

\*\*\*\*\*

The “officially released” date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the “officially released” date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

\*\*\*\*\*

WELLS FARGO BANK, N.A., TRUSTEE *v.*  
MICHAEL JOHN MELAHN ET AL.  
(AC 45699)

Prescott, Moll and Clark, Js.\*

*Syllabus*

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant M. Before it initiated the foreclosure action, the plaintiff sent M a notice of default, which included information regarding his rights under the Emergency Mortgage Assistance Program (EMAP) pursuant to statute (§ 8-265ee). After protracted litigation, including various appeals to this court and our Supreme Court, the plaintiff filed a motion for summary judgment as to liability only, and M filed a motion to dismiss, arguing that the plaintiff had failed to give him proper EMAP notice pursuant to § 8-265ee and that the court, therefore, lacked subject matter jurisdiction. The court, relying on *Bank of New York Mellon v. Tope* (202 Conn. App. 540), denied M's motion to dismiss as an impermissible collateral attack on the judgment of strict foreclosure and concluded that no evidentiary hearing on the issue of EMAP notice was necessary. The court granted the plaintiff's motion for summary judgment as to liability only and rendered a judgment of strict foreclosure. *Held:*

1. M could not prevail on his claim that the trial court improperly declined to hold an evidentiary hearing before denying his motion to dismiss; pursuant to our Supreme Court's holding in *KeyBank, N.A. v. Yazar* (347 Conn. 381), the plaintiff's alleged lack of compliance with the EMAP notice requirement did not implicate the trial court's subject matter jurisdiction and, thus, the motion to dismiss did not raise a critical dispute regarding a jurisdictional fact that, if established, would have deprived the court of subject matter jurisdiction.
2. This court concluded that the trial court's denial of M's motion to dismiss did not constitute reversible error on the alternative ground that M's motion failed to raise properly a claim that the trial court lacked subject matter jurisdiction over the action: although the trial court relied on this court's holding in *Tope* as support for its conclusion that M's motion to dismiss was an impermissible collateral attack on the judgment, that decision was subsequently overruled by our Supreme Court in *Bank of New York Mellon v. Tope* (345 Conn. 662); moreover, even if this court's decision in *Tope* had not been overruled, the trial court improperly denied the motion to dismiss as an impermissible collateral attack on the judgment because it is well settled that, in the absence of a final judgment, a motion to dismiss is not an impermissible collateral attack, and, in the present case, there was no final judgment at the time that the court denied M's motion to dismiss, as a final judgment of strict foreclosure was not rendered until months after M had filed his motion to dismiss; furthermore, because our Supreme Court concluded in *Yazar* that the question of a plaintiff's compliance with the EMAP notice requirement does not implicate the court's subject matter jurisdiction over the foreclosure action and this court concluded that the trial court properly determined that M failed to raise a genuine issue of material fact regarding the plaintiff's compliance with the EMAP notification requirement the denial of M's motion to dismiss did not constitute reversible error.
3. The trial court did not err in granting the plaintiff's motion for summary judgment as to liability only and, thus, properly rendered a judgment of strict foreclosure: the court found a lack of a genuine issue of material fact regarding the plaintiff's compliance with EMAP as, pursuant to statute (§ 8-265dd (b)), the plaintiff submitted to the court, inter alia, two affidavits of compliance with the EMAP notice requirements and a copy of the notice of default with evidence, including a United States Postal Service bar code and tracking number, that it was sent to M via certified mail; moreover, the evidence M presented in opposition, an affidavit that he did not receive the required notice, was not sufficient to raise a genuine issue of material fact, as the plaintiff was obligated

to show only that the notice had been sent.

Argued September 12—officially released December 19, 2023

*Procedural History*

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants were defaulted for failure to appear; thereafter the court, *Pavia, J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Pavia, J.*, opened the judgment and granted the motion to dismiss filed by named defendant; thereafter, the court, *Pavia, J.*, granted the plaintiff's motion to reargue and vacated its order of dismissal, and the named defendant appealed to this court, *Gruendel, Bear and Flynn, Js.*, which reversed the trial court's judgment and remanded the matter for further proceedings; subsequently, the named defendant filed amended special defenses and a counterclaim; thereafter, the court, *Russo, J.*, granted the plaintiff's motion to strike the amended special defenses and counterclaim and rendered judgment on the counterclaim for the plaintiff, from which the named defendant appealed to this court, *Sheldon, Bright and Bear, Js.*, which dismissed in part the appeal and affirmed in part the trial court's judgment, and the named defendant, on the granting of certification, appealed to our Supreme Court, which vacated the judgment of this court and remanded the case to this court with direction to reconsider; subsequently, this court, *Bright, Moll and Bear, Js.*, dismissed in part the appeal and affirmed in part the trial court's judgment; thereafter, the trial court, *Shaban, J.*, denied the named defendant's motion to dismiss and granted the plaintiff's motion for summary judgment as to liability only and rendered judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

*Ridgely Whitmore Brown*, for the appellant (named defendant).

*Marissa I. Delinks*, for the appellee (plaintiff).

*Opinion*

PRESCOTT, J. The defendant Michael John Melahn<sup>1</sup> appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-6, Asset-Backed Certificates, Series 2007-6. The defendant claims that the court improperly (1) declined to hold an evidentiary hearing on his motion to dismiss, which asserted that the plaintiff failed to give him proper notice of the Emergency Mortgage Assistance Program (EMAP) as required by General Statutes § 8-265ee (a),<sup>2</sup> (2) denied his motion to dismiss as an impermissible collateral attack on the 2010 judgment of strict foreclosure, and (3) rendered summary judgment as to liability only despite the plaintiff's failure to comply with the EMAP notice requirement. We affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal.<sup>3</sup> The plaintiff commenced this action against the defendant in September, 2010, to foreclose a mortgage on residential property in Ridgefield. The defendant was defaulted for failure to appear, and the court rendered a judgment of strict foreclosure in November, 2010, with law days to commence in January, 2011. As part of the judgment, the court ordered the plaintiff to notify the defendant, who had not appeared in the action, in accordance with uniform foreclosure standing orders. Although the court sent notice of the order and judgment to the plaintiff on the day following the judgment, the plaintiff failed to send notice to the defendant until just four days prior to his law day. The defendant did not receive the notice until the actual law day. The notice also failed to contain all of the information required by the standing orders. Despite these deficiencies, the plaintiff nonetheless certified to the court that it had provided proper notice in compliance with the court's standing orders.

On February 22, 2011, an attorney filed an appearance in the matter on behalf of the defendant, and, one month later, the defendant filed a motion to dismiss the action citing the plaintiff's noncompliance with the court's standing orders and the false certification. The plaintiff opposed the motion, but, on July 14, 2011, the court nevertheless opened the judgment of strict foreclosure and granted the defendant's motion to dismiss.

The plaintiff filed a motion to reargue, which the court granted. The court subsequently vacated its order granting the defendant's motion to dismiss, concluding that, despite the plaintiff's actions, the court lacked authority to open the judgment because the law days had passed, vesting absolute title in the plaintiff. As a result, it denied the defendant's motion to dismiss. The defendant appealed, claiming that the court improperly

granted the plaintiff's motion for reargument and vacated the judgment of dismissal in his favor. See *Wells Fargo Bank, N.A. v. Melahn*, 148 Conn. App. 1, 85 A.3d 1 (2014). This court concluded on appeal that, "given the unusual specific facts and circumstances of this case"; *id.*, 3; the trial court had both jurisdiction and authority to open the judgment, despite the running of the law days, and abused its discretion by vacating its prior order. *Id.*, 12–13.

After the case was remanded to the trial court, the parties engaged in a protracted dispute regarding the adequacy of various counterclaims and special defenses filed by the defendant. These disputes resulted in the defendant's filing of a second appeal on July 18, 2016.

This court dismissed, for lack of a final judgment, a portion of that appeal and affirmed the judgment with respect to the court's judgment disposing of the defendant's counterclaims. *Wells Fargo Bank, N.A. v. Melahn*, 181 Conn. App. 607, 614, 186 A.3d 1215 (2018), *rev'd*, 333 Conn. 923, 218 A.3d 67 (2019). Our Supreme Court granted the defendant's petition for certification to appeal and, thereafter, vacated the judgment of this court and remanded the case with direction to reconsider the appeal in light of its recent decision in *U.S. Bank National Assn. v. Blowers*, 332 Conn. 656, 212 A.3d 226 (2019). *Wells Fargo Bank, N.A. v. Melahn*, 333 Conn. 923, 218 A.3d 67 (2019). On remand, this court concluded that *Blowers* did not require a different result and once again dismissed, for lack of final judgment, the defendant's appeal from the striking of the defendant's second amended special defenses and affirmed the judgment in all other respects. *Wells Fargo Bank, N.A. v. Melahn*, 198 Conn. App. 151, 168–69, 232 A.3d 1201, *cert. denied*, 335 Conn. 947, 238 A.3d 19 (2020).

Following this court's decision, the plaintiff demanded, and the defendant filed, a purported disclosure of defense.<sup>4</sup> The plaintiff subsequently filed a motion for summary judgment as to liability only and a supporting memorandum of law. The plaintiff attached, as an exhibit to an affidavit in support of its memorandum of law, a copy of the notice of default that the plaintiff had mailed to the defendant at the mortgaged property on April 19, 2010. That notice of default contains information about EMAP. At the top of the first page of the notice is a barcode with a twenty digit number below it, which the parties do not appear to dispute is the United States Postal Service (USPS) bar code and tracking number of the certified receipt for the mailed notice.

The defendant objected to the motion for summary judgment and also filed a motion to dismiss. In his motion to dismiss, the defendant argued, for the first time,<sup>5</sup> that the plaintiff failed to comply with the EMAP notice requirement and that the trial court therefore lacked subject matter jurisdiction over the action. He

also requested an evidentiary hearing on the motion. The plaintiff filed an objection to the motion to dismiss, to which it again appended as an exhibit a copy of the notice of default to demonstrate its compliance with the requirements of § 8-265e.

On October 12, 2021, the court, *Shaban, J.*, heard argument on the defendant's motion to dismiss and the plaintiff's motion for summary judgment as to liability only.<sup>6</sup> In January, 2022, the court issued separate memoranda of decision denying the motion to dismiss and granting the motion for summary judgment.<sup>7</sup> With respect to the defendant's motion to dismiss, the court concluded, relying in part on *Bank of New York Mellon v. Tope*, 202 Conn. App. 540, 246 A.3d 4 (2021), rev'd, 345 Conn. 662, 286 A.3d 891 (2022), that the defendant's motion to dismiss was an impermissible collateral attack on the judgment of strict foreclosure. Additionally, the court found unpersuasive the defendant's argument that the plaintiff failed to comply with the EMAP notice requirement and concluded that no evidentiary hearing on the issue of EMAP notice was necessary. With respect to the motion for summary judgment, the court concluded that the defendant had neither submitted any evidence to rebut the plaintiff's prima facie case nor alleged any viable defense, and, therefore, that there was no genuine issue of material fact as to the defendant's liability. On July 18, 2022, the trial court rendered a judgment of strict foreclosure. This appeal followed.

We begin our analysis by noting that the defendant's brief on appeal is not a model of clarity. The defendant appears to claim that the court improperly (1) declined to hold an evidentiary hearing on his motion to dismiss, which raised the plaintiff's asserted failure to comply with the EMAP notice requirement, (2) concluded that the defendant's motion to dismiss was an impermissible collateral attack on the 2010 judgment of strict foreclosure, and (3) rendered a summary judgment as to liability only despite the plaintiff's failure to comply with the EMAP notice requirement.

Although the defendant's brief discusses at length the court's denial of his motion to dismiss, it does not explicitly challenge the court's decision granting the plaintiff's motion for summary judgment. We conclude, however, that both orders, as well as the court's ultimate decision to render a judgment of strict foreclosure, are implicated by the EMAP notice issues that the defendant raises on appeal. Accordingly, we construe his brief as challenging both of these decisions. We further conclude, for the reasons that follow, that the court properly rendered the judgment of strict foreclosure, as there was no reversible error as to either the denial of the defendant's motion to dismiss or the granting of the plaintiff's motion for summary judgment as to liability only. We accordingly affirm the judgment of the trial court.

The defendant first claims that the court improperly declined to hold an evidentiary hearing before denying his motion to dismiss. We disagree.

“Trial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case. . . . [The] [l]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.

“[If] a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

“In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant’s motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits; see Practice Book § 10-31 (b); or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff’s jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

“Finally, [if] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts.” (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 650–52, 974 A.2d 669 (2009).

The defendant argued in his motion to dismiss that an

evidentiary hearing was necessary to resolve a critical factual dispute regarding the court's subject matter jurisdiction because, in his view, the plaintiff filed false affidavits regarding its compliance with the EMAP notice requirement. We are not persuaded that he is entitled to reversal of the judgment on this claim.

First, the defendant raised this factual dispute by filing a motion to dismiss for lack of subject matter jurisdiction. It is true that, under existing law at the time the motion to dismiss was filed, a plaintiff's failure to comply with the EMAP notification requirements deprived the court of subject matter jurisdiction. See *MTGLQ Investors, L.P. v. Hammons*, 196 Conn. App. 636, 645, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020). That case, however, was subsequently overruled by our Supreme Court's decision in *KeyBank, N.A. v. Yazar*, 347 Conn. 381, 397, 297 A.3d 968 (2023), which concluded that a plaintiff's lack of compliance with the EMAP notice requirement does not implicate the court's subject matter jurisdiction. Consequently, the defendant's motion to dismiss no longer raises a critical dispute regarding a *jurisdictional* fact that, if established, would have deprived the court of subject matter jurisdiction. Thus, an evidentiary hearing on the defendant's motion to dismiss is not required, and he is not entitled to a reversal of the judgment on this claim.

## II

We next address the defendant's claim that the court improperly denied his motion to dismiss because it was an impermissible collateral attack on the judgment. Although we agree with the defendant that his motion to dismiss was not an impermissible collateral attack on the judgment, we conclude that the court's denial of the motion to dismiss may be affirmed on alternative grounds.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Conboy v. State*, supra, 292 Conn. 650.

The court understandably relied on this court's decision in *Bank of New York Mellon v. Tope*, supra, 202 Conn. App. 540, which was binding precedent at the time, as support for its conclusion that the defendant's motion to dismiss was an impermissible collateral attack on the judgment. That reliance, however, is no longer justifiable because that decision is no longer good law. On December 20, 2022, our Supreme Court in *Bank of New York Mellon v. Tope*, 345 Conn. 662,



286 A.3d 891 (2022), reversed this court’s decision in *Bank of New York Mellon v. Tope*, supra, 202 Conn. App. 540. This court held in *Tope* that the defendant’s motion to open the foreclosure judgment based on a lack of subject matter jurisdiction constituted an impermissible collateral attack on the judgment because he never directly challenged the foreclosure judgment and because he failed to demonstrate that the court’s lack of subject matter jurisdiction was entirely obvious. Id., 548–50.

Our Supreme Court, in reversing this court’s decision, recognized “that an attack on a judgment within the same action or proceeding in which it was obtained can be [an impermissible] collateral attack if the judgment has become final and the court that rendered the judgment no longer has jurisdiction to open it.” *Bank of New York Mellon v. Tope*, supra, 345 Conn. 672. Our Supreme Court noted, however, that it was well settled law that “[i]n a foreclosure by sale, the court retains jurisdiction to modify the judgment until the foreclosure sale is approved”; id., 673; and reasoned that the court in that case had jurisdiction to modify the judgment at the time the defendant filed the motion to open because the defendant filed the motion to open within the four month limitation period triggered by the court’s modification of the sale date.<sup>8</sup> Id., 676. Our Supreme Court, therefore, held that the motion to open filed by the defendant was not an impermissible attack on the judgment of foreclosure because, although the judgment was final, the court retained jurisdiction over it. Id.

In the present case, a final judgment of strict foreclosure was not rendered until July 18, 2022, which was months after the defendant filed the motion to dismiss. Although an attack on a judgment made within the same action can be an impermissible collateral attack, that is only the case *if the judgment has become final* and the court that rendered the judgment no longer has jurisdiction. There was no final judgment in this case at the time the court decided the motion to dismiss. Therefore, even if this court’s decision in *Tope* had not been overturned by our Supreme Court, the court improperly denied the motion to dismiss as an impermissible collateral attack on the judgment because it is well settled law that, in the absence of a final judgment, a motion to dismiss is not an impermissible collateral attack.

Nevertheless, “[if] the trial court reaches a correct decision but on [improper] grounds, this court has repeatedly sustained the trial court’s action if proper grounds exist to support it. . . . [W]e . . . may affirm the court’s judgment on a dispositive [alternative] ground for which there is support in the trial court record.” (Citation omitted; internal quotation marks omitted.) *Hoskins v. Titan Value Equities Group, Inc.*, 252 Conn. 789, 794, 749 A.2d 1144 (2000).

As we discuss in part I of this opinion, the question of a plaintiff's compliance with the EMAP notice requirement no longer implicates the court's subject matter jurisdiction over the foreclosure action. See *Key-Bank, N.A. v. Yazar*, supra, 347 Conn. 397. Thus, the court would have been entitled to deny the motion to dismiss because it failed to raise properly a claim that the court lacked subject matter jurisdiction over the action. Finally, we note that the court addressed the merits of the defendant's EMAP claim when it adjudicated both the defendant's motion to dismiss and the plaintiff's motion for summary judgment. As we conclude in part III of this opinion, the court properly determined that the defendant failed to raise a genuine issue of material fact regarding the plaintiff's compliance with the EMAP notification requirement. Accordingly, the denial of the defendant's motion to dismiss does not constitute reversible error.

### III

The defendant's final claim is that the court improperly rendered summary judgment as to liability only because the plaintiff failed to comply with the EMAP notice requirement. We disagree. As we previously discussed, the court decided the issue of whether the plaintiff properly provided notice of EMAP to the defendant before initiating this action in adjudicating both the defendant's motion to dismiss and the plaintiff's motion for summary judgment. Because we have concluded that this issue does not implicate the court's subject matter jurisdiction, we analyze the issue in the context of whether the court properly granted the plaintiff's motion for summary judgment.

The following additional procedural history is relevant to this claim. On March 12, 2021, the plaintiff moved for summary judgment against the defendant as to liability only. The plaintiff attached to its memorandum of law in support of its motion an affidavit from a senior loan analyst of the loan servicer of the plaintiff. Attached to the affidavit is a copy of the notice of default that indicates that it was sent to the defendant on April 19, 2010, well before the initiation of the action. That notice included information regarding the defendant's rights under EMAP.

In opposing the motion for summary judgment, the defendant argued in his memorandum of law that a genuine issue of a material fact existed regarding whether the plaintiff had provided notice of EMAP prior to initiating the foreclosure action. The defendant's opposition did not state the reasons why he believed that the plaintiff had not complied with the notice requirements. The only evidentiary support attached to the opposition was an affidavit executed by the defendant in which he averred that he never "received" the EMAP notice.

In the plaintiff's reply to the defendant's objection, it referenced again the April 19, 2010 notice of default, which contained the notice of EMAP. It also referred the court to two affidavits filed on November 12, 2010, and November 17, 2010, respectively, that set forth its compliance with the EMAP notice requirements contained in § 8-265ee. Finally, the plaintiff argued that it was not obligated to prove that the defendant had received the notice; rather, it had to prove only that the notice had been sent.

The court concluded in its memorandum of decision granting the motion for summary judgment as to liability only that the plaintiff had met its initial burden to demonstrate the absence of a genuine issue of material fact with respect to its compliance with EMAP. The court also determined that the defendant failed to rebut this showing in part because the defendant's affidavit was unaccompanied by any evidentiary support and was simply a bald denial of the allegations in the plaintiff's complaint. The court also noted that the defendant had made equally unsupported factual assertions regarding EMAP compliance in his memorandum of law in support of his motion to dismiss.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . [I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"A party opposing summary judgment must prove an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . In other words, [d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing

summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact. . . . The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment.” (Citations omitted; internal quotation marks omitted.) *Bank of New York Mellon v. Horsey*, 182 Conn. App. 417, 435–36, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018).

We next turn to the EMAP notice requirement. “[Section] 8-265ee prohibits the initiation of a valid suit without providing the EMAP notice by affirmatively providing that [n]o such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. . . . [General Statutes §] 8-265dd, which establishes EMAP, also prevents the court from rendering any judgment of foreclosure until the EMAP notice has been sent, the sixty day response time has expired, and, if relevant, a determination has been made on the application for emergency mortgage assistance payments. . . . Specifically, the statute provides in relevant part: [N]o judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action instituted by the mortgagee . . . for the foreclosure of an eligible mortgage unless . . . notice to the homeowner who is a mortgagor has been given by the mortgagee in accordance with section 8-265ee and the time for response has expired . . . .” (Citations omitted; internal quotation marks omitted.) *KeyBank, N.A. v. Yazar*, supra, 347 Conn. 392–93.

“Moreover, the EMAP does not require a return receipt for the provision of the required notice to a mortgagor, and the lack of a return receipt in the record does not affect [a mortgagee’s] compliance with the [EMAP]. . . . Consequently, [it is sufficient] to establish that a letter was actually placed in the mail. . . . Whether a letter actually was placed in the mail may be proved either by direct or circumstantial evidence. It may be proved by the testimony of the person who deposited it or by proof of facts from which it may be reasonably inferred that it was duly deposited.” (Citations omitted; internal quotation marks omitted.) *Pennymac Corp. v. Tarzia*, 215 Conn. App. 190, 203, 281 A.3d 469 (2022).

Consequently, to be entitled to summary judgment, the plaintiff in the circumstances of this case was obligated to demonstrate the lack of a genuine issue of material fact regarding whether it complied with the statutory scheme by sending to the defendant by certified mail a notification of EMAP prior to initiating this

action.<sup>9</sup> We conclude that the plaintiff met this burden.

The plaintiff has submitted, pursuant to § 8-265dd (b), two identical affidavits of compliance with the EMAP notice requirements. In those affidavits, a representative of the plaintiff's loan servicer avers that "the [p]laintiff has complied fully with the requirements of [§] 8-265ee (a) by delivering a 60 day notice to the [defendant] in the proper form and content prescribed by § 8-265ee (a)." Although the affidavits do not describe the manner of "delivery," the record also includes an additional affidavit, filed in connection with the motion for summary judgment, attached to which is a copy of the notice of default that the plaintiff sent to the defendant more than sixty days prior to the initiation of this action. That notice of default contains on its first page a USPS bar code and tracking number, which is evidence that the notice was sent by certified mail to the defendant.<sup>10</sup> Taken together, the averments and documents are sufficient to demonstrate the lack of a genuine factual dispute regarding the plaintiff's compliance.

The only evidence that the defendant proffered in response to the plaintiff's averments is his representation in his affidavit that he did not receive the required EMAP notice. As noted previously, however, the plaintiff was not obligated to demonstrate that the notice was in fact received by the defendant. See *Pennymac Corp. v. Tarzia*, supra, 215 Conn. App. 203. It was obligated to show only the absence of a genuine factual dispute regarding whether the notice was sent.

In conclusion, we are not persuaded that the court improperly rendered summary judgment for the plaintiff as to liability only. As a result, we also conclude that the court properly rendered the judgment of strict foreclosure.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

\* The listing of judges reflects their seniority status on this court as of the date of oral argument.

<sup>1</sup> The complaint also named Danbury Radiological Associates, P.C., and Danbury Hospital as additional defendants, but they were defaulted for failure to appear and have not participated in this appeal. Accordingly, we refer to Michael John Melahn as the defendant.

<sup>2</sup> General Statutes § 8-265ee (a) provides in relevant part that "a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to each homeowner who is a mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. Such notice shall advise the homeowner of his delinquency or other default under the mortgage and shall state that the homeowner has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the authority with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the homeowner and mortgagee are unable to resolve the delin-

quency or default.”

Although § 8-265e(a) has been amended since the events underlying this appeal; see Public Acts 2021, No. 21-44, § 8; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

<sup>3</sup> This foreclosure action, which commenced in 2010, has a long and tortuous procedural history, which includes several prior appeals. See *Wells Fargo Bank, N.A. v. Melahn*, 148 Conn. App. 1, 3–6, 85 A.3d 1 (2014); *Wells Fargo Bank, N.A. v. Melahn*, 181 Conn. App. 607, 614, 186 A.3d 1215 (2018), rev’d, 333 Conn. 923, 218 A.3d 67 (2019); *Wells Fargo Bank, N.A. v. Melahn*, 198 Conn. App. 151, 153, 232 A.3d 1201, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

<sup>4</sup> The defendant’s disclosure of defense alleges that he has a bona fide equitable defense to the plaintiff’s action but does not describe with any detail the nature of that defense.

<sup>5</sup> The defendant failed to raise a claim at any point during the first ten years of the pendency of this case that the plaintiff had not complied with the EMAP notice requirements.

<sup>6</sup> The parties agreed to argue the motion for summary judgment and the motion to dismiss at the same hearing.

<sup>7</sup> The trial court issued the memorandum of decision on the motion to dismiss on January 12, 2022, and issued the memorandum of decision on the motion for summary judgment on January 19, 2022.

The defendant filed an interlocutory appeal to this court from the denial of the motion to dismiss and the granting of the motion for summary judgment. The plaintiff filed a motion to dismiss the appeal for lack of final judgment, which this court granted.

<sup>8</sup> Our Supreme Court held that, “when a court opens a judgment of foreclosure by sale to change the sale date or otherwise to modify the terms of the sale and renders a new judgment, a new limitation period begins under [General Statutes] § 52-212a.” *Bank of New York Mellon v. Tope*, supra, 345 Conn. 676. The court had opened, modified, and rendered the judgment on July 3, 2017, fewer than four months before the defendant had filed the motion to open the judgment of foreclosure by sale. *Id.*, 673.

<sup>9</sup> The defendant does not assert that the judgment was rendered prior to the expiration of the sixty day statutory period. Accordingly, we do not address that requirement.

<sup>10</sup> In his motion to dismiss, the defendant asserted that he has proof that the plaintiff failed to send the notice by certified mail because when one searches the certified tracking number on the USPS tracking website, as the defendant’s counsel did on July 27, 2021, the website responds with a message indicating “[l]abel [c]reated, not yet in system.” He argues that, because there is no record of the EMAP notice being sent in the USPS system, it must therefore be the case that the plaintiff never sent EMAP notice to the defendant.

Even if we were to consider this argument in the context of our review of the summary judgment rendered by the court, we would not be persuaded that it raises a genuine issue of material fact regarding whether the plaintiff sent the notice. In adjudicating the motion to dismiss, the trial court took judicial notice of the undisputed fact that USPS stores tracking information for certified mail for only two years and the court, therefore, rejected the defendant’s claim in its memorandum of decision on the motion to dismiss.

We agree with the court that the fact that the defendant’s counsel was unable to obtain tracking information in 2021 for a mailing that was sent eleven years earlier is not evidence that the plaintiff did not send the required EMAP notice to the defendant. The same claim was made and rejected in *JPMorgan Chase Bank, National Assn. v. Essaghof*, 217 Conn. App. 93, 102–103, 287 A.3d 1124 (2022), vacated on other grounds by *JPMorgan Chase Bank, National Assn. v. Essaghof*, 346 Conn. 909, 288 A.3d 1031 (2023).