SUMMARY ORDER OF THE SECOND CIRCUIT (MARCH 5, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: LAWRENCE R. MULLIGAN,
RENEE T. MULLIGAN,

Debtors.

LAWRENCE R. MULLIGAN,

Debtor-Appellant.

v.

BRUCE K. JALBERT, PAMELA JALBERT,

Appellees.

No: 18-1657

Appeal from a May 3, 2018 order of the United States District Court for the District of Connecticut (Meyer, J.)

Before: John M. WALKER, Jr.,
Debra Ann LIVINGSTON, Circuit Judges.,
Katherine Polk FAILLA, District Judge*.

* Judge Katherine Polk Failla, of the United States District Court for the Southern District of New York, sitting by designation

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is AFFIRMED.

Debtor-Appellant Lawrence Mulligan ("Mulligan"), proceeding *pro se*, appeals a judgment of the United States District Court for the District of Connecticut (Meyer, J.) affirming the bankruptcy court's earlier judgment that a debt owed by Mulligan to Appellees Bruce and Pamela Jalbert ("The Jalberts") was not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(4). The bankruptcy court held, and the district court agreed, that Mulligan's debt was not dischargeable because it was incurred by conduct constituting defalcation while Mulligan acted in a fiduciary capacity, basing their decisions on a state court decision finding Mulligan liable to the Jalberts for, *inter alia*, conversion and statutory theft. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Background

In 2008, the Jalberts filed a complaint against Mulligan in Connecticut state court in connection with Mulligan's representation of them in a property matter. In 2010, while that action was pending, Mulligan and his wife filed for relief under the United States Bankruptcy Code. The Jalberts initiated an adversary proceeding in bankruptcy court and argued that Mulligan's debt to them was not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(4). At a June 2010 bankruptcy court hearing, the parties agreed to lift the automatic stay and litigate the Jalberts' state court lawsuit. Accordingly, in November 2010, the Jalberts filed an amended complaint in the state

court action alleging conversion, statutory theft, violation of the Connecticut Unfair Trade Practices Act, fraud, and false pretenses. In June 2013, the state court found in favor of the Jalberts on all counts except fraud.

The state court made the following factual findings. Mulligan acted as the Jalberts' attorney between 1995 and 2008. In 2005, the Jalberts asked Mulligan to represent them concerning an easement on their land, and the parties agreed that, in the event the Jalberts' title insurance company would not pay for the needed representation, the Jalberts would compensate Mulligan with construction services rather than cash. Bruce Jalbert provided Mulligan with construction work valued at $84,750 between 2005 and 2007. In 2006, a company sued the Jalberts to obtain use of the easement. Mulligan contacted the Jalberts' title insurance company and told the Jalberts that it would not provide them with representation. However, in March 2007, Mulligan received a letter from the title insurance company informing him that it had in fact already hired representation for the Jalberts and would not compensate any other counsel. Mulligan did not show that letter to the Jalberts, instead telling them that he would continue to represent them and that the title company, which had now agreed to pay for the Jalberts' representation, had merely hired an attorney to assist him.

In May 2007, Mulligan asked the Jalberts for $85,000 in order to show the title company that the Jalberts had paid for his work, explaining that he could not make a claim for payment based on the construction services that he had received. The Jalberts transferred the money with the understanding that it

would be returned following settlement of the easement litigation. The attorney hired by the title company then negotiated a settlement in which the Jalberts received $100,000; the Jalberts gave Mulligan $50,000 from that sum in compensation for the legal work that they believed he had done for them. On the basis of these facts, the state court found that Mulligan had "intentionally and wrongfully" obtained $135,000 from the Jalberts, having "intentionally misled them concerning the $85,000 payment" and "intentionally misled [them] into believing that his services were needed . . . , and that he was entitled to be paid therefor, causing them also to agree that he would receive $50,000 from the settlement." *Jalbert v. Mulligan*, No. UWYCV086001044S, 2013 WL 3388862, at *9 (Conn. Super. Ct. June 11, 2013), *aff'd*, 101 A.3d 279 (Conn. App. Ct. 2014).

The Jalberts moved for summary judgment in the bankruptcy court adversary proceeding. At a January 2015 hearing, the parties agreed that they would not dispute the state court's findings of fact, but only whether those findings satisfied the requirements of 11 U.S.C. § 523(a)(4). In October 2017, the bankruptcy court granted partial summary judgment in favor of the Jalberts. Applying the doctrine of collateral estoppel, the bankruptcy court found that the state court's finding that Mulligan had committed statutory theft compelled the conclusion that he had also committed defalcation pursuant to 11 U.S.C. § 523(a)(4). Accordingly, it determined that Mulligan's debt to the Jalberts pursuant to the state court judgment was not dischargeable in bankruptcy. The district court affirmed the bankruptcy court's decision. Mulligan timely appealed.

Discussion

"A district court's order in a bankruptcy case is subject to plenary review, meaning that this Court undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court." *D.A.N. Joint Venture v. Cacioli (In re Cacioli)*, 463 F.3d 229, 234 (2d. Cir. 2006) (internal quotation marks omitted). The bankruptcy court's conclusions of law are reviewed *de novo* and its findings of fact for clear error. *Babitt v. Vebeliunas (In re Vebeliunas)*, 332 F.3d 85, 90 (2d Cir. 2003).

1. Collateral Estoppel

Collateral estoppel "'prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim.'" *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 32 (2d Cir. 2017) (quoting *Lighthouse Landings, Inc. v. Conn. Light & Power Co.*, 15 A.3d 601, 613 (Conn. 2011)); *see also Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (federal courts apply the preclusion law of the state in which judgment was rendered). "An issue decided against a party in a prior proceeding may not be relitigated if: (1) it was fully and fairly litigated in the first action; (2) it was actually decided; and (3) the decision was necessary to the judgment." *Trikona Advisers*, 846 F.3d at 32 (internal quotation marks omitted). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." *Lighthouse Landings*, 15 A.3d at 613 (internal quotation marks omitted).

The bankruptcy court accorded collateral estoppel effect to the state court's factual findings. Mulligan argues that prior to doing so, the court was required to inquire into the record underlying the state court's judgment to determine whether the issues were fully and fairly litigated and the judgment valid. He further contends that the state court judgment is invalid because it was not supported by the evidence and was based on facts outside the pleadings. As an initial matter, Mulligan waived these arguments when he agreed before the bankruptcy court that the state court's factual findings were not in dispute, and that the only issue to be decided was whether those findings satisfied the requirements of 11 U.S.C. § 523(a)(4). *See In re Johns-Manville Corp.*, 759 F.3d 206, 219 (2d Cir. 2014) (failure to raise an argument in bankruptcy court constitutes waiver, even if the argument was subsequently raised in the district court).

Moreover, even absent waiver, Mulligan's arguments lack merit. First, Mulligan misrepresents the state court record. For instance, Mulligan contends that two allegations underlying the state court's judgment—that he failed to inform the Jalberts that their title company had assumed their defense and that he had agreed to in-kind payment for legal services—were not pleaded in the Jalberts' complaint and therefore not fully and fairly litigated before the state court. But these allegations are present in the complaint. *See* App. at 86 (Fourth Am. Compl.) (alleging that Mulligan failed to notify the Jalberts that their title insurance company had agreed to defend them and that he agreed to accept carpentry services as in-kind payment). Second, Mulligan asserts that Connecticut law requires an inquiry into the record underlying a state

court judgment to confirm whether that judgment is "valid." Mulligan Reply Br. at 2, 3. That assertion misconceives the doctrine of collateral estoppel. Indeed, the review in which Mulligan urges the federal courts to engage—looking to the state court record to determine whether the state court's factual findings were correct—is not a prerequisite to collateral estoppel, but rather precisely the review that this doctrine precludes. *See Trikona Advisers*, 846 F.3d at 32.

2. Defalcation under 11 U.S.C. § 523(a)(4)

"Section 523(a)(4) of the Federal Bankruptcy Code provides that an individual cannot obtain a bankruptcy discharge from a debt 'for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.'" *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269 (2013) (quoting 11 U.S.C. § 523(a)(4)). In this context, "defalcation" includes "a culpable state of mind requirement": specifically, "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Id.* "Where actual knowledge of wrongdoing is lacking," this requirement is met "if the fiduciary consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty." *Id.* at 274 (internal quotation marks omitted).

Mulligan argues that, even if collateral estoppel applies, the facts found by the state court do not establish the requisite mental state for defalcation under 11 U.S.C. § 523(a)(4). This argument is meritless. In finding that Mulligan was liable for statutory theft, the state court necessarily found that "with the intent to deprive another of property or to appropriate the

same to himself or a third person, [Mulligan] wrongfully [took], obtain[ed] or [withheld] such property from [the] owner." *Mulligan*, 2013 WL 3388862, at *9 (quoting *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 761 A.2d 1268, 1281 (Conn. 2000)). Specifically, the state court found that Mulligan, an attorney, "intentionally misled" the Jalberts, his clients, with the "intent to deprive [them] of property." *Id.* This conduct is an obvious breach of fiduciary duty. *See Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin,* 717 A.2d 724, 730 (Conn. 1998) (attorney owes fiduciary duties of loyalty and honesty to clients). Thus, the bankruptcy court did not err in deciding that the state court's findings also established that Mulligan possessed the required mental state for defalcation—that is, that he knew, or was grossly reckless with respect to, "the improper nature of [his] fiduciary behavior." *See Bullock*, 569 U.S. at 269.

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We have considered all of Mulligan's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk

ORDER OF THE DISTRICT COURT AFFIRMING DECISION OF BANKRUPTCY COURT (MAY 3, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAWRENCE R. MULLIGAN,

Appellant-Debtor,

v.

BRUCE K. JALBERT and PAMELA D. JALBERT,

Appellees-Creditors.

No. 3:17-cv-01873 (JAM)

Before: Jeffrey Alker MEYER,
United States District Judge.

Appellant-debtor Lawrence Mulligan has appealed from a ruling of the United States Bankruptcy Court, *see In re Mulligan*, 577 B.R. 6 (Bankr. D. Conn. 2017) (Nevins, J.), in which the Bankruptcy Court granted summary judgment concluding that Mulligan's debt to appellees-creditors Bruce and Pamela Jalbert was not a dischargeable debt in bankruptcy pursuant to 11 U.S.C. § 523(a)(4) (providing in part that a debt is not dischargeable "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"). Judge Nevins relied on a prior state court ruling that

Mulligan in his capacity as an attorney for the Jalberts had engaged in conversion and intentional statutory theft of funds they entrusted to him. *See Jalbert v. Mulligan*, 2013 WL 338862, at *3-9 (Conn. Super. 2013), *aff'd*, 153 Conn. App. 124, *cert. denied*, 315 Conn. 901 (2014).

Mulligan raises three grounds on appeal. First, he contends that the state court exceeded its authority, because the Bankruptcy Court lifted the automatic stay only to permit the underlying state court proceedings to proceed as to plaintiffs' common law fraud allegations, rather than as to additional claims such as statutory theft. I do not agree with this argument for the reasons explained by Judge Nevins in her ruling as well as those reasons stated in the Jalberts' briefing. Based on my review of the relevant portions of the transcript, I conclude that the Bankruptcy Court's lifting of the stay was not limited to only the claim for fraud, and the parties themselves understood this when they later filed a stipulation in state court stating that the stay was lifted as to a broad range of claims including conversion, statutory theft, CUTPA, fraud, and false pretenses. *See* Appellant Appendix 173.

Second, Mulligan faults the Bankruptcy Court for relying on the "factually deficient" findings of the state court despite the Jalberts' alleged failure to identify underlying supporting evidence for these findings in the state court record. I do not agree with this argument for the reasons stated by the Jalberts in their briefing. Most significantly, the parties agreed that the Bankruptcy Court "could not reconsider findings of fact made by the [state] trial court," leaving it to the Bankruptcy Court's determination whether "those findings of fact constituted a violation of 11 U.S.C. § 523

(a)(4)." *In re Mulligan*, 577 B.R. at 14. Indeed, the whole point of collateral estoppel is to pretermit a review of the underlying evidence where there have been factual findings in another proceeding between the same parties by another competent court of jurisdiction. In view of the parties' agreement on the limited scope of review as well as the very purpose of collateral estoppel, the Bankruptcy Court acted well within its authority by relying on the state court's factual findings without probing the underlying evidence in the state court record.

Third, Mulligan argues that the requirements for collateral estoppel were not met. I do not agree for the reasons set forth by the Jalberts in their briefing. It is well established that "a party may assert the doctrine of collateral estoppel successfully when three requirements are met: [1] [t]he issue must have been fully and fairly litigated in the first action, [2] it must have been actually decided, and [3] the decision must have been necessary to the judgment." *Deutsche Bank AG v. Sebastian Holdings, Inc.*, 174 Conn. App. 573, 587 (2017). Each one of these requirements was met as to the predicate facts as found by the state court to support the conversion and statutory theft claims, *see Jalbert*, 2013 WL 338862, at *3-9, and these facts were in turn relied on by Judge Nevins to support her conclusion that Mulligan engaged in a defalcation of funds while acting in his attorney fiduciary capacity for the Jalberts. *See In re Mulligan*, 577 B.R. at 17, 19-20. Having had a full and fair opportunity to litigate the facts before the state trial court and then to challenge the trial court's factual findings by means of his appeals to the Connecticut Appellate Court and the Connecticut Supreme Court, Mulligan was not at

liberty to assail the integrity of those findings before the Bankruptcy Court. Judge Nevins correctly concluded that Mulligan's debt was not dischargeable in bankruptcy.

For the foregoing reasons, the order of the Bankruptcy Court is AFFIRMED.

Dated at New Haven this 3rd day of May 2018.

/s/ Jeffrey Alker Meyer
United States District Judge

AMENDED MEMORANDUM OF DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT, AFTER RECONSIDERATION (OCTOBER 27, 2017)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION

In re: LAWRENCE R. MULLIGAN,
and RENEE T. MULLIGAN,

Debtors.

BRUCE K. JALBERT, and PAMELA D. JALBERT,

Plaintiffs,

v.

LAWRENCE R. MULLIGAN,

Defendant.

Case No.: 10-50037 (AMN) Chapter 7

Adv. Pro. No. 10-05023 (AMN)

Re: ECF No. 53, 57, 61, 62, 63, 67, 82, 95, 96; 101; 105

Before: Ann M. NEVINS, U.S. Bankruptcy Judge
District of Connecticut.

I. Introduction

The issue before the court is whether a June 11, 2013, decision entered in a Connecticut Superior Court (the "State Court") case between the parties to this adversary proceeding should have preclusive effect over the claims pending here based on the doctrine of collateral estoppel. If it does, this court must find that some or all of plaintiffs' claims against the defendant in this adversary proceeding are non-dischargeable under the Bankruptcy Code.

The State Court found after trial that Lawrence R. Mulligan ("Mulligan"), one of the debtors in the main bankruptcy case, case number 10-50037 (the "Main Case"), and the defendant in this adversary proceeding, was liable to the plaintiffs, Bruce K. Jalbert and Pamela D. Jalbert, (the "Jalberts") for conversion, statutory theft, a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), and larceny by false pretenses. However, the State Court also found that Mulligan was not liable to the Jalberts for fraud.

Following briefing and oral argument, the parties agreed that the key issue before this court is whether the State Court determined that Mulligan had the requisite intent to commit defalcation under 11 U.S.C. § 523(a)(4).[1] If so, then Mulligan's debt to the plaintiffs resulting from the State Court litigation should be deemed non-dischargeable.

In addition, the Jalberts claimed that the debt should be non-dischargeable pursuant to 11 U.S.C.

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[1] Whether the debt is non-dischargeable pursuant to 11 U.S.C § 523(a)(4) as it pertains to embezzlement or larceny (as opposed to defalcation) has neither been raised nor asserted by the plaintiffs.

§ 523(a)(2)(A), although neither party discussed this claim extensively, and both parties briefed the question of the applicability of 11 U.S.C. § 523(a)(2)(6), even though the plaintiffs did not raise it as a claim in their complaint or motion for judgment.

The parties further agreed that the standards for a motion for summary judgment should guide the court's determination. AP-ECF No. 86,[2] Transcript of 1/13/15 hearing.

This Amended Memorandum of Decision is being issued after additional briefing and argument about the court's conclusion relating to Count V of the complaint, raised by the defendant by way of a timely filed motion to reconsider. AP-ECF Nos. 101, 105.

II. Jurisdiction, Venue, and Standing

This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1334(b) and 157(b), and the District Court's Order of referral of bankruptcy matters, dated September 21, 1984. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J) (objections to discharge). This adversary proceeding arises under the Main Case, a chapter 7 proceeding pending in this District; therefore, venue is proper in this District pursuant to 28 U.S.C. § 1409. The plaintiffs have standing to seek the relief sought in the complaint because, as creditors in the Main Case, they may object to the granting of a discharge pursuant to 11 U.S.C. § 727(c)(1).

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[2] References to the court's docket entries in the main chapter 7 bankruptcy case, case number 10-50037 (AMN), are, "ECF No.___." References to the docket entries in this adversary proceeding, number 10-5023 (AMN) are "AP-ECF No. ___."

III. Procedural Background

Mulligan and his spouse, Renee T. Mulligan, filed a petition under chapter 7 of the United States Bankruptcy Code on January 8, 2010 (the "Petition Date"). In their schedule of liabilities, they listed an unsecured, disputed debt to the plaintiffs in the amount of $150,000 incurred in 2008 with the consideration listed as "Judgment." On March 29, 2010, the plaintiffs filed the complaint in the present adversary proceeding. The complaint, styled as a "complaint objecting to dischargeability of debt," sought a judgment finding Mulligan liable for conversion (Count I), statutory theft (Count II), violation of CUTPA (Count III), fraud (Count IV), and false pretenses (Count V). AP-ECF No. 1. The plaintiffs alleged that by committing the actions alleged in each of the first four counts, Mulligan had "defrauded the [plaintiffs] by way of fraud or defalcation while acting in a fiduciary capacity contrary to 11 U.S.C. § 523(a)(4)." The plaintiffs further alleged that by obtaining money by false pretenses and/or actual fraud as alleged in Count V, Mulligan had acted "contrary to 11 U.S.C. § 523(a)(2)(A) and therefore the debts owed by [Mulligan] to the plaintiffs should be deemed non-dischargeable." The plaintiffs requested both that the court enter judgment for money damages, punitive damages, interest, treble damages, attorney's fees, and costs of the suit, and that it determine the judgment in the State Court Action to be non-dischargeable.

In a June 15, 2010 hearing, United States Bankruptcy Judge Alan H. W. Shiff (now retired) determined that the liability questions would be better answered in state court. AP-ECF No. 67, Exh A. During the hearing, the parties discussed a state court action,

Jalbert v. Mulligan, Superior Court, judicial district of Waterbury, Docket No. CV-08-6001044-S (the "State Court Action"), that had been pending on the Petition Date. AP-ECF No. 67, Exh A. The court asked whether the action had the same core as the adversary proceeding. AP-ECF No. 67, Exh A. Mulligan's attorney stated that the state court action was broader than the adversary proceeding. AP-ECF No. 67, Exh A. The judge instructed the parties to "find out if there's any liability" in state court where the matter had already been pending. AP-ECF No. 67, Exh. A p. 10. Judge Shiff further stated the parties should "fight it out or settle it, or do whatever you're going to do in the state court where it is already in progress. . . . [I]f there's a finding of common law fraud that—and there's an amount of a debt, I should think you'd all say then that debt should be not discharged. If there's fraud, the debt should not be discharged. Conversely, the opposite result."[3] AP-ECF No. 67, Exhibit A p. 11. The plaintiffs' attorney then asked whether the court would be entering an order for relief from stay. Judge Shiff stated he had ruled on the bench and confirmed that the parties consented to relief from stay; the plaintiffs' attorney stated, "[w]e stipulate, Your Honor." AP-ECF No. 67, Exhibit A p. 12. The judge then ordered, "you go ahead

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[3] Mulligan contends that this statement by the judge only lifts the stay for a State Court finding on the fraud count. The judge's statement regarding fraud was not a ruling limiting the State Court; the judge clearly indicated he wanted all issues regarding liability decided in State Court. The judge's statement about fraud is an indication as to the judge's thoughts regarding the effects of a decision in the State Court. The court does not consider this statement to in any way limit its inquiry to only fraud rather than fraud, defalcation, and the other issues the parties have raised.

and continue what you've started in the state court." AP-ECF No. 67, Exhibit A p. 12. The court entered a docket entry stating the parties stipulated to relief from the automatic stay on June 15, 2010, and the parties filed a stipulated notice of relief from stay in the State Court Action on August 9, 2010.[4] *See* AP-ECF No. 62, Exhibit C.

After the State Court entered judgment for the Jalberts they moved for judgment in this adversary proceeding. AP-ECF No. 53. The fourth amended complaint in the State Court Action contained the same five counts arising out of the same facts as the complaint in the present action, for conversion, statutory theft, violation of CUTPA, fraud, and false pretenses.[5] *Compare* AP-ECF NO. 57, Exhibit 1, *with* AP-ECF No. 1.

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[4] Mulligan also contends that this was not sufficient to effectuate relief from the automatic stay, citing to *In re: Toor*, 477 B.R. 299 (D. Conn. 2012). In *Toor*, the district court determined that a stay went into effect upon a bankruptcy court's filing of its order imposing the stay on the docket, rather than on the date three months earlier when it ruled orally that the stay would be imposed. *Toor*, 305. In that case, the parties had vigorously contested whether a stay would be imposed and when it would be imposed, in sharp contrast to the present case where the parties stipulated to relief from stay, filed their stipulation in state court, and proceeded to litigate the issues extensively in reliance on their understanding that the stay had been lifted. *See*, *Toor*, 303. Mulligan defended the State Court Action, and never sought further elaboration, advice, or imposition of the stay from the Bankruptcy Court.

[5] The court will refer to the counts in the present proceeding by number, Count I, etc., and the counts in the State Court Action by legal theory, the conversion count, etc.

The State Court found Mulligan liable for conversion, statutory theft, CUTPA violation, and larceny by false pretenses, but not for fraud. AP-ECF No. 53, Exhibit 1, p. 29. The State Court found, in short, that Mulligan, then a friend of the Jalberts, had represented them as their attorney without informing them that their title insurance company had appointed another attorney to represent them. AP-ECF No. 53, Exhibit 1, pp. 2–4. Mulligan claimed the title insurance company initially refused to provide representation related to a November 2006 suit regarding a purported easement on the plaintiffs' property, but then subsequently appointed an attorney for the Jalberts. AP-ECF No. 53, Exhibit 1, pp. 2–4. Mulligan told the Jalberts this attorney had been appointed to assist him. AP-ECF No. 53, Exhibit 1, pp. 2–4.

According to the State Court opinion after trial, the parties had earlier agreed to in-kind payment, whereby Bruce Jalbert would perform construction work for Mulligan in exchange for legal services from Mulligan if the title insurance company did not pay Mulligan to serve as the plaintiffs' attorney. AP-ECF No. 53, Exhibit 1, pp. 2–4. The undisputed value of the renovations Bruce Jalbert performed between 2005 and 2007 was $84,750. AP-ECF No. 53, Exhibit 1, p. 3. In May 2007, Mulligan asked the plaintiffs for $85,000 in order to show the title insurance company that the plaintiffs had paid him. AP-ECF No. 53, Exhibit 1, p. 4. He agreed to hold the $85,000 in an escrow account, but did not return the funds. AP-ECF No. 53, Exhibit 1, p. 4.

The State Court also concluded Mulligan had filed no pleadings on behalf of the Jalberts, but rather the attorney appointed by the title insurance company

filed pleadings and subsequently engaged in settlement discussions and settled the case. AP-ECF No. 53, Exhibit 1, p. 4. As part of the settlement, $100,000 was received by Mulligan, of which he retained $50,000 as payment for his legal services. AP-ECF No. 53, Exhibit 1, p. 4. The State Court credited the Jalberts' testimony that they would not have permitted Mulligan to retain this amount if they had known that the title insurance company had retained an attorney for them. AP-ECF No. 53, Exhibit 1, pp. 10–11. The State Court also made numerous findings regarding Mulligan's misleading conduct and misleading documents he created. AP-ECF No. 53, Exhibit 1, pp. 11–13.

The State Court awarded damages of $746,842.11 to the Jalberts. AP-ECF No. 53, Exhibit 1, p. 30. It later supplemented its initial award by adding offer of compromise interest based on General Statutes § 52-192a and Connecticut Practice Book § 17-8, and attorney's fees, but decreasing the interest previously awarded, to increase the total award to $821,664.92 plus attorney's fees of $125,000. AP-ECF No. 63, Exhibit 1, pp. 16–17.

Mulligan filed an opposition to the motion for judgment in this case, attaching the fourth revised complaint from the State Court action. In his objection, Mulligan claimed, *inter alia*, that the plaintiffs had failed to follow the proper procedures for a motion for summary judgment, and that the State Court judgment was not yet final. These issues have been resolved by the subsequent briefing and the passage of time. In 2014, the Connecticut Appellate Court upheld the State Court judgment and the Connecticut Supreme Court denied certification to appeal. *Jalbert v. Mulligan*, 153

Conn. App. 124, 101 A.3d 279, *cert. denied*, 315 Conn. 901, 104 A.3d 107 (2014).

The plaintiffs filed a memorandum regarding dischargeability, an amended memorandum regarding dischargeability, and a supplemental memorandum regarding dischargeability. AP-ECF Nos. 61, 62, 63. The additional memoranda provided argument regarding the pertinent legal standards that had been lacking in plaintiffs' initial motion, and attached their initial complaint in the present action, the two pertinent State Court decisions, and a variety of exhibits from the State Court Case. AP-ECF Nos. 61, 62, 63. Mulligan also filed a memorandum in opposition to non-dischargeability to which he attached a transcript of the June 15, 2010 hearing before Judge Shiff, and additional exhibits related to the State Court Case.

During a hearing held before Judge Shiff on January 13, 2015, the parties agreed that despite the rather unorthodox briefing, the matter would be disposed of as a motion for summary judgment. AP-ECF No. 86, p. 3. At a hearing held before the undersigned on these motions on May 3, 2016, the parties agreed that the court could not reconsider findings of fact made by the trial court; the issue was whether those findings of fact constituted a violation of 11 U.S.C. § 523(a)(4). AP-ECF No. 92, 00:01:55.[6] Mulligan's attorney stated that the issue the State Court had not decided was Mulligan's state of mind when committing the acts of which he had been found liable. AP-ECF No. 92,

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[6] All timestamps indicate the hours minutes and seconds (00:00:00) for the .mp3 file publicly available at the referenced ECF No. as played on VLC Media Player.

00:05:13. The parties agreed to file statements pursuant to Local Rule 56(a)(2). AP-ECF No. 92, 00:29:30. The plaintiffs filed a statement of material facts on June 24, 2016, and Mulligan filed a statement on July 15, 2016 admitting some of the facts, denying others, and stating which issues he contended were genuine issues of material fact requiring a trial. AP-ECF Nos. 95, 96.

The parties' Rule 56(a)(2) statements contained substantial agreement regarding the procedural posture and findings of the State Court, but differed in a number of particulars. AP-ECF Nos. 95, 96. Mulligan's status as the plaintiffs' attorney from 1995 to 2008 was undisputed. AP-ECF Nos. 95, 96, ¶¶ 7, 31; AP-ECF No. 96, Disputed Issues of Material Fact ¶¶ 4, 5 (dispute as to whether Mulligan was subjectively aware of breach of fiduciary duty, but no claim that he was not a fiduciary).

However, Mulligan denied the Jalberts' characterization of the claims in the State Court Action as identical to the claims here, noting that this adversary proceeding is a determination non-dischargeability pursuant to 11 U.S.C. §§ 523(a)(4) and)(2)(A), while the State Court Action concerned only state law causes of action.[7] AP-ECF Nos. 95, 96, ¶¶ 3, 4. For example, Mulligan emphasized that the State Court did not find that Mulligan mislead the plaintiffs when he informed

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[7] A number of the disputed facts pertained to the underlying facts of the case, rather than to the State Court's findings. A number also pertain to the CUTPA count, which as the court will discuss *infra*, does not have collateral estoppel effect on this proceeding.

them that the title insurance company was not representing them. AP-ECF Nos. 95, 96, ¶ 14. Mulligan maintains that the State Court found that the title insurance company informed Mulligan it would represent the plaintiffs two months after Mulligan informed them that it would not. AP-ECF Nos. 95, 96, ¶ 14. Mulligan claims there is an issue of fact regarding the $85,000 paid to him by the plaintiffs, asserting that it was for legal fees in the period before the title insurance company provided representation, and that the State Court never found that he had not performed any legal work, but rather found that his services were not worth what he charged.[8] AP-ECF Nos. 95, 96, ¶¶ 16, 22.

Mulligan also directly asserted the existence of material facts in dispute. He claimed that: (1) there was an issue—unresolved by the State Court—as to whether the Jalberts justifiably relied on his statements or conduct regarding the fraud and false pretenses claims, AP-ECF No. 96, Disputed Issues of Material Fact ¶ 3; (2) there remained an issue of fact as to whether he subjectively knew or was willfully blind to a substantial and unjustifiable risk that he was violating his fiduciary duty to the plaintiffs, AP-ECF No. 96, Disputed Issues of Material Fact ¶¶ 4–6; and (3) there is a genuine issue of material fact as to whether he was entitled to legal fees for work performed before the title insurance company provided representation.[9] AP-ECF No. 96, Disputed Issues of Material Fact ¶ 7.

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[8] This is an attack on the underlying judgment and will be addressed in the Discussion.

[9] *See* footnote 8, *supra.*

Following the court's decision granting summary judgment in favor of the Jalberts, the defendant filed a motion for reconsideration as to the court's characterization of an argument in a footnote (now omitted) and as to the court's conclusion that the Jalberts were entitled to summary judgment as to Count V. For the reasons that follow, the court now restates its decision, granting summary judgment in favor of the Jalberts as to Count II and finding the State Court's judgment to be non-dischargeable. As to Count V—as well as Counts I and III—summary judgment is denied.

IV. Discussion

A. Applicable Law

1. Summary Judgment Standard

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, that in turn provides in pertinent part that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 300 (2d Cir. 2003). The court resolves all ambiguities and draws all factual inferences in favor of the non-movant. *Nationwide Life Ins. Co. v. Bankers Leasing Assoc.*, 182 F.3d 157, 160 (2d Cir. 1999). Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of act to find for the non-moving party." *Kearney v. New York State Dep't of Corr. Servs.*, 581 F. App'x 45, 46 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 2919, 192 L.Ed.2d 932 (2015), *reh'g denied*, 136 S.Ct. 21, 192 L.Ed.2d 992 (2015).

2. Collateral Estoppel

"Parties may invoke collateral estoppel to preclude relitigation of the elements necessary to meet a § 523(a) exception." *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006), *citing Grogan v. Garner*, 498 U.S. 279, 285, n.11 (1991). "Collateral estoppel is applicable if the facts established by the previous judgment . . . meet the requirements of non-dischargeability. . . . " *Ball*, 451 F.3d at 69, *quoting In re Docteroff*, 133 F.3d 210, 215 (3d Cir. 1997). "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Malcolm v. Honeoye Falls-Lima Cent. Sch. Dist.*, 629 F. App'x 87, 88 (2d Cir. 2015), *cert. denied sub nom. Malcolm v. Honeoye Falls-Lima Cent. Sch.*, 136 S.Ct. 2411 (2016) (internal quotation marks omitted), *see also Evans v. Ottimo*, 469 F.3d 278, 281 (2d Cir. 2006) (state law preclusion applied to non-dischargeability in bankruptcy proceeding).

The Connecticut Supreme Court described Connecticut's standards for collateral estoppel in *Lighthouse Landings, Inc. v. Connecticut Light & Power Co.*, 300 Conn. 325, 343–45, 15 A.3d 601 (2011):

> "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an

> issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta."

3. Bankruptcy Code Section 523 (a)

Section 523 (a) of the Bankruptcy Code provides in pertinent part:

> "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— . . .
>
> "(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –
>
> "(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . . .

"(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. . . .

"(6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . ."

11 U.S.C. § 523 (a).

i. Defalcation–Bankruptcy Code Section 523(a)(4)

As described in § 523(a)(4), "'[d]efalcation' covers a failure to produce funds entrusted to a fiduciary and applies to conduct that does not necessarily reach the level of fraud, embezzlement or misappropriation." *In re Hunt*, 2013 WL 1723795, at *12 (Bankr. D. Conn. Apr. 22, 2013), *citing* 4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 523. 10[1][b], at 523–71 (16th ed. 2012); *In re Hall*, 483 B.R. 281, 294 (Bankr. D. Conn. 2012). "At minimum, 'defalcation,' as that term is used in section 523(a)(4), embraces misappropriation by a fiduciary." *In re Stone*, 94 B.R. 298, 300 (S.D.N.Y. 1988), *aff'd*, 880 F.2d 1318 (2d Cir. 1989), *citing Central Hanover Bank & Trust v. Herbst*, 93 F.2d 510, 511–12 (2d Cir. 1937) (*L. Hand, J.*). "[T]he attorney-client relationship, although usually not involving a technical trustee or express trust, has long been understood to be a fiduciary relationship within the meaning of the defalcation exception." *In re Hayes*, 183 F.3d 162, 168 (2d Cir. 1999). The Supreme Court recently determined that defalcation, "includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in

respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1758 (2013). While "[f]raud typically requires a false statement or omission . . . [d]efalcation . . . can encompass a breach of fiduciary obligation that [does not involve] falsity." *Bullock*, 1760.

ii. False Pretenses–Bankruptcy Code Section 523(a)(2)(A)

While false pretenses is contained in the same section as false representations and actual fraud, each of the terms in § 523(a)(2)(A) embodies a distinct concept. *In re Steinberg*, 2016 WL 2637959, at *5 (Bankr. S.D.N.Y. May 5, 2016); *see Husky Int'l Elecs., Inc. v. Ritz*, 136 S.Ct. 1581, 1590, 194 L. Ed. 2d 655 (2016) (noting use of disjunctive "or" in § 523(a)(2)(A)). "'False pretenses,' is one of three separate bases for non-dischargeability of a debt under § 523(a)(2)(A) the others being a 'false representation' and 'actual fraud'. These terms of art were used by Congress to incorporate the general common-law of such torts; *i.e.* the 'dominant consensus' of jurisdictions, rather than the specific law of any given State." *In re Knight*, 538 B.R. 191, 208–209 (Bankr. D. Conn. 2015) (*quoting Field v. Mans*, 516 U.S. 59, 70 fn. 9 (1995)). The United States Supreme Court, "has historically construed the terms in § 523(a)(2)(A) to contain the 'elements that the common law has defined them to include.' *Field v. Mans*, 516 U.S. 59, 69, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). 'Actual fraud' has two parts: actual and fraud. The word 'actual' has a simple meaning in the context of common-law fraud: It denotes any fraud that 'involv[es] moral turpitude or intentional wrong.'" *Neal v. Clark*, 95 U.S. 704, 709, 24 L.Ed. 586 (1878). 'Actual' fraud stands in contrast to 'implied' fraud or fraud 'in law,'

which describe acts of deception that 'may exist without the imputation of bad faith or immorality.' *Ibid.* Thus, anything that counts as 'fraud' and is done with wrongful intent is 'actual fraud.' *Husky Int'l Elecs., Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016).

False pretenses have been broadly construed as a group of omissions, actions, or representations undertaken to create a false impression. *In re Carrano*, 530 B.R. 540, 557 (Bankr. D. Conn. 2015); *In re Rosenfeld*, 543 B.R. 60, 72 (Bankr. S.D.N.Y. 2015); *In re Steinberg*, 2016 WL 2637959, at *6 (Bankr. S.D.N.Y. May 5, 2016). "In order to establish that a debt is non-dischargeable as a debt for money obtained by false pretenses, the plaintiff must establish (1) an implied misrepresentation or conduct by the defendant; (2) promoted knowingly and willingly by the defendant; (3) creating a contrived and misleading understanding of the transaction on the part of the plaintiff; and (4) which wrongfully induced the plaintiff to advance money, property, or credit to the defendant." *In re Steinberg*, at *6. "A failure to disclose material facts on which a transaction depends may constitute false pretenses." *In re Rosenfeld*, 534 B.R. at 72. Likewise, "presenting an invoice seeking payment for goods which are never delivered constitutes false pretenses. . . . " *In re Nisivoccia*, 502 B.R. 139, 156 (Bankr. E.D.N.Y. 2013).

"[T]he level of a creditor's reliance on a fraudulent misrepresentation necessary" to render the debt non-dischargeable within the meaning of § 523(a)(2)(A) is not reasonable reliance but "the less demanding one of justifiable reliance on the statement." *Field v. Mans*, 516 U.S. at 59. "This requires the creditor not to 'blindly rely upon a misrepresentation [or pretense] the falsity of which would be patent to him if he had

utilized his opportunity to make a cursory examination or investigation.'" *Field v. Mans*, 516 U.S. at 71. "Finally, a creditor must prove that the subject pretense was the legal or proximate cause of the subject debt. A fraudulent misrepresentation is the legal cause of a loss only if the loss might reasonably be expected to result from reliance upon the misrepresentation." *In re Knight*, 538 B.R. at 209 (*citing Restatement of Torts*, at § 548A).

iii. Willful and Malicious Injury– Bankruptcy Code Section 523(a)(6)

"Under the Bankruptcy Code, discharge is not available for a debt for willful and malicious injury by the debtor to another. 11 U.S.C. § 523(a)(6). As used in that section, the word 'willful' indicates a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. . . . The injury caused by the debtor must also be malicious, meaning wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will. . . . Malice may be implied by the acts and conduct of the debtor in the context of [the] surrounding circumstances." *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (internal citations omitted, internal quotation marks omitted).

B. Application of Law to Relevant Undisputed Facts

Applying the standards above requires the court to determine whether the facts that were necessarily determined in the State Court Action also demonstrate the resulting debts are non-dischargeable under 11 U.S.C. § 523(a). The court will discuss defalcation in a

fiduciary capacity as it relates to the conversion, statutory theft, and CUTPA counts of the State Court Action, the impact of the State Court's finding that Mulligan was not liable for fraud, and, false pretenses under § 523(a)(2)(A) as it relates to the State Court's finding on the larceny by false pretenses count in the State Court Action. Finally, the court will discuss the applicability of § 523(a)(6).

Turning first to defalcation, there are three elements the plaintiffs must have in the State Court Action before the State Court's factual finding dictates a legal conclusion of non-dischargeability based on § 523(a)(4): Mulligan must have been acting as a fiduciary, must have committed acts constituting defalcation—such as but not limited to failing to produce funds entrusted to him or misappropriating funds—and must have done so with the requisite mental state. The parties have not contested the first two elements. The plaintiffs' statement of the issues classifies Mulligan as the parties' attorney and describes his actions in misappropriating the funds at issue. Mulligan does not claim that these facts are in dispute, but rather focuses on whether the State Court made a finding as to his mental state.

1. Conversion and Count I

Mulligan argues that the trial court's finding of conversion did not require the State Court to make any finding regarding his mental state. This is accurate, in that the difference between conversion and statutory theft is that statutory theft requires proof of intent whereas conversion does not. *See Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 771 (2006). Therefore the State Court's finding of conversion does

not have collateral estoppel effect on this court's consideration of the claim in Count I that by converting funds Mulligan committed defalcation pursuant to 11 U.S.C. § 523(a)(4). Therefore, the court will not grant summary judgment as to Count I.

2. Statutory Theft and Count II

In its discussion of conversion, the State Court found that a letter from Mulligan to the plaintiffs was as "a studied effort to obtain funds by providing misleading information, since Mulligan nowhere stated therein what he knew at the time: that Chicago Title was providing a defense. . . ." AP-ECF No. 53, Exhibit 1, p. 8. This finding was not required for the conversion finding, but the court specifically incorporated all of its findings in the conversion count into its findings regarding the statutory theft count, for which it was necessary and to which the court will now turn.

In laying the factual groundwork for its ruling on statutory theft, the State Court found that the evidence was, "also clear and convincing that Mulligan intentionally and wrongfully took and withheld $135,000 from the plaintiffs. Mulligan intentionally misled them concerning the $85,000 payment from the trust. Mulligan intentionally misled the plaintiffs into believing that his services were needed to defend them in the Warren Enterprises litigation, and that he was entitled to be paid therefor, causing them also to agree that he would receive $50,000 from the settlement. He intentionally deprived them of those funds as well." AP-ECF No. 53, Exhibit 1, p. 16. These detailed findings were necessary to the State Court's disposition of the statutory theft count and Mulligan's argument that

the State Court did not consider his intent is unavailing.

"Statutory theft . . . requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property." *Mystic Color Lab, Inc. v. Auctions Worldwide, LLC*, 284 Conn. 408, 418–19 (2007). Intentional conduct is more culpable than knowing or reckless conduct, the standard the Supreme Court held is required for defalcation. *See, e.g., S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (describing recklessness as "a state of mind approximating actual intent"). The State Court's finding of intentional conduct for the statutory theft count is therefore preclusive of this court's consideration of whether Mulligan was knowing or reckless as it applies to defalcation in Count II.

Mulligan also argued to this court that the State Court incorrectly failed to find that the $85,000 was for legal fees prior to the title insurance company providing representation and that Mulligan should have received credit for the services he did perform for the plaintiffs. However, because it is clear the State Court did find that Mulligan intentionally misappropriated the $85,000 paid to him by the plaintiffs and the finding was a ground for the State Court's rulings on statutory theft and larceny by false pretenses, these rulings are preclusive as to defalcation pursuant to § 523(a)(4) here.

Importantly, the State Court found that Mulligan's statements and records regarding the work he performed were not credible, and it did not provide for any setoff. AP-ECF No. 53, Exhibit 1, p. 8, 11–13. The decision of the State Court was appealed and affirmed;

it is therefore a final judgment and this court "has no authority to review final judgments of a state court in judicial proceedings." *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983).

The State Court's finding that Mulligan committed statutory theft therefore controls this court's determination that he also committed defalcation while acting in a fiduciary capacity. As a consequence, those damages that result from the statutory theft count are non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(4) and the plaintiffs are entitled to summary judgment on Count II.

3. CUTPA and Count III

The State Court further found that Mulligan had violated CUTPA, and awarded damages plus attorney's fees. These damages included the damages for statutory theft, as well as damages for the work Bruce Jalbert performed in the belief that he was exchanging this work for in-kind payment, valued at $84,750. Mulligan makes the same contention regarding Count III and the State Court's determinations on the CUTPA count that he made regarding the false pretenses count: because the State Court was not required to determine Mulligan's intent to find a CUTPA violation the State Court's findings should not be binding here. Finding a CUTPA violation requires only that a practice offend public policy, be immoral, unethical, oppressive, or unscrupulous, and cause substantial injury to consumers, and not that a defendant have a particular mental state. *See, Harris v. Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350–51 (2010).

The court agrees that as to the allegations in Count III of the complaint before the court here, the State

Court's findings as to the CUTPA count, standing alone, do not direct a determination of non-dischargeability on Count III. The court therefore will not grant summary judgment on Count III.

4. Fraud and Count IV

While the court has not been asked to enter summary judgment for either party on Count IV, consideration of the State Court's finding as to fraud is nonetheless required. Mulligan claims that the State Court's determination that he was not liable for fraud prevents this court from finding that he committed defalcation. In deciding the fraud claim, the State Court focused on three specific representations alleged by the plaintiffs:

> "In their post-trial memorandum, the plaintiffs seek damages for fraud for three separate claimed fraudulent representations. Two of these relate to promises by [Mulligan] to do acts in the future. They contend that he falsely informed them that if they transferred $135,000 to him, he would return the funds at the end of the litigation ($85,000 from the trust and $50,000 from the settlement). They also contend that, by falsely informing the plaintiffs that Chicago Title had refused to defend their interests, [Mulligan] fraudulently induced Bruce Jalbert to perform labor for [Mulligan]'s benefit, without compensation. *See* plaintiffs' post-trial memorandum, pp. 29–30.
>
> As to the first two, the allegation concerning the payment from the trust is pleaded as a promise. . . . The court is unpersuaded that

> the plaintiffs have proved that [Mulligan] had a present intent not to fulfill the promise when it was made. As to the second, the allegation concerning the $50,000 not returned from the settlement is not pleaded as a fraudulent misrepresentation."

AP-ECF No. 53, Exhibit 1, p. 21–22.

The State Court determined that the plaintiffs had failed to prove, regarding the first two representations, or to allege, regarding the third representation, that Mulligan had a specific intent to defraud them at the time he made statements regarding his future intent. This is not dispositive of the plaintiffs' claims that they are entitled to judgment on Counts I through III for defalcation, or on Count V for false pretenses.[10] Moreover, the court does not read the State Court's decision that the plaintiffs failed to establish fraud as pled in the State Court Action to contradict the State Court's findings that the plaintiffs did establish their claims against Mulligan grounded in conversion, statutory theft, CUTPA, and larceny by false pretenses. "Defalcation" as used in § 523(a)(4) does not require a specific statement, or that the requisite mental state be contemporaneous with a given action. Statutory theft may be found where Mulligan initially intended to return money, and only later formed the intent to retain it for his own use. *See* Conn. Gen. Stat. §§ 53a-119(1) and (8). False pretenses, both pursuant to the federal standards applicable to § 523(a)(2)(A) above, and in the state law

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[10] Mulligan did not make a cross motion for summary judgment on Count IV, therefore the issue of whether the State Court's findings bind this court on Count IV is not before the court.

standards to which the court will turn next, involves a broader range of conduct, including both nonverbal conduct and omissions.

5. Larceny by False Pretenses and Count V

The State Court found that Mulligan was liable for larceny by false pretenses, a type of statutory theft. Mulligan argues that because the State Court failed to find the Jalberts justifiably relied on his representations, a genuine issue of material fact exists that the State Court did not determine, and that precludes summary judgment pursuant to the false pretenses theory under § 523(a)(2)(A). *See* AP-ECF No. 96. The court, after reconsideration, agrees that the State Court did not make a finding or draw a conclusion as to whether the plaintiffs justifiably relied on Mulligan's representations or conduct. Therefore collateral estoppel on this ground is not warranted and summary judgment is denied as to Count V.

6. Willful and Malicious Injury–11 U.S.C. § 523(a)(6)

The plaintiffs also raised the issue of whether the State Court had decided the issue of the non-dischargeability of Mulligan's debt based on "willful and malicious injury" pursuant to 11 U.S.C. § 523(a)(6). Mulligan asserted that this issue was not properly raised because it was not alleged in the complaint. The court notes it was also not raised in the plaintiffs' initial motion for judgment, but it was extensively argued by the parties. Mulligan also claimed that the State Court never made a finding as to his intent to injure the plaintiffs, a finding that would be necessary for liability according to 11 U.S.C. § 523(a)(6), but that

was not necessary to any of the five grounds that the State Court did determine. Without deciding whether the issue was properly raised, the court determines that the State Court did not make a finding as to whether the injury to the plaintiffs was deliberate and intentional, and malicious. Therefore, collateral estoppel on this ground is not warranted.

7. Dischargeability of Pre-Judgment Interest, Treble Damages

Mulligan raised the issue of whether the enhanced damages found by the State Court are non-dischargeable. The United States Supreme Court has determined that, "[w]hen construed in the context of the statute as a whole, then, § 523(a)(2)(A) is best read to prohibit the discharge of any liability arising from a debtor's fraudulent acquisition of money, property, etc., including an award of treble damages for the fraud." *Cohen v. de la Cruz*, 523 U.S. 213, 220–21 (1998). The treble damages, prejudgment interest, and offer of compromise interest were awarded based on findings of statutory theft. These findings also support a finding in this court of defalcation pursuant to § 523(a)(4). Each of the components of the State Court's damages award on these grounds are thus non-dischargeable.

V. Conclusion

The plaintiffs' motion for summary judgment is granted in part and accordingly, it is hereby:

ORDERED, that the motion for summary judgment is granted as to Count II of the complaint and judgment shall enter in favor of Bruce K. Jalbert and

Pamela D. Jalbert, and against Lawrence R. Mulligan; and it is further

ORDERED, that the State Court's finding of damages, treble damages and interest as to the claim of statutory theft is hereby determined to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(4); and it is further

ORDERED, that the plaintiffs' motion for summary judgment is denied as to Counts I, III and V.

Dated on October 27, 2017, at New Haven, Connecticut.

/s/ Ann M. Nevins
United States Bankruptcy Judge
District of Connecticut

ORDER OF THE CONNECTICUT SUPREME COURT ON PETITION FOR CERTIFICATION TO APPEAL (DECEMBER 3, 2014)

SUPREME COURT
STATE OF CONNECTICUT

BRUCE JALBERT, ET AL.,

v.

LAWRENCE MULLIGAN, ET AL.

No. PSC-14-0206

On consideration of the petition by the named defendant for certification to appeal from the Appellate Court (153 Conn. App. 124 [AC 35824]), it is hereby ordered that said petition be, and the same is hereby denied.

Eveleigh, J., did not participate in the discussion or decision of this petition for certification

By The Court

/s/ Alan M. Gannuscio
Assistant Clerk-Appellate

Dated: 12/3/2014

OPINION OF THE APPELLATE COURT OF CONNECTICUT (SEPTEMBER 23, 2014)

COURT OF APPEAL OF CONNECTICUT

BRUCE JALBERT, ET AL.,

v.

LAWRENCE MULLIGAN, ET AL.

No. AC 35824

Appeal from Superior Court,
Judicial District of Waterbury, Shapiro, J.

Before: KELLER, MULLINS and SCHALLER, Js.

KELLER, J.

The defendant, Lawrence R. Mulligan, appeals from the judgment, rendered after a court trial, in favor of the plaintiffs, Bruce K. Jalbert and Pamela D. Jalbert.[1] On appeal, he challenges as clearly erroneous

[1] Although the operative complaint also named Renee T. Mulligan and Bastille Estates, LLC, as defendants, the plaintiffs withdrew their action with respect to those parties. Accordingly, we refer to Lawrence R. Mulligan as the defendant in this appeal.

Additionally, we note that, at oral argument, the defendant introduced himself as a self-represented party. The record nevertheless contains appearances on his behalf by the firms of Bai, Pollock, Blueweiss & Mulcahey, P.C., and Slavin, Stauffacher & Scott, LLC. The record reveals that approximately six months after this appeal was commenced, the defendant filed an appearance

the trial court's findings as to (1) the assumption of a defense by Chicago Title Insurance Company (Chicago Title), (2) the barter agreement between the parties, and (3) his retention of $135, 000 for legal fees allegedly incurred. He further claims that (4) the barter agreement between the parties is unenforceable, (5) a pleading deficiency bars recovery under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA), and (6) the court's erroneous findings of fact "result in clearly erroneous judgments against" him. We affirm the judgment of the trial court.

The following relevant findings of fact are set forth in the court's detailed memorandum of decision. "The [plaintiffs] are husband and wife. Pamela Jalbert did not graduate from high school and received a [general equivalency diploma]. Bruce Jalbert is a carpenter. The defendant acted as the plaintiffs' attorney between 1995 and 2008, [working on matters that included] real estate transactions. He represented them when they purchased their home at 35 Tolstoy Lane in Southbury for $295, 000 in 2004. On the defendant's recommendation, they purchased title insurance from [Chicago Title]. The defendant also handled Bruce Jalbert's father's estate, including probate work and real estate transactions.

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herein. That appearance states that it is in addition to an appearance already on file. The record further indicates that although his counsel filed an appellate brief on his behalf on December 19, 2013, the defendant filed a motion for permission to file a substitute appellate brief on December 30, 2013. This court granted that motion and the defendant thereafter filed a substitute appellate brief. That brief, as well as the reply brief filed by the defendant, is signed by the defendant alone.

"The defendant was a close personal friend of the [plaintiffs]. He testified that he and his wife and the [plaintiffs] 'were about as close as you would deem family.' . . . During a ten year period, they had dinner [153 Conn. App. 128] together, socialized at one another's homes, and traveled together. When they purchased their home in 2004, the [plaintiffs] were aware that a neighboring owner, Jean Elin, of 39 Tolstoy Lane, had an easement for a right-of-way over their land. . . . Pamela Jalbert described it as a pass-way to a summer cottage, to be used for three weeks to three months out of the year, which was not to be widened or maintained. In 2005, after friends of the [plaintiffs] learned of an issue concerning rights to use Tolstoy Lane and, as a result, decided not to purchase 39 Tolstoy Lane, the [plaintiffs] asked the defendant to represent them concerning the easement issue.

"To compensate the defendant for his legal services, the [plaintiffs] and the defendant agreed to a barter system, contingent on whether Chicago Title provided representation to the [plaintiffs]. They agreed that if Chicago Title did not provide representation, the parties would exchange Bruce Jalbert's construction work for the defendant's legal services. If Chicago Title did provide representation, then the defendant would pay for Bruce Jalbert's work. This agreement was not put in writing.

"Between 2005 and 2007, Bruce Jalbert worked on several renovation projects for the defendant, at properties located in Connecticut, New York and Rhode Island. The undisputed value thereof was $84, 750. . . .

"Elin sold 39 Tolstoy Lane to Warren Enterprises, LLC (Warren Enterprises), in May, 2006. Warren Enterprises sued the [plaintiffs] in November, 2006,

seeking access to Tolstoy Lane over the plaintiffs' property (Warren Enterprises litigation). . . . After receiving the suit papers, the defendant contacted Chicago Title and then told Pamela Jalbert that Chicago Title's claims representative informed [him] that Chicago Title was not going to provide representation for the [plaintiffs]. As a result, Mrs. Jalbert asked the defendant to represent them. He represented them at court appearances in December, 2006, and February, 2007.

"After the second appearance in February, 2007, the defendant informed the plaintiffs that Chicago Title had hired Attorney Neil Marcus of the law firm of Cohen & Wolf, P.C., 'to help him.' . . . In fact, by letter dated March 8, 2007 . . . Chicago Title informed the defendant that it had retained Marcus to defend the [plaintiffs], and that it would not be responsible for any fees or expenses of any other counsel. Marcus filed an appearance for the [plaintiffs] in the Warren Enterprises litigation, in lieu of the defendant, in March, 2007, to defend the [plaintiffs] against all counts of the complaint in that matter. . . . The defendant did not provide Chicago Title's letter to the [plaintiffs], and they saw it only after the Warren Enterprises litigation was settled in April, 2008, and after they had commenced suit against the defendant in this matter.

"In May, 2007, the defendant asked the plaintiffs for $85,000 from Bruce Jalbert's father's trust (the trust), in order to show Chicago Title that the plaintiffs had paid the defendant for his work. According to the defendant, he could not show Chicago Title that he

had been paid by Bruce Jalbert's work.[2] The defendant agreed to hold the $85, 000 in an escrow account, to be returned to the trust after the settlement of the Warren Enterprises litigation. . . . [T]he trust provided the $85, 000, which the [plaintiffs] provided to the defendant by personal check. . . . The defendant did not return these funds.

"Prior to Marcus' appearance, the defendant filed no pleadings in the Warren Enterprises litigation. Marcus filed pleadings after he appeared. Marcus then worked with opposing counsel, who also had been retained by a title insurance company, to settle the Warren Enterprises litigation. No depositions were taken and no motion practice occurred. As part of the settlement, Warren Enterprises received a parcel on the north side of the [plaintiffs'] property for use as a driveway, and the [plaintiffs] received a parcel as a buffer zone so that their neighbors could not build near the [plaintiffs'] house. Also, $50, 000 each was paid by Chicago Title and First American Title Insurance Company, Warren Enterprises' title company. [A total of $100,000 in settlement funds was] deposited in the defendant's client funds account. . . . [T]he defendant [retained] $50, 000 from the settlement." (Citations omitted; footnote added.)

Approximately two weeks after the Warren Enterprises litigation settled, Pamela Jalbert asked the defendant to return the $85, 000 from the escrow account. The defendant refused to do so, and this civil action ensued. The operative complaint, the plaintiffs'

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[2] We reiterate that the court specifically found that the undisputed value of the construction work performed by Bruce Jalbert on the defendant's properties was $84,750.

December 11, 2012 fourth revised complaint, contains five counts alleging conversion, statutory theft in violation of General Statutes § 52-564, violation of CUTPA, fraud and larceny by false pretenses. In their prayer for relief, the plaintiffs requested, inter alia, monetary damages, treble damages pursuant to the statutory theft count, prejudgment interest, costs and reasonable attorney's fees. The matter was tried before the court over the course of two days in March, 2013, during which all parties testified.

In its memorandum of decision, the court began its discussion by observing that "[t]he resolution of this matter involves the court's assessments of credibility and the fiduciary nature of the attorney-client relationship." Throughout its decision, the court expressly credited the testimony of the plaintiffs. By contrast, the court did not find the defendant's testimony to be credible, detailing numerous assertions and explanations that the court found to be unpersuasive or lacking in credibility. The court ultimately ruled in favor of the plaintiffs on all but the fraud count, concluding in relevant part that "[t]he evidence is . . . clear and convincing that the defendant intentionally and wrongfully took and withheld $135,000 from the plaintiffs. The defendant intentionally misled them concerning the $85,000 payment from the trust. The defendant intentionally misled the plaintiffs into believing that his services were needed to defend them in the Warren Enterprises litigation, and that he was entitled to be paid therefor, causing them also to agree that he would receive $50, 000 from the settlement. He intentionally deprived them of those funds as well." The court further found that "[t]he evidence before the court shows that the plaintiffs, who were

not as well educated as the defendant, an attorney, were misled by the defendant, who, at the time of the events at issue, was their friend, attorney and fiduciary. It is evident that he misled them to believe that Chicago Title was not providing a defense and that he had expended vast hours on their behalf in their defense. . . . The defendant never paid for Bruce Jalbert's construction services. As a result, the plaintiffs suffered an additional ascertainable loss of $84,750. . . . This conduct . . . was unfair, immoral, unethical, oppressive, and unscrupulous." (Citation omitted.)

The court awarded the plaintiffs a total of $746, 821.11 in damages, which included treble damages on the statutory theft count pursuant to § 52-564, treble prejudgment interest pursuant to General Statutes §§ 37-3a and 52-564, and CUTPA damages. The court further determined that an award of attorney's fees was warranted in light of the CUTPA violation, and thus granted the plaintiffs a period of fifteen days in which to file an affidavit of attorney's fees and expenses. From that judgment, the defendant appealed to this court.[3]

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[3] Following the commencement of this appeal, the plaintiffs filed a motion for attorney's fees accompanied by a detailed affidavit thereof, as well as a motion for additur seeking an award of offer of compromise interest pursuant to General Statutes § 52-192a. After a hearing, the court on August 29, 2013, granted both motions and modified its judgment to reflect a total amount of $821,664.92 in damages and $125,000 in attorney's fees awarded to the plaintiffs. The defendant did not amend his appeal to challenge any aspect of that modified award. In this appeal, the defendant likewise does not contest the court's calculation of damages in any manner.

On appeal, the defendant primarily challenges various factual findings rendered by the court. The standard of review governing such claims is well established. "[I]t is axiomatic that [t]he trial court's [factual] findings are binding upon [an appellate] court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Greco v. Greco*, 275 Conn. 348, 359, 880 A.2d 872 (2005). With that standard in mind, we turn to the defendant's claims.

I

The defendant challenges as clearly erroneous certain findings pertaining to Chicago Title's assumption of a defense on behalf of the plaintiffs in the Warren Enterprises litigation. Specifically, the defendant claims that the court erroneously found that he deceived the plaintiffs into believing that Chicago Title had declined to furnish such a defense, particularly when, he alleges, Marcus advised them to the contrary. For two distinct reasons, his claims fail.

First, our appellate courts repeatedly have recognized that "[w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court

judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims. (Internal quotation marks omitted.) *Russell v. Russell*, 91 Conn. App. 619, 634–35, 882 A.2d 98, cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005). The defendant's appellate brief fails to cite to any legal authority in regard to these claims. Rather, his brief consists entirely of bald assertions unaccompanied by substantive analysis thereof. As a result, the defendant has not adequately briefed those issues.

Second, even assuming the claims were adequately briefed, the record before us contains ample evidence substantiating the court's findings. At trial, Pamela Jalbert was asked whether the plaintiffs were notified that Chicago Title had agreed to represent them in the Warren Enterprises litigation. She testified that shortly after she was served with legal process in the Warren Enterprises litigation, the defendant informed her that he had contacted Chicago Title and that Chicago Title responded that "they weren't going to represent us."[4] Later in her testimony, the following colloquy ensued:

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[4] The defendant testified at trial that he learned that Chicago Title had hired counsel to represent the plaintiffs "[i]n September

> "[The Plaintiffs' Counsel]: . . . [D]id you know that in March of 2007 [the defendant] had received . . . a letter from Chicago Title that said that Chicago Title was hiring [the law firm of] Cohen &Wolf to defend you?
>
> "[Pamela Jalbert]: No. [The defendant] kept telling us that our title company was not representing us. . . .
>
> "[The Plaintiffs' Counsel]: . . . [W]hat was your understanding regarding Chicago Title's part of this case?
>
> "[Pamela Jalbert]: That they were not representing us. That they had hired Neil Marcus to help [the defendant] and that the title company was not representing us. I did not find out that they were representing us until after we sued [the defendant], after we started this lawsuit. Then, subsequently, when he turned over his files, we found out that . . . they were representing us. But [the defendant] kept telling us from day one up until the end, even when we settled, he kept telling us the title company wasn't representing us [and that] [w]e need to sue them for failure to represent."

In addition, the March 8, 2007 letter from Chicago Title to the defendant, in which it formally notified the defendant that it would be providing a defense on behalf of the plaintiffs, was admitted into evidence at trial. Pamela Jalbert testified that the defendant

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or October, 2006." The Warren Enterprises litigation commenced in November, 2006.

never showed her and her husband that letter or conveyed its substance to them. She further testified that "if we had known that Chicago Title was representing us from day one, we would have had no reason to hire [the defendant]. There would have been no barter agreement, there wouldn't have been any exchange of money because Chicago Title would have been representing us, so we would have had representation. There would have been no need for any of it. . . . [W]e wouldn't have had to have [the defendant] as our attorney." "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *United Technologies Corp. v. East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002). As trier of fact, the court was "free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *DiVito v. DiVito*, 77 Conn. App. 124, 138, 822 A.2d 294, cert. denied, 264 Conn. 921, 828 A.2d 617 (2003). The court thus was entitled to credit the aforementioned testimony of Pamela Jalbert.

The record also contains evidence belying the defendant's assertion that "all the evidence commands the conclusion" that Marcus had advised the plaintiffs that Chicago Title was providing a defense on their behalf in lieu of the defendant. The court thoughtfully considered, and rejected, this argument, finding it unpersuasive. We concur. Marcus testified that, after filing an appearance on behalf of the plaintiffs, the defendant "requested that I communicate with the [plaintiffs] through him, and that . . . if we needed to

meet with the [plaintiffs], he would set up the appointment, he would attend any of our meetings. Essentially, he was asking that he be the filter between the [plaintiffs] and me." Pamela Jalbert similarly testified that, after informing the plaintiffs that Marcus had been retained to "help him" with their defense, the defendant "told us not to speak with "Marcus. As a result, the vast majority of communications between Marcus and the plaintiffs "went through" the defendant. Marcus further testified that "[a]s we were reaching the final throes of the settlement agreement, it became apparent to me that the communications were not working because I was getting a response allegedly from the [plaintiffs], which was coming through [the defendant], that didn't make sense . . . because it was not, in my opinion at the time, in the [plaintiffs'] best interest. . . . [A]t some point I realized that I had to talk directly to the [plaintiffs], and that was my eye-opener, that I realized that the communications weren't working. . . . I spoke to them directly . . . and at that point I realized that they had been somewhat confused. They really, at that point, felt that [the defendant] was representing them. . . . " Marcus' testimony substantiates the court's finding that the plaintiffs were not aware that Chicago Title had assumed their defense in lieu of the defendant. We thus cannot say that the court's finding was clearly erroneous.[5]

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[5] We likewise disagree with the defendant that the issue of whether Chicago Title would defend the plaintiffs in the Warren Enterprises litigation was irrelevant to the court's consideration of his receipt of legal fees. The court specifically found that the plaintiffs had asked him to represent them in the Warren Enterprises litigation as a direct result of his false representation that a claims representative of Chicago Title had informed him that Chicago Title would not provide a defense on their behalf. That

II

The defendant also contests the court's findings with respect to the barter agreement between the parties. In its memorandum of decision, the court found in relevant part: "The defendant acknowledges that he had a barter agreement with Bruce Jalbert. . . . However, he disagrees with the plaintiffs' contentions as to its terms and whether it continued until the settlement of the Warren Enterprises litigation. Under the barter agreement, the defendant agreed to pay for Bruce Jalbert's construction services if Chicago Title provided a defense to the Jalberts. . . . [T]he defendant misled the plaintiffs so that they were not aware that Marcus was defending them on behalf of Chicago Title. The court credits the plaintiffs' contentions that the barter agreement involved an exchange of services

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finding is supported by the record before us. As Pamela Jalbert testified at trial, "if we had known that Chicago Title was representing us from day one, we would have had no reason to hire [the defendant]. . . . [W]e wouldn't have had to have [the defendant] as our attorney." In addition, the court found that when Marcus commenced his representation of the plaintiffs, the defendant falsely advised them that Chicago Title had hired Marcus "to help him." That representation by the defendant is contrary to the undisputed evidence that Marcus had filed an appearance on their behalf in lieu of the defendant and that Chicago Title's March 8, 2007 letter to the defendant specifically apprised the defendant that "[p]ursuant to the terms and conditions of the policy . . . we have retained Neil Marcus, Esq. of the law firm of Cohen & Wolf, P.C., to defend the interest of the [plaintiffs] with respect to the challenge to title as insured. We will not be responsible for any fees or expenses of any other counsel. Neil Marcus, Esq. is primarily responsible for handling the matter . . . ." In light of the foregoing, we conclude that the court properly considered Chicago Title's assumption of a defense in evaluating the propriety of the defendant's receipt of legal fees in the present case.

based on hours expended, without, as contended by the defendant, adjustment by an hourly rate differential which recognized that the defendant's hourly rates were considerably higher than Bruce Jalbert's hourly rates. This was an arrangement between close friends, where the defendant previously had represented the plaintiffs in the purchase of their home, when they obtained the title insurance recommended by the defendant." (Citations omitted.)

The record before us contains evidence substantiating those findings. In particular, Pamela Jalbert testified at trial that her husband "was already working for [the defendant] at his Meadow Road house in Woodbury. And [the defendant] was in our kitchen and he said, I came up with an idea, let's—since you're already working for me, Bruce, why don't we work out a barter system. That if the title company represents you, all right. Then if [the title company] does not represent you, we'll do service for service, legal work for carpentry work. If they do represent you, then Bruce would get paid, [the defendant] would pay Bruce for all the work that he did. So, that was the barter agreement that they came up with." Bruce Jalbert similarly testified at trial that he never provided any estimates to the defendant for the various work he performed at the defendant's properties "[b]ecause of the nature of our barter agreement, it was strictly a service for service deal. There was never any question about whose service was worth more or whose was worth less. It was, I do this for you, you do this for me."

The gist of the defendant's claim is that he offered evidence that conflicted with that offered by the plaintiffs, which the court should have credited.[6] His argument reflects a fundamental misunderstanding of the applicable standard by which we review his claim. Under the clearly erroneous standard of review, an appellate tribunal does not weigh the quantum of evidence submitted; it simply inquires as to whether there is any evidence in the record to support a given finding, or whether the tribunal otherwise is definitely and firmly convinced that a mistake has been made. *See Getty Petroleum Marketing, Inc. v. Ahmad*, 253 Conn. 806, 811, 757 A.2d 494 (2000).

At its essence, the defendant's claim asks this court to engage in an independent review of the credibility of the respective parties. That we cannot do. "[I]t is well established that the evaluation of a witness' testimony and credibility are wholly within the province of the trier of fact. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must

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[6] In his reply brief, the defendant acknowledges the central tenets of the clearly erroneous standard of review, noting that findings of fact "must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) The defendant then submits: "The reverse is also true. If the trier of fact could not have found as he did because the weight of the evidence prohibiting the conclusion is so great as to alert the appellate court [that] an error has occurred, the finding must be reversed." He provides no authority for his novel assertion that application of the clearly erroneous standard compels consideration of "the weight of the evidence," nor can we uncover any under Connecticut law.

defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Citation omitted; internal quotation marks omitted.) *Schoenborn v. Schoenborn*, 144 Conn. App. 846, 851, 74 A.3d 482 (2013). For that reason, "[i]n reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Murtha v. Hartford*, 303 Conn. 1, 13, 35 A.3d 177 (2011).

Although the defendant offered conflicting documentary and testimonial evidence at trial, the memorandum of decision plainly indicates that the court rejected that evidence and instead chose to credit that presented by the plaintiffs. Such is the exclusive prerogative of the trier of fact, with which this court will not interfere on appeal. *See Ravetto v. Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 728, 941 A.2d 309 (2008) (appellate court must defer to trier of fact's assessment of credibility); *Klein v. Chatfield*, 166 Conn. 76, 80, 347 A.2d 58 (1974) ("trier is privileged to adopt whatever testimony it reasonably believes to be credible"); *Talton v. Warden*, 33 Conn. App. 171, 179, 634 A.2d 912 (1993) ("[w]e cannot . . . pass on the credibility of a witness"), aff'd, 231 Conn. 274, 648 A.2d 876 (1994). Because there is supporting evidence in the record and we are not convinced that a mistake was made, the court's findings with respect to the barter

agreement between the parties are not clearly erroneous.

III

The defendant also challenges the court's findings with respect to his retention of $135,000 for legal services he allegedly provided the plaintiffs in the Warren Enterprises litigation. In its memorandum of decision, the court found, inter alia, that (1) the barter agreement "involved an exchange of services based on hours expended, without . . . adjustment by an hourly rate differential"; (2) under the barter agreement, the defendant would be compensated for his work in the Warren Enterprises litigation, by way of construction services, only if Chicago Title declined to provide a defense to the plaintiffs; and (3) "the defendant converted the $85,000 which he [obtained] from the trust [and] also converted the $50,000 [he retained] from the Warren Enterprises litigation settlement." We already have concluded in part II of this opinion that the court's findings with respect to the barter agreement are not clearly erroneous. As a result, given Chicago Title's representation of the plaintiffs in the Warren Enterprises litigation, the court reasonably found that the defendant was not entitled to any compensation thereunder.[7]

The defendant nonetheless maintains that the court improperly found that he was not entitled to any compensation for work performed prior to Chicago Title's assumption of a defense. Apart from the terms

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[7] Indeed, the defendant in his reply brief acknowledges that this court's resolution of the barter agreement issue "will determine the result of this appeal."

of the barter agreement, we note that the court also concluded that the defendant failed to provide credible evidence to establish that he was, in fact, entitled to such compensation. The court found the defendant's testimonial and documentary evidence regarding his legal fees to be wholly lacking in credibility. As it stated: "The defendant's credibility, including his statements made in documents related to billing, is undermined by his acknowledged backdating of a retainer agreement with the [plaintiffs]. In his testimony, the defendant stated that he prepared a retainer agreement for the [plaintiffs] to sign in March, 2007 . . . but dated it February, 2005, more than two years earlier. . . . He stated that he did so '[b]ecause I felt it would be helpful to have a memorialization of our agreement in the beginning of the file for purposes of our ultimate claim against Chicago Title.' . . . Although the document states that Bruce Jalbert signed it in February, 2005, the defendant testified that Bruce Jalbert signed it in March, 2007. . . . The defendant also testified that, at the time he wrote this letter, he knew that Chicago Title had provided a defense for the [plaintiffs]. . . . The letter stated, in its first sentence, 'Chicago Title may not provide you with a defense against the claims brought by Jean Elin to cross your property.' This letter also does not mention the barter agreement which was in effect when the defendant wrote it. . . . According to the defendant, he drafted the letter in March, 2007, to be correct as of February, 2005. His fabrication of the document undermines the defendant's credibility.

"Other examples of misleading documents created by the defendant also undermine his credibility and his arguments about being entitled to be paid for legal

services. He prepared a letter addressed to the [plaintiffs], dated May 30, 2007, in which he stated that he 'and his paralegal combined have in excess of 460 hours at our regular rate per hour for my time and $55 dollars per hour for my paralegal's time resulting in a total more than $140,000 for my time and about $25,000 for paralegal time and expenses to date.' . . . In the next paragraph, the defendant stated that he and the [plaintiffs] had 'come to a resolution for a flat fee of $130,000 for all legal fees to date, and $25,000 for paralegal fees and expenses.' The last sentence of this letter states, 'I look forward to receiving your first payment in this regard.' At trial, the defendant testified that his paralegal on the case was Pamela Jalbert. . . . Thus, the letter was a bill to the [plaintiffs], which included charging them for Pamela Jalbert's own work. In contradiction to his own letter, the defendant testified that '[i]t was not my intention that the [plaintiffs] would be paying my legal fees out-of-pocket at any time.' . . . The court does not credit the statement in the letter or the defendant's trial testimony that an agreement was reached for payment to the defendant of a flat fee.

"The misleading statements in his May 30, 2007 letter were followed five days later by the defendant's June 4, 2007 letter and statement of account to the [plaintiffs] for professional services from February 19, 2005, to February 12, 2007. . . . In the June 4, 2007 letter, the defendant stated, incredibly, that he reduced the total time reflected since the fees were escalating 'at a very rapid pace.' The statement again billed for paralegal time. In contrast to the May 30, 2007 letter, which billed for in excess of 460 hours of attorney and paralegal time, the June 4, 2007 statement billed for

877.75 hours of the defendant's time, an increase of over 410 hours. The defendant stated that he did not have contemporaneous time records to support either amount; instead, he leafed through the file and came up with a number. . . . The defendant's testimony that both numbers were 'reasonably accurate' . . . lacks credibility. Similarly lacking in credibility is the sheer amount of the bill, $209,445.97." (Citations omitted; emphasis omitted.)

In his reply brief, the defendant alleges that "all fees billed by and earned by him were earned prior to Chicago [Title] assuming [the] plaintiffs' defense, and no fees were billed nor any received after [it] assumed [that] defense in March, 2007 . . . ." (Citations omitted; emphasis omitted.) The court nevertheless found that "[t]he evidence . . . does not establish that the defendant provided legal services in connection with the Warren Enterprises litigation which were worth [the] payment of $85, 000 [made by the plaintiffs from the trust]. The defendant did not engage in discovery, such as taking or defending depositions, or prepare witnesses, or prepare for trial, or represent the [plaintiffs] at trial. By comparison, Marcus, who represented the [plaintiffs] in the Warren Enterprises litigation for about one year, billed approximately $10,800 for his services. . . . The defendant's claimed legal work was unsupported by contemporaneous time records, and he acknowledged that it included an inordinate amount of time reviewing deeds. . . . The court is unpersuaded by his assertions about the value of and the extent of the legal work he claims to have performed."[8] (Citation

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[8] As but one example, we note that the defendant testified at trial that he spent 312 hours reviewing deeds on behalf of the plaintiffs in 2005-the year before Warren Enterprises filed suit

omitted.) Those factual findings all are supported by the record before us. As such, they are not clearly erroneous.

IV

Despite the fact that none of the causes of action contained in the plaintiffs' complaint sound in breach of contract, the defendant contends that the barter agreement is unenforceable because (1) "no consideration was given by [the plaintiffs] to [the] defendant" and (2) its terms were not definite and certain. That claim requires little discussion, as the defendant did not preserve it before the trial court. Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. *See* Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority"); *see also* 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"). "We have repeatedly held that this court will not consider claimed errors on the part of the trial court unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim." (Internal quotation marks omitted.) *McGuire v. McGuire*, 102 Conn. App. 79, 87, 924 A.2d 886 (2007). To review a claim advanced for the first time on appeal and not raised before the trial court amounts to a trial by ambuscade of the trial judge. *Liberty Mutual Ins. Co. v. Lone Star Industries,*

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against the plaintiffs. The defendant further testified that he spent 758 hours reviewing deeds on behalf of the plaintiffs in 2006.

Inc., 290 Conn. 767, 798, 967 A.2d 1 (2009). We therefore decline to afford review of this unpreserved contention.

V

As best we can comprehend, the defendant also argues that the court improperly found a CUTPA violation stemming from his failure to pay for the construction services that Bruce Jalbert had rendered on his properties. Amidst a sea of abstract assertion set forth in part II of his appellate brief-which is titled, "The Trial Court Made Clearly Erroneous Findings that the Assumption of Defense by Chicago Was Relevant to Defendant's Receipt of Fees and that Plaintiff Was Not Aware of its Assumption"—comes a mere sentence regarding an alleged CUTPA pleading deficiency. The brief states: "Since even if the court had been correct [in awarding CUTPA damages], no such judgment could enter as there was no allegation or claim for carpentry fees set forth in the plaintiffs' complaint, the estimate [of construction costs] went unchallenged."

To the extent that the defendant submits that this sentence sets forth a distinct ground of appeal, it is the quintessence of inadequacy. The statement of issues makes no mention of that claim. The brief does not contain a separate heading regarding this point of contention, nor does it identify the applicable standard of review, in contravention of the mandates of Practice Book § 674 (d). Further, the brief cites no legal authority to support the allegation contained therein.

"In Connecticut, our appellate courts do not presume error on the part of the trial court." *Brett Stone*

Painting & Maintenance, LLC v. New England Bank, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013). Rather, the burden rests with the appellant to demonstrate reversible error. *Brookfield v. Candle wood Shores Estates, Inc.*, 201 Conn. 1, 7, 513 A.2d 1218 (1986) ("[t]he burden is on the appellant to prove harmful error"); *Harlow v. Stickels*, 151 Conn. App. 204, 210, ___ A.3d ___ (2014) ("[a]n appellant bears the burden to show that there was error from which she appeals"). Such bald assertion as that set forth in the sentence previously quoted, divorced from any meaningful analysis or compliance with the strictures of our rules of practice, does not satisfy that burden.

VI

As a final matter, the defendant claims that the court's erroneous findings of fact "result in clearly erroneous judgments against" him. Once again, the defendant has failed to furnish a discussion of any legal authority whatsoever in support of his claim, which consists entirely of abstract assertion. His brief contains no application of facts to the elements of the various causes of action on which the court ruled in favor of the plaintiffs. *See Grasso v. Connecticut Hospice, Inc.*, 138 Conn. App. 759, 769, 54 A.3d 221 (2012). "We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Paoletta v. Anchor Reef Club at Branford, LLC*, 123 Conn. App. 402, 406, 1 A.3d 1238, *cert. denied*, 298 Conn. 931, 5 A.3d 491 (2010). To the extent that the concluding portion of the defendant's

appellate brief may be construed as anything but a summation of his prior points of contention, they do not merit further review.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISION OF THE SUPERIOR COURT (JUNE 11, 2013)

SUPERIOR COURT
J.D. OF WATERBURY, AT WATERBURY

BRUCE K. JALBERT, ET AL.,

v.

LAWRENCE R. MULLIGAN, ET AL.

Docket No. UWY CV-08-6001044 S

Before: Robert B. SHAPIRO,
Judge of the Superior Court.

This matter was tried to the court on March 12-14, 2013. Thereafter, in lieu of oral argument, the parties presented post-trial briefs, filed on May 15, 2013. After consideration, the court issues this memorandum of decision.

I. Background

In count one of their five count fourth revised complaint (#166) (complaint), the plaintiffs, Bruce K. Jalbert and Pamela D. Jalbert (hereinafter referred to as the plaintiffs or the Jalberts), allege that their former attorney, defendant Lawrence R. Mulligan, Esq., is liable for converting funds in the course of representing them concerning a real property dispute between neighbors. In count two, the plaintiffs allege

that the defendant is liable for statutory theft, pursuant to General Statutes § 52-564.[1] In count three, the plaintiffs allege that the defendant's conduct in his legal representation and billing concerning that the property dispute violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

In count four, the plaintiffs claim that the defendant is liable for fraud. In count five, they allege he made false representations and/or statements, as a result of which he received something of value from the plaintiffs without compensating them.

The Jalberts are husband and wife. Pamela Jalbert did not graduate from high school and received a GED. Bruce Jalbert is a carpenter. The defendant acted as the plaintiffs' attorney between 1995 and 2008, including on real estate transactions. He represented them when they purchased their home at 35 Tolstoy Lane in Southbury, Connecticut, for $295,000, in 2004. On the defendant's recommendation, they purchased title insurance from Chicago Title Insurance Company (Chicago Title). The defendant also handled Bruce Jalbert's father's estate, including probate work and real estate transactions.

The defendant was a close personal friend of the Jalberts. He testified that he and his wife and the Jalberts "were about as close as you would deem family." *See* Trial Transcript, March 12, 2013, p. 122 (hereafter, Tr., March, ___, 2013, p. ___). During a ten

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[1] Section 52–564 provides, "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

year period, they had dinner together, socialized at one another's homes, and traveled together.

When they purchased their home in 2004, the Jalberts were aware that a neighboring owner, Jean Elin, of 39 Tolstoy Lane, had an easement for a right of way over their land. *See* Plaintiffs' Exhibit 4 (hereafter, Plff. Exh. ___). Pamela Jalbert described it as a passway to a summer cottage, to be used for three weeks to three months out of the year, which was not to be widened or maintained. In 2005, after friends of the Jalberts learned of an issue concerning rights to use Tolstoy Lane and, as a result, decided not to purchase 39 Tolstoy Lane, the Jalberts asked the defendant to represent them concerning the easement issue.

To compensate the defendant for his legal services, the Jalberts and the defendant agreed to a barter system, contingent on whether Chicago Title provided representation to the Jalberts. They agreed that, if Chicago Title did not provide representation, the parties would exchange Bruce Jalbert's construction work for the defendant's legal services. If Chicago Title did provide representation, then the defendant would pay for Bruce Jalbert's work. This agreement was not put in writing.

Between 2005 and 2007, Bruce Jalbert worked on several renovation projects for the defendant, at properties located in Connecticut, New York and Rhode Island. The undisputed value thereof was $84,750. *See* Plff Exh. 17 (summary).

Elin sold 39 Tolstoy Lane to Warren Enterprises, LLC (Warren Enterprises) in May 2006. Warren Enterprises sued the Jalberts, in November 2006, seeking access to Tolstoy Lane over the plaintiffs'

property (Warren Enterprises litigation). *See* Plff. Exh. 6. After receiving the suit papers, the defendant contacted Chicago Title and then told Pamela Jalbert that Chicago Title's claims representative informed the defendant that Chicago Title was not going provide representation for the Jalberts. As a result, Mrs. Jalbert asked the defendant to represent them. He represented them at court appearances in December 2006 and February 2007.

After the second appearance in February 2007, the defendant informed the Jalberts that Chicago Title had hired Attorney Neil Marcus of the law firm of Cohen &Wolf, P.C. "to help him." *See* Tr., March 12, 2013, p. 38. In fact, by letter dated March 8, 2007 (Plff. Exh. 9), Chicago Title informed the defendant that it had retained Marcus to defend the Jalberts, and that it would not be responsible for any fees or expenses of any other counsel. Marcus filed an appearance for the Jalberts in the Warren Enterprises litigation, in lieu of the defendant, in March 2007, to defend the Jalberts against all counts of the complaint in that matter. *See* Plff. Exh. 45. The defendant did not provide Chicago Title's letter to the Jalberts and they saw it only after the Warren Enterprises litigation was settled in April 2008 and after they had commenced suit against the defendant in this matter.

In May 2007, the defendant asked the plaintiffs for $85,000 from Bruce Jalbert's father's trust (the trust), in order to show Chicago Title that the Jalberts had paid the defendant for his work. According to the defendant, he could not show Chicago Title that he had been paid by Bruce Jalbert's work. The defendant agreed to hold the $85,000 in an escrow account, to be returned to the trust after the settlement of the

Warren Enterprises litigation. As discussed further below, the trust provided the $85,000, which the Jalberts provided to the defendant by personal check. *See* Plff Exh. 30. The defendant did not return these funds.

Prior to Marcus' appearance, the defendant filed no pleadings in the Warren Enterprises litigation. Marcus filed pleadings after he appeared. Marcus then worked with opposing counsel, who also had been retained by a title insurance company, to settle the Warren Enterprises litigation. No depositions were taken and no motion practice occurred.

As part of the settlement, Warren Enterprises received a parcel on the north side of the Jalberts' property for use as a driveway and the Jalberts received a parcel as a buffer zone so that their neighbors could not build near the Jalberts' house. Also, $50,000 each was paid by Chicago Title and First American Title Insurance Company, Warren Enterprises' title company. These funds were deposited in the defendant's client funds account. As discussed further below, the defendant received $50,000 from the settlement.

The court discusses the evidence further below.

II. Discussion

The resolution of this matter involves the court's assessments of credibility and the fiduciary nature of the attorney-client relationship. "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *Gianetti v. Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012). "A trier of fact is free to reject

testimony even if it is uncontradicted . . . and is equally free to reject part of the testimony of a witness even if other parts have been found credible." (Internal quotation marks omitted.) *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 12, 662 A.2d 89 (1995). "[T]he credibility of witnesses, the findings of fact and the drawing of inferences are all within the province of the trier of fact." (Internal quotation marks omitted.) *Keeney v. Buccino*, 92 Conn. App. 496, 513, 885 A.2d 1239 (2005).

"[T]he relationship between an attorney and client must involve personal integrity and responsibility on the part of the lawyer and an equal confidence and trust on the part of the client. . . . The relationship between an attorney and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Matza v. Matza*, 226 Conn. 166, 183-84, 627 A.2d 414 (1993).

A. Count One-Conversion

Conversion "is an unauthorized assumption and exercise of the right of ownership over property belonging to another, to the exclusion of the owner's rights." *Mystic Color Lab, Inc. v. Auctions Worldwide, LLC*, 284 Conn. 408, 418, 934 A.2d 227 (2007). "The intent required for a conversion is merely an intent to exercise dominion or control over an item even if one reasonably believes that the item is one's own." *Plikus v. Plikus*, 26 Conn. App. 174, 180, 599 A.2d 392 (1991). The plaintiffs' burden to prove conversion is by clear and convincing evidence. *See Suarez-Negrete v. Trotta*, 47 Conn. App. 517, 518, 705 A.2d 215 (1998).

"To establish a prima facie case of conversion, [a] plaintiff ha[s] to demonstrate that (1) the material at issue belonged to the plaintiff, (2) that [the defendant] deprived the plaintiff of that material for an indefinite period of time, (3) that [the defendant's] conduct was unauthorized and (4) that [the defendant's] conduct harmed the plaintiff" (Internal quotation marks omitted.) *Coster v. Duquette*, 119 Conn. App. 827, 832, 990 A.2d 362 (2010). "There may be a conversion by a wrongful taking, by an illegal assumption of ownership, by an illegal user or misuse, or by any other form of possession wrongfully obtained. Furthermore, a wrongful detention, even though possession was rightfully obtained, may constitute conversion." *Bruneau v. W. & W. Transportation Co.*, 138 Conn. 179, 182-83, 82 A.2d 923 (1951).

"Under our case law, [m]oney can clearly be subject to conversion." (Internal quotation marks omitted.) *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 771, 905 A.2d 623 (2006).

The court credits the plaintiffs' contentions that the $85,000 from the trust was paid to the defendant, in response to his request, in order to enable him prove to Chicago Title that the Jalberts had incurred legal fees, and had paid the defendant that amount for his legal services in connection with the Warren Enterprises litigation, and that the defendant promised to hold those funds in escrow and to return them to the plaintiffs. In contrast, the defendant's explanation of the parties' understanding as to the May 2007 payment to the defendant of the $85,000 lacks credibility. The evidence is clear and convincing that the plaintiffs were misled by the defendant into providing the $85,000 payment. Likewise, the plaintiffs' authorization

of payment of $50,000 to the defendant from the settlement of the Warren Enterprises litigation also stemmed from misleading conduct by the defendant, by which he caused them to believe that he was representing their interests in that matter and that Chicago Title had refused to do so.

The defendant relies on his May 2007 correspondence to Paul McNinch of American Guaranty & Trust Company (Plff. Exhs. 25-26), which he argues sets forth a summary of the situation, why and how he was entitled to the $85,000 payment, and that Bruce Jalbert agreed thereto, as evidenced by his signature. In the first of these letters, dated May 9, 2007 (Plff. Exh. 25), the defendant asserted that he saw the Warren Enterprises litigation as "a money machine," and that legal fees in the amount of $200,000 will be incurred by both parties. The defendant added that, "[t]he litigation itself is going to take us to Cleveland, Ohio and Bangor, Maine in order to take depositions of persons who owned the property earlier in time."

In the May 9, 2007 letter, the defendant sought $85,000 in order to continue to work on the Jalberts' behalf to settle the property dispute, noting that Chicago Title had been "dragging its heals [sic]." He also stated that "[t]his distribution is made on the condition that in our litigation against Chicago Title any of those funds which we recover, from the AGT funds, would be sent back to AG &T for redeposit into the Trust Fund. This can be a part of the distribution condition and Mr. Jalbert is willing to sign such a document." The defendant's request for the $85,000 payment was further supported by his statement that "I have approximately 5,000 pages of data at this point in time and we are about to go into a heavy round of

discovery procedures. I am hoping to avoid this by settling the case soon."

The defendant's letter was a studied effort to obtain funds by providing misleading information, since the defendant nowhere stated therein what he knew at the time: that Chicago Title was providing a defense for the Jalberts in the Warren Enterprises litigation, that the law firm of Cohen & Wolf had appeared as counsel in that matter *in lieu* of the defendant, and that he was no longer counsel of record representing them. *See* Plff. Exh. 9, letter from Chicago Title to defendant, dated March 8, 2007, tendering defense to the Jalberts. Instead, the defendant stated in the May 9, 2007 letter, "I have just been advised that Chicago Title, who hired counsel a few months ago, the day before the first court hearing, is not going to pay prior legal fees, which decision I believe will be overturned once I sue them."

In his letter, the defendant did not advise that the counsel hired by Chicago Title was representing the plaintiffs. Instead, a reader of the letter reasonably would be led to believe that the payment sought was for the purpose of funding the defendant's continued representation of the Jalberts in the Warren Enterprises litigation in order to secure a settlement about which Chicago Title was dragging its heels.

The evidence also does not establish that the defendant provided legal services in connection with the Warren Enterprises litigation which were worth a payment of $85,000. The defendant did not engage in discovery, such as taking or defending depositions, or prepare witnesses, or prepare for trial, or represent the Jalberts at trial. By comparison, Marcus, who repre-

sented the Jalberts in the Warren Enterprises litigation for about one year, billed approximately $10,800 for his services. *See* Tr., March 13, 2013, pp. 52-53. The defendant's claimed legal work was unsupported by contemporaneous time records, and he acknowledged that it included an inordinate amount of time reviewing deeds. *See* Tr., March 14, 2013, p. 102. The court is unpersuaded by his assertions about the value of and the extent of the legal work he claims to have performed.

The court also finds unpersuasive the defendant's argument that Marcus' testimony demonstrates that the Jalberts "were fully aware that Chicago Title and Attorney Neil Marcus were representing them." *See* defendant's post-trial brief, p. 5. While Marcus testified that, in March 2007, he told the Jalberts that he had been retained by Chicago Title to represent them, he also stated that they requested that he communicate with them through the defendant. *See* Tr., March 13, 2013, pp. 73-75.

Significantly, Marcus explained that the defendant asked that the defendant "be the filter between the Jalberts and me." *See* Tr., March 13, 2013, p. 47. According to Marcus, the defendant told Marcus that the Jalberts "were like family to him," "[the defendant] considered Mr. Jalbert to be like a brother," but the defendant "thought that they were not the brightest people in the world and-he was not complimentary to their abilities to grasp the concepts that I would have to explain to them and he could explain them better." *See* Tr., March 13, 2013, p. 47. Pamela Jalbert testified that the defendant told the Jalberts not to speak to Marcus. *See* Tr., March 12, 2013, p. 85.

Marcus also testified that, in March 2008, when he was in the process of attempting to settle the Warren Enterprises litigation, he realized that the Jalberts did not understand that he was representing them. Marcus stated that he received threatening communications from the Jalberts. *See* Tr., March 13, 2013, pp. 101-102; defendant's Exhibit I (email from Pamela Jalbert to Marcus, dated April 12, 2008). Marcus testified that, at some point, "I realized that the communications weren't working because the Jalberts and Larry Mulligan were somewhat on the outs at that point, and this brotherly love that I'd been led to believe was a relationship had really turned nasty." *See* Tr., March 13, 2013, p. 101. He testified that he had thought the Jalberts were aware that he was defending them, "but apparently, they were not." *See* Tr., Mard 13, 2013, p. 101. Only after he spoke to them directly did he learn that they were "somewhat confused," and they thought that the defendant was representing them, until they had a falling out with him. *See* Tr., March 13, 2013, pp. 101-102. Thus, while Marcus initially informed the Jalberts about what his role would be, they did not understand and continued to rely on the defendant, who they thought was representing them and looking out for their interests.

Under these circumstances, Bruce Jalbert's signatures on the May 9, 2007 letter to American Guaranty & Trust Company (Plff. Exh. 25) and the subsequent letter of protection (Plff Exh. 26), authorizing a distribution of monies from the trust, to be paid to the defendant, are of no factual significance. The Jalberts and the defendant previously had agreed to the barter agreement concerning how the defendant was to be compensated. It is evident that the Jalberts were

misled by the defendant as to his role in connection with the Warren Enterprises litigation. Where, as here, Bruce Jalbert's approval of the payment to the defendant of monies received from the trust was based on misleading conduct by the defendant, his signature provides no support to the defendant's factual contentions. *See Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 331 n.30, 852 A.2d 703 (2004) (conversion where defendant secures possession "illegally or tortuously, by fraud or other wrongful conduct" (Internal quotation marks omitted)).

Similarly, the court credits the plaintiffs' contention that their authorization of payment of $50,000 to the defendant, from the Warren Enterprises litigation settlement proceeds, was based on his misleading conduct. If the plaintiffs had understood that Chicago Title had been defending them, they would not have agreed that the defendant was entitled to that sum. In the May 14, 2007 letter of protection from the defendant to Paul McNinch of American Guaranty & Trust Company (Plff. Exh. 26), which was approved by Bruce Jalbert, the defendant stated that the purpose of the $85,000 advance from the trust was to pay legal fees for the Warren Enterprises litigation. He also stated that if "the first portion of the case," meaning the Warren Enterprises litigation, settled for $100,000, he would be advancing $50,000 from his legal fees, and refunding $50,000 to American Guaranty & Trust Company at that time, and that an additional $35,000 would be refunded to make the trust whole after successfully resolving the contemplated suit against Chicago Title. After receiving the settlement funds from the Warren Enterprises litigation, no refund to

American Guaranty & Trust Company was made by the defendant.

Instead, of the $100,000 received from the title companies, the defendant retained $50,000 as a payment for his legal services. The plaintiffs received a check in the amount of $23,500. *See* Plff. Exh. 42. This reduced amount reflected a repayment to the defendant of monies loaned for the purchase of a motorcycle by Bruce Jalbert.

As discussed above, as Marcus testified, the plaintiffs did not understand that Chicago Title had provided representation for the Jalberts, by Cohen & Wolf, for the Warren Enterprises litigation, in lieu of the defendant. If the defendant had not misled them, they would not have continued to believe that his legal services were needed for that matter and would not have agreed that he was entitled to be paid.

In addition, the court is unpersuaded that the defendant's bill for $69,738.90 to Chicago Title, dated February 16, 2008 (Plff. Exh. 15) represents a reasonable summary of the extent of his legal services or their value. Rather, it contains a substantial inflating of the time spent by the defendant on this matter. That bill includes a list of services, including "15 meetings with client regarding status of case and potential for settlement; multiple telephone conversations with Neil Marcus regarding potential for settlement; . . . multiple telephone conversations with Tom Gugliotti [opposing counsel]." In view of the fact that the defendant misled the Jalberts concerning his representation of them, the court is unpersuaded that such activities by the defendant were warranted or that their extent was accurately described.

The defendant's credibility, including his statements made in documents related to billing, is undermined by his acknowledged back-dating of a retainer agreement with the Jalberts. In his testimony, the defendant stated that he prepared a retainer agreement for the Jalberts to sign in March 2007 (Plff. Exh. 7), but dated it in February 2005, more than two years earlier. *See* Tr., March 12, 2013, pp. 134-35. He stated that he did so "[b]ecause I felt it would be helpful to have a memorialization of our agreement in the beginning of the file for purposes of our ultimate claim against Chicago Title." *See* Tr., March 12, 2013, p. 135. Although the document states that Bruce Jalbert signed it in February 2005, the defendant testified that Bruce Jalbert signed it in March 2007. *See* Tr., March 12, 2013, p. 135.

The defendant also testified that, at the time he wrote this letter, he knew that Chicago Title had provided a defense for the Jalberts. *See* Tr., March 12, 2013, p. 137. The letter stated, in its first sentence, "Chicago Title may not provide you with a defense against the claims brought by Jean Elin to cross your property." This letter also does not mention the barter agreement which was in effect when the defendant wrote it. *See* Tr., March 13, 2013, pp. 10-11. According to the defendant, he drafted the letter in March 2007 to be correct as of February 2005. His fabrication of the document undermines the defendant's credibility.

Other examples of misleading documents created by the defendant also undermine his credibility and his arguments about being entitled to be paid for legal services. He prepared a letter addressed to the Jalberts, dated May 30, 2007, in which he stated that he "and his paralegal combined have in excess of 460

hours at our regular rate per hour for my time and $55 dollars per hour for my paralegal's time resulting in a total more than $140,000 for my time and about $25,000 for paralegal time and expenses to date." *See* Plff. Exh. 10. In the next paragraph, the defendant stated that he and the Jalberts had "come to a resolution for a flat fee of $130,000 for all legal fees to date, and $25,000 for paralegal fees and expenses." The last sentence of this letter states, "I look forward to receiving your first payment in this regard."

At trial, the defendant testified that his paralegal on the case was Pamela Jalbert. *See* Tr., March 13, 2013, p. 12. Thus, the letter was a bill to the Jalberts which included charging them for Pamela Jalbert's own work. In contradiction to his own letter, the defendant testified that "It was not my intention that the Jalberts would be paying my legal fees out-of-pocket at any time." *See* Tr., March 13, 2013, p. 13. The court does not credit the statement in the letter or the defendant's trial testimony that an agreement was reached for payment to the defendant of a flat fee.

The misleading statements in his May 30, 2007 letter were followed five days later by the defendant's June 4, 2007 letter and statement of account to the Jalberts for professional services from February 19, 2005 to February 12, 2007. *See* Plff. Exhs. 11-12, respectively.[2]

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[2] The defendant testified that both billing statements were sent to the Jalberts. *See* Tr., March 13, 2013, p. 26; March 14, 2013, pp. 28-29. However, the Jalberts testified that they did not see billing statements from the defendant until after they commenced suit against him. As discussed, the defendant's credibility

In the June 4, 2007 letter, the defendant stated, incredibly, that he reduced the total time reflected since the fees were escalating "at a very rapid pace." The statement again billed for paralegal time. In contrast to the May 30, 2007 letter, which billed for in excess of 460 hours of attorney and paralegal time, the June 4, 2007 statement billed for 877.75 hours of the defendant's time, an increase of over 410 hours. The defendant stated that he did not have contemporaneous time records to support either amount; instead, he leafed through the file and came up with a number. *See* Tr., March 14, 2013, pp. 22-23. The defendant's testimony that both numbers were "reasonably accurate," Tr., March 14, 2013, p. 25, lacks credibility. Similarly lacking in credibility is the sheer amount of the bill, $209,445.97.

Under these circumstances, the plaintiffs' expressions to the effect that they wanted the defendant to be paid (*see* Deft. Exh. I, April 12, 2008 email from Pamela Jalbert to Marcus, complaining of "Chicago Title[']s unwillingness to honor their commitments" and requesting payment of $69,000 to the defendant; Deft. Exh. J, April 8, 2012 emails to defendant), and their proposal of deeding a portion of their property to him as a means of compensating him for legal services, do not amount to admissions as to the value of the defendant's work for the Jalberts, or persuasive support for the defendant's arguments of entitlement to the funds at issue. Rather, like the payment from the trust, they resulted from the defendant's efforts to mislead the plaintiffs.

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and claims of entitlement to retain funds due to legal services rendered are undermined by these documents.

Likewise unpersuasive are the defendant's references to Pamela Jalbert's May 6, 2008 email to the defendant (Deft Exh. Q), concerning the defendant's legal bills and returning money to the trust. Due to the defendant's misleading conduct, at the time it was written, she did not understand that Chicago Title had been representing the Jalberts. Similarly, as Marcus expressed in his testimony, at around this time, the plaintiffs' relationship with the defendant had deteriorated. The court is unpersuaded by the defendant's contentions that the plaintiffs' demand for the return of their money is evidence that the $85,000 had not been provided in 2007 to show Chicago Title that the Jalberts had paid the defendant, and was a payment to the defendant for a fee to which he was entitled.

Similarly, the $50,000 which the defendant received from the Warren Enterprises litigation settlement also resulted from the defendant's deceptive conduct, in which he took advantage of his fiduciary relationship with the plaintiffs, and their friendship.

By clear and convincing evidence, the plaintiffs have proved that the defendant converted the $85,000 which he sought from the trust, which was paid to him, and which he never returned. By clear and convincing evidence, the court finds that the defendant also converted the $50,000 from the Warren Enterprises litigation settlement.

B. Count Two-Statutory Theft

In count two of their complaint, the plaintiffs allege that the defendant committed statutory theft in violation of General Statutes § 52-564. "[S]tatutory theft under . . . § 52-564 is synonymous with larceny [as defined in] General Statutes § 53a-119; . . . and the

definition of larceny includes various fraudulent methods of taking property from its owner." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Stuart v. Stuart*, 297 Conn. 26, 41, 996 A.2d 259 (2010). "Pursuant to § 53a-119, [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [with[. . .]holds] such property from [the] owner." (Internal quotation marks omitted.) *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 44, 761 A.2d 1268 (2000). The standard of proof applicable to statutory theft "is the preponderance of the evidence standard." *Stuart v. Stuart, supra*, 297 Conn. 44.

"Statutory theft . . . requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property." *Mystic Color Lab, Inc. v. Auctions Worldwide, LLC*, *supra*, 284 Conn. 418-19.

As discussed above, the court has found the defendant to be liable for conversion. The evidence is also clear and convincing that the defendant intentionally and wrongfully took and withheld $135,000 from the plaintiffs. The defendant intentionally misled them concerning the $85,000 payment from the trust. The defendant intentionally misled the plaintiffs into believing that his services were needed to defend them in the Warren Enterprises litigation, and that he was entitled to be paid therefor, causing them also to agree that he would receive $50,000 from the settlement. He intentionally deprived them of those funds as well. *See Kosiorek v. Smigelski,* 138 Conn. App. 695, 713-14, 54 A3d 564 (2012), cert. denied, 308 Conn. 901, 60 A.3d

287 (2013) (wrongful withholding of amount of unreasonable legal fee is evidence of statutory theft). Accordingly, the court finds the defendant liable for statutory theft.

C. Count Three-CUTPA

The plaintiffs' third count is premised on the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). "[General Statutes §] 42-1 110b(a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission 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. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result

of the use or employment of a [prohibited] method, act or practice . . . ." (Internal quotation marks omitted.) *Harris v. Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350-51, 994 A.2d 153 (2010). The plaintiffs' burden of proof as to their CUTPA claim is by the preponderance of the evidence. *See Stuart v. Stuart, supra*, 297 Conn. 38.

"In *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 520-21, 461 A.2d 93 8 (1983), our Supreme Court concluded that not all aspects relating to the conduct of the profession of law were excluded from the purview of CUTPA. More recently, we explained: 'In general, CUTPA applies to attorney conduct, but only as to the entrepreneurial aspects of legal practice.'" *Kosiorek v. Smigelski, supra*, 138 Conn. App. 711-12.

"[T]he most significant question in considering a CUTPA claim against an attorney is whether the allegedly improper conduct is part of the attorney's professional representation of a client or is part of the entrepreneurial aspect of practicing law." *Suffield Development Associates Ltd. Partnership v. National Loan Investors, LP.*, 260 Conn. 766, 781, 802 A.2d 44 (2002). The "entrepreneurial" exception is applicable, for example, to an attorney's advertising, billing, bill collection, and solicitation of business. *See id.*, 782.

In *Kosiorek v. Smigelski, supra*, 138 Conn. App. 712, there was evidence that the defendant attorney "failed to provide [his client] with the entire fee agreement or to explain the nature of the contingency agreement at the time it was executed. Additionally, there was evidence that the defendant had not kept accurate time records, paid himself an unreasonable fee and refused to return the disallowed fee to the

estate." Such evidence "related to the entrepreneurial aspects of legal practice" and was properly submitted for the jury's consideration of the CUTPA claim. *Id.*

As discussed above, the court has found the defendant to be liable for conversion and civil theft of the $85,000 which he received from the trust, and of the $50,000 he received from the settlement of the Warren Enterprises litigation, both ostensibly for legal fees, as a result of his misleading conduct. The entrepreneurial exception is applicable to both sums, as these damages related to the defendant's fee agreement with the Jalberts, and were unreasonable fees which he received but did not return. Such conduct violated CUTPA in that it was unfair, immoral, unethical, oppressive, and unscrupulous, and the plaintiffs suffered ascertainable losses of money as a result.[3]

In addition, pursuant to the barter agreement, the defendant received the value of Bruce Jalbert's construction services, in the amount of $84,750. *See* Plff Exh. 17. The value of these services was not disputed at trial.

The defendant acknowledges that he had a barter agreement with Bruce Jalbert. *See* defendant's post-trial brief, p. 11. However, he disagrees with the plain-

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[3] The defendant argues that the claim concerning the $50,000 payment is not included in the count three's allegations of CUTPA violations. However, count three incorporates by reference the allegations of count two. See count three, ¶ 1. In count two, which alleges that the defendant is liable for civil theft, paragraph 7k of count one, which states that the defendant "received $100,000 in settlement funds in the litigation, but only returned $50,000 to Plaintiffs," is incorporated by reference.

tiffs contentions as to its terms and whether it continued until the settlement of the Warren Enterprises litigation.

Under the barter agreement, the defendant agreed to pay for Bruce Jalbert's construction services if Chicago Title provided a defense to the Jalberts. Tr., March 12, 2013, pp. 24-25. As discussed above, the defendant misled the plaintiffs so that they were not aware that Marcus was defending them on behalf of Chicago Title.

The court credits the plaintiffs' contentions that the barter agreement involved an exchange of services based on hours expended, without, as contended by the defendant, adjustment by an hourly rate differential which recognized that the defendant's hourly rates were considerably higher than Bruce Jalbert's hourly rates. This was an arrangement between close friends, where the defendant previously had represented the plaintiffs in the purchase of their home, when they obtained the title insurance recommended by the defendant.

The defendant argues that the barter agreement did not continue to the end, asserting that, if it had continued, then Bruce Jalbert would not have questioned the fees for the defendant's work which were being accumulated, would not have wondered how he was going to pay the defendant's bills, and would not have offered to pay the defendant from a sale of a parcel of their property to the defendant at a reduced price. *See* defendant's post-trial brief, pp. 12-14.

The evidence before the court shows that the plaintiffs, who were not as well-educated as the defendant, an attorney, were misled by the defendant,

who, at the time of the events at issue, was their friend, attorney and fiduciary. It is evident that he misled them to believe that Chicago Title was not providing a defense and that he had expended vast hours on their behalf in their defense, so that they were under the belief that what Bruce Jalbert provided by way of construction services was far less than what was provided by the defendant. *See* Tr., March 14, 2013, pp. 146, 160 (Bruce Jalbert testimony that, although the defendant had not presented a bill, defendant had worked for a number of years and every time he spoke to the plaintiffs the dollar amount would go up exponentially, so that eventually they were told that the defendant had "invested" up to $400,000, leading to concern that Jalberts would have to sell their house).

The defendant never paid for Bruce Jalbert's construction services. As a result, the plaintiffs' suffered an additional ascertainable loss of $84,750. The entrepreneurial exception is applicable to this sum also, as these damages related to the defendant's fee agreement with the Jalberts, and amounted to unreasonable fees which he received but did not earn by providing legal services in exchange therefor. This conduct also violated CUTPA in that it was unfair, immoral, unethical, oppressive, and unscrupulous.

D. Fraud

The plaintiffs' fraud claims are based on conduct which is discussed above. "The essential elements of an action in fraud, as we have repeatedly held, are: (1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so

act on it to his injury." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C. v. Beckett*, 269 Conn. 613, 643, 850 A.2d 145 (2004). "A party alleging fraudulent misrepresentation must prove the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which higher standard we have described as clear and satisfactory or clear, precise and unequivocal." (Internal quotation marks omitted.) *Wallenta v. Moscowitz*, 81 Conn. App. 213, 220, 839 A.2d 641, cert. denied, 268 Conn. 909, 845 A.2d 414 (2004). "'Clear and satisfactory' evidence is the equivalent to 'clear and convincing' evidence." (Internal quotation marks omitted.) *Id.*

"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).

In their post-trial memorandum, the plaintiffs seek damages for fraud for three separate claimed fraudulent representations. Two of these relate to promises by the defendant to do acts in the future. They contend that he falsely informed them that if they transferred $135,000 to him, he would return the funds at the end of the litigation ($85,000 from the trust and $50,000 from the settlement). They also contend that, by falsely informing the plaintiffs that Chicago Title had refused to defend their interests, the defendant fraudulently induced Bruce Jalbert to perform labor for the defendant's benefit, without

compensation. *See* plaintiffs' post-trial memorandum, pp. 29-30.

As to the first two, the allegation concerning the payment from the trust is pleaded as a promise. *See* count four, ¶ 22d. The court is unpersuaded that the plaintiffs have proved that the defendant had a present intent not to fulfill the promise when it was made. As to the second, the allegation concerning the $50,000 not returned from the settlement is not pleaded as a fraudulent misrepresentation. *See* count four, ¶ 7k. "The plaintiff cannot recover upon a cause of action not alleged in its complaint." *United Construction Corporation v. Beacon Construction Co.*, 147 Conn. 492, 496, 162 A.2d 707 (1960).

Concerning the third fraud claim, the plaintiffs did not allege in the fourth count that the defendant falsely informed them that Chicago Title had refused to defend them, when that was untrue and he knew it to be untrue. Rather, they alleged that the defendant represented that he would accept payment in kind from Bruce Jalbert, but later represented he would not. As stated above, the plaintiffs may not recover on a claim which was not pleaded.

E. Larceny by False Pretenses

In count five, based on the same allegations, all of which are incorporated by reference, the plaintiffs claim that the defendant is liable for larceny by false pretenses.[4] The court discussed the elements of

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[4] In the defendant's post-trial brief, page 3, he argues, citing Practice Book§ 10-3, that count five does not allege a statute. Any such contention was waived. *See Thompson & Peck, Inc. v.*

larceny above in part B concerning statutory theft. "The elements that the plaintiffs must prove to obtain treble damages under the civil theft statute, § 52-564, are the same as the elements required to prove larceny, pursuant to General Statutes § 53a-119. *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770-71, 905 A.2d 623 (2006)." *Sullivan v. Delisa*, 101 Conn. App. 605, 619-20, 923 A.2d 760, *cert. denied*, 283 Conn. 908, 928 A.2d 540 (2007).

The same analysis is applicable to count five. The evidence is clear and convincing that the defendant is liable for the $135,000 which he intentionally and wrongfully obtained and withheld from the plaintiffs.

F. Damages, Interest, and Attorney's Fees

As discussed above, as to counts one and two, for conversion and civil theft, the plaintiffs have proved that they suffered actual damages in the total amount of $135,000 ($85,000 plus $50,000). The court is unpersuaded by the defendant's argument (*see* defendant's post-trial brief, p. 21) that the $23,500 paid to the Jalberts from the Warren Enterprises litigation settlement reduces their claim concerning the $85,000. As discussed above, the repayment to the defendant of funds loaned for the purchase of a motorcycle by Bruce Jalbert were deducted from the $50,000 which otherwise would have been paid to the plaintiffs from the $100,000 received from the title companies as part of the settlement of the Warren Enterprises litigation.

Harbor Marine Contracting Corp., 203 Conn. 123, 132, 523 A.2d 1266 (1987).

As to count two, the plaintiffs seek treble damages pursuant to General Statutes § 52-564, for the defendant's conversion of $135,000. As discussed above, § 52-564 provides, "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." Under this mandatory language, where liability is found, the damages are to be trebled. *See Stuart v. Stuart, supra*, 297 Conn. 53 n.14 (§ 52-564 contains mandatory language). Accordingly, as to count two, concerning statutory theft, the plaintiffs are awarded treble damages, $405,000 ($135,000 x 3).

The plaintiffs also seek an award of prejudgment interest pursuant to General Statutes § 37-3a, which provides, in relevant part, "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . , as damages for the detention of money after i becomes payable." A decision concerning "whether to grant interest under § 37-3a is primarily an equitable determination . . . ." *Sosin v. Sosin*, 300 Conn. 205, 227, 14 A.3d 307 (2011). "[P]rejudgment interest is awarded in the discretion of the trial court to compensate the prevailing party for a delay in obtaining money that rightfully belongs to him." (Internal quotation marks omitted.) *Northrop v. Allstate Ins. Co.*, 247 Conn. 242, 254-55, 720 A.2d 879 (1998).

"A trial court must make two determinations when awarding compensatory interest under§ 37-3a: (1) whether the party against whom interest is sought has wrongfully detained money due the other party; and (2) the date upon which the wrongful detention began in order to determine the time from which interest should be calculated." *Blakeslee Arpaia Chapman,*

Inc. v. EI Constructors, Inc., 239 Conn. 708, 735, 687 A.2d 506 (1997).

"[T]he court's determination [as to whether interest should be awarded under§ 37-3a] should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Internal quotation marks omitted.) *Sosin v. Sosin*, *supra*, 300 Conn. 229. The term "wrongful" "has been construed to mean 'without . . . legal right . . . .'" *id.*, 244 n.25. A finding of wrongfulness under § 37-3a "does not require the trial court to assess blameworthiness . . . ." *Id.*

"[T]he primary purpose of § 37-3a . . . is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money." (Footnote omitted.) *Id.*, 230. Even where money is withheld on the basis of a good faith belief by a party that he was entitled thereto, "the trial court [is] not foreclosed from awarding interest pursuant to§ 37-3a." *Id.*

"[A]n interest award is limited to cases in which the damage is of a sort [that] could reasonably be ascertained by due inquiry and investigation on the date from which the interest is awarded." (Internal quotation marks omitted.) *Id.*, 234-35.

Where liability has been found pursuant to General Statutes § 52-564, the Appellate Court has affirmed trebling the prejudgment interest awarded. "Prejudgment interest on money wrongfully withheld from the owner is a proper, albeit discretionary, element of a

plaintiffs damages. . . . General Statutes 52-564 provides that if the defendant stole the plaintiffs property, he 'shall pay the owner treble his damages.' We see no reason to carve out of those damages, as a matter of law, the prejudgment interest element for the benefit of a defendant who has been found liable pursuant to General Statutes 52-564." (Citation omitted.) *Lauder v. Peck*, 11 Conn. App. 161, 167-68, 526 A.2d. 539 (1987).

As discussed above, the court has found that the defendant is liable for conversion and civil theft concerning the $85,000 from the trust and the $50,000 from the Warren Enterprises litigation settlement. His retention of those monies was wrongful. In the exercise of its discretion, an award of prejudgment interest, to compensate the plaintiffs for the delay in obtaining money that rightfully belongs to them, is appropriate.

Although the plaintiffs contend that Bruce Jalbert transferred the $85,000 from the trust to the defendant on May 31, 2007 and interest should be awarded thereon from that date, they also acknowledge that they expected that those funds would be returned at the end of the Warren Enterprises litigation. *See* plaintiffs post-trial memorandum, p. 34. As to the $50,000 from the settlement, they contend that interest should be awarded from March 27, 2008, the date when the settlement funds were transferred. *See* Plff Exh. 36. The court finds that interest should be awarded from March 27, 2008 on both sums.

Accordingly, pursuant to § 37-3a, the court awards treble interest, at the rate of 10 per cent per annum, from March 27, 2008, for the defendant's wrongful detention of $135,000.

As to count three, as discussed above, the court has found that the defendant is liable and that the plaintiffs proved ascertainable losses in the total amount of $219,750, including $84,750 for Bruce Jalbert's construction services. Prejudgment interest at the statutory rate of ten per cent (10%) is awarded. As discussed above, under the barter agreement, the defendant agreed to pay for Bruce Jalbert's work if Chicago Title provided a defense. After the defense was provided, the defendant's failure to pay for the construction services was wrongful. It is unclear when each project was completed, but the work was done between 2005 and 2007. Marcus filed his appearance to defend the Jalberts in March 2007. Interest on the $84,750 is awarded from January 1, 2008. By that date, all of the construction work had been done.

Also as to count three, the plaintiffs seek awards of attorneys fees and punitive damages. Pursuant to General Statutes § 42-110g(a)[5] and (d)[6], a prevailing

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[5] Section 42-110g(a) provides, "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."

[6] General Statutes § 42-110(d) provides, in pertinent part, "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys fees based on the work reasonably performed by an attorney and not on the amount of recovery."

plaintiff in a CUTPA action may be awarded punitive damages and reasonable attorneys fees.

"A court may exercise its discretion to award punitive damages to a party who has suffered any ascertainable loss pursuant to CUTPA. *See* General Statutes § 42-110g(a). In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . [A]warding punitive damages and attorneys fees under CUTPA is discretionary. . . . Further, [i]t is not an abuse of discretion to award punitive damages based on a multiple of actual damages." (Citations omitted; internal quotation marks omitted.) *Votta v. American Car Rental, Inc.*, 273 Conn. 478, 485-86, 871 A.2d 981 (2005).

Here, as discussed above, under General Statutes § 52-564, the legislature has provided for treble damages and the court has awarded them. In addition, the court has trebled the award for prejudgment interest. In the exercise of its discretion, since treble damages are awarded, and, as discussed below, attorneys fees are warranted also, the court declines to award punitive damages. *See Kosiorek v. Smigelski, supra*, 138 Conn. App. 712 n.16 (trial court declined to award punitive damages in addition to treble damages and attorneys fees).

"The public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices. . . . In order to encourage attorneys to accept and litigate CUTPA cases, the legislature has provided for the award of attorney's fees and costs. . . . [T]he amount of attorney's fees that the trial court may award is based on the

work reasonably performed by an attorney and not on the amount of recovery. . . . Once liability has been established under CUTPA, attorney's fees and costs may be awarded at the discretion of the court." (Citations omitted; internal quotation marks omitted.) *Carrillo v. Goldberg*, 141 Conn. App. 299, 316-17, 61 A.3d 1164 (2013).

In the exercise of its discretion, the court will award attorney's fees. By June 26, 2013, the plaintiffs may file a motion for a supplemental judgment of attorneys fees and expenses with a detailed affidavit of attorneys fees and expenses. Any response thereto by the defendant shall be filed by July 10, 2013. Thereafter, the court will schedule a hearing on the award of attorneys fees and costs.[7]

"[A] plaintiff may be compensated only once for his just damages for the same injury." (Internal quotation marks omitted.) *Mahon v. B. V Unitron Mfg., Inc.*, 284 Conn. 645,661, 935 A.2d 1004 (2007). "[T]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an

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[7] Although the plaintiffs seek an award of attorneys fees under each count, they presented argument for an award of attorneys fees only as to count three, the CUTPA count. Accordingly, the court does not consider whether, having prevailed on other counts, the plaintiffs are entitled to attorneys fees awards under those counts. *See Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008).

injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (Internal quotation marks omitted.) *Id.*, 663.

Accordingly, although the plaintiffs also have prevailed on count five, and damages are awarded in the principal amount of $135,000 ($85,000 plus $50,000) on this count, the same losses are at issue as discussed above. The plaintiffs may not recover for the same loss more than once. As set forth below, the court itemizes the damages awarded.

III. Conclusion

For the reasons stated above:

1. Judgment may enter for the plaintiffs and against the defendant on counts one, two, three and five. Judgment may enter for the defendant and against the plaintiffs on count four.

2. Damages are awarded to the plaintiffs on counts one and five in the amount of $135,000. As to count two, trebled damages are awarded in the amount of $405,000. Trebled interest is awarded also, in the amount of $210,953.97.[8]

3. Damages are awarded to the plaintiffs on count three in the amount of $219,750. Prejudgment

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[8] Calculated at the rate of ten per cent (10%) per annum, from March 27, 2008. The per diem rate is $36.99 ($135,000 x .10 divided by 365), which, trebled, equals $110. 97 per day. $110.97 x 1901 days equals $210,952.97.

interest is awarded as to $84,750 of this amount, in the amount of $46,138.14.[9]

4. Eliminating duplicative damage awards results in total damages awarded as follows:

> $615,953.97 (including trebled interest) plus $130,888.14 (including interest):
>
> Total Damages: $746,842.11.

5. By June 26, 2013, the plaintiffs may file a motion for a supplemental judgment attorneys fees and expenses with a detailed affidavit of attorneys fees and expenses. Any response thereto by the defendant shall be filed by July 10, 2013. Thereafter, the court will schedule a hearing concerning the motion.

It is so ordered.

BY THE COURT

/s/ Robert B. Shapiro
Judge of the Superior Court

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[9] Calculated at the rate of ten per cent (10%) per annum, from January 1, 2008. The per diem rate is $23.22 ($84,750 x .10 divided by 365). $23.22 x 1987 days equals $46,138.14.

ORDER OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (APRIL 15, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: LAWRENCE R. MULLIGAN,
RENEE T. MULLIGAN,

Debtors.

LAWRENCE R. MULLIGAN,

Debtor-Appellant.

v.

BRUCE K. JALBERT, PAMELA JALBERT,

Appellees.

Docket No: 18-1657

Appellant, Lawrence R. Mulligan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV of the United States Constitution, § 1

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

28 U.S.C. § 1738

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, 62 Stat. 947.)

It is now well established that . . . a federal court must give the same "full faith and credit" to . . . judicial proceedings of any state court that they would receive in the state from which they arise. 28 U.S.C. Sec. 1738. *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, (11th Cir. 1987), *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270, 100 S.Ct. 2647, 65 L.Ed.2d 757, (1980).

5th Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment to the United States Constitution. § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11 U.S.C. § 523(a)(4)

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt. . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1334(b)

. . .

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all

civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United

States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) Of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section

28 U.S.C. § 157(b)

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) Matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation

of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) Orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) Proceedings to determine, avoid, or recover preferences;

(G) Motions to terminate, annul, or modify the automatic stay;

(H) Proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) Objections to discharges;

(K) Determinations of the validity, extent, or priority of liens;

(L) Confirmations of plans;

(M) Orders approving the use or lease of property, including the use of cash collateral;

(N) Orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) Other proceedings affecting the liquidation of the assets of the estate or the

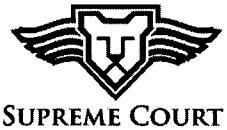
adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) Recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.



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