NO. AC 27515	:	SUPREME COURT
JAMES P. PURCELL ASSOC., INC.	:	
VS.	:	
J. MARTIN HENNESSEY, ET AL.	:	JANUARY 7, 2008

PETITION TO SUPREME COURT FOR CERTIFICATION FOR REVIEW FROM APPELLATE COURT

Pursuant to Conn. Gen. Stat. §51-197f and P.B. §§84-1 *et seq.,* the plaintiff in the above-captioned matter, JAMES P. PURCELL ASSOCIATES, INC., respectfully petitions the Supreme Court for certification to appeal from the judgment of the Appellate Court in this case reported December 18, 2007 as *James P. Purcell Associates, Inc. v. J. Martin Hennessey, et al.,* 105 Conn. App. 1 (2007).

1. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- Whether the Appellate Court erred in affirming the trial court's judgment in favor of the defendant J. Martin Hennessey (personally);
- Whether the Appellate Court erred in holding that the resolution of the appeal turned on the question of which entity entered into the contract with SunAmerica for the development of the subject projects;
- Whether the Appellate Court erred in holding that the determination in this case of whether the defendant J. Martin Hennessey's failure to pay the plaintiff was unjust and whether the

defendant was benefitted were essentially factual findings subject only to a limited scope of review on appeal;

- Whether the Appellate Court erred in holding that the plaintiff failed to offer sufficient evidence to prove that the individual defendant had alleged that he had incurred expenses individually as the result of a contract entered into by the corporate defendant; and
- Whether the Appellate Court erred in holding that the plaintiff could not prevail on its claim that the individual defendant's prior pleadings were an admission that the corporation's expenses and benefits were attributable to him individually.

2. STATEMENT OF BASES FOR CERTIFICATION

- The judges of the Appellate Court panel are divided in their decision; and
- The majority opinion plainly failed (with all due respect) to consider the simple fact set forth in the dissent that even if the majority is right in holding that the plaintiff was required to prove the individual defendant had alleged that he had incurred expenses individually, the plaintiff introduced the very complaint filed by the defendant Hennessey, wherein he alleged he had incurred expenses individually;

3. SUMMARY OF THE CASE

The defendant J. Martin Hennessey over the years formed a number of companies for various real estate development projects with the design to attempt to insulate himself from personal liability. *See* Trial Transcript (hereinafter "Tr."), pp. 24-25. In the course of developing the Glastonbury Fox Glen project (the "Project"), Hennessey and/or his entities sought the services of several professionals to provide necessary services. Among those was the plaintiff, with whom the defendant entered into two (2) separate agreements in December 1998 and January 1999, respectively, totaling some $95,234.29 (currently due).[1] As for the financing of the Project, the defendant **in his individual capacity** entered into a written agreement with SunAmerica Affordable Housing Partners, Inc. ("SunAmerica"). *See* Appendix, pp. 8-9. The plaintiff completed its work in late 2000, to the full satisfaction of the defendant. See Tr. p. 4. The defendant admitted that the invoices issued by the plaintiff for that work were and are due and owing in their entirety.[2] *Id.*

On or about October 20, 2003, Hennessey, **in his individual capacity,** filed suit against SunAmerica in the Hartford Superior Court, in which he sought damages in excess of $15,000.00. *See* Appendix, pp. 8-13. In that action,

[1] The defendant could not recall in what capacity he entered into the contractual obligations with those entities, though it can be assumed from his testimony concerning insulating himself from liability that he at least attempted to do so in a "corporate" capacity.

[2] Despite the entry of a judgment by stipulation against the corporate defendant, the bill remains unpaid in its entirety and the plaintiff has no expectation of collecting on that judgment.

Hennessey alleged, *inter alia,* that he **personally** "incurred significant development expense in preparing to acquire the [Glastonbury] property and commence construction thereon." *Id. at 10.* At trial in the instant case, Hennessey deftly attempted to avoid the plaintiff's contention that the past due balance owing to the plaintiff was part of those alleged "expenses" by testifying instead that they were "just the time of doing business…" Tr., p. 29. Subsequent to the filing of the suit against SunAmerica, Hennessey entered into a multi-party settlement agreement that, *inter alia,* required Hennessey to withdraw the SunAmerica suit. As a result of that agreement **and the withdrawal of the suit,** Hennessey **personally** received at least $80,000.00.[3] Even after the defendant lined his own pockets with proceeds from the settlement (paid first to his lawyer, to be exact) and admitted the quality of the plaintiff's work was AOK, the plaintiff was never paid a penny for the hard work

[3] The settlement proceeds apparently were paid by a third-party, not by the defendant in that case, SunAmerica. It is noteworthy that at trial Hennessey continued to play the "artful dodger" (begun at his deposition) by doing his level best not to admit **any** connection to the settlement proceeds, **even to the point of actually denying under oath he had received any money at all.** Tr., pp. 30-31. He reluctantly admitted finally that he **had** received settlement monies, but only after he was confronted by his own deposition testimony. *Id.* Even then, after Hennessey's recollection concerning his deposition testimony had (apparently) been refreshed, he persisted in denying he had gotten any money. His eventual explanation after much fanfare was that he was telling the truth (about not having received any settlement monies) because his attorney had actually received the settlement proceeds initially, for disbursement to Hennessey and to himself (presumably for fees due and owing). *See* Tr., p. 31. (The defendant's "alternative" positions as to individual and corporate liability in the SunAmerica and instant actions actually caused the plaintiff to deliberate over the notion of calling opposing counsel as a witness at trial, given his apparently "strained" role in drafting for his client the SunAmerica complaint (alleging personally liability for obligations the client would later say (in this case) were corporate obligations all along) and subsequently representing Hennessey in the instant case wherein a corporate shield defense was interposed. The plaintiff ultimately determined not to seek counsel's testimony).

it performed.[4] At trial, the defendant stipulated to judgment in full in favor of the plaintiff as against the corporate defendant The Hennessey Co., Inc., in the amount of $95,234.29 plus interest, attorney's fees and costs.[5] During the trial, the plaintiff requested the court to take judicial notice of the SunAmerica complaint, to which the defendant conceded. *See* Tr., p. 27. The plaintiff contended that the defendant Hennessey's allegation(s) in that complaint that he individually had incurred development expenses constituted a judicial admission. *See* Tr., p. 47.

In its decision, announced from the bench upon the conclusion of argument, the court, Stengel, J., found that the plaintiff had failed to meet its burden of proof as to its unjust enrichment claim against the defendant J. Martin Hennessey individually, and entered judgment for the individual defendant accordingly. *See* Tr., pp. 52-55. Thereafter, the plaintiff timely moved for reargument, which motion was summarily denied by the court without even entertaining argument (which had been requested by the plaintiff).

The plaintiff timely appealed the trial court judgment to the Appellate Court. In its appeal, the plaintiff maintained it had proven that the individual defendant had been unjustly enriched by virtue of his leveraging of settlement funds from the SunAmerica case in which the defendant had alleged, *inter alia,* that he had incurred development costs in his **individual** capacity, which costs, notwithstanding the defendant's denial to the contrary, plainly included (at least by implication) plaintiff's invoices. On December 18, 2007, a split court affirmed the trial court

[4] The defendant has never suggested that any of the work performed by the plaintiff was in any way, shape or form insufficient, overpriced, substandard, or otherwise deficient.
[5] That judgment entered at the conclusion of trial (January 24, 2006).

decision, McDonald, J., dissenting. The majority found that the issue(s) on appeal turned on which entity had entered into the contract with SunAmerica. *Id.* at 4. It went on to hold that the plaintiff's failure to place the SunAmerica contract into evidence (or to offer other proof of it at trial) was fatal. *Id.* The court found that when viewed through a prism of a clearly erroneous standard, the plaintiff had failed to offer sufficient evidence to prove the individual defendant had **alleged** he had incurred expenses individually as the result of the contract with the plaintiff entered into in a corporate capacity.[6] *Id.* at pp. 4-5. Therefore, the court held, the plaintiff could not prevail on its claim that the trial court was required to find that the individual defendant's prior pleadings were an admission that the corporation's expenses and benefits were attributable to him individually. *Id.* at 5.

In his dissent, Judge McDonald pointed to the fact that the plaintiff had adduced uncontroverted evidence that Hennessey sued SunAmerica in his individual capacity **and** that he alleged individual liability for the expenses incurred in furtherance of the subject project(s). *Id.* at 6. He went on to say that by receiving a settlement in his personal capacity based on the cost of work performed by the plaintiff for the Hennessey Co., and not paid for, Hennessey unjustly received a benefit separate and distinct from the benefit conferred on the corporation.

[6]The Appellate Court directed its criticism of the plaintiff's case insofar as it failed to prove J. Martin Hennessey had **alleged** the incurrence of individual expense, not that it had failed to prove that he actually **did** incur those expenses. The plaintiff agrees completely with the court in this regard. The plaintiff has consistently maintained the issue is whether it was unjust for the defendant to leverage settlement monies for himself personally by **alleging** in the SunAmerica complaint that he had borne individual expenses in the project(s), including the plaintiff's bill in the approximate amount of $95,000.00. The defendant was never required to prove who bore the expense, as his case against SunAmerica of course was withdrawn when it settled.

Therefore, he concluded, because the trial court's decision was contrary to the undisputed evidence, it was clearly erroneous.

4. ARGUMENT

A. IT WAS WELL WITHIN THE TRIAL COURT'S PURVIEW TO TAKE JUDICIAL NOTICE OF HENNESSEY'S PLEADINGS IN THE SUNAMERICA CASE, AND HIS ALLEGATION(S) THAT HE INCURRED PERSONAL EXPENSES RELATED TO THE SUBJECT PROJECT(S) IS BINDING ON HIM AS A JUDICIAL ADMISSION,

A party's pleading in one case, whether withdrawn or not, is admissible in a later case. *Tough v. Ives,* 162 Conn. 274, 282-83 (1972); *Kucza v. Stone,* 155 Conn. 194, 196-97 (1967). *See also* TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE (3rd ed.) §8.16.5(c)(3). The later case need not involve the same parties. *See Jewett v. Jewett,* 265 Conn. 669, 678 n.7 (2003). It is an elementary rule of evidence that an admission of a party may be entered into evidence as an exception to the hearsay rule. *Fico v. Liquor Control Commission,* 168 Conn. 74, 77 (1975). As pleadings are judicial admissions, a party is absolutely bound by such admissions unless the court, in the exercise of its discretion, permits the admission to be withdrawn, explained or modified. *Levine v. Levine,* 88 Conn. App. 795, 804 (2005).[7]

Here, Hennessey alleged in his suit against SunAmerica that he personally incurred development expenses relative to the subject projects. But for the plaintiff's work (and the work of the others specified), the defendant could not have made such an allegation. If his attorney, architect and engineer had done their

[7] It is noteworthy in this regard, too, that Hennessey's prior pleading may also have been used to attack his **credibility,** a "live" issue in this case from the start. *See Kucza, 155 Conn.* at 196.

work free of charge, the defendant would have been unarmed in his attempt to leverage funds out of the SunAmerica litigation.

B. HENNESSEY'S RECEIPT OF SETTLEMENT FUNDS WAS THE DIRECT RESULT OF WORK PERFORMED BY THE PLAINTIFF, RENDERING NONPAYMENT FOR THE PLAINTIFF'S WORK UNJUST AND INEQUITABLE.

In a simplistically logical dissent, Judge McDonald pointed to the fact that the plaintiff had done at trial just what the majority (apparently) believed it had not— the plaintiff presented uncontroverted evidence that not only had Hennessey sued SunAmerica in his individual capacity, but **he specifically alleged that he had incurred expenses individually in furtherance of the subject project(s).** *Purcell,* 105 Conn. App. at 6. By introducing Hennesey's complaint against SunAmerica via judicial notice, which notice was specifically conceded by the defendant and acknowledged by the court (in its decision), the plaintiff completed the "circle" of the necessary elements of unjust enrichment. *See Jo-Ann Stores, Inc. v. Property Operating Co., LLC,* 91 Conn. App. 179, 194, 880 A.2d 945 (2005); *Marlin Broadcasting, LLC v. Law Office of Kent Avery, LLC,* 101 Conn. App. 638, 651, 922 A.2d 1131 (2007). Therefore, Hennessey unjustly received a benefit separate and distinct from the benefit conferred on the Hennessey Co. *Purcell,* 105 Conn. App. at 7.

It is irrelevant to the court's determination of the issue of whether Hennessey was unjustly enriched that he may not in fact have been personally liable to the plaintiff. There is a presumption of good faith that attaches to every pleading. *See Dreier v. Upjohn Co.,* 196 Conn. 242, 492 A.2d 164 (1985). The only logical way

out of a binding admission arising from these facts would be if the trial court actually were to buy into Hennessey's "tongue in cheek" assertion that the expenses he incurred were defined as his personal time and not the invoices of the plaintiff and others involved.

WHEREFORE, for all the foregoing reasons, the plaintiff respectfully requests the court to grant its petition for certification to appeal from the judgment of the Appellate Court in this case.

PLAINTIFF, JAMES P. PURCELL ASSOCIATES, INC.

By:_____

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CERTIFICATION

This is to certify that the foregoing motion and attached Appendix are in compliance with Practice Book §§66-3 and 84-5, and that a copy of the same was mailed, postage prepaid, this 7th day of January 2008, to all counsel and pro se parties of record as follows:

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_____
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APPENDIX

A. Opinion(s) of the Appellate Court

B. SunAmerica complaint (introduced at trial by judicial notice)

C. List of Parties

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