NNH CV22-6126724 S	: SUPERIOR COURT
BRIAN ST. PIERRE	: JUDICIAL DISTRICT OF : NEW HAVEN
V.	: AT NEW HAVEN
HEMINGWAY COVE CONDOMINIUM ASSOCIATION, INC.	: MAY 8, 2024

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT No. 115.00

The defendant, Hemingway Cove Condominium Association, Inc., moves for summary judgment on all counts of the complaint filed by the plaintiff, Brian St. Pierre, on the grounds that each of those causes of action are barred by the applicable statute of limitations. It further argues that even if the breach of contract and violation of the Common Interest Ownership Act ("CIOA") claims are not barred by the statute of limitations, the plaintiff cannot prevail on theses claims because he stopped paying his homeowners association fees imposed by the condominium declaration. The plaintiff opposes the motion for summary judgment, arguing that his causes of action are not barred by the statutes of limitations either because the claims are subject to the six-year statute of limitations set forth in General Statutes § 52-576 or because the statutes of limitations are tolled by the continuing course of conduct doctrine. The plaintiff did not respond to the argument that the breach of contract and CIOA claims are barred because of his own non-performance under the declaration.

SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." Practice Book § 17-49; *Provencher* v. *Enfield,* 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "A 'genuine' issue has been variously described as a 'triable,' 'substantial' or 'real' issue of fact; ... and has been defined as one which can be maintained by substantial evidence." (Citations omitted.) *United Oil Co.* v. *Urban Redevelopment Commission,* 158 Conn 364, 378, 260 A.2d 596 (1969). A "material fact" is one that would make a difference in the outcome of the case. *Hammer* v. *Lumberman's Mutual Casualty Co.,* 214 Conn. 573, 578, 573 A.2d 699 (1990).

This court must view the evidence in the light most favorable to the nonmoving party. *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312, 77 A.3d 726 (2013). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way ... [A] summary disposition ... should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party ... [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; internal quotation marks omitted). *Dugan* v. *Mobile Medical Testing Services, Inc.,* 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[I]t is only [o]nce [the moving party]'s burden in establishing [its] entitlement to summary judgment is met [that] the burden shifts to [the non-moving party] to show that there is a genuine issue of fact exists justifying a trial. ... Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. ... [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings." (Citations

omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. at 320-21.

Once the moving party has made out a prima facie case for summary judgment, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. *Maffucci* v. *Royal Park Ltd. Partnership,* 243 Conn. 552, 554-55, 707 A.2d 15 (1998). It is not enough for the opposing party to assert the existence of a disputed issue of fact. Id. The opposing party must demonstrate that it has sufficient counterevidence to raise a genuine issue of material fact as to each of the essential elements of its cause of action. See *Stuart* v. *Freiberg,* 316 Conn. 809, 822-23, 116 A.3d 1195 (2015).

UNDISPUTED MATERIAL FACTS

The plaintiff and his wife acquired a unit in the Hemingway Cove Condominiums in 2008. When they acquired the unit, they became parties to a declaration, which sets forth contract terms between and among the unit owners and the Association.

During early 2017, the defendant repaired and replaced the roof over the units, including that portion of the roof over the plaintiff's unit. In March 2017, the plaintiff discovered a hole in the roof over his unit, and he attributed this hole to the failure of the defendant to install a ridge vent. That same month, he brought this problem to the attention of the defendant's property manager, Gary Poitras, who told him the defendant "would send someone over to fix the roof." In April and May 2017, the plaintiff followed up with emails asking Poitras about the status of the repairs. Poitras responded to the second email with the statement "roofers were on the site two months ago to repair the ridge vent. Are you still see[sic] water coming in?" In September 2017, the plaintiff sent two additional emails to Poitras. The plaintiff paid exterminators to

address squirrels getting into his unit's attic. Eventually, on or about December 8, 2018, the plaintiff paid Calderon Roofing and Home Improvement to repair or replace the ridge vent.

The plaintiff stopped paying his homeowners association fees that unit owners are required to pay in March 2017 when he discovered the hole in the roof. There is no evidence that those fees remain outstanding. Indeed, the defendant brought a separate foreclosure action to pursue those fees, which action was settled when the plaintiff in this case sold his unit.

The defendant was served with process in this action on September 15, 2022.

DISPUTED MATERIAL FACTS

In September 2020, Poitras telephoned the plaintiff about an issue involving the plaintiff's tenant's dog. During that same conversation, Poitras brought up the fact that the plaintiff was behind on paying his homeowners association fees. The plaintiff responded that he was not paying the fees because the amount he was owed for roof repairs, exterminators and income loss from early tenant departures exceeded the amount of the fees. According to the plaintiff, Poitras acknowledged that the roof repair was the defendant's obligation, that the defendant owed more money to the plaintiff than the plaintiff owed in fees, and that the defendant would reimburse the plaintiff by forbearing on the collection of the fees that were owed. The plaintiff claims he did not realize that there was no such agreement until the defendant's lawyers sent him a demand letter on March 1, 2022.

LEGAL ANALYSIS

I. STATUTE OF LIMITATIONS

The question of whether a claim is barred by the statute of limitations is a question of law. *Medical Device Solutions, LLC* v. *Aferzon,* 207 Conn. App. 707, 754, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021). In Connecticut, the statute of limitations stops running when the complaint is served on the defendants. *Chestnut Point Realty, LLC* v. *East Windsor,* 324 Conn. 528, 540, 153 A.3d 636 (2017); *Consolidated Motor Lines, Inc.* v. *M & M Transportation Co.,* 128 Conn. 107, 109, 20 A.2d 621 (1941). Here, that service of process occurred on September 15, 2022.

A. Common Law Negligence

Count one of the plaintiff's complaint sounds in negligence. The statute of limitations for negligence is set forth in General Statutes § 52-584. That statute "imposes two specific time requirements on plaintiffs. The first requirement, referred to as the discovery portion ... requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered. … The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of …. The three year period specifies the time beyond which an action under § 52-584 is absolutely barred, and the three year period is, therefore, a statute of repose." (Citation omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 661, 127 A.3d 257 (2015). The plaintiff admits that he discovered the roof problem in March 2017. Therefore, if that statute began running in March 2017, it expired in March 2019, long before the complaint was served.

The plaintiff argues, in his supplemental memorandum no. 128.00, that count one sounds in breach of contract, not negligence, and thus is subject to the six-year statute of limitations in General Statutes § 52-576. Specifically, he argues that the duty alleged in this claim is based on a contract – the condominium declaration. The problem with this argument is that this is not how the complaint is plead. Count one is labeled negligence. It alleges the four elements of negligence – duty, breach, causation and damages. It does not refer to a contract as the source of the duty element. Moreover, the complaint does not mention the declaration until count three, which alleges breach of express contract.

The plaintiff tries to base this argument on our Supreme Court's recent decision in *Canner* v. *Governors Ridge Association, Inc.*, 348 Conn. 726, 311 A.3d 173 (2024). In that case, the Supreme Court was considering two complaints, each of which alleged claims based on the CIOA and violations of the declaration of the plaintiffs' condominium association. Id. at 733-34. Because the CIOA does not have its own statute of limitations, the court went on to analyze whether the claims in those cases sounded in tort or contract, and ultimately concluded that they sounded in tort and were barred by the statute of limitations in General Statutes § 52-577. Id. at 745-46. Separate and apart from this holding, the Supreme Court held that the claims based upon breach of the declaration were contractual and subject to the contract statute of limitations, General Statutes § 52-576. Id. at 746. Applying these holdings to this case, this court concludes that they are only relevant to counts three and four, which will be discussed below.

At oral argument, the plaintiff argued that, even if this is a negligence claim subject to the two-year statute of limitations in Section 52-584, the continuing course of conduct doctrine

applies to toll that statute of limitations.[1] "Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place. ... Consistent with that notion, [w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed." *Medical Device Solutions, LLC* v. *Aferzon,* supra, 207 Conn. App. at 753 (citing *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 311, 94 A.3d 553 (2014)).

The first issue to be addressed is whether the continuing course of conduct doctrine even applies here. "The continuing course of conduct doctrine has no application after the plaintiff has discovered the harm; the doctrine applies only to the repose portion of the statute and not to the discovery portion." *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. at 662 (discussing Section 52-584). Because the plaintiff discovered the harm in March 2017, the continuing course of conduct doctrine does not apply to his negligence claim. Therefore, summary judgment is granted on count one.

B. Breach of Implied Contract

Count two is entitled breach of implied contract. The plaintiff alleges that in or around March 2017, he entered into an agreement by way of email communication and verbal discussions with Gary Poitras, an employee of the defendant. It appears that the plaintiff is attempting to

[1] The plaintiff did not plead the continuing course of conduct doctrine in his replies to the statute of limitations special defenses. Instead, each of his replies simply stated "denied." "The continuing course of conduct doctrine must be pleaded in avoidance pursuant to Practice Book § 10-57." *Macellaio* v. *Newington Police Department*, 145 Conn. App. 426, 430, 75 A.3d 78 (2013). In that case, which involved a self-represented plaintiff, the Appellate Court considered whether the statute of limitations was tolled so as to avoid summary judgment because the defendant was on notice that the plaintiff was claiming some form of tolling. Id. at 430-31. In this case, the plaintiff's first argument in his opposition memorandum is that the statute of limitations for negligence has been tolled. No. 117.00 at 7. Although the defendant argues that there was no tolling here, it does not raise the issue that the argument is procedurally improper. Therefore, the court will consider whether the continuing course of conduct doctrine could apply here.

allege a contract implied in fact. But an implied contract must be implied from conduct, not expressed in words. See, e.g., *Connecticut Light and Power Co.* v. *Proctor*, 324 Conn. 245, 259, 152 A.3d 470 (2016). The material facts do not support this theory. The contract alleged here is based on an oral conversation.

Preliminarily, the court is aware that the plaintiff, in his memorandum in opposition to summary judgment no. 117.00 and his affidavit no. 118.00, attempts to characterize this implied contract claim as being based on a conversation he and Poitras had in the Summer of 2020. The court disregards this purported contract because it is not alleged in the complaint. "In adjudicating a motion for summary judgment, a court is not required to address allegations that are not made in the complaint." *Lewis* v. *Newtown*, 191 Conn. App. 213, 237, 214 A.3d 405, cert. denied, 333 Conn. 919, 216 A.3d 650 (2019). The court will consider only the claim of a contract based on the March 2017 conversations and emails that is alleged in count two.

The defendant argues that count two actually is a claim for breach of oral contract because the emails do not create a contract and only the March 2017 conversation with Poitras could create a contract. The court agrees that any contract would be based upon Poitras' oral statement that the defendant "would send someone over to fix the roof." The defendant further argues that count two would be subject to the three-year statute of limitations in General Statutes § 52-581.

The determination of which statute of limitations applies to an action is a question of law. *Medical Device Solutions, LLC* v. *Aferzon*, supra, 207 Conn. App. at 764. "All contracts have a six year statute of limitations except for those that are *both* oral and executory. General Statutes § 52-581 provides a three year statute of limitations for executory oral contracts. … All other contracts are governed by a six year statute of limitations pursuant to General Statutes § 52-576."

(Emphasis added; citation omitted; internal quotation marks omitted.) Id. The Appellate Court has distinguished between the two statutes of limitation:

> "These two statutes, each establishing a different period of limitation, can both be interpreted to apply to actions on oral contracts. Our Supreme Court has distinguished the statutes, however, by construing § 52-581, the three year statute of limitations, as applying only to *executory* contracts. … A contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations. … It is well established, therefore, that the issue of whether a contract is oral is not dispositive of which statute applies. Thus, the … argument that § 52-581 automatically applies to [an] oral contract between … parties is incorrect. The determinative question is whether the contract was executed."

(Emphasis in original; citation omitted; internal quotation marks omitted.) Id. at 764-65. The Appellate Court held that the contract at issue was not executory because one party had fully executed its contractual obligations. Id. at 765. In this case, however, the plaintiff has not come forward with any evidence that either party here has fully executed its contractual obligations. Indeed, the undisputed material facts are quite the opposite. The applicable statute of limitations is the three-year limitation set forth in Section 52-581. It expired in March 2020.[2] Summary judgment is granted on count two.

C. Breach of Express Contract

Count three alleges a breach of express contract based upon the declaration. This claim is governed by the six-year statute of Section 52-576. See *Canner* v. *Governors Ridge Association, Inc.*, supra, 348 Conn. at 746. Even if the breach occurred as early as March 2017, that statute of limitations had not run by September 15, 2022.

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[2] Even if the statute of limitation had not expired by March 19, 2020 when the Connecticut Governor's Executive Order No. 7G suspended all statutes of limitations, any tolling based upon that order would not have extended as far as September 15, 2022. The order was only in effect from March 19, 2020 to March 1, 2021. See Executive Order No. 10A. The few days that might have been remaining would have run out sometime in March 2021.

D. Violation of the Common Interest Ownership Act

Finally, count four alleges a violation of General Statutes § 47-249. That statute, which is part of the CIOA, provides in relevant part that "the association is responsible for maintenance, repair and replacement of the common elements, and each unit owner is responsible for maintenance, repair and replacement of his unit." Another provision of the act, General Statutes § 47-278(a), authorizes a unit owner to "bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws." The plaintiff alleges in count four that pursuant to Section 47-249, the defendant is responsible for the maintenance, repair and replacement of the common elements, including the roof. He further alleges that he gave the defendant and its agents or employees access to his unit so that the roof repairs could be done and that those repairs either were not done or were done improperly. There is no mention of the declaration in count four.

As discussed above, the CIOA has no express statute of limitations. The Supreme Court provided some guidance about which statute of limitations to apply in *Canner* v. *Governors Ridge Association, Inc.*, supra, 348 Conn. 726. "[V]iolations of duties imposed directly by CIOA sound in tort and are circumscribed by § 52-577, whereas violations of the declaration or bylaws, by contrast, sound in contract and are governed by § 52-576." Id. at 743-44. The Supreme Court went on to determine that the pleadings at issue did not allege that the declaration or the bylaws were violated during the construction of the condominiums and therefore the claims arising out of the construction process alleged only statutory, not contractual violations. Id. at 744-45. Relying on precedent, the court stated that those statutory violations sound in tort. Id. at 745. As such, the court held that they were subject to the three-year statute of repose set forth in General Statutes § 52-577.

That same reasoning applies to count four. That count makes no reference to the declaration or the bylaws. Therefore, count four alleges a statutory violation and is subject to the statute of repose in Section 52-577. That statute provides: "[n]o action founded upon tort shall be brought but within three years from the date of the act or omission complained of."

The act or omission complained of in count four appears to be the failure to install the ridge vent in the roof above the plaintiff's unit. Count four alleges, in relevant part:

> "5. In or around March 2017, Plaintiff placed Defendant on notice of a hole in the roof of the Unit which was causing water leakage into the unit and pest infestation.
>
> 6. Despite numerous attempts by Plaintiff to have the issue remedied by Defendant, the roof remained unrepaired.
>
> 7. On or about December 2018, Plaintiff was forced to resolve the issue at his sole cost and expense.
>
> ...
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> 10. Pursuant to C.G.S. 47-249, the Defendant is responsible for maintenance, repair and replacement of the common elements, including roofs.
>
> 11. The Plaintiff afforded the Defendant and their agents or employees, access to the Unit so that the roof repairs could be made.
>
> 12. The roof repairs were not performed by the Defendant or if completed, was done improperly."

If the act or omission was the original failure to install the ridge vent, the statute of repose in Section 52-577 expired in March 2020.[3] The plaintiff argues that this three-year statute of repose is tolled by the continuing course of conduct doctrine. The Appellate Court recently has defined the continuing course of conduct doctrine:

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[3] As with the three-year statute of limitations in Section 52-581 that applies to the oral contract alleged in count two, this three-year statute of limitations could have been subject to some very brief tolling as a result of Executive Order No. 7G.

> "[I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the *breach of a duty* that remained in existence after commission of the *original wrong* related thereto.' ... Courts have found that such a duty continues to exist after the original wrong where there is some later wrongful conduct of a defendant related to the prior act. Put another way, a precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an *initial wrong* upon the plaintiff. ... A second requirement for the operation of [this doctrine] is that there must be evidence of the *breach of a duty* that remained in existence after commission of the original wrong related thereto."

(Emphasis in original; citations omitted; internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon,* supra, 207 Conn. App. at 757.[4]

The issue of whether the defendant engaged in a continuing course of conduct is a mixed question of law and fact. *Medical Device Solutions, LLC* v. *Aferzon,* supra, 207 Conn. App. at 754-55. "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. ... When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. at 310.

Here, the plaintiff has come forward with sufficient disputed facts to raise a question whether the continuing course of conduct doctrine applies. The original breach of a duty to install the ridge vent occurred in early 2017 when the defendant repaired and replaced the roofs on the condominium units. The plaintiff discovered this problem in March 2017 and brought it to the

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[4] The other basis for application of the continuing course of conduct doctrine is a special relationship. *Medical Device Solutions, LLC* v. *Aferzon,* supra, 207 Conn. App. at 761. However, a mere contractual relationship does not create a fiduciary or confidential relationship. Id. at 762 (citing *Saint Bernard School of Montville* v. *Bank of America*, 312 Conn. 811, 835-36, 95 A3d 1063 (2014)).

attention of Poitras on behalf of the defendant that same month. He continued to communicate about the hole with Poitras through September 19, 2017. The plaintiff had the roof repaired by a third party on December 8, 2018. The next interaction between the parties was in the Summer of 2020 when Poitras telephoned the plaintiff. The parties dispute the content of that telephone conversation. According to the plaintiff, Poitras acknowledged that the roof repair was the defendant's obligation, acknowledged that the defendant owed the plaintiff an amount in excess of his outstanding homeowners association fees, and that the defendant would pay for those repairs. The plaintiff further claims that he understood that this was a verbal agreement to forebear from collection of the homeowners association fees.

The court declines to apply the "sham affidavit" rule to exclude the plaintiff's affidavit insofar as it recounts this Summer 2020 conversation between the plaintiff and Poitras. Although the affidavit provides far more detail than does the earlier deposition testimony, the deposition questions did not preclude the additional evidence in that affidavit. The ultimate arbiter of credibility is the jury. See, e.g., *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 710, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016) ("[w]hen a court, in ruling on a motion for summary judgment, is confronted with conflicting facts, resolution and interpretation of which would require determinations of credibility, summary judgment is not appropriate").

The plaintiff has met his burden to "present evidence that demonstrates the existence of a disputed issue of fact" as to whether that September 2020 conversation and the failure to follow through on it was "later wrongful conduct" that related to the "original wrongful act" of not installing the ridge vent such that the continuing course of conduct tolled the statute of limitations

on the plaintiff's CIOA claim. *Maffucci* v. *Royal Park Ltd. Partnership*, supra, 243 Conn. at 554-55; *Medical Device Solutions, LLC* v. *Aferzon,* supra, 207 Conn. App. at 757.

II. PLAINTIFF'S FAILURE TO PAY HOMEOWNERS ASSOCIATION FEES

The defendant also argues that summary judgment should enter on counts three and four because the plaintiff failed to perform his own obligations under the declaration to pay his homeowners association fees. Specifically, the defendant argues that those fees were the consideration for the defendant properly to repair and replace the roof in the first place and to properly repair the missing roof vent. According to the defendant, the plaintiff's refusal to pay those fees bars his rights to recover for the defendant's breach of its duties under the declaration. The defendant has not established that the plaintiff continues to owe any fees.

The CIOA claim should not be barred by any failure of the plaintiff to pay fees required by the declaration. That count does not mention the declaration. As discussed above, the Supreme Court has characterized a CIOA statutory claim that does not refer to the declaration or the bylaws as a tort claim. Section 47-278(a) of the CIOA provides in relevant part: "A ... unit owner ... may bring an action to enforce a right granted or obligation imposed by this chapter, declaration or the bylaws. The court may award reasonable attorney's fees and costs." The statute does not restrict that right to those who are current on their fees or dues. Indeed, in subsection 47-278(c)(2), it recognizes the right of an association to foreclose a lien against a unit for fees, without indicating that this blocks the rights provided by subsection (a). "The CIOA is a remedial statute and therefore must be afforded a liberal construction in favor of those whom the legislature intended to benefit." *Fruin* v. *Colonnade One at Old Greenwich Ltd. P'ship*, 237 Conn. 123, 133, 676 A.2d 369 (1996). See also *Grey* v. *Coastal States Holding Co.*, 22 Conn. App. 497, 504-05,

578 A.2d 1080, cert. denied, 216 Conn. 817, 580 A.2d 57 (1990). The defendants' argument that would precondition a unit owner's right to sue would seem to fly in the face of this liberal construction.

Two of the cases that the defendant relies upon are distinguishable or mischaracterized. In *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 406, 927 A.2d 832 (2007), our Supreme Court held that the plaintiff, a lawyer, could not recover the full amount of attorneys' fees for a dissolution of marriage when he was disbarred and could not complete that performance. This holding would seem to support the plaintiff's argument here that he did not owe the condominium fees because the defendant did not perform. In *Coach Run Condominium, Inc.* v. *Furniss*, 136 Conn. App. 698, 705-07, 47 A.3d 413 (2012), the Appellate Court held that, in a foreclosure action based on failure to pay condominium fees, there were no defenses other than those that contested nonpayment. Therefore, it affirmed a trial court that struck special defenses based on the association's failure to perform maintenance obligations. Id. at 707. The court took note of the fact that the defendant condominium owner had brought a separate action, comparable to the plaintiff's suit here, to recover damages for the plaintiff's alleged failure to maintain and repair exterior walls and common areas. Id. at 700 n.3. Cf. *Bella Vista Condominium Ass'n, Inc.* v. *Byars*, 102 Conn. App. 245, 925 A.2d 365 (2007) (implying that although a unit owner could not use Section 52-278 as a defense in a foreclosure action to collect condominium fees, the unit owner could have brought a counterclaim based on that statute).

The principal case on which the defendant relies, *Twin Oaks Condominium Association, Inc.* v. *Jones*, originated as a foreclosure action to recover condominium fees. *Twin Oaks Condominium Association, Inc.* v. *Jones*, Superior Court, judicial district of Hartford, Docket No. CV04-4004140 (January 22, 2010, *Bentivegna, J.*). After the foreclosure action settled, the unit

owner's counterclaim went to trial. The court entered judgment on the breach of contract and CIOA claims, even though it found that the association breached the contract in multiple respects, on the grounds that a unit owner cannot unilaterally exempt himself from paying common charges. All four of the superior court decisions on which the court relied were foreclosure actions in which breach of contract special defenses were stricken. The court did, however, find in favor of the unit owner on his negligence claim and awarded damages. That damages award on the negligence claim was affirmed on appeal. *Twin Oaks Condominium Association, Inc.* v. *Jones*, 132 Conn. App. 8, 30 A.3d 7 (2011), cert. denied, 305 Conn. 901, 43 A.3d 663 (2012). This court declines to follow the *Twin Oaks* decision. The logic of preventing a CIOA or breach of contract defense in a foreclosure action for outstanding fees does not extend to barring claims authorized by statute and contract, particularly where there is no proof that the fees are still owed.

The motion for summary judgment as to these counts is denied.

CONCLUSION

The motion for summary judgment is granted as to counts one and two but is denied as to counts three and four.

BY THE COURT,

Stewart, J.

Hon. Elizabeth J. Stewart