FBTCV225047781S : CONNECTICUT SUPERIOR COURT

HENRY BERRY : JUDICIAL DISTRICT OF FAIRFIELD

VS. : AT BRIDGEPORT

BLACK ROCK GARDENS, LLC : June 7, 2024

MEMORANDUM OF DECISION re: APPLICATION FOR PREJUDGMENT REMEDY (#124.00)

Background

This is a dispute with an extended history, and the history includes other pending matters between the parties.

Borrowing extensively from a decision on a motion to strike, this is part of an ongoing tenant-landlord dispute. The self-represented plaintiff, a tenant, has sued two entities and two individuals claimed to be involved in the landlord-aspect of a landlord-tenant relationship. (All claims against Fredric Beitman have been stricken, such that any reference to the defendants in a collective sense does not include him.)

Separately, there is a summary process action brought against the plaintiff by defendant Black Rock Gardens (BPHCV236013617S) – which recently went to judgment in favor of the defendant landlord. The plaintiff also has started a separate action directed to the named defendant, claiming abuse of process (FBTCV235053144S). Also pending is a separate action against all of the defendants initially in this action, alleging elder abuse (FBTCV235053388S). As discussed during testimony, the plaintiff had started a small claims matter in 2021 (*Berry v. Hub Realty*

124.10

6/7/24: JDNO sent. Notice to RJD. Mailed to self-represented party Henry Berry. 293 Ellsworth St. 8D, Bridgeport, CT 06605. Jean Jean Asst. Clerk

Associates, BPHCV215004577S).[1] Finally, for the sake of completeness, also pending is an administrative appeal filed by the plaintiff arising from a CHRO complaint filed by the plaintiff and dismissed by the Commission (*Berry v. CHRO*, FBTCV245053777S), seemingly overlapping at least to some degree the factual claims in the elder abuse action.

There have been two motions to strike that have been filed. There have been two revised complaints (each in response to a request to revise); there also had been an amended complaint and a substitute complaint filed prior to the second motion to strike. After the second motion to strike was granted in part, yet another substitute complaint (#143.00 and #144.00) was filed, and that appears to be the operative complaint.

The plaintiff had filed an application for a prejudgment remedy in 2023 and the defendants filed their objection and request for a hearing (#148.00); proceedings on the PJR application had been held in abeyance, pending the outcome of the second motion to strike. After the motion to strike was granted in part, the plaintiff pursued his request for a prejudgment remedy. Evidentiary hearings were conducted on a number of days; the court heard final arguments on the application on June 4, 2024, the parties waiving the filing of briefs.

In granting the motion to strike as to the then-operative complaint, this court effectively had removed from the case all claims directed to defendant Fredric Beitman,[2] the first CUTPA count, the claim for intentional infliction of emotional

---

[1] As reflected by the docket number, the matter was filed as a Housing Small Claims matter (Major-Minor code H-13); it was dismissed because the claim had been directed to the manager of the property rather than the owner/landlord.

[2] While perhaps not of legal significance at this stage of the proceedings, the court notes that there was no appreciable if any mention of any involvement of Fredric Beitman in any of the events described during the course of evidentiary hearings.

distress, and all contractually-related claims other than directed to defendant Black Rock (the party with whom the plaintiff had a contractual relationship – as tenant).

As set forth in the complaint filed after the granting of the motion to strike (#143.00), there remain a number of pending claims. The current first count asserts a CUTPA violation, based on a lengthy list of claimed events (spanning approximately 1 ½ pages), characterized as unfair practices. That is followed by a claim of negligent infliction of emotional distress; a claim of breach of contract based on improper entry to the plaintiff's apartment; a claimed breach of an implied contractual provision relating to quiet enjoyment of his apartment; and finally, a claimed breach of General Statutes § 52-570d relating to improper recording of telephone communications.

Legal principles

The plaintiff's claim for a prejudgment remedy implicates the statutory procedure set forth in Chapter 903A of the General Statutes. It is a statutory procedure, and it requires the applicant to establish a likelihood of success to a probable-cause standard, taking into account defenses and setoffs (which have been alleged); see, General Statutes § 52-278d(a)(1).

> "In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. We are further cautioned by the fact that the trial court in a hearing on an application for a prejudgment remedy need only make a finding of probable cause, as opposed to a more heightened standard that may prevail during the trial of the cause of action....
>
> "The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the

> circumstances, in entertaining it.... Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false.... The hearing in probable cause for the issuance of a prejudgment remedy is not contemplated to be a full scale trial on the merits of the plaintiff's claim. The plaintiff does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim.... The court's role in such a hearing is to determine probable success by weighing probabilities .... In this process the trial court is vested with broad discretion...." *Canty v. Otto*, 304 Conn. 546, 565-66 (2012) ((internal quotation marks and citations, omitted).

Discussion

As noted earlier, the CUTPA count contains approximately 1 ½ pages of assertions of wrongful conduct, the overwhelming majority of evidence presented – if not the entirety of evidence presented – related to the events occurring in the summer of 2021. The focus was on an initial claimed leak from the plaintiff's apartment into the apartment below (causing damage), followed by another claimed leak a number of weeks later, again into the apartment below (and again causing damage). Somewhat related is that in the same period of time, apparently around the time of the discovery of the second leak, the plaintiff had started a small claims action against the defendants, which in turn was the subject of at least some of the evidence presented.

More specifically, in early July 2021, maintenance people, implicitly employees of defendant Hub (as the manager of the complex), attempted to enter the plaintiff's apartment, and then on two occasions did enter the plaintiff's apartment. The claimed need for entry was a reported leak in the apartment below. According to the plaintiff,

on at least one of the occasions, entry occurred without any level of consent by the plaintiff.

The plaintiff contends that there was no need or emergency warranting entry of workers into his apartment. He commenced the small claims action in July 2021 with an answer date in August. He claims that when he refused a request from Mr. Beitman to withdraw the small claims action, in something of a retaliatory fashion, the plaintiff claims that there was a claimed second episode of leaking water into the unit below requiring further checking for leaks.

The applicable burden of proof for purposes of a prejudgment remedy requires recognition of the potential existence of a situation in which a burden of proof for one level may have been achieved but not another. On rare occasions, as a means of emphasizing the definitiveness of proof, the court may comment that a party has not only met the applicable burden of proof but has actually met the next higher burden of proof. Conversely, particularly when there is an enhanced burden of proof such as clear and convincing evidence, the court might note that a party did or plausibly did satisfy a preponderance of the evidence standard, but did not achieve the higher level of proof required for a clear and convincing standard. Accordingly, a determination that the plaintiff may have satisfied a probable-cause standard is not reflective of the likelihood of eventual satisfaction of a higher – required – standard of preponderance of the evidence when the case is tried on the merits.

With a benchmark of probable cause, the court must distinguish between a level of proof that might not satisfy an ordinary preponderance of the evidence standard, but that despite a failure to establish that a fact was more likely true than not true (with the possible corresponding implication that it is more likely not true than true), it still could suffice for a probable cause standard. In somewhat oversimplified terms, the court must entertain the existence of situations where the court does not

actually believe something to have been proven to be true based on the evidence presented, but nonetheless must deem a probable cause standard to have been satisfied.

As a specific example relating to subordinate facts, the court can determine that, at least in general terms, the plaintiff has established probable cause relating to the nature of his interaction(s) with workers seeking entry based on a claimed emergency need to look for leaks. His assertions relating to their insistence, and apparent intent to override any resistance, is sufficiently plausible and weighty, to be credited for this purpose. Similarly, that the plaintiff did not observe any visible leaks within his apartment, and that at least on initial visits the workers did not seem to find any visible leaks (or sources of leaks), is sufficiently plausible and weighty, to be credited for this purpose. An essential element of his claims, however, is that there were no actual leaks on either occasion, such that entries into his apartment for purposes of finding a leak, were purely pretextual, and that more critical finding was not established by the plaintiff even to the reduced standard of probable cause.

To the contrary, the evidence submitted by the defendants was sufficient to negate probable cause of the claimed absence of a basis for a need for entry into the apartment. The eventually-discovered leaks were not open and apparent, such that it would not be surprising if they were not discovered on an initial examination of conditions in the plaintiff's apartment. While it is certainly theoretically possible that the defendants intentionally concocted claims of two hard-to-find sources of water leakage, the supporting level of detail that would have been required to make the claims plausible – with actual additional evidence presented to the court -- makes that pretextual quality highly unlikely to the point of precluding even probable cause.

The plaintiff effectively is claiming the equivalent of a Potemkin Village – that the defendants created an elaborate façade to hide the actual unfavorable reality, a

reality of nothing of substance. According to the plaintiff, the defendants created a false complaint of water leakage (and resulting damage) by the tenant below, including at least one email (offered into evidence) where the downstairs tenant is claiming that the conditions are intolerable. To further bolster the illusion, the defendants are claimed either to have fabricated photographs (or used photographs from other places) supposedly to document the existence of damage. (There is a third even more extreme possibility -- that they created false damage which then was photographed.)[3] All of this is claimed to have been intended to provide some level of justification for harassment of the plaintiff.

During argument, there was a discussion of the plaintiff's desire to see the interior of the unit below, via a request to the defendants to arrange such a visit/examination. The court could not help but note the level of incongruence between the plaintiff's resistance to having workers enter his apartment -- an intrusion on his rights to enjoy the sanctity of his home – while asking the landlord/management to persuade another tenant (the tenant below) to allow a non-employee (the plaintiff) to be allowed into the downstairs apartment to confirm the existence of damage. When asked about his failure to ask the tenant directly for permission to view the damage, the plaintiff's not-unreasonable response was that he was concerned that if he approached the downstairs tenant(s) directly, that might be perceived as harassment of that neighbor.

However reasonable that explanation might be, the defendants would have no way of knowing, with any degree of confidence, that that would be the plaintiff's position with respect to contacting the downstairs tenant(s) directly – which would be critical to perpetuating an illusion of a leak if there were no actual leak. Further, there

[3] There also was testimony as to a video that had been recorded, but it was never offered into evidence or shown to the court – the plaintiff characterized the video as a fake.

always would be the possibility of an unplanned encounter in a common area of the premises. Therefore, if the defendants were perpetrating a scheme based on a fictitious leak, the tenants would seem to be required to be participants (if passive).

The above discussion primarily addresses the first entries into the plaintiff's apartment, in early July – but there was a second round of claimed searches for a leak in early August. By that time, the defendants were on notice that the plaintiff intended to pursue legal relief (he having started the small claims matter by that time) – and the plaintiff has asserted that the second-leak scenario was in retaliation for his refusal to withdraw the small claims action.[4] Therefore, not only would the tenant(s) below have to be complicit in the fabricated story of now a second leak, but with court proceedings likely, there would have had to have been a willingness to testify falsely in court, under oath, as the plaintiff could have requested issuance of a subpoena for any resulting court proceeding.

Fast-forwarding to the past few months, the plaintiff also is asserting, at least inferentially, that all of the witnesses testifying on behalf of the defendants have perjured themselves to the extent that they have supported the existence of complaints from the downstairs tenant(s) relating to leaks, and the existence and repairs of such leaks.

During argument, the court inquired of the plaintiff as to whether he was relying solely on his disbelief of the defendants and their witnesses. The court recognized and recognizes the often-difficult burden of establishing a negative, but here there is substantial evidence and testimony of an affirmative nature.

---

[4] The court's recollection is that there was evidence that the second leak was known/claimed to have existed at the time of the phone call during which Mr. Beitman had asked the plaintiff to withdraw the small claims action.

Arguably, the seemingly undisputed absence of visible leakage based on an examination of the plaintiff's apartment might be deemed some evidence of the absence of a leak. The court does not recall any testimony from the plaintiff concerning any examination of the sill on which the air conditioner had been situated, the source of the initial identified leak; the court does not recall any testimony that the entire window area was seamlessly intact such that condensation from the air conditioner could not have entered the area behind a wall and dripped down into the unit below. Rather, the plaintiff relied on the non-continuous nature of the presence of the air conditioning unit (intermittent based on weather), and his perception of the unlikelihood of water taking a path leading from a window above to a somewhat interior location below.

With respect to the second leak, the plaintiff seems to rely on his sense of implausibility that the wax ring – serving as something of an oversized gasket between the toilet and the pipes – could have caused a leak that was not visible from within his apartment. The plaintiff did not claim any expertise or even familiarity with the plumbing for a toilet, such that the "concealed" location of the wax ring would make it unlikely that leakage due to a deteriorated wax ring would result in water visible from above.

Returning to the low burden of proof associated with probable cause and its application – a still lower burden of proof exists in connection with resisting a motion for summary judgment. In connection with summary judgment, the question is whether there is evidence sufficient to create a material issue of fact. In effect, the standard is evidence which if believed and without consideration of contrary evidence, might be sufficient to allow judgment in favor of the non-moving party (assuming, as a starting point, that the moving party has established, at least on a

prima facie basis, entitlement to judgment because of a facial absence of any material issue of fact).

Summary judgment requires some level of transposition to be an analogy or frame of reference; the equivalent of a summary judgment standard focusing solely on the plaintiff's evidence would be the directed-verdict standard (jury) or motion to dismiss for failure to make out a prima facie case (*Practice Book* § 15-8). The court need not determine in any direct sense whether the plaintiff's evidence would or would not be sufficient to avoid disposition on either of these bases, if this had been a hearing on the merits of the case; the mere existence of any level of uncertainty as to whether the evidence would suffice to survive either a motion for directed verdict or motion to dismiss for failure to make out a prima facie case essentially establishes the minimal level of probative evidence for purposes of establishing the affirmative of plaintiff's claims. Probative evidence hovering in the area of the absolute minimum to survive summary disposition in some fashion (again, if this were a hearing on the merits) does not satisfy the somewhat higher – if still modest/limited – burden of proof for a prejudgment remedy, i.e., probable cause.

To be clear: based on the evidence presented relating to the entries into the plaintiff's apartment based on claimed need to check for leaks, the plaintiff has not established probable cause for the contention that those entries were not for legitimate reasons and were not of an emergency nature. The direct claims of fabrication and the associated claims such as deprivation of his right to enjoy his apartment, all have not been proven to the requisite standard of probable cause.

Necessarily, there was insufficient evidence of malice as a motivation, given the presence of reasonable cause for the entries and a failure to establish probable cause of an absence of reasonable cause to believe that there was an emergency. The plaintiff does not appear to contest the proposition that <u>if</u> there were actual leaks

from above into the apartment below, it was an emergency-type situation and it would have been reasonable to inspect the plaintiff's premises as a possible if not likely source of such a leak. He rejects the premise of that statement.

With respect to the other claims of wrongful conduct, with a focus on the CUTPA claim asserted in the first count of the operative complaint, the court addressed, during argument, the need for evidence of an ascertainable loss. The court discussed that concept extensively in its decision on the second motion to strike, and will reproduce that discussion as a starting point:

> "An element of a CUTPA claim that is challenged with modest frequency (but seemingly with relative rarity, successfully), is the requirement that there be an ascertainable loss.
>
> > '[T]o be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. ... CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss ... as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. ... Rather ... [d]amage ... is only a species of loss ... hence [t]he term loss necessarily encompasses a broader meaning than the term damage. ... Accordingly ... for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. ... [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. ... Under CUTPA, there is no need to allege or prove the amount of the actual loss. Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of [its] CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim ....' (Internal quotation marks and citation, omitted.) *Pointe Residential Builders BH, LLC v. TMP Construction Group, LLC*, 213 Conn. App. 445, 278 A.3d 505, 459 (2022).

"Claims of emotional distress and other intangible losses are outside the scope of ascertainable losses.

> 'As to the plaintiff's contention that his emotional harm can fulfill the ascertainable loss requirement, we have explicitly held that a "claim of emotional distress does not constitute an ascertainable loss of money or property for purposes of CUTPA.' *Di Teresi* v. *Stamford Health System, Inc.*, 149 Conn. App. 502, 512, 88 A.3d 1280 (2014). We need go no further. For the reasons set forth previously, we agree with the trial court that the plaintiff failed to allege and demonstrate an ascertainable loss, and, accordingly, it properly rendered summary judgment as to count seventeen.'" *Parnoff v. Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 183, 204 A.3d 717, 736 (2019).

"Footnote 17 in *Parnoff* – at the end of the quoted passage above – observed that the failure to allege or establish an ascertainable loss obviated the need to determine whether there had been any unfair practice:

> "'We need not reach the issue of whether there was a genuine issue of material fact as to whether the defendants conduct constituted an unfair or deceptive practice because we have determined that the plaintiff failed to allege and demonstrate an ascertainable loss.'"[5]

In connection with a motion to strike – testing the legal sufficiency of the allegations and giving the non-moving party the benefit or all reasonable inferences from the allegations actually asserted – the court concluded that assertions relating to the rental value apartment being less than had been represented, etc., were capable of interpretation as asserting an ascertainable loss. That was a matter of sufficiency of allegations. If the plaintiff seeks a prejudgment remedy based on such

---

[5] *Berry v. Black Rock Gardens, LLC*, Docket No. FBTCV225047781S, 2023 Conn. Super. LEXIS 3248, at *19-21, 2023 WL 8741006, at *7 (Super. Dec. 12, 2023).

claims, however, there must be evidence of such a disparity; as set forth in the last portion of the passage quoted from the motion to strike, in connection with an evidentiary phase of the proceedings, there must be evidence that demonstrates the existence of an ascertainable loss. The court does not recall any evidence, and certainly does not recall any credible evidence, that demonstrated any disparity between what the plaintiff claims he had been led to believe he would receive in terms of quality of his apartment and what he actually received, etc. Most directly, the plaintiff claims that the defendants:

> "Advertis[ed] the plaintiffs apartment as a luxury apartment and charging commensurate rent when bathroom walls of the apartment have been unpainted for years, water spots run down the walls of the bedroom, there is water damage to the floor by the bedroom windows, and there is a crack in the wall above one of the bedroom windows...."

There was no credible evidence as to any aspect of this claim and especially impact on value.[6] There was no credible evidence as to any "ascertainable loss" quality to the claimed lawsuits relating to a refusal to renew a lease.

This is on top of the lack of credible evidence relating to any wrongfulness of the conduct described in ¶ 6 of the operative complaint -- again, approximately 1 ½ pages in length, with specific focus on wrongfulness as coming within the scope of the so-called cigarette rule.

The Connecticut Supreme Court recently reaffirmed the continuing vitality of the cigarette rule in Connecticut, notwithstanding changes at the Federal level. "We take this opportunity to clarify that, until such time as the legislature chooses to enact

[6] The plaintiff testified about a water stain on a wall in his apartment, but not in the context of a claimed impact on the value of his rental unit; it was part of a discussion with a worker as to whether the stain might be indicative of the initial leak of concern to maintenance personnel.

a different standard, the cigarette rule remains the operative standard for unfair trade practice claims under CUTPA." *Kent Literary Club of Wesleyan Univ. at Middletown v. Wesleyan Univ.*, 338 Conn. 189, 231–32, 257 A.3d 874, 899 (2021).

In the next paragraph in that decision, the Court quoted the rule:

> "[I]n determining whether a practice violates CUTPA we have adopted the criteria [previously] set [forth] in the cigarette rule by the [FTC] for determining when a practice is unfair: (1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]." ((Internal quotation marks and citation, omitted.)

Absent competent and credible evidence as to the events themselves (even to the modest probable-cause standard), it is impossible for there to have been proof that the (unproven) conduct violated the cigarette rule.

To the extent that the plaintiff alludes to retaliatory litigation, there were two possible actions. First in time would be the filing of a counterclaim to the plaintiff's small claims action, wherein the defendants sought reimbursement for costs associated with the first discovered leak, which was ascribed to the defendant's unauthorized (prohibited) installation of a window air conditioner. There was no evidence or possible inference of an ascertainable loss, particularly since the plaintiff already had commenced the litigation such that there were no apparent incremental costs that might be associated with defending the counterclaim. To the extent that the plaintiff relies on a perceived retaliatory motive, the fact that a party did not take the initiative to commence litigation but pursued a claim in the form of a counterclaim

is not, inherently, an impermissible form of "retaliation" but rather often if not usually is a reflection of a lack of interest or priority for pursuing litigation for the claim but perceived to be a low effort means of advancing the claim on the merits once litigation is commenced. Given the court's perception that there had been proof of damage caused by leaks emanating from the plaintiff's apartment – with the first leak reasonably perceived to be fault-related given the determined origin to have been the improper installation of an air conditioning unit – there was no credible evidence of a cigarette rule violation, and especially not to the requisite probable-cause level.

The second litigation was the eviction action – that went to judgment on the merits, against the plaintiff, such that there is ample evidence of a reasonable basis for the proceeding and a corresponding absence of probable cause that the litigation was improper or actionable – particularly in a CUTPA framework.

The court has focused on the CUTPA count both because it is the first count and because it encompasses some/most of the conduct the plaintiff claims to have been wrongful in other counts.

The second count asserts negligent infliction of emotional distress. The specific conduct alleged in ¶ 5 is:

> "The defendants individually, jointly, and/or collectively inflicted negligent emotional stress to the plaintiff in one or more of the following ways: (a) creating extreme, immediate, and lasting emotional and psychological stress by interfering with and/or allowing interference with the plaintiff's right of circumstances of normal occupation of his rented apartment; (b) creating extreme, immediate, and lasting emotional and psychological stress by allowing and/or enabling threats against the plaintiff's physical safety with such objects as a rounded metal bar about a yard long and packages placed on stairs, an ax placed in a window of a downstairs tenant in the same apartment building as the plaintiff

where the plaintiff would encounter it, and a utility truck driven by a tenant suddenly and surprisingly moving fast aimed right at the plaintiff so as to endanger him; repeated hostile and aggressive entry into the plaintiff's apartment by employees and/or agents of the defendants; repeated fraudulent entry into the apartment by defendants' employees and/or agents by fraudulently stating they were looking for and/or working on a leak."

The claims related to his right to an undisturbed enjoyment of his apartment and the claims of impropriety of entries into his apartment have been addressed, and the court's conclusions as to lack of adequate (if any) proof applies. As to the remaining allegations, there was again no credible if any evidence as to the identified occurrences and no indication of explanation as to how the landlord might have responsibility for the conditions and the possible impact on the plaintiff. (Aside from lack of evidence, it is not clear how the landlord might conceivably be liable if "a utility truck driven by a tenant suddenly and surprisingly moving fast aimed right at the plaintiff so as to endanger him.")

The third count asserts a breach of contract, and is explicitly directed to claims of improper entries to the plaintiff's apartment. The court already has concluded that there was more than ample evidence of good cause for the claimed need for emergency entries to the plaintiff's apartment, and a corresponding lack of evidence satisfying a probable cause standard that the entries were improper. That the plaintiff may have taken exception to the attitude/demeanor of the workers does not appear to be probative with respect to the reason (validity of the reason) that they were there in the first place. The non-obvious source of the leak, addressed earlier, again does not undercut the validity of the reason for the entries – while the water damage, below, could have come from a source other than the plaintiff's apartment, that would not impact the emergency need for investigation or that the plaintiff's apartment was the logical/"obvious" starting point for such an investigation.

The next count asserts a breach of the implied contractual provision (or covenant) of quiet enjoyment. The court's recollection is that during the course of argument, the court noted that the plaintiff's conception of quiet enjoyment might be based on a colloquial use of such a term, whereas the legal concept was somewhat more formal and substantial. To the extent that the plaintiff is relying upon a claimed right to not be disturbed in his occupancy of the apartment, that is not within the scope of the implied covenant (contractual provision) of quiet enjoyment.

As a preliminary matter, any implied provision arising from a contract would be subordinate to an explicit provision, and the agreement in question allowed for entry onto the premises by the landlord or its representatives, in cases of emergency. The court has repeatedly identified in this case the substantial evidence of an emergency warranting entry onto the premises of the plaintiff's apartment, without regard to his consent, and the court also has repeatedly noted the absence of sufficient evidence from the plaintiff establishing to a probable cause standard, the absence of an emergency.

On a more technical level:

> "The covenant of quiet enjoyment is that the grantee shall have legal quiet and peaceful business and is broken only by an entry on and an expulsion from the land or from actual disturbance of possession by virtue of some paramount title or right.... The covenant of quiet enjoyment is implied in every lease, unless expressly disclaimed. The [covenant of quiet enjoyment is] deemed to be independent [of the lease] so that breach of the landlord's promise does not suspend the obligation of the tenant under the lease to pay rent.
>
> "A party pleading breach of the covenant of quiet enjoyment is required to plead either actual or constructive eviction, A constructive eviction arises where a landlord, while not actually depriving the tenant of possession of any part of the premises leased, has done or suffered

some act by which the premises are rendered untenantable. Thus, the party must plead ... "that (1) the problem was caused by the landlord, (2) the tenant vacated the premises because of the problem, and (3) the tenant did not vacate until after giving the landlord reasonable time to correct the problem.

"At the outset, the defendant has failed to plead either an actual or constructive eviction and thus, fails to meet the threshold requirement to claiming a breach of the covenant of quiet enjoyment. Moreover, although the defendant has successfully shown that the plaintiff did not repair or replace the roof, the defendant never vacated the premises and continued to operate its business. Accordingly, because the defendant failed to properly plead this defense and since there is no evidence that the plaintiff constructively evicted the defendant, its reliance on this special defense fails." (Internal quotation marks and citations, omitted.) *Camera v. Jake's Tavern, LLC*, Docket No. MMXCV196024584S, 2019 Conn. Super. LEXIS 2391, at *8-10, 2019 WL 4668061, at *4 (Super. Aug. 23, 2019).

The court recognizes that its decision on the motion to strike did not go into this level of technical detail, as the focus seemed to be on a less technical concept of quiet enjoyment. In the context of a motion to strike, the court is limited to the issues actually raised by the moving party; *Meredith v. Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980); *Stuart v. Freiberg*, 102 Conn. App. 857, 861, 927 A.2d 343, 345 (2007). Even if the court erred in not addressing this technical aspect of this claim in connection with the motion to strike, before the court can consider affording the plaintiff any relief, even if on a prejudgment remedy level, the court must determine whether there is probable cause for that which is being claimed, and that requires a somewhat more rigorous analysis of the claim itself.

The last paragraph quoted above from *Camera* is dispositive. Putting aside the question of whether the plaintiff adequately alleged a proper claim of breach of

covenant of quiet enjoyment, there is no level of interference that has been alleged or proven that even approaches the required level of an actual or constructive eviction. The plaintiff continued to reside in the apartment despite the entries into his apartment and other claimed harassment, and his continued right of residency became subject to challenge only as a result of non-payment of rent.

Finally, the plaintiff asserts a violation of General Statutes § 52-570d. That statute provides, in relevant part:

> "a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.
>
> "....
>
> "(c) Any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee."

The plaintiff testified that in early August 2021, he had a telephone conversation with Mr. Beitman, and near the or at the conclusion of the conversation, Mr. Beitman reportedly stated that the conversation had been/was being recorded. The plaintiff further testified that almost immediately after the conversation, he sent a message to Mr. Beitman, requesting/demanding that the recording of the conversation be preserved. Mr. Beitman, in turn, testified that there was no such

recording capability at the time of this communication such that no recording actually had been made. Mr. Beitman did not deny that the plaintiff had engaged in the almost-immediate follow-up described above, tending to confirm that the plaintiff had reacted in that manner to the conversation. Mr. Beitman did not deny having made a statement of that nature (or one that could reasonably be interpreted in the manner that the plaintiff interpreted the statement).

That the plaintiff reacted in the described manner tends to be sufficient to establish probable cause that he had reacted to a statement of Mr. Beitman that had been interpreted as a statement that the conversation was being recorded. The claimed absence of recording capability would seem to be a truly binary situation – either there was or was not a recording capability. Recognizing that Mr. Beitman may have made the statement for reasons other than the truth (inadvertently? Ignorance of the actual functioning of the system at that time? For its potential effect on the plaintiff?), and given that the statement was readily falsifiable, the court concludes that the statement was made, and the "admission" quality of the statement itself seems to satisfy, if barely, a probable cause standard.

The court recognizes that the testimony of Mr. Beitman to the effect that the system did not have that capacity at that time might well be persuasive, at a trial on the merits. However, for a probable cause analysis, what amounts to an admission – even if erroneous/inadvertent – would seem to satisfy a probable cause standard.

The plaintiff offered no proof of damages arising from this incident. The plaintiff is self-represented such that he has incurred no expenses for legal representation. He does not appear to have incurred any costs associated with commencing this