# CHANNING REAL ESTATE, LLC *v.* BRIAN GATES (SC 19575)

Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.

*Syllabus*

The plaintiff limited liability company appealed to this court from the judgment of the Appellate Court, which reversed the judgment of the trial court and ordered a new trial. The defendant was a co-owner and member of F Co., a limited liability company that owned commercial real estate. On six different occasions, the defendant executed a promissory note in exchange for funds that the plaintiff provided to him. Each of the six notes included an identical clause that precluded oral modification of the note. After the defendant failed to make any payments on the notes, the plaintiff brought a breach of contract action. The defendant alleged four special defenses and filed a three count counterclaim. The plaintiff filed a motion in limine to preclude any extrinsic evidence that varied the terms of the notes, including the evidence the defendant sought to introduce to support his claim that the funds that the plaintiff had provided to him were interim payments made in exchange for an interest in commercial real estate owned by F Co. The trial court denied the plaintiff's motion, concluding that the parol evidence rule did not bar the introduction of extrinsic evidence to vary the terms of the notes because the notes were not integrated

as a result of the parties' failure to reduce to writing their full agreement, including the proposed real estate transaction. The trial court rendered judgment for the defendant on, inter alia, the complaint and on the third count of the counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.). On appeal to the Appellate Court, the plaintiff claimed, inter alia, that the trial court improperly had admitted parol evidence to vary the terms of the notes. The Appellate Court concluded that the notes were integrated and that their terms were unambiguous, and, therefore, that the parol evidence rule barred the introduction of extrinsic evidence. The court remanded the case for a new trial on the basis of its conclusion that the introduction of parol evidence was an error that permeated the trial court's findings and undermined its entire judgment, and stated that, on remand, the defendant was entitled to allege and prove any exceptions he may have to the parol evidence rule as a special defense or counterclaim, including a violation of CUTPA. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. This court concluded that, although the Appellate Court properly determined that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes, that court improperly remanded the case for a new trial rather than directing judgment for the plaintiff on the issue of liability and ordering a hearing in damages: each note having contained language that barred the introduction of extrinsic evidence under the applicable parol evidence rule, and the defendant having failed to present any valid defenses or counterclaims that served as exceptions to the parol evidence rule, the trial court's findings pertaining to the extrinsic evidence were irrelevant, and the trial court's remaining findings regarding the terms of the notes and the defendant's failure to pay any of the amounts due thereunder were sufficient to establish the defendant's liability as a matter of law, rendering a new trial on remand unnecessary; furthermore, this court declined to address the defendant's unpreserved claim that, notwithstanding the application of the parol evidence rule, certain actions of the plaintiff effected a postcontractual modification of the notes, providing him with a valid and meritorious special defense in equitable estoppel that entitled him to a new trial on remand, the defendant having failed to raise this distinct claim in the trial court.

2. A new trial on the count of the defendant's counterclaim alleging a violation of CUTPA was unwarranted because it was F Co. rather than the defendant who would have had standing to assert a CUTPA claim against the plaintiff; F Co. was a limited liability company and thus a distinct legal entity from the defendant, the injuries the defendant alleged in the CUTPA count of his counterclaim were those allegedly suffered by F Co., specifically, and not the defendant, and, because a member of a limited liability company, such as the defendant, cannot recover

for an injury allegedly suffered by the company itself, the defendant lacked standing to pursue his CUTPA claim.

Argued November 16, 2016—officially released July 4, 2017

*Procedural History*

Action to recover on six promissory notes, and for other relief, brought to the Superior Court in the judicial district of Windham, where the defendant filed a counterclaim; thereafter, the court, *A. Santos*, *J.*, denied the plaintiff's motion to preclude certain evidence; subsequently, the case was tried to the court, *A. Santos*, *J.*; judgment for the defendant on the complaint and in part on the counterclaim, from which the plaintiff appealed to the Appellate Court, *Sheldon*, *Keller* and *Bear*, *Js.*, which reversed the trial court's judgment and remanded the case for a new trial, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed in part; reversed in part; judgment directed; further proceedings.*

*Linda L. Morkan*, with whom was *Stuart D. Rosen*, for the appellant (plaintiff).

*Frank J. Liberty*, for the appellee (defendant).

*Opinion*

ESPINOSA, J. The plaintiff, Channing Real Estate, LLC, appeals from the judgment of the Appellate Court, which reversed the judgment of the trial court in favor of the defendant, Brian Gates, on both the plaintiff's complaint seeking recovery on six promissory notes (notes) and on the defendant's counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. *Channing Real Estate, LLC* v. *Gates*, 159 Conn. App. 59, 83, 122 A.3d 677 (2015). The plaintiff, which prevailed in the Appellate Court, challenges only the scope of the court's remand order, claiming that it improperly ordered a new trial rather than restricting the proceedings on

remand to a hearing in damages. The plaintiff contends that a new trial is unnecessary because the Appellate Court's proper application of the parol evidence rule resolved the issue of liability on the notes in favor of the plaintiff as a matter of law and because the defendant lacks standing to raise a CUTPA claim.[1] The defendant argues that the Appellate Court correctly concluded that a new trial is necessary to allow him to pursue valid special defenses and counterclaims. We conclude that a new trial is unnecessary, and, accordingly, reverse in part the judgment of the Appellate Court.

The trial court found the following relevant facts. The plaintiff is a limited liability company organized under New York law, with Douglas Chan as principal. The defendant was a co-owner and member of Front Street Commons, LLC (Front Street Commons), a limited liability company organized under Connecticut law that owned commercial real estate in Putnam.

On six different occasions between January, 2008, and February, 2009, the defendant executed a promissory note in exchange for funds that the plaintiff provided to him. The total principal amount of the six notes was $281,272.74. The defendant has made no payments on any of the notes.

[1] We granted the plaintiff's petition for certification to appeal limited to the following questions: (1) "Did the Appellate Court correctly remand this case for a new trial instead of a hearing in damages?"; (2) "Did the Appellate Court correctly order a retrial on the defendant's negligent misrepresentation claim when there was no appeal from the trial court's decision against him?"; (3) "Did the defendant have standing to raise a [CUTPA] claim?"; and (4) "Does CUTPA apply to disputes among either intracorporate entities and/or joint venturers?" *Channing Real Estate, LLC* v. *Gates*, 319 Conn. 952, 125 A.3d 530 (2015). This court's resolution of the first certified question is dispositive of the second certified question. See footnote 2 of this opinion. Further, because we conclude that the defendant lacks standing to pursue a CUTPA claim against the plaintiff, we need not reach the fourth certified question.

With the exception of the principal amounts and maturity dates, the terms of each of the six notes were identical. In each note, the defendant promised to pay the corresponding principal amount to the defendant with annual interest at the rate of 14 percent. If the notes were not paid by the maturity dates, their terms called for the payment of interest either at 16 percent annually or the highest rate permitted under New York law, whichever was higher. Each note set forth the address to which the defendant was to send his payments and in what form those payments were to be made. The terms of each note also stated that the defendant promised to pay all reasonable collection costs, including attorney's fees. Finally, each note included the following clause precluding oral modification of the contract: "This [n]ote may not be changed, modified or discharged, nor any provision waived, orally, but only in writing, signed by the party against whom enforcement of any such change, modification, discharge or waiver is sought."

On December 15, 2009, the plaintiff demanded payment of all six notes and, after the defendant failed to make any payments, brought this action for breach of contract, seeking to collect principal, interest, costs, and fees as provided in the notes. The defendant alleged four special defenses and filed a three count counterclaim, all of which related to the parties' failed negotiations pertaining to a proposed real estate transaction through which the plaintiff would have acquired an interest in the commercial real estate owned by Front Street Commons. The defendant asserted special defenses of fraud in the inducement, unjust enrichment, innocent or negligent misrepresentation, and promissory estoppel. The defendant's counterclaim alleged fraud, negligent misrepresentation, and a violation of CUTPA, and sought, inter alia, damages for lost rents in connection with the failed real estate transaction.

The plaintiff filed a pretrial motion in limine claiming that the parol evidence rule barred the trial court from considering any extrinsic evidence that varied the terms of the notes because the notes are written, integrated, and the terms stated therein are unambiguous. The extrinsic evidence the plaintiff sought to exclude related to the defendant's claim that the notes were not promises to repay loans but were issued in connection with the proposed real estate transaction between the parties. Specifically, the defendant claimed that, rather than loans, the funds that the plaintiff had paid to him were interim payments made in exchange for an interest in the commercial real estate owned by Front Street Commons. The sole purpose of the notes, according to the defendant, was to protect the plaintiff's investment in the event that the defendant backed out of the proposed transaction or the commercial property was destroyed.

The trial court denied the plaintiff's motion in limine, concluding that the parol evidence rule did not bar the introduction of extrinsic evidence to vary the terms of the notes. The trial court determined that the parol evidence rule did not apply because it found that the notes were not integrated as a result of the parties' failure to reduce to writing what the court deemed to constitute their full agreement—the proposed real estate transaction. Relying on the extrinsic evidence presented by the defendant, the trial court ruled in his favor on the plaintiff's complaint, and on the third and fourth special defenses alleging negligent misrepresentation and estoppel, as well as the third count of the counterclaim alleging a violation of CUTPA. Lastly, the trial court found for the plaintiff on the defendant's first and second special defenses alleging fraud in the inducement and unjust enrichment, and on the first count of the defendant's counterclaim alleging fraud in the inducement. Although in its memorandum of

decision the trial court ruled in favor of the defendant's counterclaim for negligent misrepresentation, it did not award any damages in connection with that claim.[2] The trial court awarded the defendant $25,575 in attorney's fees on the CUTPA claim.[3] See General Statutes § 42-110g (d).

The plaintiff appealed to the Appellate Court claiming, inter alia, that the trial court improperly admitted parol evidence to vary the unambiguous terms of the notes, each of which was a fully integrated agreement. The Appellate Court examined the notes and agreed that they were integrated and that their terms were unambiguous. The court therefore reversed the judgment of the trial court, concluding that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 81–83. Unlike the trial court—which examined the notes and the parol evidence rule under Connecticut law—the Appellate Court applied New York law, but observed that "there are no material differences between New York and Connecticut law as applied to the facts of the present case." Id., 73.

The Appellate Court remanded the case for a new trial on the basis of its conclusion that the introduction

[2] The defendant did not appeal from the trial court's judgment awarding him no damages on his counterclaim for negligent misrepresentation and therefore did not preserve this claim for appeal. Even if the defendant had appealed from the trial court's judgment, the defendant's counterclaim sounding in negligent misrepresentation relied on the same extrinsic evidence that he cited in support of his defenses to the plaintiff's complaint. Accordingly, our conclusion that the Appellate Court properly concluded that the parol evidence rule precluded the consideration of that extrinsic evidence is dispositive of the second certified question. See footnote 1 of this opinion.

[3] Initially, the trial court had awarded the defendant $28,000 in attorney's fees. In response to the plaintiff's objection to that award, the court decreased the defendant's award to $25,575.

of parol evidence to vary the terms of the notes was "an error that permeate[d] the [trial] court's findings and undermine[d] its entire judgment." Id., 83. The court stated that, "[o]n remand, the plaintiff is . . . entitled to the opportunity to prove its damages with respect to each of the notes, the existence and written terms of which the defendant does not dispute. The defendant is entitled on remand to allege and prove any of the defenses [he] may have to each of the notes in accordance with the recognized exceptions under New York law to the parol evidence rule. . . . The only exceptions to the parol evidence rule that the defendant has pleaded as a special defense or counterclaim are mistake,[4] fraud, and a violation of CUTPA. On remand, the trier of fact should analyze separately each of the defendant's valid defenses under New York law with respect to each of the notes, and each count of the counterclaim alleged by the defendant, at least one of which, the CUTPA count, is subject to Connecticut law, in accordance with this opinion. . . . To the extent that the negligent misrepresentation and CUTPA counts of the counterclaim can still be pursued by the defendant, it is likely that those claims, on the basis of the alleged place of injury, will be subject to Connecticut law." (Citations omitted; footnote added.) Id., 82–83.

The plaintiff filed a motion for reconsideration or clarification, requesting that the court restrict its remand of the case to order only a hearing in damages. The plaintiff also requested that the court address the plaintiff's claims that the defendant lacked standing to pursue a CUTPA claim and that CUTPA did not apply to the parties. The Appellate Court denied the plaintiff's motion. This appeal followed. Additional facts will be set forth as necessary.

[4] Although the Appellate Court's opinion appears to suggest that the defendant pleaded mistake as a special defense, our review of the record does not reveal that the defendant did so.

I

The plaintiff first contends that although the Appellate Court properly concluded that the application of the parol evidence rule to the facts of the present case required reversal of the judgment of the trial court, it improperly ordered a new trial rather than ordering only a hearing in damages. We agree that the Appellate Court properly held that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes. Because that conclusion resolved all questions regarding the defendant's liability under the notes, we conclude that the Appellate Court improperly remanded the case for a new trial rather than directing judgment for the plaintiff and ordering a hearing in damages.

The Appellate Court considered whether the substantive contract law of New York or Connecticut applied to its interpretation and construction of the notes. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 72. The notes did not contain a choice of law provision but did require the defendant to make payment by mail to the plaintiff in New York. The court, citing § 195 of the Restatement (Second) of Conflict of Laws, determined that the local law of the state where the contracts required that payment be made was applicable and, therefore, applied the substantive contract law of New York. Id., 73–74; 1 Restatement (Second), Conflict of Laws § 195 (1971). New York's parol evidence rule is clear. "Briefly, absent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing." *Marine Midland Bank-Southern* v. *Thurlow*, 53 N.Y.2d 381, 387, 425 N.E.2d 805, 442 N.Y.S.2d 417 (1981). Furthermore, under New York's parol evidence rule, "extrinsic and

parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (Internal quotation marks omitted.) *W.W.W. Associates, Inc.* v. *Giancontieri*, 77 N.Y.2d 157, 163, 566 N.E.2d 639, 565 N.Y.S.2d 440 (1990).

The Appellate Court reviewed the terms of the notes and determined that "[e]ach of the six notes represented and reflected a specific transaction between the parties. Standing alone, each note constituted an integrated agreement, supported by new and different consideration, and was enforceable separately according to its unambiguous terms." *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 78. On the basis of that conclusion, the Appellate Court applied the parol evidence rule and held that the trial court improperly admitted extrinsic evidence to vary the terms of the notes. Our review of the notes leads us to the same conclusion. The clause in each note prohibiting oral modification is clear. Accordingly, the Appellate Court properly concluded that the parol evidence rule barred the consideration of extrinsic evidence. Id., 77–79; see *Marine Midland Bank-Southern* v. *Thurlow*, supra, 53 N.Y.2d 387.

The remaining question is whether, in light of the Appellate Court's correct conclusion that the parol evidence rule precluded consideration of the extrinsic evidence relied on by the defendant, the Appellate Court properly remanded the case for a new trial rather than directing judgment and ordering a hearing in damages. Whether the Appellate Court properly determined the scope of a remand order is a question of law over which this court's review is plenary. See, e.g., *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

When no question of liability remains, given the undisputed facts in the record, the appropriate scope of the remand is limited to a hearing in damages. See *Allstate*

*Ins. Co.* v. *Palumbo*, 296 Conn. 253, 268, 994 A.2d 174 (2010) ("[t]here are times . . . when the undisputed facts or uncontroverted evidence and testimony in the record make a factual conclusion inevitable so that a remand to the trial court for a determination would be unnecessary" [internal quotation marks omitted]); *Waterbury* v. *Washington*, 260 Conn. 506, 583, 800 A.2d 1102 (2002) (remand for decision on unreached elements of claim is unnecessary if remaining elements can be determined as matter of law on record); *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 171–72, 117 A.3d 876 (remand for new trial was unnecessary when all elements of cause of action for breach of contract had been proven), cert. denied, 318 Conn. 902, 122 A.3d 631 (2015); see also *State* v. *Carbone*, 172 Conn. 242, 254, 374 A.2d 215 ("The reversal of a judgment annuls it, but does not necessarily set aside the foundation on which it rests. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A reversal therefore is never, standing alone, and ex vi termini, the grant of a new trial. If the error was one in drawing a wrong legal conclusion from facts properly found and appearing on the record, it would be an unnecessary prolongation of litigation to enter again on the work of ascertaining them." [Internal quotation marks omitted.]), cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977).

In the present case, our review of the record reveals that a remand to the trial court for a new trial is unnecessary because there is no question as to the defendant's liability under the notes. The trial court, in its findings of fact, set forth certain terms of the notes and the undisputed fact of the defendant's failure to pay any of the amounts listed in them. Most significantly, there is no dispute that each of the six notes contains the language that both this court and the Appellate Court have

concluded bars the introduction of extrinsic evidence under the New York parol evidence rule. Namely, each note provides: "This [n]ote may not be changed, modified or discharged, nor any provision waived, orally, but only in writing, signed by the party against whom enforcement of any such change, modification, discharge or waiver is sought." The trial court made no findings of any executed collateral agreements, nor is there any evidence in the record of any such agreements. All of the defendant's defenses and claims relied on extrinsic evidence. The sole claim raised by the defendant that would have constituted an exception to the parol evidence rule—and for which he had standing—was his special defense of fraud.[5] But the trial court found that the defendant failed to prove fraud, and the defendant has not appealed from that ruling. Accordingly, the defendant has not presented any valid defenses or counterclaims that are exceptions to the parol evidence rule, and he is liable on the notes as a matter of law.

The Appellate Court grounded its decision to remand for a new trial on its conclusion that the trial court's misapplication of the law so permeated the trial court's findings that a new trial was necessary. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 83. Our reading of the trial court's findings leads us to a different conclusion. The effect of the Appellate Court's proper application of the parol evidence rule undermined only those findings of the trial court that pertained to the extrinsic evidence offered by the defendant. The application of the parol evidence rule simply renders the court's findings regarding that extrinsic evidence irrele-

[5] We recognize that the defendant also brought a counterclaim asserting that the plaintiff violated CUTPA. As we explain in part II of this opinion, we conclude that the defendant lacks standing to pursue a CUTPA claim against the plaintiff. Accordingly, it is unnecessary for us to resolve whether the defendant's allegations supporting his CUTPA claim, if proven, would constitute an exception to New York's parol evidence rule.

vant. What remain unaffected, however, are the trial court's findings of fact that govern the disposition of the present case as a matter of law. The only matter that remains to be litigated between the parties, therefore, is the amount of the plaintiff's damages.

Notwithstanding the application of the parol evidence rule, the defendant claims that, because some of the plaintiff's actions effected a postcontractual modification of the notes, he has a valid and meritorious special defense in equitable estoppel and therefore is entitled to a new trial on remand. The defendant did not raise this distinct claim in the trial court, however. Therefore, we decline to address its merits. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

The following additional relevant facts as found by the trial court demonstrate that the claim is unpreserved. In arguing that the plaintiff was equitably estopped from collecting on the notes, the defendant relied in part on a letter that the plaintiff sent to the defendant after the last note was signed. This letter, which was drafted by the defendant, stated that the funds that the plaintiff had provided to the defendant were part of the parties' proposed real estate transaction, and that through those funds, the plaintiff had purchased an interest in the commercial real estate owned by Front Street Commons. Despite the absence of finalized terms for the proposed transaction and the lack of any executed operating or option agreements, Sharon Chan—a member of the plaintiff—signed the letter on its behalf.

The defendant contends that his defense of equitable estoppel is not barred by the parol evidence rule because it relies on an event that occurred after the execution of the last note—Sharon Chan's signing of

the letter—to establish a postcontractual modification of the notes. The defendant claims that because this event constitutes a postcontractual modification of the notes, it is not evidence of a prior or contemporaneous agreement, which would be barred by the parol evidence rule. See *Lax* v. *Design Quest N.Y. Ltd.*, 101 App. Div. 3d 431, 955 N.Y.S.2d 34 (2012). The record reveals, however, that the defendant did not raise this claim of *postcontractual* modification through equitable estoppel in the trial court. Instead, he argued to the trial court that the plaintiff was equitably estopped from enforcing the notes because the letter was evidence of the plaintiff's *precontractual* representations as to the purpose of the notes. Accordingly, this claim is unpreserved and we do not address it.

The defendant also contends that he has the right to present evidence at a new trial based on the Appellate Court's ruling that New York law, rather than Connecticut law, applies when interpreting the notes. As noted by the Appellate Court, however, "there are no material differences between New York and Connecticut law as applied to the facts of the present case." *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 73.

II

The plaintiff next claims that because the defendant lacks standing to allege a violation of CUTPA, a new trial on the third count of the defendant's counterclaim is unwarranted. Specifically, the plaintiff argues that Front Street Commons, not the defendant, would be the proper party to allege any such claim. We agree.

The following additional facts are relevant to our determination of this issue. During the parties' negotiations regarding Front Street Commons' commercial real estate, the parties exchanged various proposed option and operating agreements, none of which was executed. The proposed agreements listed Front Street Commons

as a party, not the defendant. At trial, the defendant sought damages for lost rental income suffered by Front Street Commons, and the trial court found that "[t]he injury to the defendant is that *Front Street Commons* no longer receives financial assistance, as necessary, from the plaintiff." (Emphasis added.) Front Street Commons is not a party to this action.

The issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). "Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009).

Although this court has not addressed the question of whether a member of a limited liability company has standing to bring suit on the basis of a wrong allegedly suffered by the limited liability company, we find guidance in the decisions of the Appellate Court. "A limited liability company is a distinct legal entity whose existence is separate from its members. . . . A limited liability company has the power to sue or to be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. See General Statutes

§ 34-187.[6] A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company." (Citation omitted; footnote added; internal quotation marks omitted.) *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

In the present case, the facts demonstrate that it is Front Street Commons and not the defendant that would have standing to assert a CUTPA claim against the plaintiff. The defendant has not demonstrated a specific, personal, and legal interest separate from that of Front Street Commons. Front Street Commons owned the property that was at issue during the parties' negotiations. Front Street Commons would have been a party to the proposed option and operating agreements. Front Street Commons allegedly lost financial assistance from the plaintiff and suffered lost rental income. From these facts, it is clear that the injuries the defendant alleges in the CUTPA count of his counterclaim, if any, are those allegedly suffered by Front Street Commons specifically, and not the defendant. Front Street Commons is a limited liability company and is therefore a distinct legal entity from the defendant, who is simply a member of that entity. Because a member of a limited liability company cannot recover for an injury allegedly suffered by the limited liability company, we conclude that the defendant lacks standing to pursue a claim alleging a violation of CUTPA. But cf. *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 215–16, 982 A.2d 1053 (2009) (members of limited liability company have standing

[6] We note that §§ 34-124, 34-186 and 34-187 have been repealed, effective July 1, 2017. See Public Acts 2016, No. 16-97. We also note, however, that General Statutes § 34-243h (a), effective July 1, 2017, provides: "A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs."

to bring claims for breach of contract when they are personally parties to contract).

The judgment of the Appellate Court is reversed in part and the case is remanded to that court with direction to reverse the judgment of the trial court in favor of the defendant on the complaint and on the third count of the counterclaim and to remand the case to the trial court with direction to render judgment for the plaintiff as to the liability on the complaint and on the third count of the counterclaim, and for a hearing in damages on the complaint; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

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## ROBERT BARTON *v.* CITY OF NORWALK
## (SC 19671)

Rogers, C. J., and Palmer, Eveleigh, Robinson and Beach, Js.

*Syllabus*

The plaintiff B brought this action, alleging, inter alia, that the defendant city had inversely condemned a parcel of real property containing a partially leased building by taking, through the power of eminent domain, an adjacent parcel containing a parking lot used by the tenants of the subject property. Shortly after purchasing the subject property, B purchased the adjacent parcel in order to construct a parking lot. B subsequently began leasing portions of the building on the subject property to various residential and commercial tenants including, among others, a church. In 2002, the defendant condemned the adjacent parcel in order to build a police station and paid B $127,000 in compensation for the taking. The lack of available parking due to the condemnation of the adjacent parcel subsequently rendered the subject property undesirable to current and prospective tenants. Both the percentage of space leased and B's rental income subsequently declined. Thereafter, B filed an action in the Superior Court seeking review of the compensation afforded to him by the defendant for the condemnation of the adjacent parcel. The court found in favor of the plaintiff, determining that the adjacent parcel was worth $310,000 rather than $127,000. Because B could not recover for losses to the subject property in the previous action concerning the adjacent parcel, he subsequently commenced the present action alleging inverse condemnation of the subject property.

The trial court concluded that the lack of parking resulting from the defendant's condemnation of the adjacent parcel precluded B from operating the building on the subject property as a leasable facility and, as a result, had substantially destroyed B's use and enjoyment of the subject property. In so concluding, the trial court rejected the defendant's claim that, in light of B's position in the previous action that the highest and best use of the adjacent parcel was as a mixed use development, the doctrine of judicial estoppel barred B from asserting, for the purpose of his inverse condemnation claim, that he would have continued using the adjacent parcel as a parking lot. The trial court rendered judgment in favor of B, from which the defendant appealed to the Appellate Court claiming, inter alia, that B had failed to make out prima facie case for inverse condemnation because the subject property retained significant value and that the trial court had incorrectly concluded that B's claim was not barred by the doctrine of judicial estoppel. The Appellate Court disagreed with these claims and, accordingly, affirmed the judgment of the trial court. The defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant had inversely condemned the subject property by taking the adjacent parcel through the power of eminent domain: the trial court's conclusion that B's use and enjoyment of the subject property was substantially destroyed was amply supported by its factual findings that B faced extreme difficulty renting space due to the absence of parking and that the market value of the subject property had fallen by more than 80 percent; moreover, this court could not conclude, in light of declining lease rates and the lack of success in marketing, that the continued presence of the church, which had declined to renew its lease after the condemnation of the adjacent parcel, undermined the trial court's conclusions; furthermore, the fact that the subject property retained some economic value did not undermine the trial court's ultimate finding that B's use and enjoyment of the subject property was substantially destroyed.
2. The defendant could not prevail on its claim that the trial court abused its discretion by declining to bar B's inverse condemnation claim under the doctrine of judicial estoppel; the plaintiff's claim in the present action that he would continue to use the adjacent parcel as a parking lot was not clearly inconsistent with his position in the previous action that the highest and best use of the adjacent parcel was as a mixed use development, as a property owner need not actually use his or her property in accordance with its highest and best use.

Argued January 19—officially released July 4, 2017

*Procedural History*

Action to recover damages for, inter alia, the defendant's alleged taking of certain of the plaintiff's real

property by inverse condemnation, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion to cite in Sonoson, LLC, as a party plaintiff; subsequently, the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which the defendant appealed to the Appellate Court, *Gruendel*, *Prescott* and *Pellegrino*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*Carolyn M. Colangelo*, assistant corporation counsel, with whom were *Mario F. Coppola*, corporation counsel, and *Daniel J. Krisch*, for the appellant (defendant).

*Elliott B. Pollack*, with whom, on the brief, was *Tiffany K. Spinella*, for the appellees (plaintiffs).

*Opinion*

EVELEIGH, J. In this certified appeal, the defendant, the city of Norwalk, appeals from the judgment of the Appellate Court affirming the judgment of the trial court awarding the plaintiff Robert Barton[1] $899,480 in damages plus prejudgment interest for his claim that the defendant inversely condemned a parcel of real property located at 70 South Main Street in Norwalk (70 South Main) by taking, through the power of eminent domain, the plaintiff's parking lot located across the street at 65 South Main Street (65 South Main). See *Barton* v. *Norwalk*, 163 Conn. App. 190, 193–94, 135

[1] We note that Sonoson, LLC, is also a plaintiff in the present action. Barton was the owner of the property at issue at the time of the alleged taking and commenced the present action. Thereafter, Barton executed a quitclaim deed to the property in favor of Sonoson, LLC. Thereafter, Barton filed a motion to cite in Sonoson, LLC, as a party plaintiff, which was granted by the trial court. For the sake of convenience, we hereinafter refer to Barton as the plaintiff.

A.3d 711 (2016). The defendant raises two claims in the present appeal. First, the defendant claims that the Appellate Court incorrectly affirmed the judgment of the trial court that the plaintiff had proven inverse condemnation because 70 South Main retains significant value and generates significant income. Second, the defendant claims that the Appellate Court incorrectly concluded that the plaintiff's inverse condemnation claim was not barred by judicial estoppel. We disagree with the defendant and, accordingly, affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to the disposition of the present appeal. "In 1981, the plaintiff purchased the four story walk-up commercial building at 70 South Main as an office for his sail-making business. There was a single parking space at 70 South Main. The defendant told the plaintiff that he needed more parking for 70 South Main to comply with zoning regulations. The defendant approved a site plan for 70 South Main that involved the [plaintiff's purchase of] the vacant lot across the street at 65 South Main and creating forty-four parking spaces there. The plaintiff did so, and the defendant issued a certificate of zoning compliance in 1984 for both properties.

"In 1985, the plaintiff sold his sail-making business but kept the building. The buyers remained at 70 South Main for one year before moving out. When they did, the plaintiff began leasing space at 70 South Main to a number of commercial tenants. Lessees included a barbershop and a housing services office on the first floor, Macedonia Church on the second floor as well as parts of the third and fourth floors, a photo-gift business on the third floor, and several crafts persons on the fourth floor. The court did not expressly find but it is undisputed that there was also a residential apartment on the fourth floor. For most of the next fifteen years, the building was 95 to 100 percent occupied.

"When the plaintiff bought 70 South Main, there was abundant on-street parking nearby. Beginning in 1990, however, the defendant enlarged no-parking zones and converted several side streets into through streets. As a result, on-street parking grew steadily more limited. In 1996, when the plaintiff learned of the defendant's interest in building a new police headquarters on land that included his parking lot at 65 South Main, he and his tenants grew concerned that they and their customers would have nowhere to park. They expressed this concern to city officials, who offered the plaintiff and his tenants forty parking permits at the South Norwalk train station, which would expire after ten years, as a compromise. The plaintiff and his tenants rejected this offer because they asserted that those spaces were far away, unpleasant, and possibly dangerous. The plaintiff stressed in his talks with two subsequent mayors of Norwalk that, if the defendant condemned his parking lot at 65 South Main, it would cripple operations at 70 South Main.

"In February, 2002, the defendant condemned the parking lot at 65 South Main and paid the plaintiff $127,000 as just compensation for it. . . . The plaintiff asked the Superior Court to review the defendant's statement of just compensation, arguing that 65 South Main was worth $350,000. . . . In addition, the plaintiff twice tried to amend his pleadings in that case to add a claim for losses to 70 South Main as a result of the taking of 65 South Main. The defendant successfully objected to both amendments.

"The parties' experts testified in that proceeding only to the fair market value of 65 South Main standing alone. . . . Specifically, both parties' real estate appraisers agreed that the highest and best use for 65 South Main, which is the standard measure of just compensation . . . would be a mixed use . . . .

"On January 27, 2009, the court rendered judgment in favor of the plaintiff in that case. The court found that 65 South Main was worth $310,000 as a mixed use development and awarded the plaintiff $310,000 in just compensation, minus the $127,000 that the defendant had already paid the plaintiff, plus interest, fees, and costs. . . .

"Because the plaintiff could not recover for losses to 70 South Main in the action concerning 65 South Main, he filed a second action—the subject of this appeal—in November, 2003, in which he alleged that the defendant had inversely condemned 70 South Main when it took 65 South Main. A four day trial to the court occurred in February, 2013. The plaintiff called four witnesses, namely, himself, his expert real estate appraiser, a former tenant of 70 South Main, and a current tenant of 70 South Main. The defendant chose to call no witnesses. Instead, when the plaintiff rested, the defendant moved for a judgment of dismissal on the ground that the plaintiff had failed to make out a prima facie case. After the court took that motion under advisement, the defendant rested without presenting a case-in-chief." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 194–97.

The trial court found that the lack of parking, caused by the taking of 65 South Main, had "substantially destroyed the [plaintiff's] ability to operate [70 South Main] as a leasable facility and enjoy even a modicum of financial success." More specifically, the trial court found that the lack of parking made the plaintiff's "chances of commercial success" at 70 South Main "negligible or nonexistent." The trial court concluded that this is a "close case," but nevertheless found that "the only evidence in this case is that 70 South Main has substantially depreciated in value, by [more than 80 percent], and this loss has been caused by the taking through eminent domain of the dedicated parking

spaces [at 65 South Main]." On the basis of these findings, the trial court concluded that the defendant had inversely condemned 70 South Main because the taking of 65 South Main amounted to "a substantial destruction of the [plaintiff's] ability to enjoy or use [70 South Main] . . . ."

The trial court also rejected the defendant's judicial estoppel claim.[2] "The defendant had argued that the plaintiff was judicially estopped from bringing an action for the inverse condemnation of 70 South Main because (1) the plaintiff's position in the previous litigation that 65 South Main's highest and best use was as a mixed use development was 'completely inconsistent' with his position in this litigation that he would have continued using 65 South Main as a parking lot, and (2) his inconsistent positions gave him the unfair advantage of being able to bring the inverse condemnation action for losses to 70 South Main. The [trial] court disagreed, finding that the positions were consistent and that the plaintiff derived no unfair advantage." *Barton* v. *Norwalk*, supra, 163 Conn. App. 200–201.

Accordingly, "the court rendered judgment in favor of the plaintiff on his claim for the inverse condemnation of 70 South Main. The court awarded him $899,480 in damages plus $543,384.49 in prejudgment interest." Id., 197. The defendant appealed to the Appellate Court, which affirmed the judgment of the trial court.[3] See id., 219. This certified appeal followed.[4]

[2] At the trial court, the defendant asserted other special defenses and counterclaims, all of which were rejected. None of those claims are raised on appeal.

[3] The Appellate Court rejected the plaintiff's claim on cross appeal that the trial court incorrectly denied the plaintiff offer of compromise interest under General Statutes § 52-192a. *Barton* v. *Norwalk*, supra, 163 Conn. App. 219. The plaintiff has not appealed from the judgment of the Appellate Court on that issue.

[4] This court granted the defendant's petition for certification for appeal limited to the following issues: (1) "Did the Appellate Court properly affirm the trial court's judgment awarding monetary damages based upon the theory

I

We begin with the defendant's claim that the Appellate Court incorrectly affirmed the trial court's judgment awarding monetary damages on a theory of inverse condemnation. The defendant claims that 70 South Main was not inversely condemned because it retained economic value, was approximately one half occupied, and continued to generate revenue. In response, the plaintiff claims that the Appellate Court properly affirmed the judgment of the trial court because the plaintiff's use and enjoyment of 70 South Main was substantially destroyed. We agree with the plaintiff.

"As a preliminary matter, we note that, for this constitutional claim [of inverse condemnation], we review the trial court's factual findings under a clearly erroneous standard and its conclusions of law de novo." *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008).

"Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. . . . An inverse condemnation claim accrues when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding . . . ." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 83, 931

of inverse condemnation when [70 South Main] retained significant value, was used for the same purpose as before the condemnation, and continued to generate substantial rental income?"; and (2) "Did the Appellate Court properly hold that the plaintiff's inverse condemnation action was not barred by the doctrine of judicial estoppel, given the inconsistent positions that he had taken on the use of the taken property?" *Barton* v. *Norwalk*, 321 Conn. 901, 901–902, 136 A.3d 1272 (2016).

A.2d 237 (2007). The government action must result in such a substantial interference with the use of the property that it "amounts to practical confiscation." (Internal quotation marks omitted.) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298. "Accordingly, an inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, supra, 83.

"The word taken in article first, § 11 of our state constitution[5] means the exclusion of the owner from his private use and possession, and the assumption of the use and possession for the public purpose by the authority exercising the right of eminent domain. . . . Although property may be taken without any actual appropriation or physical intrusion . . . there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose . . . as where the economic utilization of the land is, for all practical purposes, destroyed. . . . A constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed." (Footnote in original; internal quotation marks omitted.) Id., 83–84. In other words, "Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." Id., 85.

The issue of whether there has been a substantial destruction of an owner's ability to use or enjoy a prop-

[5] Article first, § 11, of the constitution of Connecticut provides: "The property of no person shall be taken for public use, without just compensation therefor."

erty—the basis for liability in the present case—is a fact intensive issue. See *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298 ("[w]hether a claim that a particular governmental regulation or action taken thereon has deprived a claimant of his property without just compensation is an essentially ad hoc factual inquir[y]" [internal quotation marks omitted]). There is no bright line standard. We have previously observed that "it may be difficult to determine in certain close cases whether the alleged infringement on property rights is sufficient to constitute the type of complete taking that inverse condemnation requires . . . ." *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 85; see also *Washington Market Enterprises, Inc.* v. *Trenton*, 68 N.J. 107, 116, 343 A.2d 408 (1975) ("[t]he general question as to when governmental action amounts to a taking of property has always presented a vexing and thorny problem").

We recently observed, in a zoning variance case, that "[w]hen a reasonable use of the property exists, there can be no practical confiscation."[6] (Internal quotation

[6] We have noted that the "same analysis" is applied in zoning variance cases as in inverse condemnation cases because "when the [zoning] regulation practically destroys or greatly decreases [the property's] value for any permitted use to which it can reasonably be put . . . the loss of value alone may rise to the level of a hardship." (Citation omitted; internal quotation marks omitted.) *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 323, 130 A.3d 241 (2016). Generally speaking, a landowner must show, inter alia, "unusual hardship" to be granted a variance. Id., 321. In order to meet this element of the legal standard for a variance, the landowner may demonstrate that "the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property." Id., 322. Accordingly, we have observed that this places our variance cases "at the intersection of two related, yet distinct, areas of law: land use regulation and constitutional takings jurisprudence." (Internal quotation marks omitted.) Id. The unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose. Compare id., 323 ("we have continually held in variance cases that [w]hen a reasonable use of the property exists, there can be no practical confiscation" [internal quotation marks omitted]), with *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284

marks omitted.) *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 323, 130 A.3d 241 (2016). Thus, when a putative condemnee fails to show that the property cannot be used for any reasonable and proper purpose, liability for inverse condemnation is precluded. See *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298–300 (finding no inverse condemnation where landowner failed to show it could not continue to operate water utility on subject property); *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 55 (finding no inverse condemnation where contamination from nearby city landfill did not prevent landowner from continuing to use land for mining operations or marketing land for residential development); *Sinotte* v. *Waterbury*, 121 Conn. App. 420, 437, 995 A.2d 131 (finding no inverse condemnation where landowners could still use home as residence despite periodic sewage backups), cert. denied, 297 Conn. 921, 996 A.2d 1192 (2010).

"Conversely, when the property retains no reasonable use or value under the zoning regulation, a practical confiscation occurs." *Caruso* v. *Zoning Board of Appeals*, supra, 320 Conn. 324. In *Caruso*, this court noted prior cases holding that compelling the use of large homes as single-family homes when it would be prohibitively expensive to maintain the homes as such would result in a practical confiscation. Id., 324–25, citing *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, 143 Conn. 257, 260–61, 121 A.2d 637 (1956), and *Libby* v. *Board of Zoning Appeals*, 143 Conn. 46, 52–53, 118 A.2d 894 (1955). In *Libby*, the conclusion that the regulation amounted to a practical confiscation was sustained on the basis of the inability

Conn. 84 ("there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose" [internal quotation marks omitted]); see also *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 299 (noting that landowner's inverse condemnation claim failed for same reasons as its claim of unusual hardship).

to market the property as a single-family residence. *Libby* v. *Board of Zoning Appeals*, supra, 52 ("[The property's] usefulness as a [single-family] house is gone. The extent to which its value has dropped is borne out by the inability to find, over a [two year] period, a single individual who was willing to make any offer for it.").

Against this legal background, we conclude that the trial court properly found that the defendant inversely condemned 70 South Main in the present case. After the defendant took the parking lot at 65 South Main, the use of 70 South Main was substantially destroyed. This conclusion is amply supported by the trial court's findings of fact that the plaintiff faced extreme difficulty renting space at 70 South Main, which, in turn, resulted in a more than 80 percent diminution of its value.

At the outset of its analysis, the trial court highlighted the "serious, immediate, and enduring adverse effects" of the taking of 65 South Main on the marketability of 70 South Main. The court concluded that the lack of parking had rendered space at 70 South Main undesirable to prospective tenants. This was evidenced by the plaintiff's graph depicting a drop in leased space from 97 percent[7] in 2001, to 5 percent in 2006, with a slight increase to 10 percent in 2011. The Family and Children's Aid Society of Fairfield County, a prior tenant that had occupied three quarters of the ground floor, left at the end of its lease citing the lack of parking. Tenants on the third and fourth floor also departed at the end of their lease because of the lack of parking. The

[7] The memorandum of decision recites that 87 percent of the building was under lease in 2001. The graph admitted into evidence recites the figure of 97 percent for 2001. Elsewhere in the memorandum of decision, the trial court states that "[r]ental space under lease fell from over 90 percent in 2001 . . . ." Because the trial court cited the graph as its source for the 87 percent figure and we find no other basis in the record for the conclusion that 87 percent of the building was under lease in 2001, we conclude that the 87 percent figure in the memorandum of decision was a typographical error.

trial court noted the evidence presented about interest from prospective tenants who found the space attractive, but were dissuaded by the lack of parking. Lover Thomas, a barber who had run his business out of 70 South Main since 1989, attempted to endure the parking challenges. He suffered a loss of one quarter of his customers and ultimately closed shop, citing the lack of parking.[8]

As the tenants departed, the plaintiff was unable to replace them. After 65 South Main was taken, the plaintiff's real estate broker documented the interest of prospective tenants, interest that would not materialize into a lease principally due to the lack of parking.[9] In a letter, the broker informed the plaintiff that, without a solution to the lack of parking, "the future tenancy of 70 South Main . . . looks very bleak at present." In the intervening ten years from the taking of 65 South Main to the trial, the plaintiff managed to attract only two small tenants to lease space. One is a cell phone store and the other is a bail bondsman. The trial court found that the tenancy of the bail bondsman is the consequence of the unique situation that 70 South Main is located across the street from the police station. The cell phone store depends on walk-in clientele, and the owner himself walks to work. The trial court found that "the remainder of the building will attract tenants only

[8] Thomas stated the following in a June, 2006 letter: "It just doesn't pay to open every day anymore. The neighborhood is better, and that should be good, but the parking situation has just killed us. . . . Nobody wants to pay a $15 or $25 fine to get a $12 haircut. . . . With all this, it is a struggle each month to stay current with the rent and other expenses, and I don't see the situation improving."

[9] Over the course of approximately 120 days in 2002, the broker fielded twenty to twenty-five inquiries regarding the space available at 70 South Main. The broker noted that the "primary and paramount issue" with respect to the spaces for these inquiries was the lack of on-site or nearby parking. Four potential tenants were shown space. Three of the potential tenants declined to enter a lease citing parking issues, while the fourth did not give a reason.

by rock bottom rents, and these will be tenants for which parking is not an issue, likely a small and transient group."

As a result of the lack of marketability, the plaintiff struggled to maintain 70 South Main. When the plaintiff sought the necessary permits for certain maintenance services, he was rebuffed by the defendant's agencies on the basis of the lack of parking. The trial court noted that "the record is replete with responses from municipal authorities that nothing can be done because of the parking issue and pending litigation." The trial court noted that, in order to keep costs down, at one point, the plaintiff's son lived in the building and furnished maintenance services. Indeed, as the trial court found, "[t]he evidence shows the lack of parking . . . reduced [70 South Main's] chances of commercial success to negligible or nonexistent."

The defendant claims that the trial court's finding with respect to the viability of the property is improper because it ignores the fact that Macedonia Church, which had leased space from the plaintiff since 1987 continued to occupy space in the building and generate substantial revenue. It is true that Macedonia Church occupied a substantial portion of the building—39 percent. Macedonia Church continued to occupy all of the second floor and parts of the third and fourth floor of the building through the date of the trial on a month to month basis. As a result of the its continued tenancy, the decline in operating income[10] was not as steep as the decline in term lease tenancy. The trial court found that the income declined from $94,080 in 2001 to $20,661 in 2006.

[10] According to the plaintiff's exhibit, "[o]perating [i]ncome is defined as [g]ross [r]ents received less [o]perating [e]xpenses. Operating [e]xpenses exclude mortgage interest and principal, depreciation, and capital improvements. Services provided 'in-kind' to the property are not reflected in [o]perating [e]xpenses."

The defendant, however, glosses over significant facts regarding Macedonia Church's occupancy of 70 South Main. Although it enjoyed below market rents, once the parking lot was taken, Macedonia Church did not renew its lease with the plaintiff and informed the plaintiff that it intended to quit the premises when a suitable alternative was found. As an act of municipal grace, the defendant permitted Macedonia Church to use certain parking spaces on a nearby street at no cost. A leader from Macedonia Church testified that, if parking were not furnished, it would need to seek an alternative location on a temporary basis. As of the date of trial, the plaintiff had not found any new tenants for any of the spaces above the ground level. Thus, notwithstanding the length of Macedonia Church's continuing month to month occupancy, the plaintiff simply could not count on it as a revenue stream to continue to profitably operate the building long term. Therefore, we cannot conclude that, in light of the dismal lease rate and lack of success marketing vacant space, Macedonia Church's presence undermined the trial court's conclusion that the plaintiff's use and enjoyment of 70 South Main has been substantially destroyed.

The trial court's conclusion is also supported by its finding that the value of 70 South Main had fallen by more than 80 percent. In making its finding, the trial court "generally accept[ed]" the documentary and oral expert testimony of a commercial real estate appraiser, Michael McGuire. McGuire had thirty years of experience as a real estate appraiser, was a principal at a real estate appraisal firm in Norwalk, and was "knowledgeable about real estate values and trends in the Norwalk area . . . ." McGuire had recent experience in dealing with parking rules in Norwalk.[11] On the basis of McGuire's report, the trial court found that the value of 70

[11] McGuire testified that he had recently served on a committee that examined parking in the area.

South Main had diminished from $1.1 million to $200,520 or 81.77 percent.[12] McGuire attributed this decline in value to the absence of available parking. He testified that "parking is the lifeline of [a] building" in a suburban market. He added that when "[y]ou take the parking away, you've gutted . . . the value of a building." McGuire further testified that 70 South Main was "pretty close to teardown value." The appraisal report stated that, without available parking, the property may be worth less than if it were vacant and available for development.

We are not persuaded that the fact that 70 South Main retains some economic value undermines the trial court's conclusion that the plaintiff's use and enjoyment of the property was substantially destroyed. "Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 85. Logic dictates that where inverse condemnation is found for substantial—but not complete—destruction of an owner's ability to use or enjoy property, the remaining quantum of use or enjoyment will be reflected in some economic value. Where, as here, the plaintiff has shown that his use and enjoyment of property has been substantially destroyed, the taking is of constitutional magnitude and the plaintiff is enti-

[12] The defendant notes in its brief that McGuire determined the before taking value of 70 South Main by applying valuation methodology that considered the use of 70 South Main and 65 South Main together and suggests that this method is inaccurate. At trial, however, the defendant declined to present any evidence with respect to the value of 70 South Main. Ultimately, the trial court credited McGuire's testimony and found that his analysis provided a determination of the damage done to only 70 South Main. The defendant did not challenge the trial court's findings of fact on appeal. Our holding in the present case, therefore, should not be construed as an endorsement of the method used by McGuire to determine the before taking value of 70 South Main.

tled to just compensation for the inverse condemnation of his property. "[T]he usual measure of damages is the difference between the market value of the [property] before the taking and the market value of [the property] thereafter." (Internal quotation marks omitted.) Id., 71.

In sum, we conclude that the trial court properly concluded that the plaintiff had proven his theory of inverse condemnation in the present case.

II

We next turn to the defendant's claim that the plaintiff's inverse condemnation action was barred by the doctrine of judicial estoppel. The defendant claims the trial court incorrectly failed to find the plaintiff estopped from asserting that 70 South Main should be valued with the use of 65 South Main as a parking lot. Specifically, the defendant claims the following: (1) the plaintiff's position with respect to the use of 65 South Main is clearly inconsistent with his position in the previous eminent domain action, wherein he argued the highest and best use of 65 South Main was as mixed use development; (2) the trial court in the previous case adopted the plaintiff's position and awarded compensation on that basis; and (3) the plaintiff would derive an unfair advantage against the defendant by taking such a position in the present case. We conclude that the defendant failed to prove that the plaintiff's claim was barred by judicial estoppel.

We begin by setting forth our standard of review of the defendant's claim. "Because the rule is intended to prevent improper use of judicial machinery . . . judicial estoppel is an equitable doctrine invoked by a court at its discretion . . . . Accordingly, our review of the trial court's decision not to invoke the doctrine is for abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 171, 2 A.3d 873 (2010).

"[J]udicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding. . . . [J]udicial estoppel serves interests different from those served by equitable estoppel, which is designed to ensure fairness in the relationship between parties. . . . The courts invoke judicial estoppel as a means to preserve the sanctity of the oath or to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, 301 Conn. 361, 372, 21 A.3d 791 (2011). The doctrine "protect[s] the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . ." (Citations omitted; internal quotation marks omitted.) *New Hampshire* v. *Maine*, 532 U.S. 742, 749–50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

Judicial estoppel applies if (1) "a party's later position is clearly inconsistent with its earlier position," (2) "the party's former position has been adopted in some way by the court in the earlier proceeding," and (3) "the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." (Internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 319 Conn. 582, 612, 125 A.3d 988 (2015); see *Dougan* v. *Dougan*, supra, 301 Conn. 372–73; see also *DeRosa* v. *National Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010). The application of judicial estoppel is further limited to "situations where the risk of inconsistent results with its impact on judicial integrity is certain." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, supra, 373. In addition, generally speaking, the doctrine will not apply "if the first statement or omission was the result of a good faith mistake . . . or an unintentional error." (Internal quotation marks omitted.) Id.

With respect to the first element of judicial estoppel, the defendant claims that in the earlier eminent domain proceeding, the plaintiff took the position that the highest and best use of 65 South Main was as a mixed use development, whereas in the present case, 65 South Main was treated as a parking lot dedicated to use in conjunction with 70 South Main for purposes of valuation. The defendant claims that the plaintiff's positions with respect to 65 South Main are clearly inconsistent. The plaintiff claims that the positions are not inconsistent because a person need not actually use property in accordance with its asserted highest and best use. We agree with the plaintiff.

When land is taken by the government, the landowner is entitled to just compensation. Conn. Const., art. I, § 11. It is by now axiomatic that "the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken." (Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 25, 861 A.2d 473 (2004). To achieve this, the landowner is compensated the fair market value of the property taken. Id. "In determining market value, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land . . . . The fair market value is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use." (Internal quotation marks omitted.) Id. The highest and best use of certain property is not necessarily the present use of the property. To the contrary, "[t]he highest and best use concept, chiefly employed as a starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value, greatest financial return, or the most profit from

the use of a particular piece of real estate." (Internal quotation marks omitted.) Id. The law requires the court to "consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking." (Internal quotation marks omitted.) Id.

The defendant's claim in this case is a conflation of " 'value in use' " and " 'value in exchange.' " *Wellmark, Inc.* v. *Polk County Board of Review*, 875 N.W.2d 667, 673 (Iowa 2016). " 'Value in exchange' refers to the value to persons generally and focuses on market value based upon a willing buyer and willing seller. . . . 'Value in use' refers to the value a specific property has for a specific use. . . . Value in use is based upon the value of the property as it is currently used, not on its market value considering alternative uses." (Citations omitted.) Id. In a free society, there is no requirement that every property owner employ his property in its highest and best use. But the fact that a property owner chooses to put his property to less productive use does not necessarily result in a diminution of the market value of the property.[13] If someone were to use the newest model cell phone as nothing more than a paper weight, no one would argue that in a competitive market the cell phone would be worth that of an idle paper weight. Because there would be a reasonable probability that a willing buyer would use the cell phone as intended—its highest and best use—rather than as a paper weight, its market value is the former rather than the latter, irrespective of its actual use. In valuing property, an asserted highest and best use is not a promise,

[13] The defendant's suggestion elsewhere in its brief that the before taking value of 70 South Main should be based upon the capitalization of the below market rent the plaintiff received from the Macedonia Church suffers from the same flaw.

but rather a means to ascertain fair market value. It is not inconsistent for a property owner to assert a particular use of property different from an asserted highest and best use of the property.

The fact that the plaintiff sought and proved a fair market value of 65 South Main as a mixed use development in the earlier eminent domain proceeding does not now preclude him from claiming, in the present case, that he would continue to use that property as a parking lot had it not been taken. This case is about the value of 70 South Main. In presenting his case, the plaintiff, through his expert, compared the value of 70 South Main with the use of 65 South Main as a parking lot with the value 70 South Main without the use of 65 South Main as a parking lot. The trial court found as fact, and the defendant did not challenge on appeal, that this analysis showed the damage 70 South Main incurred as a result of the defendant taking 65 South Main. The fact that the plaintiff asserts in the present case that he would have continued to use 65 South Main as a parking lot is not clearly inconsistent from his assertions in the earlier eminent domain action as to the fair market value of that property.[14] Accordingly, the trial court did not abuse its discretion in rejecting the defendant's judicial estoppel claim.

We conclude that the Appellate Court properly determined that the trial court correctly concluded that the defendant had inversely condemned 70 South Main when it took 65 South Main, and that the trial court did not abuse its discretion in rejecting the defendant's judicial estoppel claim.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[14] Because we conclude that the defendant failed to prove the first element of judicial estoppel, we need not discuss whether the defendant had satisfied the second and third elements.