DOCKET NO. CV-18-6076645-S	:	STATE OF CONNECTICUT
	:	
SAFE IRA PARTNERS, LLC	:	SUPERIOR COURT
AS TRUSTEE OF THE MILES	:	
STANDISH TRUST,	:	JUDICIAL DISTRICT OF NEW HAVEN
THE MILES STANDISH TRUST	:	:
	:	AT NEW HAVEN
V.	:	
	:	
	:	
DAVID E. ROSENBERG	:	
THE MARINOSCI LAW GROUP, P.C.	:	
AND ANNE BRENSLEY	:	APRIL 19, 2024

MEMORANDUM OF DECISION

STATEMENT OF CASE

This case stems from an attorney's involvement in the closing of a loan transaction that was inadequately secured. On September 18, 2018, the plaintiffs, Safe IRA Partners, LLC (Safe IRA Partners), as Trustee of the Miles Standish Trust, and the Miles Standish Trust, filed the operative three-count complaint (Docket Entry #138), sounding in breach of contract, legal malpractice, negligent misrepresentations, and respondeat superior, against the defendants, David E. Rosenberg and Marinosci Law Group, P.C. (Marinosci Law Group).[1] On March 12, 2019, the defendants filed their operative answer and four special defenses: (1) failure to mitigate damages, (2) comparative negligence, (3) equitable estoppel, and (4) ripeness (Docket Entry #169). On May 7, 2019, the plaintiffs filed a reply denying the special defenses (Docket Entry #178). On July 24, 2019, the defendants filed a third-party complaint for indemnification against Anne Brensley (Docket Entry #187).[2] On September 2, 2022, Brensley filed a third-party answer and

[1]Counts one through three of the operative complaint were against Terk & Carlone, LLC, and Matthew S. Carlone, but the plaintiffs have withdrawn those counts (Docket Entry #269).

[2]Initially, the defendants also brought the third-party complaint against BFT Advisors, LLC, Municipal Enterprises, Inc., Angelo Squillante, John Doyle, and Doyle Real Estate

counterclaim against the defendants sounding in abuse of process (Docket Entry #306). On June 20, 2023, the defendants filed an answer to the third-party counterclaim (Docket Entry #331) and a reply denying Brensley's special defenses (Docket Entry #332). The court held a trial over the course of fifteen days, commencing on August 17, 2023, with the last day of trial on September 7, 2023. On August 22, 2023, the parties filed a Joint Statement of Undisputed Facts. (Docket Entry No. 355). Subsequent to the trial, each party submitted proposed findings of facts (Docket Entries ##360, 362, and 365) and memoranda (Docket Entries ##361, 363, and 364). On December 1, 2023, the plaintiffs filed a reply memorandum in response to the defendants' post trial memorandum (Docket Entry #366), and on December 4, 2023, the defendants filed a reply memorandum in response in the plaintiffs' post trial memorandum (Docket Entry #367). On April 4, 2024, the parties agreed to waive the 120-day time for issuance of the court's decision to May 15, 2024.

FINDINGS OF FACTS

"The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties . . . ." (Internal quotation marks omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "It is the sole province of the trial court to weigh and interpret the evidence before it and to pass on the credibility of the witnesses." (Emphasis omitted; internal

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Advisors, LLC (Docket Entry #187). On September 3, 2019, the court entered default judgments against BFT Advisors, LLC, Municipal Enterprises, Inc., and Angelo Squillante for failure to appear (Docket Entries ##188.10, 189.10, and 190.10). On December 8, 2021, the defendants withdrew their claims as to John Doyle and Doyle Real Estate Advisors, LLC (Docket Entry #265).

quotation marks omitted.) *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 679-80, 6 A.3d 141 (2010). The court makes the following findings of fact by a fair preponderance of the evidence.

I

Rosenberg's Retention

Safe IRA Partners is a limited liability company formed for the purpose of investing individual retirement accounts in fully collateralized investments. Safe IRA Partners is the sole trustee of the Miles Standish Trust, which is formed and administered in accordance with Chapter 802c of the General Statutes. In 2015, Safe IRA Partners' managing director, Judson Villa, was contacted by Eric Fedewa, a broker with whom he had been discussing various investments, about an investment in Connecticut. The investment was in a restaurant and would be secured by property located in Colchester, Connecticut (property), which was meant to satisfy the 50 percent loan to value ratio that Safe IRA Partners required to finance the loan. Villa accepted Fedewa's proposal and executed a term sheet (Defs.' Ex. RRRRR) on or about October 15, 2015. The term sheet contemplated a closing date of November 6, 2015. The term sheet specifically delineates the items that were to be included within the realm of due diligence for this loan.

On November 2, 2015, Fedewa contacted Rosenberg, who is the managing attorney of the Marinosci Law Group's Middletown, Connecticut office, on Villa's behalf to inquire whether Rosenberg could represent Safe IRA Partners in a loan. In the email chain (Pls.' Ex. 1), in which Villa was copied, Fedewa went on to introduce Rosenberg to his "partner" Villa. Fedewa specifically stated that he would like to have a call with his "partner" Villa on two separate occasions.

The plaintiffs engaged Rosenberg as their lawyer in 2015 to represent them in closing on the loan. No engagement letter was signed, despite the Rules of Professional Conduct requiring one. During the scope of Rosenberg's engagement as an attorney for the plaintiffs, he was acting within the course and scope of his employment for Marinosci Law Group.

Rosenberg was aware early on that the property was going to be used as collateral for the loan and that a prior appraisal supplied by potential borrowers valued the property at $3.9 million, provided that the property could be used as a landfill. Villa repeatedly expressed to Rosenberg that Safe IRA Partners would only make the loan if the value of the property was over $3.2 million, such that the loan to value ratio would not be more than 50 percent.

II

Rosenberg's Inquires

On November 12, 2015, Rosenberg emailed Peter Parasco, an attorney whom Rosenberg believed represented the prospective borrowers, about several issues. These issues included (1) that the property was previously appraised last at $3.9 million in part because it is licensed as a landfill and (2) whether the property is labeled as an establishment based upon its use as a landfill and its prior contamination. In the email, Rosenberg stated that he needed a copy of the license to see if it runs with the land and that the lender was looking for a new appraisal. He also asked if Parasco had anything from the Department of Energy and Environmental Protection (the department) about whether the property was an establishment. On numerous occasions prior to the closing, Rosenberg requested proof that the property could be used as a landfill.

III

The Title Commitment

Rosenberg obtained a Commitment for Title Insurance provided by Stewart Title Insurance Company dated November 16, 2015 (Stewart Title Commitment), from Parasco, who was then counsel for the borrower and guarantors. The Stewart Title Commitment contained notice of a stipulated judgment on the property, which was entered on April 19, 1983 (1983 stipulated judgment). The 1983 stipulated judgment opens by stating that the deposition of solid waste in multiple portions of the property shall cease immediately. It then provides lengthy instructions as to how that portion of the property must be closed, capped, seeded and fertilized in a specified manner, subject to approval by the department. It contains further notice that the property owner must construct a 2,000-gallon septic tank and leaching system. The 1983 stipulated judgment was signed by a representative of the department, by attorneys for Municipal Enterprises, Inc. (Municipal Enterprises), and by Angelo Squillante, the owner of Municipal Enterprises.

The 1983 stipulated judgment was never provided to Rosenberg and he did not himself obtain it. He never provided to his client any analysis or summary of the contents thereof. On December 3, 2015, Rosenberg, having reviewed the Stewart Title Commitment, raised certain issues about the title commitment with Parasco, including making sure that any operating permit for the landfill "is lienable and transferable in the event of a default . . ." and that "[t]he title report includes mention of a stipulated judgment . . . and consent order . . . which were not included in the copies." (Pls.' Ex. 4.) Although Rosenberg initially flagged this issue, he never followed up.

IV

The Review Appraisal

As part of the underwriting of a previous potential loan involving the property with a different lender, that lender obtained an appraisal of the property (Bates & Donner Appraisal) dated November 3, 2014, which stated that the fair market value of the property was $3.9 million. (Defs.' Ex. PP.) As part of the underwriting process for the loan at issue in the present action, Fedewa authorized Anne Brensley, the Chief Financial Officer of the borrower, Fondue Fusion, LLC, to retain John Doyle, who worked on behalf of Doyle Real Estate Advisors, LCC, to perform a review of the Bates & Donner appraisal. The review appraisal gave a valuation of $3.9 million provided that the property could be used as a landfill. Upon receiving the appraisal, Villa reviewed it and discussed it with Rosenberg.

V

Rosenberg's Assurances

On December 21, 2015, Rosenberg emailed Brensley and Parasco that he had told Safe IRA Partners "the good news that we should be ready to disburse tomorrow morning." (Pls.' Ex 10.) Rosenberg then acknowledged that one funding condition that still needed to be met was "verification of the site plan on file with the Town of Colchester and that the landfill permit remain[ed] in place with the [department] . . . ." (Pls.' Ex 10.) Also on December 21, 2015, Villa asked Rosenberg whether the statement in a 1981 permit transfer that "[t]he transfer of this permit does not allow for the resumption of waste disposal . . ." was accurate. (Pls.' Ex. 9.) Villa was concerned because if the property could not be used as a landfill that would affect its value negatively. In response, Rosenberg informed him that as of 1982, the permits were valid and

active. With this assurance from Rosenberg, Villa concluded that the value of the collateral was sufficient to make the loan without exceeding a loan to collateral ratio of greater than 50 percent, and Rosenberg told him "we were all good."

VI

The McKeegan Email and Isner Letter

On December 22, 2015, Rosenberg received an email from David McKeegan of the department (McKeegan email). The email disclosed that "[t]he transfer of the permit would not allow any disposal activities to occur at the landfill, but it may include certain obligations that the new property owner will have regarding maintenance and monitoring of the site." (Pls.' Ex. 19.) The email further disclosed that fines had to be paid as detailed in an attached letter. The McKeegan email also informed Rosenberg that there was "an open solid waste enforcement case and there are encumbrances on this property" and that he could contact Stan Gormley at the department. (Pls.' Ex. 19.) The email closed by cautioning that "it may be prudent for you to arrange a meeting with the Office of the Attorney General . . . to discuss any outstanding issues regarding the landfill." (Pls.' Ex. 19.)

The letter attached to the McKeegan email, from Robert Isner of the department to Squillante (Isner letter), revealed the presence of a second stipulated judgment from 2001 (2001 stipulated judgment). (Pls.' Ex. 19.) The Isner letter states that the 2001 stipulated judgment remained "unresolved and must be fully complied with." (Pls.' Ex. 19.) The letter also cites a "pattern and degree of noncompliance" that "would result in findings by staff and/or Program Directors that issuance of almost any permit from the Department would not be recommended." (Pls.' Ex. 19.) The Isner letter "emphasize[d] that the longer the period of noncompliance

continues, the more significant the pattern and degree of noncompliance becomes and in turn the more difficult it will be to establish a compliance history record that would facilitate or enable the Department to issue a permit to the defendants in the Judgment." (Pls.' Ex. 19.) The Isner Letter further disclosed that pursuant to the 2001 stipulated judgment, "a permanent injunction exists preventing operating a solid waste disposal area at the [property] without any and all state and local permits." (Pls.' Ex. 19.) In addition, the Isner letter states that the department "considers this permit to be somewhat dated regarding the operating conditions and utilization of the permit would likely require that a modification be sought to reflect current industry practices as well as current regulatory requirements . . . ." (Pls.' Ex. 19.) The 2001 stipulated judgment orders that "the existing [t]emporary [i]njunction . . . become a permanent injunction, hereinafter preventing Municipal Enterprises, Inc. and Angelo Squillante and their agents, heirs, successors and assigns from operating a solid waste disposal area at the Colchester site without any and all state and local permits required by law, including but not limited to a solid waste permit and a water discharge permit from the [department] and zoning and wetlands approvals from the Town of Colchester." (Pls.' Ex. 33.) The 2001 stipulated judgment was executed by counsel for Squillante and Municipal Enterprises. Rosenberg did not provide the McKeegan email and Isner letter to Safe IRA Partners, or otherwise communicate any of the information contained in them. In the afternoon of December 22, 2015, after receiving the McKeegan email that morning, Rosenberg sent an email to Safe IRA Partners stating in part: "1. Do you know if [Villa] sent over the wire? I still need the docs and your final approval before I send anything out but we'll need to tell them if I'm funded at least shortly. 2. I heard back from the [department] regarding the permit, as we thought, the permit is still valid but it's more of a zoning permit, not an

operating permit. I was also told that there are outstanding orders for the maintenance of the property and more importantly, fines that have not been paid. I don't have a formal payoff but it's in the area of $50,000.00, which I would suggest we have escrowed to pay those off." (Pls.' Ex 10.) Rosenberg focused on the 2006 penalty that the department had imposed, failing to communicate what, if anything, he meant by "more of a zoning permit."

VII

The Opinion Letter and Environmental Certification

Two of the necessary documents for Safe IRA Partners to close on the property were an opinion letter and environmental certification. Carlone, a licensed attorney practicing law through Terk & Carlone, LLC (Terk & Carlone), represented the borrower and guarantors at certain times in the relevant loan transaction. Carlone, while being retained by the borrowers, was tasked with drafting an opinion letter and environmental certification for the loan. Rosenberg provided Terk & Carlone with a draft opinion and a draft environmental certification. On December 22, 2015, Rosenberg forwarded the McKeegan email to Carlone without comment. On December 23, 2015, Carlone provided a signed opinion letter and environmental certification to Rosenberg. Carlone suggested to Rosenberg that the opinion letter and environmental certification needed to be changed to reflect the information contained in the Mckeegan email; Rosenberg convinced him not to by claiming that oral communications he supposedly had with his client were incorporated by reference. Rosenberg forwarded the closing documents, including the mortgage, note, opinion letter, and environmental certification, to Safe IRA Partners on December 23, 2015.

The opinion letter stated that "the operation of any current or proposed use [on the property] . . . comply with all applicable subdivision, zoning, building, wetland, water course, traffic or other similar Federal, State and local governmental laws, regulations or requirements . . . ." (Pls.' Ex. 12.) It further stated that counsel had performed diligent inquiry and there was no judgment, order, action, or other proceeding that would adversely affect the property. Likewise, the environmental certification stated that it was prepared "to induce The Miles Standish Trust to make the above-referenced loan" and that any proposed or current use of the property would comply with all applicable laws, regulations, or requirements, and would not require issuance of approvals, permits, licenses or authorizations by any governmental authority. (Pls.' Ex. 13.)

VIII

Closing

On December 23, 2015, Villa informed Rosenberg that Safe IRA Partners was prepared to fund the transaction, and thanked Rosenberg for all his hard work and his time. The plaintiffs loaned $1.6 million to the borrower, Fondue Fusion, LLC, and accepted a mortgage on the property. The note provided for a 12 percent interest rate and a 17 percent default interest rate. The transaction occurred in Connecticut. The loan was guaranteed by individuals Squillante, Kimberly Owens, Lynn Powers, and Parasco, and entities Sticks N' Stones Grille, LLC, and Municipal Enterprises. The loan was secured by a mortgage on the property.

Out of the $1.6 million disbursed at closing, the plaintiffs were paid $7680.31 in prepaid interest, $92,575.71 also went to the plaintiffs to fund an escrow reserve, and the plaintiffs charged the borrower $69,294 in lender fees, which were paid at closing. (Defs.' Ex. NNN.)

These lender fees included a $1000 underwriting fee, a $500 site visit fee, as well as fees for credit reporting and background checks.

IX

The Borrower's Default

In April 2016, after making three payments of $8228.90, totaling approximately $24,686.70, the borrower defaulted on its loan obligations, triggering the mortgage and guarantee obligations and remedies. On Safe IRA Partners' behalf, Rosenberg commenced a foreclosure action on September 1, 2016.

During the foreclosure action, at the end of March 2017, the Attorney General's office reached out to Rosenberg and advised him that there was an issue with the landfill permit. On March 31, 2017, Rosenberg emailed Safe IRA Partners to state that he had spoken to Robert Isner of the department. Rosenberg informed Safe IRA Partners that "before a transfer can be approved . . . in this case, because the permit was as old as it was, that the permit would have to be brought up to date since the standards for a landfill have changed dramatically since the landfill was last operated . . . ." (Pls.' Ex.18.) This was exactly what the Isner letter itself stated. Rosenberg further informed Safe IRA Partners in the March 31, 2017 email that he had spoken with Stan Gormley, to whom McKeegan had referred him in the McKeegan email, and Gormley informed him that "the permit is essentially non-transferrable and non-viable based upon [the 2001 stipulated judgment]." (Pls.' Ex.18.) Rosenberg stated in the email that "I am quite certain that had any of us known that there was a judgment out there against the landfill permit, that you never would have made this loan . . . ." (Pls.' Ex.18.) Subsequent analysis by Bruce Hunter, an

appraiser disclosed as an expert by both plaintiffs and defendants, indicates that the property's value is negative, meaning that it has no value and large associated liabilities. (Pls.' Ex. 36.)

On or about November 20, 2017, Rosenberg was replaced as the plaintiffs' attorney. On August 17, 2017, the plaintiffs filed suit against the guarantors. The pursuit of the guarantors resulted in a judgment in the amount of $3,308,048.60 issued on September 12, 2022, in favor of the plaintiffs. After a nearly six year pause in the foreclosure action, the plaintiffs obtained a judgment of foreclosure by sale on July 19, 2023, and the property was sold at auction on September 23, 2023, for $10,000. During the course of the present litigation, the plaintiffs settled their claims against Carlone, Terk & Carlone, Doyle, and Doyle Real Estate Advisors, LCC for a total of $1.2 million.

Additional facts will be added subsequently as needed.

LEGAL ANALYSIS

I

Subject Matter Jurisdiction

The defendants allege in their fourth special defense that the present causes of action are not ripe because the plaintiffs cannot establish damages. Although the defendants failed to brief this issue in their memorandum, the court will address the ripeness of the plaintiffs' claims as it implicates the court's subject matter jurisdiction. See *Bloom* v. *Miklovich*, 111 Conn. App. 323, 336, 958 A.2d 1283 (2008) ("[r]ipeness is a justiciability doctrine, which implicates the court's subject matter jurisdiction"). "Pursuant to Connecticut's ripeness jurisprudence, as long as it is clear that a plaintiff has suffered an injury sufficient to give rise to the cause of action alleged, a lack of certainty as to the precise scope of damages will not prevent the claim from being

justiciable." (Internal quotation marks omitted.) *Lee* v. *Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 305, 975 A.2d 715 (2009). In *Lee* v. *Harlow, Adams & Friedman, P.C.*, the court held that the plaintiff's legal malpractice claim was ripe even though the precise amount of damages was uncertain when the plaintiff was trying to lessen the amount of damages through a separate legal action against an entity other than the defendants. Id., 306-307. Similarly, although the plaintiffs in the present case may be able to lessen the amount of their damages by pursuing legal actions to collect from the borrower or guarantors, that does not affect the ripeness of the present claims. The plaintiffs' causes of action are ripe and the court therefore has subject matter jurisdiction.

II

Count Four:[3] Breach of Contract Against Rosenberg

The plaintiffs allege that Rosenberg and Safe IRA Partners had a contract for legal services and that Rosenberg breached this contract by failing to adequately secure the loan and by failing to provide legal services that were competent, professional, and adhered to all industry and professional standards of care. Specifically, the plaintiffs contend that Rosenberg breached the contract by: (1) failing to obtain a copy of the 1983 stipulated judgment and failing to provide Safe IRA Partners with a copy of it; (2) failing to inform Safe IRA Partners of the issues raised in the McKeegan email, and (3) failing to review the opinion letter and environmental certification before advising the plaintiffs that they were ready to close.

[3]The plaintiffs have withdrawn counts one through three (Docket Entry #269).

In response, the defendants claim that the plaintiffs' breach of contract claim is actually a malpractice claim and that the plaintiffs have not established the elements of a breach of contract. The plaintiffs counter that the breach of contract claim is distinct from their malpractice claim and that they are entitled to bring both a malpractice and breach of contract claim.

"The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291, 87 A.3d 534 (2014). "[I]t is well established that claims may be brought against attorneys sounding in contract or in tort, and that [s]ome complaints state a cause of action in both contract and tort. . . . [O]ne cannot bring an action [under both theories, however] merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims. . . . To ensure that plaintiffs do not attempt to convert negligence claims into breach of contract claims by talismanically invoking contract language in [the] complaint . . . reviewing courts may pierce the pleading veil by looking beyond the language used in the complaint to determine the true basis of the claim. . . . [A]n action in contract is for the breach of a duty arising out of a contract . . . [whereas] an action in tort is for a breach of duty imposed by law." (Citations omitted; internal quotation marks omitted.) Id., 290-91.

"Connecticut courts . . . have determined that an attorney's failure to comply with the specific provisions of a contract sound[s] in breach of contract." Id., 292. Additionally, the Appellate Court has described a "true contract claim" against a professional as one "in which a plaintiff asserts that a defendant who is a professional breached an agreement to obtain a specific

result." *Caffery* v. *Stillman*, 79 Conn. App. 192, 197, 829 A.2d 881 (2003).[4] "Correspondingly, Connecticut courts have concluded that claims alleging that the defendant attorney had performed the required tasks but in a deficient manner [sound] in tort rather than in contract." *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn 294.

In *Hill* v. *Williams*, 74 Conn. App. 654, 659-660, 813 A.2d 130, cert. denied, 263 Conn. 918, 822 A.2d 242 (2003), the court held that the plaintiff's complaint sounded in breach of contract because the allegations in the complaint were not merely tort claims obscured behind contractual language. Instead, the complaint described how the defendant attorney refused "to take certain actions in furtherance of the matters for which the defendant had been hired." Id., 659. The court noted that the "[u]se of the word 'refuse' imports an intentional act rather than some inadvertence or negligent act or omission on the part of the defendant in breach of the agreements between the parties." Id., 660.

In contrast, the present case is more similar to *Pelletier* v. *Galske*, 105 Conn. App. 77, 78-79, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008), in which the Appellate Court held that a complaint failed to state a claim sounding in breach of contract

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[4]Subsequent to the court's decision in *Caffery* v. *Stillman*, there is a split among trial courts as to whether an agreement to obtain a specific result is a necessary element of a breach of contract claim against an attorney. Compare *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-11-6010036-S (May 3, 2012, *Tobin, J.*) ("[i]n the context of claims asserted by former clients against attorneys and law firms, Connecticut has not held that a breach of contract claim needs to allege a guarantee of a specific result"), with *Abate* v. *Loew*, Superior Court, judicial district of Fairfield, Docket No. CV-10-6012889-S (January 18, 2012, *Radcliffe, J.*) (53 Conn. L. Rptr. 339, 340) (striking breach of contract claim against attorney because it failed to allege promise to obtain specific result). The court does not need to determine if there is such a requirement, however, as the other required elements of a breach of contract claim against an attorney are dispositive in the present case. See *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn 290-91.

against the defendant. The court noted that "the gravamen of the action was the alleged failure by the defendant to exercise the requisite standard of care in failing to advise the plaintiff . . . ." Id., 83. Moreover, the court explained that "[n]otwithstanding that embedded in the language of the plaintiff's claim are the contractual rudiments of promise and breach, [w]here the plaintiff alleges that the defendant negligently performed legal services . . . the complaint sounds in negligence, even though he also alleges that he retained him or engaged his services." (Internal quotation marks omitted.) Id.

In the present case, the plaintiffs do not point to any specific provision in the representation agreement but rather allege that Rosenberg breached the contract "by failing to securitize the [l]oan and by failing to provide legal services that were competent, professional and adhered to all industry and professional standards of care." Rev. Compl., Count Four, ¶ 59. This count sounds in tort. See *Pelletier* v. *Galske*, supra, 105 Conn. App. 83. Unlike in *Hill*, supra, 74 Conn. App. 659-60, the plaintiffs have not alleged that Rosenberg refused to fulfill any specific contractual duties and have not submitted a written contract with Rosenberg into evidence. Instead, they contend that Rosenberg failed to obtain a copy of the 1983 stipulated judgment and to provide Safe IRA Partners with a copy of it, failed to inform Safe IRA Partners of the issues raised in the McKeegan email, failed to review the opinion letter and environmental certification before advising the plaintiffs that they were ready to close, and failed to provide legal services that adhered to all industry and professional standards of care. All these claims sound in tort. See *Pelletier* v. *Galske*, supra, 105 Conn. App. 83. As such, count four is a malpractice claim couched in the language of a breach of contract claim, and the plaintiffs have not sufficiently proven a breach of contract. Accordingly, the court enters judgment in favor of

Rosenberg on count four.

III

Count Five: Legal Malpractice Against Rosenberg

In count five, the plaintiffs allege that Rosenberg owed them a duty of care to provide legal services that were competent and professional and that adhered to industry standards, but negligently failed to provide those services. The plaintiffs contend that Rosenberg breached this duty by (1) not obtaining, reviewing, or advising the plaintiffs about the 1983 stipulated judgment; (2) not advising the plaintiffs about the McKeegan email and Isner letter; (3) not obtaining, reviewing, or advising the plaintiffs about the 2001 stipulated judgment; (4) providing the opinion letter and environmental certification without any caveats; and (5) telling the plaintiffs that the deal was good to go. The defendants counter that Rosenberg complied with the applicable standard of care. Furthermore, the defendants contend that Rosenberg cannot be held responsible for the statements made by another attorney in the opinion letter and environmental certificate. The defendants also assert that Rosenberg looking into the permit issue any more than he did without being asked to do so by his clients was not within his responsibilities because he was retained to prepare documents for closing, not to evaluate the worth of the property. Notwithstanding, the defendants claim that even if Rosenberg breached his duty of care, he was not the proximate cause of the plaintiffs' injuries because the property could not be operated as a landfill even without the permit issues because the property is environmentally contaminated.

"[P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with

the result of injury, loss, or damage to the recipient of those services. . . . In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Vona* v. *Lerner*, 72 Conn. App. 179, 187-88, 804 A.2d 1018 (2002), cert. denied, 262 Conn. 938, 815 A.2d 138 (2003). It is undisputed that Rosenberg and the plaintiffs had an attorney-client relationship. See Joint Statement of Undisputed Facts, ¶ 4. The court will examine the other elements in turn.

A

The Attorney's Wrongful Act or Omission

"Generally, to prevail on a legal malpractice claim, in Connecticut, a plaintiff must present expert testimony to establish the standard of proper professional skill or care." (Internal quotation marks omitted.) *DiStefano* v. *Milardo*, 82 Conn. App. 838, 842, 847 A.2d 1034 (2004), aff'd, 276 Conn. 416, 886 A.2d 415 (2005). In the present case, both the defendants and the plaintiffs produced expert witnesses who testified as to whether Rosenberg met the applicable standard of care. Attorney Gregory Cava testified as an expert witness for the plaintiffs, and Attorney Michael Murray testified as an expert witness for the defendants.

Rosenberg represented the plaintiffs in the loan transaction and had a responsibility to the plaintiffs once he became aware, or should have become aware, that there were issues related to the value of the property that was to serve as collateral for the loan. Rosenberg, as the plaintiffs' legal representation, was aware of the importance of the value of the property and should have realized that there were issues related to its value when he received the McKeegan email, which discloses that the transfer of the permit would not allow any disposal activities to occur at the

property, and the Isner letter, which references the 2001 stipulated judgment preventing the property form being operated as a landfill, and when he examined the Stewart Title Commitment, which references the 1983 stipulated judgment prohibiting the disposal of solid waste in multiple portions of the property. On multiple occasions prior to closing, Rosenberg requested proof that the premises could be used as a landfill, indicating that he knew that determining such was crucial to the deal closing. Unfortunately, however, Rosenberg failed to continue looking into the issue or to adequately raise the issue to the plaintiffs' attention after receiving the McKeegan email and the Stewart Title Commitment, which should have alerted him to the fact that the property was grossly overvalued because it could not be used as a landfill.

The defendant cannot simply escape all liability by claiming that he was only the closing attorney. Even the defendants' own expert testified that although the property had been appraised at $3.9 million, that would not absolve Rosenberg of providing information that could impact the value of the property to his clients. Although Rosenberg was not specifically hired to underwrite the loan, Rosenberg still had an obligation to bring the issues associated with the property's value to his clients' attention. Rosenberg failed to fulfill this obligation.

Additionally, although Rosenberg was not the attorney that signed the opinion letter or environmental certificates, he still had an obligation to challenge their contents when he knew that they were not fully accurate. Instead, Rosenberg convinced Carlone not to change the opinion letter and environmental certification to reflect the information in the McKeegan email. This falls below the standard of care required of an attorney.

Furthermore, despite the defendants' contentions, Rosenberg did not meet the required standard of care by communicating that the permit was "more of a zoning permit, not an

operating permit." (See Pls.' Ex 10.) That statement, without further explanation, fails to convey the true nature of the problem that the property could not be used as a landfill and was worth significantly less than it was appraised for. Furthermore, Rosenberg still advised his clients that the deal was good to go and moved forward with the closing despite having received multiple documents that should have alerted him that the property was not worth its appraised value. As such, the plaintiffs have met their burden of proof as to the element of Rosenberg's wrongful act.

B

Causation

"To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries. . . . As [our Supreme Court] observed . . . [l]egal cause is a hybrid construct, the result of balancing philosophic, pragmatic and moral approaches to causation. The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. . . . The second component of legal cause is proximate cause, which [our Supreme Court has] defined as [a]n actual cause that is a substantial factor in the resulting harm . . . . The proximate cause requirement tempers the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules which are feasible to administer, and yield a workable degree of certainty. . . . [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection." (Citation omitted; internal quotation marks omitted.) *Vona* v. *Lerner*, supra, 72 Conn. App. 189-90.

The plaintiffs claim that Rosenberg caused their injuries because they only went through with the loan transaction based on Rosenberg's actions as their attorney. The defendants counter that Rosenberg's actions are not the proximate cause of any injury that the plaintiffs may have suffered because the property could not be used as a landfill regardless of any alleged negligence by Rosenberg. Hunter, the parties' expert, testified that even if the property was properly permitted, it would have been worthless based on the preexisting level of contamination and pollutants. The defendants further contend that Rosenberg is not a proximate cause of any damages because Doyle's negligence regarding the review appraisal broke the chain of events connecting Rosenberg's actions to the plaintiffs' alleged damages. The defendants are essentially arguing that Doyle's purported negligence was a superseding cause.

If Rosenberg had not been negligent and had informed the plaintiffs that the property could not be used as a landfill, the plaintiffs would not have gone through with the loan. The plaintiffs had informed Rosenberg that they were looking for a 50 percent loan to value ratio for the collateral, and the property's appraisal value was contingent on it being able to be operated as a landfill. Moreover, after Rosenberg got in contact with the department and finally examined the 2001 stipulated judgment subsequent to the closing, he acknowledged in an email to the plaintiffs dated March 31, 2017, that he was "quite certain that had any of us known that there was a judgment out there against the landfill permit, that you never would have made this loan . . . ." (Pls.' Ex. 18.) Because of Rosenberg's failure to properly advise his clients as to the true nature of the property, the plaintiffs closed the deal when they otherwise would not have. As their attorney, Rosenberg was responsible for preparing the clients for what would happen in a default, which he failed to do by not disclosing that the property's value was likely less than it was

appraised for. As such, Rosenberg's professional negligence is both the cause-in-fact and the proximate cause of the plaintiffs' injuries.

The defendants' contention that the plaintiffs' loss was not caused by Rosenberg because even without the injunction and permit issues, the property cannot be used as a landfill, lacks merit. If Rosenberg had informed the plaintiffs that the property could not be used as a landfill, or had given them notice of the 2001 stipulated judgment, then the plaintiffs would not have gone through with the loan, regardless of whether or not the property had other issues, such as environmental contamination issues. It is irrelevant that the property could also not be used as a landfill for nonlegal reasons.

Similarly, the defendants' argument that Rosenberg was not a proximate cause of the plaintiffs' harm because Doyle was negligent in performing the review appraisal, also lacks merit. Here, as previously discussed, the defendants are arguing that Doyle's negligence was a superseding cause that shifts the defendants' liability entirely to Doyle. The Supreme Court has abolished the superseding cause doctrine as to "the situation in cases . . . wherein a defendant claims that its tortious conduct is superseded by a subsequent negligent act or there are multiple acts of negligence." (Internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 167, 971 A.2d 676 (2009). "Prior to *Barry* [v. *Quality Steel Products, Inc.*, 263 Conn. 424, 820 A.2d 258 (2003)], the superseding cause doctrine was applied to any intervening force—be it of nature, man or beast—that a defendant claimed had superseded his own tortious conduct to such a degree that it alone was the sole proximate cause of the plaintiff[s'] injuries. . . . In light of the significant changes to our tort system implemented by tort reform, however, this court determined in *Barry* that the doctrine of superseding cause no longer

serves a useful purpose in our jurisprudence when a defendant claims that a subsequent negligent act by a third party cuts off its own liability for the plaintiff[s'] injuries. [In such] circumstances, superseding cause instructions serve to complicate what is fundamentally a proximate cause analysis. . . . [B]ecause our statutes allow for apportionment among negligent defendants . . . and because Connecticut is a comparative negligence jurisdiction . . . the simpler and less confusing approach to cases . . . [in which] the [fact finder] must determine which, among many, causes contributed to the [plaintiffs'] injury, is to couch the analysis in proximate cause rather than allowing the defendants to raise a defense of superseding cause. . . . Under this approach, the fact finder need only determine whether the allegedly negligent conduct of any actor was a proximate cause, specifically, whether the conduct was a substantial factor in contributing to the plaintiff[s'] injuries. If such conduct is found to be a proximate cause of the plaintiff[s'] foreseeable injury, each actor will pay his or her proportionate share pursuant to our apportionment statute, regardless of whether another's conduct also contributed to the plaintiff[s'] injury. Put differently, the term superseding cause merely describes more fully the concept of proximate cause when there is more than one alleged act of negligence, and is not functionally distinct from the determination of whether an act is a proximate cause of the injury suffered by the plaintiff." (Citations omitted; internal quotation marks omitted.) *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 748-49, 212 A.3d 646 (2019). As the plaintiffs' attorney, Rosenberg had a duty to provide counsel on the effect of the review appraisal on the loan transaction. Although Doyle's negligence may also have been a cause of the plaintiffs' injuries, Rosenberg's negligent conduct was a substantial factor in producing the plaintiffs' injuries and his negligence is not superseded. See id. The degree to which Rosenberg and other individuals are at fault for the plaintiffs'

injuries will be discussed in a subsequent section of this memorandum.

C

Damages

The plaintiffs have suffered damages due to Rosenberg's professional negligence because as a result of his negligence, they issued a loan that was not adequately secured and, therefore, could not recover the money owed under the terms of the loan through a foreclosure on the property. The specific amount of damages will be addressed in a separate section in this memorandum.

Accordingly, the plaintiffs have met their burden of proof as to Rosenberg's liability for professional negligence, subject to the defendants' special defenses, discussed in a subsequent section.

IV

Count Six: Negligent Misrepresentation Against Rosenberg

In count six, the plaintiffs allege that they relied on Rosenberg's representations and omissions regarding the condition of the property when making the loan. In their posttrial brief, the plaintiffs claim that they relied on five negligent misrepresentations made by Rosenberg: (1) not advising the plaintiffs about the 1983 stipulated judgment; (2) not advising the plaintiffs about the McKeegan email and Isner letter; (3) not advising the plaintiffs about the 2001 stipulated judgment; (4) providing the opinion letter and environmental certification; and (5) telling the plaintiffs that the deal was good to go and that it was protected. In response, the defendants contend that Rosenberg conveyed the substance of the McKeegan email and Isner letter to the plaintiffs. The defendants also maintain that Rosenberg made no representations at

all in the opinion letter and environmental certification, which he did not sign or author. Furthermore, the defendants claim that any misrepresentation was not the proximate cause of the plaintiffs' injuries for the same reasons that they contend any legal negligence was not the proximate cause of the plaintiffs' injuries, because the property could not be used as a landfill regardless of Rosenberg's conduct.

"[The Supreme Court] has long recognized liability for negligent misrepresentation. [It has] held that even an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. . . . [When the information supplied is to be used in the furtherance of a business transaction and the alleged harm is solely pecuniary, the] governing principles are . . . [that] [o]ne who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance [on] the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 342-43, 210 A.3d 469 (2019). "Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 626, 910 A.2d 209 (2006). "Liability for negligent misrepresentation may be placed on an individual when there has been a failure to disclose known facts and, and in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak." (Internal quotation marks omitted.) *Johnny*

Mountain Associates v. *Ochs*, 104 Conn. App. 194, 206, 932 A.2d 472 (2007), cert. denied, 286 Conn. 906, 944 A.2d 978 (2008). "[A] failure to disclose can be deceptive only if, in light of all the circumstances, there is a duty to disclose." (Internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 180, 757 A.2d 14 (2000).

In the present case, Rosenberg failed to disclose relevant information concerning the valuation of the property, namely, that he received the McKeegan email and Isner letter, which provided notice that the property could not be operated as a landfill because of the 2001 stipulated judgment, and that the Stewart Title Commitment referenced the 1983 stipulated judgment, which also provided notice that there might be issues preventing the property from being used as a landfill. As the plaintiff's attorney for the loan, he had a duty to disclose that information regarding the property's inability to be used as a landfill as he knew it was highly relevant to the plaintiffs' interests in issuing the loan. Rosenberg's statement that the permit was more of a zoning permit than an operating permit failed to convey the risk that the property could not be used as a landfill and did not have enough value to adequately secure the loan. Additionally, Rosenberg told the plaintiffs that the deal was good to go and encouraged them to go through with the closing, despite the fact that Rosenberg either knew or should have known that the deal was not good to go because the property's value was not sufficient to secure the loan. Because of Rosenberg's misrepresentations, the plaintiffs closed on the deal and issued a loan that was not adequately secured. Thus, the plaintiffs suffered pecuniary loss. The amount of that loss will be discussed in a subsequent section on damages.[5]

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[5]The statements made in the opinion letter and environmental certification were not negligent misrepresentations made by Rosenberg because they were authored and signed by Carlone, not Rosenberg, and the plaintiffs have not alleged any representation by Rosenberg

Accordingly, the plaintiffs have met their burden of proof as to Rosenberg's liability for negligent misrepresentation, subject to the defendants' special defenses, discussed in a subsequent section.

V

Count Seven: Respondeat Superior as to Marinosci Law Group

As Rosenberg was acting within his capacity as an employee of Marinosci Law Group at all relevant times, Marinosci is vicariously liable for Rosenberg's conduct in counts five and six. See *Matthiessen* v. *Vanech*, 266 Conn. 822, 839, 836 A.2d 394 (2003) ("under the common-law principle of respondeat superior, an employer is vicariously liable for compensatory damages arising out of the tortious conduct of his employee when that conduct occurs during the course of the employee's employment" [emphasis omitted]).

VI

Special Defenses

The defendants raise three special defenses that the court has not yet addressed: (1) mitigation; (2) comparative negligence; and (3) equitable estoppel. The court will address the special defense of mitigation in a subsequent section on damages.

A

Comparative Negligence

In their second special defense, the defendants allege that any damages should be reduced by the plaintiffs' comparative negligence. The defendants contend that the plaintiffs were negligent due to their reliance on the review appraisal and representations from their agents that

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directly affirming those statements.

were inaccurate.

"In situations where the claim of malpractice sounds in negligence . . . the defense of comparative negligence should be made available." (Citation omitted.) *Somma* v. *Gracey*, 15 Conn. App. 371, 378, 544 A.2d 668 (1988). Furthermore, "[i]t is axiomatic . . . that the duty of the attorney to act does not extend to the business of the client in general. . . . The obligation of the attorney is to provide the service for which he was hired." (Citation omitted.) Id., 379.

In *Somma* v. *Gracey*, the Appellate Court held that the trial court did not err in instructing the jury on comparative negligence. The court concluded that there was sufficient evidence to support the submission of the defense of comparative negligence to the jury. "In their complaint, the plaintiffs alleged that the defendants were negligent in several respects. Specifically, the plaintiffs alleged (1) that the defendants failed to conduct an adequate investigation of the buyers, and (2) that the defendants failed to inform the plaintiffs that they should not have gone through with the deal because there was inadequate security. At trial, the plaintiffs produced expert testimony that, indeed, the defendants had been negligent in those respects.

"The defendants produced evidence, however, that they had not agreed to conduct an investigation of the buyers. [The defendant] testified that it was the plaintiffs' responsibility to conduct the investigation of the buyers. [The defendant] further testified that any obligations he might have had in this area were satisfied when he informed the plaintiffs that if he were in their position he would do a more thorough check on the buyers." Id., 378-79. The court explained that "[i]f the attorneys' obligations did not include conducting an investigation of the buyers, then the attorneys could not have been negligent in that respect. The plaintiffs, then, would have been responsible for conducting the investigation, and it would have been their negligence in

conducting that investigation which would have been partly responsible for the losses they incurred. *At the same time*, the jury could reasonably have found that the defendants were negligent in not telling the plaintiffs not to go through with the deal without more security." (Emphasis added.) Id., 379-80. Similarly, Rosenberg was negligent and made negligent representations, as discussed previously, but the plaintiffs' own negligence was also partly responsible for the losses they incurred, including the negligence of their agent, Fedewa.

"[A]pparent and ostensible authority is such authority as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe that the agent possesses.[6] This authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency. It is essential to the application of the above general rule that two important facts be clearly established: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent . . . . [T]he liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under

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[6]"[T]he doctrine of apparent authority expands the authority of an actual agent, while the doctrine of apparent agency creates an agency relationship that would not otherwise exist . . . . [I]t has been the rule in this state for courts to use the terms apparent agency and apparent authority interchangeably." (Citation omitted; footnote omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 593, 605-606, 141 A.3d 752 (2016).

the circumstances conferred upon his agent." (Footnote added; internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 593, 602-603, 141 A.3d 752 (2016). "[R]egardless of whether there is an actual agency relationship between the defendant and the direct tortfeasor or only an apparent agency, if the [principal] has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for [the principal] to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion." (Internal quotation marks omitted.) Id., 607-608.

In the present case, the plaintiffs held Fedewa out as a person with authority to act on the plaintiffs' behalf, and the defendants reasonably believed that Fedewa was acting on behalf of the plaintiffs. Villa, the managing director of Safe IRA Partners, made it clear that he authorized Fedewa to take numerous underwriting actions on behalf of the plaintiffs. Fedewa referred to himself as Villa's partner in multiple emails to Rosenberg with Villa copied, and Villa never refuted the statements that they were partners. (Pls.' Ex. 1.) Additionally, Fedewa had a Safe IRA Partners email address and business card. Fedewa was the one who authorized and reviewed the review appraisal, and it was addressed to him care of Safe IRA Partners. The plaintiffs accepted lender fees paid directly to them for Fedewa visiting the property and meeting with the borrower and guarantors. Rosenberg and Brensley considered Fedewa the face of the plaintiffs for this transaction and he was their primary point of contact. Thus, Fedewa had apparent authority and was an agent of the plaintiffs.

Fedewa, acting as an agent on behalf of the plaintiffs, undertook underwriting the loan and evaluating how it would be paid back. Fedewa expressed that his plan was to have the debt serviced by the operating revenue from the restaurant, despite the Chief Financial Officer of the

restaurant saying that was essentially impossible. Fedewa directed Brensley to order the review appraisal instead of a new appraisal altogether. Fedewa reviewed and discussed the review appraisal with Villa, who ultimately approved it. Given that the review appraisal explicitly provided that it was contingent on the property being operated as a landfill, the plaintiffs should have inquired into the property's ability to be operated as such. If the plaintiffs had ordered a new appraisal instead of a review appraisal, they likely would have become aware of the valuation issues concerning the property and may not have gone through with the loan without more sufficient collateral. Furthermore, although Villa claims that he knew nothing about the property, he had a responsibility as the managing director of Safe IRA Partners to conduct due diligence. Moreover, the term sheet for the loan provides that the closing of the loan is subject to Safe IRA Partners' satisfactory review and approval of specified due diligence information, including, inter alia, a title insurance policy, appraisal review, and confirmation of zoning and entitlements of the property. (Defs.' Ex. RRRRR.) The plaintiffs should have reviewed the Stewart Title Commitment, which references the 1983 stipulated judgment prohibiting certain parts of the property from being used as a landfill, and the appraisal review, which provides that the property's value was contingent on its use as a landfill but does not determine if the property can be used as a landfill, and should have been alerted to the property's overvaluation. The plaintiffs had a responsibility to conduct due diligence regarding the property's value and had they done so, they would have realized the property was not adequate collateral and would not have gone through with closing the loan. Therefore, the plaintiffs' own negligence contributed to their injuries. Having considered all of the testimony and documentary evidence in this case, and considering the totality of the circumstances, the court finds by a fair preponderance of the

evidence that the plaintiffs were 20 percent negligent and the defendants were 80 percent negligent.

B

Equitable Estoppel

In their third special defense, the defendants allege that the plaintiffs' causes of action are barred by the doctrine of equitable estoppel. The defendants do not address this special defense in their memorandum. Accordingly, the court considers this argument abandoned. See *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 38, 717 A.2d 77 (1998) (issues that are not adequately briefed are deemed abandoned).

VII

Third-Party Complaint: Indemnification

In the third-party complaint, the defendants allege that Brensley, while acting within the scope of her employment at BFT Advisors, LLC (BFT Advisors), represented herself as a broker working on behalf of the borrower and guarantors and advised the defendants that the property would serve as adequate collateral and had solid waste permits that could easily be transferred, which was not true. The defendants contend that if they are liable to the plaintiffs, Brensley is liable to them for common-law indemnification based on her negligence.

"[T]o assert a claim for indemnification . . . [a] defendant must show that: (1) the party against whom the indemnification is sought was negligent; (2) that party's active negligence, rather than the defendant's own passive negligence, was the direct, immediate cause of the accident and the resulting injuries . . . (3) the other party was in control of the situation to the exclusion of the defendant seeking reimbursement; and (4) the defendant did not know of the

other party's negligence, had no reason to anticipate it, and reasonably could rely on the other party not to be negligent." *Smith* v. *New Haven*, 258 Conn. 56, 66, 779 A.2d 104 (2001). The Supreme Court has defined "exclusive control over the situation" as "exclusive control over the dangerous condition that gives rise to the accident." (Internal quotation marks omitted.) *Skuzinski* v. *Bouchard Fuels*, 240 Conn. 694, 706, 694 A.2d 788 (1997).

"In an action for indemnity . . . one tortfeasor seeks to impose total liability upon another [tortfeasor]. . . . [I]ndemnity involves a claim for reimbursement in full from one on whom a *primary liability* is claimed to rest . . . . Ordinarily there is no right of indemnity . . . between joint tortfeasors . . . . Where, however, one of the defendants is in control of the situation and his negligence alone is the direct immediate cause of the injury and the other defendant does not know of the fault, has no reason to anticipate it and may reasonably rely upon the former not to commit a wrong, it is only justice that the former should bear the burden of damages due to the injury. . . . Under the circumstances described, [the court has] distinguished between active or primary negligence, and passive or secondary negligence. . . . Indemnity *shifts the impact of liability* from passive joint tortfeasors to active ones." (Emphasis in original; internal quotation marks omitted.) *Bristol* v. *Dickau Bus Co.*, 63 Conn. App. 770, 773, 779 A.2d 152 (2001).

Although Brensley's purported negligence may have contributed to the plaintiffs' injuries, she was not in control of the situation to the exclusion of the defendants. The defendants were counsel for the plaintiffs. As such, they could and should have challenged the contents of the review appraisal, the opinion letter, and the environmental certification, and advised the plaintiffs that the property would not serve as adequate collateral, which could have prevented the loan from closing with inadequate collateral. Rosenberg should not have relied solely on any

representations made by Brensley and should have known through other sources, such as the McKeegan email and the Stewart Title Commitment, that the value of the property was not sufficient to secure the loan. Therefore, Brensley was not in control to the exclusion of the defendants. Additionally, Rosenberg's negligence is more than passive negligence. See id. He cannot fully shift the liability to Brensley when he himself was actively negligent. See id.

Accordingly, the court enters judgment in favor of Brensley as to the defendants' third-party complaint.

VIII

Third-Party Counterclaim: Abuse of Process

In her third-party counterclaim, Brensley brings an action for abuse of process against the defendants. Brensley claims that the defendants' only purpose in bringing their third-party complaint was in the hopes that she "would default or could be used as a scapegoat in the legal proceedings." Third-Party Def.'s Posttrial Memo., ¶ IV.

"An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process . . . the gravamen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . . [The word] primarily is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987). "[A]lthough attorneys

have a duty to their clients and to the judicial system not to pursue litigation that is utterly groundless, that duty does not give rise to a third party action for abuse of process unless the third party can point to specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation." Id., 497.

Although the defendants have not met the high bar of proving their indemnification claim, there is no evidence that bringing the indemnification claim was an abuse of process. Based on the evidence before the court, Brensley's role in these matters is much more than she claims, even if any alleged negligence was not to the exclusion of the defendants. Here, Brensley does not point to any specific misconduct by the defendants intended to cause specific injury outside of the normal contemplation of private litigation, and thus, has not met her burden of proof for her abuse of process claim. See id. Accordingly, the court enters judgment in favor of the defendants' on Brensley's third-party counterclaim.

IX

Damages

The plaintiffs contend that their damages should be the amount of debt they incurred to their investors that they were not able to pay off because the loan that was secured by the property was not paid back. Alternatively, the plaintiffs assert that the proper measure of damages is the difference between the value to the plaintiffs that the property would have had if it was as represented and could have been used as a landfill and the value that the property actually had. The plaintiffs claim that if the property had been worth what they believed it to be, then upon default of the loan, the plaintiffs would have been able to recover the amount owed on the loan, including the 17 percent interest owed under the loan.

In contrast, the defendants contend that the plaintiffs should only receive the amount they loaned minus the payments already received from the borrower and from the settlement payments regarding the loan transaction. The defendants claim that this would put the plaintiffs in as good a position as they would have been in if not for the defendants' tortious conduct because the plaintiffs would not have gone through with the loan if they were aware that the property was overvalued.

A

Loan to Investors

The plaintiffs assert that one proper way their damages could be measured in the present case is by the amount that the plaintiffs claim to owe to their investors, which they describe as the hard costs that they have incurred. Specifically, the plaintiffs contend that they have an obligation to pay their investors from January, 2016, to January, 2017, which they claim is evidenced by contracts, and an obligation to pay interest from February, 2017, to the present, which they claim arises from an oral agreement made in February, 2017. The purported contracts that the plaintiffs rely on to prove that they owe their investors certain payments from January 1, 2016, through January 1, 2017, are multiple notes that are not signed by either of the plaintiffs and do not identify either of the plaintiffs as a party to the contract. (Pls.' Ex. 49.) "[A] person who is not a party to a contract (i.e., is not named in the contract and has not executed it) is not bound by its terms." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 797, 17 A.3d 40 (2011). The notes name Safe IRA Investments, LLC, who is not a party in the present action, as a party to the notes, and the notes are signed by Villa as the managing

member of Safe IRA Investments, LLC. Villa testified that this was a typographical error, however, he took no steps to correct this purported error since signing the notes in 2016. The court finds that the evidence the plaintiffs have submitted to establish their obligation to investors from January 1, 2016, to January 1, 2017, is not credible.

As to the plaintiffs' claimed obligation to make interest payments to their investors from February, 2017, onward, they have submitted no written evidence and rely solely on Villa's testimony. Villa testified that the plaintiffs and their investors had a meeting in February, 2017, during which time they orally agreed to suspend payments until the plaintiffs collected a judgment in the present case and, in exchange, once the plaintiffs collected a judgment, they would pay their investors 10 percent interest from the date that the payments were suspended to the date the new payment was made. The court does not find Villa's testimony on this issue credible, and therefore rejects out of hand his testimony that there was an oral agreement to pay the plaintiffs' investors the interest for the period from February, 2017, forward. See *Zahringer* v. *Zahringer*, supra, 124 Conn. App. 679-80 ("[i]t is the sole province of the trial court to weigh and interpret the evidence before it and to pass on the credibility of the witnesses" [emphasis omitted; internal quotation marks omitted]). The court simply does not believe there was such an oral agreement.

Additionally, Villa testified that when the plaintiffs received $1.2 million as a settlement from other defendants, they made a payment to their investors that only went toward interest on the loan, not principal. This testimony is inconsistent with the plaintiffs' posttrial memorandum, in which they state that "[w]hile Mr. Villa may have stumbled over his words, the [c]ourt may conclude that the calculation is 10 [percent] on $1.6 million from February 2017 to February

2022, totaling $2,399,890.49, at which point a partial recovery was paid out to the retirees that paid off the interest and part of the principal, leaving $1,199,890.49, on which 10 [percent] interest continues to run, meaning damages of $1,419,008.06 through December 1, 2023." Pls.' Posttrial Memo, p. 20. This inconsistency regarding what the 2022 claimed payment went toward sheds further doubt on Villa's credibility. Moreover, Villa's testimony fails to provide the court with any way to estimate the amount that the plaintiffs purportedly owe their investors with *reasonable certainty* because the plaintiffs' own posttrial memoranda states that Villa stumbled over his words when he testified that the $1.2 million from the settlement payments went only toward interest and urges the court to adopt a calculation different from that testified to in order to arrive at a damages calculation of $1,419,008.06. See *Lawson* v. *Whitey's Frame Shop*, 241 Conn. 678, 689, 697 A.2d 1137 (1997) ("[d]amages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty" [internal quotation marks omitted]).

During trial, the defendants raised the statute of frauds as an alternative ground to establish that the plaintiffs have no obligation to pay their investors. The defendants did not raise the statute of frauds as a special defense nor did they brief the issue. Therefore, the court will not address the statute of frauds claim.[7] See *Willow Springs Condominium Assn.*, *Inc.* v. *Seventh BRT Development Corp.*, supra, 245 Conn. 38 (issues that are not adequately briefed are deemed

[7]Even if the defendants did properly raise the statute of frauds, the court does not need to reach the issue as the plaintiffs have failed to prove that there was an agreement to pay back the interest on the loans because the evidence submitted to substantiate the payments owed for the period from January, 2016, to January, 2017, is not credible and neither is Villa's testimony regarding an oral contract to pay back the interest on the loans covering the period from February, 2017, forward.

abandoned).

As such, the amount that the plaintiffs claim to owe to their investors is not the proper measure of damages in the present case.

B

The Plaintiffs' Loss

The "measure of damages in [a] legal malpractice action is [the] actual amount that the client would have recovered in [the] underlying action if the malpractice had not occurred." *Hartford Casualty Ins. Co.* v. *Farrish-LeDuc*, 275 Conn. 748, 760, 882 A.2d 44 (2005). Furthermore, "[a]s a general matter, the damages available to a plaintiff in connection with a claim for negligent misrepresentation are measured by the [plaintiffs'] costs incurred in reliance on the defendant's misstatements and false promises, rather than by the profits that the plaintiffs hoped to accrue therefrom." *Kent Literary Club* v. *Wesleyan University*, 338 Conn. 189, 223, 257 A.3d 874 (2021). "[T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate." (Citations omitted; internal quotation marks omitted.) *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 226 n.22, 477 A.2d 988 (1984).

If not for the defendants' conduct, the plaintiffs would not have closed the loan transaction. The plaintiffs disbursed $1.6 million at the closing of the loan transaction. They were

immediately paid back $169,549.45, including prepaid interest, an escrow reserve, and lender fees. (Pls.' Ex. 17.) The plaintiffs also received three payments of $8,228.90 on the loan. (Pls.' Ex. 17.) Thus, the plaintiffs' loss as a result of the defendants' legal malpractice and negligent misrepresentations is $1,405,763.85, the amount they loaned less the payments they received at closing and the payments the borrower made on the loan.

The plaintiffs' contention that the damages should be measured by the value that the property would have had if it was worth what is was appraised for minus the actual value of the property is without merit. As discussed earlier in this memorandum, the plaintiffs would not have gone through with the closing if not for the defendants' tortious conduct. Although they cite several cases, none of which are binding on this court, to support their position that they are entitled to the benefit of the bargain, measured by the difference between the property as they believed it to be worth and its actual value, those cases are distinguishable. For example, in *Nowakowski* v. *Rozbicki*, 39 Conn. Supp. 458, 458, 466 A.2d 353 (1983), the only Connecticut case that the plaintiffs rely on to support this position, involves a judgment for breach of a contract to perform legal services, not for legal malpractice or negligent misrepresentations. In *Nowakowski*, the defendant represented the plaintiffs in the purchase of a home and represented that the boundaries of the property were larger than they actually were, resulting in the plaintiffs purchasing a property smaller than they thought they purchased. Id., 458-59. The parties in *Nowakowski* provided evidence and expert testimony as to the difference in value between the land as described to them and what was actually conveyed. Id., 460. In the present case, the difference in value between what Rosenberg represented the property as being worth and the actual value of the property is not as clearly calculated. The plaintiff asks the court to take

judicial notice of the fact that in the foreclosure action, the property sold for a de minimis price. The price for which the property was sold, however, does not adequately reflect the difference in value of the property due to the defendants' conduct, because even without the stipulated judgments and permit issues, Hunter, the parties' expert, testified based on the preexisting level of contamination and pollutants the property had other environmental issues that still would have rendered it worthless. Even if the proper measure of damages was the difference in value, which it is not in the present case, the plaintiffs have not proven with certainty what that difference in value would be.

C

Mitigation

The defendants contend that the plaintiffs failed to mitigate their damages by not pursuing legal action against the guarantors until nearly six years after the default. The defendants assert that had the plaintiffs took immediate action against the guarantors, the guarantors' net worth at closing of $1.2 million would have been available and reduced their damages. The plaintiffs counter that they made business judgments about which actions to pursue and that the defendants should not be able to escape liability with unfounded claims that there could have been possible recovery elsewhere.

"[I]n the contracts and torts contexts . . . the party receiving a damage award has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier. . . . [T]he burden of proving that the injured party could have avoided some or all of his or her damages universally rests on the party accused of the tortious act. . . . To claim successfully that the plaintiff failed to mitigate

damages, the defendant must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty. . . . Furthermore, [t]he duty to mitigate damages does not require a party to sacrifice a substantial right of his own in order to minimize a loss." (Citations omitted; internal quotation marks omitted.) *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 334, 193 A.3d 1192 (2018).

The defendants have provided no authority that suggests that the plaintiffs must pursue legal action against certain individuals before others, much less any authority that states the plaintiffs must pursue an action against the guarantors of a loan before pursuing an action against their attorney for legal negligence and negligent misrepresentations. Additionally, the defendants have not provided evidence that the plaintiffs' damages would have been lessened even if the plaintiffs had pursued the guarantors sooner. The plaintiffs may not have been able to collect any damages even if the legal action was successful if the plaintiffs' contention that the guarantors were judgment proof is true. The defendants have not introduced sufficient evidence to overcome this contention. See id. Additionally, the amount of any damages that the plaintiffs could have avoided by pursing the guarantors is speculative, and could not be measured with reasonable certainty as required for a mitigation special defense. See id. As such, the defendants have not met their burden of proof as to their mitigation special defense.

D

Reduction for Settlements and Comparative Negligence

The defendants contend that pursuant to General Statutes § 52-572h any recovery the plaintiffs receive should be reduced by the $1.2 million they received in settlements with Doyle

and Carlone in connection with the loan at issue. The plaintiffs do not contest that these settlements are for losses suffered due to the loan at issue in the present case, but argue nonetheless that the settlement amounts should not reduce the amount of damages awarded. The plaintiffs contend that General Statutes § 52-216a[8] should control the determination and would permit reducing the amount of damages by the settlement amounts only if the damages award would otherwise be excessive as a matter of law. The plaintiffs maintain that a full damages award would not be excessive in the present case.

Section 52-572h (c) provides: "In a negligence action to recover *damages resulting from personal injury, wrongful death or damage to property* occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages except as provided in subsection (g) of this section." (Emphasis added.) "[D]amage to property, as used in § 52-572h, does not include purely economic losses." (Internal quotation marks omitted.) *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 584, 657 A.2d 212 (1995). Section 52-572h (c) does not apply to the present action because the economic damages

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[8]General Statutes § 52-216a provides in relevant part: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury. If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. . . . This section shall not prohibit the introduction of such agreement or release in a trial to the court."

suffered by the plaintiffs are not damages resulting from personal injury, wrongful death, or damage to property. See *Lunsford* v. *Goodwin*, Superior Court, judicial district of New Haven, Docket No. CV-11-6017153-S (December 28, 2011, *Wilson, J.*) (53 Conn. L. Rptr. 229, 230) (holding that damages claimed do not fall within ambit of § 52-572h when "the only specific allegations of damage are the plaintiff's repeated allegations that they paid more than the property's fair market value").

"[The Supreme Court] has repeatedly recognized that the legislature abrogated the common-law rule with respect to pretrial settlement payments when it adopted [§] 52-216a." *Menard* v. *State*, 346 Conn. 506, 525, 291 A.3d 1025 (2023). The Supreme Court has stated that "§ 52-216a allows the trial court to consider a settlement payment in a bench trial and that such consideration might prevent double recovery." Id., 526. "In other words, the trial court may reduce the damages to account for pretrial settlement payments, whether in a trial to the jury or to the court, when the award would otherwise be excessive as a matter of law in the absence of such a reduction." Id. "In contemplating what it means for the award to be excessive in light of a settlement by a joint tortfeasor or another party legally responsible for the payment of damages, it is important to appreciate what the settlement represents. . . . [A] settlement does not necessarily represent a claimant's fair, just and reasonable damages but, rather, represents, in part, the parties' assessments of the risks of litigation. . . . [I]t does not equate to a satisfaction of a judgment represent[ing] full compensation for injuries . . . ." (Citation omitted; internal quotation marks omitted.) Id., 526-27.

In *Menard* v. *State*, supra, 346 Conn. 527, the Supreme Court held that the plaintiffs' damages award could not be deemed excessive as a matter of law, even when not reduced by

dram shop settlement payments, because the settlement payments contemplated damages for Post-Traumatic Stress Disorder, which were specifically not included as part of the trial court's damages award. In the present case, however, the settlement payments represent solely economic damages that resulted from the plaintiffs closing on the loan because they believed that the property was worth more than it was actually worth. Thus, unlike in *Menard*, the settlement payments in the present case are not for any damages not contemplated by the present damages award. It would be excessive as a matter of law to enter a damages award for the plaintiffs' full loss when they have already recovered $1.2 million in settlement payments for that loss. Accordingly, the damages of $1,405,763.85 is reduced by $1.2 million, which results in a damages award of $205,763.85. Furthermore, as discussed in part VI A of this memorandum, the court finds the plaintiffs' were 20 percent negligent. As such, the plaintiffs' damages of $205,763.85 is further reduced by 20 percent, resulting in $164,611.08 in damages.

CONCLUSION

For the foregoing reasons, the court enters judgment in favor of Rosenberg as to count four, sounding in breach of contract. The court enters judgment in favor of the plaintiffs as to counts five through seven, sounding in legal malpractice, negligent misrepresentation, and respondeat superior, respectively. The court enters judgment in favor of Brensley on the defendants' third-party complaint, sounding in indemnification, and enters judgment in favor of the defendants on Brensley's third-party counterclaim, sounding in abuse of process. The court enters a damages award in the amount of $164,611.08, which represents the $1.6 million the plaintiffs loaned less the $169,549.45 they received in prepaid interest, an escrow reserve, and lender fees, the $24,686.70 they received in payments on the loan, and the $1.2 million they

received in settlement payments, reduced by 20 percent for the plaintiffs' own negligence. It is so ordered.

Juris No. 421279
Wilson, J.