DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* ROBERT FRABONI ET AL.
(AC 40704)

Keller, Elgo and Bright, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property of the defendant F. After the trial court rendered a judgment of strict foreclosure, it denied F's second motion to open and extended the law day to June 28, 2016. On June 24, 2016, F filed his third motion to open. On June 27, 2016, F filed an untimely appeal from the denial of his second motion to open, and the plaintiff thereafter filed a motion to dismiss that appeal. F subsequently filed a motion for permission to file a late appeal. This court granted the plaintiff's motion to dismiss the June 27 appeal and denied F's motion for permission to file a late appeal. Thereafter, the trial court held a hearing on the defendant's June 24, 2016 motion to open, during which the parties argued whether an appellate stay arose as a result of F's filing of the untimely June 27 appeal and, thus, whether the June 28 law day had expired. Subsequently, the trial court granted the joint motion of the parties to reserve for appellate advice two questions of law: (1) whether, except as otherwise provided by statute or other law, the filing of an appeal after the time to file an appeal has expired automatically stays the trial court proceedings in a

noncriminal matter pursuant to the applicable rule of practice (§ 61-11) until the final determination of the cause; and (2) if the answer to the first question was negative, whether the filing of F's untimely appeal in this action resulted in an automatic stay of execution, which tolled the running of his law day, pursuant to § 61-11. *Held:*

1. The first reserved question was answered in the negative: pursuant to the clear language of § 61-11 (a), unless otherwise provided by statute or other law, in noncriminal cases, an automatic stay is in place until the time to file an appeal has expired and, thus, the automatic stay expires when the applicable appeal period expires and the filing of a late appeal does not initiate an automatic stay of execution in a noncriminal case, and although § 61-11 does not set forth the requirement that an appeal be timely for an automatic stay to remain in place, it was clear from an examination of the rule as a whole that only a timely appeal stays the proceedings until the final determination of the cause; moreover, the arguments raised by F under various subsections of § 61-11 did not support a finding that an automatic stay is available for a late appeal, and although F claimed that a defendant in a civil action could be harmed if a late appeal did not reinstate the § 61-11 automatic stay, there was nothing absurd or unworkable about a system that allows a plaintiff to enforce a judgment rendered in its favor when the defendant has not properly exercised his right to challenge that judgment, especially given that a defendant who files a late appeal has remedies available to stop the execution of the judgment, such as requesting a discretionary stay or filing a motion to open the judgment before the running of the law days in a strict foreclosure.
2. The second reserved question was answered in the negative; although the denial of a motion to open a judgment of strict foreclosure is an appealable final judgment itself and distinctly appealable from the underlying judgment, if the appeal from that judgment is not timely filed and no request for a discretionary stay is made and granted, the law day will not be tolled and the appeal will become moot if the law day passes before the appeal is decided, and under the facts as stipulated by the parties, F's late appeal from the denial of his second motion to open the judgment of strict foreclosure did not revive the automatic stay to toll the running of the law day, as the judgment was stayed for twenty days pursuant to § 61-11 after the trial court denied F's second motion to open, that automatic stay expired twenty days later when F failed to file a timely appeal or to request a discretionary stay, and, therefore, the running of the law day was not tolled.

Argued March 19—officially released June 26, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief,

brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, rendered a judgment of strict foreclosure; thereafter, the court denied the named defendant's motion to open, and the named defendant appealed to this court, which dismissed the appeal; subsequently, the plaintiff filed an application for execution of ejectment; thereafter, the court, *Mintz*, *J.*, pursuant to the parties' stipulation, reserved two questions of law for the advice of this court.

David M. Bizar, with whom, on the brief, was *J. Patrick Kennedy*, for the appellant (plaintiff).

Marc T. Miller, with whom, on the brief, was *Dina E. Nathanson*, for the appellee (named defendant).

Opinion

BRIGHT, J. This appeal comes to us on a reservation of a legal issue pursuant to General Statutes § 52-235[1] and Practice Book § 73-1.[2] The stipulation of the parties

[1] General Statutes § 52-235 provides: "(a) The Superior Court, or any judge of the court, with the consent of all parties of record, may reserve questions of law for the advice of the Supreme Court or Appellate Court in all cases in which an appeal could lawfully have been taken to said court had judgment been rendered therein.

"(b) The court or judge making the reservation shall, in the judgment, decree or decision made or rendered in such cases, conform to the advice of the Supreme Court or the Appellate Court."

[2] Practice Book § 73-1 provides: "(a) Counsel may jointly file with the superior court a request to reserve questions of law for consideration by the supreme court or appellate court. A reservation request shall set forth: (1) a stipulation of the essential undisputed facts and a clear and full statement of the question or questions upon which advice is desired; (2) a statement of reasons why the resolution of the question by the appellate court having jurisdiction would serve the interest of simplicity, directness and judicial economy; and (3) whether the answers to the questions will determine, or are reasonably certain to enter into the final determination of the case. All questions presented for advice shall be specific and shall be phrased so as to require a Yes or No answer.

"(b) Reservation requests may be brought only in those cases in which an appeal could have been filed directly to the supreme court, or to the appellate court, respectively, had judgment been rendered. Reservations in

presents two questions for the advice of this court: (1) "[Except where otherwise provided by statute or other law,] [d]oes the filing of an appeal 'after the time to file an appeal has expired' . . . automatically stay the trial court proceedings in a noncriminal case pursuant to Practice Book § 61-11 until the final determination of the cause?"[3] and (2) "If the answer to the first question is not categorically no, then did the filing of [the] defendant's appeal in this instance 'after the time to file an appeal [had] expired' result in an automatic stay of execution [pursuant to Practice Book § 61-11] which tolled the running of his law day." We answer both questions in the negative.

The parties stipulated to the following relevant facts. "This is a judicial foreclosure action commenced by [the] plaintiff[4] by complaint dated March 4, 2010 . . . . The Superior Court granted . . . a judgment of strict foreclosure . . . on February 6, 2014. . . . [The] defendant's law day was extended multiple times—most recently on May 9, 2016, when the Superior Court denied [the] defendant's April 29, 2016 motion to open the judgment and extended his law day, sua sponte, to June 28, 2016. . . . On June 24, 2016, [the] defendant filed another motion to open [the] judgment (his third in this case) in the Superior Court. . . . On June 27, 2016—[forty-nine] days after the judgment [was rendered]—he filed an appeal [from the court's May 9,

cases where the proper court for the appeal cannot be determined prior to judgment shall be filed directly to the supreme court."

[3] We have reframed the first question by adding the bracketed text and replacing the word "ever" with an ellipses because, as originally proposed, it was too broad. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 57, 557 A.2d 1249 (1989) (reframing questions in reservation that parties had framed too broadly).

[4] The plaintiff, Deutsch Bank National Trust Company, as trustee for Freemont Home Loan Trust Series 2006-3, Asset-Backed Certificates, Series 2006-3, commenced this action against the defendants, Robert Fraboni and Louise Fraboni. Louise Fraboni has not participated in this reservation and, therefore, our references to the defendant are to Robert Fraboni.

2016 denial of his second motion to open], which was assigned [docket number] AC 39352 in [the Appellate] Court. . . . On July 5, 2016, [the] plaintiff filed a motion to dismiss the appeal, arguing that it was untimely, that the late appeal did not create an appellate stay, and that, because [the] defendant's June 28 law day had passed without [the] defendant exercising the equity of redemption, title had already vested absolutely in [the] plaintiff, rendering the case moot. . . . On July 8, 2016, [the] defendant filed a motion for permission to file a late appeal. . . . On July 13, 2016, [the] defendant filed an objection to the motion to dismiss. . . . On July 18, 2016, [the] plaintiff filed a response in opposition to [the] defendant's motion to file a late appeal. . . . On September 14, 2016, this court granted [the] plaintiff's motion to dismiss . . . . Also on September 14, 2016, this court denied [the] defendant's motion for permission to file a late appeal. . . .

"On November 7, 2016, the Superior Court held a hearing on [the] defendant's June 24, 2016 motion to open. . . . During the hearing, the parties argued about whether an appellate stay ever arose [by the defendant having filed the late appeal] and, thus, whether [the] defendant's June 28 law day had expired. . . . [The] defendant initially claimed that this court had remanded the case to set a new law day, but the Superior Court pointed out that no remand language appeared in the order dismissing the appeal. . . . The Superior Court also expressed concern that, by demanding that [the] plaintiff seek a new law day, [the] defendant was creating a new 'perpetual motion machine' like the one described in *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, [966 A.2d 239] (2009). . . . Reluctant to rule on an issue it deemed novel, the Superior Court instructed . . . counsel to consult the Practice Book to figure out a way to certify the issue to the Appellate Court. . . .

"On December 5, 2016, [the] plaintiff filed an application for execution of ejectment ('application'). . . . The next day, [the] defendant filed an objection to the application . . . . On January 9, 2017, the parties appeared before the Superior Court for a hearing on [the] plaintiff's application. . . . At the hearing, [the] defendant once again conceded that the appeal was untimely, but argued that the appellate stay provided by Practice Book § 61-11 applied. . . . [T]he parties [thereafter] filed a joint request to reserve the question to this court, which [then] was granted by the Superior Court on May 8, 2017." (Footnote added.) This court preliminarily accepted the joint reservation of the parties.

We first determine whether we have jurisdiction to decide the reserved questions of law; if we do have jurisdiction, we next determine whether the questions presented appropriately may be answered by way of a reservation. *State* v. *Wang*, 312 Conn. 222, 228, 92 A.3d 220 (2014). "Section 52-235 (a) confers jurisdiction in this court to consider reserved questions 'in all cases in which an appeal could lawfully have been taken to said court had judgment been rendered therein.' " *State* v. *Wang*, supra, 228; see Practice Book § 73-1 (b) ("[r]eservation requests may be brought only in those cases in which an appeal could have been filed directly to the supreme court, or to the appellate court, respectively, had judgment been rendered").

In this case, following a judgment of strict foreclosure by the trial court and this court's dismissal of the defendant's late appeal from the denial of a motion to open that judgment, the plaintiff filed an application and execution for ejectment, using form JD-CV-30, which references General Statutes § 49-22,[5] and the defendant filed

[5] General Statutes § 49-22 provides in relevant part: "(a) In any action brought for the foreclosure of a mortgage or lien upon land, or for any equitable relief in relation to land, the plaintiff may, in his complaint, demand possession of the land, and the court may, if it renders judgment in his favor

an objection thereto. The parties, with the approval of the Superior Court, requested that we undertake to answer two reserved questions. We conclude that we have jurisdiction to do so.

"As did the common law, § 49-22 permits a court, in its discretion and if the mortgagee is so entitled, to issue an execution of a judgment of ejectment in favor of the mortgagee after a successful action to foreclose the mortgage, as long as the person in possession is a party to the mortgage action. . . . Because § 49-22 requires the trial court to determine whether the mortgagee is entitled both to foreclosure and to possession before issuing an execution of a judgment of ejectment, it expressly contemplates that there may exist circumstances in which a mortgagee is entitled to foreclosure, but is not entitled to possession. Indeed, courts have recognized that, 'in equity, title and possession of premises may not automatically be linked.' " (Emphasis omitted; footnote omitted.) *First Federal Bank, FSB* v. *Whitney Development Corp.*, 237 Conn. 679, 690–91, 677 A.2d 1363 (1996) (reversing judgment granting execution of judgment of ejectment rendered against party tenant in possession of mortgaged property following judgment of strict foreclosure). Furthermore, this court previously has held that a mortgagor can challenge on appeal an execution of ejectment that he claims was issued in violation of the appellate stay. See, e.g., *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, 98 Conn.

and finds that he is entitled to the possession of the land, issue execution of ejectment, commanding the officer to eject the person or persons in possession of the land no fewer than five business days after the date of service of such execution and to put in possession thereof the plaintiff or the party to the foreclosure entitled to the possession by the provisions of the decree of said court, provided no execution shall issue against any person in possession who is not a party to the action except a transferee or lienor who is bound by the judgment by virtue of a lis pendens. The officer shall eject the person or persons in possession and may remove such person's possessions and personal effects and deliver such possessions and effects to the place of storage designated by the chief executive officer of the town for such purposes. . . ."

App. 72, 84–85, 909 A.2d 526 (2006). Similarly, a foreclosure plaintiff would have the right to appeal from a decision of the trial court denying its application for the issuance of an execution of ejectment. Accordingly, we conclude that this is a case in which an appeal could have been filed had judgment been rendered.

Notwithstanding our jurisdiction to decide these reserved questions, in accordance with the standards articulated in Practice Book § 73-1, we also must determine whether we *should* entertain the questions. *State* v. *Wang*, supra, 312 Conn. 229. "Section 73-1 (f) provides that '[t]he court will not entertain a reservation for its advice upon questions of law arising in any action unless the question or questions presented are such as are, in the opinion of the court, reasonably certain to enter into the decision of the case, and it appears that their present determination would be in the interest of simplicity, directness and economy of judicial action.' " Id. "Neither our Supreme Court nor this court is bound to entertain a reservation, and whether it will do so rests in its discretion. . . . The extent to which we will entertain a reservation also rests in the discretion of this court." (Citation omitted; internal quotation marks omitted.) *Capel* v. *Plymouth Rock Assurance Corp.*, 141 Conn. App. 699, 704, 62 A.3d 582 (2013). The reserved questions meet the settled criteria under our rules of practice because the questions are reasonably certain to enter into the decision on the plaintiff's application for an execution of ejectment. Accordingly, we will proceed to answer them.

Our analysis of the parties' reserved questions requires us to construe Practice Book § 61-11,[6] particularly subsection (a). "The interpretive construction of

[6] Practice Book § 61-11 provides: "(a) Automatic stay of execution

"Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. If the case goes to judgment on appeal, any stay thereafter shall be in accordance

with Section 71-6 (motions for reconsideration), Section 84-3 (petitions for certification by the Connecticut supreme court), and Section 71-7 (petitions for certiorari by the United States supreme court).

"(b) Matters in which no automatic stay is available under this rule

"Under this section, there shall be no automatic stay in actions concerning attorneys pursuant to chapter 2 of these rules, in juvenile matters brought pursuant to chapters 26 through 35a, or in any administrative appeal except as otherwise provided in this subsection.

"Unless a court shall otherwise order, any stay that was in effect during the pendency of any administrative appeal in the trial court shall continue until the filing of an appeal or the expiration of the appeal period, or any new appeal period, as provided in Section 63-1. If an appeal is filed, any further stay shall be sought pursuant to Section 61-12.

"For purposes of this rule, 'administrative appeal' means an appeal filed from a final judgment of the trial court or the compensation review board rendered in an appeal from a decision of any officer, board, commission, or agency of the state or of any political subdivision thereof. In addition to appeals filed pursuant to the Uniform Administrative Procedure Act, 'administrative appeal' includes, among other matters, zoning appeals, teacher tenure appeals, tax appeals and unemployment compensation appeals.

"(c) Stays in Family Matters and Appeals from Decisions of the Superior Court in Family Support Magistrate Matters

"Unless otherwise ordered, no automatic stay shall apply to orders of relief from physical abuse pursuant to General Statutes § 46b-15, to orders for exclusive possession of a residence pursuant to General Statutes §§ 46b-81 or 46b-83 or to orders of periodic alimony, support, custody or visitation in family matters brought pursuant to chapter 25, or to any decision of the superior court in an appeal of a final determination of a support order by a family support magistrate brought pursuant to chapter 25a, or to any later modification of such orders. The automatic orders set forth in Section 25-5 (b) (1), (2), (3), (5) and (7) shall remain in effect during any appeal period and, if an appeal is filed, until the final determination of the cause unless terminated, modified or amended further by order of a judicial authority upon motion of either party.

"Any party may file a motion to terminate or impose a stay in matters covered by this subsection, either before or after judgment is rendered, based upon the existence or expectation of an appeal. Such a motion shall be filed in accordance with the procedures in subsection (e) of this rule or Section 61-12. The judge hearing such motion may terminate or impose a stay of any order, pending appeal, as appropriate, after considering (1) the needs and interests of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not entered or is terminated; (3) if the appeal is from a judgment of dissolution, the need to preserve, pending appeal, the mosaic of orders established in the judgment; (4) the need to preserve the rights of the party taking the appeal to obtain effective relief if the appeal is successful; (5) the effect, if any, of the automatic orders under Section 25-5 on any of the foregoing

considerations; and (6) any other factors affecting the equities of the parties.

"The judge who entered the order in a family matter from which an appeal lies may terminate any stay in that matter upon motion of a party as provided in this subsection or sua sponte, after considering the factors set forth in this subsection or if the judge is of the opinion that an extension of time to appeal is sought or the appeal is filed only for delay. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

"(d) Termination of stay

"In all cases not governed by subsection (c), termination of a stay may be sought in accordance with subsection (e) of this rule. If the judge who tried the case is of the opinion that (1) an extension to appeal is sought, or the appeal is filed, only for delay or (2) the due administration of justice so requires, the judge may at any time, upon motion or sua sponte, order that the stay be terminated. Whether acting on a motion of a party or sua sponte, the judge shall hold a hearing prior to terminating the stay.

"(e) Motions to terminate stay

"A motion to terminate a stay of execution filed before judgment is entered shall be filed with the trial court, and the judge who tried or presided over the matter may rule upon the motion when judgment is entered. If such a motion is filed after judgment but before an appeal is filed, the motion shall be filed with the clerk of the trial court and may be ruled upon by the trial judge thereafter. After an appeal is filed, such a motion shall be filed with the appellate clerk and shall be forwarded by the appellate clerk to the trial judge for a decision. If the judge who tried or presided over the case is unavailable, the motion shall be forwarded to the clerk of the trial court in which the case was tried, who shall assign the motion for a hearing and decision to any judge of the superior court.

"Upon hearing and consideration of the motion, the trial court shall file with the clerk of the trial court its written or oral memorandum of decision that shall include the factual and legal basis therefor. If oral, the decision shall be transcribed by the court reporter and signed by the trial court. If an appeal has not been filed, the clerk shall enter the decision on the trial court docket and shall send notice of the decision to counsel of record. If an appeal has been filed, the clerk of the trial court shall enter the decision on the trial court docket and send notice of the decision to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record.

"(f) Motions to request stay

"Requests for a stay pending appeal where there is no automatic stay shall be governed by Section 61-12.

"(For stays of execution in criminal cases, see Section 61-13; for stays in death penalty cases, see Section 61-15.)

"(g) Strict Foreclosure—Motion Rendering Ineffective a Judgment of Strict Foreclosure

"In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under

the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . 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 . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles gov-

oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. Such affidavit shall recite the specific facts relied on in support of the moving party's claim of good cause. If, notwithstanding the submission of such an affidavit of good cause, the plaintiff contends that there is no good cause to stay the court's judgment of strict foreclosure pending resolution of the appeal, the plaintiff may seek termination of the automatic stay by filing a motion requesting such relief accompanied by an affidavit stating the basis for the plaintiff's claim. In the event such a motion to terminate stay is filed, it shall be set down for argument and the taking of evidence, if necessary, on the second short calendar next following the filing of the motion. There shall be no automatic appellate stay in the event that the court grants the motion to terminate the stay and, if necessary, sets new law dates. There shall be no automatic stay pending a motion for review of an order terminating a stay under this subsection.

"(h) Foreclosure by Sale—Motion Rendering Ineffective a Judgment of Foreclosure by Sale

"In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period."

erning the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594–95, A.3d (2018).

The plaintiff argues that Practice Book § 61-11 is plain and unambiguous. As to subsection (a), the plaintiff argues that the second sentence of that subsection complements the first sentence, requiring, under our well established principles of statutory construction, that both sentences be read together to secure the proper meaning and intent of the rule. According to the plaintiff, when read together, the first two sentences of § 61-11 (a) "stay the enforcement of a final judgment . . . to permit aggrieved parties the opportunity to appeal up until the time for exercising that right expires, and then *extend* . . . such a stay until the final determination of the cause *if* an appeal is [*timely*] filed. . . . [N]othing in the text creates a new stay [after] the former stay terminates and the appellant . . . [decides to file a late appeal] after the deadline." (Emphasis altered.) The plaintiff further argues that, under § 61-11 (a), "any automatic stay of execution ends when the appeal period expires . . . . [N]o new automatic stay arises for a late filed appeal."

The defendant also argues that Practice Book § 61-11 is plain and unambiguous. His reading of the rule, however, differs from that of the plaintiff. The defendant contends, contrary to the plaintiff, that the second sentence of subsection (a) should be read independently from the first sentence, and that it means exactly

what it says: "If an appeal is filed, such proceedings shall be stayed until the final determination of the cause." The defendant argues that there is nothing in that sentence that says the appeal must be timely filed in order for a stay to be initiated. The defendant further contends that other parts of § 61-11, particularly subsections (b) and (c), "explicitly list the types of matters for which no automatic stay is permitted under . . . [§] 61-11 (a)." He argues: "An appeal filed outside the [twenty] day appeal period is not included on this list of matters where no automatic appellate stay is available." He contends, therefore, that the fact that the rule does not mention a late appeal, supports his position that, as § 61-11 (a) clearly states: "If an appeal is filed, such proceedings shall be stayed until the final determination of the cause." The defendant, citing to *Stratford* v. *LeBlanc*, 175 Conn. App. 362, 167 A.3d 1015 (2017), and *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 37 A.3d 766 (2012), also contends that our appellate case law supports his argument. He argues that, in these foreclosure cases, despite acknowledging that the appeals were late, we remanded *White Water Mountain Resorts of Connecticut, Inc.*, to the trial court with direction to reset the law days, and we remanded *LeBlanc* to the trial court with direction to set a new sale date.

Although the parties' agree that Practice Book § 61-11 is plain and unambiguous, they each advance a different interpretation of that rule. On the basis of our own consideration of the language of § 61-11 and its relationship to other rules, particularly Practice Book § 61-12[7];

[7] Practice Book § 61-12 provides in relevant part: "In noncriminal matters in which the automatic stay provisions of Section 61-11 are not applicable and in which there are no statutory stay provisions, any motion for a stay of the judgment or order of the superior court pending appeal shall be filed in the trial court. If the judge who tried the case is unavailable, the motion may be decided by any judge of the superior court. Such a motion may also be filed before judgment and may be ruled upon at the time judgment is

see General Statutes § 1-2z ("[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes"); although we agree that Practice Book § 61-11 is plain and unambiguous, we conclude that the plaintiff's interpretation of the rule is accurate. See *Honulik* v. *Greenwich*, 293 Conn. 698, 710–11, 980 A.2d 880 (2009) ("[t]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous" [internal quotation marks omitted]). Specifically, we conclude that, pursuant to Practice Book § 61-11, unless otherwise provided by statute or other law, the filing of a late appeal does not revive the automatic stay of execution in a noncriminal case. Accordingly, we also conclude that the defendant's late appeal from the denial of his second motion to open the judgment of strict foreclosure did not revive the automatic stay to toll the running of the law day.

I

We address the first reserved question, "[except where otherwise provided by statute or other law,] [d]oes the filing of an appeal 'after the time to file an appeal has expired' . . . automatically stay the trial court proceedings in a noncriminal case pursuant to Practice Book § 61-11 until the final determination of the cause," and we answer that question in the negative.

In construing the meaning of Practice Book § 61-11, in accordance with § 1-2z, we first turn to the language of the rule. Subsection (a) provides in relevant part:

rendered unless the court concludes that a further hearing or consideration of such motion is necessary. A temporary stay may be ordered sua sponte or on written or oral motion, ex parte or otherwise, pending the filing or consideration of a motion for stay pending appeal. The motion shall be considered on an expedited basis and the granting of a stay of an order for the payment of money may be conditional on the posting of suitable security. . . ."

"Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ." Subsection (b) provides in relevant part: "Under this section, there shall be no automatic stay in actions concerning attorneys . . . juvenile matters . . . or in any administrative appeal except as otherwise provided in this subsection." Subsection (c) provides in relevant part: "Unless otherwise ordered, no automatic stay shall apply to orders of relief from physical abuse . . . to orders for exclusive possession of a residence . . . to orders of periodic alimony, support, custody or visitation in family matters brought . . . or to any decision of the superior court in an appeal of a final determination of a support order by a family support magistrate . . . ." Subsection (d) provides in relevant part: "In all cases not governed by subsection (c), termination of a stay may be sought in accordance with subsection (e) of this rule. . . ." Subsection (e) provides in relevant part: "A motion to terminate a stay of execution filed before judgment is entered shall be filed with the trial court . . . . If such a motion is filed after judgment but before an appeal is filed, the motion shall be filed with the clerk of the trial court . . . . After an appeal is filed, such a motion shall be filed with the appellate clerk and shall be forwarded by the appellate clerk to the trial judge for a decision. . . ." Finally, subsection (f) provides in relevant part: "Requests for a stay pending appeal where there is no automatic stay shall be governed by Section 61-12. . . ."

The text of Practice Book § 61-11 (a) dictates that, unless otherwise provided by statute or other law, in noncriminal cases, an automatic stay is in place "*until the time to file an appeal has expired.*" (Emphasis

added.) Clearly then, the automatic stay expires when the applicable appeal period expires. The second sentence of the rule then provides that "[i]f an appeal is filed, such proceedings shall be stayed until the final determination of the cause." We acknowledge that subsection (a) certainly could be more explicit in its second sentence by setting forth the requirement that an appeal be *timely* for the automatic stay to remain in place. Nevertheless, examining § 61-11 as a whole, as we must, it is clear to us that, unless otherwise established by statute or other law, only a timely appeal stays the proceedings "until the final determination of the cause."

As this court recently explained: "It is axiomatic that, with limited exceptions, an appellate stay of execution arises from the time a judgment is rendered until the time to file an appeal has expired. Practice Book § 61-11 (a). If an appeal is filed, any appellate stay of execution in place during the pendency of the appeal period continues until there is a final disposition of the appeal or the stay is terminated. Practice Book § 61-11 (a) and (e). If no appeal is filed, *the stay automatically terminates with the expiration of the appeal period*." (Emphasis added.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 99, 172 A.3d 1263 (2017). "[When] no appeal [is] filed from [a] judgment of strict foreclosure . . . any initial appellate stay of execution that arose when that judgment was rendered expire[s] after the appeal period for that judgment ha[s] run . . . . [Nevertheless, a] party [may seek] a discretionary stay of execution with respect to the foreclosure judgment.[8] Accordingly, [if] there [is] no appellate stay in effect when the law days [begin] to run . . . absolute title to the property transfer[s] to the plaintiff as a matter of

[8] Certainly, although no automatic stay may arise, any party may request the imposition of a discretionary stay pending appeal in accordance with Practice Book §§ 61-11 (f) and 61-12.

law after all law days expired." (Footnote altered.) Id., 100–101. "[T]he automatic tolling of the law days is necessary in the context of filing an appeal because otherwise defendants would be deprived of their rights to file *a timely appeal* and to redeem." (Emphasis added.) *Deutsche Bank National Trust Co.* v. *Pardo*, 170 Conn. App. 642, 653 n.11, 155 A.3d 764, cert. denied, 325 Conn. 912, 159 A.3d 231 (2017).

The defendant argues that Practice Book "§ 61-11 (b) and (c) explicitly list the types of matters for which no automatic stay is permitted under [§] 61-11 (a). An appeal filed outside the [twenty] day appeal period is not included on this list of matters where no automatic appellate stay is available. Practice Book [§] 61-11 (d) and (e) provide the mechanism for terminating the automatic stay that is otherwise available under Practice Book § 61-11 (a), and [§] 61-11 (f) provides the mechanism for obtaining a stay of proceedings when the matter is one in which no automatic stay is provided under [§] 61-11 (b) and (c)." We disagree.

First, subsections (b) and (c) of Practice Book § 61-11 list only the types of matters as to which there is no automatic stay. They do not address the timing requirement set forth in § 61-11 (a). If anything, the language of § 61-11 (b) supports our interpretation of § 61-11 (a). Section 61-11 (b) provides that "any stay that was in effect during the pendency of any administrative appeal in the trial court shall continue until the filing of an appeal or the expiration of the appeal period, or any new appeal period, as provided in Section 63-1." Thus, like in § 61-11 (a), once the appeal period expires, so does the existing stay.

Practice Book § 61-11 (f), which is entitled "Motions to request stay," provides in relevant part: "Requests for a stay pending appeal where there is no automatic stay shall be governed by Section 61-12." Nowhere in

subsection (f) does it provide that a request for a stay can be made only in matters where there is no automatic stay as provided under § 61-11 (b) and (c). Rather, subsection (f) directs a party to request a stay "where there is no automatic stay" by using the procedure set forth in § 61-12.

Practice Book § 61-12 provides in relevant part: "In noncriminal matters in which the automatic stay provisions of Section 61-11 are not applicable . . . any motion for a stay of the judgment . . . shall be filed in the trial court. . . . Such a motion may also be filed before judgment and may be ruled upon at the time judgment is rendered . . . . The motion shall be considered on an expedited basis . . . ." Clearly, taken together, these rules also provide a means to request a stay of execution in a noncriminal case when the automatic stay has expired, i.e. there is no automatic stay, and a late appeal is filed.

The defendant also argues that Practice Book § 61-11 (g) and (h) "make no mention of the automatic stay being unavailable for late filed appeals." Although we agree with the defendant's statement, we disagree that it supports his argument that, pursuant to subsection (a), an automatic stay is created, or recreated, when a late appeal is filed. Section 61-11 (g) addresses only the issue of how many times a foreclosure defendant is entitled to an automatic stay while appealing denials of motions to open. It in no way modifies the timing requirement of § 61-11 (a). Similarly, § 61-11 (h) addresses only a last minute motion to open filed by a foreclosure defendant to disrupt a scheduled foreclosure sale. It does not expand a foreclosure defendant's rights to an automatic stay. To the contrary, it "stays" only the filing of a motion to approve the sale "until the expiration of the appeal period following the denial of the motion [to open] without an appeal having been filed." Practice Book § 61-11 (h). Consistent with our

interpretation of § 61-11 (a), this language provides the defendant with relief only if he files a timely appeal.

Additionally, the defendant argues that the plaintiff's interpretation of Practice Book § 61-11 "would yield an absurd and unworkable result" because it would permit an execution on a judgment for millions of dollars and the seizure of bank accounts despite the filing of an appeal, albeit, a late appeal. He also argues that it would permit title to pass in a foreclosure case, even after an appeal, again, albeit, a late appeal, has been filed. The final example given by the defendant in support of his argument that the plaintiff's interpretation "would yield an absurd and unworkable result" is that, if Connecticut still had a death penalty, we could be in a situation where the plaintiff's reading of § 61-11 "conceivably [could result] in the state ending the life of someone whose death penalty conviction is validly before this court on appeal. . . . Without a stay in place for a late filed appeal, appellees could execute on judgments issued by the trial court at [its] leisure, while those very same judgments remained in doubt on appeal." Clearly, the defendant is misguided in this final argument; § 61-11 applies only in noncriminal matters.

As to the first two arguments, we also are not persuaded. Although the defendant is concerned that a defendant in a civil action could be harmed if a late appeal did not reinstate the automatic Practice Book § 61-11 stay, we conclude that there is nothing absurd or unworkable about a system that allows a plaintiff to enforce a judgment rendered in its favor when the defendant has not properly exercised his right to challenge that judgment. Indeed, it seems more absurd to construe the rule to allow a party who has sat on his rights to use an untimely appeal to reinstate the expired automatic stay and thereby thwart a plaintiff's legally proper efforts to collect or to proceed with a foreclosure once a judgment has been rendered and the defendant

has failed to file a timely appeal. Furthermore, the defendant who files a late appeal still has remedies available to him to stop the execution of the judgment. The defendant can request a discretionary stay under Practice Book §§ 61-11 (f) and 61-12 in such instances, or file a motion to open the judgment before the running of the law days in a strict foreclosure, in accordance with General Statutes § 49-15 and Practice Book §§ 61-11 and 63-1.

Finally, the defendant points us to two foreclosure cases from this court where, after considering the defendants' late filed appeals, we remanded the cases to the trial court to either reset the law day or reset the sale date. See *Stratford* v. *LeBlanc*, supra, 175 Conn. App. 362; *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 133 Conn. App. 536. We do not find either decision helpful to our analysis. Although both appeals were filed late, the plaintiffs had waived any objection to their late filing because they had not filed motions to dismiss the late appeals pursuant to Practice Book § 66-8. See *Stratford* v. *LeBlanc*, supra, 365 n.3; *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 542–43. Although we do recognize that this court remanded those cases to the trial court for a resetting of the law days or the resetting of the sale date, respectively, the issue of whether the Practice Book § 61-11 automatic stay had expired was not raised on appeal, and, therefore, this court did not consider it. Accordingly, we do not find these cases helpful to our analysis. In fact, both our Supreme Court and this court consistently have described the right to an automatic stay as arising out of a timely filed appeal. See, e.g., *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 689, 105 A.3d 675 (2016) ("the defendant's filing of [an] appeal *within twenty days of* [*the*] *judgment* continue[s] the stay 'until the final determination of [the appeal]' " [emphasis

added]); *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 347, 579 A.2d 1054 (1990) (holding that "[t]he *seasonable filing* of a notice of appeal . . . operates as a stay of further proceedings under a judgment of foreclosure" [emphasis added; internal quotation marks omitted]); *Deutsche Bank National Trust Co. v. Pardo*, supra, 170 Conn. App. 653 n.11 (recognizing purpose of automatic stay in foreclosure proceedings is protection of defendant's right to "file a *timely* appeal and to redeem" and that rule exists to "provide that proceedings to enforce or carry out the judgment or order shall be automatically stayed *until the time to file an appeal has expired*" [emphasis added; internal quotation marks omitted]); *Brooklyn Savings Bank v. Frimberger*, 29 Conn. App. 628, 631, 617 A.2d 462 (1992) (holding that a "stay remains in effect until the disposition of this appeal *because* the defendant's appeal was *timely* filed during the appeal period" [emphasis added]).

Having considered the parties' first reserved question, "[except where otherwise provided by statute or other law,] [d]oes the filing of an appeal 'after the time to file an appeal ha[d] expired' . . . automatically stay the trial court proceedings in a noncriminal case pursuant to Practice Book § 61-11 until the final determination of the cause," we answer that question in the negative. (Emphasis added.) Specifically, we conclude that, pursuant to Practice Book § 61-11, unless otherwise provided by statute or other law, the filing of a late appeal does not initiate an automatic stay of execution in a noncriminal case.

II

We next address the second reserved question, "did the filing of [the] defendant's appeal in this instance 'after the time to file an appeal has expired' result in an automatic stay of execution [pursuant to Practice

Book § 61-11] which tolled the running of his law day," and we answer that question in the negative. (Emphasis added.)

The defendant in this case has not identified any statute or law other than Practice Book § 61-11 (a) as the basis for his argument that his late filed appeal resulted in an automatic stay. Consequently, under the facts stipulated to by the parties, it is clear that the defendant's late filed appeal did not trigger an automatic stay. The defendant filed his second motion to open the judgment of strict foreclosure, which the trial court denied on May 9, 2016. Pursuant to Practice Book §§ 61-11 and 63-1, that judgment was stayed for twenty days. On June 27, 2016, clearly well beyond the twenty day appeal period, the defendant filed an appeal from that denial, which, upon motion by the plaintiff, this court then dismissed, without a written opinion. The law day in this case had been set for June 28, 2016. Although there had been an automatic stay from the court's May 9, 2016 denial of the defendant's second motion to open, that automatic stay expired twenty days later when the defendant failed to file a timely appeal. No request for a discretionary stay was made by the defendant. Accordingly, the running of the law day was not tolled. In summation, although "[t]he denial of a motion to open a judgment of strict foreclosure is an appealable final judgment itself and distinctly appealable from the underlying judgment"; *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687 n.8; if the appeal from that judgment is not timely filed and no request for a discretionary stay is made and granted, the law day will not be tolled and the appeal will become moot if the law day passes before the appeal is decided. See Practice Book §§ 61-11 and 61-12.

Accordingly, we answer the second reserved question in the negative. The defendant's late appeal from the denial of his second motion to open the judgment of

strict foreclosure did not revive the automatic stay, under Practice Book § 61-11, to toll the running of the law day.

The first reserved question is answered: "No." The second reserved question is answered: "No."

No costs will be taxed in this court to any party.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT LEE HUDSON III
(AC 39825)

Lavine, Prescott and Harper, Js.

Syllabus

Convicted, following a plea of guilty, of the crimes of criminal possession of a firearm and altering a firearm identification mark, the defendant appealed to this court. The defendant had entered into a plea agreement with the state pursuant to *State* v. *Garvin* (242 Conn. 296), under which he would receive a certain sentence so long as he appeared before the court for a scheduled sentencing hearing and was not arrested before that time while out on bond, and would be subject to enhanced penalties if he violated that agreement. The sentencing hearing had been continued several times, and between the time the defendant entered into the *Garvin* agreement and the sentencing hearing, he was arrested on new criminal charges. The trial court denied the defendant's motion to continue the sentencing until the second case was resolved and sentenced him to a total effective sentence of ten years of incarceration instead of the previously agreed six years of incarceration. *Held* that the defendant could not prevail on his claim that the trial court deprived him of his right to due process by finding that he violated the no new arrests condition of the *Garvin* agreement and increasing his sentence without first holding a hearing, in accordance with *State* v. *Stevens* (278 Conn. 1), to determine whether his arrest in the second case was supported by probable cause; although the defendant did request the trial court to postpone his sentencing in the present case until the ultimate question of his guilt in the second case was decided, he failed to put the court on notice that he was challenging the validity of the arrest in the second case and, therefore, his claim was unpreserved, and even though the record was adequate to review the claim pursuant to *State* v. *Golding* (213 Conn. 233) and the claim implicated the defendant's constitutional

right to due process, the defendant failed to demonstrate the existence of a constitutional violation of his right to due process pursuant to the third prong of the test set forth in *Golding*, as any evidence pertaining to the defendant's ultimate criminal liability with respect to the second case was irrelevant to the trial court's determination that he breached the *Garvin* agreement, and there was nothing in the record to suggest that the arrest in the second case lacked the requisite minimal indicium of reliability necessary to be considered at sentencing given that a judicial determination of probable cause was made within forty-eight hours of the warrantless arrest and that the defendant had conceded, at oral argument and in response to questions from this court, that he was not challenging whether there was a legitimate basis for that arrest.

Argued February 5—officially released June 26, 2018

Procedural History

Substitute information charging the defendant with the crimes of criminal possession of a firearm and altering the identification mark of a firearm, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant was presented to the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee, on a plea of guilty; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, *Paul Ferencek*, supervisory assistant state's attorney, and *James Bernardi*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Robert Lee Hudson III, appeals following the judgment of conviction, challenging only the sentence imposed on him by the trial

court following his plea of guilty under the *Alford*[1] doctrine to criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217[2] and altering the identification mark of a firearm in violation of General Statutes (Rev. to 2013) § 29-36.[3] The defendant's plea was entered subject to a *Garvin* agreement.[4] The sole issue on appeal is whether the court violated the defendant's right to due process when it found that he had violated the *Garvin* agreement without first conducting a hearing in accordance with *State* v. *Stevens*, 278 Conn. 1, 11–13, 895 A.2d 771 (2006), to determine whether probable cause existed to support the defendant's subsequent arrest, which was the basis of the violation. We conclude that the defendant's right to due process was not infringed and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. On September 9, 2013, the defendant was arrested pursuant to a warrant for criminal

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); see also *State* v. *Fairchild*, 155 Conn. App. 196, 199 n.2, 108 A.3d 1162 ("[a] criminal defendant who enters a guilty plea under the *Alford* doctrine does not admit guilt but acknowledges that the state has sufficient evidence to convict"), cert. denied, 316 Conn. 902, 111 A.3d 470 (2015).

[2] Hereinafter, all references to § 53a-217 in this opinion are to the 2013 revision of the statute.

[3] Hereinafter, unless otherwise indicated, all references to § 29-36 in this opinion are to the 2013 revision of the statute.

[4] A *Garvin* agreement is a conditional plea agreement. See *State* v. *Garvin*, 242 Conn. 296, 300–302, 699 A.2d 921 (1997). Typically, a defendant who enters into a *Garvin* agreement agrees to a particular sentence of incarceration, but wishes to be at liberty pending sentencing. Thus, the court will release the defendant on bond prior to sentencing and, in exchange, the defendant agrees to abide by certain conditions. Oftentimes, those conditions include a requirement that the defendant appear at the sentencing hearing and refrain from being arrested. If the defendant violates a condition of the *Garvin* agreement, the court may impose a longer sentence than that to which the defendant originally agreed. See id., 300–302, 309–14; see also *State* v. *Brown*, 145 Conn. App. 174, 176 n.1, 75 A.3d 713, cert. denied, 310 Conn. 936, 79 A.3d 890 (2013).

possession of a firearm in violation of § 53a-217, altering the identification mark of a firearm in violation of § 29-36, and having a weapon in a motor vehicle in violation of General Statutes (Rev. to 2013) § 29-38. The charges stemmed from the defendant's alleged involvement with an attempted burglary in Stamford (Stamford arrest).

On September 4, 2014, the defendant pleaded guilty, under the *Alford* doctrine, to criminal possession of a firearm and altering the identification mark of a firearm. The defendant subsequently entered into a *Garvin* agreement whereby the court agreed to release the defendant on bond while he awaited sentencing and to impose the agreed upon sentence, which was six years incarceration, followed by four years of special parole, so long as he (1) appeared in court for sentencing on December 5, 2014, and (2) was not arrested while out on bond (no new arrests condition). The court advised the defendant that, if he violated a condition of the *Garvin* agreement, he was no longer entitled to the agreed upon sentence and the court instead could sentence him up to the statutory maximum period of incarceration for the charges to which he pleaded guilty. The court canvassed the defendant as follows:

"Q. Now you're out on bond on these files, sir. You understand you have to be back here on December 5th. Do you understand that, sir?

"A. Yes, sir.

"Q. If you don't come back on that date, I will feel free to sentence you to the maximum term for the charges to which you've plead[ed] [guilty], which is ten years to serve; two [years] mandatory minimum time. Do you understand that, sir?

"A. Yes, sir.

"Q. In addition to that, you would be charged with failure to appear in the first degree, which brings with

it an additional five years in the state's prison system. Do you understand that, sir?

"A. Yes, sir.

"Q. Secondarily, if you were to pick up any files between now and the time you are sentenced, be they serious motor vehicle offenses or criminal offenses, I would feel free to sentence you to the maximum term, which is ten years to serve. Do you understand that, sir?

"A. Yes, sir.

"Q. Do you agree to all of that, sir?

"A. Yes, sir."[5]

On December 3, 2014, the sentencing hearing was continued to January 20, 2015. On December 19, 2014, the defendant was arrested in connection with a shooting in the Norwalk-Stamford area and charged with attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), reckless endangerment in the first degree in violation of General Statutes § 53a-63, criminal possession of a pistol or revolver in violation of General Statutes (Supp. 2014) § 53a-217c, unlawful discharge of a firearm in violation of General Statutes § 53-203, altering the identification mark of a firearm in violation of General Statutes (Supp. 2014) § 29-36, and stealing a firearm in violation of General Statutes § 53a-212 (Norwalk arrest).

On October 14, 2015, following numerous continuances, the court held a sentencing hearing on the charges to which the defendant had pleaded guilty under the *Alford* doctrine as a result of his Stamford arrest. The court noted the *Garvin* agreement that the

[5] We note that, at the time the defendant accepted the plea agreement, the court did not explain to him in explicit terms that if he was subsequently arrested, *and that arrest was supported by probable cause*, it would constitute a violation of the *Garvin* agreement. The defendant, however, does not challenge on appeal whether the *Garvin* canvass itself was proper.

defendant had entered into with respect to those charges. The defendant's attorney, Richard Meehan, Jr., then asked the court whether it would (1) consider sentencing the defendant to the original agreed upon disposition, which was six years to serve, followed by four years of special parole, or (2) refrain from sentencing him until the Norwalk case was resolved because he claimed that a third-party witness would exonerate him of those charges.[6]

In response to Meehan's request, the court stated that "[w]hen the *Garvin* warnings are given—and the *Garvin* warnings are not predicated upon guilt beyond a reasonable doubt—the *Garvin* warnings are given with the understanding that if [the defendant is] involved in any kind of subsequent behavior that *results in a judge finding probable cause for his arrest*, be it a serious motor vehicle matter or a criminal matter, then he has violated the *Garvin* warnings given by the [c]ourt. That was the agreement he agreed to at the time the *Garvin* warnings were given, not proof beyond a reasonable doubt." (Emphasis added.)

[6] Specifically, Meehan stated to the court: "If Your Honor please, I discussed with [the defendant] the fact that the court intends to move forward and sentence him in accordance with . . . *Garvin*, based upon the circumstances of the new arrest. He has asked me to make application to the court as follows. Either, one, that the court consider sentencing him to the original plea bargain here in the case, which was six years to serve, two of which were to be mandatory, on the criminal possession of a firearm, followed by four years of special parole. Or, [in the] alternative, to continue this case until the resolution of the latest case, his Norwalk arrest, which forms the basis for the *Garvin* claim.

"It's [the defendant's] contention—and he's indicated this to his prior counsel, [Attorney John] Imhoff, and also to Attorney O'Reilly who's now been appointed—that there is a witness in that case, a codefendant who has in fact given a statement that exonerates him. So, if in fact that's true, and if in fact he prevails before a jury on the new charge, it really would be somewhat unfair for him, to sentence him under *Garvin* on the technicality of the arrest. So he's asked me to make that application to the court. If Your Honor chooses not to impose the original plea bargain sentence that had been discussed, then I would ask Your Honor to continue this matter indefinitely until the resolution of the pending Norwalk case."

Despite the court's explanation, the defendant failed to argue that his Norwalk arrest was not supported by probable cause or otherwise contest its validity. Nor did the defendant explicitly request a hearing of any kind.

The court then heard from the state, which requested that the court increase the defendant's total sentence to ten years of incarceration. The defendant subsequently made a formal motion to continue the sentencing until the Norwalk case was resolved. The court denied the defendant's motion for continuance and sentenced him to two consecutive five year terms of incarceration for criminal possession of a firearm in violation of § 53a-217 and altering the identification mark of a firearm in violation of § 29-36, for a total effective sentence of ten years of incarceration, two years of which were a mandatory minimum period of incarceration.

On November 21, 2016, the defendant filed the present appeal. On June 26, 2017, during the pendency of this appeal, the Norwalk case was resolved when the defendant pleaded guilty[7] under the *Alford* doctrine to criminal possession of a firearm in violation of § 53a-217 and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[8]

[7] The fact that the defendant pleaded guilty to those charges does not render this appeal moot. In *Council* v. *Commissioner of Correction*, 286 Conn. 477, 486–88, 944 A.2d 340 (2008), our Supreme Court considered this exact issue, namely, whether the fact that the petitioner pleaded guilty to a charge stemming from a subsequent arrest rendered moot his claim that the court should have allowed him to contest the validity of that arrest before finding that he violated the *Garvin* agreement. In that case the petitioner argued, and our Supreme Court agreed, that his claim on appeal was not moot because the sentencing court had considered all of the charges brought against him as a result of his subsequent arrest rather than the single charge to which he ultimately pleaded guilty. Id., 488. The rest of the charges were nolled by the state. Thus, our Supreme Court reasoned that it was possible that, "if [the petitioner] were to prevail in this appeal, he would not be precluded from attempting to establish on remand that there was no basis for those charges. If the trial court were to agree . . . it might impose a different sentence." Id.

[8] Although § 29-35 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-193, § 9; that amendment has no bearing on

On appeal, the defendant claims that the court deprived him of his right to due process by finding that he violated the no new arrests condition of the *Garvin* agreement and increasing his sentence without first holding a *Stevens* hearing to determine whether his Norwalk arrest was supported by probable cause. We disagree.

The state contends that this claim is not preserved. The defendant, however, argues that his assertion that he would be exonerated of the charges stemming from his Norwalk arrest was enough to put the court on notice that he was requesting a *Stevens* hearing. We agree with the state that the claim the defendant advances on appeal was not distinctly raised to the trial court and is therefore unpreserved.

The defendant's request that his sentencing in the Stamford case be postponed until the ultimate question of his guilt in the Norwalk case was decided is fundamentally different than a request for adjudication by the court regarding the validity of his Norwalk arrest. At no point during the defendant's October 14, 2015 sentencing hearing did the defendant contest whether his Norwalk arrest was supported by probable cause or otherwise challenge the validity of the arrest, despite the court's statement that "the *Garvin* warnings are not predicated upon guilt beyond a reasonable doubt—the *Garvin* warnings are given with the understanding that if [the defendant is] involved in any kind of subsequent behavior that results *in a judge finding probable cause for his arrest* . . . then he has violated the *Garvin* warnings . . . ." (Emphasis added.) We do not mean to suggest that the defendant was required to use the precise phrase, "I am requesting a *Stevens* hearing," in order to preserve his claim. At the very least, however, he needed to put the court on notice that he was

the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

challenging the validity of the arrest itself. Because he failed to do so, we conclude that his claim is not preserved.

The defendant requests that, in the event we conclude that his claim is not preserved, we review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40.

As a threshold matter, we note that the defendant's claim is reviewable under *Golding* because the record is adequate for review and the claim is of constitutional magnitude. Specifically, the issue of whether the court was required to hold a *Stevens* hearing before finding that the defendant violated the no new arrests condition of the *Garvin* agreement implicates his constitutional right to due process. See *State* v. *Stevens*, supra, 278 Conn. 7 n.8, 11–13. The defendant cannot satisfy the third prong of *Golding*, however, because no constitutional violation occurred in the present case.

We begin by setting forth the legal principles relevant to the defendant's claim. A *Garvin* agreement is a conditional plea agreement. See *State* v. *Brown*, 145 Conn. App. 174, 176 n.1, 75 A.3d 713, cert. denied, 310 Conn. 936, 79 A.3d 890 (2013). If a defendant enters into a

Garvin agreement and, thereafter, violates a condition of that agreement, the court may decline to impose the agreed upon sentence and instead increase the defendant's sentence up to his or her maximum statutory exposure. See *State* v. *Garvin*, 242 Conn. 296, 300–302, 314, 699 A.2d 921 (1997). Moreover, a no new arrests condition may properly be imposed by the court pursuant to a *Garvin* agreement. See *State* v. *Stevens*, supra, 278 Conn. 8–9 (condition of *Garvin* agreement that defendant not get arrested while awaiting sentencing was valid).

In *State* v. *Stevens*, our Supreme Court determined that, regarding a violation of a no new arrests condition of a *Garvin* agreement, due process requires that the defendant be given the opportunity to contest the validity of the arrest. Id., 12. If the defendant does contest the validity of the arrest, the court must conduct an inquiry regarding the defendant's challenge.[9] Id., 13. The defendant in *Stevens*, however, did not dispute the facts leading to the arrest or whether it was supported by probable cause. Id., 12. Our Supreme Court concluded, therefore, that "in the absence of a dispute as to the validity of the arrest, giving effect to the breach of the no [new] arrest condition does not violate due process." Id.

The defendant argues that the court should have conducted a *Stevens* hearing before finding that he violated the no new arrests condition of the *Garvin* agreement. The defendant further appears to argue that the hearing to which he was entitled would include, in addition to any inquiry regarding whether his Norwalk arrest was supported by probable cause, an opportunity to contest his ultimate criminal liability. In *Stevens*, however, our Supreme Court determined that due process did not

[9] Although *Stevens* does not entirely delineate the scope of the requisite inquiry, our reading of that case indicates that, typically, the issue would be limited to whether there was probable cause to arrest the defendant.

require the court to find that the defendant actually committed the postplea offense that led to her arrest before concluding that she violated the *Garvin* agreement. See id., 12–13. Thus, even if the court did conduct a *Stevens* hearing in the present case, any evidence relating to the defendant's ultimate criminal liability would not have altered the court's conclusion that he violated the *Garvin* agreement.

Moreover, absent any indication that the defendant's Norwalk arrest was not valid, the court was free to consider the arrest at sentencing without first holding a *Stevens* hearing.[10] "A sentencing judge has very broad discretion in imposing any sentence within the statutory limits . . . . To arrive at a just sentence, a sentencing judge may consider information that would be inadmissible for the purpose of determining guilt . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Huey*, 199 Conn. 121, 126, 505 A.2d 1242 (1986). "The trial court's discretion, however, is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability." Id., 127.

In the present case, there is nothing in the record to suggest that the defendant's Norwalk arrest lacked the requisite minimal indicium of reliability necessary to be considered at sentencing. Although the defendant was arrested without a warrant, the court, *Dennis*, *J.*, later determined, within the applicable forty-eight hour period required by Practice Book § 37-12, that the arrest

[10] The defendant argues that a defendant must affirmatively waive his right to a *Stevens* hearing, citing *State* v. *Stevens*, supra, 278 Conn. 11–13, and *State* v. *Yates*, 169 Conn. App. 383, 388, 401–403, 150 A.3d 1154 (2016), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017). Our appellate courts, however, have never imposed such a rule, nor do we think it is appropriate to require a court to canvass a defendant regarding his or her right to a *Stevens* hearing in every case with an alleged *Garvin* violation. Presumably, a defendant is the person most likely in possession of any information undermining the validity of the arrest that formed the basis of the *Garvin* violation and, thus, would know whether a hearing might be appropriate.

was supported by probable cause. Moreover, at oral argument and in response to questions from this court, the defendant conceded that he was not challenging whether there was a "legitimate basis" for the arrest—in other words, he does not argue that the arrest lacked probable cause.

Thus, because (1) any evidence pertaining to the defendant's ultimate criminal liability with respect to the Norwalk arrest was irrelevant to the court's determination that he breached the *Garvin* agreement, and (2) there is nothing in the record to suggest that the arrest lacked the requisite minimal indicium of reliability necessary to be considered at sentencing, we conclude that the defendant's right to due process was not violated. See *State* v. *Yates*, 169 Conn. App. 383, 401–403, 150 A.3d 1154 (2016), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017) (sentencing court properly considered defendant's pending arrest warrants in deciding what sentence to impose in light of defendant's failure to comply with "no new arrests" condition of *Garvin* agreement where, inter alia, defendant never challenged whether arrest warrants were supported by probable cause [internal quotation marks omitted]). The defendant's claim, therefore, fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

FEDERAL NATIONAL MORTGAGE ASSOCIATION *v.* RICHARD FARINA ET AL.
(AC 39924)

DiPentima, C. J., and Prescott and Elgo, Js.

Syllabus

The plaintiff mortgage company sought, by way of summary process, to gain possession of certain real property previously owned by the defendant F. In the underlying residential mortgage foreclosure action, F had appealed from a judgment of strict foreclosure to this court, which

affirmed the judgment and remanded the case to the trial court for the purpose of setting new law days. F subsequently filed an amended motion to vacate the judgment of strict foreclosure, which was treated as a motion to open the judgment of strict foreclosure and was denied by the trial court. F appealed from the trial court's denial of his motion to open and his motion to reargue, and this court dismissed that second appeal as frivolous. F subsequently filed a second motion to open and a motion to dismiss that were both denied by the trial court, which extended the law days to April 25, 2016. After F appealed to this court from the trial court's denial of his motion to dismiss, the plaintiff filed a motion to dismiss F's appeal, which this court granted. Subsequently, the plaintiff commenced the present summary process action. F filed a motion to dismiss on the ground that the plaintiff lacked standing to bring the summary process action because it was not the valid title holder of the subject property. The trial court granted F's motion to dismiss and rendered judgment of dismissal, from which the plaintiff appealed to this court. On appeal, F claimed that dismissal of the summary process action was proper because, pursuant to the applicable rule of practice (§ 61-11), an automatic stay of execution of the prior foreclosure judgment was in place and, thus, the April 25, 2016 law day passed without effect and title never vested in the plaintiff. The plaintiff claimed that title properly vested after the running of the law days on April 25, 2016, as no automatic stay was created by the filing of the final appeal in the foreclosure action pursuant to § 61-11 (g). *Held* that the trial court improperly granted F's motion to dismiss the summary process action for lack of standing; F's claim in the present appeal regarding the plaintiff's standing was an impermissible collateral attack on the judgment in the prior proceeding, as this court previously rendered judgment granting the plaintiff's motion to dismiss F's final appeal of the foreclosure action on the ground that the appeal was moot because § 61-11 (g) prevented the automatic stay from going into effect and, therefore, the law days passed and title of the property had vested absolutely with the plaintiff, F did not file a petition for certification with our Supreme Court from that decision, and the plaintiff was entitled to rely on the finality of the judgment in the underlying foreclosure action for its standing in the present summary process action.

Argued February 13—officially released June 26, 2018

Procedural History

Summary process action brought to the Superior Court in the judicial district of New Britain, Housing Session, where the court, *Hon. Henry S. Cohn*, judge trial referee, granted the motions to dismiss filed by the named defendant et al. and rendered judgment of

dismissal, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Robert J. Wichowski, for the appellant (plaintiff).

William E. Carter, for the appellee (named defendant).

Opinion

ELGO, J. In this summary process action, the plaintiff, Federal National Mortgage Association, appeals from the judgment of dismissal in favor of the defendant Richard Farina.[1] On appeal, the plaintiff claims that the trial court improperly concluded that it lacked standing to bring the present action. The plaintiff contends that, pursuant to a judgment of strict foreclosure, title to the subject property vested absolutely in the plaintiff on April 25, 2016, and, therefore, as the owner of the property, it had standing to prosecute the summary process action. The defendant, by contrast, claims that title never passed to the plaintiff in the foreclosure action because an appellate stay was in effect that prevented the law days from passing and, thus, the defendant is still the title holder of the property. We agree with the plaintiff and reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendant owned a residential property known as 100 Town Line Road in Plainville that was encumbered by a mortgage that had been assigned to BAC Home Loans Servicing, LP (BAC Home Loans), by an assignment of mortgage recorded on the Plainville land records. In July, 2009, BAC Home Loans brought an action to foreclose on the mortgage due to

[1] Linda Farina and Richard Farina were named as defendants in the underlying foreclosure action. Linda Farina also was named as a defendant in this action, but did not file an appearance. The four tenants of the property are named as defendants in this action as Jane Doe 1, Jane Doe 2, John Doe 1 and John Doe 2 (tenants). The tenants did not participate in this appeal. We, therefore, refer to Richard Farina as the defendant in this opinion.

the defendant's failure to meet the payment obligations on the underlying note. On February 3, 2012, BAC Home Loans filed a motion for summary judgment, in which it argued that there were no genuine issues of material fact regarding the allegations of its complaint and that it was entitled to judgment as a matter of law. The court granted that motion and rendered summary judgment in favor of BAC Home Loans as to liability only on March 5, 2012. The trial court thereafter granted BAC Home Loans' motion to substitute Bank of America, N.A., as the plaintiff after a merger between BAC Home Loans and Bank of America, N.A.

On June 19, 2012, Bank of America, N.A., filed a motion for judgment of strict foreclosure, and the defendant filed an objection to said motion on September 10, 2012. The court granted the motion for a judgment of strict foreclosure on September 10, 2013, and set law days to commence on October 7, 2013. On September 16, 2013, the defendant filed his first appeal with this court, in which he challenged the summary judgment rendered as to liability and the judgment of strict foreclosure. This court ultimately affirmed the propriety of the judgment and remanded the case to the trial court for the purpose of setting new law days. See *BAC Home Loans Servicing, LP* v. *Farina*, 154 Conn. App. 265, 107 A.3d 972 (2014), cert. denied, 316 Conn. 908, 111 A.3d 884 (2015).

On May 11, 2015, the defendant filed with the trial court a motion to vacate summary judgment and strict foreclosure on the basis of newly discovered facts. The defendant amended the motion to vacate on July 8, 2015, which the court treated as a motion to open. The court denied that motion on August 3, 2015.

On July 7, 2015, Bank of America, N.A., filed a motion to open and a motion to substitute the plaintiff as the plaintiff in the underlying foreclosure action. The court

granted the motions on August 3, 2015.[2] On August 13, 2015, the defendant filed a motion to reargue his July 8, 2015 motion to open. On August 14, 2015, the court denied the defendant's motion to reargue. The defendant appealed from the court's denial of the motion to reargue and the motion to open on September 1, 2015. On October 28, 2015, this court dismissed the defendant's second appeal as frivolous. The plaintiff subsequently, on November 10, 2015, filed a motion to open the judgment to reenter judgment after appeal and to award additional attorney's fees. The court granted the motion on December 21, 2015, reentered judgment, and set new law days to commence on January 25, 2016.

On January 21, 2016, the defendant filed a motion to open, which was denied by the court on January 25, 2016. In its order, the court set new law days for February 29, 2016. The defendant also filed a motion to dismiss, pursuant to Practice Book § 10-30, on January 21, 2016, and attached to said motion was an "affidavit of truth" signed by the defendant. On February 29, 2016, the court extended the law days to March 28, 2016, and, on March 1, 2016, the court denied the defendant's motion to dismiss. On March 16, 2016, the defendant filed a motion to reargue the motion to dismiss, which the court denied on March 28, 2016, and extended the law days to April 25, 2016.

On April 15, 2016, the defendant appealed from the court's denials of the motion to dismiss and motion to reargue. On May 4, 2016, the plaintiff moved to dismiss the defendant's appeal, arguing that the defendant's appeal was "untimely, as no automatic stay was in effect pursuant to . . . Practice Book § 61-11 (g). Further, [the] defendant did not file an affidavit as required by . . . § 61-11 (g), and therefore no automatic stay was in effect. For that reason, [the] defendant's law day

[2] New law days were set for September 14, 2015.

remained April 25, 2016, which has since passed, and title has vested absolutely in [the] plaintiff. As title vested absolutely in [the] plaintiff, [this court] is without jurisdiction to hear [the] defendant's appeal. [The] plaintiff filed this motion to dismiss within ten days of the date on which title vested absolutely in [the] plaintiff. In the absence of an actual controversy, the court should dismiss the appeal." On July 20, 2016, this court granted the plaintiff's motion to dismiss the final appeal of the foreclosure action.[3]

A certificate of foreclosure was filed on May 6, 2016, on the Plainville land records. On May 9, 2016, a notice to vacate pursuant to General Statutes § 49-31p was sent to the defendant. On August 22, 2016, a notice to quit was served upon the defendant and the defendant's tenants to quit possession on or before August 27, 2016.

On August 31, 2016, the plaintiff commenced this summary process action. The defendant filed a motion to dismiss on October 13, 2016, and the plaintiff filed an objection to the defendant's motion on October 27, 2016. Following a hearing before the trial court on October 27, 2016, the defendant filed a supplemental memorandum, in which he claimed that the plaintiff was not the valid title holder of the property and, as a result, the plaintiff lacked standing to bring the summary process action. In support of its objection to the motion to dismiss, the plaintiff filed a supplemental brief claiming that, because this court had dismissed as moot the final appeal of the foreclosure action, the law days have long since passed and title properly vested in the plaintiff. The parties appeared before the court again on December 15, 2016, at which time the court granted the defendant's motion to dismiss the summary process action

[3] The order of this court read as follows: "The motion of the [plaintiff], filed May 4, 2016, to dismiss [the] appeal, having been presented to [this] court, it is hereby ordered granted. The appeal as amended is dismissed."

and rendered a judgment of dismissal.[4] From that judgment, the plaintiff now appeals.

The sole issue on appeal is whether the trial court properly granted the defendant's motion and dismissed this summary process action. We begin by noting that "[t]he standard of review for a court's decision on a motion to dismiss is well settled. 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. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable

[4] During the hearing on the defendant's motion to dismiss the summary process action, the following colloquy occurred:

"The Court: I think there should have been a reset for law dates—

"[The Plaintiff's Counsel]: But Your Honor, the Appellate Court certainly knows how to rescript with that instruction—

"The Court: Well, they didn't.

"[The Plaintiff's Counsel]: —and they did not do so in this case.

"The Court: They didn't.

* * *

"The Court: And all they said was case dismissed.

* * *

"The Court: I'm still not convinced that you have . . . no stay here at the time when the order was issued.

"[The Plaintiff's Counsel]: Well, Your Honor, it—

"The Court: So, I'm going to dismiss the action. That's it, I don't agree with you. I think there's too much of a loophole here that you should have come back to the foreclosure court. Tell him you want a new law day, and get the thing wiped out, and then you're all set. I just don't like it that there was a clear stay, and just because you asked, and they didn't do anything about it, I just don't know—

"[The Plaintiff's Counsel]: Your Honor, with all due respect there was no clear stay. There was no—

"The Court: There was absolutely a clear stay. Your motion said there was and then the—

"[The Plaintiff's Counsel]: Your Honor, our objection said there was none. We filed an objection yesterday which clearly [sets] everything out.

"The Court: I'm overruling your position, and I'm dismissing the case. Take an appeal."

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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010).

The defendant argues that dismissal of this summary process action was proper because, as provided for in Practice Book § 61-11 (a),[5] an automatic stay of execution of the prior foreclosure judgment was in place and, thus, the April 25, 2016 law day passed without effect and title never vested in the plaintiff. The plaintiff argues that title properly vested after the running of the law days on April 25, 2016, as no automatic stay was created by the filing of the final appeal in the foreclosure action because of § 61-11 (g).

We begin by noting that, "[p]rior to October, 2013, a defendant in a foreclosure action could employ consecutive motions to open the judgment in tandem with Practice Book §§ 61-11 and 61-14 to create almost the perfect perpetual motion machine. . . . Prior to October, 2013, a court's denial of a motion to open a judgment of strict foreclosure automatically stayed the running of the law days until the twenty day period in which to file an appeal from that ruling had expired, and, if an appeal was filed, that initial appellate stay continued until there was a final determination of the appeal.

[5] Practice Book § 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ."

"Practice Book § 61-11 was amended effective October 1, 2013 . . . to address this problem by the addition of subsections (g) and (h)." (Citation omitted; internal quotation marks omitted.) *Citigroup Global Markets Realty Corp.* v. *Christiansen*, 163 Conn. App. 635, 639–40, 137 A.3d 76 (2016). Practice Book § 61-11 (g) provides in relevant part: "In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. Such affidavit shall recite the specific facts relied on in support of the moving party's claim of good cause. . . ."

On appeal, the plaintiff seeks reversal of the judgment dismissing this summary process action for the very reason that it successfully moved for dismissal of the final appeal of the foreclosure action. As we noted previously, we granted the plaintiff's motion to dismiss the final appeal of the foreclosure action on July 20, 2016. By granting the plaintiff's motion to dismiss, we decided that the appeal was moot because Practice Book § 61-11 (g) prevented the automatic stay from going into effect and, therefore, the law days passed and title of the property had vested with the plaintiff. The defendant did not file a petition for certification with our Supreme Court and thus, the judgment was final as to that action. On appeal, the defendant is essentially challenging the validity of the judgment in the prior proceeding.

"[F]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfa-

vored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016).

"Unless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Internal quotation marks omitted.) *In re Shamika F.*, 256 Conn. 383, 407–408, 773 A.2d 347 (2001).

We recently discussed the importance of the principle of the finality of judgments in *Ruiz* v. *Victory Properties, LLC*, 180 Conn. App. 818, A.3d (2018). "Generally, courts recognize a compelling interest in the finality of judgments which should not lightly be disregarded. Finality of litigation is essential so that parties may rely on judgments in ordering their private

affairs and so that the moral force of court judgments will not be undermined. The law favors finality of judgments . . . . This court has emphasized that due consideration of the finality of judgments is important and that judgments should only be set aside or opened for a strong and compelling reason. . . . It is in the interest of the public as well as that of the parties [that] there must be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligation to act further in the matter by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . [T]he modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 828.

The defendant's position regarding the plaintiff's standing is an impermissible collateral attack on the judgment in a prior proceeding, from which the defendant failed to file a petition for certification with our Supreme Court. In accordance with our decision granting the plaintiff's motion to dismiss the final appeal of the foreclosure action, the underlying foreclosure action concluded with title vesting absolutely in the plaintiff on April 25, 2016. The plaintiff was entitled to rely on the finality of the underlying foreclosure action for its standing in the present summary process action. Thus, the court improperly granted the defendant's motion to dismiss this summary process action for lack of standing.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

CHARLES D. GIANETTI *v.* ADAM DUNSBY ET AL. (AC 40419)

Keller, Elgo and Bright, Js.

Syllabus

The plaintiff brought this action against the defendant members of the Easton Board of Selectmen for the alleged wrongful denial of certain tax relief to which the plaintiff claimed that he was entitled for elderly homeowners under a municipal ordinance. The ordinance provided that the determination as to whether an applicant's income qualified for tax relief and whether an application was bona fide would be made by the town tax assessor and that an applicant who was denied relief could appeal to the board. Following the denial of his application for tax relief pursuant to the ordinance, the plaintiff appealed to the board, which denied the appeal. The plaintiff thereafter commenced the present action, claiming that the tax assessor and the board wrongfully had denied him tax relief pursuant to the ordinance. The trial court denied the defendants' motion to dismiss, in which they claimed that the trial court lacked subject matter jurisdiction over the plaintiff's action because there was no statutory right to appeal from the board's decision to the Superior Court. Thereafter, following a hearing during which the defendants again raised the issue of the court's subject matter jurisdiction, the trial court render judgment in favor of the defendants, concluding that the plaintiff's claim failed on its merits. On appeal to this court, the plaintiff raised various challenges to the factual findings and evidentiary determinations of the trial court. *Held* that the trial court lacked subject matter jurisdiction over the plaintiff's action, as the plaintiff was not authorized by statute to commence an administrative appeal in the Superior Court challenging the propriety of the board's decision on his tax relief appeal: this court construed the plaintiff's action as an administrative appeal, which is permitted only under statutory authority, and because the plaintiff failed to identify any statutory authority permitting his appeal and the subject ordinance expressly was enacted pursuant to certain enumerated statutes, none of which provided an applicant for municipal tax relief an avenue of appeal in the Superior Court, the trial court lacked jurisdiction to entertain the plaintiff's appeal; moreover, the plaintiff was not entitled to judicial review of the board's decision under the Uniform Administrative Procedure Act (§ 4-166 et seq.), as that act applies only to state agencies and the plaintiff could not satisfy the contested case requirement of the act because the board was not statutorily obligated to determine the plaintiff's rights and privileges with respect to his tax relief appeal; accordingly, because the trial court lacked subject matter jurisdiction over the plaintiff's action, it

should have rendered judgment dismissing the action rather than rendering judgment on the merits.

Submitted on briefs March 19—officially released June 26, 2018

Procedural History

Action to recover damages for the defendants' alleged wrongful denial of certain tax relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Edward F. Stodolink*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Improper form of judgment*; *judgment directed*.

Charles D. Gianetti, self-represented, the appellant (plaintiff) filed a brief.

Peter V. Gelderman filed a brief for the appellees (defendants).

Opinion

ELGO, J. The self-represented plaintiff, Charles D. Gianetti, appeals from the judgment of the Superior Court rendered in favor of the defendants, Adam Dunsby, Robert Lesser, and Scott Centrella, in this action concerning the plaintiff's eligibility for tax relief under a municipal ordinance.[1] On appeal, the plaintiff raises a bevy of challenges to the factual findings and evidentiary determinations of the court. In response, the defendants contend, inter alia, that the court lacked subject matter jurisdiction to entertain the present action. We agree with the defendants and, accordingly, reverse the judgment of the court and remand the case with

[1] Oral argument on this appeal was scheduled for the morning of March 19, 2018. The plaintiff did not appear at that time and did not contact the court or the clerk's office regarding his failure to appear. Counsel for the defendants did appear and indicated on the record that he had not heard from the plaintiff. Attempts made by both the clerk of court and opposing counsel to reach the plaintiff by telephone that morning were unsuccessful. With the consent of the defendants' counsel, this court, therefore, took the matter on the record and the briefs submitted.

direction to dismiss the plaintiff's action for lack of subject matter jurisdiction.

This appeal concerns the "2009 Tax Relief For The Elderly Ordinance" (ordinance) enacted by the town of Easton, the stated purpose of which is to assist "elderly homeowners with a portion of the costs of property (real estate) taxation." The ordinance specifies various criteria for relief thereunder. The determination as to whether an applicant's "income qualifies for tax relief," as well as whether the "application is bona fide," is made by the Easton tax assessor (assessor) pursuant to §§ 14 and 15 of the ordinance. The ordinance also provides a mechanism by which an applicant who is denied relief may appeal the assessor's determination. Section 14 (g) states in relevant part that "[a]ny person refused relief for any reason may appeal to the Board of Selectmen whose decision shall be final."

On April 23, 2009, the plaintiff filed an application for tax relief pursuant to the ordinance. After receiving notice that his application had been denied, the plaintiff appealed to the Easton Board of Selectmen (board), on which the defendants served, in accordance with § 14 (g) of the ordinance. Following a hearing, the board sent a letter to the plaintiff, in which the board indicated that it was prepared to deny the plaintiff's appeal. That letter further advised the plaintiff that, if he had any additional information or documentation regarding his eligibility for tax relief under the ordinance, the board would reconsider its determination. When the plaintiff did not respond in any manner, the board sent him another letter informing him that his appeal was denied.

By complaint dated August 31, 2011, the plaintiff commenced a mandamus action against the members of the board stemming from their denial of his appeal. Following a hearing, the court, *Hon. Michael Hartmere*, judge trial referee, rendered a judgment of dismissal in

favor of the defendants, concluding that the plaintiff had "failed to establish the essential elements of [his] mandamus action." *Gianetti* v. *Herrmann*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029623-S (October 30, 2014). The plaintiff did not appeal from that judgment.

The plaintiff commenced the present action against the defendants on June 22, 2015, approximately six years after the denial of his tax relief appeal by the board. The operative complaint, the plaintiff's August 3, 2015 amended complaint, contains one count titled "Wrongful Denial of Relief Pursuant to the Senior Tax Relief Program Ordinance." In that count, the plaintiff alleged that although he had applied for tax relief pursuant to the ordinance and satisfied the requirements thereof, the assessor "refused the tax relief." The plaintiff further alleged that the board, in denying his appeal, "erroneously and wrongfully denied the relief provided by the [ordinance], and the plaintiff has been harmed thereby."[2]

After filing their answer and special defenses,[3] the defendants filed a motion to dismiss, claiming that the

[2] In the sole count of his complaint, the plaintiff alleged in full:

"1. [The plaintiff] is a resident of Easton, Connecticut.

"2. [The defendants] at all times hereinafter mentioned are the selectmen of [Easton].

"3. [Easton] has a Senior Tax Relief Program ordinance.

"4. The plaintiff applied for tax relief for tax year 2009.

"5. The plaintiff met all qualifying provisions of the ordinance.

"6. The plaintiff submitted the financial information required by the ordinance.

"7. The [assessor] refused the tax relief.

"8. The [board] denied the plaintiff's appeal.

"9. The plaintiff has a clear legal right to the relief provided by the ordinance.

"10. The [board] erroneously and wrongfully denied the relief provided by the tax relief ordinance, and the plaintiff has been harmed thereby."

[3] In their special defenses, the defendants raised the doctrines of collateral estoppel and res judicata, alleging in relevant part that the present action "should be barred in its entirety as a matter of law because the exact same claim for tax relief as pleaded here was fully adjudicated on the merits in

court "does not have subject matter jurisdiction in this matter because there is no statutory right or authorization to appeal the [board's] decision to the Superior Court." The court, *Radcliffe*, *J.*, heard argument on the motion on August 22, 2016, and thereafter denied the motion to dismiss. The defendants filed a motion for reargument or reconsideration of that determination, which the court denied. In addition, the defendants filed a motion for summary judgment, claiming that "there are no genuine issues of material fact to be tried with respect to the [plaintiff's] complaint." In denying that motion, the court in its order clarified that "relief in this case is not sought nor can it be awarded based upon a claim of mandamus. The only issue here is the action of the [board] in denying the [plaintiff's request for] senior citizen tax relief for the year 2009."

A one day hearing on that issue was held before the court, *Hon. Edward F. Stodolink*, judge trial referee, on January 5, 2017. At that hearing, the plaintiff introduced certain documents into evidence, including copies of the ordinance, his April 23, 2009 application for tax relief, and his 2008 federal income tax return. The plaintiff also testified briefly at that hearing. During his testimony, a colloquy ensued as to the precise nature of the plaintiff's action. The court at that time observed that, "[a]s I understand it, we're testing the propriety of an administrative procedure of the town of Easton for the year 2009; correct?" In response, the defendants' attorney stated: "Testing the propriety? I guess that's correct, Your Honor." The plaintiff then informed the court that his action pertained to "the erroneousness of" the board's decision to deny his appeal. Later in the hearing, the defendants again raised the issue of the court's subject matter jurisdiction over the plaintiff's

Gianetti v. *Herrmann*, [supra, Superior Court, Docket No. CV-11-5029623-S]." The defendants also alleged that the plaintiff's action was untimely and subject to preclusion pursuant to the doctrine of laches.

action.[4] The defendants also advanced that claim in their posttrial brief.

In its memorandum of decision, the court did not resolve the question of subject matter jurisdiction. Instead, it stated in relevant part: "The court has examined the evidence submitted in this case and the arguments raised by the briefs of the parties. It is the court's determination that the plaintiff's claim fails on its merits." Following a discussion of the merits of the plaintiff's claim of entitlement to tax relief under the ordinance, the court rendered judgment in favor of the defendants, and this appeal followed.

Although the plaintiff raises various challenges to the factual findings and evidentiary determinations of the trial court, "[i]t is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006). As our Supreme Court observed more than a century ago, "[w]henever the absence of jurisdiction is brought to the notice of the court . . . cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Woodmont Assn.* v. *Milford*, 85 Conn. 517, 524, 84 A. 307 (1912). Indeed, "[o]nce it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiffs' complaint, any further discussion

[4] When the plaintiff concluded his testimony, the defendants' attorney reiterated the subject matter jurisdiction claim raised by the defendants, stating in relevant part: "[The plaintiff's action is] an appeal from the decision of the [board], since he names the selectmen as the defendants in this case, [and] I don't think the court has any jurisdiction over that, because in order to be able to take an appeal from an administrative act . . . that right has to be set forth in the statute. There has to be a statutory right to take an appeal. There is none either in the ordinance or in the enabling legislation . . . ."

of the merits is pure dicta. Lacking jurisdiction, neither the trial court nor this court should deliver an advisory opinion on matters entirely beyond our power to adjudicate." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 246, 558 A.2d 986 (1989). For that reason, "as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made." *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991). In the present case, the court did not comply with that well established precept but, rather, issued a memorandum of decision in which it concluded that the plaintiff's claim failed on its merits.

On appeal, the defendants renew their claim that the court lacked subject matter jurisdiction over the plaintiff's complaint. "A determination regarding a trial court's subject matter jurisdiction is a question of law over which we exercise plenary review. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Citation omitted; internal quotation marks omitted.) *Reinke* v. *Sing*, 328 Conn. 376, 382, 179 A.3d 769 (2018).

As a preliminary matter, the defendants submit that the present action can be construed only as an administrative appeal from the decision of the board denying the appeal, brought by the plaintiff pursuant to § 14 (g) of the ordinance, from the tax relief determination of the assessor. They argue that the operative complaint does not allege any cognizable cause of action and emphasize that the plaintiff's prior mandamus action against the board was dismissed years ago. See *Gianetti* v. *Herrmann*, supra, Superior Court, Docket No. CV-11-5029623-S. Furthermore, in denying the defendants'

motion for summary judgment, the court in the present case specifically found that "relief in this case is not sought nor can it be awarded based upon a claim of mandamus. The only issue here is the action of the [board] in denying the [plaintiff's request for] senior citizen tax relief for the year 2009." Because the operative complaint names the board's members as defendants and alleges that the board "erroneously and wrongly" denied the plaintiff's appeal, the defendants maintain that the present action may "only be characterized as an administrative appeal." We agree with that assessment. Our task, therefore, is to determine whether the plaintiff was authorized under Connecticut law to commence an administrative appeal in the Superior Court from the decision of the board on this municipal tax relief matter.

We begin by noting that, "with respect to administrative appeals generally, there is no absolute right of appeal to the courts from a decision of an administrative [body]. . . . Appeals to the courts from administrative [bodies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created . . . and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an administrative body's] decision."[5] (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006); accord *Delagorges* v. *Board of Education*, 176 Conn. 630, 633, 410 A.2d 461 (1979) ("[our Supreme Court] has repeatedly held that appeals to the courts from administrative officers or [bodies] may be taken only when a statute provides authority for judicial intervention").

[5] "In hearing administrative appeals . . . the Superior Court acts as an appellate body." *Fagan* v. *Stamford*, 179 Conn. App. 440, 443 n.2, 180 A.3d 1 (2018).

The plaintiff has not identified, and we have not discovered, any statutory authority permitting him to appeal from the decision of the board on this municipal tax relief matter to the Superior Court.[6] The ordinance in question expressly was enacted pursuant to the provisions of General Statutes §§ 12-129n, 12-170aa, and 12-129b through 12-129d.[7] None of those statutes provides an applicant for municipal tax relief an avenue of appeal in the Superior Court.[8] The Superior Court, therefore, lacks jurisdiction to entertain an appeal commenced pursuant thereto. See *Tazza* v. *Planning & Zoning Commission*, 164 Conn. 187, 190, 319 A.2d 393 (1972)

[6] We note that although he is not a lawyer licensed to practice in this state, the plaintiff is not an inexperienced litigant. See, e.g., *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 43 A.3d 567 (2012); *Gianetti* v. *Siglinger*, 279 Conn. 130, 900 A.2d 520 (2006); *Gianetti* v. *Rutkin*, 142 Conn. App. 641, 70 A.3d 104 (2013); *Gianetti* v. *Gombos*, 142 Conn. App. 197, 64 A.3d 369, cert. denied, 309 Conn. 918, 70 A.3d 40 (2013); *Gianetti* v. *Riether*, 139 Conn. App. 909, 56 A.3d 474 (2012), cert. denied, 308 Conn. 921, 94 A.3d 638 (2013); *Gianetti* v. *Connecticut Newspapers Publishing Co.*, 136 Conn. App. 67, 44 A.3d 191, cert. denied, 307 Conn. 923, 55 A.3d 567 (2012); *Gianetti* v. *Gerardi*, 133 Conn. App. 858, 38 A.3d 1211 (2012); *Gianetti* v. *Anthem Blue Cross & Blue Shield of Connecticut*, 111 Conn. App. 68, 957 A.2d 541 (2008), cert. denied, 290 Conn. 915, 965 A.2d 553 (2009); *Gianetti* v. *American Fabrics Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-02-0394671-S (April 15, 2004).

[7] Section 12-129n is titled "Optional municipal property tax relief program for certain homeowners age sixty-five or over or permanently and totally disabled." Section 12-170aa is titled "Tax relief for certain elderly or totally disabled homeowners. Reductions in real property taxes." Section 12-129b is titled "Real property tax relief for certain persons sixty-five years of age or over." Section 12-129c is titled "Application for real property tax relief for certain persons sixty-five years of age or over. Biennial requirements. Penalty for false affidavit or false statement." Section 12-129d is titled "State payment in lieu of tax revenue."

[8] We note that our General Statutes expressly provide a right of appeal to the Superior Court from particular decisions of a municipal board of selectmen. For example, General Statutes § 13a-39 authorizes a board of selectmen to define the boundaries of a highway in their municipality that "have been lost or become uncertain . . . ." Pursuant to General Statutes § 13a-40, "[a]ny person aggrieved by such decision may appeal to the superior court for the judicial district where such highway is situated within ten days after notice of such decision has been given . . . ."

("unless a statute provides for such [administrative] appeals courts are without jurisdiction to entertain them").

Resort to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., is equally unavailing. The UAPA "applies only to state agencies . . . ." *Edwards* v. *Code Enforcement Committee*, 13 Conn. App. 1, 3, 534 A.2d 617 (1987). In *Maresca* v. *Ridgefield*, 35 Conn. App. 769, 772 n.2, 647 A.2d 751 (1994), this court held that, because a "board of selectmen . . . does not meet the statutory definition of an agency" set forth in § 4-166 (1), the plaintiff could not commence an administrative appeal against that board pursuant to the UAPA. Furthermore, even if the plaintiff could surmount that shortcoming, he still could not satisfy the contested case requirement of the UAPA. See *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 442–43, 870 A.2d 448 (2005). As our Supreme Court explained in *Lewis* v. *Gaming Policy Board*, 224 Conn. 693, 705, 620 A.2d 780 (1993), even when an administrative body conducts a hearing on a given matter, "that does not constitute a matter as a 'contested case' under § 4-166 (2) unless the plaintiff's rights or privileges are 'statutorily' required to be determined by the agency. If the plaintiff's rights or privileges are not 'statutorily' required to be determined by the agency, a 'contested case' does not exist and a plaintiff would have no right to appeal pursuant to [General Statutes] § 4-183 (a)." Because the General Statutes contain no provision obligating the board to determine the plaintiff's rights and privileges with respect to his municipal tax relief appeal, a contested case does not exist pursuant to § 4-166 (2). For those reasons, the plaintiff in the present case is not entitled to judicial review under the UAPA.

Neither § 4-183 (a) of the UAPA nor any other provision of the General Statutes provides applicants for municipal tax relief an avenue of appellate review in

the Superior Court. We therefore conclude that the Superior Court lacked subject matter jurisdiction over the plaintiff's action challenging the propriety of the board's decision on his tax relief appeal.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to dismiss the plaintiff's action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.