DOCKET NO. LLI-CV21-5013836-S : SUPERIOR COURT

ANTHONY MACCHIAROLI : J.D. OF LITCHFIELD

V. : AT LITCHFIELD

DAVE GRECO, ET AL. : SEPTEMBER 15, 2023

# PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Anthony Macchiaroli ("Plaintiff") hereby submits this Memorandum of Law in Opposition to Motions for Summary Judgment filed by Dave and Angie Greco ("Grecos") (#179.00) and Dark Entry Forest, Inc. ("Dark Entry") (#174.00). The Motions for Summary Judgment must be denied because Defendants have failed to meet their burden of demonstrating that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. At a minimum, multiple genuine issues of material fact exist with respect to whether Cook Road was ever discontinued by the Town of Cornwall, whether Plaintiff is entitled to a prescriptive easement to use Cook Road, whether Plaintiff is entitled to an easement by necessity or implication, whether Defendants' properties or any portion of Cook Road is designated as a wetland or watercourse, whether Plaintiff caused any unreasonable pollution or damage to wetlands or watercourses, and whether Defendants' properties have been damaged to the extent required to support their trespass and continuing nuisance claims. Those issues can only be decided by the Court after receiving evidence at trial, and accordingly, the Court must deny the Motions for Summary Judgment in their entirety.

#### I. FACTUAL BACKGROUND

Plaintiff is the owner of a 13-acre parcel of real property in the Town of Cornwall known as 85 Cook Road ("85 Cook Road" or the "Property"). Affidavit of Anthony Macchiaroli (the "Macchiaroli Affidavit"), at ¶2. The only physical access to the Property is Cook Road. *Id.* at ¶4.

The Property originally was part of a larger, 75-acre parcel of land designated as Lot 11 on the Assessors Map of Cook Road (the "75-Acre Parcel") a copy of which is attached to the Affidavit of Attorney Elton. Harvey ("Harvey Affidavit") as Exhibit 8. The Grecos own a 5-acre parcel of real property abutting Cook Road known as 8 Cook Road, designated as Lot 8 on Exhibit 8 to the Harvey Affidavit. Defendant Dark Entry is a Connecticut corporation with a principal place of business at 12 Pond Road, Cornwall Bridge, Connecticut. Dark Entry owns three parcels of real property abutting Cook Road (collectively, the "Dark Entry Property"). See *id*.

8 Cook Road and the Dark Entry Property are located approximately one mile south of 85 Cook Road, near the intersection of Cook Road and Pritchard Road, as shown on Exhibit 8 to the Harvey Affidavit. Cook Road provides the only means of access between Pritchard Road and 85 Cook Road. Macchiaroli Affidavit at ¶ 4.

Cook Road is a public road in the Town of Cornwall. See, e.g., *Breen v. Town of Cornwall*, 73 Conn. 309 (1900) (noting that Cook Road is a public highway); see also Affidavit of Attorney Wilson T. Carroll ("Carroll Affidavit"), Ex. 12 ("Permit to Disturb a Town Highway" issued to Defendants David and Angela Greco for work on "Town Highway at Cook Rd/Pritchard Rd."). As a public road, the Plaintiff has the right to use Cook Road to access 85 Cook Road. In 1903, the Town of Cornwall held a town meeting at which it discussed whether to discontinue Cook Road. Harvey Affidavit, at ¶ 8 and Ex. 3. At that time, the requirements of Connecticut law to discontinue a public road were not followed. The Cornwall Selectmen ("Selectmen") were required, among other things, to produce a signed writing evidencing a vote to discontinue Cook Road, in addition to the vote at the town meeting. *Id.* No such writing exists, and Cook Road, therefore, remains a public road. *Id.* As a result, Plaintiff has the right to use Cook Road as a public road for access to the Property.

Prior to 1979, H. Melissa Clark ("Clark") had acquired the 75-Acre Parcel, which includes what is now 85 Cook Road, through a series of transactions connected to a quiet title action that resolved a boundary dispute (the "Quiet Title Action"). Harvey Affidavit at ¶ 9. To resolve the Quiet Title Action, certain owners of properties abutting the 75-Acre Parcel quitclaimed to Clark any interests they may have had in the 75-Acre Parcel. In exchange, Clark remised, released, and quitclaimed to those same owners "all releasee's right, title and interest in and to all real property in said town of Cornwall lying outside of" the 75-Acre Parcel. See *id.* at ¶ 13, Ex. 6, and Ex. 7.

On June 25, 1979, Clark transferred the 75-Acre Parcel to James F. McClelland by warranty deed. Carroll Affidavit at Ex. 7. As reflected in the Town of Cornwall's tax assessment records, as of 1991, the Property was improved with a single-family home constructed in 1982 when the Property was owned by McClelland. Carroll Affidavit at Ex. 5. Subsequent tax assessment records indicate that the single-family residence was constructed in 1988. Carroll Affidavit at Ex. 6. The tax assessment records confirm that the Property was accessible by a "dirt road." Carroll Affidavit at Ex. 5. They confirm that the owner was able to permit the Cornwall Assessor's Office to conduct an interior inspection of the Property in 1991. Carroll Affidavit at Ex. 5. They also confirm that the Property had its electrical service supplied by propane as of 1991. Carroll Affidavit at Ex. 5 ("\*note: no elec/propane gas for lighting"). Since at least McClelland's ownership of the Property, individuals who have lived in and/or used the residence have used Cook Road for ingress and egress to 85 Cook Road. See Affidavit of Ian Branson ("Branson Affidavit") at ¶¶ 4–7 and Carroll Affidavit at Ex. 5, Ex. 6. The residence on the Property has telephone service, electricity supplied by a generator fueled by 1,000-gallon

propane tanks, running water, and septic service. Branson Affidavit at ¶ 8; Macchiaroli Affidavit at ¶ 8.

On May 22, 2002, McClelland transferred the 75-acre Parcel to Woodbury Mountain LLC by warranty deed, "[t]ogether with all of the Grantor's right, title and interest in and to Cook Road, so-called." Carroll Affidavit at Ex. 8. Woodbury Mountain, LLC mortgaged the 75-acre Parcel to J.P. Morgan Chase Bank, which foreclosed on and took title to the parcel on February 11, 2019. Carroll Affidavit at Ex. 9.

On January 20, 2021, J.P. Morgan Chase Bank conveyed 85 Cook Road to Plaintiff by quitclaim deed. Macchiaroli Affidavit at ¶ 3, Ex. 1. Schedule A of that quitclaim deed states that Plaintiff took the Property together with "all of the Grantor's right, title and interest in and to Cook Road, so-called." *Id*.

After taking title to the Property, Plaintiff encountered significant resistance from Defendants with respect to his right to use Cook Road to access his Property, culminating in Defendants' installation of a fence to prevent access to Cook Road. Macchiaroli Affidavit, at ¶ 12. In August 2021, Plaintiff, then appearing *pro se*, filed a complaint seeking, among other relief, a temporary injunction to prevent Defendants from interfering with Plaintiff's use of Cook Road to access his Property. See Complaint (#100.31).

On September 7, 2021, Defendant Dark Entry filed a five-count counterclaim asserting claims for: 1) Trespass (Count One); 2) "Violation of § 22a-36, et seq., Connecticut Inland Wetlands & Watercourses Act" (Count Two); 3) "§22a-16 Connecticut Environmental Protection Act" (Count Three); 4) Quiet Title (Count Four); and 5) Continuing Nuisance (Count Five). See Answer and Special Defense and Counterclaim (#110.00). On September 9, 2021, Defendants the Grecos filed a four-count counterclaim asserting claims for: 1) Quiet Title (Count

One); 2) Trespass (Count Two); 3) Violation of the Connecticut Inland Wetlands & Watercourses Act, Conn. Gen. Stat. § 22a-36, *et seq.* (Count Three); and 4) Violation of the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-16. See Answer and Counterclaim (#112.00). Defendants also sought a temporary injunction preventing Plaintiff from using Cook Road.

The Plaintiff filed an Answer to Dark Entry's Counterclaim on October 4, 2021 (#124.00). Plaintiff filed an Amended Answer to Defendant David and Angela Grecos' Counterclaims on December 7, 2021 (#141.00).

This Court granted Defendants' motions for temporary injunction (#111.00 and #113.00) on August 12, 2022, finding at that preliminary stage that Cook Road had been discontinued in 1903. Defendants filed the present motions for summary judgment on September 16 and September 20, 2022. The Court thereafter ordered supplemental briefing on the issue of whether Cook Road had been discontinued in 1903 and ultimately declined to change its ruling.

On September 16, 2022, Dark Entry moved for summary judgment on the Plaintiff's Complaint and all of Defendant Dark Entry's Counterclaims. On September 20, 2022, Defendants the Grecos moved for Summary Judgment on the Plaintiff's Complaint, Count One of the Grecos' Counterclaims, and Counts Two, Three, and Four of their Counterclaim as to liability only.

#### II. LAW

The legal standards concerning motions for summary judgment are well-established.

"[The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... A material fact is a fact that will make a difference in the result of the case.... [T]he burden of showing the

nonexistence of any material fact is on the party seeking summary judgment.... It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward ... evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute.... The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact.... Once raised, if it is not conclusively refuted by the moving party, a genuine issue of fact exists, and summary judgment is inappropriate.

"The court is required to view the facts presented in a motion for summary judgment in the light most favorable to the party opposing the motion.... [I]ssue-finding, rather than issue-determination, is the key to the procedure.... [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment.... [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Vollemans v. Town of Wallingford*, 103 Conn. App. 188, 193 (internal citations and quotation marks omitted), *cert. granted in part*, 284 Conn. 920 (2007), *judgment aff* d, 289 Conn. 57 (2008). *See Gallo v. Barile*, 284 Conn. 459 (2007) (in deciding motion for summary judgment, trial court must view evidence in light most favorable to nonmoving party); *see also Tidewater Oil Co. v. Murphy Motors, Inc.*, 4 Conn. Cir. Ct. 160 (App. Div. 1967) (summary judgment relief is to be granted with much caution so as not to defeat litigant's right to plenary trial on merits); *Manufacturers Small Business Inv. Co. of Conn. v. Empire Auto Body, Inc.*, 3 Conn. Cir. Ct. 613 (App. Div. 1966) (litigant has right to trial where there is slightest doubt as to facts, and denial of that right is reviewable, but refusal to grant summary judgment is not reviewable).

"[P]reliminary decisions, such as on preliminary injunctions or other temporary orders, are not entitled to preclusive effect.... Ordinarily, findings of fact and conclusions of law made

in a preliminary injunction proceeding do not preclude reexamination of the merits at a subsequent trial.... Declining to accord the effect of finality to preliminary decisions, such as on preliminary injunctions or other temporary orders, is consistent with the observation of the United States Supreme Court that such orders are often issued with 'haste' and are 'customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." (Citations omitted; internal quotation marks omitted.) *Indep. Party of CT-State Cent. v. Merrill*, 330 Conn. 681, 715–16 (2019).

#### III. ARGUMENT

a. A genuine issue of material fact exists regarding whether Cook Road was discontinued.

Defendants argue that Cook Road is not a public road. The sole basis for this argument is that Cook Road was discontinued in 1903. Defendants have failed to establish that there is no genuine issue of material fact about whether Cook Road was discontinued in 1903. To the contrary, there is no evidence that the statutory requirements in effect in 1903 were complied with to discontinue the road, as confirmed by Attorney Elton Harvey, Plaintiff's title expert.

It is undisputed that under the applicable Connecticut statute in force in 1903, an action to discontinue a public highway required: (a) a vote to discontinue by the Selectmen; (b) a writing signed by the Selectmen evidencing such vote; and (c) a vote to discontinue by the Town. Harvey Affidavit, at ¶ 5. The vote by the Selectmen can come before or after the vote by the Town, but in accordance with the requirements of Connecticut law at that time, the Cornwall Board of Selectmen has a demonstrated history of executing signed writings after the pertinent town vote. Harvey Affidavit, at ¶¶ 6–7, Ex. 1, 2. In *Clark v. Town of Cornwall*, 93 Conn. 374, 378 (1919), our Supreme Court stated: "[t]he procedure followed in the attempt to discontinue this highway was that specified in section 1442, Revision 1918: 'The selectmen of any town

may, with its approbation, by a writing signed by them, discontinue any highway' ... Two requisites are provided for: (1) Action by the selectmen, manifested by a writing signed by them, discontinuing the highway. (2) The approbation of the town in the discontinuance. Both the action of the town and of the selectmen should be formal and definite, so as to give parties in interest and the public notice of the action taken."

In *Clark*, the Selectmen voted to discontinue the road at issue *after* the Town meeting vote. "[T]he selectmen of Cornwall duly warned a special town meeting of Cornwall, by notice dated June 8<sup>th</sup> to take action on June 15<sup>th</sup>, to discontinue these portions of this highway....

Pursuant to this warning and notice, the town meeting passed [a vote to discontinue the highway].... Thereafter the selectmen of Cornwall reported in writing to the town that pursuant to the vote of the town they have discontinued two certain portions of highway within the town, describing the portions as contained in the said notice of the town meeting." *Id.* at 348. See Harvey Affidavit, at ¶¶ 7, 8, and Ex. 1, 2. In connection with the discontinuance in the *Clark* case, the Selectmen signed a writing (separate from and subsequent to the Notice of the Special Town Meeting) to discontinue the highway. Harvey Affidavit, at ¶ 7, Ex. 2.

In the present case, there is no evidence that the Selectmen themselves voted to discontinue Cook Road, or that they executed a writing that discontinued Cook Road. Harvey Affidavit, at ¶ 8, Ex. 3. Instead, Defendants point only to a notice for the October 5, 1903 Town meeting (the "Town Meeting Notice"), which references an action "to discontinue" Cook Road, and the meeting minutes (the "Town Meeting Minutes"), which reference a town meeting vote to discontinue Cook Road. Those records contain no reference to any action by the Selectmen regarding Cook Road either before or after the Town vote. *Id.* The Town Meeting Notice and Town Meeting Minutes alone do not establish that the Selectmen either voted to discontinue

Cook Road or executed a writing to discontinue the road. See *Greist v. Amrhyn*, 80 Conn. 280 (1907) ("The only governmental agencies which could have discontinued a highway were the General Assembly, the county court, and the selectmen of the town within which the highway was situated.... A town, in a town meeting, could not discontinue a highway. If therefore, the town ... by the vote recited in the finding, intended ... to discontinue the highway in question the vote was ineffective to accomplish such purpose."); and *Mackie v. Hull*, 69 Conn. App. 538 (2002) ("[T]here was no evidence indicating that the selectmen produced a signed writing to discontinue the road.... We cannot presume, from evidence of town approbation alone, that the selectmen produced the necessary signed writing. Such an evidentiary presumption would effectively collapse two statutory elements into one, rendering the writing requirement meaningless. The methods of discontinuing a highway through governmental agencies are prescribed by law and must be strictly followed." (Citation omitted; internal quotation marks omitted).

The Town Meeting Notice provides in pertinent part:

For the following purposes Viz---- To elect town officers of said town to fill any and all office which may by law be filled by the town; to take action upon a vote to discontinue the 'River Road' so called extending northerly from the school-house in Cornwall Bridge; and also to discontinue the old 'Cook Road' from near the residence of Richard Brophy to the point of intersection with the road leading from the Warren Road; also a ballot will be taken to determine whether any person shall be licensed to sell spiritous and intoxicating liquors; to lay a tax to defray the expenses of said town; to receive and act upon the reports of town officers of said town, and also to do any other business proper to come before said meeting..."

(Emphasis added.) Harvey Affidavit at Ex. 3.

The Town Meeting Minutes provide in pertinent part:

It was voted – That all the highway leading North from Cornwall Bridge called the River road be discontinued from a point six rods North of the South line of Hough F. Bailey's land;

Voted – That the highway known as the "Cook Road" from near the residence of Richard Brophy to the point of intersection with the road leading from the Warren road past the residence of Jacob English be discontinued.

Id.

Defendants have not presented evidence that the Selectmen voted to discontinue Cook Road, and they have failed to present a writing signed by the Selectmen discontinuing Cook Road. Additionally, Defendants have produced no evidence regarding the location of "the residence of Richard Brophy," which would be necessary to determine the specific portion of Cook Road that was the subject of the ineffective discontinuance.

Moreover, in *Mackie v. Hull*, the court stated: "We observe that the notice does not indicate that the voters were convened to consider or act upon any *recommendation of the selectmen as to this action...*" (Emphasis added.) *Mackie*, 69 Conn. App. at 548. In the present case, the Town Meeting Minutes only provide: "The Reports of the Selectmen ... were accepted...." Defendants have failed to offer the Court any evidence that the Selectmen's "reports" contained "recommendations" at all or any information about Cook Road. Based on the present record, the "reports" could have concerned only the other ballot items (i.e., the election of town officers, whether any person shall be licensed to sell liquors, and whether an additional tax should be imposed). The Town Meeting Minutes do not tell the reader anything about whether the Selectmen ever affirmatively voted to discontinue Cook Road.

Further, the *Mackie* court's remark regarding a recommendation from the Selectmen refers to a "recommendation of the selectmen *as to this action*." (Emphasis added.) *Mackie*, 69 Conn. App. at 548. The Town Meeting Notice contains no reference to a recommendation of the selectmen *as to the discontinuance of Cook Road*. The Town Meeting Notice cannot be considered a "formal and definite" writing signed by the Selectmen sufficient to discontinue

Cook Road. Because the Meeting Notice is insufficient to prove that the statutory requirements were adhered to, there is a genuine issue of material fact with respect to whether Cook Road was discontinued.

In addition, the content of the Town Meeting Notice suggests that there was no prior vote about the discontinuance of Cook Road. The relevant portion of the Meeting Notice provides: "to take action upon a vote to discontinue the 'River Road' so called extending northerly from the school-house in Cornwall Bridge; and also to discontinue the old 'Cook Road'...." Harvey Affidavit, at Ex. 3. The Selectmen's use of a semicolon and "and also to..." in its discussion of Cook Road—as distinct from the language about River Road—indicates that there was no prior vote of the Selectmen. To the extent that "and also to..." is meaningful or purposeful, it serves to distinguish the vote on discontinuance of Cook Road from the vote on River Road. The Town Meeting Notice indicates that the Selectmen had voted previously to discontinue River Road, but not Cook Road. Nothing would prevent the Town from considering both votes simultaneously, and the Selectmen would be left to vote on the discontinuance of Cook Road at a later date, after which they would produce a signed writing evidencing their vote. Further, the Defendants have offered no subsequent signed writing—consistent with the process that Cornwall followed in other instances and as required by Connecticut law—by which the Selectmen actually discontinued Cook Road. At the very minimum, there are issues of fact about whether there is any "formal and definite" writing, signed by the Selectmen, evidencing a **vote** of the Selectmen to discontinue Cook Road. Accordingly, there is a genuine issue of material fact with respect to whether Cook Road was discontinued.

Finally, this Court's conclusion in the preliminary injunction hearing was merely that it was "more likely than not" that the Selectmen's reports would "have evidenced a vote to

discontinue River and Cook Roads," which does not resolve the genuine issue of material fact regarding the discontinuance of Cook Road. Whether it was "more likely than not" may have sufficed at the temporary injunction stage based on an incomplete record, but now it is the Defendants' burden to "bring forward ... evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute." *Vollemens v. Town of Wallingford*, 103 Conn. App. at 193. Moreover, in determining whether there is any genuine issue of material fact, "[t]he court is required to view the facts presented in a motion for summary judgment in the light most favorable to the party opposing the motion.... [I]ssue-finding, rather than issuedetermination, is the key to the procedure.... [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment.... [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Id*.

Viewing the facts in the light most favorable to the Plaintiff, as the Court is obligated to do, there is, at a minimum, a genuine issue of material fact with respect to whether Cook Road was discontinued in 1903, and therefore, whether Cook Road remains a public road. It is axiomatic that the Plaintiff would have the right to use Cook Road as a public road, and therefore summary judgment must be denied as to the Plaintiff's Complaint, Count One and Count Four of Dark Entry's Counterclaim, and Count One and Two of the Grecos' Counterclaim.

b. Even if Cook Road was discontinued in 1903, and even if Clark, for some reason, gave up her private rights to Cook Road in 1979, Defendants are still not entitled to summary judgment because there is a genuine issue of material fact about whether the Plaintiff and his predecessors in title acquired a prescriptive easement over Cook Road for access to the Property.

Cook Road has been used to access 85 Cook Road continuously since at least 1988, and therefore, even if the discontinuance of Cook Road was effective, and even if the Quiet Title Action resulted in the 75 Acre Parcel suddenly becoming landlocked with no attendant access

rights,<sup>1</sup> there is a genuine issue of material fact with respect to whether Plaintiff has a prescriptive easement of access over Cook Road.

The elements of a prescriptive easement claim are well-established. "[General Statutes §] 47–37 provides for the acquisition of an easement by adverse use, or prescription. That section provides: No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. In applying that section, this court repeatedly has explained that [a] party claiming to have acquired an easement by prescription must demonstrate that the use [of the property] has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right...." *Slack v. Greene*, 294 Conn. 418, 427 (2009) (affirming the trial court's decision to grant a prescriptive easement over a 16-foot right of way).

As a threshold matter, "[w]hether a right of way by prescription has been acquired presents primarily a question of fact for the trier after the nature and character of the use and the surrounding circumstances have been considered." *Id.* at 426. *Kroll v. Sebastian*, 58 Conn. App. 262, 267 (2000) (citations omitted) (reversing trial court's grant of summary judgment on prescriptive easement claim because there was a genuine issue of material fact). Accordingly, because the determination of a prescriptive easement is a question of fact, it is impermissible for the Court to grant summary judgment on this issue. *Cf. Krasnow v. 31 Cannon St., LLC*, No. CV085020077, 2010 WL 3584447, at \*7 (Conn. Super. Ct. Aug. 16, 2010)<sup>2</sup> (denying the defendants' motions for summary judgment on an adverse possession claim, and holding that

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<sup>&</sup>lt;sup>1</sup> The effect, if any, of the 1979 transactions involving Clark are discussed below in Section d. As discussed in that Section, the effect of the documents constituted a boundary line agreement. However, even if, as Defendants argue, those transactions resulted in Clark giving away her private access rights, those transactions would not defeat Plaintiff's prescriptive claim. The transactions are irrelevant to the prescriptive easement claim, as well as the discontinuance issue.

<sup>&</sup>lt;sup>2</sup> Unreported decisions cited herein are attached hereto

"[i]t is well-settled that the issue of adverse possession where facts are disputed, is to be determined by the trier of fact.").

Here, a single-family residence was constructed on the Property in 1982 or 1988. See Carroll Affidavit at Ex. 5, Ex. 6. The construction and maintenance of the single-family residence necessarily would have required frequent access over Cook Road. Dating back to 1982, the electricity for the dwelling has been supplied by propane, and thus, propane deliveries would have been required. See Carroll Affidavit at Ex. 5. The house was livable in 2003 when the forester for the former owner, Ian Branson, resided at the Property. Branson Affidavit at ¶ 3. At that time, the road was passable, and the owner of the Property used Cook Road for vehicular access to the Property. Branson Affidavit at ¶¶ 3–4. Mr. Branson continued to use Cook Road while working as a forester for the former owner from 2003 to 2006. Branson Affidavit at ¶ 5. During the time from 2003 to 2006, the Property would also receive regular propane deliveries. Branson Affidavit at ¶ 7. The propane company used Cook Road for vehicular access to and from the Property for the propane deliveries. Branson Affidavit at ¶ 7. Also during this time, a landscaper would come once per week to service the Property. Branson Affidavit at ¶ 7. The landscaper used Cook Road for vehicular access to and from the Property. Branson Affidavit at ¶ 7. The house had running water, electricity supplied by a propane generator, a phone line, and a septic system. Branson Affidavit at ¶ 8. These systems were in existence and functional at the time that Mr. Branson began living at the Property in the summer of 2003 and remained functional through 2006. Branson Affidavit at ¶ 8.

Because the house was livable from 2003 through 2006, there is a reasonable inference that Cook Road was used at least between 1982 and 2003 to construct and maintain the home.

Thus, even judged by this period, there is, at a minimum, a genuine issue of material fact about whether the Plaintiff acquired a prescriptive easement based on the usage from 1988 to 2006.

Moreover, at the time that Plaintiff acquired the Property, Cook Road was still passable to access the Property, and he used Cook Road to access the Property. Macchiaroli Affidavit, at ¶¶ 4–5. The Property has running water, electricity supplied by a propane generator, a phone line, and a septic system. *Id.* at 8; Branson Affidavit at ¶¶ 7–8; Carroll Affidavit at Ex. 3, Ex. 4. Again, the continued existence and functionality of these systems at a minimum create a genuine issue of material fact about whether the Plaintiff and his predecessors in title acquired a prescriptive easement.

David Colbert, president of Defendant Dark Entry, also admitted under oath at the temporary injunction hearing in this matter that previous owners of 85 Cook Road used Cook Road to access the property. See Carroll Affidavit at Ex. 2. The Court asked Colbert: "Mr. Colbert, [using] the existing serviceable ... roads right now, it appears that Mr. Macchiaroli could access his property, the 13.1 acres at 85 Cook [Road], by way of coming up Pritchard Road through Cook Road; is that correct?" Colbert responded: "That's how the former owners of the undivided 85 Cook Road accessed that property." *Id.* (emphasis added). Mr. Colbert had previously admitted to the Plaintiff, both orally and in writing, that the Plaintiff has legal access and a right of way to Cook Road. Macchiaroli Affidavit at ¶ 7, Ex. 2. Mr. Colbert's multiple admissions on behalf of Dark Entry about the use of Cook Road to access the Property, at a minimum, create a genuine issue of material fact about whether the Plaintiff and his predecessors in title acquired a prescriptive easement.

In addition, David Bain, the real estate agent who sold 85 Cook Road to Plaintiff, also testified at the temporary injunction hearing that he and his clients had often used Cook Road to

access 85 Cook Road. Plaintiff asked Bain: "when you showed the property, how did you access the property?" to which Bain replied: "Well, I used Cook Road. Drove it often. Had clients drive it." Carroll Affidavit at Ex. 2. Bain's testimony further confirms that he and potential buyers frequently had used Cook Road to access 85 Cook Road even at the time that the Property was sold to the Plaintiff.

In addition, the Plaintiff easily meets the claim of right element because the right to use Cook Road is expressed in the Plaintiff's deed and the deeds of the Plaintiff's predecessors in title. See, e.g., *Reynolds v. Soffer*, 190 Conn. 184, 188 (1983) ("There was clear evidence of use under a claim of right in the form of the deed from the town of Branford to Louis Soffer which expressly referred to the right of way as part of the grant."). See Carroll Affidavit at Ex. 8, 9; Macchiaroli Affidavit at Ex. 1.

Defendants cannot overcome their burden of establishing that there is no issue of material fact as to the prescriptive use of Plaintiff and Plaintiff's predecessors. Therefore, a genuine issue of material fact exists with respect to whether Plaintiff has a prescriptive easement to use Cook Road, and therefore, summary judgment must be denied as to the Plaintiff's Complaint, Count One and Count Four of Dark Entry's Counterclaim, and Count One and Two of the Grecos' Counterclaim.

c. A genuine issue of material fact exists regarding whether Plaintiff has an easement by implication or easement of necessity to access his Property using Cook Road.

There is a genuine issue of material fact concerning whether H. Melissa Clark retained either an easement by necessity or an easement by implication to use Cook Road to access the 75-Acre Parcel, which would have passed to Plaintiff as a successor in title.

"An implied easement is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property.... We examine two principal factors in determining whether an easement by implication has arisen.... First, we look to the intention of the parties and, second, we consider whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." *Sanders v. Dias*, 108 Conn. App. 283, 293 (2008). "The principle underlying the creation of an easement by implication is that it is so evidently necessary to the reasonable enjoyment of the granted premises, so continuous in its nature, so plain, visible, and open, so manifest from the situation and relation of the two tracts that the law will give effect to the grant according to the presumed intent of the parties." *Rischall v. Bauchmann*, 132 Conn. 637, 644–45 (1946) (Internal quotation marks omitted.).

"The requirements for an easement by necessity are rooted in our common law.... [A]n easement by necessity will be imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor, or where the grantor retains an adjoining parcel which he can reach only through the lands conveyed to the grantee.... [T]o fulfill the element of necessity, the law may be satisfied with less than the absolute need of the party claiming the right of way. The necessity element need only be a reasonable one.... Although the requirements for an easement by necessity once included a showing of unity of ownership ... our Supreme Court has eliminated that requirement.... An easement of necessity may occur when a parcel has become landlocked from outside access such that the owner would have no reasonable means of ingress or egress except over lands promised by another and a right-of-way is

necessary for the enjoyment of the parcel...." (Citations omitted.) *Christensen v. Reed*, 105 Conn. App. 578, 583–84 (2008).

"Although related in concept, an easement by implication differs from an easement by necessity.... The difference between the two types of easements is that an easement by necessity requires the party's parcel to be landlocked, and an easement by implication does not require that the parcel be landlocked. An additional difference is that an easement by necessity does not require that the parcel have a preexisting use of an apparent servitude at the time of severance ... whereas an easement by implication requires such an apparent servitude to be existing at the time of severance, and that the use of the apparent servitude be reasonably necessary to the use and enjoyment of the grantee's property." *Deane v. Kahn*, 179 Conn. App. 58, 70 (2018).

A similar situation to the instant case arose in *Hollywyle Ass'n, Inc. v. Hollister*, 164 Conn. 389 (1973). In that case, the owner of roads in a subdivision brought an action seeking to prevent grantees of an adjacent parcel from using or interfering with the roads. The former owner and developer of the tract of land, Hollister, had conveyed title to the roads of Hollywyle Park to the plaintiff in settlement of a lawsuit. The operative quitclaim deed provided that the plaintiff would assume ownership and maintenance of the roads, and it contained no reservation of rights to Hollister to access the contiguous parcel that she owned. *Hollywyle*, 164 Conn. at 391. The trial court held that the quitclaim conveyance of roads was made "without reservation so as to settle pending litigation and that her purposeful relinquishment of any rights in the premises destroys the basis for any claimed easement...." *Id.* at 399.

Our Supreme Court disagreed. The Court stated:

The conclusion that a deliberate omission on the part of the named defendant to reserve a right of way precludes any claim for an easement ... cannot stand. First, even though the named defendant's deed to the plaintiff purported to convey all and any interest she may have had in the roads., this deed did not operate to destroy her rights to their use.... The

presumption as to the intent of the parties is a fiction of law, as the court recognized long ago ... and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use.... In cases of extreme necessity, the presence of a right of way for a special purpose has not precluded the imposition of an additional unlimited way of necessity for all legal uses in favor of grantee across the lands of his grantor.

*Hollywyle*, 164 Conn. at 399–400. The Court ultimately remanded the case to the trial court for a precise determination of the scope of the easement.

Here, the Quiet Title Action resulted in a quitclaim deed from Defendant Dark Entry, as grantor, to H. Melissa Clark, as grantee. Harvey Affidavit at Ex. 6. That quitclaim deed assigned to Clark all of Dark Entry's right, title, interest, claim and demand whatsoever to the 75-Acre Parcel. Accordingly, to the extent that the 75-Acre Parcel became landlocked following the Quiet Title Action, Dark Entry's quitclaim conveyance "left the grantee with a parcel inaccessible save over the lands of the grantor," which is the requirement for an easement by necessity.

In the alternative, if the Quiet Title Action did not result in the 75-Acre Parcel becoming landlocked, use of Cook Road to access the 75-Acre Parcel was still "so evidently necessary to the reasonable enjoyment of the granted premises" that it can be presumed that the parties intended the 75-Acre Parcel to benefit from its use. That establishes an easement by implication.

Accordingly, there is a genuine issue of material fact with respect to whether Plaintiff has an easement by necessity or implication.

## d. A genuine issue of material fact exists regarding whether the H. Melissa Clark Quiet Title Action resulted in the 75-acre parcel becoming landlocked.

Even if the discontinuance of Cook Road was effective, there also remains a genuine issue of material fact with respect to whether H. Melissa Clark, when she fixed the boundaries of the 75-Acre parcel to resolve the Quiet Title Action, was left with a landlocked parcel and whether the conveyances related to the Quiet Title Action bar any claim of the Plaintiff to use

Cook Road for access. As a threshold matter, if Cook Road was not discontinued, then Clark could not terminate her rights to the public road by virtue of a quit claim deed. See *Chaput v*. *Clarke*, 26 Conn. App. 785, 789 (1992). They also cannot bar the Plaintiff's right of access based on a prescriptive easement that arose subsequent to conveyances. The conveyances also do not bar the Plaintiff from asserting private access rights that Clark had at the time because: 1) the conveyances were only intended to establish boundaries of the Property and not eliminate access rights; and 2) under *Hollywyle Ass'n, Inc. v. Hollister*, 164 Conn. 389 (1973), the conveyances cannot legally eliminate these private access rights.

Attorney Harvey opines that, based on the standards of Connecticut real estate practice, the Quiet Title Action and the related documents did not result in Clark giving up her rights to Cook Road. Harvey Affidavit, ¶¶ 10–14. Defendants argue that Clark gave up all of her rights to use Cook Road by virtue of the quitclaim deeds exchanged to resolve the Quiet Title Action, which Defendants claim released "all releasee's right, title and interest in and to all real property in said town of Cornwall lying outside of' the 75-Acre Parcel.

In addition, per the expert testimony of Attorney Harvey, the purpose of the quit claim deeds was not to relinquish Clark's rights of access, but rather, to confirm the borders of the 75-Acre Parcel to settle a boundary dispute consistent with Connecticut practice. Harvey Affidavit, ¶¶ 10–14. Attorney Harvey's testimony about the common practice in Connecticut to document a boundary line agreement is unrefuted on summary judgment.

Moreover, the quitclaim deed from Dark Entry to Clark, see Harvey Affidavit at Ex. 6, states: "The purpose of this deed is to fix and establish the common boundary lines of lands of the Releasor and Releasee as shown on the aforesaid map and as described above" And that the grants therein are "**for purposes of a boundary line agreement**." (Emphasis added.) Harvey

Affidavit, ¶ 14, and Ex. 6, 7. It was therefore *not* the intention of the parties to eliminate all access to the 75-Acre Parcel, as Defendants maintain. See also *Hollywyle Ass'n*, *Inc. v*. *Hollister*, 164 Conn. 389 (1973) (concluding that grantor of a quitclaim deed retained access rights even though the access rights were not set forth in the deed).

As in *Hollywyle*, the Clark quitclaim deeds establishing the boundaries of the 75-Acre Parcel did not eliminate all access to the 75-Acre Parcel. There is no evidence that the parties intended to destroy Clark's right to use Cook Road to access the 75-Acre Parcel. Accordingly, there is a genuine issue of material fact with respect to whether the Quiet Title Action resulted in the 75-acre parcel being landlocked, or whether H. Melissa Clark retained a right-of-way to use Cook Road to access that property. Therefore, summary judgment must be denied as to the Plaintiff's Complaint, Count One and Count Four of Dark Entry's Counterclaim, and Count One and Two of the Grecos' Counterclaim.

e. A genuine issue of material fact exists as to whether Dark Entry's property, the Grecos' property, or any portion of Cook Road is a wetland or watercourse within the meaning of the IWWA.

Defendants' environmental claims are predicated on a cease and desist letter from the Town of Cornwall, a CT DEEP report, and certain photographs of Cook Road allegedly depicting disruption caused by Plaintiff. Defendants claim that there is no genuine issue of material fact that Plaintiff violated the Inland Wetlands and Watercourses Act ("IWWA") and the Connecticut Environmental Protection Act ("CEPA") based on his failure to obtain a permit to conduct a regulated activity, and because he allegedly caused greater than two gallons of hydraulic oil to be spilled onto Dark Entry's property. Defendants are mistaken—there are genuine issues of material fact, supported by the expert opinion of Soil Scientist and Wetlands Scientist George Logan, regarding whether Plaintiff's roadwork was a "regulated activity" within

the meaning of the IWWA, and whether the roadwork caused unreasonable pollution of the public trust in the natural resources of the state pursuant to CEPA.

First, although failure to obtain a permit pursuant to General Statutes § 22a-42a(c)(1) can form the basis of a private enforcement action pursuant to General Statutes § 22a-44(b), there is a genuine issue of material fact with respect to whether Plaintiff's minor roadwork is a "regulated activity" within the meaning of the IWWA, because it has not been established that any portion of Cook Road is classified as a wetland or watercourse area. General Statutes § 22a-38(13) defines "Regulated activity" as "any operation within or use of a *wetland or watercourse* involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such *wetlands or watercourses*, but shall not include the specified activities in section 22a-40." (Emphasis added.)

There is a genuine issue of material fact regarding whether Dark Entry's Property, and the portion of Cook Road on which Plaintiff worked, is classified as a "wetland" at all.

Defendants have offered no expert testimony in the form of a soil study or wetlands delineation to establish that any work that was performed had any impact on wetlands or watercourses.

Moreover, there has been no comprehensive wetland mapping of this section of Cornwall, and Defendants have not offered a wetland map or any other evidence that Plaintiff's roadwork occurred in the vicinity of any wetland or watercourse. Indeed, expert Soil Scientist and Wetlands Scientist George Logan visited the Property on January 17, 2023, and he stated that "I am unaware of the Defendants having any wetlands mapping of the Property or of Cook Road.

Any wetlands that may exist in or around the Property have not been delineated." Affidavit of George Logan (the "Logan Affidavit), at ¶¶ 5, 9.

Additionally, when Defendants David and Angela Greco applied for permits with the Town of Cornwall, the Town confirmed that inland wetlands were "not applicable". Carroll Affidavit at Ex. 10, 11, 13. Moreover, Defendant David Greco has in the past argued that it would be "impossible" to determine wetlands "further up (to the north) on Cook Road or to the left of the phone line trench because the trench had disturbed the soil." Carroll Affidavit at Ex. 14.

Even the CT DEEP report on which Defendants rely merely states that the area near the Plaintiff's roadwork was "extremely wet," which could have been due to weather patterns as opposed to the existence of an actual wetland or watercourse. Dec. of T. Blatchley, Ex. R; see also Carroll Affidavit, Ex. 1 ("All [Plaintiff] did was grade the road and because of the heavy rains we had, the road got flooded...."). The Cease and Desist likewise contains no support for the existence of a wetland or watercourse on Cook Road, and Defendants' photographs depict, at most, a poorly-drained dirt road that had recently been rained-on. *Id.* at Ex. I–P. The photographs do not establish the existence of a wetland and watercourse.

Even if portions of Cook Road are considered wetlands, however, section 22a-40 provides that "[t]he following operations and uses shall be permitted in wetlands and watercourses, as of right.... (4) Uses incidental to enjoyment and maintenance of residential property.... Such incidental uses shall include maintenance of existing structures and landscaping.... [and] (6) Maintenance relating to any drainage pipe which existed before the effective date of any municipal regulations adopted pursuant to section 22a-42a or July 1, 1974 ... provided such pipe is on property which is zoned as residential.... "[M]aintenance" means the removal of accumulated leaves, soil, and other debris whether by hand or machine, while the pipe remains in place...." Plaintiff's minor roadwork is incidental to the enjoyment and

maintenance of his residential property and the drainage structures appurtenant to his property. Moreover, the subject of Plaintiff's roadwork was maintenance of a pre-existing drainage system along Cook Road. Carroll Affidavit, at Ex. 1 ("I [Plaintiff] cleared some drainage pipes, and I [re]placed some drainage pipes. I did not add anything, it's all – it was all repairing existing infrastructure."). Defendants have offered no evidence to prove that the existing drainage system along Cook Road was installed after municipal wetlands regulations were adopted or after July 1, 1974. Absent that proof, summary judgment should be denied as to Count One and Count Two of Dark Entry's Counterclaims, and Count Two, Count Three, and Count Four of the Grecos' Counterclaims.

f. There is a genuine issue of material fact with respect to whether Plaintiff's roadwork caused unreasonable pollution of the public trust in the natural resources of the state.

Defendants claim that Plaintiff's roadwork caused unreasonable pollution and that his failure to obtain a permit is somehow a "per se" violation of CEPA. Defendants' allegations may have been enough to state a claim for a violation of the IWWA and CEPA, but Defendants' proof falls far short of the standard required on summary judgment.

"In order to establish a prima facie case under § 22a–16, the plaintiff must establish that the conduct of the defendant, acting alone, or in combination with others, has, or is reasonably likely unreasonably to pollute ... the public trust in the ... water of the state." *Shukis v. Bd. of Educ. of Reg'l Dist. No. 17*, 122 Conn. App. 555, 567 (2010) (internal quotation marks omitted). Mere allegations that conduct has "caused damage or destruction to the natural resources of the State of Connecticut, and the public trust herein" are "bare legal conclusions [that are] insufficient to allege a colorable claim of *unreasonable* destruction of the environment." *McNiece v. Green Site Design, LLC*, No. KNL-CV17-5016902-S, 2018 WL 6721791, at \*3

(Conn. Super. Ct. Dec. 4, 2018) (emphasis in original.). *See also Mystic Marinelife Aquarium*, *Inc. v. Gill*, 175 Conn. 483, 503 (1978) (noting that mere destruction of the environment is insufficient to render it unreasonable).

Failure to obtain a permit cannot form the basis for a claim under CEPA. When "alleged conduct involves a permitting claim ... there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court, and the claim must be resolved under the provisions of the appropriate licensing statutes.... [T]o establish a prima facie case under § 22a-16, the plaintiff must establish that the conduct of the defendant, acting alone, or in combination with others, has, or is reasonably likely ... to pollute [unreasonably] ... the public trust in the ... water of the state.... Allegations of a flawed licensing proceeding do not meet that test.... [A] claim under [CEPA] that conduct causes unreasonable pollution is not the same as a claim that conduct fails to comply with the requirements of other environmental statutes.... [A] claim that conduct is not properly authorized does not necessarily establish that the conduct causes unreasonable pollution under CEPA." Lewis v. Plan. & Zoning Comm'n of Town of Clinton, 275 Conn. 383, 392–94 (2005) (emphasis added).

Defendants' claim that Plaintiff's purported violation of the IWWA is a per se violation of CEPA must fail. For example, Dark Entry argues that the mere issuance of a Cease and Desist is a violation of a "substantive provision of the applicable inland wetlands regulations" that "could support a finding that it constituted unreasonable pollution under CEPA." Dark Entry Brief, at 16. Dark Entry cites *Shukis* for the proposition that a cease and desist order is "an administrative determination that constitutes sufficient proof of the violation—for CEPA purposes, conduct not in compliance with the applicable legislative and regulatory scheme." *Id*.

Defendants' reliance on *Shukis* is misplaced. Whether conduct is "not in compliance with the applicable legislative and regulatory scheme" is distinct from whether conduct has "unreasonably polluted the public trust in the waters of the state." Additionally, the Cease and Desist order in this matter was predicated exclusively on Plaintiff's roadwork being "commenced without permits in place and without [Dark Entry's] permission." Dec. of T. Blatchley, at Ex. Q. There is no determination in the Cease and Desist that any particular conduct caused or was reasonably likely to cause unreasonable pollution, and therefore there is a genuine issue of material fact regarding whether any pollution by Plaintiff was unreasonable.

At a minimum, George Logan's expert opinions contained in his affidavit create issues of material fact with respect to whether Plaintiff's conduct caused or was reasonably likely to cause unreasonable pollution. With respect to alleged oil discharge, Defendants' photographs do not depict oil discharge from his construction vehicle. See Dec. of T. Blatchley at Ex. I–P. Further, George Logan opines based on his site inspection that: Plaintiff did not disturb, contaminate, or adversely affect the alleged wetlands in the disputed area.... I did not observe any hydraulic oil spill or any evidence of the remediation of any hydraulic oil spill." Logan Affidavit at ¶¶ 5, 7.

With respect to alleged damage to trees or other herbaceous species, George Logan opines: "I ... did not observe any of the alleged damage to trees or herbaceous species that the Defendants claim." Logan Affidavit, at  $\P$  6. Further, he opines that "I observed no evidence that any invasive species on the Property or on Cook Road were placed there by the Plaintiff and were not located there by other means. In any event, any invasive species at the site are de minimus and would not constitute ... unreasonable harm to natural resources and environment or damage to wetlands and/or watercourses." Id. at  $\P$  8.

Defendants rely heavily on the DEEP report, appended to the Declaration of T. Blatchley at Exhibit R. That report indicates only a minor impact to Cook Road. It states: "Though some hydraulic oil impact was visible and material on site observed only verifies the construction equipment used had and was leaking. *No evidence of a large scale release was observed....* At this time the DEEP ERU will refer its case to the Remediation Division for review. With that said *no further Emergency Response Unit involvement is warranted for this incident*, case closed. (Emphasis added.) Defendants' Ex. R. The DEEP Report supports George Logan's determination that no oil spill or other contamination occurred. Mr. Logan further opines: "My conclusion is supported by the fact that the DEEP closed the investigation without further action and the fact that the alleged sampling done by the Defendant Grecos indicates that any alleged contamination at the disputed area did not exceed the minimum standards to find that contamination had occurred." Logan Affidavit at ¶ 5.

The Affidavit of George Logan, as well as Plaintiff's Affidavit, and the content of the DEEP report, create multiple genuine issues of material fact with respect to whether "the conduct of the [Plaintiff] ... has, or is reasonably likely to [impair] ... the public trust in the [natural resources] of the state." *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 140 (2003) (internal quotation marks omitted). Therefore, this Court should deny summary judgment on Count Three of the Dark Entry's Counterclaim and Count Four of the Grecos' Counterclaim.

### g. Summary judgment should be denied as to Defendants' trespass claims.

Count One of Dark Entry's Counterclaim and Count One of the Grecos' Counterclaim both purport to allege trespass claims. As set forth more fully above, the Plaintiff has the right to use Cook Road, and therefore, he did not trespass.

"The essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury...." *Boyne v. Town of Glastonbury*, 110 Conn. App. 591, 601 (2008).

First, "[s]ince trespass is a possessory action, it is incumbent on the [claimant] to prove possession, actual or constructive, in order to prevail." *Wadsworth Realty Co. v. Sundberg*, 165 Conn. 457, 461 (1973). Accordingly, to the extent that any of Plaintiff's claims regarding his right to use Cook Road to access his Property proceed past the summary judgment stage, summary judgment must also be denied as to Defendants' trespass claims.

Second, regardless of Plaintiff's possessory interest in Cook Road, Defendants' motions for summary judgment must be denied with respect to trespass because there is a genuine issue of material fact regarding whether Plaintiff caused direct injury to Defendants' property. The Plaintiff did not cut down any trees, did not spill any oil, did not remove any walls, and did not remove any material from Cook Road. Macchiaroli Affidavit at ¶ 10. Defendants' photographs do not show any spilled oil, any damage to stone walls, or any damage to trees. See Dec. of T. Blatchley, Ex. I–P. Plaintiff's expert, George Logan, opines that "[b]ased on my physical inspection of the property and my review of records related to the property and the alleged claims, the Plaintiff did not disturb, contaminate, or adversely affect the alleged wetlands in the disputed area," that there was no damage to trees or herbaceous species, that he did not observe any hydraulic oil spill or evidence of remediation of any hydraulic oil spill, that he observed no evidence of any invasive species being places on Defendants' properties or on Cook Road, and that Plaintiff's alleged activities do not constitute unreasonable harm to natural resources and the environment. Logan Affidavit at ¶¶ 5–10.

At a minimum, there are multiple genuine issues of material fact on the Defendants' trespass claims. Defendants have failed to show that there is no genuine issue of material fact regarding direct damage to their properties or Cook Road, and summary judgment on Count One of Dark Entry's Counterclaim and Counts One and Two of the Grecos' Counterclaims should be denied.

### h. Summary judgment should be denied as to Defendant Dark Entry's continuing nuisance claim.

Count Five of Dark Entry's Counterclaim alleges that the Plaintiff has caused a "continuing nuisance" to Dark Entry's property. Its perfunctory continuing nuisance count alleges only that Plaintiff's actions "are causing unreasonable harm to Dark Entry's use and enjoyment of its adjacent property and therefore constitute a continuing nuisance." Dark Entry Counterclaim, No. 110.00, at Count Five. Dark Entry's Motion for Summary Judgment is likewise threadbare, and Dark Entry cannot overcome its burden on summary judgment to prove that there is no genuine issue of material fact with respect to its continuing nuisance claim.

Our Supreme Court has stated that "in order to recover damages in a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property.... Whether the interference is unreasonable depends upon a balancing of the interests involved under the circumstances of each individual case.... The interference must be substantial to be unreasonable." *Pestey v. Cushman*, 259 Conn. 345, 361 (2002).

Like Defendants' trespass claims, to the extent that Plaintiff has any access rights to Cook Road, summary judgment must be denied on Dark Entry's nuisance claim. In addition, in light of George Logan's expert opinion that Plaintiff's conduct did not constitute unreasonable harm to natural resources and the environment, Dark Entry cannot overcome its burden on

summary judgment to prove that there is no genuine issue of material fact as to whether Plaintiff's interference with its use and enjoyment of its property or Cook Road is substantial or unreasonable.

Dark Entry claims that "a violation of the IWWA scheme is a *prima facie* showing of a *per se* violation of CEPA and *per se* nuisance since no reasonable person would violate the applicable regulatory requirements." Dark Entry Motion for Summary Judgment, at 17. Dark Entry cites *Shukis* and *Waterbury v. Washington*, 260 Conn. 506, 557 (2002) to support that novel argument, but those cases undermine rather than support Dark Entry's position.

In *Shukis*, certain erosion and sediment control measures were allegedly ineffective, and it was claimed that their deficiencies persisted after the entities responsible for maintaining them were put on notice of the damage being caused. *Shukis*, 122 Conn. App. at 588–89. The trial court granted summary judgment on the plaintiff's nuisance claims. On appeal, the Appellate Court reversed, concluding that there were genuine issues of material fact on plaintiff's nuisance claims. *Id.* at 589. *Shukis* only supports the denial of Dark Entry's motion because, in this case, as in *Shukis*, there are genuine issues of material fact about whether there has been *any* damage to Dark Entry's property. Moreover, the Appellate Court did *not* conclude that a IWWA or CEPA violation is a "per se" nuisance claim.

Waterbury v. Washington likewise provides no support for Dark Entry's position. First, the trial court, after a bench trial, actually ruled in favor of Waterbury on the defendants' nuisance claims even though it concluded that Waterbury violated the CEPA. Waterbury, 260 Conn. at 510–11 and n. 4. Accordingly, Waterbury confirms that a CEPA violation does **not** per se prove a nuisance claim. In addition, the trial court's finding about the CEPA violation—which was reversed on appeal—came after a bench trial and not on summary judgment.

Waterbury provides no support for the Dark Entry's arguments and only confirms that its motion for summary judgment must be denied.

There are genuine issues of material fact with respect to whether Plaintiff caused any damage to Dark Entry's property or Cook Road, and summary judgment should therefore be denied as to Count Five of Dark Entry's Counterclaim.

### i. Defendant Dark Entry's declaration and attached exhibits are inadmissible on summary judgment.

Defendant Dark Entry relies on a "Declaration of Thomas Blatchley," (the "Declaration"), with appended exhibits, to support its Motion for Summary Judgment. That Declaration is signed but unsworn. Accordingly, the Declaration and its exhibits cannot be used as evidence to support summary judgment.

Practice Book § 17-45 provides: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents."

"Under Connecticut law, [o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment, and the applicable provisions of our rules of practice contemplate that supporting [or opposing] documents ... be made under oath or be otherwise reliable." (Internal quotation marks omitted.) *Rockwell v. Quintner*, 96 Conn. App. 221, 233 n. 10, *cert. denied*, 280 Conn. 917 (2006).

"An affidavit is defined as [a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths ... [U]nsworn statements ... do not fit this definition ... [When] witness statements [are] not sworn to before an officer authorized to administer oaths, they [do] not meet the requirements of an affidavit ...' *Krassner v. Ansonia*, 100 Conn. App. 203, 209–10 (2007) (citation omitted; internal quotation marks

omitted). Unsworn statements made in a document purporting to be an affidavit cannot be relied on in support of a motion for summary judgment. *Fogarty v. Rashaw*, 193 Conn. 442, 444 (1984)." *List Servs. Corp. v. Ampere Media, LLC*, No. DBD-CV08-5004926-S, 2010 WL 2927420, at \*3 (Conn. Super. Ct. June 29, 2010).

The unsworn Declaration and its exhibits cannot be considered when this Court rules on the present motions for summary judgment.

j. Even if the Defendants object and the Court denies Plaintiff's Requests to Amend, because Plaintiff's *pro se* Complaint and his *pro se* Answers to the Defendants' Counterclaims must be construed broadly, flexibly, and in the light most favorable to him, the Court is required to consider all of his claims and defenses.

Plaintiff has filed, contemporaneously with this Opposition, a Request to Amend Complaint, a Request to Amend his Answer and Special Defenses to Dark Entry's Counterclaim, and a Request to Amend his Answer and Special Defenses to the Grecos' Counterclaim.

Defendants may object to the Requests to Amend and argue that if the Court denies the Requests to Amend, the Court cannot consider Plaintiff's claims and defenses of prescriptive easement, easement by implication, or easement by necessity. The requested amendments are to clarify the nature of Plaintiff's *pro se* allegations against the Defendants, and Plaintiff's *pro se* pleadings in response to the Defendants' Counterclaims, and the Court should permit the amendments.

Regardless of whether this Court grants the Request to Amend, however, Plaintiff is still entitled to advance his claims and defenses of prescriptive easement, easement by implication, and easement by necessity because his *pro se* pleadings must be read broadly and flexibly. See *Macellaio v. Newington Police Dept.*, 145 Conn. App. 426, 431 (2013) ("[C]onstruction of a self-represented party's pleading ... should afford the [plaintiff] a broad, realistic construction of the pleading under review."); and *State v. Mark T.*, 339 Conn. 225, 232-33 (2021) ("It is the established policy of Connecticut courts to be solicitous of [self-represented] litigants and ... to

construe the rules of practice liberally in favor of the [self-represented] party...."). As to the Plaintiff's *pro se* Complaint, he disputed the Defendants' contention that 85 Cook Road was landlocked. Complaint at ¶ 1. He further alleged that he "determined the property had a right of way and utility easement along Cook Road to Prichards [sic] road." Complaint at ¶ 2. The Plaintiff's Complaint did not identify the specific legal theories upon which 85 Cook Road was *not* landlocked or which formed the basis for the claimed right of way and easement. The Plaintiff's Complaint was certainly not limited to a singular legal theory.

In addition, the Defendants' counterclaims allege that Plaintiff has no right to access Cook Road—see Docket Numbers 110.00 and 112.00. The Plaintiff disputed these allegations in his prior Court filings. The Plaintiff alleged in his Answer to Dark Entry's Counterclaim (#124.00) that "Macchiaroli has an inherent right to access his property using Cook road [sic] to Prichard Road and expressed in his deed." Answer to Dark Entry's Counterclaim at ¶ 4. He further alleged that "I presently have title of right of way if a need quick [sic] title that will be up to the court to device [sic]." *Id.* at 12. He further alleged that "Macchiaroli has the right way [sic] and if not he is entitled to easement buy [sic] necessity." *Id.* at ¶ 13. Plaintiff alleged in his Revised Answer to the Defendant Grecos' Counterclaim (#141.00) that "Greco was well aware that Macchiaroli had the right of way to Cook Road...." Revised Answer to Defendant Grecos' Counterclaim at ¶ 3. In addition, Plaintiff specifically denied numerous allegations in the Counterclaims, including the allegation in the Grecos' Counterclaim that "The Greco Property is not subject to any easement rights of the owner of the Macchiaroli Property." Answer to the Defendant Grecos' Counterclaim at ¶ 6.

The Plaintiff further alleges at various points that he has a right to use Cook Road by virtue of his deed. See, e.g., Answer to Dark Entry Counterclaim, #124.00 ("Macchiaroli has an

inherent right to access his property using Cook road.... Expressed in his deed.... I presently have title right of way....") and Answer to Defendant Grecos, #141.00 ("[Plaintiff's] deed states Together with all of the Grantor's right, title and interest in and to Cook Road, so-called."). It is well-established that prescriptive easements are title rights that, once established, are passed to subsequent owners by deed. See Boccanfuso v. Conner, 89 Conn. App. 260, 268 (2005) ("Once established, a prescriptive easement appurtenant to the benefited property generally runs to all subsequent owners thereof.... Accordingly, a party may establish a prescriptive right by proving the adverse use by a predecessor in title for the requisite amount of time."). Likewise, easement by necessity and easement by implication are claims that only exist by deed. See Francini v. Goodspeed Airport, LLC, 327 Conn. 431, 446 n.9 (2018) ("The ... rights reserved in an easement by necessity are those between the original and subsequent owners and the new owners of the severed parcel"); D'Amato v. Weiss, 141 Conn. 713, 718 (1954) ("[C]reation of [an easement by implication] depends on the intention of the parties as shown by the deed.... [T]he conception underlying the creation of an easement by implication is that the parties are presumed to have intended the grant of an easement.... as ascertained from the terms of the deed and the facts of the case.").

The Court must read the Plaintiff's Answers to the Counterclaims flexibly and broadly. *Macellaio v. Newington Police Dept.*, 145 Conn. App. 426, 431 (2013). The Plaintiff clearly disputed both Defendants' claims that he did not have the legal right to use Cook Road to access 85 Cook Road.

Accordingly, even if the Court denies the Request to Amend, because it must construe Plaintiff's *pro se* pleadings broadly, with flexibility, and in the light most favorable to him, Plaintiff's prescriptive easement claim must be considered on summary judgment.

#### IV. CONCLUSION

Genuine issues of material fact exist with respect to whether Cook Road was ever discontinued by the Town of Cornwall, whether Plaintiff will prevail on his claim and defense of prescriptive easement, whether Plaintiff is entitled to an easement by necessity or implication, whether Defendants' properties or any portion of Cook Road is designated as a wetland or watercourse, whether Plaintiff caused any unreasonable pollution or damage to wetlands or watercourses, and whether Defendants' properties have been damaged to the extent necessary to support their trespass and continuing nuisance claims. To the extent that this Court made findings of fact at the preliminary injunction stage, those findings of fact are not binding and do not receive any preclusive effect. It is the movant's burden on a motion for summary judgment to prove the non-existence of genuine issues of material fact, and Defendants cannot shoulder that burden on the evidence presented in support of their motions. This Court is bound to view the facts in the light most favorable to the Plaintiff. Under the standard for summary judgment, Defendants' motions for summary judgment should be denied in their entirety.

### THE PLAINTIFF, ANTHONY MACCHIAROLI

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Juris No. 010032

# **UNREPORTED DECISIONS**

2010 WL 3584447
Only the Westlaw citation is currently available.

# UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Fairfield.

Eileen KRASNOW

V.

31 CANNON STREET, LLC, et al.

No. CV085020077.

West KeySummary

## 1 Summary Judgment 🤛 Real Property

Genuine issues of material fact existed as to whether property owner maintained exclusive control over an alley behind her property, and summary judgment was therefore precluded on her claim of adverse possession. Owner, who had held title to her property for thirty years, claimed she had used the alley to take 10 to 15 minute cigarette breaks, to receive occasional deliveries, to run telephone lines, to reconstruct and improve a wooden door at the alley entrance, and to store trash. However, record owner, who argued the city had held the alley until transferring it to the record owner 5 years ago, also argued that property owner had never erected any signs or notices prohibiting entrance to the alley or proclaiming her ownership. Record owner further argued that she had not attempted to prohibit anyone from using the alley, including a restaurant which stored trash and vented its exhaust system into the alley, and that she had never arranged for snow removal, surface repairs, paving, or landscaping of the alley.

## **Opinion**

## RICHARD E. ARNOLD, Judge.

\*1 The defendant, Bridgeport Phase II Owner, LLC, has moved for summary judgment on all counts of the plaintiff's complaint directed against this defendant on the grounds that the plaintiff's claims are premised on the application of the doctrine of adverse possession. This defendant argues that the plaintiff has failed to produce any evidence to support the application of the doctrine of adverse possession. The plaintiff's complaint is dated October 24, 2008 and bears a return date of November 25, 2008. The complaint contains sixteen counts. Counts thirteen through sixteen are directed towards this defendant, and the subject motion is only applicable to these counts. Count Thirteen is an action to quiet title. Count Fourteen alleges adverse possession. Count Fifteen alleges trespass, and Count Sixteen alleges nuisance. The plaintiff seeks a judgment pursuant to General Statutes § 47–31:(1) determining the rights of the parties in and to the adverse possession and seeking title thereto, in Krasnow as against the defendant; and (2) declaring that the title to the adverse possession property is quieted and settled in Krasnow. 1 The plaintiff also seeks temporary and permanent injunctive relief: (1) enjoining the defendant from asserting any claims over the property; (2) ordering the defendant to release any claims they may have over the property; and (3) to retreat from and not enter into or on the property. The plaintiff also seeks a judgment declaring that title to the property is quieted and settled in the plaintiff. The plaintiff by way of further relief seeks money damages and punitive damages.<sup>2</sup>

Ι

#### **Facts**

The plaintiff is the title owner of a building located at 35 Cannon Street, Bridgeport, Connecticut, which she uses as a law office, shared with family members, including her husband. The building was acquired by the husband in 1971. Title to this property was transferred by the husband to the plaintiff, his wife, in 1981. This action seeks to quiet title to a small alleyway ("alley") which backs on five separate properties, including the plaintiff's property. It is situated within the boundaries of the property located at 991 Main Street, Bridgeport, Connecticut, which is owned by the defendant, Bridgeport Phase II. The plaintiff, Krasnow,

asserts that her use of the alley since 1981 to take 10– to 15–minute cigarette breaks; to receive occasional deliveries; to run telephone lines; to reconstruct and improve a wooden door at the alley entrance; and to store her trash, has given her exclusive ownership rights to the alley under the legal doctrine of adverse possession.

The property at 991 Main Street was acquired by this defendant as part as an overall \$22,000,000 redevelopment of the Downtown North area of the City of Bridgeport. In return for the City's agreement to transfer title to this defendant by way of a quitclaim deed, this defendant undertook to perform a \$10,000,000 renovation to the property at 991 Main Street into a mixed residential and retail space. This defendant, for the purposes of this motion, accepts as true, the plaintiff's claim of the uses of the alley for the aforementioned purposes. The sole dispute concerns whether such uses are sufficient to establish a transfer of title by way of adverse possession. <sup>3</sup>

II

## Standard of Law for Summary Judgment

\*2 "Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Viola v. O'Dell*, 108 Conn.App. 760, 763–64, 950 A.2d 539 (2008).

"A material fact is a fact that will make a difference in the outcome of the case ... Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court ..." Campbell v. Plymouth, 74 Conn. App. 67, 80–81, 811 A.2d 243 (2002).

"[I]ssue-finding, rather than issue-determination, is the key to the procedure ... [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment ... [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) Precision Mechanical Services, Inc. v. T.J. PFund Associates, Inc., 109 Conn.App. 560, 564, 952 A.2d 818, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008). "The test is whether a party would be entitled to a directed verdict on the same facts ... A motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." (Emphasis added; internal quotation marks omitted.) Weiner v. Clinton, 106 Conn. App. 379, 383, 942 A.2d 469 (2008). The issue of adverse possession is normally a question of fact. Rudder v. Mamanasco Lake Park Ass'n, 93 Conn.App. 759, 779, 890 A.2d 645 (2006); General Statutes § 52–575. <sup>4</sup>

III

#### Adverse Possession

The "essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner ... Adverse possession must be proven by the claimant ... by clear and convincing evidence." (Internal quotation marks omitted.) Anderson v. Poirier, 121 Conn.App. 748, 752, 997 A.2d 604 (2010); Roberson v. Aubin, 120 Conn.App. 72, 74, 990 A.2d 1239 (2010); see also General Statutes § 52-575. The standard of proof for establishing title by adverse possession is "clear and positive proof." Roche v. Fairfield, 186 Conn. 490, 498, 442 A.2d 911 (1982); Ruggiero v. East Hartford, 2 Conn.App. 89, 96, 477 A.2d 668 (1984); Clark v. Drska, 1 Conn.App. 481, 484, 473 A.2d 325 (1984). This burden of proof places a higher burden upon the claimant than the preponderance of the evidence standard. See *Clark v. Drska, supra*, at 486–87, 473 A.2d 325 ("clear and positive" standard equated to "clear and convincing" standard). Whether the elements of adverse possession or ouster have been established are questions of fact for the trial court. Id., at 484-85, 473 A.2d 325."

\*3 "[A]n adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title ... [T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other ... Occupation must not only be hostile in its inception, but it must continue hostile, and at all times during the required period of fifteen years challenge the right of the true owner, in order to found title by adverse use upon it ... Such an acknowledgment of the owner's title terminates the running of the statutory period, and any subsequent adverse use starts the clock anew." (Citations omitted; internal quotation marks omitted.) *Id*.

"In general, exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership; viz., such acts as would ordinarily be exercised by an owner in appropriating land to his own use and the exclusion of others ... Thus, the claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use ... It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." (Citations omitted; internal quotation marks omitted.) *Roche v. Fairfield, supra*, 186 Conn. at 502–03, 442 A.2d 911.

IV

Discussion

A.

Government Immunity from Claims of Adverse Possession

The defendant argues that the disputed property was owned by the City of Bridgeport until it was deeded to Bridgeport Phase II in November 2005, as part of a City redevelopment project. The City had acquired the subject property pursuant to a Certificate of Taking dated February 2, 2001. Because the disputed property was being held by the City of Bridgeport from February 2, 2001 until its transfer to the defendant on November 18, 2005, the plaintiff's purported possession of the alley, did not begin to run until November 18, 2005. This period of time falls far short of fifteen years required for adverse possession.

It is well-established that a state, municipal or governmental agency is immune from claims of adverse possession when it holds the disputed property for a "public use." American Trading Real Estate Properties, Inc. v. Town of Fairfield, 215 Conn. 68, 77, 574 A.2d 796 (1990); see also Goldman v. Quadrato, 142 Conn. 398, 402-03, 114 A.2d 687 (1955) ("Title to realty held in fee by a state or any of its subdivisions for a public use cannot be acquired by adverse possession"). Properties held in fee simple ownership by municipalities must be presumed to be held for future use. American Trading Real Estate Properties, Inc. v. Town of Fairfield, supra, 215 Conn. at 80, 574 A.2d 796. Land is held for "public use" even when the municipality is not presently making use of it, but is simply holding for development a some later time. *Id.* at 79, 574 A.2d 796. Absent some evidence of a municipal intention to abandon its plans for future development of the property, the land is immune from claims of adverse possession. *Id.*, at 79-80, 574 A.2d 796. The party seeking title by adverse possession has the burden of rebutting that presumption. Id. at 80, 574 A.2d 796.

\*4 The plaintiff claims it can rebut the presumption of municipal immunity and that summary judgment is inappropriate. It is the plaintiff's argument that Goldman v. Quadrato, supra, 142 Conn. at 403, 114 A.2d 687, the controlling factor is not whether the municipality holds title to the property, but "the use to which the realty [is] put after its acquisition." Id., at 404, 114 A.2d 687. It is the plaintiff's position that whether the property was held for public use after its acquisition by the City of Bridgeport is a question of fact. The plaintiff claims the defendant has failed to offer evidence that the City dedicated the alley to public use from the time of its acquisition by the City in 2001 until its transfer by the City to this defendant in 2005. The plaintiff also argues that the defendant has not presented evidence that: (1) the public has used the alley; (2) that the City informed the plaintiff that it owned the alley during the period of 2001 through 2005; (3) that the public needed access to the alley; that Krasnow should not prevent access to the alley; or (4) that the City ever plowed, graded, paved or otherwise maintained the alley. The plaintiff also argues that her claim of ownership is based on her time of possession and that of her predecessor in title, which dates back to 1972. Thus, any record interest in the alley had been extinguished before the City took title to the subject property in 2001.

The court finds that the defendant does not have to prove specific ways in which the City dedicated the alley to public

use from 2001 through 2005. There is a presumption of public use. "Municipal immunity from adverse possession is the rule and not the exception, and we have consistently held that the party seeking to acquire title by adverse possession bears the burden of proving all of the elements of adverse possession." *American Trading Real Estate Properties, Inc. v. Town of Fairfield, supra*, 215 Conn. at 80, 574 A.2d 796.

By way of documentation submitted by the defendant in support of this motion the defendant has established that the alley at question was part of the Downtown North Arcade parcel that had been held by the City for future development. The arcade was acquired by the Bridgeport Economic Development Corporation on behalf of the City pursuant to a Certificate of Taking dated February 2, 2001. The City held the property until November 18, 2005 when it transferred title to Urban Green/Bridgeport Phase II, an urban renewal development firm by way of a quitclaim deed. In furtherance of the City's redevelopment plans, the defendant undertook a \$22,000,000 redevelopment project.

The plaintiff next argues that because her husband took title in the property in 1971, her period of ownership should be "tacked on" to her husband's period of ownership to create the requisite fifteen-year time period, prior to the City's ownership of the property. The plaintiff's theory that she is entitled to the subject property involves the concept of "tacking." Tacking requires the continuous possession of two or more persons. Matteo v. Dan Beard, Inc., 15 Conn.App. 458, 479-81, 546 A.2d 854, appeal denied, 209 Conn. 812, 550 A.2d 1082 (1988). It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years whether by one or more persons. Id. "[T]he possession [however] must be connected and continuous." Har v. Boreiko, 118 Conn. App., 787, 799–800, 986 A.2d 1072 (2010). Accordingly, to determine the question of tacking the court would be required to hear evidence and clear and convincing proof by the plaintiff regarding claims of open, notorious exclusive and uninterrupted possession by the plaintiff's predecessor in title, without the consent of the owner, prior to her assuming title to the property in 1981. The plaintiff must prove that her predecessor in title's use was adverse. Marguis v. Drost, 155 Conn. 327, 331, 231 A.2d 527 (1967).

\*5 The court notes that there has never been a legal claim of adverse possession filed by the plaintiff or her husband, her predecessor in title until this present action. A lockable, ten-foot-tall steel gate was erected by someone other than

the plaintiff or her husband in the interim, subsequent to the plaintiff acquiring title. This replaced a wooden gate that was present when her husband acquired title in 1971. The erection of either gate would break the privity of possession between the plaintiff's estate and that of her husband. The erection of the fence can be an act that reinstates the title owner's claim and can be evidence of shared dominion, which would defeat the plaintiff's claim of adverse possession. Whitney v. Turmel, 180 Conn. 147, 148, 429 A.2d 826 (1980), Lisiewski v. Seidel, 95 Conn. App. 696, 702, 899 A.2d 59, (2006). The circumstances surrounding the erection of the gate to the alley and the dates of the erection are questions of fact, which directly affect the question of tacking. While the court is convinced that the City was immune from claims of adverse possession during its ownership of the property, the question of the plaintiff's ability to tack on her predecessor period of ownership prior to the City taking title is a question of fact. The question of adverse possession is a question of fact for the trier. Id., at 799, 899 A.2d 59.

В.

#### Exclusive Possession

In order to prevail on her adverse possession claim, the plaintiff must prove by clear and convincing evidence that her use of the alley was exclusive. The defendant claims the plaintiff cannot meet this burden for four reasons. First, from the moment Krasnow took title, and possibly before, access to the alley was gained through a gate which Krasnow did not install or control. Krasnow at her deposition stated that when she took title to her property at 35 Cannon Street in 1981, a hinged wooden gate blocked access to the alley. Krasnow could not remember if the wooden gate had been in place when her husband had acquired title to 35 Cannon Street, in 1971. Subsequent to Krasnow acquiring title in 1981, someone other than the plaintiff and her husband took down the wooden gate and erected a ten-foot-tall locking steelbarred gate. Krasnow at her deposition testified that she did not know who erected the steel gate, but she did not complain to or attempt to contact anyone regarding the erection of this gate. It does not appear the steel gate has ever been locked, nor has Krasnow ever locked it. Krasnow has admitted she cannot control or limit access to the alley, as access to the alley has been open to all since the date of Krasnow's ownership. In 2008, the owners of 41 Cannon Street, Bridgeport, opened a restaurant and began storing trash in the alley. The restaurant did not ask Krasnow's permission to do so and Krasnow did

not complain or attempt to stop the restaurant from doing so. The restaurant also vented its exhaust system out into the alley. Again, the restaurant did not ask Krasnow's permission to do so and Krasnow did not attempt to stop the restaurant from doing so.

\*6 The defendant also argues that Krasnow has never erected any signs or notices prohibiting entrance to the alley or proclaiming her ownership. She has not attempted to prohibit anyone from using the alley or called the police for assistance against trespassing, although she has now accused the defendants in this action of trespassing. Krasnow is present at her office is generally from 9:00 a.m. to 5:00 p.m. from Monday through Thursday and 9:00 a.m. to 3:00 p.m. on Thursday. She does not know if anyone else uses the alley during these hours or the hours she is away from work. She has also admitted that she was unaware if construction workers for the defendant used the alley or took lunch breaks there during the renovation of the premises at 991 Main Street, Bridgeport, Connecticut. The defendant continues that Krasnow has failed to take any other actions which would indicate ownership or control of the alley. While she has occasionally swept debris from the alley area by her office, she never arranged for snow removal, surface repairs, paving or landscaping of the alley. Finally, the defendant argues that sporadic and occasional use or maintenance of a disputed parcel of property are insufficient to establish exclusivity for a claim of adverse possession.

The plaintiff asserts that her use of the alley and that of her family's law firm, since 1981 to take 10– to 15–minute cigarette breaks; to receive occasional deliveries; to run telephone lines; to reconstruct and improve a wooden door at the alley entrance; and to store trash, has given her exclusive ownership rights to the alley under the legal doctrine of adverse possession. She also maintains through an affidavit of her predecessor in title, Edward Krasnow, that during his possession he occupied the alley by way of an open, notorious exclusive and uninterrupted possession from 1972 to 1981.

In its Reply Memorandum of Law the defendant argues that the plaintiff "lacks standing to assert her claim" since her law firm's use of the alley does not inure to the plaintiff's benefit for purposes of adverse possession. *Derigibus v. Silberman Furniture Co.*, 121 Conn. 633, 638–40, 186 A. 553 (1936).

The requisite exclusive possession fails if the adverse user shares dominion over the property with other users. *Arcari* v. *Dellaripa*, 164 Conn. 532, 536, 325 A.2d 280 (1973).

If dominion is shared, then the exclusivity element of adverse possession is absent. Bowen v. Serksnas, supra, 121 Conn.App. at 508-09, 997 A.2d 573 (2010). "Furthermore, "[a]n adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title ... [T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other ... Occupation must not only be hostile in its inception, but it must continue hostile, and at all times during the required period of fifteen years challenge the right of the true owner, in order to found title by adverse use upon it ... Such an acknowledgment of the owner's title terminates the running of the statutory period, and any subsequent adverse use starts the clock anew." (Citations omitted; internal quotation marks omitted.) Id., at 512, 997 A.2d 573. The court finds that the use of the alley by the plaintiff and/or her law firm and her predecessor in title, as these uses affect the plaintiff's claim of adverse possession, are genuine issues of material fact.

\*7 Lastly, the defendant objects that the plaintiff has filed a self-serving affidavit from Edward Krasnow which contradicts and conflicts with the plaintiff's prior sworn deposition testimony. The court agrees with the defendant that an issue of fact cannot be created by the submission of a self-serving affidavit that contradicts prior sworn testimony. The court notes, however, that the deposition testimony was that of the plaintiff, Mrs. Krasnow, and the affidavit is from Mr. Krasnow. The court's decision does not rest solely on the affidavits submitted by the Krasnows. Rather, the court's decision is reached upon a review of the entire record submitted by the respective parties. While there may be an identity of interests problem between Mr. Krasnow and the plaintiff, Mrs. Krasnow in this action, the court feels that the testimony of the respective parties will be subjected to vigorous cross-examination by the defendant and will be evaluated accordingly, by the trier of fact.

V

## Conclusion

The defendant has made a strong argument for the granting of summary judgment. However, upon a review of the complaint, the legal briefs and the supporting materials submitted, the court is not convinced that there are no genuine issues of material fact despite the defendant's position that all material facts are undisputed. While the granting of summary

judgment in adverse possession cases is not unheard of, it is well-settled that the issue of adverse possession where facts are disputed, is to be determined by the trier of fact. *Har v. Boreiko*, 118 Conn.App. 787, 986 A.2d 1072 (2010); *Rudder v. Mamanasco Lake Park Ass'n, supra*, 93 Conn.App. at 779, 890 A.2d 645; *Allen v. Johnson*, 79 Conn.App. 740, 745, 831

A.2d 282, cert. denied, 266 Conn. 929, 837 A.2d 802 (2003). Accordingly, the motion for summary judgment is denied.

#### All Citations

Not Reported in A.2d, 2010 WL 3584447

#### **Footnotes**

- 1 General Statutes § 47–31 reads in relevant part as follows:
  - (a) An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it, or to have any estate in it, either in fee, for years, for life or in reversion or remainder, or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.
  - (b) The complaint in such action shall describe the property in question and state the plaintiff's claim, interest or title and the manner in which the plaintiff acquired the claim, interest or title and shall name the person or persons who may claim the adverse estate or interest. In any such action the plaintiff may join as defendants any unknown person or persons who claim or may claim any rights, title, estate or interest in or lien or encumbrance on the property described in the complaint, adverse to that of the plaintiff, whether the claim or possible claim be vested or contingent. If in the complaint, the plaintiff alleges that there are or that there may be persons who have or may have some right, title, estate or interest in or lien or encumbrance on the real or personal property but the persons cannot be located or are unknown to the plaintiff, or both, and describes the actual or possible estate or interest of such person or persons, and how derived, so far as may be known to him from a reasonable search of the available land records or otherwise, he may join as defendants all unknown persons who may have made any such claim by stating in the summons, after setting forth the names of known claimants, the words, "and all unknown persons, claiming or who may claim any rights, title, interest or estate in or lien or encumbrance upon the real property described in this complaint, adverse to the plaintiff, whether such claim or possible claim be vested or contingent," and it shall not be necessary to set forth therein any further description of the unknown person or persons. If, there are no known claimants, or possible claimants, to the property described in the complaint, the action shall be deemed to be maintained against all unknown persons claiming or who may claim any rights, title, estate, or interest, or lien or encumbrance upon the real or personal property described in the complaint, adverse to that of the plaintiff, whether the claim be vested or contingent, and the action may be prosecuted to judgment in the same manner and with like effect as though there had been known claimants or possible claimants designated as party defendants ...
  - (d) Each defendant shall, in his answer, state whether or not he claims any estate or interest in, or encumbrance on, the property, or any part of it, and, if so, the nature and extent of the estate, interest or encumbrance which he claims, and he shall set out the manner in which the estate, interest or encumbrance is claimed to be derived.

- (e) No judgment for costs shall be rendered in such action against any defendant, who, by his answer, disclaims all estate or interest in or encumbrance on such property, but costs shall be taxed in his favor at the discretion of the court; and the court shall, in any such case, without further proof, render judgment that such defendant has no estate, interest in or encumbrance on such property or any part of it.
- (f) The court shall hear the several claims and determine the rights of the parties, whether derived from deeds, wills or other instruments or sources of title, and may determine the construction of the same, and render judgment determining the questions and disputes and quieting and settling the title to the property.
- In Counts One through Twelve, the plaintiff alleges similar claims against the other defendants and seeks similar remedies and relief.
- A similar motion for summary judgment has been filed by the defendant Shore Winds No. 41 Cannon Street, LLC, adopting the same positions as the present defendant, Bridgeport Phase II Owner, LLC. It is the intent of the court, that this decision will be dispositive of the companion motion.
- 4 General Statutes § 52–575(a) reads as follows:
  - (a) No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. The limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate.
- 5 The plaintiff has not objected to the submission of the documentation by the defendant.

**End of Document** 

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2010 WL 2927420 Only the Westlaw citation is currently available.

# UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Danbury.

LIST SERVICES CORP.

v.

AMPERE MEDIA, LLC.

No. DBDCV085004926S.

June 29, 2010.

MARANO, J.

## FACTUAL AND PROCEDURAL BACKGROUND

\*1 On June 4, 2008, the plaintiff, List Services Corporation, commenced this action by service of process against the defendant, Ampere Media, LLC. In its two-count complaint seeking breach of contract and unjust enrichment, the plaintiff alleges the following facts. On March 19, 2006, the plaintiff, a Connecticut corporation with a place of business in Bethel, entered into a "lead generation agreement" with the defendant, a limited liability company located in Northbrook, Illinois. Pursuant to this contract, the defendant agreed to provide qualified leads for the plaintiff's client, Financialaid.com, in exchange for a fee paid by the plaintiff. The purpose of this lead data was to provide Financialaid.com with the names of qualified individuals to solicit for student loan consolidations. In its complaint, the plaintiff alleges that "the lead data was required to include certain information for each individual including, but not limited to, first name, last name, address, city, state, e-mail address, phone number, social security number, and the correct 'yes' or 'no' answers to several questions including the answers 'no' to 'Are any of your student loans in default' and 'Are you a full time student' and 'yes' to 'Do you have \$7,500 or more in student loan debt." "Pursuant to this agreement, the defendant provided lead data to Financialaid.com and the plaintiff paid the defendant for this lead data.

The parties subsequently entered into another agreement on December 5, 2006. In this contract, the defendant represented

that it would "make best efforts to generate qualified leads" and that "[e]ach lead is carefully reviewed by our exclusive lead generation technology." In March 2007, the defendant provided lead data directly to Financialaid.com. The defendant then submitted an invoice dated March 31, 2007 to the plaintiff in the amount of \$26,054, which the plaintiff paid in full. On April 7, 2007, the defendant provided additional lead data to Financialaid.com, which was reflected in an invoice submitted to the plaintiff totaling \$30,234. The plaintiff also paid this invoice in full. Additionally, the plaintiff submitted the March 31, 2007 and April 30, 2007 invoices to Financialaid.com. Upon receipt of these invoices, Financialaid.com informed the plaintiff that almost none of the lead data provided by the defendant resulted in qualified leads. Specifically, Financialaid.com indicated that: (1) the leads included incorrect social security numbers; (2) that 'yes' answers were given to questions that required a 'no' answer and (3) that there were charges for duplicate leads. As a result of these incorrect leads, the plaintiff demanded that the defendant reimburse the plaintiff, which it has failed to do. The plaintiff alleges that it was wrongful for the defendant to withhold reimbursement and that the defendant has been unjustly benefitted by the payment that it received for inaccurate and duplicative leads.

On March 31, 2010, the defendant filed a motion for summary judgment, as well as a memorandum of law in support of its motion. The defendant's motion attaches a copy of the December 5, 2006 contract between the parties and a document titled "Advertising Standard Terms and Conditions" dated July 16, 2008. On April 28, 2010, the plaintiff filed a memorandum of law in opposition, which attaches: (1) the sworn affidavit of Malcolm W. McCluskey, who is the plaintiff's president; (2) an agreement between the plaintiff and Financialaid.com dated January 12, 2006; (3) a copy of the March 15, 2006 contract between the parties; (4) an offer preview created by the defendant setting forth the required lead data dated March 15, 2006; (5) a copy of the December 5, 2006 contract between the parties; (6) an e-mail from J.D. Etmore to Tara Wexler dated January 11, 2007; (7) an email from J.D. Etmore to Tara Wexler dated January 23, 2007; (8) an email from Tara Wexler to Andrew Thomashow dated January 29, 2007 and (9) invoices from the defendant dated March 31, 2007 and April 30, 2007.

\*2 On May 20, 2010, the defendant filed: (1) an unnotarized "declaration" from Phillip Schechter, who is the defendant's president and chief executive officer and (2) an unnotarized "declaration" from Andrew Thomashow, who is

the defendant's director of media sales. The defendant further filed a reply memorandum on May 24, 2010. In response, the plaintiff filed its own reply memorandum on June 2, 2010, which attaches: (1) a copy of a print out from the defendant's website dated March 30, 2010 and (2) an additional sworn affidavit from McCluskey. Finally, on June 8, 2010, the defendant filed notarized versions of the affidavits that it had previously submitted from Schechter and Thomashow.

#### DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) Provencher v. Enfield, 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way ... [A] summary disposition should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." (Citations omitted; internal quotation marks omitted.) Dugan v. Mobile Medical Testing Services, Inc., 265 Conn. 791, 815, 830 A.2d 752 (2003). The burden is on the moving party to demonstrate an absence of any triable issue of material fact and "[t]o satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) Zielinski v. Kotsoris, 279 Conn. 312, 318-19, 901 A.2d 1207 (2006). "As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation, including affidavits." Heyman Associates No. I v. Insurance Co. of Pennsylvania, 231 Conn. 756, 796, 653 A.2d 122 (1995).

Before addressing the substantive legal issues raised in this motion, the court first must determine which evidence submitted by the parties that it can consider. The plaintiff has raised an objection to the admissibility of the Schechter and Thomashow affidavits offered by the defendant. Specifically, the plaintiff argues that these affidavits are inadmissible because they are not properly sworn documents, inadmissible hearsay and were untimely filed.

\*3 Under Connecticut law, "[o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment, and the applicable provisions of our rules of practice contemplate that supporting [or opposing] documents ... be made under oath or be otherwise reliable." (Internal quotation marks omitted.) Rockwell v. Ouintner, 96 Conn. App. 221, 233 n. 10, 899 A.2d 738, cert. denied, 280 Conn. 917, 908 A.2d 538 (2006). "An affidavit is defined as [a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths ... [U]nsworn statements ... do not fit this definition ... [When] witness statements [are] not sworn to before an officer authorized to administer oaths, they [do] not meet the requirements of an affidavit ..." (Citation omitted; internal quotation marks omitted.) Krassner v. Ansonia, 100 Conn .App. 203, 209-10, 917 A.2d 70 (2007). Unsworn statements made in a document purporting to be an affidavit cannot be relied on in support of a motion for summary judgment. Fogarty v. Rashaw, 193 Conn. 442, 444, 476 A.2d 582 (1984).

The Schechter and Thomashow affidavits filed with the court on May 20, 2010, are not notarized or signed by a commissioner of the Superior Court. Although these documents do indicate that the statements contained therein were made under penalty of perjury pursuant to 28 U.S.C. § 1746, <sup>1</sup> which allows for unsworn declarations under federal law, there is no indication that this provision has been adopted in Connecticut. In fact, Connecticut courts have consistently stated that in order for a document to be considered a valid affidavit, it must be sworn before an officer authorized to administer oaths. *Krassner v. Ansonia, supra,* 100 Conn.App. at 209-10. Accordingly, the court cannot consider the Schechter and Thomashow affidavits that were filed on May 20, 2010.

In an effort to correct this defect, the defendant filed notarized versions of the Schechter and Thomashow affidavits on June 8, 2010, which was one day after the short calendar hearing on this matter. Although this action on the part of the defendant

may have produced legally sufficient affidavits had they been part of the original motion for summary judgment, these versions of the affidavits should not be considered by the court because they are untimely filed. "Our rules of practice require affidavits in support of or in opposition to summary judgment motions to be filed before the motion is to be heard; see Practice Book § 17-45; and where an affidavit is not timely filed under the rules, the trial court does not abuse its discretion in refusing to consider it ..." (Internal quotation marks omitted.) Durkin Village Plainville, LLC v. Cunningham, 97 Conn.App. 640, 656, 905 A.2d 1256 (2006). For this reason, the court also will not consider the notarized versions of the Schechter and Thomashow affidavits. Therefore, the only remaining evidence offered in support of the defendant's motion for summary judgment is a copy of the December 5, 2006 contract between the parties and the "Advertising Standard Terms and Conditions" document dated July 16, 2008. <sup>2</sup>

I

## COUNT ONE: BREACH OF CONTRACT

\*4 The defendant first moves for summary judgment on count one, breach of contract. In its memorandum of law, the defendant argues that there is no genuine issue of material fact that the defendant did not breach the terms of the contracts. Specifically, the defendant argues that it had no contractual obligation to ensure that the leads that it provided to the plaintiff had correct social security numbers. Indeed, the defendant contends that it would have been a violation of various state and federal privacy laws for it to verify the social security numbers of the leads. The defendant also argues that the plaintiff failed to satisfy a condition precedent under the terms of the contracts. According to the defendant, the subject contracts mandated that the plaintiff notify the defendant of any discrepancies within forty-eight hours of the original lead delivery date and send weekly reports regarding the leads that it received. The defendant argues that the plaintiff failed to satisfy these conditions precedent, and, therefore, the plaintiff has waived its breach of contract claim.

In response, the plaintiff argues that the defendant has failed to meet its burden to establish a lack of any genuine issues of material fact. The plaintiff argues that the defendant was under a contractual obligation to provide "qualified leads," and that the defendant breached the parties' contracts because

it produced leads "significantly in excess of the quantity requested, and almost entirely worthless ..." Moreover, the plaintiff notes that the defendant has attempted to rely on the "Advertising Standard Terms and Conditions" document dated July 16, 2008 to support its position, even though the plaintiff never saw this document until the commencement of this litigation. The plaintiff further argues that it was necessary for the leads to have valid social security numbers because Financialaid.com needed social security numbers in order to determine the creditworthiness of people who would be applying for student loan consolidations. Finally, the defendant contends that the plaintiff's argument regarding its supposed violation of a condition precedent takes the contractual language out of context, and, therefore, that the plaintiff has not waived its breach of contract claim. For all of these reasons, the plaintiff argues that the defendant's motion for summary judgment should be denied.

Having determined that the court should not consider either version of the Schechter and Thomashow affidavits because they are unsworn and untimely, the defendant must prove that it is entitled to judgment as a matter of law based on its two remaining exhibits, which are a copy of the December 5, 2006 contract between the parties and the "Advertising Standard Terms and Conditions" document dated July 16, 2008. In his affidavit offered in opposition to the defendant's summary judgment motion, McCluskey attests that: "the Plaintiff did not receive a copy of the document entitled 'Ampere Media LLC Advertising Standard Terms and Conditions' before or at the time it entered into the March or December 2006 Agreement." McCluskey further attests that the first time that the plaintiff received such a document was after the defendant filed a motion to dismiss in this lawsuit. The defendant has produced no evidence that clearly disproves these attestations. <sup>3</sup> Consequently, there is a genuine issue of material fact as to whether the "Advertising Standard Terms and Conditions" document was actually a part of the parties' contract. Accordingly, this document cannot be used by the defendant to demonstrate that there are no genuine issues of material fact regarding the plaintiff's breach of contract claim. As such, in order for the defendant to prevail on its motion for summary judgment as to count one, it must be clear from the language of the parties' agreements that the defendant did not breach the subject contracts.

\*5 "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction ... [T]he

intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract ... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." (Internal quotation marks omitted.) Office of Labor Relations v. New England Health Care Employees Union, District 1199, AFL-CIO, 288 Conn. 223, 231-32, 951 A.2d 1249 (2008). "If a contract is unambiguous within its four corners, intent of the parties is a question of law ... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ..." (Internal quotation marks omitted.) O'Connor v. Waterbury, 286 Conn. 732, 744, 945 A.2d 936 (2008). "A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself ... Accordingly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms ... When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact ..." (Internal quotation marks omitted.) Id., at 743.

"Interpretation of the written terms of a contract and the degree of compliance by the parties are questions of fact to be determined by the trier of fact." *Burns v. Quinnipiac University*, 120 Conn.App. 311, 322, 991 A.2d 666 (2010).

The December 5, 2006 agreement provides as follows: "Ampere Media LLC will make a best effort to generate qualified leads. Each lead is carefully reviewed by our exclusive lead generation technology. Each lead is guaranteed to be deliverable to a valid postal address. However, no credits or discounts are issued for leads that could not be reached by phone or e-mail. No other guarantees or representations are made. Data to be gathered: First name, last name, address, city, state, email address, phone number. Page 2 per data provided by List Services." From the face of the contract, it is unclear precisely what the term "qualified leads" means. The defendant argues that its only contractual obligations were to collect leads that were deliverable to a valid postal address and to collect the data that is specifically enumerated in the contract. In contrast, the plaintiff has produced a contract between the plaintiff and Financialaid.com that is dated January 12, 2006. This document is the plaintiff's exhibit 2. According to this contract, a "valid lead" is defined as a "yes" answer to the question "Do you have \$7,500 in student loan debt," as well as "no" answers to the questions "Are any of your student loans in default," and "Are you a full time student." The January 12, 2006 contract further provides that a "valid lead" includes a correct "First Name, Last Name, Address, Phone Number, Email, SSN." In his affidavit, McCluskey attests that in the March 19, 2006 and December 5, 2006 contracts, that the parties agreed that the defendant "would provide qualified lead information as set forth [in the January 12, 2006 contract] for Financialaid.com's use ..." As the language of the subject contracts regarding what constitutes a qualified lead is ambiguous, this attestation is sufficient to raise a genuine issue of material fact as to whether the defendant had to supply valid social security numbers and individuals who answered certain questions correctly in order to provide "qualified leads."

\*6 In an effort to demonstrate that the subject agreements could not have required the defendant to verify the social security numbers of the potential leads, the defendant's reply memorandum cites to a number of state and federal statutes that regulate the dissemination of social security numbers. Although the court recognizes that because this advertisement campaign occurred on the internet that the defendant would potentially be subject to many different federal and state laws, the relevant statutes of the two states at issue here. Illinois and Connecticut, do not make it per se illegal for the defendant to confirm social security numbers. 4 In its reply memorandum, the defendant cites to 815 Ill. Comp. Stat. 505/2QQ (2007)<sup>5</sup> for the proposition that it would have been illegal for the defendant to collect social security information under Illinois law. An examination of this statute, however, reveals that it only prohibits the printing of a social security number on a health insurance card, and, therefore, the statute is inapplicable to the present case. Furthermore, the relevant statute in this state, General Statutes § 42-470, does not prohibit the use of social security numbers "for internal verification or administrative purposes." 6 As the plaintiff contends that the purpose of obtaining the social security numbers of the leads was to verify whether the individual would be appropriate for a student loan consolidation, the defendant has failed to affirmatively demonstrate that the parties' agreements are in violation of § 42-470.

Finally, the defendant argues that the plaintiff breached a condition precedent, and, therefore, that the plaintiff has waived its breach of contract claim. "Whether the performance of a certain act by a party to a contract is a condition precedent to the duty of the other party to act

depends on the intent of the parties as expressed in the contract and read in light of the circumstances surrounding the execution of the instrument." (Internal quotation marks omitted.) Gingras v. Avery, 90 Conn. App. 585, 590, 878 A.2d 404 (2005). "It is axiomatic that the intent of the parties is a question of fact. Summary judgment is inappropriate where the inferences that the parties seek to have drawn concern questions of intent." Reid & Riege v. Brainerd Cashman Ins. Agency, 26 Conn .App. 580, 584, 602 A.2d 1051 (1992). The defendant contends that the plaintiff failed to satisfy two different conditions precedent. First, the defendant states that the subject contracts required the plaintiff to notify the defendant of any invalid leads with forty-eight hours. As stated in the December 5, 2006 contract: "Client is responsible for reporting any discrepancies between actual lead data received and the confirmed lead *count* as provided by Ampere Media. Ampere Media must be notified by client via email to athomashow@AmpereMedia.com of any discrepancies within 48 business hours of original lead delivery date." (Emphasis added .). As correctly pointed out by the plaintiff, however, this contractual language only refers to discrepancies in the amount of leads, not the quality of the leads.

\*7 Second, the defendant argues that the plaintiff was required to send weekly reporting lists to the defendant regarding the number of leads that it received. The December 5, 2006 contract does state that "Client will send weekly reporting to: LeadReporting@amperemedia.com." Although the plaintiff does not dispute that it did not send a weekly report as provided in the contracts, the defendant has not demonstrated why this failure on the part of the plaintiff would preclude the plaintiff from bringing this action. There is no language in the relevant contracts indicating that the plaintiff's failure to send a weekly report would bar the plaintiff from commencing a civil action seeking redress for the defendant's alleged breach of contract. The defendant has also not brought forth any evidence indicating that this was the intent of the parties. Accordingly, the defendant has failed to demonstrate that the plaintiff breached a contractual condition precedent that would entitle the defendant to summary judgment in its favor on count one.

For all of these reasons, the defendant has failed to establish that there are no genuine issues of material fact as to count one. Therefore, the motion for summary judgment on this count is denied. II

#### UNJUST ENRICHMENT

The defendant also moves for summary judgment on count two, unjust enrichment, because "[t]he parties agree that there was a contract setting forth their obligations to each other. The contract is a complete bar to the plaintiff's claim for unjust enrichment." In its memorandum of law, the defendant argues that because there is no genuine issue of material fact that there was a contract between the parties, then the plaintiff is precluded, as a matter of law, from any recovery under the theory of unjust enrichment. The plaintiff responds that it should be allowed to plead unjust enrichment in the alternative because it alleges that it made payments to the defendant for data that could not be used and that the defendant wrongfully benefitted from these payments.

"A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another ... Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy ... Plaintiffs seeking recovery for unjust enrichment 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.) New Hartford v. Connecticut Resources Recovery Authority, 291 Conn. 433, 451-52, 970 A.2d 592 (2009). Because unjust enrichment is an equitable cause of action, "[p]roof of a contract enforceable at law precludes the equitable remedy of unjust enrichment ..." Polverari v. Pratt, 29 Conn.App. 191, 199, 614 A.2d 484, cert. denied, 224 Conn. 913, 617 A.2d 166 (1992). Nevertheless, "[p]arties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims ... Under this typical belt and suspenders approach, the equitable claim is brought in an alternative count to ensure that the plaintiff receives some recovery in the event that the contract claim fails." (Citations omitted; internal quotation marks omitted.) Stein v. Horton, 99 Conn. App. 477, 485, 914 A.2d 606 (2007). "[T]he existence of a contract, in itself, does not preclude equitable relief which is not inconsistent with the contract ..." (Internal quotation marks omitted.) Fuller v. Fuller, 119 Conn.App. 105, 119, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992

A.2d 329 (2010). Rather, it is the "lack of a *remedy* under the contract [that] is a precondition for recovery based upon unjust enrichment." (Emphasis added; internal quotation marks omitted.) *Marlin Broadcasting, LLC v. Law Office of Kent Avery, LLC*, 101 Conn.App. 638, 651 n. 7, 922 A.2d 1131 (2007).

\*8 The defendant's sole argument in support of its motion for summary judgment on count two is that the existence of a contract between the parties precludes any recovery for unjust enrichment. While it is true that both sides agree that there were written contracts in effect between the parties, that fact alone does not mandate that the defendant is entitled to summary judgment on the plaintiff's claim for unjust enrichment. As demonstrated by the above cited case law, the plaintiff could succeed on an unjust enrichment claim in the event that a fact finder determines that the plaintiff cannot

obtain a remedy for the defendant's alleged breach of contract. Consequently, the defendant has failed to demonstrate that there are no genuine issues of material fact regarding the plaintiff's unjust enrichment cause of action. Accordingly, the defendant's motion for summary judgment on count two is denied.

#### CONCLUSION

For all of the reasons stated above, the defendant's motion for summary judgment is denied in its entirety.

#### **All Citations**

Not Reported in A.2d, 2010 WL 2927420

## **Footnotes**

- 28 U.S.C. § 1746 provides: "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
  - "(1) If executed without the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).'
  - "(2) If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).' "
- The court also notes that the plaintiff has attached some unauthenticated documentary evidence in opposition to the defendant's motion for summary judgment. Under Connecticut law, "before a document may be considered by the court in support of a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be." (Internal quotation marks omitted.) New Haven v. Pantani, 89 Conn.App. 675, 679, 874 A.2d 849 (2005). Nevertheless, a court has discretion to consider unauthenticated documentary evidence when no objection has been raised by the opposing party. Barlow v. Palmer, 96 Conn.App. 88, 92, 898 A.2d 835 (2006). As the defendant has not objected to the plaintiff's use of unauthenticated documentary evidence in opposition to the motion for summary judgment, the court can consider this evidence when ruling on the motion.

- The December 5, 2006 agreement does state that: "This Insertion Order/Invoice Incorporates Publisher standard terms and conditions, Client Acknowledges that it has read and agrees to be bound by them: www.amperemedia.com/terms.html." Although the "Advertising Standard Terms and Conditions" document does appear to be a print off from this internet address, the date on this document is July 16, 2008. As the contracts between the parties were formed in March and December 2006, there is no way of knowing whether this document accurately reflects the terms and conditions that were integrated into the parties' agreements.
- According to the "Advertising Standard Terms and Conditions" document, the parties agreed that the subject contracts would be interpreted under Illinois law. As there is a question of fact regarding whether this document was actually part of the parties' contracts, this memorandum will analyze this issue under both Illinois and Connecticut law.
- 815 III. Comp. Stat. 505/2QQ (2007) provides: "Insurance cards; social security number. (a) As used in this Section, 'insurance card' means a card that a person or entity provides to an individual so that the individual may present the card to establish the eligibility of the individual or his or her dependents to receive health, dental, optical, or accident insurance benefits, prescription drug benefits, or benefits under a managed care plan or a plan provided by a health maintenance organization, a health services plan corporation, or a similar entity.
  - "(b) A person or entity may not print an individual's social security number on an insurance card. A person or entity that provides an insurance card must print on the card an identification number unique to the holder of the card in the format prescribed by Section 15 of the Uniform Prescription Drug Information Card Act.
  - "(c) An insurance card issued to an individual before the effective date of this amendatory Act of the 93rd General Assembly that does not comply with subsection (b) must be replaced by January 1, 2006 with an insurance card that complies with subsection (b) if the individual's eligibility for benefits continues after the effective date of this amendatory Act of the 93rd General Assembly.
  - "(d) A violation of this Section constitutes an unlawful practice within the meaning of this Act."
- General Statutes § 42-470(d) provides: "This section does not prevent the collection, use or release of a Social Security number as required by state or federal law or the use of a Social Security number for internal verification or administrative purposes."

**End of Document** 

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Only the Westlaw citation is currently available.

# UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New London at New London.

Adam MCNIECE

v.

#### GREEN SITE DESIGN, LLC

KNLCV175016902S

-

December 4, 2018

## **Opinion**

#### Cosgrove, J.

\*1 The defendant, Wide World of Indoor Sports East, LLC, (WWIS) moves to dismiss count one, alleging violations of Connecticut General Statutes (CGS) § 22a-42a(c)(1), and count three, alleging violations of CGS § 22a-16, of the plaintiffs, Adam McNiece, revised complaint <sup>1</sup> on the ground of lack of subject matter jurisdiction due to the plaintiff's lack of standing. Specifically, the defendant argues that the court must dismiss count one because the plaintiff did not own the property at the time of the alleged harm, and thus, lacks standing to pursue his claims. As to count three, the defendant argues the plaintiff fails to present a colorable claim of unreasonable pollution by the defendant and, thus, lacks standing.

The court is aware of the status of the plaintiff as a party representing himself in this civil action. The court has reviewed the pleadings carefully and has not focused on any procedural deficiencies in the plaintiff's pleading. It must however, in reviewing the substance of the plaintiff's claims, consider and act fairly with regard to both the plaintiff and the defendants in this action. This motion raises substantive issues.

The defendant asked the court to take judicial notice of the prior lawsuit filed by the plaintiff against the defendant in which the plaintiff raised substantially identical claims. See *McNiece v. CLA Engineers, Inc. et al.*, KNL CV 15-5014982.

The court will do so to provide, in part, a factual context for the motion to dismiss that it decides herein.

The 2015 case. The 2015 case was commenced by Adam McNiece at a time when title to the property at 1446 Route 85, Montville, Connecticut was in the name of Adam & Sons Construction, LLC. Mr. McNiece sued CLA Engineers, Inc., Green Site Design, LLC and Wide World of Indoor Sports East, LLC. He complained of inland wetland act violations as to the defendants. When the issue of the plaintiff's standing was raised, the plaintiff was allowed to substitute the corporate entity he controlled as the plaintiff (Adam & Sons Construction, LLC) and the plaintiff retained an attorney to prosecute the action. Mr. McNiece, pursuant to CGS § 22a-16, filed an intervening complaint against CLA and Green Site. Thus, the LLC plaintiff was prosecuting the complaint based upon its ownership of the parcel and the individual plaintiff was prosecuting claims under the Connecticut Environmental Protection Act regarding unreasonable pollution to the environment.

On or about June 1, 2017 the attorney for the plaintiff LLC was allowed to withdraw and the claims of the LLC were not prosecuted. In a failed attempt to resurrect his claims, Adam McNiece transferred the Route 85 property to himself in June of 2017. He was not allowed to substitute himself as plaintiff. Ultimately all claims were dismissed. In October of 2017 this suit was commenced by the plaintiff.

\*2 Prior to Adam & Sons Construction LLC's ownership of the Route 85 property, Lombardi Gravel & Excavation secured permitting for the development of a 19-lot industrial subdivision on property it owned that abutted the Route 85 property. The permits from the Planning and Zoning Commission and the Inland Wetlands Commission were issued in June and September 2004 and recorded on the Montville Land Records. See Docket No. KNL CV 15-5014982, No. 251, "Recitals and Affidavit." Inland wetlands were authorized to be disturbed and a storm water treatment pond or fire pond was allowed to be constructed in that area. Notice of these applications was given to the plaintiff's predecessor in title.

In 2014 WWIS received approval from the Planning and Zoning Commission for "Construction of an 80,000 Sq. Ft. Building with Associated Parking" on the lot of the subdivision abutting the property then owned by Adam & Sons Construction, LLC on Route 85. The storm water

treatment or fire pond previously had been built pursuant to the 2004 permits.

#### DISCUSSION

#### Standard

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) MacDermid, Inc. v. Leonetti, 310 Conn. 616, 626, 79 A.3d 60 (2013). "[A] motion to dismiss is the proper procedural vehicle to raise a claim that the court lacks subject matter jurisdiction over the action." Bellman v. West Hartford, 96 Conn. App. 387, 392, 900 A.2d 82 (2006). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) Fort Trumbull Conservancy, LLC v. New London, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). The trial court may consider the complaint and any undisputed facts evidenced from the record when deciding a motion to dismiss. Conboy v. State, 292 Conn. 642, 651-52, 974 A.2d 669 (2009). "[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss." Electrical Contractors, Inc. v. Dept. of Education, 303 Conn. 402, 413, 35 A.3d 188 (2012). Similarly, "[u]nder our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum ... In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) Levine v. Sterling, 300 Conn. 521, 528, 16 A.3d 664 (2011).

## The Present Case

With this context the court turns to the Motion to Dismiss count one of this action. This count alleges pursuant to, § 22a-42a and its enforcement provision, General Statutes § 22a-44(b), a private cause of action to allow a claim that a defendant has failed to obtain a required permit for a regulated activity pursuant to § 22a-42a(c)(1). Windels v. Environmental Protection Commission, 284 Conn. 268, 301, 933 A.2d 256 (2007). Nevertheless, a plaintiff must be personally aggrieved to pursue such an action. *Id.*, 302. In

the present case, the plaintiff lacks standing. The defendants presented undisputed evidence that the plaintiff did not own the property at the time of the alleged harm. <sup>2</sup> The harm was to the property owner at the time, either Adam & Sons Construction, LLC or its predecessor in title. Although the plaintiff was a member of that entity, the actual harm does not implicate him solely because of his membership. Rather, the harm belongs to the entity. See Simons v. Planning & Zoning Commission, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV 10-5013463-S (November 30, 2012, Genuario, J.) (55 Conn. L. Rptr. 124, 127) ("the plaintiff is not a title holder, owner, occupant, lessee or contract purchaser of the abutting property. She chose to convey her ownership interest to an existing legal entity for her own purposes. While she maintains an interest in that entity she maintains no interest in the property"). Accordingly, the plaintiff lacks standing to pursue count one and the court lacks subject matter jurisdiction. The defendant's motion to dismiss count one is granted.

\*3 Turning to count three, to have standing under § 22a-16, a plaintiff must bring a "colorable claim of unreasonable pollution, impairment or destruction of the environment." (Emphasis omitted.) Fort Trumbull Conservancy, LLC v. New London, 265 Conn. 423, 432, 829 A.2d 801 (2003). A complaint does not sufficiently allege standing by merely reciting the provisions of § 22a-16; id., 433; it "must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." (Internal quotation marks omitted.) Id. "[A] claim that conduct is not properly authorized does not necessarily establish that the conduct causes unreasonable pollution under CEPA." Connecticut Coalition Against Millstone v. Rocque, 267 Conn. 116, 141, 836 A.2d 414 (2003). "Where the alleged conduct involves a permitting claim ... there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court, and the claim must be resolved under the provisions of the appropriate licensing statutes." Id., 148. Section 22a-16 "does not confer standing on a plaintiff who seeks to challenge the validity of the permitting process." Lewis v. Planning & Zoning Commission, 275 Conn. 383, 394, 880 A.2d 865 (2005).

The court construes the third count to be directed at the defendant WWIS except where the allegations are specifically directed at some of the other defendants. In count three the plaintiff incorporates paragraphs 23 and 24 of count

2 of his complaint into count three. Paragraph 23 lists specific and detailed claimed violations of CGS § 22a-32, but those allegations only pertain to the Town of Montville and Mayor Ronald K. McDaniel. The allegations are directed to wetlands enforcement, notices, failure to hold hearings, failure to enforce approved site plans and engaging in "impropriety and conflicting interest" with the defendants CLA and Green Site Design. Paragraph 24 alleges that the conduct of the Town of Montville and the mayor created the personal aggrievement of the plaintiff; i.e., the claimed loss of a freshwater spring, damage to his well, loss of a visual buffer zone, loss or diminishment of natural habitat and the installation of a septic system 75 feet from the plaintiff's drinking water supply. Even if these allegations are construed to be directed to WWIS, these allegations pertain to the permitting or enforcement process and do not allege a colorable complaint "of unreasonable pollution, impairment or destruction of the environment." The remaining allegations of paragraphs 27 and 28 of the third count describe damage or destruction to regulated wetlands and watercourses or damage or destruction of natural habitat and wildlife in the regulated areas. These allegations however do not describe how this alleged damage was an unreasonable pollution, impairment or destruction of the environment. Thus, the plaintiff's complaint fails to allege such a claim. The plaintiff merely alleges that "the defendants have caused damage or destruction to the regulated wetlands and watercourse area adjacent to the site, which are natural resources of the State of Connecticut, and the public trust herein." These bare legal conclusions are insufficient to allege a colorable claim of *unreasonable* destruction of the environment. See *Mystic Marinelife Aquarium, Inc. v. Gill*, 175 Conn. 483, 503, 400 A.2d 726 (1978) (noting that mere destruction of the environment is insufficient to render it unreasonable). The conclusory statements are insufficient to confer subject matter jurisdiction on the court.

Therefore, the plaintiff's complaint is not sufficient to give him standing pursuant to CGS § 22a-16 to maintain this action. The defendant's motion to dismiss count three is granted.

#### **All Citations**

Not Reported in Atl. Rptr., 2018 WL 6721791

#### **Footnotes**

- The defendant claims the plaintiff's revised complaint (# 138) filed on March 6, 2018 is the operative complaint, but the plaintiff filed a second revised complaint on (# 157) on August 6, 2018, which is operative. See *Lund v. Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). Regardless, the allegations against the defendant in both complaints are identical.
- The court may consider undisputed facts evidenced in the record when deciding a motion to dismiss. See *Conboy v. State*, 292 Conn. 642, 650-51, 974 A.2d 669 (2009).

**End of Document** 

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## **CERTIFICATION OF SERVICE**

I hereby certify that a copy of the above was mailed or electronically delivered as of the date hereof to all counsel and pro se parties of record, and that written consent for electronic delivery was received from all counsel and pro se parties of record who were electronically served, as follows:

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