DOCKET NO. FST-CV-23-6059675-S		SUPERIOR COURT
RICK NATHANSON		JUDICIAL DISTRICT OF
V.	:	STAMFORD-NORWALK
	:	AT STAMFORD
EDWARD GUILFOYLE ET AL.	:	MAY 7, 2024

MEMORANDUM OF DECISION

The apportionment defendants, Niko Nakos and Quibus, LLC ("Nikos and Quibus") and Jeff Woerz and Absolute Value Management ("Woerz and Absolute Value") have moved to dismiss counts one and two respectively of the Apportionment Complaint dated June 8, 2023. Apportionment plaintiff Edward Guilfoyle ("Guilfoyle") is the defendant in a lawsuit brought by plaintiff and homeowner Rick Nathanson ("Nathanson"). Guilfoyle subsequently filed an apportionment complaint in which he has alleged that apportionment defendants Nikos and Quibus were negligent in the design of the residence that the defendant renovated for plaintiff Nathanson.

Specifically, he has alleged that Nikos and Quibus' design failed to adequately address the existing conditions that their renovations would impact, that they were negligent in their oversight of the construction work done at Nathanson's residence, and that they were negligent in failing to advise Nathanson that it was against his interest to terminate Guilfoyle's company, Guiltec, as the termination of this company would exacerbate Nathanson's loss and violate Guiltec's right to receive notice of any defects and an opportunity to cure them.

In the second count of the apportionment complaint, Guilfoyle has alleged that Jeff Woerz and his company Absolute Value Management were hired by Nathanson to oversee the

design and construction work being done at Nathanson's residence. He has claimed that Woerz and Absolute Value negligently performed the owner's representative duties. Specifically, he has alleged that Woerz and Absolute Value failed to ensure that the project architect adequately addressed the existing conditions in the home that would be impacted by the renovations, failed to ensure that the architect addressed these existing conditions, were negligent in failing to advise Nathanson that he lacked the grounds for terminating Guiltec for cause, and for failing to advise Nathanson that terminating Guiltec would exacerbate Nathanson's loss and violate Guiltec's right to receive notice of the defect and an opportunity to cure the defect.

The apportionment defendants have moved to dismiss the apportionment claims against them for lack of subject matter jurisdiction. They allege that under Connecticut General Statutes §52-572h(c) and subsection (k), Guilfoyle cannot recover for the type of damages alleged in the apportionment complaint and that consequently, the court lacks subject matter jurisdiction over these claims.

FACTS

Plaintiff Rick Nathanson is the owner of real property located at 147 Byram Shore Road in Greenwich. The defendant and apportionment plaintiff Edward Guilfoyle is a principal at Guiltec Development, LLC, a Connecticut limited liability company with a place of business in Stamford. Guiltec provides home improvement services including custom home building and design, high end remodeling, and construction management. Guiltec focuses its business on providing services in the field of luxury residential real estate construction and holds itself out as a licensed and certified home improvement contractor. The plaintiff and Guiltec entered into a contract in September 2020 whereby Guiltec would provide renovation, construction and supervision services to improve the plaintiff's property for a fixed fee. As part of this contract,

Guilfoyle would personally supervise all the individuals who provided labor and materials to improve the plaintiff's property.

In his complaint, the plaintiff has alleged that Guilfoyle failed to exercise the due care, skill, diligence, and reasonable degree of professional competence required. He has further alleged that Guilfoyle failed to adequately supervise the individuals who were working on the plaintiff's property so that the renovation work done at the plaintiff's residence resulted in damage to the plaintiff's residence.

In count one of the underlying complaint, Nathanson has alleged that Guilfoyle had agreed to "personally supervise and ensure the management and quality of the work" and that he "had a duty to exercise the level of due care, skill, and diligence consistent with the level of care utilized by supervisors of home improvement and construction contractors, subcontractors, and materialmen in the trade of home improvement projects." In count two, Nathanson has alleged that by making this representation, as well as representations regarding how many and which contractors and subcontractors would be working on this renovation project and then failing to follow through with these representations, Guilfoyle acted intentionally, as well as recklessly and wantonly and thus violated Nathanson's right.

In count three, Nathanson has alleged that Guilfoyle made false representations regarding the contractors and subcontractors who would be working on this project and that as a result, Nathanson relied on these negligent representations to his detriment. In count four, Nathanson has alleged that because the aforementioned conduct by Guilfoyle was undertaken in the course of his trade and business, Guilfoyle's conduct constitutes unfair or deceptive practices within the meaning of the Connecticut Unfair Trade Practices Act ("CUTPA") as outlined in Connecticut General Statutes § 42-110b. He has further alleged that this conduct was

immoral, unethical or unscrupulous or is substantially injurious to consumers, competitors or other businesspersons, and that it caused substantial monetary injury to Nathanson and resulted in him suffering an ascertainable loss.

In his apportionment complaint, Guilfoyle has alleged that to the extent that he may be responsible for the losses suffered by the plaintiff, additional parties (who were not part of the original action filed by Nathanson) are also responsible for the losses that Nathanson has incurred. Specifically, Guilfoyle has alleged in count one of his apportionment complaint dated June 8, 2023 that Nakos and his company Quibus were hired to provide architectural services and to oversee Guiltec's work and that they were negligent in the performance of these tasks.

He has also alleged in count two of his apportionment complaint that Woerz and his company Absolute Value Management were hired to serve as the plaintiff's representative on the project in order to oversee the design and construction work. He has alleged that Woerz and Absolute Value also bear responsibility for the plaintiff's losses because they negligently performed their owner's representative duties by failing to ensure that the project's architect adequately addressed the existing conditions at the residence that would be implicated by the renovation work and failed to direct the architect to design for this purpose. Guilfoyle has also alleged that Woerz and Absolute Hardware knew or should have known about the architect's design failure and that they, on the owner's behalf, should have corrected this failure by adequately supervising the architect.

Guilfoyle has claimed that Woerz and Absolute Hardware failed to ensure that the architect addressed the existing home conditions when Guiltec encountered them and failed to take corrective action on the owner's behalf once this discovery had been made. Finally, Guilfoyle also claims that Woerz and Absolute Hardware were negligent in failing to advise the

plaintiff that it was against his best interests to terminate Guiltec because of the expected exacerbation to the plaintiff's losses by violating Guiltec's right to notice and an opportunity to cure the defects.

PROCEDURAL HISTORY

The plaintiff filed a summons and complaint against Guilfoyle on January 18, 2023. At the time the complaint was filed the plaintiff was already a defendant in the matter of *Guiltec Development, LLC v. Nathanson*, FSt-CV-21-6053376-S. The latter case was consolidated with the pending matters on May 1, 2023. In the pending matter, the plaintiff has alleged that the defendant engaged in negligent supervision, intentional misrepresentation, negligent misrepresentation, and a CUTPA violation. Guilfoyle filed his answer and special defenses on April 17, 2023.

Guilfoyle subsequently filed his apportionment complaint against Nakos, Quibus, Woerz, and Absolute Value on June 8, 2023. Apportionment defendants Nakos and Quibus filed their motion to dismiss on September 5, 2023. Apportionment defendants Woerz and Quibus filed their motion to dismiss on September 29, 2023. In the latter's motion, they assert that there are incorporating the law and the arguments set forth in the motion to dismiss filed by defendants Nakos and Quibus. Apportionment plaintiffs Guilfoyle and Guiltec filed their opposition to both motions to dismiss on November 13, 2023.

The matters were scheduled for a hearing on all pending motions and the objection on January 16, 2024. This memorandum of decision shall serve as an order with respect to both pending motions to dismiss and the objections filed in response to those motions.

LEGAL PRINCIPLES

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Weiner* v. *Clinton*, 100 Conn. App. 753, 756-57, 919 A.2d 1038, cert. denied, 282 Conn. 982, 926 A.2d 669 (2007), quoting *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde* v. *Specialized Education of Connecticut, Inc.*, 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014). "If a defendant challenges the court's personal jurisdiction, the plaintiff bears the burden of proving the court's jurisdiction." (Internal quotation marks omitted.) *Golodner* v. *Women's Center of Southeastern Connecticut, Inc.*, 281 Conn. 819, 825-26, 917 A.2d 959 (2007).

"[T]he grounds which may be asserted in [a motion to dismiss] are: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper avenue; (4) insufficiency of process; and (5) insufficiency of service of process." *Zizka* v. *Water Pollution Control Authority,* 195 Conn. 682, 687, 490 A.2d 509 (1985). "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services,* 301 Conn. 268, 274, 21 A.3d 759 (2011). "The motion to dismiss . . . admits all facts which are well

pleaded . . . ." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007).

"'Depending on the record before it, a ... court ruling on a motion to dismiss for lack of subject matter jurisdiction ... may decide that motion on the basis of: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. ... Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.'" *Fay v. Merrill*, 336 Conn. 432, 445 (2020) quoting *Feehan v. Marcone*, 331 Conn. 436, 446 (2019). "A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 626 (2013). Such a motion "admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." Id. When a motion to dismiss "is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint." *Wilcox v. Webster Ins. Inc.*, 294 Conn. 206, 209 (2009).

"In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court 'must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations....' .... A trial court considering a motion to dismiss may, however, 'encounter different situations, depending on the status of the record in the case.... '[I]f the complaint is supplemented by undisputed facts ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint.... Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] ....

Conversely, 'where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts.... Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits.... An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties.... The trial court 'may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred.'" *Giannoni v. Commissioner of Transportation*, 322 Conn. 344, 349-50 (2016) (citations omitted).

CONNECTICUT GENERAL STATUTES § 52-572h

Connecticut General Statutes § 52-572h(2)(o) states in relevant part: "Except as provided in subsection (b) of this section, there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence, including but not limited to, an action for wrongful death pursuant to section 52-555 or an action for injuries by a motor vehicle owned by the state pursuant to section 52-556."

Connecticut General Statutes § 52-572h(k) further states: "This section shall not apply to breaches of trust or of other fiduciary obligation."

In *Crotta v. Home Depot, Inc.,* 249 Conn. 634, 732 A. 2d 767 (1999), the Connecticut Supreme Court explained the meaning of § 52-572h : "Section 52-572h, which governs the

apportionment of liability among multiple tortfeasors, provides in relevant part: '(c) ... [I]f 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 his proportionate share of the recoverable economic damages and the recoverable noneconomic damages ... [Emphasis in *Crotta* opinion.] It is therefore clear that the express language of § 52-572h provides for apportionment of liability only among those parties from whom the plaintiff is entitled to recover damages.

Thus, as courts have found, where the plaintiff does not have a valid cause of action against the apportionment defendants the apportionment plaintiff does not have a valid cause of action against the apportionment defendant. See *Lanzara v. Henry M. Osowiecki & Sons, Inc.*, 2017 WL 3671333, Superior Court, judicial district of Litchfield and Litchfield, (*Schuman, J.*), 64 Conn. L. Rptr. 846, July 17, 2017. " § 52-572h does not provide a basis for the defendants to assert a claim against Crotta for apportionment of liability in connection with his allegedly negligent supervision of the plaintiff." *Crotta v. Home Depot, Inc.*, 249 Conn. 634, 732 A. 2d 767 (1999).

DISCUSSION

The apportionment defendants have alleged that the claims raised by Guilfoyle in his apportionment complaint are invalid because the allegations he has asserted and the damages he has sought fall outside the scope of Connecticut General Statutes § 52-572h. Specifically, they have claimed that the apportionment statute prohibits recovery for causes of action based on a breach of trust or other fiduciary obligations under subsection (k). They argue that since the claims that Guilfoyle has raised are based on an allegation that an architect deviated from the standard of care and that this amounts to a breach of fiduciary obligation, the claims raised by

Guilfoyle in the apportionment complaint should be dismissed for lack of subject matter jurisdiction. They have also alleged that the damages sought by Guilfoyle fall outside the scope of the statute because the claims asserted against Guilfoyle by Nathanson do not result from personal injury, wrongful death, or damage to property as required by Connecticut General Statutes § 52-572h.

Having reviewed the underlying complaint as well as the apportionment complaint, it is evident that the claims alleged by Guilfoyle against all the apportionment defendants fall outside the scope of Connecticut General Statutes § 52-572h. Nathanson's original complaint contains counts in which he has alleged negligent supervision, intentional misrepresentation, negligent misrepresentation, and violations under CUTPA. Guilfoyle's apportionment complaint contains claims against Nakos and Quibus alleging negligent design, negligent oversight, and a failure to adequately advise Nathanson. Guilfoyle's apportionment complaint contains claims against Woerz and Absolute Value alleging negligent representation, a failure to address the mistakes made by the project architect, and a failure to adequately advise Nathanson.

In essence, all the claims alleged by both Nathanson in his underlying complaint and by Guilfoyle in his apportionment complaint are based on a theory that the services rendered by the particular industry professional were inadequate because the professional deviated from the required standard of care and thus violated a fiduciary obligation. As stated throughout the underlying complaint, Nathanson repeatedly refers to the purported failure to exercise the degree of professional competence, the failure to adequately supervise, the failure to adequately run the project, and alleged misrepresentations that were made by the industry professionals that he hired to assist with the renovation of his residence.

Based on a plain reading of the complaint, it is clear to the court that the claims alleged are based on a theory of a breach of fiduciary duty by the named industry professionals. However, as stated in the express statutory language of § 52-572h(k) and as interpreted by numerous superior courts, this section of the statute does not apply to breaches of fiduciary obligations or breaches of trust. In addition, although Guilfoyle has alleged in his objection to the motions to dismiss that there is no unique degree of trust or loyalty which characterizes a fiduciary relationship between an architect and his client, the case he has offered in support of this claim does not actually state as such. On the contrary, in *Routh v. Preusch*, 2004 WL 2165906, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST CV 030197042, (September 1, 2004, *Lewis, J.)*, 37 Conn. L. Rptr. 745, Judge Lewis merely found that the plaintiff in that case had not carried her burden of establishing that there existed a fiduciary relationship between the parties - not that there could never be found to exist a fiduciary relationship between an architect and a client.

"[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." (Internal quotation marks omitted.) *Konover Development Corp. v. Zeller*, 228 Conn. 206, 219, 635 A. 2d 798 (1994).

In this case, it is clear from the allegations in the underlying complaint that Nathanson placed a degree of trust and confidence in the industry professionals that he hired to renovate his home and he relied on their superior knowledge, skill, and expertise so that they were under a duty to represent his interests. To that end, he has alleged in his compliant that he had hired Guilfoyle for an intended and specific purpose, and as part of their agreement, Guilfoyle had promised Nathanson that Guilfoyle would personally supervise and ensure the management and

quality of the work being done at the residence by the various individuals who were hired to work on Nathanson's home.

Guilfoyle has alleged in his apportionment complaint that Nakos and Quibus were hired to provide architectural services to Nathanson and that these services included providing the design for the renovations, oversight of the renovations being undertaken at the residence, and essentially, insight and expertise as to appropriate design solutions that would consider the existing conditions at the residence. He has further alleged that Nakos and Quibus failed to adequately advise Nathanson about the consequences of terminating Guiltec. With respect to Woerz and Absolute Value, Guilfoyle has alleged that they were hired to act as the representatives of Nathanson by being present at the site of the renovations, and to thus address whatever needed to be addressed as part of the renovations while acting on Nathanson's behalf.

All of these actions that are alleged as part of Guilfoyle's claims inherently include the professional judgement, discretion, experience, and unique expertise of the individuals that Nathanson had hired to handle the renovations at his residence. But for these qualities, Nathanson could have supervised and overseen the renovations at his own residence as many homeowners commonly do when they engage in a home renovation project. For these reasons, the court finds that there existed a fiduciary relationship in this case. However, as a claim of a breach of fiduciary duty does not fall within the ambit of § 52-572h, this claim may not be apportioned by Guilfoyle.

With respect to the damages claimed by Nathanson in the underlying complaint, all of the alleged actions that Nathanson has referenced purportedly resulted in Nathanson suffering unspecified damages. Nowhere in the underlying complaint does Nathanson describe the specific nature of the damages he suffered. More importantly, nowhere in the complaint does he

even specify that the damages were a consequence of physical or tangible damage to his residential property itself. While the court can guess that the purported damages may have resulted in tangible damage to the physical property, there is nothing in the complaint that explicitly alleges as such. "Connecticut, however, is a fact-pleading state and requires that each pleading "contain a plain and concise statement of the material facts on which the pleader relies..." *Town of New Canaan v. Brooks Laboratories, Inc.,* 2006 WL 2578772, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST CV 054006797 (August 18, 2006, *Lewis, J.)*. In the underlying complaint, there is no allegation of a loss of use of tangible property and the court may not infer as such, despite Guilfoyle's claims to the contrary.

Moreover, the court is not convinced by Guilfoyle's argument that "claims of construction defects, particularly the claims in this case relating to the renovation of the owner's existing home, are clearly claims of physical damage to tangible property – damage to both the defectively built items that must be repaired and to the areas around them damaged either by the defective construction and/or the need to repair that construction." Guilfoyle argues that Nathanson's claim in the underlying complaint is ultimately a claim of the loss of the use of the tangible property because "Nathanson is clearly seeking damages from Guiltec Development and Guilfoyle because their supposed negligence delayed his ability to resume the occupancy of his home and regain its use".

However, notably, nowhere in the underlying complaint does Nathanson himself actually allege this. As discussed above, Nathanson's claims in this action are that he suffered unspecified, actual damage and nowhere does he characterize this damage as physical damage to the home itself. Presumably, there was such damage and that is why Nathanson is seeking

monetary damages for the economic loss he suffered, but the court will not read into the complaint claims and facts that are not expressly stated therein.

Moreover, a claim of lost use of tangible property is sufficient to satisfy the traditional meaning of damage to property only when the relevant pleadings show, or necessarily imply, that a loss or impairment of the use of some tangible piece of property has occurred, and that the anticipated or regularly intended use of the particular property is precluded. In this case, there is no mention whatsoever in the underlying complaint that the damage that Nathanson suffered included physical damage to his property that deprived him of use and occupancy of his home. In fact, it was only upon the court inquiring about this issue during oral argument that the court was apprised that Nathanson was not living in the residence during the renovation process.

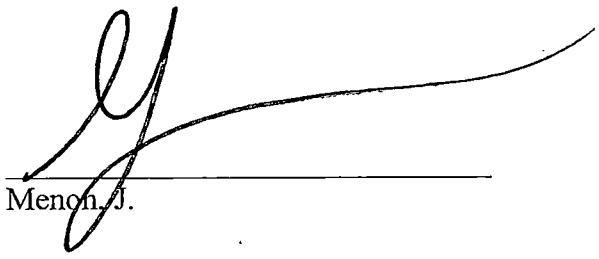
In order for this court to retain subject matter jurisdiction over the apportionment claims, the court must find that the apportionment statute covers the specific actions being apportioned. See *Carpenter v. Law Offices of Dressler & Associates, LLC*, 85 Conn. App. 655, 660, 858 A. 2d 820, cert. denied, 272 Conn. 909, 863 A. 2d 700 92004). As alleged in the underlying complaint, there is no explicit claim of physical damage made by Nathanson. Thus, this case falls squarely within the scenario addressed by the Connecticut Supreme Court in *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 657 A. 2d 212 (1995).

In *Williams Ford, Inc. v. Hartford Courant Co.*, the Supreme Court examined the history behind the enactment of § 52-572h and the term "damage to property" and held that it could "find no justification in that history, therefore, for reading that phrase in other than its traditional sense of physical damage to tangible property." Thus the court declined to extend the meaning of "damage to property" to include commercial losses unaccompanied by physical damage to or loss of use of tangible property. *Id.* As there is no explicit allegation of damage to tangible

property as a result of negligence in the underlying complaint in this case, the apportionment complaint does not fall within the ambit of § 52-572h. See *Lunsford v. Goodwin*, 2011 WL 7095161, Superior Court, judicial district of New Haven, Docket No. CV 11 6017153-S, (December 28, 2011, *Wilson, J.*), (53 Conn. L. Rptr. 229).

CONCLUSION

For the forgoing reasons, both motions to dismiss the claims against the apportionment defendants are granted and the objections are overruled.



Menon, J.

DECISION ENTERED IN ACCORDANCE WITH THE FOREGOING ON 5/7/24.
JD NO SENT 5/7/24
DCC