2014 WL 7896028 (Conn.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Connecticut.
Hartford County

CONNECTICUT HOME HEALTH SERVICES, LLC, d/b/a Right at Home of Connecticut,

v.

Ann FUTTERLEIB, et al.

No. HHD-CV13-6039949-S.
October 20, 2014.

Defendants' Post Trial Brief

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The Defendants, Ann and Alfred Futterleib, respectfully submit their Post-Trial Brief. Additionally the Defendant's Motion for Dismissal (doc # 152) is also to be ruled upon by the Court. The Defendants request that their Motion for Dismissal be granted or alternatively that judgment enter on their behalf.

I. THE STIPULATIONS ON THE RECORD:

1. Exhibit A is a copy of the alleged Services Agreement referenced by CHHS in its initial Complaint (counts 1, 2 and 4), it is the Services Agreement referred to in its acknowledged responses to interrogatories 4 and 5 (Defs' Ex. C) and a copy of which was disclosed by CHHS on or about October 23, 2013 in response to production request 2 (Defs' Ex. C). Trans. 4-8-14 pp. 4-5

2. The Defendants admit that they received services from CHHS and nonperformance is not an issue in dispute. Trans. 4.7.14 p. 94.

II. THE CONDITIONAL ADMISSION OF EVIDENCE & OBJECTIONS:

1. Defendants' Trial Exhibits B, D, E, F, G, J, K, L, M, N and O were conditionally admitted over objection of CHHS. The objections were that the documents are not relevant given that the complaint was amended and the Plaintiff was no longer pursuing claims based on the Services Agreement. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Sec. 4-1 Conn. Code of Evidence.

Defendants maintain that the these exhibits are relevant to the pleadings, specifically the defense of unclean hands concerning the knowing pursuit by CHHS of claims based upon a forged contract, which were only withdrawn when its motion to amend the complaint was granted at the commencement of trial. *See* Defs' third special defense (doc # 107). Defendants' maintain that it was their staunch defense of CHHS' claims based upon the forged Services Agreement (Counts 1, 2 and 4 of the first Complaint) that caused CHHS to amend its complaint and belatedly abandon its efforts to pursue the forged contract. The Defendants' made the strategic decision to fully disclose the evidence of the forgery to CHHS through its special defense and the discovery that it undertook, including but not limited to written discovery requests (Defs' Ex. C), the depositions of Robert Scandura and Terri

Geltman and Request for Admissions (Defs' Ex. V).[1] Should the court sustain the Plaintiff's objections to these exhibits then the Defendants will be rendered unable to present its evidence in support of the unclean hands defense.

Ex. B - emails to CHHS's counsel re: contract - relevant to establish notice of forgery to plaintiff.

Ex. D- letter from Attny. Spinella producing contract- relevant to link the disclosure of the forged contract to CHHS.

Ex. E- letter from Attny. Spinella re: discovery responses, including information on the contract-relevant to link the disclosure of the forged contract to CHHS.

Ex. F- demand letter from Attny. Spinella- relevant to demonstrate CHHS' claims made under the forged contract pursing the defendants and the prior defendant Mr. Hendrickson.

Ex. G- disclosed records transmitted from CHHS to Attny. Spinella via facsimile on January 17, 2013, including the contract - relevant to demonstrate the source of the forged contract was CHHS.

Exhibits J-N are essential exhibits by which the Defendants can prove that the signature of Mr. Hendrickson appearing on the Services Agreement (Ex. A) is a forgery and has been copied from one of the checks (Ex. L) that he signed making payment to CHHS. Exhibits J and K are copies of unsigned checks that demonstrate that the signature line contains a symbol “MP” appearing at the extreme right edge of the line. It is that same symbol that appears on the CHHS Services Agreement (Ex. A). Exhibit L is an acknowledged check making payment to CHHS that was signed by Mr. Hendrickson. Exhibits M and N are enlargements of the signature blocks from the check and the Services Agreement. These enlargements allow for a better comparison of Mr. Hendrickson's signature appearing on check # 888 (Defs' Ex. L), the client signature appearing on the Services Agreement (Defs' Ex. A) and an enhanced view of the symbol “MP” appearing on the end of both signature lines. (compare Defs Exs. A & J-N).

Ex. J- copy of Defendants' unsigned check - demonstrative evidence, stated to be fair and accurate to clearly show the symbol “MP” as it appeared at the end of the signature line on the check. *See* Tait's Handbook of Conn. Evid., 3rd Ed., Sec 11.15.1.

Ex. K- an original of Defendants' check[2] - demonstrative evidence, stated to be fair and accurate to again demonstrate that the symbol “MP” appears at the end of the signature line on the Defendants checks. *See* Tait's Handbook of Conn. Evid., 3rd Ed., Sec 11.15.1.

Ex. L- copy of the check # 888 signed by Robert Hendrickson - relevant as an acknowledged signature of Mr. Hendrickson and direct evidence of the source of the signature copied onto the Services Agreement (Defs' Ex. A).

Ex. M- copy of enlarged signature block from check # 888 (Defs' Ex. L) - demonstrative evidence, stated to be fair and accurate, where Mr. Hendrickson explained the process in creating the enlargement of the signature block (Trans. 4-7-14 p. 70) and clearly demonstrates the complete signature of Mr. Hendrickson (*see also* Ex. X; original signature of Mr. Hendrickson) and the symbol “MP” appearing at the end of the signature line of the check. *See* Tait's Handbook of Conn. Evid., 3rd Ed., Sec 11.15.1.

Ex. N- copy of enlarged signature block from the CHHS contract (Defs' Ex. A) - demonstrative evidence, stated to be fair and accurate, where Mr. Hendrickson explained the process in creating the enlargement of the signature block (Trans. 4-7-14 p. 72) and when compared with Exhibits J, K, L and M clearly demonstrates that the tops of three letters of the signature have been “cut-off” and that the symbol from Mr. Hendrickson's check; “MP” appears at the end of the signature line on the CHHS Services Agreement. Further by comparing Exhibits A (Services Agreement) and N (enlargement of signature block from Services Agreement) with Exhibit I (an original CHHS Services Agreement mailed to Mr. Hendrickson) the court can

find that that the original Services Agreement (Ex. I) does not have the symbol “MP” appearing on the client's signature line. *See* Tait's Handbook of Conn. Evid., 3rd Ed., Sec 11.15.1.

Ex. O- copy of executed Power of Attorney forms - relevant evidence of the legal authority of Robert Hendrickson to act on the Defendants' behalf on health care and financial issues.

III. PROPOSED FINDINGS OF FACT:

The Court could reasonably find from the evidence presented at trial the following facts:

1. Mr. Scandura was at all relevant times the owner and either the president or vice president of the Plaintiff, CHHS. 4-3-14 p. 20, 68, 4-4-14 p. 45.

2. The CHHS principal place of business and office is located at 30 Jordan Lane, Wethersfield, Connecticut. Trans. 4-3-14 p. 20.

3. CHHS was at all relevant times a registered “homemaker-companion agency”. Trans. 4-7-14 p. 9.

4. CHHS had submitted to the Department of Consumer Protection on or about September 28, 2006 its “Application to State Homemaker Companion Agency”, signed by Mr. Scandura that certified, in part, “[t]he agency will provide individualized contracts or service plans for each client that identify the scope, type, frequency and duration of service.” Mr. Scandura acknowledged the requirement by initialing immediately next to the statement. Defs' Ex. P, Trans. 4-7-14 pp. 8-9.

5. Mr. Scandura met with Ann and Alfred Futterleib at their residence 54 Holly Road, East Hartford, Connecticut shortly before CHHS began to provide care on February 13, 2010. Trans. 4-3-14 p.57, Trans. 4-4-14 pp. 4, 8.

6. Mr. Scandura testified that he negotiated and entered into an oral agreement with the Futterleibs while at their residence. Trans. 4-3-14 p. 56.

7. There was no oral agreement entered into by and between CHHS and the Futterleibs. Deposition testimony of Ann Futterleib, in lieu of her court room testimony, pp. 19, 23, 25.

8. No oral agreement was entered into by and between CHHS and the Futterleibs in which the Futterleibs agreed not to hire CHHS employees, interfere with their employment or cause employees to transfer to another employer, without prior written consent from Right at Home. Deposition testimony of Ann Futterleib, in lieu of her court room testimony, pp. 19, 23, 25.

9. No contract or service plan for the provision of homemaker services was drafted and delivered by CHHS to the Futterleibs or their authorized representative within seven calendar days of the date that CHHS commenced providing homemaker services, on or about February 13, 2010. *See* Defs' Ex. I., Trans. 4-7-14 p. 34.

10. Robert Hendrickson is the son of the Defendants.

11. CHHS mailed a proposed written Services Agreement to the Robert Hendrickson 33 to 35 days after placing a caregiver in the Futterleibs premises. Defs' Ex. I (hereinafter “Proposed Services Agreement”). *See* Defs' Ex. I., Trans. 4-7-14 p. 34.

12. Neither the Defendants nor their representative executed the Proposed Services Agreement. Trans. 4-7-14 pp. 34-35.

13. CHHS, through an assigned employee/caregiver, provided in-home assistance and care services for Mr. and Mrs. Futterleib at their residence commencing on or about February 13, 2010.

14. Robert Hendrickson mailed approximately 25 checks to CHHS drawn on a joint account of Mr. Hendrickson and his parents. Trans. 4.7.14 p. 35, 37, 63; Defs' Ex. H.

15. All of the checks were signed by Mr. Hendrickson.

16. CHHS transacted and made copies of each of the checks and retained them with the Defendants' financial records. Defs' Ex. H.

17. The last check issued by Mr. Hendrickson to CHHS was check # 888, dated November 26, 2012. Trans. 4-7-14 pp. 37-38, 61, Defs' Exs. L and H (*see* p. 29 of fax transmission line on top of each page).

CHHS' Collection Efforts:

18. CHHS, through its legal counsel, called Mr. Hendrickson informing him that he had signed a written contract with CHHS and that he was obligated to pay an outstanding balance on the account. During that conversation Mr. Hendrickson requested a copy of the contract. Trans. 4-7-14 p. 40.

19. Via certified letter dated January 18, 2013 CHHS, through its legal counsel, made demand upon Robert Hendrickson under the contract [3]. Trans. 4-7-14 pp. 41-43, Defs' Ex. F.

20. CHHS initiated suit against Robert Hendrickson and his parents and filed the Summons and Complaint with the court on March 19, 2013. *See* original complaint and Summons.

21. The Complaint was in four counts and three of the four counts were specifically based upon an alleged executed written Services Agreement between CHHS and either Mr. Hendrickson and/or his parents. *See* original complaint.

22. The Complaint failed to attach as an exhibit a copy of the alleged written CHHS Services Agreement. *See* original complaint.

23. On February 19, 2013 Mr. Hendrickson and the Defendants, through their counsel, sought a copy of the CHHS Services Agreement from CHHS's legal counsel. Trans. 4-7-14 pp. 45-46, Defs' Ex B.

24. On February 20, 2013 a copy of the Services Agreement was sent via facsimile from CHHS's legal counsel to Mr. Hendrickson and the Defendants' counsel. Defs' Ex D.

25. The Services Agreement had been signed and initialed in on behalf of CHHS by its president, Eileen Scandura. Trans. 4-8-14 pp. 37-38.

26. On February 22, 2013 Mr. Hendrickson and the Defendants, again through counsel, requested an opportunity to review the original of the CHHS Services Agreement at the office of CHHS's counsel. Defs' Ex B.

27. Mr. Hendrickson did not sign the Services Agreement and the his signature appearing on the contract was copied onto the document from one of the payment checks to CHHS that he had signed, most likely check # 888 (Defs' Ex. L). Trans. 4-7-14 pp. 51, 54, 56, 57, 59, 61, 62, 66-72; Defs' Exs. A, J, K, L, M, N, X.

28. CHHS copied the signature block from Mr. Hendrickson's last check (Defs' Ex. L) onto the CHHS Services Agreement, filled in the remaining open fields on the form (Defs' Ex. A) and transmitted it via facsimile to its counsel on January 17, 2014.

29. CHHS then filed suit upon the forged Services Agreement (Defs' Ex. A). Stipulation # 1.

30. The Defendants and Mr. Hendrickson served production requests upon the Plaintiff seeking the original of the executed Services Agreement, however the Plaintiff was unable to locate and produce the original of such a document. Trans. 4-8.14 p. 36, Defs' Ex. C.

31. The only version of the alleged Services Agreement ever disclosed by the Plaintiff bears the facsimile transmission line from CHHS to its legal counsel dated January 17, 2013. Defs' Ex. A.,

32. Mr. Hendrickson and the Defendants filed a Request to Revise seeking the specific identity of the person or persons who had allegedly executed the CHHS Services Agreement. *See* Request to Revise (doc # 102).

33. The Plaintiff filed its objection asserting in part that the use of the term "defendants" in describing the parties who had executed the contract meant all defendants and was subject to discovery. Objection to Request to Revise (doc # 104). The Court sustained the objection. (Doc # 104.86).

34. Mr. Hendrickson and the Defendants filed their Special Defenses (doc # 107) specifically alleging in the third special defense that the purported signature on the CHHS Services Agreement was a forgery.

35. On February 4, 2014 the Defendants filed their Request for Admissions (doc # 118) in which the majority of the requests concerned the CHHS Services Agreement. Defs' Ex. V.

36. Plaintiff failed to file its objections in the time ordered by the court. (Doc # 119.86)

IV. LAW AND ARGUMENT

a. All of the Defendants' Requested Admissions are Judicially Admitted.

The Defendants' served upon the Plaintiff written admissions (Defs' Ex. V). The Plaintiff filed a motion for extension of time which was granted allowing until March 13, 2014 in which to respond to the requests. (Docs. # 119 and 119.86) The Plaintiff failed to file its response with the court within the time granted. Practice Book § 13-23 sets forth that "[e]ach matter of which an admission is requested is admitted unless ... within such time as the judicial authority may allow, the party to whom the request is directed files and serves upon the party requesting the admission a written answer or objection ..." § 13-23(a) (emphasis added). Accordingly all of the requests are admitted.

b. Connecticut General Statute § 20-679 Prohibits Enforcement of CHHS' Alleged Oral Contract or Its Unjust Enrichment Claims.

§ 20-679, entitled, "Written contracts or service plans. Requirements", sets forth that:
Not later than seven calendar days after the date on which a homemaker-companion agency commences providing homemaker services or companion services, such agency shall provide the person who receives the services, or the authorized representative of such person, with a written contract or service plan that prescribes the anticipated scope, type, frequency, duration and cost of the services provided by the agency. In addition, any contract or service plan provided by a homemaker-companion agency to a person receiving services shall also provide notice (1) of the person's right to request changes to, or review of the contract or service plan, (2) of the employees of such agency who, pursuant to section 20-678 are required to submit to a comprehensive background check, and (3) that such agency's records are available for inspection or audit by the Department of Consumer Protection. No contract or service plan for the provision of homemaker or companion services shall be valid against the person who receives the services or the authorized representative of such person, unless the contract or service plan has been signed by a duly authorized representative of the homemaker-companion agency and the person who receives the services or the authorized representative of such person ...

(Emphasis added.) (2006, P.A. 06-187, § 61.)

The Department of Consumer Protection has promulgated regulations mirroring the statute which set forth that:
(a) A written contract or service plan shall be provided by the agency to the client, and a copy shall be kept by the Homemaker-Companion Agency. The agency shall not enforce the written contract or service plan unless it is signed by both the agency and client.

(b) Written contracts or service plans shall:

(1) provide a list of the anticipated services to be provided by the agency to the client, the term and cost of said services, a clear definition of the employee, provider and client employment relationship, safeguards for securing personal client information, a list of provider job categories such as "live-in" or "daily call," and job duties;

(2) contain the homemaker-companion agency policy for the acceptance of gratuities and gifts by the homemaker-companion agency's employees and independent contractors on behalf of the client; and

(3) contain a process for the client to file a complaint with the homemaker-companion agency. A process shall be made available for individuals other than a client to file a complaint.

State of Connecticut Regulation § 20-670-3 (Emphasis added.)

Both C.G.S. § 20-679 and state regulation § 20-670-3 mandate a signed written contract between the homemaker-companion agency and its client within 7 days of the when services initiated and the failure of CHHS to comply acts to bar it from recovery of its claims for the services provided to the Futterleibs. Sections 20-670 to 20-680, Chapter 400, are the relevant statutes concerning and titled "Homemaker-Companion Agencies" and are hereinafter collectively referred to as the "HCA". CHHS is a "homemaker-companion agency" as that term is defined by statute[4]. C.G.S. § 20-679 and state regulation § 20-670-3 require that the homemaker-companion agency provide a written "contract or service plan" to be signed by the recipient or their authorized representative and failing to do so invalidates the contract and bars recovery. It is conceded that CHHS failed to comply with both the statute and the regulation by failing to provide such a written service plan within 7 days of the initiation of services and failing to have a service plan signed by the client or authorized representative of the client.

c. The Requirement for an Executed Written Contract under § 20-679 is Clear and Unambiguous and the Plain Meaning of the Statute Bars Recovery by a Homemaker-Companion Agency Where it has Failed to so Comply.

§ 20-679 is clear and unambiguous in its meaning and requires a homemaker-companion agency to execute a written contract or Services Agreement with its client or the client's authorized representative. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Conn. General Statutes § 1-2z. "One of the most frequently invoked rules of statutory interpretation instructs that courts need not, and do not, interpret a facially clear and unambiguous statute, and only ambiguous statutes are subject to the process of statutory interpretation." *Sutherland Statutes and Statutory Construction* (2014), Part V. Statutory Interpretation, Subpart A. Principles and Policies, § 45:2, *citing to State v. Springer,* 149 Conn. 244, 178 A.2d 525 (1962).

A court's fundamental objective is to ascertain and give effect to the apparent legislative intent, in other words, to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of the case. *State v. Dupigney,* 295 Conn. 50, 988 A.2d 851 (2010); *DeFonce Construction Corporation v. State,* 198 Conn. 185, 187, 501 A.2d 745 (1985).

"It has often been said that the legislative intent is to be found not in what the legislature meant to say, but in the meaning of what it did say. Where the language used is clear and unambiguous, we will not speculate as to some supposed intention." *Caulkins v. Petrillo,* 200 Conn. 713, 716 (Conn 1986) (Internal citations and quotation marks omitted). "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." Conn. General Statutes § 1-1(a).

The language of § 20-679 is clear and unambiguous. The analysis undertaken by the *Caulkins* court in the context of the HIA is directly analogous to the analysis of the same question under the HCA:
The language of 20-429(a) [HIA] is clear and unambiguous: 'No home improvement contract shall be valid unless it is in writing....' The use of the word 'no' in the statute is self-explanatory. The use of the word 'shall' by the legislature connotes that the performance of the statutory requirements is mandatory rather than permissive. *See, e.g., Hossan v. Hudiakoff,* 178 Conn. 381, 383, 423 A.2d 108 (1979); *Akin v. Norwalk,* 163 Conn. 68, 74, 301 A.2d 258 (1972).... 'Valid' is defined by Webster's New International Dictionary as, 'having legal strength or force....' Read literally, then, it is clear that the plain language of the statute does not provide an exception to the requirement that home improvement contracts be in writing.

Caulkins at 717-718.

Applying the same analysis performed by the *Caulkins* court yields the same result under the HCA. The language chosen by the legislature leaves no doubt that for homemaker-companion agency services to be "valid" and thus enforceable they must be in writing, contain the enumerated elements as set forth in the statute [5] and be signed by client or representative.

To the extent that CHHS argues that this court should imply an exception to § 20-679 for agreements that have been fully performed by the homemaker-companion agency similar to the part performance doctrine of the statute of frauds it must be rejected by the court. *See e.g. Caulkins* at 718-720.

d. § 20-679 Bars Plaintiff from Recovery under its Oral Contract and Unjust Enrichment Claims.

Analogy to the Home Improvement Act ("HIA"), C.G.S. § 20-429 and the plethora of case law that has developed is appropriate where this appears to be a case of first impression and where the HCA requirements are analogous to those under the HIA. The court should be guided in its assessment by the body of case-law that has addressed the HIA, particularly the bar against recovery under oral contract or quasi contractual claims. The HIA when it was first passed as Public Act 79-606 read in relevant part that, "[n]o home improvement contract shall be valid unless it is in writing...." § 20-429. The well-developed body of law concerning the HIA makes abundantly clear that there is no right of recovery under either an oral contract or quasi-contractual theories, such as unjust enrichment, with certain limited exceptions.
Our Supreme Court, in interpreting the act, has established the general rule that a contractor who fails to comply with the act is prohibited from recovery under either a breach of contract claim or quasi-contractual methods of recovery, such as unjust enrichment or quantum meruit. *Liljedahl Bros., Inc. v. Grigsby,* 215 Conn. 345, 350, 576 A.2d 149 (1990); *A. Secondino & Son, Inc. v. LoRicco,* 215 Conn. 336, 340, 576 A.2d 464 (1990); *Barrett Builders v. Miller,* 215 Conn. 316, 322-23, 576 A.2d 455 (1990). The court, however, in *Habetz v. Condon,* 224 Conn. 231, 237, 618 A.2d 501 (1992), held that "[p]roof of bad faith ... serves to preclude the homeowner from hiding behind the protection of the act." The court also stated that the existence of bad faith is a question of fact. Id., at 237 n. 11, 618 A.2d 501. "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a **neglect** or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.... Bad faith means more than mere negligence; it involves a dishonest purpose." (Citation omitted; internal quotation marks omitted.) Id., at 237, 618 A.2d 501.

MacMillan v. Higgins, 76 Conn. App. 261, 270, 822 A.2d 246, 252 (2003). Notably CHHS has failed to even plead, much less establish with any evidence an analogous "bad faith" exception to the HCA.[6] Accordingly, pursuant to § 20-679 the alleged oral contract and claim for unjust enrichment are not enforceable.

e. Should the Court Undertake an Analysis of the Legislative History of § 20-679 it Will Find that the Record Does Not Support an Exception to the Bar Against Recovery.

Even though the Defendants' claim that the statute is unambiguous to the extent that the court finds ambiguity and to the extent that the Plaintiff argues that the legislature could not have intended the statute to create a bar to the enforcement of an oral contract which has been fully performed or prevent a claim for unjust enrichment then an analysis of the legislative history of § 20-627 becomes necessary. However what is revealed is that the statute was enacted to protect a vulnerable class; the **elderly** and infirm and there is a complete lack of support for the CHHS's apparently unarticulated position that the statute does not bar all recovery by the homemaker-companion agency; whether based on oral contract, quasi contract or tort, where that agency has failed to comply with the statute. The legislative history of the statute, however, does not reveal any intention on the part of the legislature to qualify or limit the effect of the statute as CHHS apparently believes. Quite to the contrary, the record demonstrates the clear understanding of the speakers that a written signed contract was a necessity. A legislator during the public hearing phase stated that the act "requires background checks of those individuals, the employees of the agencies, that would be going into the home, and it would require a contract to be entered into with the client's family so that they would know exactly what services would be provided and the correct compensation." (Emphasis added.) *SB 44, 2006 Sess.*, p. 259, remarks of Representative Winkler. Additionally, the same legislator, in questioning a homemaker-companion agency representative, stated: "I want to know how you read it that way because the way that I read is that unless prior to providing such services the agency provides the person who is to receive the services with a written contract or service plan. It would seem to me that's free to amend that contract subsequently, but just says they can't operate in the absence of a contract."." *Id* at 284-285 (Emphasis added.) In submitted written remarks Representative Feltman expressed that "[t]his legislation would help address a laundry list of both documented and alleged improprieties in the homecare industry in Connecticut in recent years. *Id* at 421.

Attorney Martin Acevedo, general counsel for Companions and Homemakers, Inc. speaking at the hearing stated, "[l]et me just be clear. Number one, we do agree that these contracts are required, there's no question about that. They are crucial, they're important." ... "I wanted to make it very clear that contracts ought to be required. We have used contracts since our inception and the contracts should provide a description of what kinds of services are being provided to the client." (Emphasis added) *Id.* In a further exchange between Attorney Acevedo and representative Feltman it was agreed by both that the contract was necessary before the services were to be provided. (Rep. Feltman- "I don't read the bill that way. I don't read the bill to say that before an amendment is proposed there has to be a resigning. All it says is there's got to be before a relationship is entered into there has to be a contract." Attny. Acevedo- "If that is the case we have absolutely no problem and no object with that. In fact you know we certainly support that.") *Id* at 286. Attorney Acevedo later made clear that the purpose of the bill was to protect the **elderly**; "I just wanted add that it's clear that the purpose of the bill is to protect the **elderly** consumer." *Id* at 294.

The Commissioner for the Department of Consumer Protection echoed the necessity for a signed written contract; "... they require the agency draft written service plan tailored to each person receiving the care.... that there is some kind of a contract or agreement showing exactly the services that are being provided by these individuals in order for us to do our due diligence in checking out the complaints. *Id* at 263. In a written statement submitted by the Commissioner he further amplified the necessity of a signed written contract; "[t]his written contractual relationship will serve to eliminate ambiguities and disputes over services, while also providing a clear record in the case of a complaint." *Id* at 423.

Senator Prague stated at the hearing that "... I do firmly believe that the contract needs to be signed. Somebody needs to be responsible and with major changes there has to be a signature on that major change contract...." *Id* at 289.

The Office of Legislative Research Bill Analysis reads:
INDIVIDUALIZED CONTRACT OR SERVICE PLAN REQUIRED

Under the bill, before providing homemaker or companion services to anyone, a homemaker or companion agency must first give the prospective client a written contract or service plan that prescribes the services' scope, type, frequency, duration, and cost. Services cannot begin until the client accepts and signs the contract or service plan. (Emphasis added) The bill also requires the contract or service plan to provide notice (1) of the individual's right to request changes to it or to review it, (2) that all the agency's employees have submitted to a state criminal history records check, and (3) that the agency's records are available for DCP inspection or audit.

Conn State Library Legislative Reference Sec. SB 44, file No. 96.

Representative Winkler when reporting the bill stated: “But everyone I'm sure, here in the room, knows how vulnerable our **elderly** are, and how easily they can be taken advantage of.... It requires a contract to be provided to the client and the family, so they know what services to expect.” Conn. Gen Assembly House Proceedings 2006, Vol 49, Part 19, p. 5923. There was no further discussion or comment and the bill passed by voice vote. *Id* at 5445.

Additionally, the “Statement of Purpose” of the Department of Consumer Protection Regulations concerning the act reads in relevant part that;
[t]he purpose of this regulation is to implement a registration process for companies that provide homemaker companion services. These services are typically provided to **elderly** home-bound residents. The registration process includes provisions that will help protect consumers by assuring all homemaker companions undergo a criminal history background check, that written detailed contracts are signed between the agencies and their clients, that agencies properly display their registration number in all advertisements, and that the Department may provide oversight. The Department believes this registration program will protect the public health and safety.

State of Connecticut Regulation § 20-670-3. (Emphasis added.)

It is apparent that this law was passed for the protection of the public and that the remedial purposes of the statute would be undermined if this court were to permit a homemaker-companion agency to enforce an oral contract or unjust enrichment claim on the grounds claimed. For example, if a homemaker-companion agency could, without a written contract, perform and provide certain work and services and then allege an oral agreement for the same services alleged to have been fully performed, the purpose and clear intent of § 20-679 would be thwarted. This court must presume, in the absence of any indication to the contrary, that the legislature intended the statute to be interpreted exactly as it is written; that is, “[n]o contract or service plan for the provision of homemaker ... services shall be valid ... unless the [written] contract or service plan has been signed....” Throughout the public record it is plainly acknowledged that a written contract between the parties is an essential perquisite to providing services. It is Defendants' position that the record is completely devoid of any suggestion let alone a discussion and articulation that in the absence of such a signed written contract that the homemaker-companion agency may proceed to collect from the client for any services that were provided. The record is clear that a written contract is required under the statute.

Accordingly it is plain that the legislative history does not support in the slightest fashion the claims of CHHS; it makes no express or implied mention of an exception to the writing requirement for contracts which have been partly or fully performed by the homemaker-companion agency. Consequently, in the absence of any legislative intent to qualify or limit the effect of the statute, this court will not “speculate upon any supposed intention not appropriately expressed in the act itself.” *Caulkins* at 720.

i. A contrary ruling will violate the Reasonableness Standard of Statutory Construction.

Even if the court were to find ambiguity in the HCA it does not allow CHHS a recovery against the Defendants. Such an outcome is directly contrary to and produces the unreasonable result of allowing CHHS to fail to comply with the HCA and to

reward its failure to comply by allowing recovery for the provision of services against the Futterleibs on the basis of an oral contract, quasi contract and/or tort[7]. "[A] golden rule of statutory interpretation instructs that, when one of several possible interpretations of an ambiguous statute produces an unreasonable result, that interpretation should be rejected in favor of another which produces a reasonable result." *Sutherland Statutes and Statutory Construction* (2014), Part V. Statutory Interpretation, Subpart A. Principles and Policies, § 45:12, *citing to State v. Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003); *Sanzone v. Board of Police Com'rs of City of Bridgeport*, 219 Conn. 179, 592 A.2d 912 (1991) (abrogated on other grounds by, *State v. Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003)); *Citerella v. United Illuminating Co.*, 158 Conn. 600, 266 A.2d 382 (1969); *Hibner v. Bruening*, 78 Conn. App. 456, 828 A.2d 150 (2003)).

The legislature could have used language to allow for recovery by the homecare agency in the absence of a signed written contract but chose not to do so. This court must nor read or attribute such language into the statute and create such a right where none exists.

f. Connecticut General Statute § 42-135a, the Home Solicitation Act ("HSA") Prohibits Enforcement of the Alleged Oral Contract.

The Home Solicitation Act ("HSA") prohibits the contract alleged to have been made between the plaintiff and the Futterleibs, where it was not in writing. *See* C.G.S. § 42-134a, et al. The HSA provides in relevant part that "[n]o agreement in a home solicitation sale shall be effective against the buyer if it is not signed and dated by the buyer...". § 42-135a. A "Home solicitation sale" is defined, in relevant part, as "*a sale ... of consumer goods or services ... in which the seller* or his representative *personally solicits the sale ... and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller.*" § 42-134a(a) (emphasis added). " *'Consumer goods or services' means goods or services purchased ... primarily for personal, family, or household purposes....*" § 42-134a(b) (Emphasis added).

CHHS' oral contract claim is therefore unenforceable where:
i. CHHS sold medical assistance and homecare services to the Futterleibs, which are personal, family and household in nature;

ii. The sale was solicited at the residence of the Futterleibs by the owner of CHHS at a location which was not the principal place of business of CHHS; and

iii. No signed agreement was executed by the Futterleibs with CHHS.

g. Plaintiff's Oral Contract (Count I) and Unjust Enrichment (Count II) Claims Cannot Be Used to Circumvent the Bar Against the Enforcement of an Illegal Contract.

Connecticut General Statute § 20-627 prohibits enforcement of a quasi-contractual claim of unjust enrichment. An unjust enrichment claim simply cannot be used to circumvent the bar against the enforcement of an illegal contract. The Plaintiff's Second Count against the Defendants is based on unjust enrichment. Connecticut courts have consistently denied recovery based on theories of unjust enrichment or quantum meruit where a contract is unenforceable as a matter of public policy because it violates a statute. *See Barrett Builders v. Miller*, 215 Conn. 316, 576 A.2d 455 (1990) (where statute specifically provides that a contract that fails to comply with the statute is not valid, court denied recovery in quantum meruit or unjust enrichment); *Design Development, Inc. v. Brignole*, 20 Conn.App. 685, 570 A.2d 221 (1990) (plaintiff who did not have architect's license as required by statute could not recover on quantum meruit or unjust enrichment). In *Design Development*, the court specifically noted that "[w]hen the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, then there can be no recovery upon quantum meruit." (Citations omitted; internal quotation marks omitted.) *Design Development*, *supra*, 688-89. In addition, in *Barrett Builders*, the court noted that "Connecticut law has long recognized that restitution is not

available for performance rendered pursuant to a contract that is unenforceable on public policy grounds." *Barrett Builders*, supra, 323-24. To allow such recovery would defeat the purpose of the statute. *Id.*

Under Connecticut law, the Plaintiff may not recover under a theory of unjust enrichment because the contract itself is unenforceable on public policy grounds. Accordingly, because Plaintiff cannot use its unjust enrichment claim to circumvent the bar against the enforcement of an illegal contract, and because Plaintiff cannot, plead an unjust enrichment claim separate and apart from the alleged illegal contract, Plaintiff's claim for unjust enrichment (Count Two) must fail. *See Solomon v. Gilmore*, 248 Conn.769, 774-775 (1999); *Barrett Builders v. Miller*, 215 Conn. 316, 576 A.2d 455 (Conn. 1990); *McKnight v. Gizze*, 119 Conn. 251, 256 (Conn. 1934); *Design Development, Inc. v. Brignole*, 570 A.2d 221, 222-24 (Conn.App. 1990).

The Supreme Court in *Solomon v. Gilmore*, 248 Conn.769, 774-775 (1999), similarly concluded that it would not allow recovery in a case concerning enforceability of a contract entered into by an unlicensed mortgagor in contravention of the secondary mortgage act.

The Court stated that:
Our approach to this question, however, is guided by three well settled principles of law. First, in light of the fact that 36a-511 does not expressly address the enforceability of a contract entered into by an unlicensed lender, we undertake our consideration of this question bearing in mind that in construing statutes, "our fundamental objective [is to ascertain and give effect] to the apparent intent of the legislature." (Internal quotation marks omitted.) *Packer v. Board of Education*, 246 Conn. 89, 115, 717 A.2d 117 (1998). Second, it is well established that contracts that violate public policy are unenforceable. *Konover Development Corp. v. Zeller*, 228 Conn. 206, 231, 635 A.2d 798 (1994). Third, the secondary mortgage act is a remedial statute that is intended to protect the consumer. Thus, because "remedial statutes should be construed liberally in favor of those whom the law is intended to protect"; *Dysart Corp. v. Seaboard Surety Co.*, 240 Conn. 10, 18, 688 A.2d 306 (1997); we liberally construe the secondary mortgage act in favor of the defendant.

Solomon at 774-775.

The *Solomon* court continued in its analysis:
[a]lthough the legislature did not expressly provide that failure to comply with 36a-511 will render the secondary mortgage act unenforceable, there is no evidence, either in the text of the statute or in the legislative history surrounding passage of the various amendments, that the legislature intended violators to be subject only to those penalties stated in the secondary mortgage act. On the contrary, a decision that a secondary mortgage loan issued in violation of 36a-511 is unenforceable would be more consistent with and would better preserve the protective purpose of the statute.

Moreover, [i]t is unquestionably the general rule, upheld by the great weight of authority, that no court will lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged right directly springing from such contract .... This court has further said that every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute. (Internal quotation marks and citations omitted.)

Id at 784-785.

Both the *Solomon* and *Barrett Builders* cases stand for the proposition that the court looks beyond the language of the statutes (Secondary Mortgage Act and HIA) and that recovery could not be had in quasi-contract even though the language of the those respective acts did not specifically prohibit restitutionary recovery. The HCA must be treated similarly.

Similarly, as the Appellate Court of Connecticut held in *Design Development, Inc. v. Brignole*, a case where architectural services were rendered by an individual without an architectural license in violation of state law that no recovery could be had on the services that had been rendered despite the fact that the defendant had known that the person was not an architect at the time of entering the contract. The court stated that;
The plaintiffs claim that the defendants cannot assert the alleged illegality of the contract as a defense because they knew that Cazetta was not a licensed architect. They further assert that should they be denied relief, the defendants will be unjustly enriched and, therefore, that the trial court was correct in ruling that they should be able to recover based upon quantum meruit. We do not agree.

The plaintiffs' argument and the trial court's finding that recovery should be permitted on the basis of quantum meruit or unjust enrichment is without merit. 'When the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, then there can be no recovery upon a quantum meruit.'

Brignole, 570 A.2d at 688-89, quoting *McKnight v. Gizze*, 119 Conn. 251, 256.

The Supreme Court of Connecticut in *Barrrett Builders* concluded that there could be no right of recovery under quasi contract where there had not been complete compliance with the written contract requirement of the HIA. The court's analysis offers useful guidance and compels the conclusion that the HCA must be treated similarly.
The issue in this appeal is whether the trial court's ruling in favor of the defendant homeowner mistakenly interpreted 20-429 to bar recovery in quasi contract for home improvements when the contractor has failed to comply with the statute's written contract requirement. The plaintiff contractor contends that there is no indication, either in the express language of the statute or in the legislative history of its enactment, that the legislature intended the Home Improvement Act to preclude its restitutionary cause of action. Since it would have been able to resort to these theories of recovery at common law, the plaintiff argues that the statute should not be construed to abrogate those remedies in the absence of a clear legislative mandate. We are not persuaded.

The starting point for our analysis is *Caulkins v. Petrillo*, 200 Conn. 713, 513 A.2d 43 (1986), in which we considered the ability of a contractor who has failed to comply with 20-429 to recover for completed home improvements. In *Caulkins*, we rejected the contractor's argument that we should imply an exception to the written contract requirement of the Home Improvement Act, analogous to the law allowing recovery for partial or full performance under an oral contract unenforceable under the statute of frauds, when the contractor has fully performed its obligations under the agreement. *Id.*, at 718-19, 513 A.2d 43. After reviewing the language of the statute and its legislative history, we held that the provisions of 20-429 are mandatory rather than permissive, and concluded that, in contrast to the statute of frauds, the Home Improvement Act "does not provide an exception to the requirement that home improvement contracts be in writing." *Id.*, at 717-18, 513 A.2d 43.

The plaintiff nonetheless maintains that our conclusion in *Caulkins* is not dispositive of the issue in this appeal. According to the plaintiff, *Caulkins* held only that an oral contract for home improvements is unenforceable notwithstanding partial or full performance of the contractor's obligations. That holding, it argues, does not address the availability of recovery in quasi contract, a cause of action that does not depend upon the existence of a valid agreement.

*458 In support of this contention, the plaintiff emphasizes that the statute provides only that "[n]o home improvement contract shall be valid unless it is in writing...." (Emphasis added.) General Statutes 20-429(a)(1). The plaintiffs argue that the statute's specific reference to the invalidity of the "contract," in conjunction with the legislature's use of broader language precluding "any action" in the case of the statute governing real estate [215 Conn. 322] brokers; General Statutes 20-325a(a); compels the conclusion that the Home Improvement Act does not bar recovery in quasi contract.

While it is true that the contractor in *Caulkins* argued only that he should be permitted recovery under a theory analogous to the law governing the statute of frauds, and that we therefore did not specifically address the availability of recovery in quasi

contract, the difference between those theories of recovery is insignificant for the purposes of the Home Improvement Act. Recovery for partial or full performance of a contract that is unenforceable under the statute of frauds is based upon principles of restitution. *See* 3 Restatement (Second), Contracts 375 (1981); Restatement, Restitution 108(d) (1937); 2 G. Palmer, Law of Restitution (1978) 6.1, pp. 2-3, and 6.4, pp. 29-32. "It is hornbook law that a party whose agreement is unenforceable under the Statute of Frauds or because of indefiniteness is generally entitled to restitution." *Montanaro Bros. Builders, Inc. v. Snow,* 190 Conn. 481, 488, 460 A.2d 1297 (1983). The plaintiff's quasi contract claim in this case is likewise restitutionary. *Burns v. Koellmer,* 11 Conn.App. 375, 384, 527 A.2d 1210 (1987); G. Palmer, "History of Restitution in Anglo-American Law," c. 3, vol. X, Restitution-- Unjust Enrichment and Negotiorum Gestio, International Encyclopedia of Comparative Law (P. Schlechtriem Chief Ed.) pp. 32-33 (1989). Neither form of recovery is an action on the contract. *See* 1 Restatement (Second), Contracts 141, comment (a) (1981). Our conclusion in Caulkins that the legislature "intended no exceptions" to the written contract requirement, even for restitution when a contractor has fully performed its obligations under the invalid agreement, thus applies with equal force to the plaintiff's claim for quasi contractual recovery in this case.

Furthermore, it is no answer that the Home Improvement Act does not explicitly preclude quasi contract remedies. While the legislature has employed broader language in the real estate broker's statute, that statute encompasses commercial as well as consumer transactions. Moreover, the legislature has also on occasion been explicit in its desire to preserve common law remedies. The parental liability statute, for example, provides that "[t]he liability provided for in this section shall be in addition to and not in lieu of any other liability which may exist at law." General Statutes 52-572(c). The fact that the legislature did not use the "any action" terminology of the real estate broker's statute is thus not conclusive of the issue.

It bears emphasis that the Home Improvement Act "*was passed for the protection of the public.*" *Caulkins v. Petrillo, supra,* 200 Conn. at 720, 513 A.2d 43 (emphasis added). As we have consistently reaffirmed, remedial legislation must be construed liberally; *Mack Financial Corporation v. Crossley,* 209 Conn. 163, 166, 550 A.2d 303 (1988); *Borzencki v. Estate of Stakum,* 195 Conn. 368, 383, 489 A.2d 341 (1985); *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo,* 190 Conn. 510, 520, 461 A.2d 938 (1983); and we have likewise held that the construction of consumer protection statutes is not limited by the rule that statutes in derogation of the common law must be strictly construed. *Rhodes v. Hartford,* 201 Conn. 89, 95, 513 A.2d 124 (1986). We therefore conclude that our decision in *Caulkins* that the written contract requirement of the Home Improvement Act is without exception applies also to the claims asserted in this appeal.

Barrett Builders at 457-458.

Two points of comparison arise between the HIA, as discussed in the *Caulkins* and *Barrett Builder* cases, and the HCA; first, § 20-679 was similarly passed for the protection of one of the most vulnerable groups of the general public; the **elderly** and infirm and thus the statute must be construed liberally and second, the identical language used by the legislature in the two statutes; no contract "shall be valid" unless in writing [8]. The HCA, similar to the HIA, is a remedial statute that is intended to protect the consumer. *See Solomon v. Gilmore,* 248 Conn.769, 774-775 (1999) and the legislative history concerning the HCA *supra.* The only possible exception to the absolute prohibition against proceeding under a claim for unjust enrichment in the context of an illegal contract is where the claimant alleges bad faith on the part of the defendant in raising the illegal contract defense. *See e.g. Barrett Builders* at 460-61. In the present case, of course, Plaintiff has not made any such allegations. To the contrary, rather than alleging fraud or misrepresentation by the Defendants regarding their failure to execute the CHHS Services Agreement, Plaintiff, through its owner, Mr. Scandura, admits that he was aware prior when CHHS commenced suit of the necessity of obtaining a signed contract with the clients of CHHS within 7 days of commencement of services (Trans. 4-4-14 pp. 45-47, 49) and yet CHHS failed to prepare and tender for review the Proposed Services Agreement until 33 to 35 days after services had commenced and it was never executed by the Defendants. Defs' Ex. I. It is contrary to public policy to permit CHHC to fail to comply with the statute and regulations and to be rewarded by allowing recovery under quasi contract or in direct contravention of the law, pursuant to an oral contract.

Further it is of no moment that CHHS attempted belatedly to comply with the law when it did mail to Robert Hendrickson a written Services Agreement that was never executed. § 20-679 requires a signed contract to be valid and enforceable and CHHS bears the responsibility and legal obligation to ensure that it is done. The homemaker-companion agency should establish procedures to ensure compliance with the law not excuses as to why it failed to comply. The recourse of CHHS when it did not obtain a signed Services Agreement was to stop providing services to the Futterleibs or to ensure that it did have the agreement executed. The non-compliance of CHHS with the HCA does not provide it an equitable avenue for an end-around the statute.

Thus, to summarize, the authorities cited above, decided under controlling Connecticut law and specifically in the context of unjust enrichment claims, establish that Plaintiff's unjust enrichment claim based on services provided to Defendants must fail as a matter of law.

h. Plaintiff's Tortious Interference Claim (Count III) Cannot Be Used to Circumvent the Bar against the Enforcement of an Illegal Contract.

For the reasons set forth in the preceding sections the Plaintiff cannot prevail upon its Third Count. What was the 4th Count in the original Complaint has now been transformed from a breach of contract claim arising within the forged Services Agreement, seeking liquidated damages into either a breach of the oral contract or tortious interference with the contract between the CHHS caregiver/employee and plaintiff (3rd Count of Amended Complaint, doc # 137). The DCP regulations require that the "[w]ritten contracts or service plans shall provide ... a clear definition of the employee, provider and client employment relationship ...." § 20-670-3(b). Thus CHHS is required to set forth this type of information in its Services Agreement, which it in fact does. *See* Defs' Ex. A. The CHHS standard Services Agreement in use during 2010 states that:

Client understands that Right at Home has incurred expenses in hiring and maintaining its employees (ie: advertising, recruiting, testing and reference checking). Client agrees not to hire Right at Home employees, interfere with their employment or cause employees to transfer to another employer during the term of this agreement and for 180 days after the termination of this agreement, without prior written consent from Right at Home. If client hires any Right at Home employee, client will pay to Right at Home in advance a fee of 10% of the annualized full-time salary of each such employee or $1,500.00, whichever is greater.

Defs' Ex. A, par 6.

These terms to be enforceable against the Futterleibs would need to be signed by them or their representative and it was not. CHHS is barred from enforcing this claim against the Defendants where it is legally required to include such information in its Services Agreement and failed to get the contract signed by the Defendants or their representative. Therefore CHHS may not side-step the HCA and make alternative legal claims premised on the same facts.

i. CHHS failed to prove damages related to the alleged tortious interference with reasonable certainty.

The only evidence before the court as to the alleged loss suffered by CHHS was the testimony of Mr. Scandura where he testified broadly and without supporting business records or data and essentially "estimated" that it was approximately $40,000. Trans. 4-3-14 pp. 51-52. CHHS failed to provide evidence of the net profit associated with the placement of its caregiver or an industry standard as to net profit derived from a caregiver. *See e.g. Capitol City Personnel Services, Inc. v. Franklin,* 52 Conn. App. 783 (1999).

ii. CHHS failed to comply with written discovery interrogatories and requests for production and must be precluded from introducing such evidence.

As first raised in Defendants Motion in Limine and supporting Memorandum (doc #s 149 & 150) the Plaintiff is precluded from offering evidence of its consequential and/or incidental damages, where it has failed and/or refused to answer interrogatories and deposition questions focusing on these damages and where it has failed to produce responsive documents. CHHS had failed to provide detailed interrogatory responses quantifying its claims for damages, other than the contractual damage claim. In Plaintiff's Amended Interrogatory Responses CHHS sets forth only the most rudimentary information concerning the damages that it is seeking. *See* interrogatory response 18 and production request 9 & 10 Defs' Ex. C.
18. Identify all damages claimed by the Plaintiff as alleged in the Fourth Count [interference with employment of caregiver] of the Complaint.

ANSWER:

Liquidated damages in the amount of $10,000.00 as provided in the contract. Attorney fees and costs of collection, as provided in the contract, totals to be ascertained at the time of trial.

Costs of advertising, recruiting, testing and reference background checks of Right at home employees, totals to be provided Loss of business opportunity.

9. A copy of all documents related to your calculation of the amounts claimed due and owing by the Defendants. RESPONSE: To be provided.

10. A copy of all documents supporting the plaintiff's claims for damages as alleged in each of the four counts of its Complaint.

RESPONSE: see response to No.9, above.

CHHS has utterly failed to provide any documents in support of its damage claims. Section 13-14 authorizes a wide array of sanctions for this conduct but the only one appropriate to these circumstances is an order precluding the party who failed to comply with the discovery requests from introducing such matters into evidence. P.B. § 13-14. Allowing the Plaintiff to present for the first and only time its claims for damages is entirely prejudicial and quite frankly nothing less than trial by ambush. The Defendants find out for the first time at trial that an amount of $40,000 is being sought and with absolutely no business records to support the calculations made. There is a continuing duty to supplement discovery responses. P.B. § 13-15.

iii. CHHS failed to allege or prove that the Defendants' hiring of their caregiver was tortious.

The Plaintiff alleges in the Third Count the Futterleibs tortious interference with its “employment relations” with one or more employees, based upon a specific oral contract between the parties.

> This court has long recognized a cause of action for tortious interference with contract rights or other business relations. While our cases have not focused with particularity on what acts of interference are tortious, *we have made it clear that not every act that disturbs a contract or business expectancy is actionable. [F]or a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation ....or that the defendant acted maliciously.*

(Citations omitted; internal quotation marks omitted; emphasis added.) *Blake v. Levy,* 191 Conn. 257, 260-61, 464 A.2d 52, 54 (1983). “A defendant is guilty of tortious interference if he has engaged in improper conduct. [*T]he plaintiff [is required] to plead and prove at least some improper motive or improper means.*” (Citations omitted; internal quotation marks omitted; emphasis added.) *Biro v. Hirsch,* 62 Conn. App. 11, 21-22, 771 A.2d 129, 136 (2001).

Stated simply, to substantiate a claim of tortious interference with business expectancy, there must be evidence that the interference resulted from the defendant's commission of a tort. " '[*A] claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.' "* *Blake v. Levy,* supra, 191 Conn. at 262, 464 A.2d 52, quoting *Top Service Body Shop, Inc. v. Allstate Ins. Co.,* 283 Or. 201, 209, 582 P.2d 1365 (1978). (Emphasis added).

Golembeski v, Metichewan Grange No. 190, 20 Conn.App. 699, 702-703, 569 A.2d 1157, cert. denied, 214 Conn. 809, 573 A.2d 320 (1990).

"A claim for tortious interference with contractual relations requires the plaintiff to establish: (1) the existence of a contractual or beneficial relationship, (2) the defendant's knowledge of that relationship, (3) the defendant's intent to interfere with the relationship, (4) the interference was tortious and (5) a loss suffered by the plaintiff that was caused by the defendant's tortious conduct." *Appleton v. Bd. of Educ.,* 254 Conn. 205, 213 (2000); *Hart, Ninlinger & Campbell Assocs., Inc. v. Rogers,* 16 Conn. App. 619, 629 (1988).

> [F]or a plaintiff successfully to prosecute [a cause of action for tortious interference] *it must prove that the defendant's conduct was in fact tortious.* This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously.... [An] action for intentional interference with business relations ... *requires the plaintiff to plead and prove at least some improper motive or improper means....* The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, **977 *but intentional interference without justification....In other words, the [plaintiff] bears the burden of alleging and proving lack of justification on the part of the [defendant].* (Citations omitted; internal quotation marks omitted.) *Daley v. Aetna Life & Casualty Co.,* 249 Conn. 766, 805-806, 734 A.2d 112 (1999).

(Emphasis added.) *Downes-Patterson Corp. v. First Nat'l Supermarkets, Inc.,* 64 Conn. App. 417, 429, 780 A.2d 967, 976-77 (2001).

The Plaintiff fails to allege in their complaint a legally sufficient cause of action where it fails to allege that the hiring by the Defendants of one or more Right at Home employees constituted a tort, or was done without justification. The Plaintiff fails to allege "that the defendant intentionally interfered with a business or contractual relationship" it only alleges that the Futterleibs "*agreed to* not hire Right at Home employees, interfere with their employment or cause employees to transfer to another employer, without prior written consent from Right at Home" (emphasis added) (Amended Complaint, C-3, par. 12). Thus this claim is entirely dependent upon a finding of an oral agreement with the Futterleibs in which they made such promises. The record is devoid of such proof, other than the self-serving testimony of Mr. Scandura. Ann Futterleib testified resolutely that there was no such oral agreement that she or her husband entered into with Mr. Scandura concerning not hiring the caregiver. (Deposition testimony of Ann Futterleib, in lieu of her court room testimony, pp. 19, 23, 25). The only allegation made by CHHS not dependent upon the existence of an oral agreement not to hire its employees is limited to the claim that the Defendants' hiring of one or more CHHS employees was in itself "interfering with the employment relations between the plaintiff and its employees" when they hired "one of more Right at Home employees". (Amended Complaint, C-3, par 13). Plaintiff has failed to introduce any evidence concerning the Defendants' motive in allegedly hiring the employee and "the [plaintiff] bears the burden of alleging and proving lack of justification on the part of the [defendant]." *Downes-Patterson Corp. v. First Nat'l Supermarkets, Inc.,* supra, 429. The Plaintiff has established, at best, that the Defendants "stole away" the employee and interfered with the contract between CHHS and that employee. "A claim is made out only when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself" (*Golembeski* supra) and "[e]very act of interference is not ... tortious." *Blake v. Levy,* supra, at 261. Thus CHHS has failed to sufficiently plead or prove that the Futterleibs tortiously interfered with the employment contract of the CHHS caregiver.

iv. Alternatively, damages under the Third Count must be capped.

It is fundamentally inequitable to allow the Plaintiff to improve its damage claim, where it has failed to comply with the HCA and obtain an executed Services Agreement, containing explicit terms governing and setting the liability for hiring of an CHHS employee by a client. If the contract had been executed (as required by the HCA) then CHHS could only recover 10% of the annualized full-time salary of each such employee or $1,500, whichever is greater. There was conditional evidence presented by the Plaintiff to establish a "full-time salary" of the caregiver in 2011 of $43,763.89 (Pl's Ex. 10), if such evidence is admitted CHHS would be capped under its Services Agreement to a recovery of $4,476.39 and if the evidence is not admitted then it will be capped at $1,000 [9]. Accordingly, no damage award in excess of $4,476.39 should be awarded to CHHS under the 3rd Count of the amended complaint.

i. The Plaintiff's Unclean Hands Bars it from any Recovery.

The Defendants allege as their second special defense (doc # 153) that the Plaintiff's claims are barred by the doctrine of unclean hands where it has (i) failed to register its trade name in accordance with state law and (ii) intentionally and illegally forged the signature of Robert Hendrickson, onto the Services Agreement and unjustly sought to enforce the terms of that contract against not only Mr. Hendrickson but also the defendants, Ann and Alfred Futterleib and only on the date of commencement of trial withdrew Counts 1, 2 and 4 from the action by amending its Complaint.

CHHS effectively withdrew all three counts of the Complaint based upon the forged contract and did so only when it was well aware that it could not prevail upon those claims, where the evidence of a forgery was clear and where it was unable to produce the original of the executed Services Agreement.

The facts clearly demonstrate the improper efforts of CHHS in pursuing Mr. Hendrickson and the Defendants on the Services Agreement:

1. In an initial telephone conference between Mr. Hendrickson and Attorney Spinella Mr. Hendrickson requested a copy of the contract;

2. CHHS commenced collection efforts, issuing a demand letter and then filing suit claiming breach of the contract;

3. CHHS claimed that all three initial defendants to the action had executed the contract;

4. Upon receiving a copy of the forged Services Agreement the Defendants (including Mr. Hendrickson at the time) advised of "serious concerns about the authenticity of the signature on the [contract].... and would like the opportunity to review the original document at [CHHS' counsel's office]" (Defs' Ex. B);

5. Defendants filed their Request to Revise to obtain a more specific statement as to who had allegedly executed the Services Agreement;

6. CHHS objected and stated that "the word 'defendants' refers to both named defendants; the remainder of the defendants Request seeks material that is property to subject of a discovery ..." (Doc # 104);

7. Defendants served upon CHHS written interrogatories and requests for production with a primary focus on the Services Agreement (Defs' Ex. C);

8. On July 15, 2013 the Defendants' filed their special defenses alleging, in part, that the signature on the Services Agreement was a forgery;

9. On January 30, 2014 CHHS unilaterally withdrew all claims as to Mr. Hendrickson;

10. On January 31, 2014 counsel conducted the deposition of Mr. Scandura and raised the issue of the forgery;

11. CHHS was unable to ever produce its original version of the Services Agreement.

12. On April 3, 2014 CHHS amended its complaint removing all allegations concerning the Services Agreement.
'It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands.... The clean hands doctrine is applied not for the protection of the parties but for the protection of the court.... It is applied not by way of punishment but on considerations that make for the advancement of right and justice.' *Eldridge v. Eldridge,* 244 Conn. 523, 536 (1998) (internal quotations omitted). '*The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue.... Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply.*' (Emphasis added) *Bauer v. Waste Mgmt. of Conn., Inc.,* 239 Conn. 515, 525 (1996)).

Because the doctrine of unclean hands exists to safeguard the integrity of the court; *Eldridge v. Eldridge*, supra, 244 Conn. 536; *Pappas v. Pappas,* 164 Conn. 242, 246, 320 A.2d 809 (1973); '[w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have.' (Internal quotation marks omitted.) *Samasko v. Davis,* 135 Conn. 377, 383, 64 A.2d 682 (1949). The doctrine generally 'applies [only] to the particular transaction under consideration, for the court will not go outside the case for the purpose of examining the conduct of the complainant in other matters or questioning his general character for fair dealing. The wrong must ... be in regard to the matter in litigation.... Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the plaintiff does not require the aid of the illegal transaction to make out his case.' (Citation omitted; internal quotation marks omitted.) *Id.;* see also *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S. Ct. 146, 78 L. Ed. 1045 (1933) (courts 'do not close their doors because of [a] plaintiffs misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication') ....

Thompson v. Orcutt, 257 Conn. 301, 310-11 (2001).

Here the Plaintiff's conduct was extreme, reckless and must not be countenanced - pursuing claims against the Defendants that it unquestionably knew were based upon a Services Agreement with a forged signature of Robert Hendrickson until the day of trial when it amended its complaint to effectively withdraw all claims and recast its complaint and based it upon an alleged oral agreement with the Futterleibs. Only as a result of the active and aggressive defense mounted by the Defendants to the claims arising from the forged Services Agreement was the Plaintiff indisputably aware of the full extent of the forgery and that it had no chance of obtaining a judgment at trial. *See* Defs' Request for Admissions Tr. Ex. V. As such it would have been barred from enforcement of its claims arising out of the forged Services Agreement; counts 1, 2 and 4 of Complaint. Once aware of the position in which it found itself it withdrew the action as to Robert Hendrickson but continued to assert the same forged contract based claims against the Defendants right up until the commencement of trial when it once again overreached by alleging an oral contract, unjust enrichment and tortious interference. CHHS cannot show that its conduct has been "fair, equitable and honest as to" its pursuit of its claims against the Futterleibs and should be precluded from any recovery.

V. CONCLUSION

The Plaintiff has done everything within its power to maintain this action, even once it understood the forged Services Agreement and the clear necessity of a signed written contract under § 20-679. The amended claims against the Futterleibs are simply part of a misguided and extremely dogged and costly effort. The Court should for the reasons set forth herein enter judgment for the Defendants.

RESPECTFULLY SUBMITTED

DEFENDANTS, ANN FUTTERLEIB & ALFRED FUTTERLEIB

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Footnotes

1 If the evidence is excluded then the Futterleibs will be prejudiced as a result of having conducted a vigorous defense throughout the entire case against the forged contract, where alternatively if they had not diligently pursued the issue, CHHS would not have amended its complaint and the evidence concerning forgery would be directly relevant to the forged contract.

2 This check is drawn on the same bank as check # 888 but Mr. Hendrickson's name does not appear on the face of the check.

3 The letter contains an obvious typographical error where it references an “employment contract”.

4 “ ‘Homemaker-companion agency’ means (A) any public or private organization that employs one or more persons and is engaged in the business of providing companion services or homemaker services....” §20-670 (7).

5 The contract shall “prescribe[es] the anticipated scope, type, frequency, duration and cost of the services provided by the agency. In addition, any contract or service plan provided by a homemaker-companion agency to a person receiving services shall also provide notice (1) of the person's right to request changes to, or review of the contract or service plan, (2) of the employees of such agency who, pursuant to section 20-678 are required to submit to a comprehensive background check, and (3) that such agency's records are available for inspection or audit by the Department of Consumer Protection.” C.G.S.§ 20-679. The DCP regulations provide more detail; “(b) Written contracts or service plans shall: (1) provide a list of the anticipated services to be provided by the agency to the client, the term and cost of said services, a clear definition of the employee, provider and client employment relationship, safeguards for securing personal client information, a list of provider job categories such as “live-in” or “daily call,” and job duties; (2) contain the homemaker-companion agency policy for the acceptance of gratuities and gifts by the homemaker-companion agency's employees and independent contractors on behalf of the client; and (3) contain a process for the client to file a complaint with the homemaker-companion agency. A process shall be made available for individuals other than a client to file a complaint.” Conn. Regs. § 20-670-3.

6 CHHS filed no responsive pleading to the Defendants' Answer and Special Defenses to Plaintiff's Amended Complaint (doc # 153).

7 CHHS in the Third Count of its Amended Complaint alleges tortious interference by the Defendants with the contractual relationship between CHHS and the caregiver.

8 The HIA at the time of enactment set forth in relevant part that, "No home improvement contract shall be valid unless it is in writing...." (PA 79-606) and § 20-629 states that "No [written] contract or service plan for the provision of homemaker ... services shall be valid against the person who receives the services ... unless the contract or service plan has been signed by a duly authorized representative of the homemaker-companion agency and the person who receives the services ...."

9 While the unsigned Service Agreement sets forth a $1500 amount the reverse of the CHHS weekly time card (Pl. Ex. 13) sets a monetary cap of only $1,000

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