MARISSA LOWTHERT *v.* FREEDOM OF INFORMATION COMMISSION (AC 44972)

Bright, C. J., and Clark and Seeley, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court denying her application filed pursuant to statute (§ 1-206 (b) (2)) for an order requiring the defendant Freedom of Information Commission to hold a hearing on a complaint she filed with the commission. The plaintiff alleged that the commission and/or its staff held one or more unnoticed or secret meetings in violation of the open meeting requirements of a provision (§ 1-225 (a)) of the Freedom of Information Act (§ 1-200 et seq.). The commission declined to schedule a hearing on the plaintiff's complaint on the ground that scheduling a hearing on the plaintiff's complaint would constitute an abuse of the commission's administrative process under § 1-206 (b) (2) (C), and the plaintiff appealed to the trial court, which rendered judgment denying her application. *Held* that this court declined to review the plaintiff's sole claim on appeal that the trial court erred in denying her application because the commission and its executive director had a conflict of interest in violation of statute (§ 1-85) when it declined to schedule a hearing on her complaint, the plaintiff having failed to preserve her claim by raising it before the trial court: in her application, the plaintiff twice made a generalized reference to a conflict of interest on the part of the commission's executive director but she did not cite § 1-85 in support of that allegation, the plaintiff made a single reference to § 1-85 in her briefs to the court, and mentioned § 1-85 only once at oral argument before the court; moreover, the plaintiff failed to explain to the court how the commission and its executive director had reason to believe that they would derive a direct monetary gain or suffer a direct monetary loss by reason of their official activity, as the plaintiff's claim that the commission and its executive director faced a possible financial penalty pursuant to § 1-206 (b) (2) was raised for the first time on appeal to this court in her reply brief, and, because the plaintiff failed to adequately raise her claim, the court and the commission did not have sufficient notice of it, the court did not make any findings as to whether the commission or its executive director violated § 1-85, and the court did not have an opportunity to consider whether a violation of § 1-85 could serve as the basis for granting the plaintiff's application or whether, instead, the plaintiff's exclusive remedy was to file a complaint with the Office of State Ethics pursuant to statute (§ 1-82).

Argued November 14, 2022—officially released June 20, 2023

Procedural History

Administrative appeal from the decision of the defendant declining to schedule a hearing on the plaintiff's complaint, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Wiese, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Marissa Lowthert, self-represented, the appellant (plaintiff).

Valicia Dee Harmon, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Opinion

SEELEY, J. The self-represented plaintiff, Marissa Lowthert, appeals from the judgment of the Superior Court denying her application, pursuant to General Statutes § 1-206 (b) (2), for an order requiring the defendant, the Freedom of Information Commission (commission), to hold a hearing on a complaint she filed with the commission. On appeal, she claims that the court erred in denying her application because the commission and its executive director had a conflict of interest in violation of General Statutes § 1-85 when they decided not to schedule a hearing on her complaint. We affirm the judgment of the court.

The record reflects the following relevant procedural history. On September 5, 2017, the plaintiff filed a complaint with the commission alleging, in relevant part, that "[the commission] and or [the commission's] staff held one or more secret meeting(s), failed to post notice(s), failed to post minute(s)/vote(s) and took action(s) tantamount to a vote," in violation of the open meeting requirements of the Freedom of Information Act (act), set forth in General Statutes § 1-225 (a).[1]

The allegations set forth in the plaintiff's complaint stemmed from decisions regarding two other complaints that the plaintiff previously had filed with the commission: *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030425-S (January 17, 2017) (63 Conn. L. Rptr. 820) (*Lowthert I*), and *Lowthert* v. *Chairman, Board of Education*, Freedom of Information Commission, Docket No. FIC 2015-147 (August 23, 2017) (*Lowthert II*).

In *Lowthert I*, the plaintiff filed a complaint with the commission alleging that the Miller Driscoll Building Committee, a school building committee for the town of Wilton, failed to comply with the open meeting requirements of § 1-225 (a). *Lowthert* v. *Freedom of Information Commission*, supra, 63 Conn. L. Rptr. 821, 824. The commission dismissed the plaintiff's complaint as untimely after determining that she failed to file her complaint within thirty days of receiving "notice in fact" that the alleged unnoticed or secret meeting was held, as required by General Statutes (Rev. to 2013) § 1-206 (b) (1).[2] Id., 821. The plaintiff appealed to the Superior Court, which considered, as a matter of first impression, the meaning of the term "notice in fact" as used in that statutory provision. Id. The court concluded that "notice in fact" meant "actual notice" to the person filing the complaint. Id., 825. Because the commission failed to apply that definition to the term and, instead, construed "notice in fact" to include implied notice, the court remanded the case to the commission for further proceedings. Id., 821, 825–26.

that the Board of Education of the Town of Wilton also held an unnoticed or secret meeting in violation of § 1-225 (a). *Lowthert* v. *Chairman, Board of Education*, supra, Docket No. FIC 2015-147, p. 2. The commission issued a final decision on August 23, 2017,[3] in which it considered whether the complaint was filed within thirty days of the plaintiff receiving "notice in fact" pursuant to General Statutes (Rev. to 2013) § 1-206 (b) (1) and *Lowthert I*. Id., p. 3. In a footnote, however, the commission recognized: "Following the [c]ourt's decision [in *Lowthert I*], the Connecticut General Assembly passed Senate Bill [No.] 983, [2017 Sess.] ([Number 17-86 of the 2017 Public Acts]), *An Act Concerning Appeals Under the Freedom of Information Act Involving Notice of Meetings*, effective October 1, 2017, which eliminates the term 'notice in fact' and substitutes 'actual or constructive notice' in the context of 'secret or unnoticed' meetings within the meaning of [§ 1-206 (b) (1)] . . . ."[4] Id. The commission ultimately determined that the plaintiff timely filed her complaint but failed to prove that the respondents violated the act, and, accordingly, it dismissed the complaint.[5] Id., pp. 4, 9–10.

In the present case, the plaintiff alleged that she first learned of Senate Bill No. 983 by reading the footnote in the commission's decision in *Lowthert II*. When she subsequently researched Senate Bill No. 983 on the Connecticut General Assembly's website, she learned that the executive director of the commission had provided written testimony that the commission "strongly support[ed]" the proposed 2017 amendment to § 1-206 (b) (1). The plaintiff alleged that, after reviewing the commission's meeting agendas and minutes, she believed that the commission had violated the open meeting requirements of § 1-225 (a) "because there is no public record that the [commission] met in public at a properly noticed or recorded (i.e. via minutes) public meeting to discuss an amendment to [the act] regarding the appeal period for secret meetings, let alone support [Senate Bill No. 983], or their concern regarding the decision in [the plaintiff's favor in *Lowthert I*]." (Emphasis omitted.)

On July 24, 2018, the executive director of the commission issued a "Notice of Request to Summarily Deny Leave to Schedule a Hearing" (notice) on the ground that scheduling a hearing on the plaintiff's complaint would "constitute an abuse of the [c]ommission's administrative process" under § 1-206 (b) (2) (C).[6] The executive director explained, among other things, that the plaintiff had filed more than forty-four complaints against various public agencies over the previous few years; the commission expended an inordinate amount of time and resources adjudicating and mediating the plaintiff's previous complaints; the commission already ruled that hearings on four of the previous complaints,

trative process;[7] the commission's resources were diminished due to budget cuts and an increased caseload; the plaintiff's complaint "barely alleges a prima facie case of a secret or unnoticed meeting, and is more akin to conjecture"; and a hearing on the plaintiff's complaint would present an "administrative quagmire" for the commission, raising ethical or conflict of interest issues, because the commissioners presumably would be both called as witnesses and have to make a decision in the case. At its regular meeting on August 22, 2018, the commission voted unanimously to affirm the executive director's decision not to schedule a hearing on the plaintiff's complaint.

Thereafter, pursuant to § 1-206 (b) (2),[8] the plaintiff applied to the Superior Court for an order requiring the commission to hold a hearing on her complaint. The parties filed briefs and the court, *Wiese, J.*, held oral argument on June 8, 2021. The plaintiff argued that scheduling a hearing on her complaint in the present case would not have constituted an abuse of the administrative process, particularly because many of her prior complaints that the executive director pointed to had been settled, withdrawn, or had merit and, therefore, had not been abusive.

On September 1, 2021, the court issued a memorandum of decision in which it denied the plaintiff's application. The court concluded: "Based on (i) the plaintiff's history of filing more than forty-four complaints with the commission over the past few years, (ii) the plaintiff's history of filing abusive complaints with the commission, (iii) the considerable amount of time and resources that have already been spent adjudicating and mediating the plaintiff's previously filed cases, (iv) the high volume of the commission's current caseload, (v) and the particular administrative difficulty the commission would face in conducting a hearing on the present complaint, this court finds that the commission acted reasonably and within its discretion in denying a hearing to the plaintiff on the ground that scheduling a hearing on the plaintiff's complaint 'would constitute an abuse of the commission's administrative process,' pursuant to § 1-206 (b) (2) (C)."

On appeal to this court, the plaintiff's sole claim is that the court erred in denying her application because the commission and its executive director had a conflict of interest in violation of § 1-85[9] when they decided not to hold a hearing on her complaint. Specifically, the plaintiff contends that the commission and its executive director faced a financial penalty of up to $1000 pursuant to § 1-206 (b) (2)[10] if they violated the act as her complaint alleged, and, therefore, they had a "substantial conflict" under § 1-85 such that they should not have taken any action on the matter. We conclude that this claim was not properly preserved, and, thus, we decline to review it.

We begin by setting forth the legal principles relevant to whether a claim was properly preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are *distinctly raised* at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Emphasis added; internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); 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"). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 455, 219 A.3d 801 (2019), cert denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

Although "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party"; (internal quotation marks omitted) *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487–88, 189 A.3d 1232 (2018); we note that the plaintiff was represented by counsel on both her application and on her initial brief to the Superior Court, and she was self-represented only for her reply brief and at oral argument before the court. Moreover, "[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) Id., 488.

In the present case, a thorough review of the record reveals that the plaintiff did not raise before the Superior Court the distinct claim that she now raises on appeal. As discussed previously in this opinion, the plaintiff argued before the court that her prior complaints were not abusive, and that scheduling a hearing on her complaint in the present case would not have constituted an abuse of the administrative process. In

her application to the court, the plaintiff twice made a generalized reference to a "conflict of interest" on the part of the commission's executive director, but she did not cite § 1-85 in support of that allegation.[11] In her briefs to that court, the plaintiff made a single reference to § 1-85, in arguing that "the executive director should not have involved herself with [the plaintiff's] complaint, which raised concerns about the executive director's own conduct. [Section] 1-85 provides: 'A public official, including an elected state official or state employee who has a substantial conflict may not take official action on the matter.' " Similarly, the plaintiff mentioned § 1-85 only once at oral argument before the court, when she argued: "[G]iven that . . . [§] 1-85 states that no public official can take an action in a matter that they have an interest in, I think there's a threshold issue that when the executive director filed the [notice], this created a conflict of interest because she had a personal interest in this matter."

Moreover, even considering the plaintiff's minimal references to § 1-85, she notably failed to explain to the court how the commission and its executive director had a reason to believe that they would "derive a direct monetary gain or suffer a direct monetary loss . . . by reason of [their] official activity" such that they had a "substantial conflict" under that statutory provision. The plaintiff's claim that the commission and its executive director faced the possibility of a financial penalty pursuant to § 1-206 (b) (2) was raised for the first time on appeal to this court *in her reply brief*, as the plaintiff acknowledged at oral argument before us. See *Benjamin* v. *Corasaniti*, 341 Conn. 463, 476 n.8, 267 A.3d 108 (2021) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (internal quotation marks omitted)).

Accordingly, because the plaintiff failed to adequately raise and develop her claim before the Superior Court, the court and the commission did not have sufficient notice of this claim, and the court did not make any findings as to whether the commission or its executive director violated § 1-85. See, e.g., *A & R Enterprises, LLC* v. *Sentinel Insurance Co., Ltd.*, 202 Conn. App. 224, 230–31, 244 A.3d 660 (plaintiff's reference to case law was insufficient to preserve distinct claim raised on appeal where plaintiff failed to develop argument before trial court), cert. denied, 336 Conn. 921, 246 A.3d 2 (2021); see also *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 193 Conn. App. 455 (claim on appeal must be articulated before trial court with sufficient clarity to place court and opposing party on reasonable notice of "very same claim" (internal quotation marks omitted)). In addition, the court did not have an opportunity to consider whether a violation of § 1-85 could serve as the basis for granting the plaintiff's application, or whether,

complaint with the Office of State Ethics.[12] See General Statutes § 1-82 (setting forth process of filing complaint with Office of State Ethics for any alleged violation of Connecticut Code of Ethics for Public Officials, General Statutes § 1-79 et seq.); see also General Statutes §§ 1-88 and 1-89 (providing remedies for such violations). Thus, we decline to review the plaintiff's claim because it was not properly preserved.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 1-225 (a) provides: "The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. The votes of each member of any such public agency upon any issue before such public agency shall be reduced to writing and made available for public inspection within forty-eight hours and shall also be recorded in the minutes of the session at which taken. Not later than seven days after the date of the session to which such minutes refer, such minutes shall be available for public inspection and posted on such public agency's Internet web site, if available, except that no public agency of a political subdivision of the state shall be required to post such minutes on an Internet web site. Each public agency shall make, keep and maintain a record of the proceedings of its meetings."

[2] General Statutes (Rev. to 2013) § 1-206 (b) (1) provides in relevant part: "Any person . . . wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held. . . ."

[3] The commission initially dismissed the plaintiff's complaint in *Lowthert II* as untimely filed, before the court's decision in *Lowthert I* was released. *Lowthert* v. *Chairman, Board of Education*, Docket No. FIC 2015-147 (November 18, 2015); *Lowthert* v. *Chairman, Board of Education*, Docket No. FIC 2015-147 (January 13, 2016). After the plaintiff filed an appeal in the Superior Court; *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-6032522-S; the parties agreed to settle that appeal on the condition that the commission would conduct an evidentiary hearing on all of the issues set forth in the plaintiff's complaint, which led to the commission's decision in *Lowthert II*. *Lowthert* v. *Chairman, Board of Education*, supra, Docket No. FIC 2015-147, pp. 1–2.

[4] Number 17-86 of the 2017 Public Acts is codified at § 1-206 (b) (1).

[5] The plaintiff appealed from the commission's decision in *Lowthert II* to the Superior Court. The court remanded the case to the commission to hear certain additional evidence; see *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041629-S (May 21, 2019); and, in its final decision on remand, the commission again concluded that the plaintiff failed to prove that the respondents violated the act. *Lowthert* v. *Chairman, Board of Education*, Freedom of Information Commission, Docket No. FIC 2015-147 (July 8, 2020) p. 11. After considering the commission's final decision on remand, the court agreed with the commission and remanded the case to the commission to determine whether another claim made by the plaintiff had been raised before it. *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041629-S (March 5, 2021). The court denied the plaintiff's subsequent motion for reconsideration, and the plaintiff appealed to this court but later withdrew that appeal.

[6] General Statutes § 1-206 (b) (2) provides in relevant part: "If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the commission's administrative process, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. . . ."

Court, pursuant to § 1-206 (b) (2), for orders requiring the commission to hold hearings on these four complaints. After a consolidated trial, the court denied the plaintiff's applications; *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket Nos. CV-17-6041080-S, CV-17-6041081-S, CV-17-6041082-S, and CV-17-6041275-S (June 11, 2019); and this court subsequently affirmed those judgments in a memorandum decision. *Lowthert* v. *Freedom of Information Commission*, 205 Conn. App. 904, 251 A.3d 99, cert. denied, 338 Conn. 907, 258 A.3d 1280 (2021).

[8] General Statutes § 1-206 (b) (2) provides in relevant part: "Any party aggrieved by the commission's denial of leave [to schedule a hearing] may apply to the superior court for the judicial district of New Britain, within fifteen days of the commission meeting at which such leave was denied, for an order requiring the commission to hear such appeal."

[9] General Statutes § 1-85, which is part of the Connecticut Code of Ethics for Public Officials, General Statutes § 1-79 et seq., provides: "A public official, including an elected state official, or state employee has an interest which is in substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state, if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. A public official, including an elected state official, or state employee does not have an interest which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed by the laws of this state, if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group. A public official, including an elected state official or state employee who has a substantial conflict may not take official action on the matter."

[10] General Statutes § 1-206 (b) (2) provides in relevant part: "[U]pon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars. . . ."

[11] Specifically, the plaintiff alleged that, (1) "[w]ith regard to [*Lowthert* v. *Freedom of Information Commission*, Freedom of Information Commission, Docket No.] FIC 2017-0518 [August 23, 2018], the executive director, who has a conflict of interest in this matter, again retaliated against [the plaintiff], and denied [the plaintiff] her rights under the act, as well [as] equal protection, and due process under the state and federal constitutions," and (2) "the commission acted illegally, arbitrarily and in abuse of [its] discretion, in that . . . [i]t ignored the personal conflict of interest the executive director and deputy director had in this matter."

[12] As the plaintiff acknowledges, there is no appellate case law addressing a violation of § 1-85.