# Highlights | Recent Superior Court Decisions

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## Administrative Law

The statutory right to appeal to the Superior Court from an administrative ruling pursuant to Conn. Gen. Stat. § 4-177c on an application for an order that a final agency decision be rendered "forthwith" following expiration of the agency's statutory 90-day time limit for rendering a decision in a contested case applies only to rulings for which there is a statutory right of appeal. Therefore, because the Covid-19 Emergency Executive Orders delegate authority to agency commissioners to extend agency deadlines during the Covid-19 pandemic without also delegating a right to appeal such an extension, no appeal may be filed from an agency's own decision to grant an extension to the 90-day time while the Emergency Orders remain in effect. *1st Alliance Lending, LLC v. Connecticut Department of Banking*, 71 CLR 3 (Noble, Cesar A., J.).

## Arbitration Law

A prejudgment remedy on a claim subject to a mandatory arbitration cannot be commenced until a civil action on the claim has been commenced, because PJR remedies are available only for claims being pursued in civil actions, even a request under the provision of the Arbitration Statute that authorizes a civil court to issue an order pendente lite at "[a]ny time before an award is rendered," Conn. Gen. Stat. § 52-422. *Conspec Associates, Inc. v. Freedom Cement, LLC*, 70 CLR 1 (Richards, Sybil V., J.).

The phrase "undue means" as used in the provision of the Arbitration Act authorizing a Superior Court to vacate an arbitration award "[i]f the award has been procured by *corruption, fraud* or *undue means*," Conn. Gen. Stat. § 52-418, requires proof of intentional misconduct, such as acting with a nefarious, bad faith or immoral intent, even for a claim of not receiving notice of an proceeding. *Johnson v. Ashley Construction Group, LLC*, 71 CLR 13 (Welch, Thomas J., J.). The opinion also holds that the provisions of the COVID-19 Executive Orders modifying the time limits for processing civil actions, Order Nos. 7G and 7OOO, do not apply to *arbitration* proceedings.

## Civil Procedure

*Carbone v. Marcus*, 71 CLR 112 (Wilson, Robin L., J.), holds that a motion to dismiss for failure to establish a prima facie case must be ruled on before the defendant presents evidence; deferral to the close of all evidence is no longer permitted.

For a voluntary association to have standing to sue a complaint must contain allegations that satisfy a three-part test: (a) some members have a personal interest sufficient to establish standing in their own right; (b) the issues raised are germane to the association's purposes; and (c) neither the claim asserted nor relief requested requires the participation of individual members. *Friends of Kensington Playground v. New Haven*, 71 CLR 101 (Young, Robert E., J.). The voluntary association in this case seeks to enjoin a city from replacing a park with residential housing without complying with the statutory requirements that a taking of park land be preceded by (1) a special public hearing and (2) the acquisition of comparable replacement land for a park at another location. The opinion dismisses the complaint for a lack of allegations concerning member interests in the litigation.

## Civil Rights

The Discriminatory Practices Act, which prohibits any person from depriving any other person of rights secured by state or federal law "on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran," Conn. Gen. Stat. § 64a-58, does not provide a private cause of action and may be judicially prosecuted only by first prosecuting an administrative complaint with CHRO. *Barristers Coffee Co. v. DaSilva*, 71 CLR 56 (Kowalski, Ronald E., J.). The opinion holds that the statute does not provide a judicial remedy for a seller's refusal to lease commercial property to the plaintiff because of the plaintiff's nationality.

## Contracts

"Construction-related work" as that phrase is used in the statute capping at ten years the length of time to which state entities may agree to extend limitations periods for the commencement of actions against contractors arising out of "construction-related work," Conn. Gen. Stat. § 52-584c, does not apply to incidental and peripheral work such as, in this case, the connection by a sewer pollution control agency of an existing local sewer system to a newly-constructed state building. *Metropolitan District Commission v. Marriott International, Inc.*, 71 CLR (Schuman, Carl J., J.).

*Brookstone Homes, LLC v. Merco Holdings, LLC*, 71 CLR 53 (Noble, Cesar A., J.), holds that the individual members of a limited liability company have no ownership interest in real estate owned by the LLC and therefore have no standing to prosecute an

application for the discharge of a lis pendens filed to protect a litigant's interest in an action involving the ownership of the real property, Conn. Gen. Stat. § 52-325a (authorizing only "the property owner" to prosecute an application to discharge a lis pendens). The opinion holds that the members of a group of limited liability companies, organized as investment vehicles for the purchase of individual multi-tenant apartment buildings to be managed by a single management company, lack standing to prosecute applications to discharge lis pendens filed against each of the apartment buildings.

## Education Law

*State v. Connecticut State University Organization of Administrative Faculty, AFSCME*, 71 CLR 93 (Shapiro, Robert B., J.T.R.), holds that an arbitration award overturning a university's decision to dismiss a Director of Student Conduct for having engaged in an off-duty standoff with police over a domestic dispute that endangered the director's own children, neighbors and responding police officers, would violate public policy and therefore should be vacated. The opinion reasons that to affirm the arbitrator's decision would be inconsistent with multiple public policies including providing protection to children under the age of 16, Conn. Gen. Stat. § 53-21(A); protecting children from neglect, Conn. Gen. Stat. § 46b-120(4); and interfering with police officers, Conn. Gen. Stat. § 53a-167(a).

## Employment Law

The statute prohibiting discrimination or retaliation of nursing home employees who advocate on behalf of patients, Conn. Gen. Stat. § 19a-532, applies not only to advocacy in public forums but also to advocacy to management within the confines of a place of employment. *Smalls v. Mary Wade Home, Inc.*, 71 CLR 16 (Kamp, Michael P., J.). This opinion holds that allegations that the plaintiff, a licensed practical nurse employed by a nursing home, was terminated in retaliation for reporting to management that a supervisor with COVID-19 symptoms was working in an area reserved for non-COVID-19 patients in conflict with facility protocol, are sufficient to state a claim for a violation of the anti-retaliation statute.

A complaint under the federal statute that creates a cause of action for a public or private employer's retaliation against an employee for engaging in conduct protected by the free speech clauses of the federal and state constitutions, Conn. Gen. Stat. § 31-51q (the Whistleblower Statute), must include an allegation of compliance with the statute's requirement that any activity upon which a claim is based, "not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and employer." *Coffy v. State*, 71 CLR 109 (Jacobs, Irene P., J.).

## Landlord and Tenant Law

A commercial tenant's willful withholding of lease payments in order to satisfy other obligations does not necessarily disqualify the tenant from relying on the doctrine of equitable estoppel to avoid termination of the lease. *Dawid Investments, LLC v. Jing Fu, Inc.*, 71 CLR 63 (Spader, Walter M., J.). The opinion holds that the plaintiff, the owner of a restaurant, may rely on the doctrine, based on the following factors: the tenant's financial difficulties appear to be related solely to the business decline caused by the COVID-19 pandemic; the lease is for 20 years and has been faithfully honored by the tenant for the first nine of those years; and the tenant claims to have access to funds sufficient to bring the arrearage current. The opinion also holds that the doctrine of equitable nonforfeiture applies to commercial as well as noncommercial tenancies.

The only stay of execution available in summary process actions is the five-day stay of the execution of a judgment; there is no right to a stay of execution following the denial of a motion to open a default or to reargue. *Atlantic St. Heritage Associates, LLC v. Bologna*, 71 CLR 67 (Spader, Walter M., J.).

The necessity of an easement to reach a landlocked parcel of land formed by a parcel-division does not necessarily establish the existence of an easement implied by necessity, because ultimately the existence of any easement must be based on the intent of the parties to the transaction which created the necessity; necessity merely provides evidence of that intent. *Main Street Conservancy, Inc. v. 346 Main, LLC*, 71 CLR 70 (Gordon, Matthew D., J.). The opinion holds that no permanent easement was created because the buyer to the original transaction had refused to accept the seller's proposal for a permanent easement, offering instead to agree to a 20-year contractual easement, thereby providing clear evidence of the parties' intent to create only a limited-time easement. The opinion also holds that the necessity relied on to establish the existence of an easement implied by necessity must be the necessity of the owner of the servient estate, not the owner of the dominant estate.

## Tax Law

*Falkenstein v. Manchester*, 71 CLR 86 (Klau, Daniel J., J.), interprets the 2016 Public Act that provides some tax relief to owners of residential buildings discovered to have foundations constructed with defective concrete by allowing immediate interim property tax assessments, rather than forcing compliance with the normal rule that assessments may be altered only at the beginning of new five-year assessment periods, Conn. Gen. Stat. § 29-265d. The opinion holds that an owner that obtains an assessment reduction in reliance on the statute is precluded from obtaining any further relief through a conventional appeal under the assessment statutes, Conn. Gen. Stat. § 12-111 for appeals to a tax board of assessment appeals and Conn. Gen. Stat. § 12-117a for judicial appeals from assessment board decisions. In this case a taxpayer who had obtained an adjustment pursuant to the new statute for the next assessment period may not appeal the old assessment which, for an unexplained reason, otherwise remained available. The opinion reasons that to allow such an appeal would improperly allow a taxpayer owning a home built with defective concrete a maximum tax benefit in excess of the five years intended by the tax relief statute. ■