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ANNA NOWAK, EXECUTOR (ESTATE OF KENNETH NOWAK) *v.* ENVIRONMENTAL ENERGY SERVICES, INC., ET AL.
(AC 44760)

Elgo, Suarez and Bear, Js.

Syllabus

The defendants, E Co. and R, one of E Co.'s directors and principal shareholders, appealed from the judgment of the trial court granting, in part, the equitable petition for a bill of discovery filed by the plaintiff in her capacity as the executor of the estate of her late husband, K. At the time of his death, K was a director and principal shareholder of E Co., which he had founded with R. The plaintiff was not involved in the operations of E Co. during K's life. She suspected corporate misconduct after his death because the defendants, inter alia, failed to provide her with all of the information she requested regarding E Co.'s financials and operations, excluded her from company meetings, prevented her from entering E Co.'s offices without permission, and sold shares without her consent. In her petition, the plaintiff alleged that probable cause existed to support claims against the defendants for an accounting and shareholder oppression and against R for breach of fiduciary duty. She requested seventeen different categories of records from E Co. and argued that she had no other adequate means of obtaining the requested records. Prior to the rendering of judgment on the petition, E Co. commenced a civil action against the plaintiff in her capacity as executor of K's estate, alleging, inter alia, breach of contract in connection with an agreement pursuant to which E Co. purchased some of its shares that were held by the plaintiff. Thereafter, the trial court granted the petition with respect to eleven of the categories of documents requested. Subsequently, the plaintiff filed an answer, special defenses, and a counterclaim against E Co. in the civil action. The trial court in the civil action granted the plaintiff's motion to cite in R as an additional party, and the plaintiff filed an amended counterclaim, alleging claims of shareholder oppression, an accounting, and breach of fiduciary duty. Thereafter, the defendants appealed to this court in the present matter, arguing, inter alia, that the plaintiff, by raising the same claims in her amended counterclaim in the civil action, admitted that she could have proceeded in the present case by commencing an action and seeking discovery in the ordinary course, which obviated the need for a separate bill of discovery. *Held*:

1. The plaintiff's petition for a bill of discovery and the judgment granting the petition were not moot, and, accordingly, this court had subject matter jurisdiction over the appeal: although it was apparent from the pleadings in the civil action that the defendants produced some documents, there was no indication in the record that they provided to the plaintiff during discovery proceedings in that action all of the discovery ordered by the trial court in the bill of discovery, and, even if the defendants had provided to the plaintiff the discovery ordered by the court in the bill of discovery, the present appeal would have been moot, not the petition or the underlying judgment; moreover, the defendants failed to provide support for their claim that the underlying judgment granting the bill of discovery was rendered moot by the plaintiff's filing in the civil action of her amended counterclaim, and the fact that there was a pending civil action in which the plaintiff had the opportunity to seek the discovery that was ordered in the bill of discovery did not moot the underlying judgment or preclude this court from affirming that judgment.
2. The defendants could not prevail on their claim that the trial court improperly granted the plaintiff's petition for a bill of discovery because the plaintiff failed to establish probable cause to bring any potential cause of action and the court incorrectly concluded that the bill of discovery was necessary to discover the information requested:
   a. The trial court's finding that the plaintiff satisfied her burden of establishing probable cause to bring claims against the defendants for breach

of fiduciary duty, an accounting, and shareholder oppression was not improper: in reaching its determination, the court made extensive findings regarding the evidence and testimony presented at the hearing, including finding that R exercised control over E Co. for several years prior to the commencement of the action; moreover, the trial court credited the testimony of the plaintiff regarding her unsuccessful attempts to obtain the information sought, the defendants' conduct in shutting her out of the affairs of E Co., and the basis for her fear that the defendants were withholding information that affected her shares in E Co., and the testimony of the plaintiff's expert, a certified public accountant, that, given his review of the limited records provided, there was potential for financial mismanagement of E Co. and he needed the requested records to determine whether the actions taken by the defendants were oppressive to E Co.'s shareholders or were in breach of fiduciary duties; furthermore, it was not for this court to second-guess the trial court's credibility determinations.

b. The defendants failed to demonstrate the existence of a well founded objection sufficient to warrant a finding that the trial court abused its discretion in granting the plaintiff's petition for a bill of discovery, which was favored in equity: the defendants' assertion that E Co. regularly provided information sought by the plaintiff and would continue to do so was not supported by the record; moreover, the defendants' assertion that the plaintiff had available to her a remedy at law (§ 33-948) to seek a court order to compel E Co. to provide corporate information was unavailing because such a remedy did not preclude the plaintiff from obtaining a bill of discovery; furthermore, the defendants' assertion that the civil action obviated the need for a separate bill of discovery was unavailing because, during the discovery proceedings in the civil action, the defendants objected to the same requests by the plaintiff that were made in the present action, they withheld the requested documents for months, their eventual disclosure of the documents was allegedly incomplete, and the trial court ended the discovery proceeding prior to the completion of the disclosure by denying the plaintiff's motion for a continuance, which was filed due to the defendants' failure to provide all of the requested discovery; additionally, the defendants provided no authority to support their assertion that, in light of the civil action, the plaintiff demonstrated that she could proceed by commencing an action and seeking discovery in the ordinary course, and, to the contrary, case law supported the plaintiff's claim that she was not precluded from seeking the equitable remedy of a bill of discovery merely because she could bring a legal action.

Argued October 6, 2022—officially released April 4, 2023

Procedural History

Petition for a bill of discovery seeking certain information relating to the governance of the named defendant, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Brazzel-Massaro, J.*; judgment granting the petition in part, from which the defendants appealed to this court. *Affirmed*.

Brendan J. O'Rourke, for the appellants (defendants).

Terence J. Gallagher, for the appellee (plaintiff).

BEAR, J. The defendants, Environmental Energy Services, Inc. (EES), and Richard Nowak, appeal from the judgment of the trial court granting, in part, the equitable petition for a bill of discovery (petition) filed by the plaintiff, Anna Nowak, in her capacity as the executor of the estate of her late husband, Kenneth Nowak. On appeal, the defendants claim that the court improperly determined that the plaintiff met her burden of establishing probable cause to bring claims against the defendants for corporate misconduct and that the plaintiff had no means, other than the bill of discovery, to discover the majority of the requested records. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. EES, which provides fuel treatment programs for utility companies located primarily in North America, has four principal shareholders.[1] Those shareholders are Richard Nowak, the Marie D'Amico Revocable Trust (trust), the state of Connecticut (state), and the plaintiff.[2] The ownership interest of the state is held by its investment arm, Connecticut Innovations, Inc. Pursuant to an amended and restated stockholders' agreement dated April 13, 2010, the trust and the state each have the right to appoint one of the directors on the board of directors (board). The board now consists of three persons, including Pauline Murphy, who represents the state's interests; Peter D'Amico, who represents the trust's interests; and Richard Nowak. Prior to his death, Kenneth Nowak was a member of the board, but his seat has remained unfilled. Kenneth Nowak and Richard Nowak were cofounders of EES, as well as shareholders, directors and officers of EES.

Prior to filing her petition, the plaintiff requested certain information from EES, only some of which was provided to her by EES through its counsel. The plaintiff subsequently filed her petition in which she alleged corporate misconduct by the defendants and argued that probable cause existed to support claims against EES for breach of fiduciary duty, an accounting, and shareholder oppression. Specifically, the plaintiff alleged that, despite there being sufficient funds to do so, EES has not distributed profits in the form of dividends to all shareholders and that the board and Richard Nowak "made a conscious decision to refuse to pay dividends that should have been paid to all shareholders . . . ." She further alleged that Richard Nowak, as the "controlling shareholder," breached his duty of care by causing the board to authorize excessive salaries and/or bonuses for himself and other executives; that she has been improperly excluded from company meetings; and that EES and/or Richard Nowak mismanaged the corporation by submitting for reimbursement as corporate expenses certain expenses for personal travel, meals and entertainment, by failing to investigate the

reasonableness of certain corporate tax deductions, and by refusing to pay dividends to all shareholders. According to the plaintiff, Richard Nowak, as a director, an officer and the "effective controlling shareholder of EES," had a fiduciary duty to act in the best interests of the corporation and its shareholders, which he breached through his unfair and oppressive conduct toward her. In the petition, the plaintiff sought seventeen different categories of records from EES. As the basis for this request, the plaintiff alleged that the documents were material and necessary for her to bring causes of action for breach of fiduciary duty, an accounting and shareholder oppression. She also argued that she had no other adequate means of obtaining the requested records.

A remote hearing was held on the petition over the course of three days, at which the parties presented testimony, including expert testimony, and offered numerous exhibits into evidence. In a memorandum of decision dated June 1, 2021, the court granted the petition, concluding that there was a sufficient basis to support a finding of probable cause to grant the petition as to eleven of the seventeen categories of documents.[3] The court's conclusion was based on its findings that the plaintiff had demonstrated that the records were material and necessary to determine whether she could pursue causes of action for breach of fiduciary duty, shareholder oppression, and an accounting, and that "the [plaintiff had] no [other] means to discover the majority of the records requested that would be material to the three contemplated causes of action for which the testimony provide[d] probable cause." This appeal followed.

In May, 2021, prior to when the court rendered judgment granting the petition and to the commencement of this appeal, EES commenced a civil action against the plaintiff, in her capacity as executor of the estate of her late husband, alleging claims for breach of contract, fraud, fraudulent inducement, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., in connection with the plaintiff's alleged breach of an agreement entered into by the parties for the purchase by EES of some of the plaintiff's shares in EES (civil action).[4] See *Environmental Energy Services, Inc.* v. *Nowak*, Superior Court, judicial district of Danbury, Docket No. CV-21-6039364-S. The judgment in the present action in equity was subsequently rendered on June 1, 2021. Thereafter, on September 15, 2021, three and one-half months after the rendering of that judgment, the plaintiff in the present action in equity filed an answer, special defenses and counterclaim against EES in the civil action. Subsequently, on April 8, 2022, she filed a motion in the civil action to cite in Richard Nowak as an additional party, which was granted by the court. Thereafter, on May 12, 2022, she filed an amended three count counterclaim

in the civil action, which alleged claims against both EES and Richard Nowak for shareholder oppression, an accounting, and a claim against Richard Nowak for breach of fiduciary duty.

In their principal appellate brief in this appeal, the defendants requested that this court take judicial notice of the civil action.[5] They argue that the plaintiff, by raising the same claims in her amended counterclaim in the civil action, "has, in effect, admitted that she could have proceeded in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." The plaintiff, in response, has not objected to the request for this court to take judicial notice of the civil action and simply argues that the defendants "should not be rewarded with continuing their more than four year avoidance of the disclosure sought herein by pleading elsewhere." She continues to argue that a bill of discovery is the only means by which she can obtain the documents and information sought.

Following oral argument before this court, we ordered the parties "to file simultaneous supplemental memoranda, of no more than five (5) pages in length, on or before October 24, 2022, addressing whether this court should conclude that the underlying judgment is moot, in light of the pending action and counterclaim filed in [the civil action], and, accordingly, vacate the judgment and remand this matter to the trial court with direction to dismiss the petition for the bill of discovery as moot." The parties timely complied with the order. Additional facts and procedural history will be set forth as necessary.

I

We begin by addressing the threshold issue of mootness, as it implicates this court's subject matter jurisdiction. See *State* v. *Council*, 344 Conn. 113, 120, 277 A.3d 1251 (2022). "Mootness is an exception to the general rule that jurisdiction, once acquired, is not lost by the occurrence of subsequent events. . . . Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *In re Rabia K.*, 212 Conn. App. 556, 560–61, 275 A.3d 249 (2022).

In their supplemental appellate brief, the defendants argue that the plaintiff, in filing the amended counterclaim in the civil action asserting the same three counts for which she claimed she needed discovery in her petition for a bill of discovery, has thereby rendered moot her petition and the underlying judgment granting the petition. They further argue that the plaintiff's three count counterclaim in the civil action "provides her the very rights of discovery she sought under the bill of discovery," as evidenced by the fact that the trial court in the civil action "has on its docket discovery requests and objections interposed by [the parties in that action] . . . ." In response, the plaintiff argues that her counterclaim in the civil action has not rendered moot the judgment granting her petition. According to the plaintiff, "[s]hould the bill of discovery be upheld, the breach of fiduciary duty, shareholder oppression and accounting claims may be amplified or even refiled as derivative rather than individual actions," and "[t]he bill of discovery could provide information that would lead to [an] extension or otherwise revised pleading in [the civil] action or even the commencement of another action."

The record reveals the following additional relevant facts. In the civil action, the parties have undertaken discovery, as the plaintiff in the present action in equity filed a first set of document requests and interrogatories, dated March 15, 2022, in which she made twenty-seven requests for various categories of documents, eleven of which are identical to the documents ordered to be disclosed by the trial court in the bill of discovery. Thereafter, in the civil action, the defendants in the present action in equity filed objections to those requests, objecting to all eleven of the relevant requests as being overly broad and burdensome. As a result, they withheld the requested documents pending resolution of their objections. On October 5, 2022, the defendants eventually provided documents in response to the production requests made in the civil action. Thereafter, the plaintiff in the present action in equity filed a motion for a continuance in the civil action, claiming that discovery was not complete. In her reply in further support of her motion for a continuance, she acknowledged the production of documents by the defendants but claimed that they did not produce all of the requested documents. It is unclear from the record whether the eleven categories of documents ordered to be disclosed in the bill of discovery were satisfied by the production of documents in the civil action, and the defendants have not so claimed in their supplemental appellate brief, which was filed on October 24, 2022, after their production of documents in the civil action.

First, we note that, if the defendants had provided in the civil action, and the plaintiff actually had obtained, the discovery ordered by the court in the bill of discovery, then the present *appeal*, but not the underlying

judgment, would be moot, as there would be no relief we could afford the defendants because they would have already provided to the plaintiff the discovery ordered by the court in granting the petition for a bill of discovery. However, there is no indication in the record before us that that has occurred. Although it is apparent from the pleadings in the civil action that some production of documents has taken place, we have no way of knowing which documents were provided. Because the record is unclear as to whether the discovery ordered in the bill of discovery was provided during the course of discovery in the civil action, and we cannot make such a determination on appeal; see *Welsh* v. *Martinez*, 191 Conn. App. 862, 884, 216 A.3d 718 (2019) ("[i]t is axiomatic that this court, as an appellate tribunal, cannot find facts"); we cannot conclude that the appeal has been rendered moot.

Moreover, we also disagree with the defendants' claim that the underlying judgment has been rendered moot by the plaintiff's filing in the civil action of her amended counterclaim. In support of their mootness argument, the defendants assert that the bill of discovery is no longer necessary due to the plaintiff's filing of her amended counterclaim in the civil action and the fact that she now "has adequate means to pursue the discovery she sought in her petition . . . ." First, we note that the defendants have failed to provide citations to authority demonstrating that an underlying judgment can be rendered moot as a result of events that have occurred during the pendency of an appeal.[6] Moreover, in making their mootness argument, the defendants appear to conflate the issue of mootness with the issue of whether the plaintiff had established her entitlement to a bill of discovery.

The fact that there is a pending civil action in which the plaintiff had or has an opportunity to seek the discovery that was ordered in the bill of discovery does not moot the underlying judgment granting the bill of discovery in this separate, equitable action, nor does it preclude this court from affirming that judgment. Indeed, it is apparent from case law that an action in equity seeking a bill of discovery is separate from a civil action and may be maintained seeking information relating to a civil action that already has been, or has yet to be, brought. See *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 681, 804 A.2d 823 (2002) ("[t]o sustain [a] bill [of discovery], the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action *already brought* or about to be brought" (emphasis added; internal quotation marks omitted)); *Peyton* v. *Werhane*, 126 Conn. 382, 387, 11 A.2d 800 (1940) ("[a] court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been

enlarged so as to make the equitable remedy unnecessary in some circumstances" (internal quotation marks omitted)); see generally *Falco* v. *Institute of Living*, 254 Conn. 321, 324, 757 A.2d 571 (2000) (during pendency of action in equity seeking bill of discovery plaintiff filed separate civil action against defendant and third party); *Pottetti* v. *Clifford*, 146 Conn. 252, 254, 257, 150 A.2d 207 (1959) (after plaintiff brought civil action against defendants she brought action in equity for bill of discovery seeking facts to be used as evidence in civil action).

In light of that authority, we conclude that, under the circumstances here, where the record does not contain information about whether the discovery ordered in the bill of discovery thereafter was fully produced during the course of discovery in the civil action, any impact that the discovery proceedings in the pending civil action may have on the present appeal relates more to the issue of whether the plaintiff previously had demonstrated to the court that she lacked adequate means for obtaining the discovery sought—a necessary requirement for obtaining a bill of discovery—and not to the issue of mootness. See part II B of this opinion. Accordingly, this court does not lack subject matter jurisdiction, and we therefore proceed to a review of the merits of the appeal.

II

On appeal, the defendants raise two arguments in support of their claim that the court improperly granted the petition: (1) the plaintiff failed to establish probable cause to bring any potential cause of action, and (2) the court improperly concluded that the bill of discovery was necessary to discover the information at issue. We disagree with both claims.

We first set forth our standard of review and general principles governing bills of discovery. "The power to enforce discovery is one of the original and inherent powers of a court of equity." *Peyton* v. *Werhane*, supra, 126 Conn. 388. "The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity that has been a procedural tool in use for centuries. . . . The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery. . . . Furthermore, because a pure bill of discovery[7] is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court's discretion. . . .

"To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense

of, another action already brought or about to be brought. . . . Although the petitioner must also show that [it] has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof. . . .

"Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. . . . A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to [its] action. . . . A plaintiff should describe with such details as may be reasonably available the material [it] seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [its] case. . . . What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion. . . .

"The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found. . . . Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. . . . A distinction exists, however, between a would-be plaintiff having to demonstrate the need for the information to determine whether a particular cause of action is worthy of being pursued and a plaintiff having to prove definitively that he has a cause of action and that he will probably prevail ultimately at the trial on the merits. . . . Whether particular facts constitute probable cause is a question of law." (Citations omitted; footnote added; internal quotation marks omitted.) *H & L Chevrolet, Inc.* v. *Berkley Ins. Co.*, 110 Conn. App. 428, 433–35, 955 A.2d 565 (2008); see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680–82. Our review of a trial court's decision involving a question of law is plenary. See *Booth* v. *Park Terrace II Mutual Housing Ltd. Partnership*, 217 Conn. App. 398, 415, 289 A.3d 252 (2023).

A

The defendants first claim that the plaintiff failed to establish probable cause to bring any potential cause of action. We disagree.

In finding that the plaintiff had met her burden of establishing probable cause, the court stated the following in its memorandum of decision: "[T]he parties have already exchanged a number of the discovery requests before the hearing in this matter. However, the discovery requests were extensive and a number of the requests were not provided or were very broad requests which this court has noted. It is also clear that there are a number of requests that cannot be produced by anyone but the defendant[s]. The [plaintiff] has demonstrated that the records are material and necessary in order to determine whether a further action can be pursued for breach of fiduciary duty, oppression of minority shareholders and/or an accounting. Thus, in viewing the testimony and applying the information to the causes of action raised by the [plaintiff] there is a sufficient basis to find that there is probable cause to grant the petition for a bill of discovery . . . ." In reaching that determination, the court made extensive findings regarding the evidence and testimony presented at the hearing, which included expert testimony.

The court's findings can be summarized as follows. Following her husband's death, the plaintiff, who had not been an active part of EES in her personal capacity during her husband's life, had attempted to obtain information about the financials of the company and its operations, of which she did not have a full understanding. She received notice of one shareholders' meeting but did not attend after she received a telephone call that made her feel " 'intimidated and confused.' " Thereafter, she did not receive notices of meetings and was not permitted to enter the offices of EES without prior permission or explaining the basis for her visit, and she discovered the selling of shares without her consent, which made her suspect financial wrongdoing and fear that her shares were being diluted. Specifically, the court found that "[t]he lack of documentation, the actions of the defendants in precluding her from the building, excluding her from meetings, ignoring her requests for documents, including minutes and notices, [a] refinance [of EES] in which she believed there was collateral used that was the property of Richard Nowak, with some additional benefits to him which were not shared with her as a shareholder or member, all caused her to believe that they were withholding information that affected her shares of the company."

Thereafter, the plaintiff retained the services of a certified public accountant, Dennis Kremer, who has experience in valuation forensics and fraud accreditations. At the hearing, he offered expert testimony that, on the basis of his review of financial records for 2016 and 2018, he had identified numerous "red flags"[8] that raised concerns of mismanagement, oppression, and improper accounting. He also testified that the documents requested were needed in order to determine

whether actions were taken that were oppressive to shareholders or in breach of fiduciary duties.

The court further found that the plaintiff, "with her expert, raised concerns about . . . shares that were given [to Richard Nowak]. At the hearing, [Richard Nowak] addressed some of these questions which have been long-standing by explaining the activity through the introduction of some documents and his explanations, none of which were produced prior to the hearing for the bill of discovery. While [Richard Nowak] provides some information, the materials provided are not disclosed as the only available documents nor are there any assurances that these disclosures satisfy the [plaintiff's] basis for a bill of discovery. The testimony of . . . Kremer indicates that his analysis clearly requires further disclosures to obtain an accurate picture, so to speak, of the operations and financial decisions of the board. Both [the plaintiff] and . . . Kremer testified about the control by [Richard] Nowak, including voting/ scheduling shareholder meetings, not scheduling meetings, which would provide an opportunity to elect, appoint, add or change any of the directors, and permitting Richard Nowak to become the only person who was the guarantee for [a certain] line of credit. There were construction loans and stock options for which it appears that no notices, reports or information was given to anyone except Richard Nowak and his close workers . . . . Richard Nowak was the sole person with information about the stock grant, its value, conditions, terms and promises related to the options." (Footnotes omitted.)

We conclude, on the basis of our plenary review of the evidence presented, that the court properly could have concluded that the plaintiff established probable cause to bring all three of the potential causes of action listed in the bill of discovery. To establish a claim for breach of fiduciary duty, a plaintiff must show "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 366–67, 241 A.3d 133 (2020). Moreover, a "fiduciary duty of loyalty is breached when the fiduciary engages in self-dealing by using the fiduciary relationship to benefit [his or] her personal interest." (Internal quotation marks omitted.) *Chioffi* v. *Martin*, 181 Conn. App. 111, 137, 186 A.3d 15 (2018).

"The basis for a right to an accounting is supported by an allegation that a fiduciary relationship exists. . . .

The fiduciary relationship is in and of itself sufficient to form the basis for the relief requested." (Citation omitted.) *Zuch* v. *Connecticut Bank & Trust Co.*, 5 Conn. App. 457, 460, 500 A.2d 565 (1985). "Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account." (Internal quotation marks omitted.) *Manere* v. *Collins*, supra, 200 Conn. App. 371. "An accounting is defined as an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due. An action for an accounting usually invokes the equity powers of the court, and the remedy that is most frequently resorted to . . . is by way of a suit in equity. . . . To support an action of accounting, *one* of several conditions must exist. There must be a fiduciary relationship, *or* the existence of a mutual and/or complicated accounts, *or* a need of discovery, *or* some other special ground of equitable jurisdiction such as fraud." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mankert* v. *Elmatco Products, Inc.*, 84 Conn. App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004).

Finally, "shareholder oppression" is defined in Black's Law Dictionary (11th Ed. 2019) p. 1319, as the "[u]nfair treatment of minority shareholders ([especially] in a close corporation) by the directors or those in control of the corporation." A claim of shareholder oppression "should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [plaintiff's] decision to join the venture." (Internal quotation marks omitted.) *Manere* v. *Collins*, supra, 200 Conn. App. 384.

In the present case, the plaintiff and Richard Nowak are shareholders in EES. Although the defendants argue that Richard Nowak is not a controlling shareholder, that status is not required to establish a fiduciary relationship between the parties. The record shows that he is a cofounder, an officer, a shareholder and a member of the board of directors of EES, and that, for several years, he has exercised control over the affairs of EES. See generally *Katz Corp.* v. *T. H. Canty & Co.*, 168 Conn. 201, 207, 362 A.2d 975 (1975) ("[a]n officer and director occupies a fiduciary relationship to the corporation and its stockholders"). The court found that the plaintiff believed that Richard Nowak controlled EES because of her past experience with him and the way he acted on behalf of EES after her husband died. She thought that he made all of the decisions for EES.

Furthermore, the plaintiff's expert, Kremer, testified about numerous red flags or concerns he had with the financial management and business dealings of EES, including a loan to Richard Nowak, the terms of which

were unclear, an auto lease that might be "disguised compensation," the issuance of approximately $400,000 of EES stock to Richard Nowak without discussion among board members or shareholders, the selling of EES shares without shareholder consent, and commissions paid in the amount of $138,000 without disclosure to whom the payment was made. It was within the discretion of the trial court to accept Kremer's testimony that, in his opinion, there was a potential for financial mismanagement of EES given his review of the limited records provided and that he needed the requested documents to be able to determine whether actions were taken by the defendants that were oppressive to shareholders or in breach of fiduciary duties, as well as his testimony as to the many red flags that caused him to be concerned regarding accounting issues, mismanagement and possible shareholder oppression by the defendants.[9] The plaintiff also testified regarding her unsuccessful attempts to obtain the information sought from the defendants, their conduct in shutting her out of the affairs of EES, and the basis for her fear that the defendants were withholding information that affected her shares in EES.

The court clearly credited Kremer's testimony and that of the plaintiff in making its finding of probable cause, and it is not for this court to second-guess the trial court's credibility determinations. See *Albuquerque* v. *Albuquerque*, 42 Conn. App. 284, 288, 679 A.2d 962 (1996) ("[c]redibility of witnesses is a matter for the trier of fact and not this court"). The record contained evidence sufficient, for probable cause purposes, to justify a reasonable belief that there were reasonable grounds to believe that the plaintiff, individually or derivatively, may have causes of action against the defendants for breach of fiduciary duty, an accounting, and shareholder oppression. Therefore, the trial court's probable cause finding was proper.

B

The defendants next claim that the court improperly concluded that the bill of discovery was necessary to discover the information at issue. In support of that claim, the defendants make three arguments: (1) the record confirms that EES has regularly provided information sought by the plaintiff and will continue to provide audited financial statements and to respond to inquiries; (2) the plaintiff has available to her a remedy at law pursuant to General Statutes § 33-948 to seek a court order to compel EES to provide corporate information; and (3) in light of the civil action, the plaintiff has demonstrated that she can proceed "in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." We conclude that the defendants' first argument is not supported by the record, and we are not persuaded by the last two argu-

ments.

As we stated previously in this opinion, a plaintiff who seeks an equitable bill of discovery must demonstrate that (1) the discovery sought "is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought," (2) "there is probable cause to bring a potential cause of action," and (3) the plaintiff "has no other adequate means of enforcing discovery of the desired material . . . ." (Internal quotation marks omitted.) *H & L Chevrolet, Inc.* v. *Berkley Ins. Co.*, supra, 110 Conn. App. 434. The defendants' second claim in the present case focuses on the third requirement. The appellate courts of this state, however, have made clear that, "[a]lthough the [plaintiff] must also show that [she] has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof." (Internal quotation marks omitted.) Id.; see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 681.

In *Pottetti* v. *Clifford*, supra, 146 Conn. 261–62, our Supreme Court addressed and rejected a claim similar to the second and third arguments raised by the defendants in the present case in support of their claim that a bill of discovery was not necessary. In *Pottetti*, after the plaintiff commenced an action against the defendants seeking to recover a certain sum allegedly owed to her by the decedent, she brought an action in equity for a bill of discovery seeking the discovery of facts to be used as evidence in the original action. Id., 254. The defendants in *Pottetti* claimed that the plaintiff had a "remedy at law for obtaining the information she [sought]." Id., 261. Our Supreme Court rejected that claim, stating: "The remedy of discovery is not limited to situations where the petitioner would be destitute of proof without a discovery of the evidence he is seeking. It is available also when the evidence he seeks is in aid of proof he may already have or be able to produce by other means. . . . It is true that means for the production of evidence and for disclosure generally under our statutes and practice afford a measure of relief. . . . From the very nature of the present case, however, and the peculiar circumstances involved, these means are obviously inadequate. An adequate remedy at law is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . That general equity principle must be applied if discovery is to be effective. . . . The availability of the other remedies suggested by the defendants for obtaining information did not *require* the denial of the

equitable relief . . . sought."[10] (Citations omitted; emphasis added.) Id., 262.

It is clear from *Pottetti* that the availability of a remedy at law does not necessarily preclude a party from obtaining a bill of discovery. Thus, the defendants' claim that the availability to the plaintiff of a remedy at law renders unnecessary the bill of discovery is unavailing. We also note that the defendants have claimed that the bill of discovery is not necessary because the plaintiff has adequate means to obtain the discovery sought in the civil action, when in that civil action they objected to the very same requests by the plaintiff that were made in the present action in equity, withheld the requested documents for months and, when a disclosure was finally made, it allegedly was incomplete and did not include all of the documents sought. Moreover, we also take judicial notice of the trial court's ruling in the civil action in January, 2023, denying the plaintiff's motion for a continuance, which sought a continuance due to the defendants' failure to provide all of the requested discovery. In denying the motion, the court stated: "The deadline for the completion of discovery has long since passed. Although objections to discovery requests were filed in May and September of 2022, no effort was made to have the court intervene to resolve any objections. The parties have had ample time to address any discovery issues." Accordingly, the fact that discovery in the civil action has ended undercuts the defendants' claim that the existence of the civil action obviates the need for the bill of discovery in this separate, independent action in equity brought by the plaintiff.

Moreover, the record simply does not support the defendants' assertion that "EES has regularly provided information sought by the [plaintiff] . . . ." The trial court noted the plaintiff's testimony that " 'a lot of information was withheld from' " her and specifically found that, after the plaintiff retained the services of an attorney, she received some information from the defendants but "has not received all of the information which her former counsel and . . . Kremer . . . requested from the [defendants] to investigate [the plaintiff's] concerns about the financial operations of the company." We also find unavailing the defendants' claim that, in light of the civil action, the plaintiff has demonstrated that she can proceed "in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." The defendants have provided no authority to support that assertion, nor are we aware of any. In fact, case law supports the plaintiff's claim that a party is not precluded from seeking the equitable remedy of a bill of discovery simply because they could bring or have already brought a legal action. See *Falco* v. *Institute of Living*, supra, 254 Conn. 324; *Pottetti* v. *Clifford*, supra, 146 Conn. 254; see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680 (bill

of discovery “may be entertained notwithstanding the statutes and rules of court relative to discovery” (internal quotation marks omitted)). In any event, the judgment in the bill of discovery action was rendered on June 1, 2021. In the civil action, the plaintiff’s answer, special defenses and counterclaim against EES was filed on September 15, 2021, three and one-half months later. On May 12, 2022, almost one year after the judgment in the bill of discovery action, the plaintiff filed her amended counterclaim against both EES and Richard Nowak in the civil action. Those filings did not undermine the validity of the existing judgment.

As we stated previously in this opinion, “a pure bill of discovery is favored in equity, [and] it should be granted unless there is some well founded objection against the exercise of the court’s discretion.” (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680–81. The defendants have failed to demonstrate the existence of such an objection sufficient to warrant a finding that the court abused its discretion in granting the petition for a bill of discovery.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Currently, there are two other individual shareholders. Collectively, they own 3.6 shares, which represent a small portion of the total equity.

[2] Prior to his death, Kenneth Nowak was a shareholder of EES. The plaintiff, as executor of his estate, controls approximately 22 percent of EES.

[3] The petition was granted as to the following items in the petition: “(1) All written communications to shareholders generally within the past four years, including the financial statements furnished for the past four years under General Statutes § 33-951; (2) EES’ historical record of common and preferred shareholders of EES; (3) All of EES’ general ledger accounting records to the extent they reflect changes in shareholdings and any dividends paid; (4) All documents concerning executive compensation, including but not limited to salaries, bonuses, benefits bestowed and payments for loan guarantees; (5) EES’ financial record ‘deferred patent costs’ as to which [the plaintiff] requests the following documents: (a) Documents sufficient to identify the patents for which these costs were incurred, (b) Documents sufficient to describe the status of the patents, (c) Documents sufficient to identify the current ownership of the patents, (d) Documents concerning any lease, license or sale of the patents, [and] (e) Documents concerning any other agreements with regard to the patents; (6) Documents sufficient to demonstrate any distributions made to preferred stockholder[s] of EES in the last year; (7) Copies of any EES warrant and/or option agreements or plans, [including] (a) Documents sufficient to show any exercise of any warrants and/or options in the past year, [and] (b) Documents sufficient to show the current ownership of EES warrants and/or options; (8) Documents sufficient to describe the loans to executives in the EES financials; (9) Documents sufficient to identify the motor vehicle costs and construction in progress costs identified in the EES financials; (10) Documents sufficient to describe the ‘commissions payable’ identified on the EES financials; [and] (11) The EES tax returns for each of the years 2014 to 2019.”

[4] The defendants’ claims in the civil action against the plaintiff related to a separate matter between the parties.

[5] We take judicial notice of the civil action. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) (“[t]here is no question . . . concerning . . . [the] power [of appellate courts] to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise”); *Pollard* v. *Geico General Ins. Co.*, 215 Conn. App. 11, 13 n.1, 282 A.3d 535 (2022) (same), cert. denied, 346 Conn. 910, A.3d (2023).

[6] We also note that, if an appeal has become moot through no fault of an

appellant, this court, to prevent the appellant from being prejudiced by the judgment, has vacated the judgment. See *Savin Gasoline Properties, LLC* v. *Commission on the City Plan*, 208 Conn. App. 513, 515, 262 A.3d 1027 (2021) (dismissing appeal and granting appellant's motion for vacatur of trial court's judgment because appeal became moot through no fault of appellant).

[7] A pure bill of discovery is one that seeks "to obtain evidence to be used in some suit other than that in which discovery is sought." (Internal quotation marks omitted.) *Peyton* v. *Werhane*, supra, 126 Conn. 389. The present action in equity involves a pure bill of discovery, as the only relief sought in the petition is the discovery of facts to be used in a potential action against the defendants. See *Pottetti* v. *Clifford*, supra, 146 Conn. 257.

[8] The court described the red flags raised by Kremer as follows: "(1) When asked for all shareholders' meetings and records of all actions taken by the shareholders, there were no shareholders' actions in 2015 through 2018; (2) The bylaws of EES [state that there] should be an annual meeting of shareholders and there has been none up to March, 2018; (3) EES paid dividends and do[es] not know if [it] declared dividends. In this regard, they issued shares and they acquired other companies, [there was] [n]o shareholder meeting to approve the audit or approval of auditors, and [they] do not know when directors were elected at EES. There are no votes about officer compensation; (4) The [plaintiff] never received a 2017 report but there were 2016 and 2018 reports, which were not consistent; (5) The patent costs are problematic because they kept increasing and will be amortized over the useful life but there [were] no questions asked [as] to the description of the patent, who owns it or when it will be amortized over the useful life; (6) There is a loan to the stockholder and based upon some of the information it appears this may be to . . . Richard Nowak but there is no description of why a loan [was given] and [under] what conditions; (7) The loan to Richard Nowak and the intercompany account raises a question as to whether it is a permanent evergreen line of credit and is 'never gonna be repaid'; (8) There is a question as to the licensing agreement [concerning] who it [was with and whether it] was . . . discussed with or approved by the board of directors; (9) [A question exists as to whether an] auto lease of $22,000 per year [was] disguised compensation or just a lease that was too high; (10) There were commissions paid with no disclosure as [to] what [they were] for and, specifically, the person compensated in the amount of approximately $138,000; (11) The expense for construction in progress noted for $519,000 does not contain any particulars; [and] (12) . . . [A]pproximately $400,000 of EES stock [was issued] to Richard Nowak with no description in any meetings or discussion among the members or shareholders. . . . Kremer testified that it is his opinion that there is a potential for financial mismanagement of the company based upon this review which led to the description of the red flags described by him."

[9] Specifically, in rejecting the defendants' argument that the plaintiff's claims were based on conjecture, the court noted that the testimony of Kremer questioned "the lack of documentation for the financial accounting or operations, which indicate concerns such as that the defendants did not properly address the need for meetings and selection of directors, leaving the number to three as a result of failing to schedule meetings so that regular meetings could be scheduled to elect directors; the audit, which has the creation of the audit documents as well as the audit performed by the same firm; and the failure to conduct a valuation of [a] Mercedes [vehicle owned by Richard Nowak that was] used as collateral, and the issuance of a stock grant without the valuation." The court further stated: "The testimony of . . . Kremer indicates that his analysis clearly requires further disclosures to obtain an accurate picture, so to speak, of the operations and financial decisions of the board. . . . Richard Nowak was the sole person with information about the stock grant, its value, conditions terms and promises related to the options." (Footnote omitted.)

[10] We note that, in *Falco* v. *Institute of Living*, supra, 254 Conn. 322–23, our Supreme Court reversed the judgment of this court affirming the trial court's granting of a bill of discovery that sought to compel the disclosure of the name of a patient at the defendant psychiatric hospital, holding that the information sought was protected by the psychiatrist-patient privilege and that no exceptions applied. In determining that the plaintiff in that case had failed to overcome the statutory privilege, the court also referred to the fact that the plaintiff in that action "merely stated in the bill of discovery that '[t]here [were] no other adequate means [of] securing the information conveniently, effectively and completely,' " and failed to present any evi-

dence showing the absence of alternative means of discovering the requested information. Id., 332. It agreed with a dissent by Judge Schaller to this court's opinion in which he rejected the contention that the failure to provide the most convenient way to obtain information could deprive a plaintiff of his constitutional right to redress and to maintain an action. Id.; see also *Falco* v. *Institute of Living*, 50 Conn. App. 654, 669, 718 A.2d 1009 (1998) (*Schaller, J.*, dissenting), rev'd, 254 Conn. 321, 757 A.2d 571 (2000). We conclude that *Falco* is distinguishable from the present case. In *Falco*, the court specifically found that "the plaintiff employed the bill of discovery as a fast and easy alternative to diligent investigation," and made those statements in the context of rejecting the notion that the statutory privilege could be overcome by the mere assertion that the plaintiff had no other means of discovering the information sought. *Falco* v. *Institute of Living*, supra, 254 Conn. 332. In contrast, in the present case, the trial court made extensive findings concerning the plaintiff's unsuccessful efforts to obtain the requested documents, her lack of understanding concerning the operations and financial affairs of EES, the questionable financial transactions of EES as testified to by Kremer, as well as Kremer's testimony that the documents were needed in order to make a determination as to whether there has been any financial mismanagement of EES, and the control of EES exercised by Richard Nowak, whom, the court found, "was the sole person" with information about certain stock options that had been granted, their value, conditions, terms and any promises that were made related to the options.