor* must play a role.

To find liability based on a transfer executed by a third party, courts have required that the debtor participated in the transfer in some fashion, which the trial court found Helen did not do here. For example, a transfer made by a third party may be considered a transfer "made by a debtor" when the third party is the debtor's alter ego. In *Thompson Properties* v. *Birmingham Hide & Tallow Co.*, 839 So. 2d 629 (Ala. 2002), the court reasoned that the parties "could be considered 'one and the same' " under Alabama's version of the Uniform Fraudulent Transfer Act because the third party was subject to the debtor's liabilities and control. Id., 634; see also *Kraft Power Corp.* v. *Merrill*, 464 Mass. 145, 154–55, 981 N.E.2d 671 (2013); *Dwyer* v. *Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291, 295 (Mo. App. 2002).[5]

Health Center, Inc., and *Presbyterian Medical Center*, as well as Connecticut trial court cases) go against the plaintiff's and the majority's position, and would have easily been found if searched for, the better explanation in the out-of-state cases with no analysis is that the parties simply did not consider the issue. Although the majority is perhaps free to arrive at the conclusion it does today, it does so against the weight of considered authority and on a theory the plaintiff did not pursue before the trial court.

[5] At the time Helen granted Stephen a power of attorney, Connecticut's statutory short form power of attorney provided that when the principal "confer[s] general authority," it "shall be construed to mean that the principal authorizes the agent to act as an alter ego of the principal with respect to any matters and affairs not enumerated" in the power of attorney agreement.

A transfer made by a third party also may be considered a transfer "made by a debtor" if the debtor "directed or orchestrated" the transfer. *Hart* v. *Pugh*, 878 So. 2d 1150, 1157 (Ala. 2003). In *Hart*, the debtor violated the terms of a divorce decree. Id., 1152–53. The next week, he gave his mother a power of attorney, explicitly permitting her to sell his land on his behalf. Id. Later, the debtor's mother sold a parcel of his land. Id. The debtor's former spouse argued that this was a transfer by a "debtor" because the debtor "directed" his mother to make the transfer. Id., 1156. Although the court ultimately rejected the claim because of insufficient evidence that the debtor had "participated in" his mother's decision to transfer the property, the court in *Hart* indicated that a transfer could indeed be attributed to a debtor if the debtor had "directed or orchestrated" a transfer made by a third party. Id., 1157. This court has relied on similar participation by the debtor before attributing a third-party transfer to a debtor. See *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 433, 429 A.2d 908 (1980) (debtor "caus[ed]" fraudulent conveyance, although wife actually executed it); see also *Virginia Corp.* v. *Galanis*, 223 Conn. 436, 445 n.12, 613 A.2d 274 (1992) (debtor fraudulently conveyed property by "direct[ing]" the conveyance, even though he did not "actually convey" it).

Bankruptcy law follows similar rules. Courts applying an analogous provision of the federal Bankruptcy Code attribute an agent's conduct to a principal only in limited circumstances. Under 11 U.S.C. § 548, an agent's actual fraudulent intent may be imputed to a principal; *In re Tribune Co. Fraudulent Conveyance Litigation*, No.

General Statutes (Rev. to 2015) § 1-55. The power of attorney agreement used by the parties in this case is not in the record, however. Therefore, it is unclear whether Stephen executed the transfers pursuant to a general authority, and, if so, whether Helen authorized him to act as her alter ego in such cases.

11-md-2296 (RJS), 2017 WL 82391, *5 (S.D.N.Y. January 6, 2017); but only if the agent is also the transferee and "in a position to dominate or control" the principal. *In re Elrod Holdings Corp.*, 421 B.R. 700, 711 (Bankr. D. Del. 2010). This is a high standard: "[V]icarious intent is an extreme situation that is dependent upon nearly total control of a debtor by a transferee." (Internal quotation marks omitted.) Id. It requires "formal, legal control as well as functional control." Id., 712. Thus, imputed intent cases almost exclusively arise in the corporate context, "typically involv[ing] sole shareholders of the transferor, with complete control of the transferor, transferring assets to themselves as transferee." Id. Although intertwined with general agency principles, the rule is driven by policies inapplicable to the vast majority of individual debtors: "With respect to individuals, section 548 (a) (1) (A)'s application is obvious: the inquiry is into the actual intent held by the flesh-and-blood individual. With a corporation or other juridical entity, the inquiry is blurred: which of the corporation's officers or directors matter? What if not all of the officers and directors agree? . . . '[A] corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.' " R. Levin & H. Sommer, 5 Collier on Bankruptcy ¶ 548.04 (16th Ed. 2018) § 548 (a) (1) (A) [1] [iv], pp. 548-65 and 548-66 (quoting *In re Personal & Business Ins. Agency*, 334 F.3d 239, 243 [3d Cir. 2003]).[6]

[6] The majority argues that courts in bankruptcy cases simply presume that the conduct of a debtor's agent is attributable to a debtor and instead focus only on whether the intent of the agent is attributable to the debtor. But some courts do, in fact, analyze whether conduct was attributable to the debtor, before addressing intent. E.g., *In re Maletta*, 159 B.R. 108, 116 (Bankr. D. Conn. 1993) ("The transfers of the $83,600 bonus funds in February and March of 1990 were within one year of the commencement of this case. . . . [*T*]*hose transfers were made by the defendant or authorized by him* . . . ." [Citation omitted; emphasis added.]).

Applying these principles to the present case, I would not conclude on this record that the trial court improperly determined that CUFTA did not reach the transfers Stephen made exercising his power of attorney. As the trial court found: "[A]ll of the transfers at issue were made by Stephen McGee, under a power of attorney from his mother. None were made by Helen McGee." Therefore, Stephen was not the "debtor" inasmuch as he was not "liable on a claim" to the plaintiff. Additionally, even if we were to construe CUFTA under some set of circumstances to reach transfers made by a third party at the behest of the debtor, as have some courts discussed previously, the trial court observed that "the plaintiff does not allege, and the evidence does not show, that Helen McGee participated in any fashion in the claimed fraudulent transfers . . . ." Stephen was not acting as Helen's alter ego, nor did Helen "direct or orchestrate" or "cause" Stephen's transfers in such a way that the court could attribute the transfers to her. Because the transfers at issue in this case were not "made by a debtor," in my view, the plaintiff failed to make out a claim that Stephen was liable under CUFTA.[7]

As construed by the majority, Stephen's transfers are attributed to Helen regardless of whether she partici-

[7] The plaintiff argues that Stephen admitted in his answer that Helen transferred the assets and that this admission bound the trial court. But this portion of Stephen's answer can neither be construed as an acknowledgement that Helen actually transferred the funds herself nor that Stephen's transfer of the funds was attributable, as a matter of law, to Helen. The first interpretation is contrary to the record, and the trial court therefore was entitled to find to the contrary. "[A] court may be justified in deviating from any such admission if [it is] unsupported by the underlying facts in evidence." *Dreier* v. *Upjohn Co.*, 196 Conn. 242, 248, 492 A.2d 164 (1985). No evidence suggests that Helen actually made these transfers herself, and the plaintiff did not argue as much. The second interpretation suggests a legal conclusion, and thus, did not bind the trial court in its factual findings. See *Borrelli* v. *Zoning Board of Appeals*, 106 Conn. App. 266, 271, 941 A.2d 966 (2008) ("[a]dmissions, whether judicial or evidentiary, are concessions of fact, not concessions of law"). Whether a transfer made by a third party is attributable to a debtor is, at least in part, a question of law.

pated in (or even knew about) them. Under General Statutes § 52-552k, the supplementary provisions of CUFTA on which the majority relies: "the principles of law and equity, including . . . the law relating to principal and agent," supplement CUFTA, "[u]nless displaced" by other provisions of the act. In this light, the majority relies on the rule that a principal is presumptively bound by the acts of an attorney-in-fact. *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 167, 7 A.3d 919 (2010). But strict application of agency principles is inconsistent with the limited reach of the language in CUFTA, which states that the transfer must be "made by a debtor"; General Statutes § 52-552f (b); as well as with the general approach to third-party transfers this court and others use, and with the approach that every court to consider the issue has taken with respect to attorneys-in-fact. In my view, even under § 52-552k, when a court has found that the principal did not otherwise participate in the transfer, the phrase, "made by a debtor," "displace[s]" agency law to the extent that a principal is automatically held liable for a transfer by its agent.

Just because CUFTA does not provide a remedy does not mean one is not available, though. For example, a nursing facility may require "an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract . . . to provide payment from the resident's income or resources for such care." 42 U.S.C. § 1396r (c) (5) (B) (ii) (2012); see, e.g., *Sunrise Healthcare Corp.* v. *Azarigian*, 76 Conn. App. 800, 810, 821 A.2d 835 (2003) ("if the [agent] acted in breach of the contract by not using [the patient's] assets as the contract required, then [the agent] is responsible for reimbursing the [nursing home]"). In fact, the plaintiff's "Resident Admissions Agreement" contemplates a "responsible party" who agrees to undertake certain duties on behalf of "the resident" and bears personal financial liability for fail-

ure to do so. Stephen was not named a responsible party in the agreement. More generally, a plaintiff in a breach of contract case can also obtain a prejudgment remedy on a showing of probable cause, thereby preserving the defendant's assets before any transfer to a third party. See General Statutes §§ 52-278a and 52-278d. Or a breaching principal might have a cause of action against its attorney-in-fact for improperly transferring assets. See, e.g., *Kindred Nursing Centers East, LLC* v. *Morin*, supra, 125 Conn. App. 173.

Therefore, I respectfully concur in part and dissent in part.

PRESIDENTIAL VILLAGE, LLC *v.* TONYA PERKINS ET AL.
(SC 20043)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins and Kahn, Js.

Syllabus

Pursuant to federal regulation (24 C.F.R. § 247.4 [2018]), a landlord must provide notice to a tenant in federally subsidized housing before an eviction proceeding may be commenced, the notice must state the reasons for the landlord's action with enough "specificity" so as to enable the tenant to prepare a defense, and, when the basis of the action involves the nonpayment of rent, the notice must state the dollar amount of the balance due on the "rent account" and the date of such computation in order to satisfy the requirement of specificity.

The plaintiff landlord brought a summary process action against the defendant tenant, seeking immediate possession of the premises solely on the ground of nonpayment of rent. In 2010, the defendant signed a one year lease with the plaintiff, which owns and manages a housing development in which the rental units are subsidized by the Department of Housing and Urban Development (HUD). Pursuant to the terms of that lease, the defendant remained in the apartment after the first year on a month-to-month basis. In the plaintiff's summary process action, which it brought in February, 2015, the plaintiff alleged that, on January 1, 2015, the defendant failed to pay the rent of $1402 then due. Prior to initiating the action, the plaintiff had sent a pretermination notice to the defendant in accordance with HUD regulations. The pretermination

notice provided: "[Y]ou failed to pay your rent, in the total rental obligation of [$6189.56]. Your failure to pay such rent constitutes a material noncompliance with the terms of your lease." The notice further provided: "Your rental obligations will include the delinquent rent, late fees, utilities, legal fees, any other eviction proceeding sundry cost." The defendant filed a motion to dismiss, claiming that the pretermination notice was defective and, therefore, that the trial court lacked subject matter jurisdiction. The defendant contended, inter alia, that the cure amount of $6189.56 in the pretermination notice varied from the alleged nonpayment of $1402 in rent that formed the basis for termination of the tenancy. The trial court granted the motion to dismiss, concluding that the notice was defective because it contained legally impermissible and factually inaccurate grounds for termination and that the defective notice deprived it of subject matter jurisdiction. The plaintiff appealed to the Appellate Court, which reversed the trial court's judgment, concluding that the pretermination notice was not jurisdictionally defective. The Appellate Court reasoned that the trial court improperly incorporated state summary process law in determining that the notice was defective and that the notice should have been assessed solely in relation to the requirements of federal law, specifically, that portion of 24 C.F.R. § 247.4 requiring only the dollar amount of the balance due on the rent account and the date of such computation. The Appellate Court determined that the plaintiff's notice complied with that federal requirement because all of the charges listed therein were amounts for either past due rent or other financial obligations due under the lease. The Appellate Court rejected the defendant's contention that the balance due on the rent account was limited to the amount of the unpaid rent that supported the nonpayment of rent ground alleged in the plaintiff's complaint. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court improperly reversed the trial court's judgment of dismissal, as the plaintiff's inclusion in the pretermination notice of undesignated charges for obligations other than unpaid rent rendered that notice jurisdictionally defective: the common meaning of the term "rent," as gleaned from dictionaries, federal housing statutes, federal regulations applicable to subsidized housing, and the HUD handbook, led this court to conclude that the term "rent account" in 24 C.F.R. § 247.4 is limited to rent charges and does not encompass utilities, costs for repairs, late fees, and attorney's fees, and such a construction of the regulation furthered the purpose of the specificity requirement therein, which was to enable the tenant to prepare a defense, and also reflected the fact that occupancy in subsidized housing is in the nature of a welfare entitlement and that such tenants are entitled to basic substantive and procedural protections; accordingly, the requirement that the pretermination notice specify the dollar amount of the balance due on the rent account was not met in the present case, as the notice was not limited to unpaid rent, which the plaintiff alleged as the only

reason for the proposed termination of the tenancy, and did not designate which of the charges were assigned to rent and which were assigned to obligations other than rent; moreover, the plaintiff could not prevail on its claim that any defect in a pretermination notice is not jurisdictional and requires that the defendant demonstrate prejudice, this court having determined that notice must be sufficiently accurate for the tenant to understand and defend against the allegations and that, if a notice is inaccurate to the point that a tenant's ability to prepare a defense is impaired, the notice is not effective.

Argued October 9, 2018—officially released June 18, 2019

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Ecker*, *J.*, granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Prescott*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings, and the named defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Amy Eppler-Epstein, with whom was *Shelley White*, for the appellant (named defendant).

David E. Schancupp, with whom was *Hugh D. Hughes*, for the appellee (plaintiff).

J.L. Pottenger, *Jr.*, filed a brief for the Jerome N. Frank Legal Services Organization et al. as amici curiae.

Opinion

McDONALD, J. This summary process action concerns the degree of specificity required in the pretermination notice[1] that, pursuant to regulations promulgated

[1] Although federal regulations refer to the notice as a "termination notice"; 24 C.F.R. § 247.4 (2018); we use the term "pretermination" in this opinion to reflect the fact that the federal notice precedes a notice to quit, which is the sole mechanism to terminate a tenancy under Connecticut law. We note that the plaintiff also referred to the notice as such in its complaint.

by the federal Department of Housing and Urban Development (HUD), must be provided to a tenant who resides in federally subsidized housing before the landlord may commence an eviction proceeding against that tenant. Specifically, the issue presented is whether a pretermination notice asserting nonpayment of rent as the ground for the proposed termination of the tenancy is jurisdictionally defective if it includes either rent charges that cannot serve as a basis for termination of the tenancy under state summary process law or undesignated charges for obligations other than rent. The trial court concluded that the inclusion of both types of charges renders the notice jurisdictionally defective. The Appellate Court concluded that state law is irrelevant to the legal sufficiency of such a notice, and that the inclusion of charges other than for rent is not a material defect under federal law. *Presidential Village, LLC* v. *Perkins*, 176 Conn. App. 493, 500, 506, 170 A.3d 701 (2017).

The defendant tenant, Tonya Perkins,[2] appeals, upon our grant of certification, from the Appellate Court's judgment reversing the judgment of the trial court dismissing the summary process action initiated by the plaintiff landlord, Presidential Village, LLC. We conclude that the inclusion of undesignated charges for obligations other than rent rendered the notice jurisdictionally defective. Accordingly, we reverse the Appellate Court's judgment.

The record reveals the following undisputed facts and procedural history. The plaintiff is a private company that owns and manages Presidential Village, a housing development in New Haven in which the rental units are subsidized by HUD through a project based

[2] We note that two additional defendants, "John Doe" and "Jane Doe," who may have resided in the premises with Perkins, were also named in the complaint but are not parties to the present appeal. All references in this opinion to the defendant are to Perkins.

Section 8[3] program intended to benefit low income families. Tenants are responsible for a portion of the rent, based on a percentage of their income and other factors; HUD makes monthly payments to the plaintiff to make up the difference between the tenant's portion of the rent and the full market rent. If a tenant fails to provide information relevant to the determination of the tenant's share of the rent, which may be periodically adjusted as circumstances change, the tenant may be required to pay the market rent.[4] See generally United States Dept. of Housing & Urban Development, HUD Handbook 4350.3 Rev-1: Occupancy Requirements of Subsidized Multifamily Housing Programs (November, 2013) (HUD Handbook).

In March, 2010, the defendant signed a HUD model lease for an apartment in Presidential Village for a term beginning March 2, 2010, and ending February 28, 2011, *and thereafter* "*continu*[*ing*]" *for successive terms of one month* . . . ." (Emphasis added.) The lease set the defendant's rent at $377 per month; it did not indicate the amount of HUD's subsidy or the market rate for the unit. The lease provides that the defendant's rent

[3] The trial court observed: "Section 8 refers to Section 8 of the Housing Act of 1937, although what are now called Section 8 programs were not created until almost forty years later, with the enactment of the Housing and Community Development Act of 1974. Section 8, as amended, is codified at 42 U.S.C. § 1437f et seq. There are many different Section 8 programs in existence. . . . In general, the Section 8 rental assistance programs can be categorized as either tenant based or project based. There are various programs within each of these two categories, and the variations themselves have spawned subvariations and permutations. . . . [HUD] has issued publications intended to provide guidance regarding occupancy and termination issues in connection with various Section 8 programs." (Internal quotation marks omitted.)

[4] Market rent is the rent HUD authorizes the owner to collect from families ineligible for assistance. See United States Dept. of Housing & Urban Development, HUD Handbook 4350.3 Rev-1: Occupancy Requirements of Subsidized Multifamily Housing Programs (November, 2013), glossary, p. 22.

may increase (or decrease) for various reasons, including a change in her income.[5]

In February, 2015, the plaintiff commenced the present summary process action against the defendant, seeking immediate possession of the premises, solely on the ground of nonpayment of rent. The complaint alleged that the defendant's monthly rent was $1402, the defendant's portion of that rent was $1402,[6] and, on January 1, 2015, the defendant failed to pay the rent then due and payable.

The complaint further alleged the procedures undertaken by the plaintiff prior to initiating the action. Specifically, it alleged that, on January 14, 2015, with the January rent still unpaid, the plaintiff sent a pretermination notice to the defendant, in accordance with HUD regulations, regarding her past due rent. It further alleged that, on January 29, 2015, with the rent still unpaid, the plaintiff served a notice to quit on the defendant. Both notices were attached as exhibits to the complaint. Relevant to the present case, the pretermination notice stated as follows:

[5] It appears that a qualifying tenant's rent is capped at 30 percent of adjusted gross income. See 42 U.S.C. § 1437a (a) (1) (2012). The model lease indicates that, annually, the landlord requests information from the tenant regarding income, family composition, and any other information required by HUD to recertify eligibility for HUD rental assistance. The landlord verifies that information and then uses it to recalculate the amount of the tenant's rent and the HUD assistance payment, if necessary. In the intervening period between annual reviews, the tenant is obligated to advise the landlord if the pertinent information changes.

[6] The basis of this amount is not established in the record. Statements by the parties' counsel at oral argument suggest that $1402 represented the market rent for the unit. The plaintiff's counsel suggested that the entire amount was owed by the defendant because she had failed to provide information or forms necessary to maintain eligibility for the subsidy. The defendant's counsel disputes that the defendant owes the entire amount but does not contend that any such overcharge would constitute a jurisdictional defect.

"You have violated the terms of your lease in that you failed to pay your *rent*, *in the total rental obligation of* *$6,189.56*. Your failure to pay such *rent* constitutes a material noncompliance with the terms of your lease.

"We hereby notify you that your lease agreement may be subject to termination and an immediate eviction proceeding, initiated by our office. We value our tenants and request that you immediately contact our office, regarding full payment of your rental obligations. *Your rental obligations will include the delinquent rent, late fees, utilities, legal fees, and any other eviction proceeding sundry cost.*

"You have the right within ten days after receipt of this notice or within ten days after the date following the date this notice was mailed whichever is earlier to discuss the proposed termination of your tenancy with your landlord's agent[7] . . . .

"If you remain in the premises on the date specified for termination, we may seek to enforce the termination by bringing judicial action at which time you have a right to present a defense." (Emphasis added.)

The defendant filed a motion to dismiss the plaintiff's summary process complaint on the ground that the pretermination notice was defective and, therefore, that the court lacked subject matter jurisdiction. The alleged defects were (1) a variance in the cure amount requested in the pretermination notice ($6189.56) and the alleged nonpayment that is the basis of the com-

[7] In a footnote in its memorandum of decision, the trial court acknowledged that the parties disputed whether the defendant had discussed, or attempted to discuss, this matter with the plaintiff during the ten day period. The court explained that it had declined to hold an evidentiary hearing to resolve this dispute because its resolution of the case on other grounds rendered it unnecessary. The Appellate Court did not address this footnote when it stated that the defendant "did not discuss the possible termination of her tenancy with the plaintiff's agent during the ten day period . . . ." *Presidential Village, LLC* v. *Perkins*, supra, 176 Conn. App. 496.

plaint ($1402), which contravenes federal laws regulating the pretermination notice, as articulated in the HUD Handbook and state case law, and (2) the notice's allegations of violations of leases that are no longer in effect, which violate Connecticut summary process law.

In its opposition to the motion, the plaintiff argued that the pretermination notice was not defective. It asserted that there was nothing defective about a pretermination notice that lists the total financial obligations owed by the defendant to the plaintiff. The plaintiff further contended that a federal pretermination notice fully complies with the law if it includes the specific information supporting the landlord's right to termination; a notice does not become defective simply because it contains more information than strictly necessary.

The trial court granted the defendant's motion to dismiss. The court determined that the notice was defective because it contained legally impermissible and factually inaccurate grounds for termination. The trial court explained that one purpose of the pretermination notice is to provide the tenant with the opportunity to cure. The present notice did not provide this opportunity because it was misleading in at least two ways. First, the notice informed the defendant that she had to pay $6189.56 in order to prevent eviction when, under state summary process law, payment of a far lesser amount, $2804 (rent for December, 2014, and January, 2015), would have prevented the only eviction that could have been initiated based on that particular notice.[8] See General Statutes § 47a-23 (d). Second, the

[8] As of March 1, 2011, the defendant's one year lease converted to a month-to-month lease. In a month-to-month tenancy, "[t]he tenancy for each month is separate and distinct from that of every other month. *Welk* v. *Bidwell*, 136 Conn. 603, 607, 73 A.2d 295 [(1950)]. There is a new contract of leasing for each successive month; *DiCostanzo* v. *Tripodi*, 137 Conn. 513, 515, 78 A.2d 890 [(1951)]; and the right of tenancy ends with that month for which the rent has been paid." *Kligerman* v. *Robinson*, 140 Conn. 219, 221, 99 A.2d 186 (1953). Each month is a separate contract. Id. Our summary process law modifies the common law by permitting a landlord to terminate a month-

notice included charges as "rental obligations" that did not qualify as "rent." The trial court noted that the plaintiff had conceded that the $6189.56 in "rental obligations" included approximately $1300 in attorney's fees for which the defendant was not even liable,[9] and that it could not account for another portion of one of the charges listed. The trial court concluded that the defective notice deprived it of subject matter jurisdiction and rendered a judgment of dismissal.

The plaintiff appealed to the Appellate Court. The Appellate Court reversed the judgment, holding that the pretermination notice was not jurisdictionally defective. *Presidential Village* v. *Perkins*, supra, 176 Conn. App. 494. The Appellate Court determined that the trial court improperly incorporated state summary process law in determining that the notice was defective. Id., 499–500. The Appellate Court held that the notice must be assessed solely in relation to the requirements of federal law; id., 500; under which a pretermination notice for nonpayment of rent required only "the dollar amount of the balance due on the rent account and the date of such computation . . . ." (Internal quotation marks omitted.) Id., 502, quoting 24 C.F.R. § 247.4 [e] (2017). The Appellate Court determined that the

to-month tenancy based on nonpayment of rent not only for the month in which the notice to quit is served but also for the immediately preceding month. See General Statutes § 47a-23 (d). In the present case, because the plaintiff served the notice to quit in January, 2015, it had the right to claim nonpayment of rent for December, 2014, but not for prior months.

[9] According to the trial court's decision, the plaintiff conceded during oral argument before that court that the attorney's fees were from a prior, unsuccessful action that should not have been charged to the defendant. At oral argument before this court, the plaintiff's counsel suggested that perhaps the defendant was liable for the attorney's fees. As this statement is in direct conflict with the trial court's decision, the proper time and means to have raised this matter would have been through the filing of a motion for rectification in the trial court. See Practice Book § 66-5. In the absence of any such rectification, we presume that the plaintiff did make, and is bound by, such a concession.

plaintiff complied with this requirement because all of the charges listed in the pretermination notice were amounts for either past due rent or other financial obligations due under the lease. Id., 502–503.

The Appellate Court rejected the defendant's argument that the balance due on the "rent account" was limited to the amount of unpaid rent that supported the nonpayment of rent ground alleged in the complaint. Id., 503–504. It agreed with the plaintiff that, irrespective of whether the notice may have misled the defendant as to the amount needed to cure the violation of the lease agreement, the federal notice requirement is intended only to allow the tenant to prepare a defense against the summary process action, not to afford an opportunity to cure noncompliance and thereby avoid such an action.[10] Id. Finally, the Appellate Court noted that, even if it were to agree with the trial court that

[10] By drawing a clear distinction between curing a default and preparing a defense, the Appellate Court appears to have implicitly rejected the possibility that the opportunity to cure may be relevant to preparing a defense to present in an eviction action. For example, equitable nonforfeiture is a defense that may apply to a summary process action premised on nonpayment of rent. See *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630, 987 A.2d 1009 (2010). "[T]he doctrine against forfeitures applies to a failure to pay rent in full when that failure is accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of a lease." (Internal quotation marks omitted.) Id. "[T]he conduct of the [lessee] after he was informed of the nonpayment . . . is conclusive of the good faith of the [lessee] . . . and his continuous desire to avoid a forfeiture . . . ." *Thompson* v. *Coe*, 96 Conn. 644, 657, 115 A. 219 (1921). "[M]any courts have also taken into consideration the tenant's actions after receiving notice by the landlord of the termination of the lease, *looking favorably on any actions by the tenant to cure the default or evidencing an intent to prevent the forfeiture* . . . ." (Emphasis added; internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 634. Thus, if the lack of specificity in a notice discourages the tenant from taking steps to cure the default, it also could impair the tenant's ability to establish an equitable defense to eviction. In light of our conclusion that the inclusion of nonrent charges rendered the notice defective, we need not determine whether a notice could be jurisdictionally defective if it is so misleading as to impair the opportunity to cure.

the inclusion of nonrent charges was relevant, it would view the inclusion of such charges as insufficient to render the pretermination notice "fatally defective." Id., 506, citing *Jefferson Garden Associates* v. *Greene*, 202 Conn. 128, 142, 145, 520 A.2d 173 (1987).

We then granted the defendant's petition for certification to appeal to this court. Although the certified questions are framed in relation to whether state summary process law is relevant to the propriety of the federal notice; see *Presidential Village, LLC* v. *Perkins*, 327 Conn. 974, 174 A.3d 193 (2017);[11] we conclude that, because the notice is jurisdictionally defective even if measured solely by reference to federal law, we need not consider whether, and the extent to which, state law would be relevant.

In reviewing the Appellate Court's determination that the trial court improperly granted the defendant's motion to dismiss, we are guided by the following well established principles. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss [is] de novo." (Internal quotation marks omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 316, 138 A.3d 257 (2016).

[11] We granted the defendant's petition for certification as to the following issues: "1. Did the Appellate Court properly reverse the trial court's holding that a federal pretermination notice for nonpayment of rent must be limited to rent charges that are a permissible basis for such an eviction under Connecticut summary process law?

"2. Did the Appellate Court properly conclude that state law is not relevant in determining whether the information provided in a federal pretermination notice is so misleading as to render it jurisdictionally defective?" *Presidential Village, LLC* v. *Perkins*, supra, 327 Conn. 974.

"There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction. General Statutes § 51-164s. The jurisdiction of the Superior Court in summary process actions, however, is subject to [certain] condition[s] precedent." *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989). "[B]efore a landlord may pursue its statutory remedy of summary process . . . the landlord must prove its compliance with all the applicable preconditions set by state and federal law for the termination of a lease." *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 143; see, e.g., *Lampasona* v. *Jacobs*, supra, 729 ("[a]s a condition precedent to a summary process action, proper notice to quit is a jurisdictional necessity"); *Lampasona* v. *Jacobs*, supra, 729 ("we have held other statutory time limitations and notice requirements to be conditions precedent to court actions and thus to be jurisdictional").

The record establishes that the preconditions required under state summary process law were met; there is no claim to the contrary. The plaintiff timely served the notice to quit alleging nonpayment of rent, and alleged in its complaint that the defendant had failed to pay rent due January 1, 2015, in the amount of $1402. See footnote 8 of this opinion.

Federal law, however, imposes additional preconditions in order to terminate a Section 8 tenancy. The purpose of these requirements is to afford due process and avoid arbitrary or discriminatory termination. See *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 143–45; see also *Anderson* v. *Denny*, 365 F. Supp. 1254, 1260 (W.D. Va. 1973); *Green* v. *Copperstone Ltd. Partnership*, 28 Md. App. 498, 516, 346 A.2d 686 (1975); *Timber Ridge* v. *Caldwell*, 195 N.C. App. 452, 454, 672

S.E.2d 735 (2009); *Nealy* v. *Southlawn Palms Apartments*, 196 S.W.3d 386, 389–90 (Tex. App. 2006).

Under HUD regulations, a tenancy in a federally subsidized project cannot be terminated in the absence of good cause. See 24 C.F.R. § 247.3 (2018). One such ground is material noncompliance with the rental agreement; see id., § 247.3 (a) (1); which includes "[n]onpayment of rent or any other financial obligation due under the rental agreement . . . ." Id., § 247.3 (c) (4).

Service of a valid pretermination notice is a condition precedent to a summary process action. See id., § 247.4.[12] In any subsequent summary process action, the landlord can rely only on grounds that were set forth in that notice, unless the landlord had no knowledge of an additional ground at the time the pretermination notice was served. See id., § 247.6 (b). With respect to the statement of such grounds in the pretermination notice, the regulations mandate that the notice must, among other things, "state the reasons for the landlord's action with *enough specificity so as to enable the tenant to prepare a defense* . . . ." (Emphasis added.) Id., § 247.4 (a) (2). When the reason is nonpayment of rent,

[12] Title 24 of the 2018 edition of the Code of Federal Regulations, § 247.4 (a), provides: "The landlord's determination to terminate the tenancy shall be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section."

We note that, although the defendant did not advance this ground in the trial court, it is apparent that the pretermination notice served on her clearly fails to comply with subsection (a) (1), in that it does not include a date on which the tenancy will terminate. We need not base our decision on this ground in light of our conclusion that the notice is jurisdictionally defective for another reason that was raised in the trial court.

the regulation provides that "a notice stating the dollar amount of the balance due on the *rent account* and the date of such computation shall satisfy the requirement of specificity . . . ." (Emphasis added.) Id., § 247.4 (e).

The question then is whether the pretermination notice served on the defendant properly states what is due on the "rent account." The notice sets forth the defendant's "rental obligations." The notice unambiguously equates this term to rent, but then indicates that rental obligations include not only delinquent rent, but also "late fees, utilities, legal fees, and any other eviction proceeding sundry cost." Although the notice lists various dollar amounts and assigns a specific due date to each amount, it does not indicate whether the amount is derived from any particular obligation, or a combination thereof.

The term "rent account" is not defined in HUD regulations, the HUD Handbook, or the HUD model lease executed in the present case. The plaintiff's view, apparently shared by the Appellate Court, is that this term encompasses any financial obligation arising under the lease. The defendant's view is that it is limited to rent charges, and only those rent charges that are a proper basis for the eviction action under state summary process law. We agree with the defendant's first point and therefore need not reach the second.

We begin with the observation that the common meaning of "rent" is a charge for the use and occupancy of the property. See, e.g., The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 1487; Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1054. This common meaning is consistent with Section 8 law, under which the tenant's rent is for a fixed amount, set in relation to the tenant's income. See 42 U.S.C. § 1437a (a) (1) (2012). It is also consistent with the definitions of various types of rent in the HUD

Handbook.[13] See HUD Handbook, supra, glossary; see also, e.g., id., p. 6 ("Contract [r]ent" is defined as "[t]he rent HUD or the Contract Administrator has approved for each unit type covered under an assistance contract. The rent may be paid by the tenant, HUD, or both. Refer to the project's rental schedule [Form HUD-92458] or Rental Assistance contract for exact amounts.").[14] Although there is some indication in one type of rent defined in the HUD Handbook's glossary that rent may include utilities; see id., p. 23 (defining "[m]inimum [r]ent" as "the tenant's contribution for rent and utilities");[15] and in the HUD form used to calculate the rent schedule; see Form HUD-92458, "Rent Schedule Low Rent Housing" (November, 2005); no definition suggests that rent may include late fees or attorney's fees. Unlike private parties, landlords receiving subsidies from HUD are not free to define "rent" as they see fit.

[13] The trial court observed that, "[t]o the extent that a requirement contained in the HUD Handbook does not appear in the relevant federal regulations, it is fair to ask whether those requirements are legally enforceable against Section 8 landlords." The trial court did not decide this issue because the plaintiff did not challenge the binding nature of the HUD Handbook, many provisions of which are reflected in the HUD model lease used by plaintiff. We observe that, even when an agency handbook is not legally binding, courts have relied on the agency's interpretations of the governing law therein to the extent that such interpretations are persuasive. See, e.g., *Burroughs* v. *Hills*, 741 F.2d 1525, 1529 (7th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S. Ct. 2321, 85 L. Ed. 2d 840 (1985); *Roberts* v. *Cameron-Brown Co.*, 556 F.2d 356, 360–61 (5th Cir. 1977); *Jackson* v. *Medical Board*, Docket No. CV-07-2188 SVW (RZ), 2008 WL 11378892, *4 (C.D. Cal. April 17, 2008); see also *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 268 n.4, 86 A.3d 1044 (2014).

[14] This definition also conforms to state law. See General Statutes § 47a-1 (h) (defining "[r]ent" as "all periodic payments to be made to the landlord under the rental agreement").

[15] In the HUD model lease, the landlord may designate certain utilities as ones that the tenant is responsible for paying directly to the utility company or as ones that are "included in the [t]enant's rent." In the lease between the parties in the present case, gas (for hot water and heat) was included in tenant rent.

Further support for a narrow construction of the term rent is found in the federal regulations distinguishing between nonpayment of rent and "any other financial obligation" due under the rental agreement as a ground for termination. See 24 C.F.R. § 247.3 (c) (4) (2018) (citing nonpayment of rent "or" other financial obligation under lease). Nonpayment of either may demonstrate material noncompliance with the rental agreement. Although an eviction action may be brought based on the failure to pay other financial obligations, if permitted under the agreement, such an action would not be one for nonpayment of "rent." It so happens that the HUD model lease expressly provides that "[t]he [l]andlord may not terminate this [a]greement for failure to pay late charges, but may terminate this [a]greement for [nonpayment] of rent . . . ."

A narrow construction of the term rent also is consistent with the manner in which rent is defined elsewhere in federal regulations applicable to subsidized housing, albeit not to privately owned property. Regulations applicable to the Public Housing Agency distinguish "[t]enant rent," defined as "[t]he amount payable monthly by the family as rent to the unit owner"; 24 C.F.R. § 5.603 (b) (2018); from other payments due under the lease. See id., § 966.4 (b) (listing as payments due under lease: [1] tenant rent; [2] charges for maintenance and repair beyond normal wear and tear, and excess utilities; [3] late payment penalties; [4] and security deposits). Additionally, lease agreements may not include a provision providing "that the tenant agrees to pay attorney's fees or other legal costs whenever the landlord decides to take action against the tenant even though the court determines that the tenant prevails in the action." Id., § 966.6 (h). Such an exclusion plainly indicates that such fees are not considered "rent." Consistent with this narrow construction, other jurisdictions have defined "tenant rent" in accordance with the

common meaning, and have refused to construe it more expansively to include charges for utilities, repairs, late fees, or attorney's fees. See *Miles* v. *Metropolitan Dade County*, 916 F.2d 1528, 1532 n.4 (11th Cir. 1990), cert. denied, 502 U.S. 898, 112 S. Ct. 273, 116 L. Ed. 2d 225 (1991); *In re Parker*, 269 B.R. 522, 533 (D. Vt. 2001); *Housing Authority & Urban Redevelopment Agency* v. *Taylor*, 171 N.J. 580, 591–94, 796 A.2d 193 (2002).

Although the Appellate Court dismissed as irrelevant case law that construed HUD regulations applicable to public housing, we view this law as persuasive because it is consistent with every other relevant source and because the HUD provisions governing subsidized housing all serve the same purpose of ensuring affordable housing to low income families. See *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("[a] court must therefore interpret the statute as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole" [citation omitted; internal quotation marks omitted]).

Finally, we observe that a narrow construction of "rent account," consistent with the meaning of "rent," furthers the purpose of the specificity requirement of a pretermination notice, to "enable the tenant to prepare a defense . . . ." 24 C.F.R. § 247.4 (a) (2) (2018). A defense to nonpayment of a financial obligation may vary depending on the nature of the obligation and its source (lease or otherwise), as well as the amount claimed to be owed.[16] The inclusion of extraneous and

[16] As state law will be the principal source of defenses to a summary process action, it is clear that state law will be relevant in some cases as to whether a pretermination notice is sufficiently specific to allow the tenant to prepare a defense. Moreover, HUD regulations expressly acknowledge that state law applies, except if preempted. See 24 C.F.R. § 247.6 (a) (2018) ("[t]he landlord shall not evict any tenant except by judicial action pursuant to [s]tate or local law"); id., § 247.6 (c) ("[a] tenant may rely on [s]tate or local law governing eviction procedures where such law provides the tenant

irrelevant charges undoubtedly can inhibit a tenant from preparing his or her defense. So too can the failure to specify the particular amount claimed as unpaid rent. Cf. *Swords to Plowshares* v. *Smith*, 294 F. Supp. 2d 1067, 1073 (N.D. Cal. 2002) (addressing specificity requirement when nuisance was alleged as ground for eviction); *Edgecomb* v. *Housing Authority*, 824 F. Supp. 312, 315 (D. Conn. 1993) (addressing specificity requirement when criminal activity was alleged as ground for eviction). It is not the tenant's obligation to ferret out the particulars. The regulations place that obligation squarely and exclusively on the landlord.

If we were to conclude otherwise, we would ignore "that occupancy in a subsidized housing project is in the nature of a welfare entitlement and that tenants in these units are entitled to basic substantive and procedural protections." "Evictions from Certain Subsidized and HUD-Owned Projects," 41 Fed. Reg. 43,330, 43,331 (September 30, 1976); see *Goldberg* v. *Kelly*, 397 U.S. 254, 261–63, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (recognizing welfare benefits as right, not privilege, entitling beneficiary of welfare benefits to procedural due process protection). These basic due process protections include not only notice of termination of welfare benefits, but "effective notice," by providing "enough information to understand the basis for the [termination] . . . ." (Citation omitted.) *Kapps* v. *Wing*, 404 F.3d 105, 124 (2d Cir. 2005). These protections are especially important because the tenant's dispossession results in the loss of the subsidy and, in turn, affordable housing, placing some low income families at risk of homelessness. See 42 U.S.C. § 1437f (a) (2012) (purpose of federal rental assistance program is to aid "low-income families in obtaining a decent place to live"); see also Task Force on the Civil Right to Counsel,

procedural rights which are in addition to those provided by this subpart, except where such [s]tate or local law has been preempted").

Boston Bar Assn., "The Importance of Representation in Eviction Cases and Homelessness Prevention" (March, 2012), Appendix A, pp. 1–3, available at http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf. Wrongful termination of a subsidized tenancy may cause irreparable harm. See, e.g., *Caulder* v. *Durham Housing Authority*, 433 F.2d 998, 1003 (4th Cir. 1970) (recognizing that wrongfully evicted tenant is, "by definition, one of a class who cannot afford acceptable housing so that he is condemned to suffer grievous loss, but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others" [internal quotation marks omitted]), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971); National Low Income Housing Coalition, "The Gap: A Shortage of Affordable Homes" (March, 2019) p. 7 (estimating that Connecticut has only thirty-eight affordable rental units for every 100 extremely low income households), available at https://reports.nlihc.org/sites/default/files/gap/Gap-Report 2019.pdf.

Having determined that in order to comply with title 24 of the Code of Federal Regulations, § 247.4, the plaintiff was required to specify the alleged dollar amount of unpaid rent in the pretermination notice, it is apparent that this requirement was not met in the present case. The notice, by its own terms, is not limited to unpaid rent. Even if we were to accept the plaintiff's dubious overinclusiveness argument (i.e., that a notice that provides more information than that required is not defective), the notice still would be defective. The notice does not designate which of the charges are assigned to rent and which are assigned to obligations other than rent. Cf. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980)

(The court stated in relation to the Truth in Lending Act, 15 U.S.C. § 1601 et seq. [1976]: "The concept of meaningful disclosure . . . cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload]." [Citation omitted; internal quotation marks omitted.]). This flaw similarly dooms the plaintiff's analogy to case law in which there is no defect when a notice to quit alleges two grounds and the plaintiff proceeds on only one in the complaint. See, e.g., *Wilkes* v. *Thomson*, 155 Conn. App. 278, 282–83, 109 A.3d 543 (2015) (no defect where one of two grounds in notice to quit turns out to be factually unsupported). The plaintiff alleged nonpayment of "rent" as the only reason for the proposed termination.

We agree with the amici curiae, groups providing services to low income families in our state,[17] that the exclusion of superfluous charges that a tenant would not need to defend against to avoid eviction is especially important in light of the lack of legal sophistication of many recipients of these notices. As the amici point out, "[a] growing body of research confirms that many low income tenants do not understand the procedural complexities of housing court. Many tenants in court face 'barriers such as low literacy, mental illness, and limited English proficiency.' [Judiciary Committee, Connecticut General Assembly, Report of the Task Force To Improve Access to Legal Counsel in Civil Matters (December 15, 2016) p. 12]. Research suggests that federal housing aid recipients are also disproportionately hindered by financial illiteracy. See [J. Collins], The

[17] An amicus brief was filed in support of the defendant by the Jerome N. Frank Legal Services Organization at Yale Law School on its behalf and on behalf of Connecticut Legal Rights Project, Connecticut Legal Services, Inc., The Connecticut Veterans Legal Center, and Disability Rights Connecticut, Inc.

Impacts of Mandatory Financial Education: Evidence from a Randomized Field Study, 95 J. Econ. Behavior & Org. 146 (2013)."

The plaintiff alternatively argues that any defect in the notice is not jurisdictional. As such, it contends that the defendant should be required to demonstrate prejudice, a burden that it posits the defendant cannot meet. We disagree with the main premise of this argument.

There is a split of authority in other jurisdictions as to whether a defect in the pretermination notice deprives the court of subject matter jurisdiction, requiring dismissal of the action regardless of prejudice. Compare *Riverview Towers Associates* v. *Jones*, 358 N.J. Super. 85, 86, 817 A.2d 324 (App. 2003) (lack of jurisdiction), *Fairview Co.* v. *Idowu*, 148 Misc. 2d 17, 22–23, 559 N.Y.S.2d 925 (Civ. 1990) ("fatal" defect), and *Hedco, Ltd.* v. *Blanchette*, 763 A.2d 639, 643 (R.I. 2000) (lack of jurisdiction), with *Hill* v. *Paradise Apartments, Inc.*, 182 Ga. App. 834, 836–37, 357 S.E.2d 288 (1987) (defective notice must cause harm), *Fairborn Apartments* v. *Herman*, Docket No. 90 CA 28, 1991 WL 10962, *6 (Ohio App. January 31, 1991) (not jurisdictional), *Pheasant Hill Estates Associates* v. *Milovich*, 33 Pa. D. & C.4th 74, 76–77 (Com. Pl. 1996) (same), and *Nealy* v. *Southlawn Palms Apartments*, supra, 196 S.W.3d 392 (same).

The plaintiff reads this court's decision in *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 128, as falling into the latter camp. It is mistaken. In that case, this court stated that, when evaluating the propriety of a federal pretermination notice, "not every deviation from the strict requirements of either [state] statutes or [federal] regulations warrants dismissal of an action for summary process. When good cause for termination of a lease has clearly been shown, and when notices of termination have been sent in strict compliance with statutory timetables, a landlord should not be precluded

from pursuing summary eviction proceedings because of hypertechnical dissection of the wording of the notices that he has sent." Id., 145. These statements were aimed at the question of whether there is a cognizable defect, not whether a cognizable defect is jurisdictional. Tellingly, this court treated the federal regulation under the same rubric as state statutes governing summary process. See id. (citing as support *Southland Corp.* v. *Vernon*, 1 Conn. App. 439, 452–53, 473 A.2d 318 [1984], which applied same hypertechnical standard to notice to quit). It is well settled that a notice to quit that is defective under our law deprives the court of subject matter jurisdiction over the summary process action. See *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 5, 931 A.2d 837 (2007).

We recognize that certain inaccuracies in a pretermination notice may go to the merits and should be addressed at trial (for example, if the amount of unpaid rent for the period at issue is incorrect, or, as is claimed in the present case, overstates the tenant's share of the rent). However, the notice must be sufficiently accurate for the tenant to understand and defend against the allegations. If a notice is inaccurate to the point that a tenant's ability to prepare a defense against the alleged reason for termination is impaired, the notice is not effective.

For the reasons previously articulated, the pretermination notice in the present case cannot be said to reflect a hypertechnical deviation from the regulatory requirements. See *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 864 (2d Cir.) ("even small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level"), cert. denied, 400 U.S. 853, 91 S. Ct. 54, 21 L. Ed. 2d 91 (1970). As such, the Appellate Court improperly concluded that the trial court's judgment of dismissal must be reversed.

In light of this conclusion, we need not reach the defendant's claim that the notice also was jurisdictionally defective because it misleadingly included rent charges for leases that are no longer in effect and that could not be used to support a summary process action under Connecticut law. While prudent landlords would be well served by limiting their pretermination notices to the rent charges that lawfully may support the summary process action, we have no occasion to determine that question in this case.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the judgment of the trial court.

In this opinion the other justices concurred.