MILFORD PAINTBALL, LLC, ET AL. *v.* WAMPUS MILFORD ASSOCIATES, LLC, ET AL.
(AC 35988)

DiPentima, C. J., and Beach and Prescott, Js.

Argued October 20, 2014—officially released April 28, 2015

(Appeal from Superior Court, judicial district of New Haven, Zemetis, J.)

Richard F. Connors, for the appellant (named defendant).

Stephen J. Conover, with whom, on the brief, was *Liam S. Burke*, for the appellee (named plaintiff).

Opinion

BEACH, J. The defendant Wampus Milford Associates, LLC, appeals from the judgment of the trial court rendered in favor of the plaintiff Milford Paintball, LLC.[1] The defendant claims that the court erred in (1) finding that agents of the defendant made negligent misrepresentations in the course of prelease discussions, and (2) concluding that the defendant had violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We disagree and affirm the judgment of the trial court.

In January, 2005, the plaintiff commenced an action in four counts alleging breach of the lease, fraud, restitution, and violation of CUTPA. The defendant filed a counterclaim and special defenses, in which it alleged that the plaintiff had failed to provide written notice of the defendant's default as required by the lease and that the plaintiff had anticipatorily breached the lease. On May 31, 2008, following a trial, the court, *Hon. David W. Skolnick*, judge trial referee, issued a memorandum of decision finding in favor of the plaintiff on its complaint and implicitly finding against the defendant on its special defenses. The defendant appealed, claiming that the trial court improperly concluded that the lease agreement never had become effective and, as a result, improperly found in favor of the plaintiff on its complaint. *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 117 Conn. App. 86, 87, 978 A.2d 118 (2009). This court concluded that the lease agreement was effective at the time of its signing and delivery, and, accordingly, reversed the judgment of the court and remanded the case for a new trial. Id., 87, 92.

On remand, following a trial to the court, the court, *Hon. Robert I. Berdon*, judge trial referee, found in favor of the plaintiff. The defendant appealed. *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 137 Conn. App. 842, 49 A.3d 1072 (2012). This court reversed the judgment of the trial court and remanded the case to that court with direction to render judgment in favor of the defendant on the second count of the plaintiff's complaint, sounding in breach of contract, and for a new trial on the defendant's counterclaim and on the first, third and fourth counts of the plaintiff's complaint. Id., 854–55.

On July 29, 2013, the court, *Zemetis, J.*, following trial, issued the memorandum of decision underlying the judgment from which the current appeal was taken. In this decision, the court found the following relevant facts. In 2003 and 2004, the defendant owned property known as 80 Wampus Lane in Milford (property). Members of the defendant included Josh Yashar, Terry Jacobs, Robert Altman and Edward Lapidus. In late 2003, Kathleen Rorick and her two sons, Matthew Rorick and Timothy Rorick (Roricks), who formed the

plaintiff LLC, expressed an interest in leasing a portion of the property for use as an indoor paintball facility. Timothy and Kathleen Rorick negotiated with Jacobs and Yashar for the rental of a portion of the property. The Roricks repeatedly described their business plans to Jacobs and Yashar and explained that the prime season for an indoor paintball facility was the "bad weather" period from September to April, when potential customers could not play paintball outdoors. Prior to the signing of the lease, Jacobs and Yashar repeatedly assured the Roricks that the landlord was ready, willing and able timely to fulfill the landlord's "fit up" obligations to allow the paintball business to operate in the fall of 2004.[2]

The lease agreement was executed on February 10, 2004. Section 3.02[3] of the lease provided that the plaintiff was to obtain zoning approval for use as a paintball facility; such use was approved on April 23, 2004. The lease provided, in § 3.06, that the "Landlord shall perform, at its sole expense, certain work at the Premises as described on Exhibit D hereto (the Landlord's Work). Landlord's Work will be completed on or before ninety (90) days following notice of Tenant's receipt of Zoning Approval (it being understood that Landlord may commence Landlord's Work prior to notice of Tenant's receipt of Zoning Approval). Landlord shall procure at Landlord's sole expense all necessary permits and licenses before undertaking Landlord's Work and shall perform such work in a workmanlike manner employing materials of good quality and so as to conform with all applicable zoning, building, fire, health and other codes . . . ." The plaintiff's securing zoning approval, then, obligated the defendant to complete the specified work by July 26, 2004.

In May, 2004, Kathleen Rorick, on behalf of the plaintiff, wrote a letter to the defendant. The letter said that the plaintiff had hired a manager to operate the paintball facility, and the manager was moving to Connecticut from another state that weekend. The letter advised that the plaintiff was ordering equipment for the operation of the paintball facility and that it was "critically important" that the landlord "move expeditiously" to complete the landlord's work. The Roricks made a series of visits to the property to check on the progress of construction, but found no progress had been made. The defendant's representatives nevertheless assured the Roricks that the landlord's work would be completed in time for the plaintiff's business to open in the fall of 2004.

The plaintiff's members repeatedly contacted the defendant's members and representatives between April 23, 2004, and August, 2004, regarding compliance with § 3.06. By August, 2004, the plaintiff's members expressed doubt to each other whether the facility would timely open. In October and November, 2004,

after a series of meetings between members of the plaintiff and defendant, the plaintiff's members concluded that the defendant was not willing to perform the landlord's work. According to the court, the plaintiff's members "made a strategic decision that they would not provide notice to the landlord of default under lease provision § 14.07 for failure to complete the Landlord's Work in accordance with the provisions of the lease agreement § 3.06. Tenant/plaintiff's members calculated that if, in October or November of 2004, they gave the Landlord notice of claimed default for failure of the Landlord to start and complete the 'fit up' then Landlord's performance of that work could extend through the Spring of 2005, thereby eliminating the entire 'indoor paintball season' from September 2004 through April 2005, and all the revenues that the plaintiff would rely upon to fund the operation of the business during the May through September 2005 'off-season' period would be lost, and the business could not afford that loss." The plaintiff, then, opted not to proceed according to § 14.07 of the lease, which stated in part that "[i]f Landlord fails to perform its obligations in the manner prescribed under this lease, Tenant shall give Landlord written notice of such non-performance, and Landlord shall have thirty (30) days following its receipt of such notice to either (a) perform its obligations under the lease, or (b) commence performance of such obligations if such obligations are not reasonably capable of completion within such thirty (30) day period and to thereafter diligently pursue the same to completion in good faith and in a commercially reasonable manner. . . ."

The court concluded that the defendant's "repeated representations that it would timely commence and complete the Landlord's Work so as to allow the paintball business to open in September 2004 was a material misrepresentation of fact," that the plaintiff reasonably relied on those misrepresentations to its detriment, and that the reasonable reliance caused damages. The court further found that the negligent misrepresentations were "immoral, unethical, oppressive or unscrupulous practices" and that "the negotiations, with the above described persistent misrepresentations intended to induce execution of the subject lease by the plaintiff, is behavior CUTPA is designed to address."[4] The court thus found for the plaintiff on the CUTPA count of its complaint and denied the defendant's special defenses. The court awarded the plaintiff $158,780.66 in damages, plus taxable costs. This appeal followed.

"To the extent that [an appellant] is challenging the trial court's interpretation of CUTPA, our review is plenary. . . . [W]e review the trial court's factual findings under a clearly erroneous standard. . . . Appellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion

in order to determine whether it was legally correct and factually supported." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 656, 850 A.2d 145 (2004).

"A party seeking to recover damages under CUTPA must meet two threshold requirements. First, he [or she] must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he [or she] must present evidence providing the court with a basis for a reasonable estimate of the damages suffered." (Internal quotation marks omitted.) *Marinos* v. *Poirot*, 132 Conn. App. 693, 707, 33 A.3d 282 (2011), aff'd, 308 Conn. 706, 66 A.3d 860 (2013).

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]omission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350–51, 994 A.2d 153 (2010).[5]

I

The defendant claims that the court erred in finding that the defendant made material representations to the plaintiff that it would complete the "fit up" work prior to the start of the September 2004 paintball season. It argues that there is no evidence to support these findings. We disagree.

"[A]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings of fact are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

been committed." (Internal quotation marks omitted.) *In re Kelsey M.*, 120 Conn. App. 537, 543, 992 A.2d 372 (2010).

The court found that the defendant's course of negligent misrepresentations violated CUTPA.[6] The defendant argues that there was no evidence that it promised to complete the work prior to the start of the September 2004 paintball season or evidence of inducement. There was evidence from which the court could have concluded that the defendant made material representations to the plaintiff that it would complete the "fit up" work prior to the start of the September 2004 paintball season and that the representations induced the plaintiff to enter into the lease agreement.[7]

The court heard the following evidence. Matthew Rorick testified that indoor paintball is "an incredibly seasonal business . . . you have to make most of your revenues to carry you through an entire year in just a couple of short months. You're sort of competing with the outdoors, so . . . we had a very specific time frame, that we needed to open in the fall, be totally up and running by the times kids come back from the summer if they're in school, that was really our . . . main market or customer base." He testified further: "The lease spells out a very specific time frame because if you don't hit that time frame, you . . . risk . . . going out of business." Asked on direct examination if "that topic was discussed with the landlord prior to the execution of this lease," he answered: "It was. It was spelled out to them in the lease and spelled out to them verbally and we had commitment from them."

Timothy Rorick testified that during the lease negotiations, which began in late 2003, he expressed to Yashar and Jacobs how critical it was that the "fit up" work be finished "at a certain time so that we could open when the kids go back to school and the weather gets cold." He testified that in their negotiations prior to the execution of the lease, the landlord was "very positive that the work was going to occur" and stated that the landlord's work was "[n]o problem, whatever you . . . need, it's no problem, not a problem, let's just get this lease going, let's get this lease signed, I'll do what you need."

Kathleen Rorick testified that in the meetings (with Yashar and Jacobs) prior to the signing of the lease in February, 2004, that a "most critical element discussed . . . [was] what had to be done in order for us to be a successful business. And we had established a time line, which is clear in the contract, that . . . once the lease was signed, then we would go and get zoning for our use in the building and then at that point the landlord would do its construction and we detailed the construction and went through those items with the landlord's representatives so they had a clear understanding of what they had to do. We talked about the

time period for the landlord to get that work done. And I remember sitting there and saying, are you absolutely sure you can get this done in ninety days? And we were assured that it's not a problem, they're going to get it done in ninety days, because we knew that we needed a shorter period of time to get the indoor . . . paintball field . . . And so it was—they had a very clear understanding of timing and how we needed to be open at the beginning of school. That was very clear." She further stated that "in reliance on what the landlord was saying, he could do his work and so forth, we signed the lease." She further testified: "I assure you that the landlord here knew our time constraints, they knew why, we explained everything to them. And we entered into this lease in reliance on what the landlord represented to us, that was, it's not a problem, we will get the work done, and that never happened."

Accordingly, the court's findings that during lease negotiations,[8] the defendant represented to the plaintiff that it would complete the "fit up" work prior to the start of the September 2004 paintball season were not clearly erroneous.

II

The defendant next claims that the court incorrectly concluded that it had violated CUTPA, in that there was no evidence of immoral, unscrupulous or unethical conduct occurring prior to the execution of the lease. We disagree.

The court found the following. Prior to the lease execution, the defendant's representatives assured the plaintiff that they were ready, willing and able timely to perform the landlord's "fit up" work so that the plaintiff could operate in the fall of 2004. The plaintiff relied on these representations in executing the lease in February, 2004, tendering the security deposit, hiring an engineering firm and legal counsel, and incurring other expenses in anticipation of opening the paintball business. After the execution of the lease, the plaintiff retained and paid an engineering firm to design the plans needed to apply for zoning approval. It paid legal counsel to apply for a special exception permitting it to operate an indoor paintball field on the premises. On April 23, 2004, the city of Milford approved the zoning application, and the plaintiff immediately provided written notice of the zoning approval to the defendant. The landlord's work, which, pursuant to the lease, was to be completed within ninety days of the receipt of notice of zoning approval, was, therefore, to be completed by July 26, 2004.

The court found that both before entering into the lease agreement in February 2004, and after the plaintiff had obtained zoning approval, the defendant "negligently misrepresented" its intention to fulfill the landlord's work obligation in a timely manner. The plaintiff

relied on the defendant's representations by providing the defendant with a security deposit, incurring expenses for legal and engineering work to secure zoning approval, purchasing equipment and hiring and training a facility manager. The court found that "[t]he lack of any credible evidence the landlord took any steps to perform its promised 'fit up' of the leased space in spite of the numerous prelease execution promises to do so, its knowledge that the timing of the 'fit up' was essential to the plaintiff's business success, and the plaintiff's many timely communications to the landlord postlease execution that timely completion 'fit up' was essential, persuade the court that the defendant negligently misrepresented that the landlord was ready, willing and able to timely complete the 'fit up' work so as to allow the plaintiff/tenant to open and operate its business in the fall of 2004."

The defendant argues that its prelease representations amount to no more than affirmations of its obligations under the lease and, accordingly, the court erred in finding that such conduct was immoral, unethical or unscrupulous within the meaning of CUTPA.[9] We disagree.

The court found, as noted previously, that both before and after the signing of the lease, the defendant "negligently misrepresented" that it would timely fulfill the landlord's work obligation. The court found that aggravating factors satisfied the second prong of the cigarette rule:[10] "Negotiations, with the above-described persistent misrepresentations by landlord's agents intended to induce execution of the subject lease by the plaintiff, is behavior CUTPA is designed to address. The court finds such negotiations to be immoral, unethical . . . or unscrupulous practices. The conduct was destitute of integrity and good faith, conscienceless, deceitful and underhanded." The court, then, clearly and emphatically found the second prong of cigarette rule to be satisfied with respect to the prelease negotiations.

The court found that the defendant's misrepresentation was "negligent." The court further found that the defendant's conduct constituted "immoral, unethical . . . or unscrupulous practices" in satisfaction of the second prong of the cigarette rule. The court's factual findings supporting those conclusions were not clearly erroneous, and the court did not err in its application of the law.

Negligence, like simple breach of contract, generally has been held not sufficient by itself to constitute a violation of CUTPA, even though the act itself does not explicitly contain as an element any particular mental state. The operative language of the CUTPA statute is simply: "Any person who suffers any ascertainable loss . . . as a result of . . . a method, act or practice prohibited by section 42-110b, may bring an action . . . ." General Statutes § 42-110g (a). Section 42-110b (a), in

turn, provides: "No person shall engage in unfair methods of competition and *unfair or deceptive acts or practices* in the conduct of any trade or business." (Emphasis added.)

Our courts have consistently held, however, that negligent acts, in the absence of sufficient aggravating factors, do not provide an adequate basis for finding a violation of CUTPA. See, e.g., *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 216, 579 A.2d 69 (1990); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 617 n.7, 440 A.2d 810 (1981). Our Supreme Court quite clearly held in *Hinchliffe*, that, at least as to actions sounding in negligent misrepresentation, the legislature had broadened the range of actionable conduct. Noting that prior to the enactment of CUTPA the consumer may have had no direct remedy for unintentional misrepresentation, the court in *Hinchliffe* held that CUTPA broadened the range. *Hinchliffe* v. *American Motors Corp.*, supra, 616–18; see also R. Langer et. al, 12 Connecticut Practice Series: Unfair Trade Practices (2014) § 4.2.

At least as to negligent misrepresentations, then, negligence, if accompanied by one or more sufficient aggravating factors, will suffice to support recovery of damages pursuant to CUTPA.[11] Here, the court expressly found a number of aggravating factors delineated by the cigarette rule. The court, then, did not err in awarding damages under CUTPA.

The court reasonably could have found that the prelease representations were not simply, as the defendant contends, affirmations of the lease obligation. The court found the persistent misrepresentations, particularly in light of the plaintiff's strict time frame, to be immoral, unethical or unscrupulous within the meaning of CUTPA. The court specifically found the actions deceitful. The negligent misrepresentations were, then, accompanied by a sufficient aggravating factor. There was evidence to support the court's factual findings of immoral, unethical or unscrupulous behavior and the court's legal conclusion that the negligent misrepresentations, under the facts of this case, satisfied CUTPA, was reasonable.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] As noted by the trial court, as a consequence of various pleadings, three individual defendants and one individual plaintiff have been removed from this case, leaving only the named business entities as parties.

[2] The lease reflects that the "fit up" work included: installing an entrance door and exit door; constructing walls; leveling floors; installing plumbing, such as toilet facilities; and electrical items such as lighting, exhaust fans, and emergency lighting.

[3] Section 3.02 provided that it was the plaintiff's responsibility to "promptly apply for and diligently pursue any Zoning Approval at its own expense." It stated that the plaintiff was to obtain zoning approval from the city of Milford and, if applicable, the state of Connecticut, to enable the plaintiff to use the premises as an indoor paintball field.

[4] The court was not bashful in describing the defendant's conduct: "The

conduct was destitute of integrity and good faith, conscienceless, deceitful and underhanded. The lack of any credible evidence that the landlord took *any steps* to perform its promised 'fit up' of the leased space in spite of the numerous prelease execution promises to do so, its knowledge that the timing of the 'fit up' was essential to the plaintiff's business success, and the plaintiff's many timely communications . . . persuade the court that the defendant negligently misrepresented that landlord was ready, willing and able to timely complete the 'fit up' work . . . ." (Emphasis in original.)

[5] The plain statutory language provides that a person violates CUTPA by committing deceptive *or* unfair acts. See General Statutes § 42-110b (a). The "cigarette rule" expressly fleshes out only the "unfair" prong. "Deceptive" has a more obvious and more narrow meaning than "unfair"; a practice may presumably be "deceptive" yet not satisfy the cigarette rule. Nevertheless, our case law seems consistently to conflate the concepts; see, e.g., *Janusauskas* v. *Fichman*, 264 Conn. 796, 808 n.10, 826 A.2d 1066 (2003); *Web Press Services Corp.* v. *New London Motors, Inc.*, 203 Conn. 342, 355, 525 A.2d 57 (1987); compare *Miller* v. *Guimaraes*, 78 Conn. App. 760, 775–76, 829 A.2d 422 (2003); see generally R. Langer et. al, 12 Connecticut Practice Series: Unfair Trade Practices (2014) § 4.2; and the trial court in this case relied on the cigarette rule. We, then, will employ the same analysis, even though the facts of this case may readily seem to suggest an analysis under the "deceptive" prong.

[6] We note that "[t]he CUTPA plaintiff need not prove reliance or that the representation became part of the basis of the bargain." *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 617, 440 A.2d 810 (1981). Although a CUTPA plaintiff need not prove these facts, the court made factual findings regarding reliance and inducement, and the court reasonably could have considered such reliance and inducement as factors, under the facts of this case, contributing to its finding that the defendant's behavior was immoral, unethical, or unscrupulous.

[7] The court and the parties on appeal have emphasized prelease representations. Although the defendant was found to have made many more representations after the lease was signed, these later misrepresentations apparently were thought not to be able to provide the basis for recovery, because it has been previously decided by this court that the plaintiff could not recover in contract because it did not adequately invoke the default procedures specified in the lease. *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, supra, 137 Conn. App. 852–54.

[8] As noted previously, the court inferred from the defendant's consistent course of conduct that it never intended to do the work in a reasonable time.

[9] The defendant also argues that the court erred in relying on postlease representations in concluding that the defendant's conduct violated CUTPA. The court did not specify precisely which facts formed the basis for its conclusion that the defendant's conduct was "unethical, immoral or unscrupulous . . . destitute of integrity and good faith, conscienceless, deceitful and underhanded." It is clear, however, that the court found that these aggravating factors accompanied prelease representations, and we conclude that the court's findings regarding the prelease representations support its conclusion that the defendant's conduct was "unethical, immoral or unscrupulous" in satisfaction of the second prong of the cigarette rule.

[10] The court also found that Cohen made representations to the Roricks on November 28 and 30, 2004, that "reflect the continuing deception by the defendant when dealing with the plaintiff's members." The court found that Cohen requested a breakdown and explanation of the plaintiff's expenses and assured the plaintiff that he believed that members of the defendant would voluntarily return the plaintiff's security deposit and reimburse the plaintiff for its detailed expenses. Cohen did not mention that he, Yashar, Jacobs and Altman, the members of the defendant with whom the Roricks had dealt, had transferred their membership interests to another individual, Lapidus, trustee, with whom the Roricks had never dealt.

Although these representations occurred after the lease was signed, they are consistent with a pattern of unscrupulous behavior.

[11] "[N]ot every misrepresentation rises to [the] level of [a] CUTPA violation. . . . There must be some nexus with a public interest, some violation of a concept of what is fair, some immoral, unethical, oppressive or unscrupulous business practice or some practice that offends public policy." (Citation omitted; internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 276, 89 A.3d 373 (2014). "[T]he expansive language of CUTPA prohibits unfair or deceptive trade practices without requiring proof of intent to deceive, to defraud or to mislead. See, e.g., *Web Press Services Corp.* v.

New London Motors, Inc., 203 Conn. 342, 362–63, 525 A.2d 57 (1987) (common-law claims for fraud, deceit and misrepresentation require proof that defendant knew of falsity of representation, whereas CUTPA claimant need not prove defendant's knowledge that representation was false); *Sportsmen's Boating Corp.* v. *Hensley*, [192 Conn. 747, 754–57, 474 A.2d 780 (1984)] (unlike tort claim for interference with business expectancies, which requires proof of malicious or deliberate interference with competitor's business expectations, CUTPA liability may be based solely on proof of unfair or deceptive acts) . . . ." (Citation omitted.) *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 158, 645 A.2d 505 (1994).