CITY OF HARTFORD v. BRIAN MCKEEVER ET AL.
(AC 33027)

Gruendel, Sheldon and Schaller, Js.

Argued April 26—officially released November 27, 2012

(Appeal from Superior Court, judicial district of Hartford, Hon. Richard M. Rittenband, judge trial referee)

Catharine H. Freeman, assistant corporation counsel, for the appellant (plaintiff).

Christopher M. Reeves, for the appellee (named defendant).

Opinion

SHELDON, J. The plaintiff, the city of Hartford, appeals from the judgment rendered by the trial court in favor of the defendant Brian McKeever[1] awarding him $195,909 in damages on his counterclaim to recoup moneys overpaid by him to the plaintiff and other prior holders of two notes secured by mortgages on his property in Hartford. The plaintiff claims that the trial court erred in finding that the plaintiff, as the most recent assignee and current holder of the defendant's note, could be held liable to repay the defendant for sums he overpaid on the note, not only to itself but to other prior holders thereof.[2] We agree with the plaintiff and thus reverse the judgment of the trial court.

The following factual and procedural history is relevant to this appeal. In May, 1983, the defendant owned a building in Hartford, known as 206–208 Hamilton Street (property). The property contained multiple units that the defendant rented to tenants. On May 5, 1983, the defendant borrowed a total of $143,065 in two separate loans from the Community Development Corporation (corporation). In one loan transaction (loan one), the defendant and the corporation entered into a promissory note agreement with a principal amount of $28,879. In the other loan transaction (loan two), the defendant and the corporation entered into a promissory note agreement with a principal amount of $114,186. Each loan was secured by a separate mortgage on the property. At the time they entered into the loan agreements, the defendant and the corporation also entered into a separate agreement, entitled "Collateral Assignment of Leases and Rentals" (assignment of rents agreement), pursuant to which the corporation was empowered to collect rent directly from the defendant's tenants if he defaulted on his obligation to make payments on the notes.

Although the corporation immediately assigned its interest in the notes to Colonial Bank,[3] which later became State Street Bank & Trust Company of Connecticut (State Street Bank), the corporation continued to service the loans. In July, 2001, State Street Bank assigned loan two to the plaintiff for the sum of one dollar. By that time, the defendant had fully paid loan one, but the plaintiff determined that the defendant had defaulted on his payment obligations as to loan two. Accordingly, in 2003, the plaintiff brought an action against the defendant to foreclose on the property.

On April 21, 2003, the defendant filed a five count counterclaim against the plaintiff, claiming: (1) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42–110a et seq.; (2) violation of the Connecticut Creditors' Collection Practices Act, General Statutes (Rev. to 1993) § 36-243a; (3) breach of the implied covenant of good faith and fair

dealing; and (4) breach of a modification agreement previously agreed to by himself and the plaintiff. He also sought, in the fifth count, an accounting as to all payments that his tenants had made under the assignment of rents agreement.[4]

The plaintiff subsequently withdrew its foreclosure complaint, conceding that the defendant had overpaid loan two by $17,397.93. Accordingly, it offered to compensate him in that amount. The defendant, however, declined the plaintiff's offer, electing instead to proceed to trial on his counterclaim to recover what he claimed to have been an overpayment of $195,909 on loan two. The plaintiff filed an answer to the counterclaim,[5] denying its essential allegations, and pleaded as a special defense that CUTPA does not apply to municipalities.

After a five day trial, the court issued a memorandum of decision in which it concluded that the plaintiff was liable to the defendant for the total amount he claimed to have overpaid on loan two to the plaintiff and all other prior holders of the note. The court therefore awarded him damages of $195,909, albeit without specifying the count of the counterclaim under which it made that award. On October 7, 2011,[6] approximately eleven months after the court's November 9, 2010 decision, the plaintiff filed a motion for articulation, requesting for the first time that the court explain, inter alia, under which count of the counterclaim it had found in the defendant's favor. The court responded that, without having access to the court file, it was unable to identify the specific count of the counterclaim under which it had found in the defendant's favor. This appeal followed.

The plaintiff claims that the trial court erred in concluding that, as an assignee, it was liable for the defendant's overpayments, if any, to its assignor, State Street Bank, or to any other prior holders of the note. We agree.[7]

Because the claim challenges the trial court's conclusions of law, our review is plenary. See *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, 259 Conn. 592, 598, 790 A.2d 1178 (2002); *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 156, 757 A.2d 14 (2000); *Hunnicutt* v. *Commissioner of Correction*, 67 Conn. App. 65, 68, 787 A.2d 22 (2001).

In setting forth the applicable legal standards, we acknowledge that there is a split of authority among our trial courts regarding an assignee's liability for affirmative claims against the assignor based upon the assignor's conduct prior to the assignment. Some of our trial courts have found that both defenses and counterclaims can be asserted against the assignee on the basis of the assignor's conduct prior to the assignment. See, e.g., *GMAC Mortgage, LLC* v. *Tornheim*, Superior Court, judicial district of New London, Docket No. CV-

09-6001296-S (October 6, 2011); *Deutsche Bank National Trust Co.* v. *Lobaton*, Superior Court, judicial district of New London, Docket No. CV-09-5009907-S (May 5, 2010); *U.S. Bank National Assn.* v. *Garces*, Superior Court, judicial district of New London, Docket No. CV-07-5004536-S (July 17, 2008); *U.S. Bank National Assn.* v. *Reynoso*, Superior Court, judicial district of New London, Docket No. CV-07-5004312-S (July 17, 2008). Other trial courts have found that to be liable for the assignor's preassignment conduct, the assignee must have expressly assumed liability for such conduct. See, e.g., *OneWest Bank, F.S.B.* v. *Reinoso*, Superior Court, judicial district of Fairfield, Docket No. CV-10-6006307-S (May 10, 2012); *IndyMac Bank, F.S.B.* v. *Khan*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5016789-S (April 16, 2010); *Fremont Investment & Loan* v. *Santiago*, Superior Court, judicial district of New London, Docket No. CV-06-5001151-S (January 13, 2010); *Deutsche Bank* v. *Gregory-Boutot*, Superior Court, judicial district of Windham, Docket No. CV-08-5003138-S (July 15, 2009); *WM Specialty Mortgage, LLC* v. *Brandt*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5001157-S (February 10, 2009); *Deutsche Bank National Trust Co.* v. *Ganci*, Superior Court, judicial district of Hartford, Docket No. CV-05-4017440-S (April 5, 2006); *SCP Corp.* v. *BankBoston*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X01-CV-98-0116198-S (March 18, 1999). For the following reasons, we adopt the latter conclusion.

"An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." 3 Restatement (Second), Contracts § 317, pp. 14–15 (1981). Although the general rule is that "[t]he plaintiff, as assignee of the mortgage, [stands] in the shoes of his assignor, *with the same rights*;" (emphasis added; internal quotation marks omitted) *Reynolds* v. *Ramos*, 188 Conn. 316, 320 n.5, 449 A.2d 182 (1982); "unless there has been an express assumption of liability, the assignee is not liable to the debtor for liabilities incurred by the assignor in connection with the subject matter of the assignment." 6A C.J.S. 512, Assignments § 117 (2004). As such, "[i]n the absence of an express contract provision, an assignee generally does not assume the original responsibilities of the assignor, but he or she may be liable for breach of the terms of the assignment or for his or her failure to perform obligations of the assignor which he or she has *assumed*." (Emphasis added.) Id., § 115, p. 511.

However, the "[defendant] may set off any valid claim he or she may have against the [assignor], such as a payment made before the assignment, the rule in this respect being that the assignee takes the mortgage sub-

ject to the state of accounts between the [defendant] and the [assignor] as at the time of the assignment."[8] 59 C.J.S. 470–71, Mortgages § 438 (2009). Therefore, "an assignee of a contract takes it subject to all *defenses* which might have been asserted against the assignor"; (emphasis added) *Fairfield Credit Corp.* v. *Donnelly*, 158 Conn. 543, 548, 264 A.2d 547 (1969); but does not take it subject to *affirmative claims* against the assignor arising from the assignor's prior conduct without express assumption of such liability by the assignee. If, then, in defense of a foreclosure action brought against him by an assignee of his note and mortgage, the mortgagor defends on the basis that the value of the note at the time of the assignment was less than that claimed by the assignee, the mortgagor may be entitled to a setoff on the ground that the assignee took the note subject to the state of accounts between the assignor and the mortgagor at the time of the assignment. If, on the other hand, the mortgagor responds to the foreclosure action by filing a counterclaim based upon his alleged overpayment of the loan prior to the assignment, the mortgagor must bring a separate claim against the assignor to recover the alleged overpayment unless the assignee has assumed liability for the assignor's preassignment conduct.[9] The assignee, however, is always liable for the mortgagor's overpayment to it.

In the present case, the original agreement between the defendant and the corporation did not include a provision establishing the corporation's liability for an overpayment by the defendant on the note. Moreover, the assignment agreement between the plaintiff and State Street Bank did not include a provision under which the plaintiff assumed liability for the prior conduct of State Street Bank or any other prior holders of the note. As such, neither the assignment nor the original agreement encumbered the plaintiff, as assignee of the note, with liability for State Street Bank's or any other holder's preassignment conduct. The plaintiff, as assignee of the note, had no greater or lesser rights thereunder than those of State Street Bank at the time of the assignment. We thus conclude that the plaintiff could have been found liable only for any overpayment by the defendant that occurred after it took assignment of the note.[10]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion SCHALLER, J., concurred.

[1] Webster Bank, Helene Fishman, Trustee, and Metropolitan District were also named as defendants but are not parties to this appeal. We refer in this opinion to Brian McKeever as the defendant.

[2] The plaintiff also claims that the trial court erred in failing to articulate the precise legal basis upon which it made its award of damages under the counterclaim. On October 25, 2011, the court, while granting the plaintiff's motion for articulation, noted that it could not "determine at th[at] time [on] which of the five counts [the defendant] prevailed." Although the court granted the motion for articulation, its inability to respond to the plaintiff's articulation request was the functional equivalent of a denial of the motion.

Like a formal denial, the effect of the court's articulation, in which it was unable to explain its decision further, was to foreclose the possibility of meaningful appellate review on the issue unless the plaintiff filed a motion for review. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 480, 706 A.2d 960 (1998).

"Our rules of practice provide a procedure for appellants seeking an articulation from the trial court as to the factual and legal bases for its decisions. Practice Book § 66-5. If the trial judge denies the motion for articulation, the appellant has a remedy by way of motion for review, which may be filed with this court pursuant to Practice Book § 66-7." *Brycki* v. *Brycki*, 91 Conn. App. 579, 593, 881 A.2d 1056 (2005). The plaintiff should have filed a motion for review pursuant to Practice Book § 66-7 when the trial court issued its incomplete articulation. It failed to do so, and, accordingly, we are unable to review the claim.

The plaintiff also claims that the court unreasonably exercised its equitable powers by relying on the defendant's testimony as to the total amount of his overpayment. The plaintiff did not object to or move to preclude the defendant's testimony as to the amount of his overpayment on the basis of his incompetence to so testify. Instead, it sought to attack his credibility on the ground that he was not familiar with generally accepted accounting principles. Although presented as a claim that the court exercised its equitable powers in an unreasonable manner, the plaintiff's claim instead is an attack on the court's credibility determinations. "The credibility of the witnesses and the weight to be accorded to their testimony is for the trier of fact. . . . [An appellate] court does not try issues of fact or pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Wasniewski* v. *Quick & Reilly, Inc.*, 292 Conn. 98, 103, 971 A.2d 8 (2009). We thus conclude that the court did not abuse its discretion in crediting the testimony of the defendant, who relied on properly admitted evidence, Exhibit YY in particular, to establish the total amount of his overpayment.

[3] The court found that "Colonial Bank was acting [in its capacity] as trustee for the [plaintiff] so [the plaintiff] was involved from the beginning." We take issue, however, with other findings set forth in the dissent. The dissent examines the deed of restrictive covenants and makes findings as to the purposes of that deed and the information provided therein. Although the deed was admitted into evidence, the findings as to the contents of the deed to which the dissent refers do not appear in the memorandum of decision issued by the trial court. Similarly, the dissent refers to the testimony of Arthur Greenblatt, the principal of the corporation, "that those funds never were furnished to the corporation, nor did the corporation ever lend it any of its own money." The trial court does not cite to this portion of Greenblatt's testimony and we are thus unable to infer that the court credited it or considered it in any way. The trial court also did not reference Greenblatt's testimony that everyone involved in the transactions at issue knew from the beginning that the corporation was never going to use its own money. The only reference by the trial court to Greenblatt's testimony was to the claimed amount of overpayments and his "arrogantly dismissive" attitude. The court further found that Greenblatt's lack of knowledge regarding the corporation's accounting systems "seriously damage[d] the plaintiff's credibility."

[4] The assignment of rents agreement was assignable pursuant to the following provision: "This Assignment shall be binding on the [defendant], and [his] heirs, executors, administrators, successors and assigns and shall inure to the benefit of [the corporation], its successors and assigns."

[5] After trial, the plaintiff attempted to file an amended answer and special defenses, but it was never filed in the court record. Upon learning that the attempted filing was unsuccessful, the plaintiff filed a motion for rectification of the record. The court denied the motion. As a result of this denial, we note that the operative pleading in the record before us is the plaintiff's original answer and special defense.

[6] The motion for articulation was originally filed, in error, with the Superior Court on February 1, 2011.

[7] The dissent suggests that the plaintiff, as an assignee, may be held liable to the defendant for the overcollection of rents from the defendant's tenants by its assignors, because the plaintiff allegedly admitted that all such rents were collected on its behalf by a third party. From that putative admission, the dissent concludes that "there existed no meaningful distinction between the plaintiff and the assignor, its trustee." As the dissent acknowledges, however, the trial court made no finding as to the making or significance of the alleged admission and based no legal conclusion upon it. It is thus not within our power to consider the factual and legal ramifications of the

admission on the issues before us, for "[t]he fact-finding function is vested in the trial court . . . . Appellate review . . . is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court." *Kaplan* v. *Kaplan*, 186 Conn. 387, 391, 441 A.2d 629 (1982). "This court cannot find facts or draw conclusions of fact from primary facts found, but can only review such findings to determine whether they could legally, logically and reasonably be found thereby establishing that the trial court could reasonably conclude as it did. . . . [T]his court must focus on the conclusion of the trial court, as well as the path by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citations omitted.) *Zolan*, *Bernstein*, *Dworken & Klein* v. *Milone*, 1 Conn. App. 43, 47, 467 A.2d 938 (1983). Here, then, where the trial court expressly referred to the plaintiff as the assignee and to State Street Bank and its predecessors in title as the assignors of the subject notes and mortgages—without making any of the findings proposed by the dissent as to the supposed unity of interest between them—we cannot join the dissent in concluding that there was no distinction between the plaintiff, as assignee, and its assignor, or that the transfer of the notes and mortgages between them should be treated as something other than an assignment.

[8] Although our Supreme Court has recognized that the Uniform Commercial Code, General Statutes § 42a-1-101 et seq., is formally limited to transactions involving personal property, it has determined that the code may furnish a guide for the law governing real property mortgages. See *Olean* v. *Treglia*, 190 Conn. 756, 762, 463 A.2d 242 (1983). As such, we look to General Statutes § 42a-3-305, entitled "Defenses and claims in recoupment," for guidance. That section provides in relevant part: "(a) [T]he right to enforce the obligation of a party to pay an instrument is subject to . . . (3) [a] claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought." General Statutes § 42a-3-305. This language, as applied to the present case, supports the proposition that the mortgagor may only file a claim against the assignor for any alleged misconduct prior to the assignment. The mortgagor may, however, receive a setoff from the assignee for any sums already paid to the assignor on the ground that the assignee takes the note subject to the state of accounts between the assignor and the mortgagor at the time of the assignment.

[9] Notwithstanding the dissent's acknowledgment that this case presents an issue on which our trial courts have been split, it nevertheless suggests that the issue has been decided in Connecticut by citing to and construing language employed by our Supreme Court in *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, 123 Conn. 616, 197 A. 766 (1938), as permitting a right to raise all equitable claims against an assignee. The language in *Hartford-Connecticut Trust Co.*, upon which the dissent relies, is as follows: "While not affected by defenses arising after the assignment, normally the assignee of a chose in action takes subject to all equities and defenses which could have been set up against the chose in the hands of the assignor at the time of the assignment." Id., 626–27. Based upon that language, the dissent suggests that the term "all equities" encompasses all equitable claims that the payor may have had against the assignor of the chose in action, specifically including counterclaims for affirmative relief. In so doing, the dissent ignores the context in which that language was used by the Supreme Court. First, the language narrowly preserves the right to assert equities "which could have been set up against the chose in the hands of the assignor at the time of the assignment," not all equitable claims which the payor may then have had against the assignor. The equities in question must therefore have been of the sort that could be asserted to defeat or limit the assignor's right of action or right of recovery under the chose itself, not other equitable claims of any kind or description. Second, the quoted language traces its origins to the earlier case of *Mechanics Bank* v. *Johnson*, 104 Conn. 696, 134 A. 231 (1926), in which our Supreme Court gave examples of such equities consistent with the above-referenced limitation, including "proof of agency, estoppel, or the like . . . ." Id., 700. In light of those examples, which are generally raised by way of defense to a claim, the relevant language, as later cited in *Hartford-Connecticut Trust Co.*, must be construed to preserve the right to raise equities that affect, defeat or limit the claim made by the assignee under the assigned chose in action, not as a generic invitation to the mortgagor to raise and assert other equitable claims it once had against the assignor against the assignee.

[10] In so concluding, we note that the court did not make a determination

as to the value of the promissory note at the time that State Street Bank assigned it to the plaintiff. As such, setoff may be warranted.

In addition, we note that this opinion does not address the issue of whether the debtor would have a right of action against the assignee for the assignor's prior misconduct if the assignee had knowledge thereof prior to the assignment.