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JOHANNA FRANCIS *v.* CIT  
BANK, N.A., ET AL.  
(AC 45253)

Prescott, Suarez and Seeley, Js.

*Syllabus*

The plaintiff property owner sought to recover damages for, inter alia, unlawful entry and detainer against the defendant companies. More than one year after the deadline for compliance with the defendants' discovery requests, the defendants filed a motion for nonsuit due to the plaintiff's failure to comply with her discovery obligations, which was granted by the trial court. The plaintiff did not appeal from the judgment of nonsuit. The plaintiff thereafter filed a motion to open the judgment of nonsuit, which was denied. The plaintiff appealed to this court, which limited the appeal to the trial court's denial of the motion to open the judgment. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open the judgment: the plaintiff failed to satisfy her burden in connection with the motion to open of demonstrating that she had been prevented by accident, mistake or reasonable cause from satisfying her discovery obligations; moreover, all of the arguments made by the plaintiff in her appeal challenged the trial court's judgment of nonsuit rather than its denial of the motion to open, and the plaintiff failed to address the basis for the judgment of nonsuit, namely, her failure to comply with her discovery obligations.

Argued January 11—officially released May 2, 2023

*Procedural History*

Action to recover damages for, inter alia, unlawful entry and detainer, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the motion for nonsuit filed by the named defendant et al. and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed*.

*Douglas R. Steinmetz*, for the appellant (plaintiff).

*Geoffrey K. Milne*, for the appellees (named defendant et al.).

*Opinion*

SUAREZ, J. In this civil action, the plaintiff, Johanna Francis, brought causes of action sounding in unlawful entry and detainer and trespass against the defendants CIT Bank, N.A., and Cascade Funding RM1 Alternative Holdings, LLC.<sup>1</sup> The plaintiff appeals from the judgment of the trial court denying her motion to open the judgment rendered by the trial court after it granted a motion for nonsuit filed by the defendants. The plaintiff claims that the court improperly denied her motion to open the judgment.<sup>2</sup> We affirm the judgment of the court.

The following facts and procedural history are relevant to our analysis.<sup>3</sup> The underlying action is related to ongoing foreclosure proceedings between the parties. See *CIT Bank, N.A. v. Francis*, 214 Conn. App. 332, 280 A.3d 485 (2022) (reversing judgment of strict foreclosure). In her revised complaint, the plaintiff alleged that, on multiple occasions, agents of the defendants, claiming a mortgage interest in the property sought to be foreclosed, and without her consent, forcibly entered the subject property, a residential property in New Canaan in which she owned the entire beneficial interest. The plaintiff alleged that, in derogation of her right to exclusive possession of the property, the defendants' agents forcibly entered and damaged the property in several ways and that they detained various items of her personal property. The plaintiff also alleged that, as a result of the defendants' entries into her property, she felt unsafe and was forced to reside elsewhere. In her revised complaint, the plaintiff, seeking various forms of relief, brought claims sounding in unlawful entry and detainer in violation of General Statutes § 47a-43 and common-law trespass.

On February 23, 2021, the defendants filed a motion entitled "Motion for Nonsuit and/or in the Alternative to Dismiss." Therein, the defendants, pursuant to Practice Book § 13-14,<sup>4</sup> argued that a judgment of nonsuit was appropriate because the plaintiff had failed to comply with her discovery obligations, particularly, responding to the defendants' written interrogatories and requests for production dated September 19, 2019, with which she should have complied by November 19, 2019.<sup>5</sup> Alternatively, the defendants, pursuant to Practice Book § 14-3,<sup>6</sup> argued that a dismissal of the action was appropriate because the plaintiff had failed to prosecute her action with due diligence. Moreover, the defendants argued that, even though the plaintiff's counsel had represented to the court and to opposing counsel that the plaintiff would do so, the plaintiff had failed to add a necessary party to the action. On May 27, 2021, the court, *Hon. Kenneth B. Povodator*, judge trial referee, after holding a remote hearing on the motion, granted the defendants' motion insofar as the defendants sought a judgment of nonsuit.<sup>7</sup> In granting the motion for nonsuit, the court was persuaded by the fact that the plain-

tiff had engaged in a pattern of noncompliance with discovery for more than one year. Although the court did not grant the defendants' request to dismiss the action for the plaintiff's failure to prosecute the action with reasonable diligence, the court nevertheless stated that the plaintiff had failed to file an appearance after her counsel had been permitted to withdraw his representation in this action, and the plaintiff had failed to prosecute the action diligently. The plaintiff did not appeal from the judgment of nonsuit.

On September 27, 2021, the plaintiff filed an appearance in this action as a self-represented party, and she filed a motion to open the judgment of nonsuit. The plaintiff claimed that several factors worked against her prosecuting the action with reasonable diligence. These reasons included her poor health, self-represented status, and involvement in unrelated legal matters. Additionally, the plaintiff represented that she did not receive notice of the May 27, 2021 remote hearing because the defendants attempted to provide her with notice at her business address in Brooklyn, New York, instead of at her mailing address in New Canaan. On October 1, 2021, the defendants filed a written objection to the motion to open. On October 22, 2021, counsel appeared for the plaintiff, and, on November 18, 2021, filed a written reply to the defendants' objection to the motion to open.

On January 18, 2022, the court, in a written decision, denied the motion to open. The court stated that “[t]he issues raised by the plaintiff [in her motion to open] have little or nothing to do with the granting of the motion for nonsuit and little or nothing to do with whether the judgment should be opened.” The court further stated that, “to the extent that the plaintiff has contended that there was no formal order relating to discovery that had been violated, such that a nonsuit or dismissal was inappropriate, the court will go back to basics. In the absence of any objection, a [discovery] ‘request’ becomes an order of the court automatically, under . . . Practice Book § 11-2. . . . [I]t is somewhat disingenuous for the plaintiff to claim that some [twenty] months after the defendant[s] had served discovery requests . . . and more than [one] year after a purported compliance [had been filed by the plaintiff] indicating that responsive materials were being sought and would be provided but without any actual/apparent supplementation, the plaintiff was not on fair notice that a nonsuit or dismissal might be entered. . . .

“[T]here is an overarching issue that the plaintiff has not addressed adequately. It is now almost [two] years since the defendants filed their first motion relating to noncompliance with discovery and approximately [eleven] months since the defendants filed their second motion relating to noncompliance. With all of her discussion of the need for proportionality and a deadline

for compliance, the plaintiff does not claim to have provided anything in the nature of full compliance despite the ‘promises’ that materials were being sought [by her] as set forth in a notice of compliance that was filed some [twenty-three] months ago.”

The court also addressed the plaintiff’s contention that she did not receive notice of the May 27, 2021 remote hearing on the motion for nonsuit. The court stated that “[h]er claim that the notice relating to scheduling [the] argument was inappropriately sent to a Brooklyn address is dubious on a number of levels. She claims the Brooklyn address is a business address, but that is the address provided by (and apparently used by) her former counsel. The Brooklyn address appears to be an apartment address, tending to suggest it is residential in nature. The limited discovery compliance provided by the plaintiff (responses to interrogatories) strongly suggests that the New Canaan address was not suitable for living, consistent with the Brooklyn address being an actual residential address, in part further confirmed by the characterization of the New Canaan address as something in the nature of a legal address.”

The court responded to additional arguments raised by the plaintiff’s counsel in its reply to the defendants’ objection to the motion to open. In particular, the court stated that, insofar as the plaintiff argued that the defendants failed to comply with Practice Book § 17-22, requiring that notice be given of the entry of judgment, that provision did not apply in the present case because the court’s granting of a nonsuit was not premised on her failure to appear but, rather, on her failure to comply with discovery. The court also responded to the plaintiff’s argument that, contrary to Practice Book § 14-3, she had not been afforded the requisite notice of the court’s hearing. The court stated that such argument was “disingenuous” because, at the time of its notice of hearing, the plaintiff was a nonappearing party, and any lack of notice “was at least substantially due to her failure to have an appearance in the file.” The court also noted that an argument based on a failure to comply with the notice provision of Practice Book § 14-3; see footnote 6 of this opinion; was misplaced in light of the fact that the primary focus of the defendants’ motion was the plaintiff’s noncompliance with the rules of discovery, not the plaintiff’s failure to prosecute the action with reasonable diligence. Moreover, responding to the plaintiff’s arguments concerning lack of notice of the court’s remote hearing of May 27, 2021, the court reasoned that, “[e]ven assuming that the plaintiff did not receive any notice of the hearing . . . until after the hearing, despite claims of diligence thereafter, the record appears to be devoid of any activity or claims of activity after the first week of June, 2021, and before September 27, 2021.”

On appeal, the plaintiff argues that the court impro-

erly denied the motion to open for several reasons. First, the plaintiff argues that, because she was an unrepresented and nonappearing party at the time that the court rendered its judgment of nonsuit, the court should have afforded her “deference” under the circumstances. Second, the plaintiff argues that it was improper for the court to dismiss the action for failure to prosecute with reasonable diligence because the court did not provide her with the notice required under Practice Book § 14-3. Third, the plaintiff argues that it was improper for the court to have rendered a judgment of nonsuit based on her noncompliance with the rules of discovery because (1) a clear discovery order did not exist, (2) the record did not establish the violation of an order that never existed, and (3) the judgment of nonsuit was disproportionately harsh. All of these arguments challenge the court’s judgment of nonsuit rather than its denial of the motion to open and, accordingly, are unpersuasive for the reasons that we will discuss subsequently in this opinion.

The power of a court to set aside a judgment of nonsuit is conferred by General Statutes § 52-212, which provides in relevant part: “(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . .”

“In ruling on a motion to open a judgment of nonsuit, the trial court must exercise sound judicial discretion, which will not be disturbed on appeal unless there was an abuse of discretion. . . . In reviewing the trial court’s exercise of its discretion, we make every presumption in favor of its action.” (Citation omitted.) *Biro v. Hill*, 231 Conn. 462, 467–68, 650 A.2d 541 (1994). In the present case, the plaintiff did not appeal from the judgment of nonsuit, and, thus, she is presently limited to challenging the court’s exercise of discretion in denying the motion to open. See *Tiber Holding Corp. v. Greenberg*, 36 Conn. App. 670, 671, 652 A.2d 1063 (1995) (“When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the

time to appeal.” (Citation omitted; internal quotation marks omitted.)).

To the extent that the plaintiff, in her motion to open, raised arguments that essentially challenged the court’s exercise of its discretion on May 27, 2021, in rendering a judgment of nonsuit, such arguments were not a proper subject of the motion to open. Consequently, in this appeal, the plaintiff cannot rely on arguments of this nature to demonstrate that the court abused its discretion in denying her motion to open. See footnote 2 of this opinion. Moreover, to the extent that the plaintiff argues in this appeal that the court improperly determined that she failed to prosecute the action with reasonable diligence, we note that the court did not dismiss the action for the plaintiff’s failure to prosecute the action with reasonable diligence. Rather, it rendered a judgment of nonsuit as a consequence of the plaintiff’s lengthy pattern of failing to comply with her discovery obligations.

To prevail in connection with her motion to open, it was incumbent on the plaintiff to address the basis for the judgment of nonsuit, namely, her noncompliance with the defendants’ interrogatories and requests for production of September 19, 2019. The record reflects that the plaintiff was represented by counsel when these discovery obligations arose, when the defendants first attempted to obtain a judgment of nonsuit related to her noncompliance on January 28, 2020, when the plaintiff filed a notice of compliance on February 18, 2020, and when the defendants filed their second motion for nonsuit related to her noncompliance on February 23, 2021. As the court correctly stated in its memorandum of decision denying the motion to open, however, the plaintiff’s arguments in support of the motion to open did not pertain to the issue of her noncompliance with discovery. The plaintiff did not attempt to satisfy her burden in connection with the motion to open of demonstrating that she had been prevented by accident, mistake, or reasonable cause from satisfying her discovery obligations. Thus, the plaintiff failed to proffer a legally appropriate reason why the motion to open the judgment should be granted.<sup>8</sup> Accordingly, the plaintiff is unable to demonstrate that the court abused its discretion in denying the motion to open.<sup>9</sup>

The judgment is affirmed.

In this opinion the other judges concurred.

<sup>1</sup> The plaintiff also named Freedom Financial Senior Funding Corporation as a defendant in the underlying action, but that entity did not appear and has not participated in this appeal. All references in this opinion to the defendants are to CIT Bank, N.A., and Cascade Funding RM1 Alternative Holdings, LLC.

<sup>2</sup> We note that, by order dated March 2, 2022, this court granted the defendants’ February 1, 2022 motion to dismiss any portion of the appeal not related to the court’s denial of the motion to open, noting that the present appeal “is limited to the January 18, 2022 denial of the motion to open the judgment of nonsuit.”

<sup>3</sup> Initially, the plaintiff was represented by counsel in this action. On March

15, 2021, the court granted counsel's motion to withdraw his appearance. On September 27, 2021, the plaintiff filed an appearance as a self-represented party. On October 22, 2021, counsel filed an appearance on the plaintiff's behalf. The plaintiff is represented by counsel in this appeal.

<sup>4</sup> Practice Book § 13-14 provides in relevant part: "(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order proportional to the noncompliance as the ends of justice require.

"(b) Such orders may include the following . . .

"(5) An order of dismissal, nonsuit or default. . . ."

<sup>5</sup> The defendants correctly represented in their motion that, on January 28, 2020, they filed a prior motion for nonsuit focusing on the plaintiff's noncompliance, and, on February 18, 2020, the plaintiff filed a notice of compliance. In support of their contention that the plaintiff had not actually complied with their interrogatories and requests for production, the defendants attached as an exhibit to their February 23, 2021 motion the plaintiff's responses thereto. It suffices to observe that, on their face, several of the plaintiff's responses were incomplete and represented that she was either in the process of obtaining records or information or that she would produce information in the future.

<sup>6</sup> Practice Book § 14-3 provides in relevant part: "(a) If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. At least two weeks' notice shall be required except in cases appearing on an assignment list for final adjudication. . . ."

<sup>7</sup> The plaintiff did not participate in the remote hearing on the motion for nonsuit. During the hearing, the court noted that, since March 15, 2021, when it granted the plaintiff's counsel permission to withdraw his representation in this action, the plaintiff had not filed an appearance. Nonetheless, the court noted at the hearing that, when it scheduled the hearing on the defendants' motion, it ordered the defendants' counsel "to send a copy of [the notice of the hearing] to the plaintiff so that the plaintiff would be aware that we were going to be scheduling a hearing such as this . . . to make sure that the plaintiff in her unrepresented capacity was aware that there was a potential for a dispositive motion to be granted." The court noted that, on May 25, 2021, the defendants' counsel filed a notice with the court that it had complied with the court's order to provide notice of the hearing to the plaintiff. Attached to that filing was written confirmation from the delivery service, FedEx, that the notice had been delivered to the plaintiff at a New York address.

<sup>8</sup> The defendants argue that the additional arguments raised by the plaintiff's counsel in his reply memorandum of November 18, 2021, should not be considered by this court because, unlike the grounds set forth in the plaintiff's motion to open, which was filed just one day shy of the four month time limit set forth in § 52-212, these additional grounds were not put before the court in a timely manner, within that four month time period. The defendants also argue that because the arguments raised in the reply memorandum of November 18, 2021, were untimely, the trial court lacked subject matter jurisdiction over the motion to open, and, consequently, this court lacks jurisdiction over this appeal.

These jurisdictional arguments are not persuasive. "Our courts have the inherent authority to open, correct, or modify judgments, but this authority is restricted by statute and the rules of practice. . . . For a trial court to open or set aside a judgment, a motion to open or a motion to set aside must be filed within four months of the date judgment is rendered with certain limited exceptions, e.g., the parties waive the statutory time limitation. . . . This statutory time limitation operates as a constraint, *not on the trial court's jurisdictional authority*, but on its substantive authority to adjudicate the merits of the case before it." (Citations omitted; emphasis added; internal quotation marks omitted.) *Jonas v. Playhouse Square Condominium Assn., Inc.*, 173 Conn. App. 36, 39–40, 161 A.3d 1288 (2017). More-



over, even if we were to assume that the trial court lacked subject matter jurisdiction over the motion, that lack of jurisdiction would not affect this court's subject matter jurisdiction over the plaintiff's appeal from the final judgment rendered by the trial court denying the motion to open. See *Herasimovich v. Wallingford*, 149 Conn. App. 325, 327 n.2, 87 A.3d 1177 (2014) (“[t]his court has jurisdiction over any final judgment of the Superior Court even if that court lacked jurisdiction”).

<sup>9</sup> The plaintiff's arguments concerning notice in connection with the hearing on the motion for nonsuit simply are not relevant to our review of the court's ruling on the motion to open. Nonetheless, we note that the court aptly observed that issues concerning her receiving notice of the hearing on the motion for nonsuit were attributable to the plaintiff's own conduct, not to factors outside of her control. To this end, we note that the plaintiff appended to her motion to open email correspondence between her and staff in the Superior Court clerk's office that reflects that, on multiple occasions prior to the May 27, 2021 hearing, the plaintiff was instructed to complete and file with the clerk's office an appearance form. As stated previously in this opinion, the plaintiff did not file an appearance as a self-represented party until September 27, 2021.

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