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BRENDA GREENE *v.* KEVIN KEATING ET AL.
(AC 36351)

Sheldon, Mullins and Harper, Js.

Argued February 18—officially released April 28, 2015

(Appeal from Superior Court, judicial district of
Stamford-Norwalk, Hon. Kevin Tierney, judge trial
referee.)

Robert D. Russo, with whom was *Elizabeth A. Falkoff*, for the appellant (plaintiff).

Christopher P. Williams, with whom was *MaryKate J. Geary* and, on the brief, *Matthew G. Conway*, for the appellees (defendant Nancy Keating et al.).

Opinion

MULLINS, J. This case primarily concerns whether the trial court has the authority to render summary judgment on grounds not alleged or briefed by the parties and which do not affect the court's subject matter jurisdiction. The plaintiff, Brenda Greene, appeals from the judgment of the trial court denying her motion for summary judgment and granting the motion for summary judgment filed by the defendants, Kevin Keating and Nancy Keating.¹ The plaintiff claims, in relevant part, that the court improperly ruled on these motions after raising and considering, *sua sponte*, a ground not raised or briefed by the parties.²

The defendants claim that, although the court considered a ground not raised specifically as a ground in the motions for summary judgment, it, nonetheless, properly granted their motion and denied the plaintiff's motion. In the alternative, the defendants argue that we should affirm the judgment of the trial court on the specific grounds alleged in their motion for summary judgment, which were fully set forth before the trial court.³

We agree with the plaintiff that the court acted in excess of its authority, and, accordingly, we vacate the judgment and remand the matter for consideration of the motions on the grounds alleged. See *Bauer v. Waste Management of Connecticut, Inc.*, 239 Conn. 515, 523, 686 A.2d 481 (1996) ("If a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered. W. Maltbie, Connecticut Appellate Procedure (2d Ed. 1957) § 345.").

We briefly set forth the relevant facts and procedural history of this case. In a civil action that preceded the present case, the defendants presented claims against the plaintiff alleging, among other things, that they had acquired a prescriptive easement and an implied easement over a portion of the plaintiff's adjoining property. They sought an injunction and damages. After a trial to the court, on April 23, 2010, the court rendered judgment in favor of the plaintiff, from which the defendants did not appeal. On October 6, 2010, the plaintiff commenced the present action for vexatious litigation, pursuant to General Statutes § 52-568, against the defendants and the law firm that had represented them in their action against the plaintiff.⁴

The parties filed cross motions for summary judgment raising opposing claims. In her motion and accompanying memorandum of law, the plaintiff asserted that she was entitled to judgment against the defendants on the ground that they had brought the prior action without probable cause. In their motion and accompanying memorandum of law, the defendants asserted that they were entitled to summary judgment on the grounds that they had probable cause to commence the prior action

and that they had relied on the advice of counsel in commencing that action. The parties also submitted supporting affidavits and other documentation with their motions.⁵

Following oral argument, the trial court, on September 11, 2013, issued a memorandum of decision in which it made two relevant determinations: First, the court determined that § 52-568 sets forth two separate and distinct causes of action, one under subdivision (1) and the other under subdivision (2); and, second, the court determined, on the basis of the plaintiff's complaint, that the plaintiff was raising only a claim of malice and treble damages, specifically pursuant to § 52-568 (2), but that the plaintiff had not brought a claim pursuant to § 52-568 (1).

After making these determinations, the court concluded, in relevant part, that, because the plaintiff requested treble damages and alleged malice in each count of her vexatious litigation complaint, but failed to offer any support for her allegation of malice, the defendants were entitled to judgment as a matter of law.⁶ The court then granted the defendants' motion for summary judgment and denied the plaintiff's motion. The plaintiff filed a motion for reargument, which the court granted, but its decision remained intact. This appeal followed.

The plaintiff claims, in relevant part, that the court acted outside of its authority in rendering summary judgment on a ground not claimed or briefed by the parties. She argues that the motions filed by the parties raised the issue of whether there was probable cause for the defendants to have commenced the prior action.⁷ She asserts that she was "unaware of the issues raised by the court until [she] read the court's decision." We agree that the court exceeded its authority in rendering judgment on grounds not raised by the parties, and which did not affect the subject matter jurisdiction of the court.

As our Supreme Court has explained: "[T]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . F. James, G. Hazard & J. Leubsdorf, *Civil Procedure* (5th Ed. 2001) § 1.2, p. 4. The parties may, under our rules of practice, challenge the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. Practice Book § 10-39. Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Practice Book §§ 17-44 and 17-49. In both instances, the rules of practice require a party to file a written motion to trigger the

trial court's determination of a dispositive question of law. The rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of such a motion." (Emphasis in original; internal quotation marks omitted.) *Vertex, Inc. v. Waterbury*, 278 Conn. 557, 564–65, 898 A.2d 178 (2006).

In this case, the plaintiff filed a motion for summary judgment on the ground that the defendants had instituted the prior action against her without probable cause. The defendants filed a cross motion for summary judgment on the grounds that they had probable cause to commence the prior action against the plaintiff and that they had acted on the advice of counsel. Neither party raised a ground related to the plaintiff's allegation of malice or her request for treble damages, nor did they claim that such allegations restricted the plaintiff's ability to prove a cause of action for vexatious litigation on the ground that the defendants had commenced the prior action without probable cause. Accordingly, we conclude, under the facts of this case, that the court acted in excess of its authority when it raised and considered, *sua sponte*, a ground for summary judgment not raised or briefed by the parties.

Although the defendants timely filed a preliminary statement of the issues raising alternative grounds for affirming the court's judgment and briefed those issues, because the trial court essentially did not rule on the parties' cross motions, we decline to consider those alternative grounds, and, instead, conclude that a remand to the trial court for its consideration of this matter in the first instance is appropriate. See generally *Singhaviroj v. Board of Education*, 124 Conn. App. 228, 232, 4 A.3d 851 (2010) (reversing judgment and remanding matter for further proceedings after trial court summarily denied motions for summary judgment, which had relied, in relevant part, on preclusion grounds); *Asgrow Seed Co. v. Wagner*, 12 Conn. App. 547, 548–49, 532 A.2d 1305 (1987) (setting aside summary judgment and ordering trial court to reconsider motion because properly filed affidavit had not been considered by court at time judgment was rendered).

The judgment is vacated and the case is remanded to the trial court for proper consideration of the parties' motions and for further proceedings according to law.

In this opinion the other judges concurred.

¹ The record reveals that Kevin Keating died in February, 2013, and that Nancy Keating, as administratrix of the estate of Kevin Keating, was substituted as a defendant. For convenience, we continue to refer to the Keatings as the defendants in this appeal. We additionally note that the plaintiff also named Rucci, Burnham, Carta, Carello & Reilly, LLP (law firm), which represented the Keatings in a prior civil action involving the plaintiff, as a defendant in her lawsuit. The plaintiff did not file a motion for summary judgment against the law firm, nor did the law firm file a motion for summary judgment against the plaintiff. On May 2, 2014, however, the court rendered judgment against the law firm in accordance with the parties' stipulation, which stated, in relevant part, that the parties agree to be bound by the decision of the Appellate Court or Supreme Court in the present case: "If

the decision is affirmed . . . that decision shall be considered as applying to the judgment [rendered] herein. On the other hand, if the judgment in [the defendants'] favor is reversed and the case is remanded for trial, the parties agree that this stipulated judgment shall be set aside and [the plaintiff's] claims against [the law firm] will be reinstated." Accordingly, the law firm is not a party to this appeal.

² Although, "[o]rdinarily, a plaintiff may not appeal from the denial of a motion for summary judgment, for lack of a final judgment; see, e.g., *Hopkins v. O'Connor*, 282 Conn. 821, 828, 925 A.2d 1030 (2007) ('[t]he denial of a motion for summary judgment ordinarily is an interlocutory ruling and, accordingly, is not a final judgment for purposes of appeal'); here, however, the parties filed cross motions and the court granted the [defendants'] motion. This court, therefore, has appellate jurisdiction to consider the propriety of both rulings. See *Hannaford v. Mann*, 134 Conn. App. 265, 267 n.2, 38 A.3d 1239 ('if parties file cross motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal'), cert. denied, 304 Conn. 929, 42 A.3d 391 (2012)." *Charlotte Hungerford Hospital v. Creed*, 144 Conn. App. 100, 104 n.4, 72 A.3d 1175 (2013).

³ In their preliminary statement of the issues, which was timely filed, the defendants asserted alternate grounds for affirmance, and they have briefed those grounds. See Practice Book § 63-4 (a), which provides in relevant part: "At the time the appellant sends a copy of the endorsed appeal form and the docket sheet to the appellate clerk, the appellant shall also send . . . the following: (1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to: (A) present for review alternative grounds upon which the judgment may be affirmed . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. . . ."

⁴ General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

⁵ The defendants objected to the affidavit of counsel submitted in support of the plaintiff's motion for summary judgment. The trial court ruled that it would not consider this affidavit but that it would consider the other supporting documents.

⁶ The plaintiff also claims that the court improperly interpreted § 52-568 to contain two separate and distinct causes of action and asks that we clarify this matter for the trial court. We agree that the court's interpretation was incorrect, and we, therefore, address this briefly because it is likely to reoccur on remand. As explained in our Civil Jury Instructions: "To prevail under *either subsection* of this statute, [the plaintiff] must prove four essential elements by a fair preponderance of the evidence: 1. that [the defendant] commenced and prosecuted the underlying [action] against (him/her) . . . 2. that [the defendant] commenced and prosecuted the underlying [action] against (him/her) without probable cause; 3. that the underlying [action] was finally terminated in a manner favorable to [the plaintiff]; and 4. that [the defendant's] commencement and prosecution of the underlying [action] against [him/her] without probable cause legally caused (him/her) to suffer at least some of the injuries or losses complained of in (his/her) complaint." (Emphasis added; footnotes omitted.) See Connecticut Civil Jury Instructions § 3.13-5, available at <http://jud.ct.gov/JI/Civil/part3/3.13-5.htm> (last visited April 16, 2015). The trier of fact does not reach the issue of malice and treble damages unless the plaintiff has proven the elements set forth and has established his or her compensatory damages. See *id.* The trier then must determine whether malicious intent has been established, which would entitle the plaintiff to treble damages. If malice is not established, the plaintiff only is entitled to double damages. See *id.*

⁷ We note that the defendants also raised as a ground in their motion for summary judgment that they had commenced the earlier action on the advice of counsel.