FBT-CV23-6125621-S

BRIDGEPORT PARK OP, LLC

VS.

PARK PACKAGE STORE, INC.,

CONNECTICUT SUPERIOR COURT

JUDICIAL DISTRICT OF BRIDGEPORT

AT BRIDGEPORT

May 31, 2024

MEMORANDUM OF DECISION re MOTION TO STRIKE (#102.00)

Background

For purposes of this motion to strike, the plaintiffs' summary of the background, as set forth in the objection to the motion, reasonably accurately sets forth the background facts and claims as asserted in the complaint (subject to editing as appropriate):

On or about August 17, 2022, George and Brenda Lahham, as the owners of 513 Park Avenue and 561-563 Park Avenue, Bridgeport, Connecticut and as principals of Park Package Store, Inc., entered into a written purchase and sale agreement with the plaintiffs. The contract included an agreement by Park Package Store, Inc. to sell its assets located at 513 Park Avenue and 561-563 Park Avenue, Bridgeport, Connecticut to Bridgeport Park OP, LLC and an agreement by the Lahhams to sell the real property to Bridgeport Park BLD, LLC. The contract outlined the terms of each sale and was signed by George and Brenda Lahham – the owners of the real estate and according to the Connecticut Secretary of State, the President and Secretary of Park Package Store, Inc., respectively. The agreement was signed by Brenda and George Lahham and a deposit was made to the sellers' attorney in the amount of $95,000.00 (10% of the aggregate sale price). The contract allocated a portion of the total price of the transaction to the business assets and a portion of the price to the real estate.

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JDNO Notice sent to all parties 5/31/2024
Asst. Clerk

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The contract called for a closing as to the business assets and title to real property on or about January 5, 2023. The plaintiffs claim that despite numerous promises to close, the defendants are alleged to have refused to do so. The plaintiffs are relying on §16 of the purchase agreement which sets forth the buyers' remedies if sellers fail to perform, which includes a right to judgment of specific performance and allows for other remedies.

The sellers provided documents and signatures in furtherance of the sale to the Department of Revenue Services and to the Connecticut Liquor Commission for the transfer of the assets contemplated by the agreement.

The buyers claim to have spent large sums of money in due diligence and in contemplation of the sales, and claim that the sellers were aware of buyers' expenses and reliance on the contract and their promises to close.

The complaint contains eight counts, the first four directed to defendant, Park Package Store, Inc. and the fifth through eighth counts directed to defendants George E. Lahham and Brenda Lahham. The first and fifth counts are framed as requests for specific performance; the second and sixth counts are claims of breach of contract (seeking damages for economic losses); the third and seventh counts assert fraud; and the fourth and eighth counts assert violations of the Connecticut Unfair Trade Practices Act (CUTPA; General Statutes § 42-110a et seq.)

The defendants have challenged all of the claims asserted by the plaintiffs. Initially, they assert that the first and fifth counts improperly seek an equitable remedy (specific performance) which is not an independent cause of action.

The defendants next contend that the first four counts -- all of the counts directed to defendant Park Package Store, Inc. -- are deficient because "the corporation was not

a signatory to the contract and therefore not a party with obligations to the defendants." They also assert that the counts are barred by the statute of frauds.

More narrowly, the third and fourth counts also are challenged on the bases that "the counts do not allege any conduct that would rise to the level of fraud or constitute a violation of CUTPA. Moreover, the complaint does not allege more than a single transaction and certainly not a practice or course of dealing."

As to the individual defendants, they claim that the fifth and sixth counts are legally deficient because "forcing the sale for Specific Performance (if a cause action) as to the "Real Estate" is not possible because the contract was not severable between the assets and real estate." They further argue that "this lack of severability is made plain in the Complaint and the attached contract."

Finally, as to the seventh and eighth counts asserting fraud and violation of CUTPA, the defendants argue that "both counts are deficient as to intentional conduct. Fraud requires an intent to deceive.... On the CUTPA count, the Complaint fails to make any factual allegations (or even to allege) a pattern and practice or course of dealing."

Not surprisingly, the plaintiffs dispute all of these claims of legal deficiency.

Legal standards

The court need not recite in detail the well-established standards for a motion to strike. See, e.g., *Hughes v. Board of Education*, 221 Conn. App. 325, 329-30 (2023). A motion to strike challenges the legal sufficiency of a pleading. In evaluating the legal sufficiency, the court is required to accept all well-pleaded facts as true, and to give the non-moving party the benefit of all reasonable inferences. In effect, the

issue is what might be provable under the non-moving party's pleading, based on the record before the court.

The court is required to interpret a pleading in a common-sense manner.

> "[P]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them.... The purpose of a complaint or counterclaim is to limit the issues at trial, and such pleadings are calculated to prevent surprise.... It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]....
>
> "The complaint is required only to fairly put the defendant on notice of the claims against him ... [T]he interpretation of pleadings is always a question of law for the court ... The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically ... Although essential allegations may not be supplied by conjecture or remote implication ... the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties ... As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Internal quotation marks and citations, omitted.) *Petrov v. Gueorguieva,* 167 Conn. App. 505, 516-17 (2016).

The label attached to a count in a complaint is not conclusive as to the nature of the count; the court is required to consider the substance of the allegations in order to determine the true nature of the claim/count; *Moulton Bros. v. Lemieux*, 74 Conn. App. 357, 361-62, 812 A.2d 129 (2002).

Discussion

As a preliminary matter, the court must note that there are two separate plaintiffs (with similar names), each asserting distinct claims – and directed to distinct defendants. At times, the defendants' arguments blur these distinctions, compounded by a narrowed failure to consider the legal sufficiency of each count on its own. That there may be conflicts between allegations of distinct parties, or conflicts between specific counts, generally does not control a motion-to-strike analysis. If a count is attacked as legally insufficient (failing to state a cause of action upon which relief might be granted), that count must be evaluated on its own. A party is permitted to plead alternative and even inconsistent causes of action, and each count must be evaluated on its own. For example, it is not uncommon for a plaintiff to allege a breach of contract in one count, with allegations of an inherently-inconsistent claim of unjust enrichment in a subsequent count. In such a situation, the court is required to consider the sufficiency of the allegations of each count independently.[1] Generally, a prevailing plaintiff is not entitled to prevail on inconsistent causes of action (theories of liability), but that is a matter deferred to the time of trial on the merits, when there actually is a determination of the merits. See, e.g., *Meribear Productions, Inc. v. Frank*, 328 Conn. 709, 724 (2018).

Further, the court notes that the manner in which the claimed legal deficiencies are identified in the introductory portion of their brief does not match the manner of

[1] Often causing a problem is when a plaintiff adopts what this court characterizes as an "incorporate everything into everything" approach, where the contract allegations are made part of the unjust enrichment count by incorporation. Only as a consequence of that type of excessive incorporation would the court need to consider contract-based allegations in connection with a challenge to the legal sufficiency of a count asserting unjust enrichment.

presentations of the actual arguments. The court will follow the format of the presentation of arguments in their brief.

I. Specific performance (Section IV (A) of brief)

The defendants argues that there is no cognizable cause of action for specific performance. At least some appellate decisions have recognized the concept (if perhaps not in rigorous terms). In connection with an analysis of a claim of equitable conversion, in *Southport Congregational Church-United Church of Christ v. Hadley*, 320 Conn. 103, 112, 128 A.3d 478 (2016), the court stated: ""[T]here must, in fact, be a clear duty on the part of the seller to convey the property, a duty enforceable by an action for specific performance." (Internal quotation marks and citations, omitted.) *Southport Congregational*, in turn, was cited in *Pack 2000, Inc. v. Cushman*, 198 Conn. App. 428, 449, 234 A.3d 49 (2020: "The defendant's first argument is misplaced because equitable conversion is not a separate cause of action but, rather, a result that arises out of a successful claim for specific performance."

More generally, in *Cutter Development Corp. v. Peluso*, 212 Conn. 107, 114-15, 561 A.2d 926 (1989), the court observed that "in an action for specific performance the plaintiff has the burden of proving all of the essential elements of his cause of action and the burden is primarily on him to show his right in equity and good conscience to the relief sought."

The court agrees that in a rigorous analytic sense, "an action for specific performance" is an action asserting a breach of contract – but it also must satisfy additional conditions sufficient to warrant the equitable relief sought. Thus, while a contract for purchase and sale of land may have something of a presumptive quality of appropriateness of specific performance due to the perception of uniqueness of

any parcel of land, specific performance more generally is based on a claim (need for eventual determination) that an award of monetary damages would provide inadequate relief. See, e.g., *Kent Literary Club v. Wesleyan University*, Docket No. MMXCV156013185, 2016 Conn. Super. LEXIS 1782, at *7, 2016 WL 3912344, at *3 (Super. June 17, 2016).

The defendants cite *307 White St. Realty, LLC v. Beaver Brook Group, LLC*, 216 Conn. App. 750, 756 (2022) for the straightforward proposition that "[s]pecific performance is a remedy, not an independent cause of action." The bracketing sentences for the quoted language are illuminating, for context. The preceding sentence observed that the relevant count "is captioned 'specific performance'" – the situation presented here. The subsequent sentence states: "Nonetheless, we construe count three, which incorporates by reference allegations regarding the defendant's repudiation of the lease option, as asserting a cause of action for anticipatory breach of contract for which the plaintiff seeks the equitable remedy of specific performance." Despite the same technical imprecision, the court observed that a proper response was to identify the actual purpose for the count and treat it accordingly.

In effect, the defendants challenge the specific performance counts solely on the basis of the label affixed to the first and fifth counts. There is no discussion of the obligation of the court to interpret pleadings in a common-sense manner, no discussion of whether it would be appropriate if not mandatory for the court to evaluate the actual allegations to determine whether, as in *307 White St.*, the count actually asserts "a cause of action for ... breach of contract for which the plaintiff seeks the equitable remedy of specific performance." There is no suggestion in the brief analysis that, so construed, the challenged counts would be legally insufficient for that purpose.

The court believes that it is obligated to treat these counts in the same manner as in *307 White St.*, which requires them to be treated as breach of contract claims for which specific performance is being sought. Therefore, the alleged legal deficiency does not exist, and the motion is denied in this respect.

II. Park Package Store, Inc. as non-signatory (Argument IV(B) of brief)

The defendants next challenge the first four counts, all directed to Park Package Store, Inc., because it is not a signatory to the agreement attached to the plaintiffs' complaint. That leads into an argument that the statute of frauds applies and can be addressed by way of a motion to strike.

Recognizing that it may be the court that is misreading the first four counts, the first four counts are directed to the agreement for sale of business assets. There is no explanation as to how the statute of frauds applies to the sale of business assets other than the real estate – with the real estate portion of the transaction set forth in the fifth through eighth counts. In effect, the defendants are applying a possible defense to the fifth through eighth counts to the first through fourth counts, with no explanation as to how or why the statute of frauds applies to the first through fourth counts.

The contract contains a signature line and signature for the asset seller, and although the identity of the asset seller entity is not specifically identified on the signature page, the document as a whole provides information from which that identity can be inferred. There is a signature immediately below the contract-specific reference to the asset seller, reasonably subject to interpretation as a signature on behalf of the identified (if indirectly) asset seller. The first and second counts are directed solely to the asset seller, such that there is no basis to conclude, via motion to strike, that the asset seller is not a signatory to the contract. The third and fourth counts assert claims that are not

contract-based in a direct sense, and are not in the nature of claims identifiable as possibly coming within the scope of the statute of frauds. As noted, the first two counts do not appear to implicate the statute of frauds at all, but a signature of a presumptive agent for the asset seller would seem to suffice at this stage even if it did apply; the asset seller might disclaim authority for the signature, but that would be outside the scope of a motion to strike.

The claims in those counts are not dependent on a signature in the same manner as a claimed agreement for the sale of real estate, and the argument presented does not address that level of refinement.

The defendants argue:

> "In this case, there is no signature by the corporation and no language that identifies that the Lahhams will be signing as authorized representatives of Park. The lack of a corporate signature, or a panel for the corporate signature, requires looking beyond the four corners of the contract for the intention of the parties and that is something that the case law prohibits under a statute of frauds analysis. *Yellow Book Sales*, supra.

Assuming the legal statement to be correct, it is inapplicable as to the first four counts, which do not appear to implicate any aspect of the statute of frauds. There is no identified authority for a claimed prohibition against "looking beyond the four corners of the contract for the intention of the parties" in a non-statute-of-frauds context. Given a signature block indicating that the signature is intended to be that of the asset seller, the signature of an individual in that block, especially for purposes of a motion to strike, is sufficient, given the obligation of the court to give the non-moving party the benefit of all reasonable favorable inferences.

Defendants' follow-up argument, that that might create an issue with respect to the real estate aspects of the agreement, does not dictate an adverse outcome for the

count(s) under consideration that are unrelated to the real estate phase of the contemplated transaction. As noted earlier, the real estate aspects of the agreement involve a different plaintiff and different defendants. Indeed, that argument at pp. 9-10 of the brief, seems to adopt a heads-I-win-tails-you-lose (or whipsaw) approach, as the defendants also are challenging the real estate aspects using an analysis to the contrary of this argument. There may well be an issue as to whether George Lahham signed on behalf of the defendant entity or signed in a personal capacity as an individual – for purposes of the first four counts the defendants are arguing that his signature was not on behalf of the asset seller but in the last four counts that his signature was not in an individual capacity. As repeatedly stated, the court is required to give the non-moving party the benefit of reasonable favorable inferences – including evidence that might be offered in support of allegations of the complaint – and the defendants are asking the court to do the opposite. As noted earlier, the court is required to evaluate the legal sufficiency of each of the challenged counts in isolation, not in the context of each other (and especially in the context of claims asserted by a different plaintiff against different defendants).

The defendants have not established that the signature underneath the designation of asset seller does not constitute a signature of that entity defendant, sufficient to establish legal insufficiency of the first four counts.

Although not identified as an issue in the introductory language of the brief or the motion, the relevant discussion states, in the heading, an alternative: "the contract itself is not clear as to its enforcement." There is no substantive discussion of this point in this section of the brief, other than perhaps the concluding comment that

> "as a final thought on this issue, the contract in dispute is a mess. And the Plaintiffs cannot use litigation as a time machine to fix its problems after

the fact. Neither should the Plaintiffs use the contract to seek the remedy of specific performance."

That the contract may lack some level of clarity as to enforcement is a matter of opinion, unsupported by any analysis. Assuming a lack of clarity as to enforcement, how does that become a fatal pleading defect, rendering the count or cause of action fatally deficient – failing to assert a claim on which relief may be granted? The characterization of the contract as a "mess" is even less of an argument for legal insufficiency, warranting the granting of a motion to strike.

It is not even clear as to which counts these comments are directed. This argument follows the argument relating to specific performance as not a cause of action, suggesting that it is part of the argument in support of the second claim in the introductory portion of the brief – an argument directed to the first four counts. Not only is that due to the order of the introductory language, but the first part of the content of the second identified issue matches the first part of the argument in the second discussion ("Counts 1-4, against Park, must be stricken because, as can be seen on the contract attached to the Complaint, the corporation was not a signatory to the contract and therefore not a party with obligations to the defendants. Moreover, the transaction as applied to Park is barred by the statute of frauds.") But of course, enforcement of the contract is not even an issue as to the third and fourth counts, and enforcement of the contract is only in the second count to the extent that a claim of breach of a contract can be characterized as enforcement – but the general tone of the defendants' submission is that enforcement is equated with specific performance.

There is some level of irony – in challenging the manner in which the contract and resulting complaint were drafted, there is a lack of individualized focus on defects in each count, implicating a different lack of precision in drafting. The hindsight observation that the contract might have been drafted in a more precise manner is not an issue before

the court; the court is limited to consideration of the legal sufficiency of each challenged count, based on the record before it.[2]

This aggregate aspect of the motion to strike is denied.

III. *The Contract fails as against Park Package because it does not comply with the Statute of Frauds and no amount of repleading will correct the plain language of the Contract. (Argument IV(C) of brief)*

The court has quoted the entire caption for this argument, because the merits essentially are addressed in the preceding analysis. The argument presented relies on the blurring of the distinction between the seller of the business assets (identified as the target of this argument – Park Package) and the identified sellers of the real estate (the individual Lahham defendants). The defendants do not explain how the statute of frauds applies to the sale of the non-realty assets of the business being operated by the defendants. The contract does not fail, as a matter of law, as to defendant Park Package because at least plausibly, the contract bears a signature on behalf of that entity.

To the extent that there may have been confusion on the part of the defendants in the presentation of their arguments, with this argument intended to be directed to the claims directed to the Lahhams as purported sellers of real estate, the very ambiguity that they have identified would seem to preclude resolution of any claimed application of the statute of frauds. The contention that it might be argued that George Lahham may not have signed the contract document on behalf of the asset seller necessarily implies that he might have signed in an individual capacity. But if Brenda Lahham signed the

[2] To the extent that the defendants argue that the contract is a "mess," it is not a matter of record as to whether this contract had been drafted by the plaintiffs or the defendants, with particular attention to the aspects of the contract that are being so characterized.

document – whether on behalf of the real estate sellers jointly or as an individual – and if George Lahham signed as an individual, then the requirement of the statute of frauds that the agreement be signed by the sellers, the parties sought to be charged, would seem to be satisfied – or at least arguably so.

Further, there is a clear disclosure in the agreement of the actual title owners to the realty, and the document identifies a signature on behalf of the aggregate sellers of the realty. The defendants cite no authority for the proposition that when there is such a disclosure of a non-technical principal – comprised of an identified group of individuals – that a signature of one such individual on behalf of that identified group of owners is not a signature as agent for the other individuals. That the "other" principal signed in a separate capacity suggests an awareness of that agency-type signature provided or to be provided (depending on sequence of signatures) on his behalf.

The court is limited to considering the issues actually advanced by the defendants. *Stuart v. Freiberg*, 102 Conn. App. 857, 861, 927 A.2d 343 (2007); *Meredith v. Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980). The issues identified by the defendants, in challenging these counts, do not justify striking the relevant counts.

IV. Third, Fourth, Seventh and Eight Counts (Argument IV(D) of brief)

The defendants next challenge, more narrowly, the third and fourth counts, claiming that "that "the counts do not allege any conduct that would rise to the level of fraud or constitute a violation of CUTPA. Moreover, the complaint does not allege more than a single transaction and certainly not a practice or course of dealing." The argument in support of that proposition is essentially the same as used in challenging the seventh and eighth counts.

The defendants may well believe that these claims are groundless, and upon a trial on the merits the facts may well bear that out. However, a claim that the defendants never intended to go through with the transaction or recklessly stated that they would do so (¶ 10-14 of third count and seventh count) constitute conduct that could "rise to the level of fraud." Those allegations seem to satisfy the first two requirements for a claim of fraud (falsity of statement and present intent not to follow through with statement of future conduct[3]). There are allegations of intent to induce conduct by the plaintiffs and the plaintiffs assert that they engaged in conduct in reliance. Paragraph 15 of the third and seventh counts alleges the detrimental consequences of their reliance.

On page 13 of the brief, there is a rhetorical question as to existence of any benefit to the defendants from such conduct. Benefit to the tortfeasor is not a recognized element of a claim of fraud – it may go to motive which may tend to reinforce (or undermine) the tortious nature of the conduct, but motive is not an element of the tortious conduct. The court and/or plaintiffs could speculate (even now), and the defendants can offer evidence supporting the lack of motivation as part of the merits of a defense at an appropriate time, but that does not have material value to a motion-to-strike analysis.

The argument that "the complaint does not allege more than a single transaction and certainly not a practice or course of dealing" requires little discussion. Fraud does not require more than a "a single transaction [or] a practice or course of dealing." If the focus of that statement is on CUTPA, the same is true with possible exceptions – but there is no identified applicable exception or cited case suggesting an exception. (A recognized exception is in the context of insurance practices (*Mead v. Burns*, 199 Conn.

[3] "Although the general rule is that a misrepresentation must relate to an existing or past fact, there are exceptions to this rule, one of which is that a promise to do an act in the future, when coupled with a present intent not to fulfil the promise, is a false representation." *Paiva v. Vanech Heights Construction Co.*, 159 Conn. 512, 515, 271 A.2d 69 (1970).

651, 509 A.2d 11 (1986)), where an isolated occurrence generally is deemed inadequate, but the specificity of that exception tends to reinforce the absence of a requirement of more than a single instance as a general rule.)

> "Furthermore, our Appellate Court has held that a single act of misconduct could constitute a CUTPA violation. See *Johnson Electric Co. v. Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 353, 805 A.2d 735, cert. denied, 262 Conn. 922, 812 A.2d 864 (2002); *Hart v. Carruthers*, 77 Conn. App. 610, 618-20, 823 A.2d 1284 (2003)." Gray v. Sullivan Real Estate Inc., Docket No. CV095012402, 2010 Conn. Super. LEXIS 1232, at *22-23, 2010 WL 2573820, at *8 (Super. May 18, 2010).

The defendants have cited no appellate-level authority to the contrary.

The defendants make the oft-repeated argument that a simple breach of contract is not an adequate basis for a CUTPA claim. The statement is generally adequate, but it assumes that the complaint only alleges a simple breach of contract. As reflected by the defendants' own grouping of arguments, this case also involves claims of fraud, and there is no attempted explanation as to why the claims of fraud as asserted in the claims against the asset seller and real estate sellers do not suffice, as a matter of law, to assert sufficiently wrongful conduct for purposes of CUTPA.

A claim of fraud would appear to satisfy, at least presumptively, the second category of wrongful conduct under the so-called cigarette rule:

> "[W]e have adopted [certain] criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes

> substantial injury to consumers [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.... Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Internal quotation marks and citations, omitted.) *Cenatiempo v. Bank of America, N.A.*, 333 Conn. 769, 790, 219 A.3d 767 (2019)

As noted above, the court is limited to considering the issues actually advanced by the defendants. *Stuart v. Freiberg*, supra; *Meredith v. Police Commission*, supra. The issues identified by the defendants, in challenging these counts, do not justify striking the relevant counts.

V. Fifth and Sixth Counts

The defendants contend that the fifth and sixth counts are legally deficient because "forcing the sale for Specific Performance (if a cause action) as to the 'Real Estate' is not possible because the contract was not severable between the assets and real estate." They further argue that "this lack of severability is made plain in the Complaint and the attached contract."

At the outset, the court must note a procedural-yet-substantive threshold problem. The above-quoted language is from the introductory portion of the brief in support of the motion to strike. As may be suggested by the absence in the heading to this section of this decision to a section of the brief, there is no section of the brief that actually discusses

the issue of severability.[4] The reply brief addresses the issue cursorily in the first paragraph, and nowhere else[5]:

> "Moreover, it does not appear from the Plaintiffs' objection that they can explain how the contract is severable between the assets and the real estate. This is important because the Plaintiffs are seeking in their Complaint to force the sale of a business and real estate by the Defendants based upon the terms of the contract, it attaches as an exhibit to its complaint."

It is not clear what burden the plaintiffs have with respect to refuting a claim that is not actually analyzed in the initial brief. It is not clear how or why the court should not treat the issue as abandoned based on the absence of any substantive discussion, even if the court were to consider the reply brief. See, e.g., footnote 3 in *Garfinkle v. Jewish Family Services of Greater Hartford, Inc.*, Docket No. X06UWYCV196053557S, 2021 Conn. Super. LEXIS 1185, at *30, 2021 WL 3409801, at *10 (Super. July 2, 2021).

Assuming it to be proper or required for the court to address the merits of this claimed deficiency, the starting point necessarily is the absence of any discussion of severability or the consequences of the claim that it is not possible to sever the sale of realty from the sale of business assets. The contract language may be consistent with an intent that there not be any severance of the transaction as to real estate and business assets, but there is no identified language in the contract explicitly so stating. There is a section of the contract addressing conditions, and there is no express condition that the sale of the business assets was conditioned on the sale of the realty or vice versa.

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[4] The court did a word-search for the root "sever" and the brief contains only two "hits" – both in the introductory paragraph on the top of page 2 of the brief, identifying the claimed legal deficiency.

[5] Similar to the immediately preceding footnote, the court did a word-search for the root "sever" and the reply brief contains only one "hit" – the passage being quoted immediately below.

More importantly, this is a challenge to the contract's provisions as to the sale of realty. Again referring to an early observation, these counts must be analyzed as to legal sufficiency on their own. The contract provides for the sale of both types of assets, and only by assuming a legal insufficiency in the counts addressed to sale of business assets (and implied dependency of the real estate counts on the completion of the asset-based transaction) can the issue of lack of severability arise. As a further refinement, the court has rejected the challenges to legal sufficiency of the asset-transfer counts, so the implied premise of legal insufficiency has been found to be inappropriate, at least at this stage of the proceedings.

The need for a fine-grained analysis of this claim is accentuated by the somewhat unusual configuration of parties – although there is one document, there are two distinct agreements between/among wholly distinct parties. There are two sellers and one buyer for the realty. The seller of the business assets is a distinct third party, and there is a distinct second buyer for those assets. There is a distinct allocation of price to the real estate and to the business assets. There may have been an expectation that the two transactions would occur at the same time, but there is no explicit statement that each transaction is dependent on the other.

To be sure, if there were to be a trial and the claim for specific performance were to be pursued, and if there were a determination that the agreement relating to the sale of business assets was unenforceable, then a claim of non-severability might have to be addressed – but it would not necessarily be an independent legal deficiency claim as the court would be required to consider all equitable factors. Fatally to the presumed argument here, however, is that it is dependent on an assumption that the agreement relating to sale of business assets is unenforceable.

The lack of discussion necessarily means that there is no attempt to address whether the severability issue applies equally to the claim for specific performance and the claim for damages.

This challenge to the legal sufficiency of the fifth and sixth counts is denied.

Conclusion

The defendants have raised a number of issues pertaining to the drafting of the underlying contract, the execution of that contract, and the manner in which the operative complaint was drafted. Particularly as to the last criticism, this court often refers to the elusive and ill-defined (and highly subjective) concept of pleading perfection. That elusive goal presumably can be adapted to drafting of contracts – with the overlay that the existence of so much boilerplate content for contracts may make customization for non-standard situations an under-developed talent.

The issues before the court are not whether any of the documents identified above could have been drafted in a more focused fashion (given the benefit of hindsight); the motion to strike limits the court to assessing the legal sufficiency of each count.

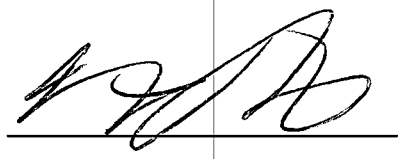
The defendants are correct in stating that the treatment of the contract as an exhibit to the complaint makes the contract document part of the record for a motion-to-strike analysis. The contract contains signatures – signatures of the individual defendants presented in arguably ambiguous roles. The defendants, themselves, do not seem to advocate for what they claim to be the proper interpretation of those roles (in a definitive sense), instead adopting a whipsaw approach whereby each alternative is argued to be a fatal flaw for a claim being attacked – without acknowledging that if the

court were to accept either proffered interpretation (as a matter of law) that would seem to establish legal sufficiency of the other claim.

The court is not suggesting that the defendants have not raised potentially significant issues. Rather, the analyses presented (including contentions for which there is no analysis) do not establish legal insufficiency of any count of the complaint. To the extent that some claims may be dependent on other claims, the defendants have not established, as a matter of law, the legal insufficiency of any predicate claims.

As repeatedly stated, the court is limited to considering the arguments made by the moving parties. Arguments not made cannot be addressed, and arguments made against less than all defendants cannot be applied to defendants to whom the arguments were not directed.

For all of these reasons, the motion to strike is denied.



POVODATOR, JTR.