WELLS FARGO BANK, N.A. *v.* ERIC LORSON ET AL.
(AC 38806)

Elgo, Bright and Beach, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant homeowners. The parties had entered into a forbearance agreement under which the plaintiff agreed to accept trial period payments on the defendants' delinquent mortgage loan for three months after which the plaintiff would determine whether to enter into a mortgage modification agreement with the defendants. After the defendants made their first payment, the plaintiff requested that they provide it with documentation that a certain judgment lien on the defendants' property had been discharged and also notified the defendants that the modification of the mortgage loan could not be completed until the lien issue was resolved. The defendants did not respond to the plaintiff's request. After the pleadings were closed, the defendants sought to amend their answer to add a special defense alleging that the plaintiff had failed to comply with certain United States Department of Housing and Urban Development regulations pertaining to home mortgage foreclosure actions. The court sustained the plaintiff's objection to the defendants' request to amend their answer and, after a hearing, rendered judgment of strict foreclosure. On appeal, the defendants claimed, inter alia, that the plaintiff had failed to prove its prima facie case because it presented insufficient evidence that it complied with the applicable federal regulations that are prerequisites to bringing a home mortgage foreclosure action. *Held*:

1. The trial court's determination that the plaintiff had proven its prima facie case was not clearly erroneous; it was not the plaintiff's burden to prove compliance with the applicable federal regulations as a condition precedent to bringing its foreclosure action, and the defendants' failure

to plead noncompliance with those regulations as a special defense resulted in their waiver of their noncompliance claim.

2. The trial court correctly determined that the defendants failed to prove their special defense of equitable estoppel; the defendants failed to point to specific conduct of the plaintiff that caused the defendants to believe that they had to make only three trial period payments to obtain a permanent loan modification, and the evidence contradicted the defendants' claim that the plaintiff represented to them that the loan modification would be final once the three payments were complete, as the plaintiff notified the defendants before they made their second payment that the loan modification could not be completed unless the judgment lien was resolved.

3. The defendants could not prevail on their claim that the trial court's finding that they failed to prove their special defense of unclean hands was clearly erroneous: the court reasonably could have concluded that the plaintiff did not engage in wilful misconduct, as the defendants presented no evidence that the plaintiff acted with unclean hands and no evidence contrary to the plaintiff's evidence that it complied with the applicable federal regulations; moreover, contrary to the defendants' allegation that the plaintiff engaged in misleading conduct when it entered into the forbearance agreement without first informing them that they would be required to satisfy the judgment lien, there was evidence that that agreement provided that a loan modification was subject to final approval, and the plaintiff notified the defendants on multiple occasions that they would not receive a final loan modification until the lien was resolved.

Argued January 18—officially released July 10, 2018

Procedural History

Action to foreclose a mortgage on certain of the defendants' real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Richard P. Gilardi*, judge trial referee; judgment of strict foreclosure, from which the defendants appealed to this court; thereafter, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Ridgely Whitmore Brown, with whom was *Benjamin E. Gershberg*, for the appellants (defendants).

David M. Bizar, for the appellee (plaintiff).

Opinion

ELGO, J. The defendants, Eric Lorson and Laurin Maday, appeal from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wells Fargo Bank, N.A. On appeal, the defendants claim that the court improperly found that the plaintiff met its burden of proving its prima facie case and that the defendants failed to prove their special defenses of equitable estoppel and unclean hands. We affirm the judgment of the trial court.

The following facts are relevant to this appeal. The defendants and the McCue Mortgage Company (McCue) executed a promissory note on December 1, 2008 (note). The note was secured by a mortgage on the defendants' property at 40 McGuire Road in Trumbull (property), in favor of Mortgage Electronic Registration Systems, Inc., as nominee for McCue. The mortgage was recorded on the Trumbull land records on December 1, 2008. The mortgage was assigned to the plaintiff on December 16, 2011, and the assignment was recorded on the Trumbull land records on December 21, 2011. It is undisputed that the plaintiff is the holder of both the note and the mortgage.

The plaintiff filed this foreclosure action on October 19, 2011. The complaint alleged that the note and mortgage were in default by virtue of nonpayment of the installments of principal and interest due on November 1, 2010, and each and every month thereafter. The complaint further alleged that the plaintiff is entitled to collect the debt evidenced by the note and to enforce the terms of the mortgage, that the plaintiff had elected to accelerate the balance of the note, and that the plaintiff requested a foreclosure of the mortgaged premises.

The court referred the parties to a foreclosure mediation program on December 1, 2011. During that program, the parties entered into a special forbearance

agreement (agreement) dated August 23, 2012, which identified twenty-two consecutive months of nonpayment. According to the terms of the agreement, the plaintiff agreed to "temporarily [accept] reduced installments" in the amount of $3009.07 per month for a period of three months.[1] Section 2 of the agreement provides in relevant part: "Upon successful completion of the [a]greement, your loan will not be contractually current. Since the installments may be less than the total amount due you may still have outstanding payments and fees. Any outstanding payments and fees will be reviewed for an option to bring the loan current. If approved for an option, based on investor guidelines, this will satisfy the remaining past due payments on your loan and we will send you a plan agreement. An additional payment may be required." Section 3 of the agreement provides: "The lender is under no obligation to enter into any further agreement, and this [a]greement shall not constitute a waiver of the lender's right to insist upon strict performance in the future."

The defendants made the first payment of $3009.07 in accordance with the agreement prior to September 22, 2012. On October 8, 2012, the plaintiff sent the defendants a letter requesting a "Notice of Release of Mortgage or Discharge of Judgment/Lien" and stating that the plaintiff is "unable to complete the final modification" of the loan until the title issue is resolved. A property title report was enclosed with the letter. The lien at issue was a judgment lien on the property from a dispute with an insurance company about the value

[1] The payment arrangement in the agreement required payments on September 22, October 22 and November 22, 2012. This was the second forbearance agreement that the parties entered into. Prior to filing the present action, the plaintiff provided the defendants an opportunity to enter into a special forbearance agreement, which provided that the defendants would make three monthly payments. The defendants subsequently did not comply with the required payments in that agreement.

of a vehicle Lorson owned that had been declared a total loss (judgment lien).[2]

On October 19, 2012, the foreclosure mediator issued a final report that indicated that the final mediation was held on July 31, 2012, the mediation period expired on September 1, 2012, and the mediation was terminated.

The defendants did not provide the plaintiff with information in response to the October 8, 2012 letter, but instead continued to make monthly payments to the plaintiff for the amount specified in the agreement beyond November, 2012, and through May, 2013. On March 4, 2013, the plaintiff sent the defendants a follow-up letter requesting documentation to resolve the title issue regarding the judgment lien on the property.[3] On April 10, 2013, the plaintiff sent the defendants another letter, stating that "[t]here are additional liens on [the defendants'] property that prevent [the plaintiff] from completing [the defendants'] request for mortgage assistance." On April 30, 2013, the plaintiff sent yet another letter to the defendants requesting documentation of the remaining lien balance. The letter specified that the requested documentation must be received by May 30, 2013. The defendants did not resolve the judgment lien.

The defendants filed an answer on July 19, 2013, in which they effectively denied each allegation and left the plaintiff to its proof. The defendants also filed two special defenses alleging unclean hands and equitable

[2] The plaintiff's position is that "without payment of [the judgment] lien . . . although [the judgment lien] had no priority over [the plaintiff] at the time, if there was a mortgage modification, [the judgment lien] would have acquired priority, which is why [the plaintiff] required that it be paid off or subordinated."

[3] The plaintiff's March 4, 2013 letter requested "documentation within ten (10) business days of the date of this letter" and cautioned that without the documentation, the plaintiff would be required to deny the defendants' request for a modification to the loan.

estoppel. The plaintiff filed a motion for summary judgment on November 12, 2013. The defendants filed an amended answer and special defenses along with their objection to the plaintiff's summary judgment motion on February 19, 2014. In the amended answer, the defendants alleged a third special defense titled "Mortgage Modification Agreement," claiming that the plaintiff refused to issue a permanent modification and "breached the terms of the agreement" by requiring payment of the judgment lien.

The court denied the plaintiff's motion for summary judgment on March 21, 2014, ruling that "the counteraffidavit submitted by the defendants in opposition to the motion raises issues of fact relating to the defendants' special defenses of unclean hands and equitable estoppel to be resolved at trial." The plaintiff filed a reply to the defendants' special defenses and a certificate of closed pleadings on October 22, 2015.

After the plaintiff filed a certificate of closed pleadings, the defendants moved to amend their answer on October 30, 2015. In the proposed amended answer, the defendants added a special defense titled "breach of contract," which alleged the plaintiff's noncompliance with various regulations of the United States Department of Housing and Urban Development as set forth in 24 C.F.R. § 203.500 et. seq. (HUD regulations). The plaintiff filed an objection to the defendants' request to amend on November 9, 2015, and the court sustained the plaintiff's objection on December 1, 2015, the first day of trial.

Following a two day bench trial, the court rendered judgment of strict foreclosure in favor of the plaintiff on January 6, 2016. On January 20, 2016, the defendants filed this appeal. The defendants filed a motion for articulation on August 4, 2016, requesting an explanation for the judgment of strict foreclosure. On November 25, 2016, the court issued a written response "to

the allegations contained in the defendants' motion [for] articulation and, specifically, the defendants' misrepresentations and failure to disclose necessary evidence within their knowledge." In that response, the court stated: "Based on the factual history of this litigation, it is the finding of this court that the plaintiff has established [its] burden of proof with respect to the allegations of the complaint. The court further finds that the defendants failed to submit sufficient evidence with respect to their burden of proof with respect to the denial of the complaint, as well as the special defenses of unclean hands and equitable estoppel. Accordingly, judgment is entered in favor of the plaintiff with respect to the complaint and special defenses." The court denied the motion for articulation and stated as follows: "With respect to the motion for articulation, it is the finding of the court that the motion is based on the misrepresentations and intentional omissions of necessary evidence. The docket sufficiently provides the basis for the rulings by the court. Accordingly, the motion for articulation is denied."

On April 4, 2017, the defendants filed a motion for review of the court's articulation with this court, which we denied as untimely. Additional facts will be set forth as necessary.

I

The defendants challenge the court's determination that the plaintiff had proven its prima facie case, which was based on their claim that the plaintiff failed to present sufficient evidence that it had complied with all applicable HUD regulations that are prerequisites to bringing a foreclosure action. In response, the plaintiff contends that noncompliance with HUD regulations must be raised as a special defense and that the defendants failed to do so. Alternatively, the plaintiff argues that even if it had the burden of proving compliance

with HUD regulations in the absence of a special defense, there is sufficient evidence of the plaintiff's compliance, and, therefore, the court's finding that the plaintiff established its prima facie case was not clearly erroneous. We conclude that the defendants had the affirmative duty to plead noncompliance with HUD regulations as a special defense and that their failure to do so is fatal to their claim.

The following additional facts are relevant to the defendants' claim. The defendants' mortgage was guaranteed and insured by the Federal Housing Administration (FHA). The note and mortgage reference HUD regulations.[4] Section 6 (b) of the note provides in relevant part that "[i]f Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary [of HUD] in the

[4] The FHA provides mortgage insurance on loans made by FHA approved lenders throughout the United States and its territories. See United States Department of Housing and Urban Development, available at https://www.hud.gov/program offices/housing/fhahistory (last visited July 3, 2018). Congress created the FHA with the passage of the National Housing Act of 1934 and the FHA became a part of HUD in 1965. 42 U.S.C. § 3534 (a) (2012). "The FHA provides lenders with protection against losses as the result of homeowners defaulting on their mortgage loans. The lenders bear less risk because [the] FHA will pay a claim to the lender in the event of a homeowner's default. Loans must meet certain requirements established by [the] FHA to qualify for insurance." United States Department of Housing and Urban Development, available at https://www.hud.gov/program offices/housing/fhahistory (last visited July 3, 2018). HUD promulgated regulations pertaining to FHA insured mortgages pursuant to its authority conferred by Congress. 12 U.S.C. § 1701 et seq. (2012); see *Pfeifer* v. *Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250, 1265, 150 Cal. Rptr. 3d 673 (2012). The regulations regarding a mortgagee's servicing responsibilities for such mortgages are codified in title 24, part 203 (Single Family Mortgage Insurance), subpart C (Servicing Responsibilities) of the Code of Federal Regulations. 24 C.F.R. §§ 203.500 through 203.681 (2017); see *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, 937 N.E.2d 853, 860 (Ind. App. 2010). Servicers are required to comply with such regulations prior to initiating foreclosure on FHA insured mortgages. *Pfeifer* v. *Countrywide Home Loans, Inc.*, supra, 1266 ("[f]or mortgages insured by the FHA, servicers are required to follow servicing regulations mandated by the HUD Secretary before initiating foreclosure").

case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary [of HUD] will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations." Section 9 (a) of the mortgage deed provides in relevant part: "Lender may, except as limited by regulations issued by the Secretary [of HUD] in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument . . . ." It is uncontested that the HUD regulations apply to the defendants' mortgage.

The defendants neither filed a motion to strike the plaintiff's complaint nor timely raised the plaintiff's noncompliance with HUD regulations as a special defense. Following the filing of the certificate of closed pleadings on October 22, 2015, the defendants moved to amend their answer for a second time on October 30, 2015. The second requested amended answer added thirty-three pages to the first amended answer and included three additional special defenses with a twelve count counterclaim. One of the additional special defenses alleged that the plaintiff failed to comply with nineteen different HUD regulations and requirements that, according to the defendants, were conditions precedent to acceleration of the debt and commencement of this foreclosure action. The plaintiff objected to the defendants' request as untimely and noted that trial was already scheduled for December 1, 2015. In its objection to the defendants' request, the plaintiff argued that "to allow [the] defendants an additional opportunity to amend their pleadings on the eve of trial, especially when such an amendment would fundamentally alter

the procedural posture of the case would, in effect, amount to pleading by ambuscade and would work extreme prejudice and delay upon the plaintiff." The court denied the defendants' request to amend their answer and sustained the plaintiff's objection on December 1, 2015.[5]

Moreover, at trial, an employee of the plaintiff, Dustin Green, was cross-examined by the defendants' counsel regarding the plaintiff's compliance with the HUD regulations.[6] Notably, Green testified that the plaintiff was compliant, and the defendants produced no evidence to the contrary, despite having had the opportunity to testify, produce witnesses, and cross-examine the plaintiff's witness. The court never precluded the defendants from presenting evidence, either through their own testimony or otherwise, of the plaintiff's alleged violation of HUD regulations. At the conclusion of trial, the court found that the plaintiff had established its burden of proof with respect to the allegations of the complaint. The defendants challenge the propriety of that finding.

At the outset, we note that to the extent that the defendants' claim involves construing rules of practice, our review is plenary. *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 145 Conn. App. 696, 711, 77 A.3d 165 (2013) ("the interpretation of the requirements of the rules of practice presents a question of law, over which our review is plenary" [internal quotation marks omitted]), aff'd, 315 Conn. 596, 109 A.3d 473 (2015). To the extent that the defendants' claim involves the factual findings

[5] The defendants do not contest the propriety of the court's denial of their request to amend their answer.

[6] The following colloquy occurred between the defendants' counsel and Green:

"[The Defendants' Counsel]: . . . Do you have documents in this loan administration showing compliance with the HUD regulations?

"[Green]: Yes."

of the court, however, our review is limited to a determination of whether the court's findings are clearly erroneous. "[W]hen reviewing findings of fact, we defer to the trial court's determination unless it is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Gaudiano*, 142 Conn. App. 440, 444–45, 68 A.3d 101, cert. denied, 310 Conn. 902, 75 A.3d 29 (2013).

"[D]ue to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . Connecticut is a fact pleading jurisdiction. . . . Pleadings have an essential purpose in the judicial process. . . . The purpose of pleading is to apprise the court and opposing counsel of the issues to be tried . . . . For that reason, [i]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings. . . . As Justice Cardozo has written: justice, though due to the accused, is due to the accuser also. . . . Fairness is a double-edged sword and both sides are entitled to its benefits throughout the trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 528–29, 955 A.2d 667 (2008); see also 71 C.J.S., Pleading § 2 (2018) ("purpose of pleadings is to frame, present, define, and narrow the issues, and to form the

foundation of, and to limit, the proof to be submitted on the trial").

We first address whether compliance with the HUD regulations was part of the plaintiff's burden of proving its prima facie case. The defendants argue that the compliance with HUD regulations was a condition precedent to the enforcement of the note and mortgage and that the plaintiff bore the burden of proving that all such regulatory requirements had been satisfied as a part of its prima facie case. This court has determined that the plaintiff must prove by a preponderance of the evidence that it satisfied any conditions precedent to establish a prima facie case in a foreclosure action. See *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392 (2014) ("[i]n order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that . . . any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied" [internal quotation marks omitted]), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). The defendants argue that the plaintiff failed to establish compliance with several HUD regulations, including 24 C.F.R. §§ 203.501, 203.605 (a), 203.614 and 203.616. In addition, the defendants claims that the plaintiff failed to establish compliance with HUD Mortgagee Letter 2000-05. Although there is no dispute that the plaintiff was required to comply with the HUD regulations, we are not persuaded that it was the plaintiff's burden to prove compliance as part of its prima facie case.

Courts outside of Connecticut have recognized that, in a foreclosure action involving an FHA-insured mortgage, a plaintiff's noncompliance with the HUD regulations is a valid affirmative defense. See, e.g., *Williams* v. *National School of Health Technology, Inc.*, 836 F. Supp. 273, 283 (E.D. Pa. 1993) ("Pennsylvania courts have recognized a mortgagee's failure to comply with

HUD forbearance regulations as an equitable defense to foreclosure"), aff'd, 37 F.3d 1491 (3d Cir. 1994); *Federal National Mortgage Assn.* v. *Moore*, 609 F. Supp. 194, 196 (N.D. Ill. 1985) ("[i]n Illinois, a mortgagee's failure to comply with the mortgage servicing regulations can be raised in a foreclosure proceeding as an affirmative defense"); *Lacy-McKinney* v. *Taylor*, *Bean & Whitaker Mortgage Corp.*, 937 N.E.2d 853, 864 (Ind. App. 2010) (defendant can "properly raise as an affirmative defense that [the plaintiff] failed to comply with the HUD servicing regulations prior to commencing this foreclosure action"); *Wells Fargo Home Mortgage*, *Inc.* v. *Neal*, 398 Md. 705, 727, 922 A.2d 538 (2007) (borrower could raise violation of HUD regulations as defense to foreclosure); *Federal Land Bank of Saint Paul* v. *Overboe*, 404 N.W.2d 445, 449 (N.D. 1987) ("various courts have held that the failure of a lender to follow HUD regulations governing mortgage servicing constitutes a valid defense sufficient to deny the lender the relief it seeks in a foreclosure action").

Recognizing noncompliance with HUD regulations as an affirmative defense is in accord with HUD's intent in drafting the provisions of the mortgage documents. HUD's interpretation of the effect of the regulations on a foreclosure action is relevant to our analysis. "When dealing with uniform contract language imposed by the United States, it is the meaning of the United States that controls." *Kolbe* v. *BAC Home Loans Servicing*, *LP*, 738 F.3d 432, 442 (1st Cir. 2013).

In June, 1989, HUD issued a "Notice of Policy" statement (HUD policy statement), published in the Federal Register, addressing the incorporation of HUD's servicing requirements into a mortgage. In that statement, HUD suggested that mortgagors may assert violations of HUD regulations as a defense. See Requirements for Single Family Mortgage Instruments, 54 Fed. Reg.

27,599 (June 29, 1989); see also *Wells Fargo Home Mortgage, Inc.* v. *Neal*, supra, 398 Md. 724 (HUD notice "states that mortgagors may assert a violation of the HUD regulations as a defense, presumably to a foreclosure action by the mortgagee").

The HUD policy statement provides in relevant part: "We note that the proposed mortgage language does not incorporate all of HUD's servicing requirements into the mortgage, but simply prevents acceleration and foreclosure on the basis of the mortgage language when foreclosure would not be permitted by HUD regulations. For example, [24 C.F.R. §] 203.606, specifically prohibits a mortgagee from foreclosing unless three full monthly payments due on the mortgage are unpaid. As long as this requirement remains in the regulations, we do not expect mortgagees to violate it even though the mortgage fails to repeat the requirement, and *we believe that a borrower could appropriately raise the regulatory violation in his or her defense*. If a mortgagee has violated parts of the servicing regulations which do not specifically state prerequisites to acceleration or foreclosure, however, the reference to regulations in the mortgage would not be applicable. HUD retains the general position recited in [24 C.F.R. §] 203.500, that whether a mortgagee's refusal or failure to comply with servicing regulations is *a legal defense is a matter to be determined by the courts*." (Emphasis added.) Requirements for Single Family Mortgage Instruments, supra, 54 Fed. Reg. 27,599. On the basis of the foregoing precedent from other jurisdictions, and HUD's policy statement, we conclude that in a foreclosure action involving an FHA insured mortgage, a defendant may raise the plaintiff's noncompliance with HUD regulations as a special defense.

Having determined that the defendants could properly raise the plaintiff's noncompliance with HUD regu-

lations as a special defense, we consider whether the defendants had the affirmative duty to *plead* that defense. We conclude that they did have such a duty.

"Practice Book § 10-50 provides that [f]acts which are consistent with [the plaintiff's allegations] but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged." (Internal quotation marks omitted.) *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, 143 Conn. App. 839, 853, 71 A.3d 619 (2013). Section 10-50 "addresses whether a defense must be specially pleaded. . . . The purpose of § [10-50] is to apprise the court and opposing counsel of the issues to be tried, not to conceal basic issues until the trial is under way . . . ." (Internal quotation marks omitted.) *Absolute Plumbing & Heating, LLC* v. *Edelman*, 146 Conn. App. 383, 390, 77 A.3d 889, cert. denied, 310 Conn. 960, 82 A.3d 628 (2013). Although it is true that § 10-50 does not specifically require that the special defense alleging the plaintiff's noncompliance with HUD regulations be specifically pleaded as a special defense, the "list of special defenses in § 10-50 is illustrative rather than exhaustive." *Kosinski* v. *Carr*, 112 Conn. App. 203, 209 n.6, 962 A.2d 836 (2009).

The plaintiff's complaint makes no reference to the HUD regulations. As noted previously in this opinion, the defendants did not move to strike the complaint because it failed to allege an essential fact. Nor did their answer provide any notice to the plaintiff that compliance with HUD regulations was in any way an issue in this case. The plaintiff, thus, put on evidence in support of the allegations actually pleaded in the complaint to prove its prima facie case. The defendants' reliance on allegations of noncompliance with HUD regulations is essentially a defense that is consistent with the plaintiff's allegations but, if proven, would show that the plaintiff has no cause of action. As such,

allegations of noncompliance needed to be raised as a special defense.

To hold otherwise would encourage trial by ambuscade and impose an unnecessary and undue burden on plaintiffs in foreclosure matters. There are potentially dozens of HUD requirements that a defendant could argue are necessary prerequisites to the bringing of a foreclosure action. The defendants' proposed amended complaint identified nineteen such requirements with which the plaintiff allegedly failed to comply. It is inconsistent with our expectation that trials are not supposed to be a game of blindman's bluff to expect a plaintiff in a foreclosure action to anticipate which HUD requirement a defendant will seize upon to argue after the plaintiff rests that it has failed to prove its case. Foreclosure trials, and motions for summary judgment in foreclosure actions, in which the facts are largely undisputed, would become drawn-out, expensive affairs as a plaintiff presents evidence regarding a lengthy list of requirements. Moreover, because plaintiffs typically are entitled to an award of attorney's fees upon the entry of judgment, the parties truly harmed by imposing such requirements on foreclosing plaintiffs are the borrowers who will be required to pay the additional fees caused by such a procedure. Consequently, in this particular context, it makes much more sense to require the defendant to plead the specific requirements that have not been met and bear the burden of proving the plaintiff's noncompliance with those requirements. Not only is this more logical and more fair to plaintiffs and the vast majority of defendants who have no interest in raising such issues, it also is consistent with the manner in which other states have addressed the issue and the guidance provided by HUD itself.

It is uncontested that defendants failed to plead the plaintiff's noncompliance with the HUD regulations as

a special defense or a specific denial.[7] After the certificate of closed pleadings had been filed, the defendants attempted to raise the issue as a special defense, but the court denied the defendants' request.[8] By failing to plead the plaintiff's noncompliance as a special defense, the defendants did not properly apprise the court, or the plaintiff, of the issue. Indeed, "it is improper for a court, sua sponte, to apply an unpleaded special defense to defeat a plaintiff's cause of action." *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, supra, 145 Conn. App. 712.

Furthermore, the plaintiff was not apprised that questions of noncompliance with HUD regulations were at issue in the present case. See *Oakland Heights Mobile Park, Inc.* v. *Simon*, 36 Conn. App. 432, 436–37, 651 A.2d 281 (1994) ("[i]t would be fundamentally unfair to allow any defendant to await the time of trial to introduce an unpleaded defense . . . [and] would result in 'trial by ambuscade' to the detriment of the opposing party"). Thus, the defendants had the affirmative duty to plead the special defense of the plaintiff's noncompliance with the HUD regulations and, by failing to assert that special defense, waived it. Consequently, they may not challenge the plaintiff's compliance on appeal.[9]

[7] Florida's Fifth District Court of Appeals has held that compliance with certain HUD regulations is a condition precedent to bringing a foreclosure action and that the burden rests with the plaintiff to prove compliance with conditions precedent if asserted in the complaint and specifically denied in accordance with Florida Rule of Civil Procedure 1.120 (c) in the answer, but shifts to the defendants if raised instead as an affirmative defense in the answer. See *McIntosh* v. *Wells Fargo Bank, N.A.*, 226 So. 3d 377, 379 (Fla. App. 2017); *Palma* v. *JPMorgan Chase Bank*, 208 So. 3d 771, 775 (Fla. App. 2016); Fla. R. Civ. P. 1.120 (c) (denial of conditions precedent "shall be made specifically and with particularity").

In this case, the defendants did not raise noncompliance with HUD regulations in their answer by denial or by a special defense. Because the defendants provided no notice of such a defense in their answer, we decline to address the burden-shifting suggested by the Fifth District Court of Appeals.

[8] As previously stated, the defendants do not contest the propriety of the denial of the request to amend on appeal. See footnote 5 of this opinion.

[9] In their reply brief, the defendants state that they introduced evidence on the issue of the plaintiff's noncompliance with the HUD regulations and

Because the plaintiff did not bear the burden of proving compliance with the HUD regulations as a condition precedent to bringing this foreclosure action, the court's finding that the plaintiff had proven its case was not clearly erroneous.[10]

II

The defendants next challenge the court's finding that they failed to prove the special defense of equitable

cite to court's exhibit I, which is a photocopy of title 24, part 203, subpart C of the Code of Federal Regulations. Because the evidence was admitted and the plaintiff did not object to the introduction of the HUD regulations into the record, the defendants argue that the plaintiff has waived any alleged failure to plead noncompliance with the regulations as a special defense. "It is well established that a failure to allege a special defense is waived if evidence relating to that special defense is admitted without objection." *Sidney* v. *DeVries*, 18 Conn. App. 581, 587, 559 A.2d 1145 (1989), aff'd, 215 Conn. 350, 575 A.2d 228 (1990). "[W]hen a matter required to be specially pleaded by a party is fully litigated at trial without objection from the opposing party, the latter's objection to the special pleading requirement is deemed to have been waived." *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 241, 866 A.2d 629 (2005). The failure to plead a special defense, however, was not waived here by the mere admission of the HUD regulations as an exhibit. The HUD regulations are simply regulations, and not themselves evidence of the plaintiff's noncompliance. Thus, the issue of noncompliance with the HUD regulations was not fully litigated at trial. Because the defendants did not introduce any evidence of the plaintiff's noncompliance with the HUD regulations, they have failed to establish that the plaintiff's objection has been waived.

[10] Even if we were to assume that the defendants properly presented this claim to the trial court and that the plaintiff had the burden of proving compliance with all HUD regulations, the defendants fail to establish that the court's determination that the plaintiff established its prima facie case was clearly erroneous. The defendants appear to suggest that the plaintiff presented no evidence that it complied with any of the HUD regulations and that the evidence established that the plaintiff failed to comply with the regulations in several crucial respects. In fact, evidence was presented to the contrary; see footnote 6 of this opinion; and the defendants failed to present any evidence of the plaintiff's noncompliance with the HUD regulations through their own witness or through cross-examination of Green. With evidence in the record of the plaintiff's compliance and no evidence presented to the contrary, the court's finding that the plaintiff established its prima facie case was not clearly erroneous.

estoppel. The defendants argue that there was uncontroverted documentary evidence establishing that the plaintiff intentionally caused the defendants to believe that the only payments necessary for a permanent mortgage modification were those set forth in the forbearance agreement, the plaintiff intentionally concealed the true fact that judgment liens would need to be satisfied because it had actual knowledge of the judgment lien, and the defendants relied to their detriment on misleading conduct of the plaintiff by accepting the agreement and beginning to make trial payments. The plaintiff argues that the defendants have failed to establish that the court's finding that the defendants failed to prove their equitable estoppel defense was clearly erroneous. We agree with the plaintiff.

"We begin with the standard of review applicable to claims of equitable estoppel. The party claiming estoppel—here, the defendant—has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there *is* evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and are consistent with the facts of the case. . . . Accordingly, we will reverse the trial court's legal conclusions regarding estoppel only if they involve an erroneous application of the law." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Fischer* v. *Zollino*, 303 Conn. 661, 667–68, 35 A.3d 270 (2012).

"[T]raditional mortgage foreclosure standards . . . permit the assertion of certain special defenses, including that of equitable estoppel. . . . The doctrine of equitable estoppel is well established. [W]here one, by

his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is [precluded] from averring a different state of things as existing at the time. . . . [I]n the context of an equitable estoppel claim . . . [t]here are two essential elements to an estoppel: the party must do or say something which is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do something to his injury which he otherwise would not have done. Estoppel rests on the misleading conduct of one party to the prejudice of the other. . . . Broadly speaking, the essential elements of an equitable estoppel . . . as related to the party to be estopped, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts." (Citation omitted; internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 337–38, 71 A.3d 541 (2013).

The defendants claim that the plaintiff "intentionally caused the defendants to believe in the existence of a certain state of things, i.e., that the only financial payments the defendants needed to make to qualify for a permanent loan modification were the three trial period payments." (Internal quotation marks omitted.) Furthermore, the defendants argue that the representations in the agreement were intended to induce the defendants to believe in the existence of those facts

and that the plaintiff had knowledge, actual or constructive, of the real facts because any requirement that satisfaction of a lien as a prerequisite to a permanent mortgage modification existed at the time that the forbearance agreement was offered. In sum, the defendants claim that the conduct of the plaintiff's loan servicing department resulted in their inability to afford the payoff for the judgment lien because they continued to make the trial period payments each month in the amount of $3009.07 through May, 2013.

The defendants' claim is without merit. The defendants fail to point to specific conduct of the plaintiff that caused the defendants to believe that they only had to pay three trial period payments for a permanent loan modification. The agreement specifically stated that "investor approval is still pending" and that "the lender is under no obligation to enter into any further agreement, and this [a]greement shall not constitute a waiver of the lender's right to insist upon strict performance in the future."

Lorson testified that he was unaware that the three payments would not result in a final loan modification. Lorson stated: "No, I was not aware of that. My understanding was, the forbearance agreement was, once we got into that, as long as I held up my end of the agreement when I made the payments I would get the mortgage modification." The plaintiff, however, sent the defendants a letter in October, 2012, before the defendants had made their second of the three required trial payments, informing them that their loan modification could not be completed unless the judgment lien was resolved. The defendants acknowledged receipt of that letter, but explained that they continued to make the trial period payments because they were "assuming that [they would] be able to resolve the issue with the lien and continue on and get the modification, and [they]

didn't want to screw that up by not making the payments." Consequently, the evidence specifically contradicts the defendants' claim that the plaintiff represented to the defendants that the loan modification necessarily would be final once the three trial payments were complete. Accordingly, the defendants have failed to establish that the court's finding that they did not present sufficient evidence to establish that their special defense of equitable estoppel was clearly erroneous.

III

The defendants' final claim is that the court's finding that the defendants failed to present sufficient evidence with respect to the special defense of unclean hands was clearly erroneous. The defendants argue that the testimony of the plaintiff's employee and the uncontroverted documentary evidence clearly establishes that the plaintiff was aware of all the HUD requirements that it was obligated to satisfy before commencing this foreclosure action. The defendants maintain that the complete failure to comply with almost all of said requirements raises a necessary inference that the plaintiff's conduct in simply ignoring its obligations was wilful and committed in bad faith. We disagree.

Our Supreme Court has recognized that the "[a]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . Whether the trial court properly interpreted the doctrine of unclean hands, however, is a legal question distinct from the trial court's discretionary decision whether to apply it."

(Citations omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 308–309, 777 A.2d 670 (2001). "The court's factual findings underlying the special defense of unclean hands, however, are reviewed pursuant to the clearly erroneous standard." *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 406, 867 A.2d 841 (2005).

"[W]e note that an action to foreclose a mortgage is an equitable proceeding. . . . It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . .

"Because the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have." (Citations omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, supra, 257 Conn. 310. "The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public

policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 804, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

The court concluded that the defendants failed to prove their special defense of unclean hands. Thus, we review the court's findings of fact underlying the special defense of unclean hands pursuant to the clearly erroneous standard.

Here, the defendants did not present any evidence to support their special defense that the plaintiff acted with unclean hands. As indicated in part I of this opinion, the plaintiff introduced evidence of compliance with the HUD regulations through the testimony of Green. See footnote 6 of this opinion. The defendants, however, presented no evidence to the contrary.

Additionally, the defendants allege in their brief that they were "induced to begin trial period payments by the misleading conduct of [the] plaintiff's employees in issuing the forbearance plan without first telling them that they would need to pay off the judgment lien."[11] There is evidence in the record, however, that the agreement explicitly provided that a loan modification was subject to final approval. Furthermore, the plaintiff sent the defendants multiple letters, beginning early on in the trial period, informing them that they would not receive a final loan modification until the judgment lien was resolved. The court, accordingly, reasonably could conclude from this evidence that the plaintiff did not engage in wilful misconduct and thus, such a conclusion was not clearly erroneous.

[11] The defendants contend that if they knew "that they did not need to make extra monthly mortgage payments past the trial period, they could have afforded the payoff [of] the judgment lien and therefore obtained the permanent modification that would have prevented the prosecution of the foreclosure action."

On the basis of our review of the record, we therefore conclude that the court properly acted within its discretion when it refused to apply the doctrine of unclean hands on the basis of the facts that it found.

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

In this opinion the other judges concurred.

TALA E. H. *v.* SYED I.*
(AC 39706)

Lavine, Keller and Bear, Js.

Syllabus

The defendant appealed to this court from the judgments of the trial court continuing for six months a civil protective order that had been issued against him and denying his motions for contempt and clarification. Pursuant to statute (§ 46b-15 [a]), the plaintiff had filed an application for relief from abuse from the defendant, whom she identified as a person to whom she was married and with whom she resided in a property that he owned. In her affidavit, the plaintiff attested to many instances that the defendant had harassed, threatened and stalked her. The trial court granted the ex parte application and ordered the defendant not to assault, threaten, abuse, harass, follow, interfere with or stalk the plaintiff. The court also scheduled a hearing to determine whether the protective order should be continued beyond two weeks. The defendant thereafter filed a fifty-one page affidavit in response to the plaintiff's application and numerous requests for the court to subpoena certain persons to appear at the hearing, and the plaintiff submitted hundreds of text messages that she had received from the defendant. During the scheduled hearing, the court, instead of following normal procedure, had three police officers that the defendant had subpoenaed testify before the plaintiff presented her case because it anticipated a lengthy hearing and did not want to inconvenience the officers by having them wait in court until the end of the plaintiff's case to testify. After reviewing the text messages submitted by the plaintiff, the court described them as obsessive and horribly unpleasant, but stated that

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

both parties had not been nice to each other. The court also offered to extend the protective order for sixty days and to permit the parties to return to court if the conflict between them had calmed down, but the parties rejected the court's offer of compromise. At the conclusion of the hearing, the court continued the protective order for six months, finding that the defendant had stalked the plaintiff pursuant to § 46b-15 (a). The court also ordered the plaintiff to remove all of her belongings from the defendant's property by a certain date. Thereafter, the defendant filed a motion for clarification of the court's order and a motion for contempt, claiming that that the plaintiff had not removed her possessions by the ordered date. The trial court denied the defendant's motions following a hearing, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that the manner in which the trial court conducted the hearing on the continuance of the protective order constituted judicial misconduct and bias, the defendant having failed to demonstrate that the court exhibited bias against him and was guilty of judicial misconduct that affected the integrity of the proceeding and denied him a fair trial; a review of the record and transcript of the subject hearing demonstrated that the trial court did not prejudge the case and that there was a factual basis to continue the protective order against the defendant for six months, and although the trial court may have addressed the parties somewhat differently at times, the substance of its statements, its rulings and its order were predicated on its need to confine the hearing to relevant issues, to control its docket and to manage the proceedings in its courtroom.

2. The trial court did not misapprehend the facts or abuse its discretion by continuing the protective order for six months: that court's decision to continue the protective order was predicated on its findings that the defendant sent the plaintiff hundreds of obsessive text messages, went to the homes of her male companion and her family, visited her workplace, used security cameras at his property to monitor her and placed a tracking device on the car he permitted her to use to find her location, which constituted stalking under § 46b-15 (a), and contrary to the defendant's claim that the court's consideration of the security cameras and the tracking device was improper because he placed them for legitimate security purposes, the evidence demonstrated that he also used them to keep track of the times the plaintiff came and went from the room that they had shared and to monitor her whereabouts, and, therefore, the court could have found that the defendant's behavior constituted stalking; moreover, although the court's finding that the defendant went to the home of the plaintiff's aunt was clearly erroneous, that finding was harmless error in the face of the overwhelming evidence that the defendant stalked the plaintiff.

Argued March 14—officially released July 10, 2018

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of New Haven, where the court, *Goodrow*, *J.*, granted the application; thereafter, following a hearing, the court, *Emons*, *J.*, continued the protective order; subsequently, the court, *Emons*, *J.*, denied the defendant's motions for clarification and contempt, and the defendant appealed to this court. *Affirmed*.

Syed I., self-represented, the appellant (defendant).

Opinion

LAVINE, J. This appeal arises out of an order of protection issued against the self-represented defendant, Syed I., in favor of the self-represented plaintiff, Tala E. H.[1] On appeal, the defendant commingles claims related to the judgments rendered by the trial court when it continued the order of protection against him and thereafter when it denied his postjudgment motions for contempt and clarification. Specifically, the defendant claims that the trial court (1) was guilty of judicial misconduct and bias, (2) denied him due process by failing to rule on his discovery motions, (3) denied him the right to a public trial, (4) misread the evidence, (5) abused its discretion by failing to create a record of certain testimony, and (6) improperly denied his motions for contempt and clarification.[2] The majority of the defendant's claims are inadequately briefed, and, therefore, we address only his judicial misconduct and evidentiary claims.[3] We affirm the judgments of the trial court.

[1] The plaintiff represented herself in the trial court and did not participate in the present appeal. We therefore decided the appeal on the defendant's brief and the record.

[2] He also claims that the New Haven Superior Court denied him due process with respect to the hearing on the protective order because the public notice board contained an inaccurate list of judge and courtroom assignments for the day.

[3] Although the defendant is a self-represented litigant, "the [General] [S]tatutes and rules of practice cannot be ignored completely. . . . We are not

The following facts and procedural history are relevant to our resolution of the defendant's reviewable claims on appeal. See footnote 2 of this opinion. On September 1, 2016, the then nineteen year old plaintiff filed an application for relief from abuse from the then forty-one year old defendant whom she identified as a person to whom she was married and with whom she resided in a property owned by him.[4] See General Statutes § 46b-15 (a). In her affidavit, the plaintiff attested that beginning on August 16, 2016, the defendant began to harass her by sending her a text message that he was going to have her evicted from her room and that he would break into her room unless she voluntarily returned certain of his possessions. The plaintiff feared for her safety and well-being, and began to stay at another address. When she returned to her room, she found that a large number of her belongings were gone, including a laptop computer, a marriage certificate, clothing, cosmetics, and jewelry. She reported the break-in to the police, who told her that nothing could be done because the defendant, whom she suspected to be the perpetrator of the theft, was her husband. The plaintiff also attested that several days later the defendant reported to the police that the motor vehicle he had given her as a gift was missing and claimed that the plaintiff's friend D had stolen it. The defendant used a tracking device to locate the car at the address where the plaintiff was staying.

required to review issues that have been improperly presented to this court though an inadequate brief. . . . Analysis, rather than abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of [relevant] authorities, it is deemed to be abandoned." (Citations omitted; internal quotation marks omitted.) *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005).

[4] The plaintiff and defendant represented that they were married in a religious ceremony but that they were not married pursuant to Connecticut law.

The plaintiff further attested that the defendant harassed her to find out where she was working. One day, he appeared at her workplace and misrepresented himself to one of the plaintiff's coworkers in order to see her. The defendant made a beverage purchase and, after paying for it, gave the plaintiff a vulgar, handwritten note. He remained in the workplace for a while before leaving. The plaintiff and D worked at the same store, and the plaintiff told her about the incident. In his effort to locate the plaintiff, the defendant had been sending text messages to D "as a relationship counselor." D sent a text message to the defendant telling him not to come to the plaintiff's workplace. The plaintiff attested that the defendant, claiming discrimination, sent D's message to the corporate headquarters of the store, which caused D to lose her employment.[5]

The plaintiff also attested that the defendant installed cameras outside the door to her room and hired someone to follow her in a car. She also attested that the defendant verbally abused her and yelled at her in public. In addition, he sent her text messages about sexual acts that disturbed her. He researched her family in order to contact her aunt and her uncle at their respective homes in Connecticut and telephone her father in the country of Lebanon. According to the plaintiff, the defendant begged her to return to the room they shared and continued to harass her by sending her text messages.

The plaintiff averred that she received an e-mail message from her bank stating that she needed to activate her bank card as soon as possible. She had never received a bank card so she believed that the defendant

[5] In his response to the plaintiff's application for an order of protection, the defendant denied that he complained about D, but he acknowledged that he forwarded D's message to the corporate headquarters and inquired whether D's asking him not to visit the store "was in line with the corporate policy."

had taken it and used it to take funds from her account. She claimed that the defendant was interfering with her everyday life and the lives of her friends. The plaintiff was terrified of the defendant. Although she asked him to leave her alone, he continued to send text messages to her. She attested that the defendant was "attempting to ruin [her] life in any way he can."

The court, *Goodrow*, *J.*, granted the ex parte application and ordered the defendant to surrender all firearms and ammunition and not to assault, threaten, abuse, harass, follow, interfere with, or stalk the plaintiff, and scheduled a hearing to determine whether the protective order should be continued beyond two weeks. The defendant was served with notice of the hearing to be held on September 14, 2016. The defendant filed a fifty-one page affidavit in response to the plaintiff's application.[6] He also filed numerous requests that the court subpoena certain persons to appear at the hearing.[7]

[6] In his response to the plaintiff's affidavit, the defendant stated that he and the plaintiff had a four month boyfriend-girlfriend relationship and shared a room in one of the properties that he owned. In addition, he stated that he and the plaintiff had intended to marry and had completed the first of the two steps toward a Muslim marriage by receiving the blessing of a sheikh. He admitted to a number of the plaintiff's allegations of harassment such as tracking the car she was driving, going to her workplace, taking a laptop computer from the room they shared, contacting members of her family, and sending her many text messages, some of which were sexually explicit. He justified his behavior on the ground that he and the plaintiff were in a relationship, and, therefore, the communication was normal and that his reaction to learning that she allegedly had been unfaithful to him was understandable. He denied that he had stolen some of the plaintiff's belongings and blamed their disappearance on third parties. He asserted that the plaintiff was mentally ill and that she had sought an order of protection because he was evicting her from the room he had rented to her. He also stated that he had ended his relationship with the plaintiff by having a sheikh tell her that the parties were divorced as of August 30, 2016. He claimed that, except to wish her well, he had not communicated with the plaintiff since August 30, 2016, when she told him unconditionally that she did not want to communicate with him. He stated that he would have nothing more to do with the plaintiff after the separate eviction proceeding was complete in a week or so.

[7] The court, *Hon. James G. Kenefick, Jr.*, judge trial referee, denied most of the defendant's subpoena applications.

On September 14, 2016, the parties appeared before the court, *Emons*, *J.*, and presented evidence and argument. The plaintiff placed into evidence a sheaf of text messages she had received from the defendant from mid to late August, 2016, that was, according to the court, more than one and one-half inches thick. The court read them and described them as "[h]orribly, horribly unpleasant exchanges." On cross-examination, the defendant asked the plaintiff why she felt threatened by him, and the plaintiff testified: "[Y]our actions have proved that time after time, texting me excessively, showing up at my employers, contacting friends and family of mine that you have no reason to contact and showing up at their homes . . . their employers, getting them fired and that's why I believe so."

The defendant stated to the court that he had not threatened the plaintiff and that he had not intended to harass her. He explained that he wanted to present evidence through third parties to discredit the plaintiff's credibility and character and that she sought an order of protection only because he was evicting her from the room he had rented to her. Although the court acknowledged that the plaintiff at times may not have been truthful, it stated that her character was not the issue under § 46b-15 (a).

During the hearing, the court stated that the parties needed to leave one another alone and offered to extend the protective order of no communication for sixty days and to permit the parties to return to court if the conflict between them calmed down. The court also stated that, in the voluminous exchange of text messages, neither party had been nice to the other. Neither party, however, was willing to accept the court's offer of compromise.

At the conclusion of the hearing, the court continued the protection order of no contact for six months,

through March 14, 2017, subject to modification. The court stated to the defendant that it had considered all of the evidence, including "hundreds and hundreds of obsessive texts, most of which are not particularly very nice; the fact that you went to her boyfriend's home or friend, I don't know what he is really; the fact that you went to the aunt's house; the fact that you went to the uncle's house; the fact that you installed cameras in the house specifically looking at her door and were texting her on what time she came and went; the fact that you admitted that you put tracking devices in her car. This is a stalking type of situation and it, I believe, the fact that there was testimony about your using other people's cars to follow her so that she won't know who you are, it is not only stalking and complies with the statute in that manner, but I believe that the continuous constant interaction that was clearly not welcome is sufficient to . . . instill in her a continuous threat or threatening based upon the statute . . . ." The court also ordered the plaintiff to remove all of her belongings from the defendant's property by September 30, 2016, and that the parties communicate through a third party.

On September 20, 2016, the defendant filed a motion for clarification of the court's order that the plaintiff remove her belongings from his property. On September 29 and October 3, 2016, he filed motions for contempt claiming, inter alia, that the plaintiff had not removed her possessions by September 30, 2016. The court denied the defendant's motions following a hearing held on October 7, 2016. The defendant filed the present appeal on October 13, 2016.

We begin with the generally applicable standard of review. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the

facts presented." (Footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111, 89 A.3d 896 (2014).[8]

I

The defendant's first claim is that the manner in which the court conducted the hearing on the continuance of the protective order constituted judicial misconduct and bias and caused him "duress." We have reviewed the entire transcript of the hearing and disagree that the court was guilty of bias or judicial misconduct.

At no time during the September 14, 2016 hearing did the defendant ask the court to recuse itself or move to disqualify the judge. His claim of judicial bias and misconduct, therefore, is unpreserved and raised for the first time on appeal. Ordinarily, a reviewing court will not entertain an issue raised for the first time on appeal. See *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 392, A.3d (2018). Even though his claim is unpreserved, the defendant did not request review pursuant to one of the exceptions by which this court may review unpreserved claims.[9] In his appellate brief, the defendant acknowledged that he did not object to the court's statements that he found to be biased "as he felt intimidated, and objection would have been fruitless and may have even resulted in further error and reprimand . . . [which] resulted in harmful error that affected the integrity of the proceeding and reversible

[8] "Section 46b-15 is part of title 46b, Family Law, and chapter 815a, Family Matters, and, as such, is specifically included as a court proceeding in a family relations matter. See General Statutes § 46b-1 (5)." (Internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 111 n.3.

[9] Under appropriate circumstances, a reviewing court may review unpreserved claims of error 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), its supervisory powers; see Practice Book § 60-2; or the plain error doctrine. See Practice Book § 60-5.

error leading not to a fair trial on the facts but a trial on the temper or whimsies of" the court.

"[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal . . . before a judge with no actual bias against the defendant, or interest in the outcome of [a] particular case." (Citation omitted; internal quotation marks omitted.) *Bracy* v. *Gramley*, 520 U.S. 899, 904–905, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). "Judicial impartiality is the hallmark of the American system of justice." 48A C.J.S. Judges § 247 (2018). Following our review of the defendant's brief, we construe his alleged judicial bias and misconduct assertions to set forth a claim of plain error. Pursuant to Practice Book § 60-5, we may, in the interest of justice, notice plain error claims not brought to the attention of the trial court.

"[A]lthough this court may review an unpreserved claim of judicial bias for plain error, not every claim of partiality warrants reversal on the basis of plain error." *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 392. In the present case, we have reviewed the defendant's claim of judicial bias under the plain error doctrine because it allegedly implicates the basic concept of a fair trial; see *Cameron* v. *Cameron*, 187 Conn. 163, 168, 444 A.2d 915 (1982); but we found no evidence of bias, misconduct, or impartiality in the record.

The plain error doctrine "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial

court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 392–93.

When an appellate court addresses a claim of plain error, the court "first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in the light of the record." (Internal quotation marks omitted.) Id., 393. In addition, "the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) Id.

The standard employed by a court reviewing a claim of judicial bias "is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." (Internal quotation marks omitted.) *State* v. *Carlos C.*, 165 Conn. App. 195, 207, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016).

A reviewing court is mindful that "adverse rulings, alone, provide an insufficient basis for finding bias even

when those rulings may be erroneous." *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 395. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." (Internal quotation marks omitted.) Id.

In his brief on appeal, the defendant has identified, in isolation, words and phrases stated by the court that he contends demonstrate judicial bias and misconduct. Our reading of the transcript of the September 14, 2016 hearing demonstrates that the defendant has taken the court's words and phrases out of context and, in doing so, has misconstrued and mischaracterized them.

He contends that at the beginning of the hearing, the court singled him out by admonishing his behavior, but did not speak to the plaintiff in a similar fashion. The transcript reveals that when the hearing commenced, the court asked the plaintiff why the case was before the court. The plaintiff responded that "[t]his man has been harassing me, among my family as well and my friends, hiring people to follow me, showing up at my workplace, contacting me excessively when I've been clear that I don't want to be contacted." The court informed the defendant that Judge Goodrow had issued a temporary restraining order against him and asked him if he had surrendered his firearms and ammunition. The defendant stated that he did not have any. The following colloquy transpired:

"The Court: Terrific. And you may not assault, threaten, abuse, harass, follow, interfere with, or stalk the complainant.

"[The Defendant]: My response is, I never did.

"The Court: I'm sure that you believe that you never did, but I'm asking you a question, and I'm going to ask you to focus on my questions, okay? Are you aware that the restraining order was granted claiming that you do not assault, threaten, or ordering, that you do not assault, threaten, abuse, harass, follow, interfere with, or stalk the complainant?

"[The Defendant]: Yes.

"The Court: Okay, that's why we are here. We are going to have a hearing today. Your hearing is going to be right now. How many people, sir, did you subpoena to court today?

"[The Defendant]: Your Honor, I subpoenaed five people."

The court then asked the defendant to identify the five people, which he did. Three of the five people were police officers. The court then explained how the hearing would proceed: "[N]ormally, when we have a hearing like this, I allow the complainant to tell me her side of the story first . . . and you may, if you can be professional and respectful and I approve of the questions that you ask, I will allow you to ask her questions if they're relevant and they have to adhere to all of the rules of evidence, all right? Then it's your turn to put on your case after she has whoever it is that she wants to testify. She may call her aunt, her uncle, she may call the police. Okay? Then it is your turn.

"I'm going to do things a little bit differently today, because I feel, and I have a little bit of a sixth sense that we have three officers sitting in court today who probably shouldn't be here. So, I'm going to take them out of order, and I'm going to hear from them subject to your questions and subject to the plaintiff's questions and try to find out what their independent knowledge

is of the complaints in this case. My goal is to get them out of here as quickly as you got them here. Okay, so who[m] would you like to start with first?"

The defendant called three police officers individually who testified briefly about their interaction with the parties.[10] Several times while the defendant was examining an officer, the court interrupted and stated: "[L]et me see if I can focus you better because I see you with reams of paper around you, and I can tell you before we even begin this hearing, that you are what I would consider to be very over prepared and by that I mean that much of what you are focusing on may not be relevant to why you're here today. So, let me read you the statute, okay? And this is the only thing that I'm going to be listening to today." The court once informed the defendant that the questions he was asking were improper because the information he sought to elicit was not relevant under the statute. After each of the officers testified, the court excused them and stated: "I'm going to move this case aside for a little bit right now and get these people back to their duties and responsibilities at work rather than here where they shouldn't have come to begin with, okay. [The parties are] going to take a backseat. I'm going to try to get some other cases dealt with, and then I'm going to reconvene this hearing and we're going to start with [the plaintiff]. I'm going to hear her version. You [the plaintiff] are free to put on whatever witnesses you would like and then, sir, you will put on your case, and I will make a final decision."

In our view, the transcript does not disclose that the court singled out the defendant or treated him differently from the plaintiff. At the beginning of the hearing,

[10] One of the officers testified about his investigation of the plaintiff's use of the defendant's motor vehicle. The other two officers testified about their investigation into a break-in of the plaintiff's room.

before taking evidence, the court stated its expectations and the procedure it would follow. In other words, it set the "ground rules" for the way in which the hearing would be conducted. Given the court's experience adjudicating protective orders, the affidavits and information in the file, the court's statement, although directed toward the defendant, set the parameters for the entire hearing. It also instructed the self-represented parties with respect to appropriate courtroom decorum. The court's words and instructions would be appropriate for any hearing on a protective order.

"A judge, trying the cause without a jury, should be careful to refrain from any statement or attitude which would tend to deny [a party] a fair trial. . . . It is [her] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." (Internal quotation marks omitted.) *In re Nathan B.*, 116 Conn. App. 521, 525, 977 A.2d 224 (2009).

"[E]ach judge brings to the bench the experiences of life, both personal and professional. A lifetime of experience that has generated a number of general attitudes cannot be left in chambers when a judge takes the bench. Thus, a judge's average personal experiences do not generally lead to reasonable questions about the judge's impartiality and subsequent disqualification." (Internal quotation marks omitted.) *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 402 n.9.

The defendant also takes exception to the court's having stated, "I'm going to do things a little bit differently today, because I feel, and I have a little bit of a sixth sense that we have three officers sitting in court today who probably shouldn't be here." In his brief on appeal, the defendant stated that the court's use of the words "sixth sense" to explain why it was going to hear evidence outside the usual order in which evidence is

presented caused him to believe that the court had prejudged the case. When the court's words are read in the context of the proceeding, however, it is apparent that the court was anticipating a lengthy hearing. The court had reviewed the file and stated that the plaintiff had submitted an affidavit that was one and one-half pages long and that the defendant had submitted a reply that was fifty-one pages long. It also knew that the defendant had submitted numerous requests for the court to issue subpoenas. Moreover, the court observed the pile of papers on the desk in front of the defendant and stated that perhaps he had "over prepared."

By virtue of its experience dealing with protective orders, the court took steps to manage its docket. There were multiple cases before the court that day. By permitting the defendant, rather than the plaintiff, to start by presenting the testimony of the police officers whom he had subpoenaed, the court enabled the police officers to return to duty relatively quickly without having to wait until the end of the plaintiff's case to testify. The court, therefore, permitted the defendant to present the evidence he wished with minimal inconvenience to the police officers and other litigants. The court's actions demonstrated reasonable trial management and concern for the public. We discern nothing improper about the court's "sixth sense" about the presence of police officers and allowing them to testify first. The court appropriately managed the proceedings in its courtroom and in no way disadvantaged the defendant.

In further support of his claim that the court was biased, the defendant argues that the court required him to make offers of proof with respect to the witnesses he had subpoenaed. The court explained to the defendant that it wanted him to make offers of proof to determine whether the evidence was relevant to the plaintiff's claim that the defendant was harassing her and whether the witnesses had firsthand knowledge

of the alleged harassment. The court's requiring the defendant to make an offer of proof was done for appropriate evidentiary and trial management purposes.

Before the defendant presented his case, he stated that the plaintiff "made a number of allegations . . . in her conversation . . . [w]hich are not correct." The court stated in reply: "[T]he fact that you believe that she has made allegations that are not correct, they may be very important to you. It's probably not as important to me for the simple reason that two people can be in the same room at the same time and see things differently. Okay? I am interested in facts about what happened when. That's as much as I'm going to tell you. I'm going to allow you to question if you can do it properly and respectfully. If you can't [do that] or get off the rails, I'm going to stop you. I'm just telling you that."

When the defendant wanted to present evidence that the plaintiff had his passport and his green card in her possession, the court asked him how he intended to prove that assertion. The following colloquy occurred:

"[The Defendant]: I'm just trying to undermine her credibility, Your Honor.

"The Court: Right, but you're killing me trying to do that. There's no nice way of saying that."

The defendant claims that the court's use of the words "off the rails" and "killing me" were threatening to him and that he was nothing other than polite and respectful to the court. He claims that such words caused him duress and that he felt intimidated by the court.[11]

The court devoted the better part of a day to the hearing and recessed it on a number of occasions to hear other matters and to permit the defendant to

[11] The defendant's claim that the court caused him duress is not explained in his brief, and, therefore, we, do not address it.

secure evidence. Although the court used colloquial expressions such as "going off the rails" and "killing me," "isolated venting of frustration" does not necessarily require reversal. *In re Nathan B.*, supra, 116 Conn. App. 526. In the present matter, the court made efforts on numerous occasions to explain to the defendant what evidence was relevant with respect to § 46b-15 (a) and what was of no consequence. Nevertheless, the defendant frequently prefaced his questions with his own view of the facts and sought to present irrelevant testimony. The court repeatedly tried to make clear to the defendant that the issue was not whether the plaintiff was not a nice person, but whether he had harassed, threatened or stalked her. The court's use of colloquial language does not in and of itself demonstrate bias.

The defendant also claims that the court was biased against him because it reprimanded him for referring to the plaintiff as "that lady" but did not admonish the plaintiff for referring to him as "that man." In addition, the defendant argues that the court described the text messages he sent to the plaintiff as horribly unpleasant[12] but did not similarly describe text messages that he

[12] The court asked the defendant if he had any objection to the text messages that the plaintiff offered into evidence. He stated that he had "absolutely no objection." The following colloquy transpired:

"The Court: You have no object[ion]; that's terrific. I'm going to take all of those texts, and I'll represent on the record that there's at least, from what I can see here, about an inch to an inch and a quarter's worth of a stack of texts. . . . It's probably bigger than that. It's probably an inch and three-quarters. Oh, this is quite telling, actually, sir, as I read through these. Horribly, horribly unpleasant exchanges. You're smiling. . . . [Y]ou must think . . . [t]hat this is very amusing.

"[The Defendant]: No, I beg your pardon, Your Honor. . . . I have similar texts. These were the things that were happening in [the] relationship.

"The Court: No, sir. No, sir, maybe your relationships, but these are not things that happen in relationships."

We have reviewed the text messages, including personal and intimate language and sexually explicit photographs, which are part of the record. We concur with the court's description of some of them.

received from the plaintiff, which he had placed in evidence. Although it did not say so at that time, when it extended the protective order for six months, the court stated that "neither one of you were nice to each other . . . ." While the defendant has cited a few instances in which the court spoke somewhat differently to the plaintiff than to him, he has not demonstrated how that disparate use of language prejudiced him with respect to the court's finding that he had stalked the plaintiff pursuant to § 46b-15. See part II of this opinion. He acknowledged that he "badgered" the plaintiff with text messages and that he was controlling. He admitted that he went to her workplace and gave her a handwritten message, tracked her when she was operating his motor vehicle, used surveillance cameras to observe her comings and goings, and visited her friends and family to ascertain information about her.

The defendant also contends that the court's offer of a compromise was a veiled threat that he present no more evidence. The following facts are related to this claim. Prior to the midday recess, the defendant wanted to place a copy of a certain e-mail he had received from the plaintiff into evidence, but he was unable to find it among his papers. The court offered to take another recess until 2 p.m.[13] The court also stated: "This is absolutely absurd. I've heard enough. I'm going to let you talk as much as you want to talk. It is unlikely to alter what I'm already considering based on the documents that you've given me. Okay. You need to leave each other alone. . . .

"Would you agree to an order not to communicate with her and you guys . . . and I can continue this order for sixty days, and you can come back here in

[13] The plaintiff objected to recessing until 2 p.m., stating that she had to work at that time. The court ordered her to call and let her employer know that she would not be in at 2 p.m.

sixty days to make sure that everything is all quiet? Would you agree to something like that?" The defendant stated that he was concerned about his reputation in a small university town and his employment. He referenced the security cameras that he had installed in the properties he rents to students. The court responded as follows:

"The Court: Sir, I'm not worried about the cameras. What I really do have to say is that I think that you're becoming very consumed with issues that you worry that I'm thinking about. I'm not thinking about that. I am only thinking about the statute; that's all I'm thinking about, and I want you to know that based on what you said in your own texts gives me reason to think that there should probably be a stay away period for a couple of months and if you can behave yourself, given the fact that you're not married anymore, and if you do not assault, threaten, abuse, harass, follow, interfere with, or stalk her, I have no interest in changing and making this more restrictive. My suggestion is that we continue it for a little period of time and let things calm down and stop and then come back and you guys can go your separate ways.

* * *

"Based on the information I have, I will keep the restraining order exactly the way it is. If you want to come back this afternoon and you believe that you have more information to change my mind and demonstrate that a restraining order should not exist, I am more than happy to hear from you and your witnesses. So, what I'm trying to suggest is . . . [i]f you by agreement, and by the way, I can continue a restraining order for one year. . . . My thought is that to quiet things down, this has gotten way out of control, way out of control. . . . My thought is to keep the peace for sixty days and

come back and let's revisit it. If that is unacceptable to you, I will see you back here at 2 [p.m.]."[14]

The defendant argues on appeal that the court was more restrictive of his questioning of the plaintiff following the midday recess. The record discloses that the court stated to the defendant that it was going to be less lenient with his questions in order to move the case along. The transcript reveals that the evidence the defendant desired to present did not address harassment and the voluminous text messages, his tracking the motor vehicle the plaintiff was operating, and his visiting her workplace and her family and friends but, rather, whether she had his green card and passport. The defendant stated that the evidence was an indication of the plaintiff's character. The court informed the defendant that the evidence he wished to present was not relevant to the protective order. We agree with the court.

[14] Following the midday recess, the court permitted the defendant to speak at length. He stated, in part, that the plaintiff was a free spirit and probably was "not happy . . . getting tied down with" him. She had certain habits, such as smoking marijuana, that he did not approve of. When she did not return to the room they shared in early August, he tried to find out what she was up to. He believed that she had a lover and was upset. With respect to the reams of text messages he sent the plaintiff, he did not believe that they constituted a threat to her but that they revealed his reaction when he "saw that the lady [he] was madly in love with was up to something . . . ." He had given her his car to use, and she was using it for her enjoyment while he sat at home alone. To find out what was going on, he attached a tracking device to the car. He stated that he had respected the plaintiff's wishes not to be intimate with him before marriage. When he learned of her male friend, it really hurt him. He told the plaintiff that he was going to divorce her; he made plans to see the sheikh. He was embarrassed before his conservative family and could not tell his friends.

The defendant argued that his communication and interaction with the plaintiff did not constitute threats. He admitted that he may have been controlling but that it was nothing more than putting the plaintiff on a better path for a better tomorrow. He found her to be very intelligent for a twenty year old, and he was in awe of her. He treated the plaintiff like a daughter in many ways to guide her toward a better path. He concluded that perhaps he had trespassed and did not realize it.

On the basis of our review of the record, including the entire transcript and the many text messages written by the defendant that were placed into evidence, we conclude that the court did not prejudge the case and that there was a factual basis to continue the protective order against the defendant for six months. Although the court may have addressed the parties somewhat differently, the substance of its statements, its rulings, and its order were predicated on its need to confine the hearing to relevant issues, to control its docket, and to manage the proceedings in its courtroom. The defendant has not persuaded us that the court exhibited bias against him and was guilty of judicial misconduct that affected the integrity of the proceeding and denied him a fair trial.[15]

II

The defendant's second claim is that the court misread the evidence. As expressed by the self-represented defendant, it is not a recognizable appellate claim. We, however, construe the claim to be that the court's factual findings are clearly erroneous and that the court abused its discretion by continuing the order of protection for six months. We are not persuaded by the defendant's claim.

The defendant's claim is predicated on the court's oral decision to continue the order of protection for six months subject to modification. At the conclusion of the hearing the court stated in part to the defendant: "I believe that given all of the documents that I have with hundreds and hundreds of obsessive texts, most of which are not particularly very nice, the fact that you went to her boyfriend's home or friend, I don't know what he is really, the fact that you went to the

[15] The defendant also claims that the court's body language and facial expressions manifested judicial bias. The record is inadequate for us to review such a claim.

aunt's house, the fact that you went to the uncle's house, the fact that you installed cameras in the house specifically looking at her door and were texting her on what time she came and went, the fact that you admitted that you put tracking devices in her car, this is a stalking type of situation and it, I believe, the fact that there was testimony about your using other people's cars to follow her so that she won't know who you are, it is not only stalking and complies with the statute in that manner, but I believe that the continuous constant interaction was clearly not welcome is sufficient to have her or instill in her a continuous threat of threatening based upon the statute and a continuous threat."

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's finding of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Joni S.* v. *Ricky S.*, 124 Conn. App. 170, 173, 3 A.3d 1061 (2010).

The protective order at issue is governed by § 46b-15 (a), which the court read several times to explain to the defendant what evidence was relevant to the proceedings. Section 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, *stalking* or a pattern of threatening, including, but limited to, a pattern of threatening, as described in section 53a-62, by another family or household member may make an application to the

Superior Court for relief under this section . . . .'' (Emphasis added.)

"Stalking is defined as [t]he act or an instance of following another by stealth. . . . The offense of following or loitering near another, often surreptitiously, to annoy or harass that person or to commit a further crime such as assault or battery. . . . To loiter means to remain in an area for no obvious reason. . . . We interpret the statute in accordance with these commonly accepted definitions, satisfied that the plain meaning of the statute does not yield an unworkable or absurd result." (Citations omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App.115.

On the basis of our review of the record and the court's oral decision, we conclude that the court did not abuse its discretion in continuing the protective order for six months. The court's decision indicates that it was predicated upon its findings that the defendant sent the plaintiff hundreds of obsessive text messages, went to the homes of her male companion and her family, visited her workplace, used security cameras to keep track of her, sent her text messages questioning her about the time she came and went, and placed a tracking device on the car he permitted her to use to find her location. Such acts constituted stalking under § 46b-15. The defendant admitted that he badgered the plaintiff with text messages and does not deny that he visited her male friend. He does, however, claim that the court's consideration of the security cameras and the tracking device on the car the plaintiff used was improper. We disagree.

With respect to the security cameras, the plaintiff acknowledged that they were placed in the hallways for security purposes. The evidence demonstrates, however, that the defendant also used them to keep track

of the times the plaintiff came and went from the room that they had shared. On the basis of that information, he sent the plaintiff text messages asking her what she was doing, whom she was with, where she had been and where she was going.

As to the tracking device on the motor vehicle the defendant gave the plaintiff to use, the defendant claims that he put the tracking device on the vehicle on the advice of his insurance company and that he was permitted to affix a tracking device to his motor vehicle and to use it in the event the vehicle was stolen. He, however, used the tracking device to monitor the plaintiff's whereabouts, and, therefore, the court could find that the defendant's behavior constituted stalking.

We agree with the defendant's claim that the court's finding that he went to the home of the plaintiff's aunt was clearly erroneous because she testified that she visited him when the plaintiff did not respond to her phone calls. We conclude, however, that that finding is harmless error in the face of the overwhelming evidence that the defendant stalked the plaintiff when she requested space and wanted to be away from him. "In order to constitute reversible error . . . the ruling must be both erroneous and harmful. . . . The burden of proving harmful error rests on the party asserting it . . . and the ultimate question is whether the erroneous action would likely affect the result." (Internal quotation marks omitted.) *Cragg* v. *Administrator, Unemployment Compensation Act*, 160 Conn. App. 430, 443–44, 125 A.3d 650 (2015).

The defendant has failed to demonstrate that the court's finding as to his visiting the plaintiff's aunt at her home was harmful, as the location of their interaction was not relevant to any of the issues concerning the continuation of the protective order. The defendant admitted that he visited the plaintiff's uncle, her male

friend and her workplace, tracked the motor vehicle she was using, called her father in Lebanon, and sent her many text messages that he thought were justified or permissible because he was in a relationship with her and he believed that she had been unfaithful to him. For the foregoing reasons, we conclude that the court did not "misapprehend the facts" and did not abuse its discretion by continuing the protective order of no contact for six months.

The judgments are affirmed.

In this opinion the other judges concurred.

WEBSTER BANK, N.A. *v.* BRIAN J. FRASCA ET AL.
(AC 40307)

Alvord, Keller and Bishop, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants F and B. After the trial court rendered a judgment of strict foreclosure, the law day passed and the defendants did not redeem. Thereafter, the plaintiff filed a motion for a deficiency judgment, which the trial court denied due to the plaintiff's failure to establish the fair market value of the property by credible and accurate evidence. On appeal to this court, the plaintiff claimed that the trial court committed plain error, demonstrated judicial bias and abused its discretion. *Held*:

1. The trial court did not commit plain error when it failed to consider certain property valuations in the plaintiff's appraisal report submitted at the deficiency judgment hearing; for the plaintiff to obtain a deficiency judgment, it had the burden of proving that the property had a fair market value that was less than the amount of the debt on the date title vested and, thus, had the burden of presenting sufficient evidence for the court to determine the value of the property on that date, the trial court, as the fact finder, found that the plaintiff's appraisal report was unreliable, and the plaintiff did not demonstrate that the claimed error was both so clear and harmful that a failure to reverse the judgment would result in manifest injustice, nor was the court's alleged error of such a monumental proportion that it threatened to erode our system of justice.

2. The trial court did not commit plain error when it imposed a preponderance of the evidence standard of proof under statute (§ 49-14); although the plaintiff argued that the court should have used the probable cause standard of proof to establish the fair market value of the property, it did not demonstrate that the standard used by the court constituted plain error, as the trial court's thorough decision included a detailed discussion and analysis in support of its finding that the appraisal contained significant errors and lacked credibility, and there was no support for the notion that a trial court should employ a lesser burden of proof than the fair preponderance standard in a deficiency judgment hearing.
3. The trial court did not commit plain error when it made certain comments on the record during the deficiency judgment hearing: although some of the court's comments went beyond the scope of the issues and were unhelpful and a distraction, they did not demonstrate hostility toward the plaintiff and were not a manifestation of bias, as none of the plaintiff's allegations could reasonably be tied to the court's finding that it failed to meet its burden of proof as to the value of the property, and the analysis in the court's memorandum of decision was thorough, well reasoned and based on valid legal principles reasonably applied to the admissible and credible evidence presented; moreover, although the trial court made remarks throughout the hearing referencing knowledge derived from extrajudicial sources, such references were not relied on by the court in its analytical decision-making process in denying the plaintiff's motion for a deficiency judgment, and the plaintiff did not demonstrate that it suffered manifest injustice such that would constitute plain error requiring reversal.
4. The plaintiff could not prevail on its claim that the trial court abused its discretion when it admitted and relied on certain evidence submitted during the hearing: although a trial court is not permitted to rely on irrelevant evidence to determine the fair market value of a subject property, the court was not required to make a fair market value determination if it did not find the evidence presented credible or reliable, F presented ample evidence for the court to determine that the plaintiff failed to satisfy its burden of demonstrating the fair market value of the property as of the date title vested in the plaintiff, and, thus, the court did not abuse its discretion in utilizing, referencing or examining certain appraisal reports to weigh against the opinion of the plaintiff's expert; moreover, because it was the plaintiff's burden to demonstrate the fair market value of the subject property, the court's decision to find no credible valuation on the basis of the plaintiff's failure to meet that burden was within the reasonable bounds of its discretion.
5. The trial court did not abuse its discretion when it denied the plaintiff's motion for a protective order in response to F's notice of deposition, the plaintiff having failed to explain how the denial of its motion caused harm and how F's notice of deposition adversely affected the underlying proceeding on the motion for a deficiency judgment.

Argued February 20—officially released July 10, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion to cite in Allison D. Brant as a party defendant; thereafter, the court, *Mintz*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court, *Mintz*, *J.*, granted the plaintiff's second motion for summary judgment as to liability only; thereafter, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, denied the plaintiff's motion for a protective order; thereafter, the court, *Hon. Kevin Tierney*, judge trial referee, granted the plaintiff's motion to reargue and for reconsideration, but denied the relief requested therein; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, denied the plaintiff's motion for a deficiency judgment, and the plaintiff appealed to this court. *Affirmed.*

Andrew P. Barsom, for the appellant (plaintiff).

Maryam Afif, with whom, on the brief, was *Seth J. Arnowitz*, for the appellee (named defendant).

Opinion

BISHOP, J. The plaintiff, Webster Bank, N.A., appeals from the trial court's denial of its motion for a deficiency judgment following a judgment of strict foreclosure against the defendants Brian J. Frasca and Allison D. Brant.[1] On appeal, the plaintiff asserts three claims: (1)

[1] Frasca is the only defendant who filed a brief in this appeal. We refer to Frasca as the defendant, and to Frasca and Brant collectively as the defendants. The other named defendants in the underlying foreclosure action, People's United Bank and the city of Stamford, were not parties to the motion for a deficiency judgment.

the court committed plain error by (a) failing to consider two valuations of the property found in the appraisal report of the plaintiff's expert witness, (b) imposing an incorrect burden of proof under General Statutes § 49-14,[2] and (c) making comments during the hearing that demonstrated judicial bias; (2) the court abused its discretion by erroneously relying on various exhibits submitted during the deficiency judgment hearing; and (3) the court abused its discretion by denying the plaintiff's motion for a protective order in response to the defendant's notice of deposition. We affirm the judgment of the trial court.

The following facts and procedural history, as set forth in the court's memorandum of decision, are relevant to our consideration of this appeal. "[The property, 83 East Middle Patent Road, Greenwich (property)] is two acres of residential zoned property improved with a single family house built in 1750. The two acres are located within the boundaries . . . of Stamford . . . but for reasons not fully explained at the hearing, [the property] is entitled to receive a Greenwich . . . address. Apparently, a number of properties located on East Middle Patent Road share that same distinction, being Stamford . . . real property with deeds and documents recorded in the Stamford land records, but possessing a Greenwich . . . address. The two defendants, then husband and wife . . . executed an

[2] General Statutes § 49-14 (a) provides: "At any time within thirty days after the time limited for redemption has expired, any party to a mortgage foreclosure may file a motion seeking a deficiency judgment. Such motion shall be placed on the short calendar for an evidentiary hearing. Such hearing shall be held not less than fifteen days following the filing of the motion, except as the court may otherwise order. At such hearing the court shall hear the evidence, establish a valuation for the mortgaged property and shall render judgment for the plaintiff for the difference, if any, between such valuation and the plaintiff's claim. The plaintiff in any further action upon the debt, note or obligation, shall recover only the amount of such judgment."

adjustable rate note to [the plaintiff] for $1,252,000 on January 19, 2006. That note was secured by a first mortgage on [the property] recorded on the Stamford land records in volume 8410 at page 239. A loan modification agreement dated February 24, 2011, was executed in which it was agreed as of March 1, 2011, that the principal balance due was $1,270,156.98. . . .

"This current foreclosure action was returnable to the Superior Court, judicial district of Stamford-Norwalk at Stamford on October 7, 2014. The operative complaint was the May 14, 2015 amended complaint, which alleged nonpayment of the installment payments due on or about March 1, 2014. . . .

"The plaintiff's May 7, 2015 motion for summary judgment as to the defendant was granted by the court, *Mintz*, *J.*, on July 13, 2015. The plaintiff's July 22, 2015 motion for summary judgment as to [Brant] was granted by the court . . . on August 31, 2015. The plaintiff's March 30, 2015 motion for judgment of strict foreclosure was granted by the court . . . on October 19, 2015. . . . On October 19, 2015, a judgment of strict foreclosure entered with a law day of December 8, 2015. The law day of December 8, 2015, passed. No appeal to the Appellate Court was filed. No stay of the judgment entered. No motion to open the judgment was filed. The defendants failed to redeem by their law day. Title [of the property] therefore passed to the plaintiff . . . .

"Immediately thereafter the plaintiff's instant motion for [a] deficiency judgment was filed on December 11, 2015. The motion was assigned to this court and the court conducted two days of evidentiary hearings on October 26, 2016 and March 1, 2017. At the conclusion of evidence each of the three parties represented by counsel furnished oral argument. Posthearing briefs were waived."

On April 4, 2017, the court, *Hon. Kevin Tierney*, judge trial referee, denied the plaintiff's motion for a deficiency judgment "because of the plaintiff's failure to establish the fair market value [of the property] by credible and accurate evidence . . . ." This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff raises three unpreserved claims for which it seeks plain error review. First, the plaintiff contends that the court committed plain error by failing to consider two valuations of the property contained in its appraisal report. Second, the plaintiff argues that the court should not have imposed a preponderance of the evidence standard but, rather, should have used a probable cause standard in determining the plaintiff's burden of proof. Third, the plaintiff claims that comments made by the court about the plaintiff's motive for seeking a deficiency judgment and about Brant's family during the hearings reveal judicial bias.

It is well established that "[the plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.

. . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 467–69, 93 A.3d 1076 (2014). With these principles in mind, we address each of the plaintiff's claims of plain error in turn.

A

The plaintiff's first plain error claim is that the court failed, incorrectly, to consider "additional statements

of value" contained in its appraisal report submitted at the hearing for a deficiency judgment. In support of this argument, the plaintiff contends that § 49-14 "does not require demonstration of the fair market value of the property as of the date of vesting with absolute scientific certainty, but rather imposes a burden on the moving party to supply sufficient facts to permit the court to make its independent determination of value as mandated by statute." The plaintiff asserts that the alternative approaches to valuation set forth in the appraisal report it submitted in support of its motion supplemented its final statement of value and, in combination, the statements of value contained in the appraisal report amply satisfied its burden of proof at the deficiency hearing. In response, the defendant argues that because the court found the appraisal report not credible, there was "no reason for the court to consider any of the valuations allegedly contained therein." We agree with the defendant.

The following additional information is pertinent to this claim. The record reveals that the plaintiff sought a deficiency judgment against the defendants because at the time of the strict foreclosure judgment, the property was appraised at $750,000 and the plaintiff's debt was $1,425,498.13. As evidence of the property's value at the hearing on the motion for a deficiency judgment, the plaintiff submitted an appraisal from its expert witness, Allen Glucksman, a residential real estate appraiser. Glucksman conducted an appraisal of the property on December 23, 2015 (December, 2015 report), and concluded that the fair market value of the property was $725,000. The plaintiff's claim regarding "three separate and distinct statements of value" contained in the December, 2015 report refers to the appraiser's discussion of the sales comparison approach, which resulted in a valuation of the property at $725,000; the cost approach, which yielded a value of $846,421; and in the

appendix to the appraisal report, a property field card which lists a 2014 appraisal value of $894,144. Glucksman's affidavit, also attached to the appraisal report, stated, "[i]t is my professional opinion to a reasonable degree of certainty that the value of the subject property in its present condition is $725,000." Glucksman testified that he could not complete the cost approach. There was no testimony regarding the 2014 property field card valuation.

The defendants did not submit their own appraisal of the property. Rather, they presented their own expert witness, Taylor Beerbower, another residential real estate appraiser, who examined and gave testimony regarding Glucksman's December, 2015 report. Beerbower asserted that the report contained significant errors making it "unreliable and inconclusive" and confirmed that it did not provide enough evidence for the court to establish the value of the property. Beerbower noted, inter alia, that the appraisal report did not include any other antique homes as comparables, included a short sale home as a comparable, contained significant errors in the square footage calculations of some of the comparables, and overall lacked discussion in the body of the report explaining how Glucksman arrived at his appraisal value. In its decision, the court noted many of the same errors in the December, 2015 report that Beerbower highlighted in his testimony.[3] It concluded that the plaintiff failed to establish the fair market value by credible and accurate evidence.

[3] For example, the court noted that the December, 2015 report erroneously stated that the property was served by public water and sewer, rather than a private well and septic system. Glucksman only was asked to conduct an external appraisal of the property, but it was vacant and available for interior inspection. Beerbower testified that internal inspections of antique houses are important. The record reflects that all four comparable properties utilized in the appraisal report were located in Stamford. Both Glucksman and Beerbower testified that property values in Greenwich would be different from those in Stamford.

This court previously has stated that "[a] deficiency proceeding has a very limited purpose. . . . [T]he court, after hearing the party's appraisers, determines the value of the property and calculates any deficiency. This deficiency judgment procedure presumes the amount of the debt as established by the foreclosure judgment and merely provides for a hearing on the value of the property. . . . The deficiency hearing concerns the fair market value of the subject property as of the date title vests in the foreclosing plaintiff under [General Statutes] § 49-14. . . . [T]he value placed on the property by the court for the purposes of rendering judgment of strict foreclosure and setting law days [is] irrelevant to a subsequent deficiency judgment proceeding. . . .

"[I]mplicit in . . . § 49-14 is the requirement that the party seeking a deficiency judgment satisfy her burden of proof regarding the fair market value of the property . . . in particular, the requirement that the plaintiff provide the court with sufficient evidence to demonstrate that she is entitled to a deficiency judgment. . . . When considering a motion for a deficiency judgment, the trial court may make an independent determination as to the valuation of the property. . . . Our Supreme Court has held that, in a deficiency judgment proceeding, [t]he determination of [a property's] value by a court is the expression of the court's opinion aided ordinarily by the opinions of expert witnesses, and reached by weighing those opinions in light of all the circumstances in evidence bearing upon value and its own general knowledge of the elements going to establish it. . . . [T]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible. . . .

"In determining valuation pursuant to . . . § 49-14, the trier, as in other areas of the law, is not bound by the opinion of the expert witnesses . . . . The evaluation of testimony is the sole province of the trier of fact. We do not retry the case. The conclusion of the trial court must stand unless there was an error of law or a legal or logical inconsistency with the facts found. . . . We will disturb the trial court's determination of valuation, therefore, only when it appears on the record before us that the court misapplied or overlooked, or gave a wrong or improper effect to, any test or consideration which it was [its] duty to regard." (Citations omitted; internal quotation marks omitted.) *Brownstein* v. *Spilke*, 117 Conn. App. 761, 765–67, 982 A.2d 198 (2009), cert. denied, 294 Conn. 927, 986 A.2d 1053 (2010).

In order for the plaintiff to succeed in its quest for a deficiency judgment, it was required to prove that the property had a fair market value that was less than the amount of the debt on the date of the vesting of title. To accomplish this goal, the plaintiff had the burden of presenting sufficient evidence for the court to determine the value of the property on that date. See *Eichman* v. *J & J Building Co.*, 216 Conn. 443, 451, 582 A.2d 182 (1990).

"When confronted with conflicting evidence as to valuation the trier may properly conclude that under all the circumstances a compromise figure most accurately reflects fair market value. . . . While we have held that the trial court *may* set the property value at a compromise figure when confronted with conflicting expert testimony as to valuation . . . we have never held that the court *must* do so in the absence of any credible evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 452. We reiterate that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be

given the evidence." (Internal quotation marks omitted.) *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 444, 988 A.2d 351 (2010).

The plaintiff claims that the court "considered only one of the three separate and distinct statements of value set forth in [the December, 2015 report]" and "failed to take into account all the circumstances in evidence bearing upon value as required and completely disregarded the obligation to use its own general knowledge to make an independent determination of the value of the property . . . ." (Internal quotation marks omitted.) In sum, the plaintiff argues that the court committed plain error because it discussed only the $725,000 appraisal value in its decision, and did not reference the other two statements of value that were "unchallenged" and "factually sufficient" listed in the December, 2015 report. In making this argument, however, the plaintiff fails to acknowledge the court's finding that the plaintiff's appraisal report was unreliable; nor has the plaintiff demonstrated that "the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 468–69. Finally, we cannot conclude that the court's alleged error was of such a monumental proportion that it threatened to erode our system of justice, based on the court's role as the trier of fact. Under § 49-14, the court "is privileged to adopt whatever testimony [it] reasonably believes to be credible;" (internal quotation marks omitted) *Brownstein* v. *Spilke*, supra, 117 Conn. App. 766; and in this case, it found the plaintiff's evidence not to be sufficiently credible. Accordingly, we conclude that the plaintiff has failed to demonstrate that the court committed plain error in not relying on the alternative values set forth in Glucksman's appraisal report.

B

The plaintiff additionally claims that the court committed plain error by imposing an erroneous burden of proof under § 49-14. In its decision, the court stated, "[t]his court finds that the plaintiff has failed to establish by sufficient credible evidence to satisfy the plaintiff's burden of proof by a fair preponderance of the evidence as to what the fair market value is of [the property] . . . ." On appeal, the plaintiff submits that trial courts should employ a probable cause standard as the burden of proof during deficiency judgment hearings. We are unpersuaded.

We first reiterate that implicit in a deficiency hearing under § 49-14 "is the requirement that the party seeking a deficiency judgment satisfy her burden of proof regarding the fair market value of the property . . . in particular, the requirement that the plaintiff provide the court with sufficient evidence to demonstrate that she is entitled to a deficiency judgment. . . . When considering a motion for a deficiency judgment, the trial court may make an independent determination as to the valuation of the property." (Emphasis omitted; internal quotation marks omitted.) *Banco Popular North America* v. *du'Glace*, *LLC*, 146 Conn. App. 651, 656, 79 A.3d 123 (2013).

Although the plaintiff argues that the court should have used a lesser standard of proof to establish the fair market value of the property, it has not demonstrated that the standard employed by the court constituted plain error. Additionally, the court's thorough decision includes a detailed discussion and analysis in support of its finding that Glucksman's appraisal contained significant errors and, accordingly, lacked credibility. See footnote 3 of this opinion. Also, we are aware of no decisional support for the notion that a trial court should employ a lesser burden of proof than

the fair preponderance standard in a deficiency judgment hearing. To the contrary, this court previously has affirmed a denial of a motion for a deficiency judgment when the trial court applied a fair preponderance of the evidence standard and concluded that the plaintiff's expert witness was not credible. See *Farmers & Mechanics Savings Bank* v. *Durham Realty, Inc.*, 34 Conn. App. 204, 206, 640 A.2d 1017 (1994) ("[t]he movant has failed to satisfy its burden of proof by establishing by a fair preponderance of the evidence the reasonable market value of the premises as of the date of the transfer of title to it" [emphasis omitted; internal quotation marks omitted]).

We reiterate that the plain error doctrine should be invoked sparingly and "reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 468. The error also must be plain in the sense that is patent or readily discernible, and obvious in the sense of not debatable. Id. In the present case, this particular argument advanced by the plaintiff, that this court should adopt a diminished standard of proof for deficiency judgment hearings, fails because the standard of proof employed by the court was not plain error. Indeed, it was not erroneous at all.

C

Next, the plaintiff claims that the court committed plain error because its comments during the hearings and in its memorandum of decision reflected a judicial bias against the plaintiff. The plaintiff asserts that the court's commentary throughout the proceedings suggests that the court attributed "an ulterior motive to [the] plaintiff in pursuing the deficiency judgment to

reach the assets of, or collection of, the proposed deficiency balance due from nonparty family members of [Brant]." The plaintiff claims, as well, that the court's comments during the hearing, specifically regarding the defendant's former father-in-law, reflected bias because he was not a party to the action. In sum, the plaintiff asserts that "the statements of the court attributing an ulterior motive to [the] plaintiff's exercise of its statutory rights and its statements within the memorandum of decision regarding the family of . . . Brant give rise to the appearance of a lack of impartiality and bias to a reasonable observer which requires reversal of the court's decision as plain error."

Before our discussion of the plaintiff's particular claims, we review, briefly, the issue of judicial bias. "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal . . . before a judge with no actual bias against the defendant or interest in the outcome of [a] particular case." (Citation omitted; internal quotation marks omitted.) *Bracy* v. *Gramley*, 520 U.S. 899, 904–905, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). "[O]ur Supreme Court has recognized that a claim of judicial bias strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary. . . . No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be characterized by the highest degree of impartiality. If [the judge] departs from the standard, he [or she] casts serious reflection upon the system of which [the judge] is a part. . . . We review this [unpreserved] claim [of partiality] therefore . . . under a plain error standard of review." (Internal quotation marks omitted.) *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 394, A.3d (2018).

"We use an objective rather than a subjective standard in deciding whether there has been a violation of

canon 3 (c) (1) [of the Code of Judicial Conduct]. Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety . . . that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard. . . . The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his . . . impartiality, on the basis of all of the circumstances. . . . Even in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Mottolese*, 267 Conn. 1, 30, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

"In assessing a claim of judicial bias, we are mindful that adverse rulings, alone, provide an insufficient basis for finding bias even when those rulings may be erroneous. . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (Citations omitted; emphasis in

original; internal quotation marks omitted.) *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 395. It is through the lens of this jurisprudence that we view the plaintiff's claims of judicial bias.

We first address the plaintiff's assertion that the court displayed bias against it by suggesting that the plaintiff had an ulterior motive in bringing this action, which was to obtain satisfaction of its debt from Peter Brant, the defendant's former father-in-law. In support of this claim, the plaintiff cites to five pages of transcript from the October 26, 2016 hearing, which, the plaintiff claims, reveal the court's impropriety in this regard. The transcript reflects that before hearing any testimony on this date, the court asked counsel whether any efforts had been made to resolve the matter and, in that context, repeatedly referred to Peter Brant, a person of substantial financial means.[4]

[4] During the October 26, 2016 hearing, the following colloquy occurred before the start of evidence:

"The Court: Okay. All right. What was the face amount of the mortgage?

"[The Plaintiff's Counsel]: Your Honor, I believe it was $1,525,000.

"The Court: No, I don't think so.

"[The Plaintiff's Counsel]: $1,595,000, then.

"[The Defendant's Counsel]: No.

"[The Plaintiff's Counsel]: Your Honor, it was $1,252,000.

"The Court: Okay. Thank you. Okay. You've . . . spent some time trying to resolve this matter?

"[The Plaintiff's Counsel]: Your Honor, I—not from my perspective. I believe there had been—

"The Court: You're looking for Peter Brant in this room?

"[The Plaintiff's Counsel]: No, Your Honor, I'm not.

"The Court: Okay. You know he's not a party to the case?

"[The Plaintiff's Counsel]: I understand that.

"The Court: Brant Foundation is not a party to this case.

"[The Plaintiff's Counsel]: Correct.

"The Court: Correct. You surely couldn't be looking for money from [the defendant], could you?

"[The Plaintiff's Counsel]: Your Honor, my client's instructions are simply to proceed against both parties obligated on the note.

"The Court: Okay. Any reason to believe that [the defendant] has any money whatsoever?

"[The Plaintiff's Counsel]: Not personally, no.

"The Court: Deficiency judgment enters against [the defendant], he pulls the plug, and I'll see you in Bridgeport. Okay.

"[The Plaintiff's Counsel]: Understood.

"The Court: Yes. So why are we spending a lot of time if that's—if that's the case?

"[The Plaintiff's Counsel]: Your Honor, my—my client's belief is—and, again, subject to verifying with Your Honor the actual substance of the note itself—that there may be available avenues for collection of the deficiency balance.

"The Court: Okay. You have title to the property, correct?

"[The Plaintiff's Counsel]: Correct, Your Honor.

"The Court: And there was a claim that you served Allison Brant at the place of abode; that is [the property], correct?

"[The Plaintiff's Counsel]: Correct.

"The Court: And there was a claim that, in fact, that was not her abode at the time of the service, correct?

"[The Plaintiff's Counsel]: Correct.

"The Court: And therefore you joined her in it—in to be able to effect service on her, is that correct?

"[The Plaintiff's Counsel]: Correct, Your Honor.

"The Court: And did—were you able to effect service on her?

"[The Plaintiff's Counsel]: Yes.

"The Court: At her father's house, wasn't it?

"[The Plaintiff's Counsel]: I believe so.

"The Court: Yes. Okay. And do you know who she is employed by?

"[The Plaintiff's Counsel]: I do not.

"The Court: You don't?

"[The Plaintiff's Counsel]: I'm from up north, Your Honor.

"The Court: You don't—you really don't know that?

"[The Plaintiff's Counsel]: I really don't. I'm not from this area.

"[Brant's Counsel]: I'm not going to disclose it, Your Honor, but I think perhaps counsel can read between the lines.

"The Court: Would it surprise you that she may have been employed by an entity over which . . . Peter Brant, may have had some or some arguable control?

"[The Plaintiff's Counsel]: It wouldn't surprise me, no. I just don't know her exact employer, Your Honor.

"The Court: So if [Peter] Brant has control over her finances by reason of where she lives, and her finances by reason of where she is employed or has occupancy, how are you going to get any money from her?

"[The Plaintiff's Counsel]: Your Honor, my client—I understand the court's position. With respect to what happens should a deficiency judgment be entered, more likely than not the bank would undertake its own collection activities absent counsel. That's what I've seen happen in every case in which a deficiency is entered.

"The Court: I bet that if your client came into this court and had a file, a manila file with a folder on the outside, that the word Brant would be in large letters, red, bold, and a sticker would—saying this is Peter Brant's daughter, because everybody in Webster Bank would know who Peter Brant is.

"[The Plaintiff's Counsel]: My understanding is that they do, Your Honor.

"The Court: Yes, they do. Okay. And everybody in Webster Bank would

We agree that the court's comments regarding the practical issue of whether the plaintiff could actually obtain satisfaction of any deficiency judgment from either of the named defendants are of concern because they were beyond the scope of the issues for the court's decision. We do not read these comments, however, as a demonstration of hostility toward the plaintiff's claim for a deficiency judgment. Instead, although we agree with the plaintiff that the court's many references to Peter Brant were unhelpful and a distraction, we do not view that as a manifestation of bias, but rather find

know that when you're talking about Peter Brant that you're talking about nine digits. All right. You know what I'm talking about?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: Okay. Isn't that coloring what your client is doing here?

"[The Plaintiff's Counsel]: Your Honor, to the extent that the bank knows it has no recourse whatsoever against Peter Brant or any party aside from those who signed that note, I don't think it bears any relevance.

"The Court: Okay. Isn't the bottom line of this case that—that there were three people who made a major mistake—[the defendant], [Brant], and [the plaintiff]—and they blew it on the value of the property. And the property is not worth a million-two or a million-five, as what they paid it. It was only worth half, and now you're trying to relitigate that mistake in this court. No body language, please.

"Unidentified Speaker: All right, sir.

"The Court: Okay."

Furthermore, our review of the record reveals that the defendant's objection to the motion for a deficiency judgment filed on February 1, 2016, and contained in the court's file, included information that may have informed the court's comments in this regard. In his objection to the motion for a deficiency judgment in which the defendant attempted to assert a defense of unconscionability, the defendant alleged: "The Webster Bank Residential Mortgage Exception Request provided by the plaintiff in its response to [the] defendant's first request for production has the following comments: [Allison] Brant's father, Peter Brant is a valued customer at Webster Bank. He has approximately [$]10 million in loans and approximately $579,000 on deposit. His net worth is approximately [$]500 million." (Internal quotation marks omitted.) In his objection, the defendant claimed, as well: "The plaintiff over-appraised the property at the time it was reviewing the defendant's loan application. The defendant was initially pursuing a loan with a different lender who would not approve the requested loan amount because the value of the property did not support such a high loan amount." Although the court did not reference the defendant's objection in its commentary, the existence of this objection in the file supports the idea that the court's knowledge of the background of the loan origination was not derived from extrajudicial sources.

that they were a reflection of the court's views of the economic realities of the plaintiff's chances of collection.

As additional support for its claim of judicial bias, the plaintiff asserts that in the March 1, 2017 hearing, the court made bias-infused comments regarding whether the court could credit any payments made on the mortgage, after the debt was determined at foreclosure, against the deficiency. One reasonable reading of the transcript reveals, however, that the court was posing a hypothetical situation and not positing that any such payments had, in fact, been made.[5] In their briefs, both parties ultimately agreed that the court had created a "fictitious scenario" during this colloquy; therefore, it is in this context that we assess the colloquy between the court and the plaintiff's counsel. We first turn to the court's comments regarding a hypothetical scenario in response to an assertion made by the plaintiff's counsel that *TD Bank, N.A.* v. *Doran*, 162 Conn. App. 460, 131 A.3d 288 (2016), stands for the principle "that the underlying finding of the judgment debt in the judgment of strict foreclosure is conclusive on the court's determination of the amount of the debt in a deficiency proceeding in that same action."[6] In reply,

[5] In raising this issue, it is apparent from the transcript that the court was aware that Brant had alleged, as a special defense, that the plaintiff failed to properly credit her for "all payments made and credits to be applied on the subject note." It is clear from the record that no evidence of any such payments was adduced at the hearing on the motion for a deficiency judgment. See footnote 8 of this opinion.

[6] In *TD Bank, N.A.* v. *Doran*, supra, 162 Conn. App. 468, this court concluded that special defenses, such as laches, that could have been raised during the foreclosure proceedings, may not be raised in the deficiency hearing. "The intent of the deficiency proceeding is to determine through a hearing the value of the property that has been foreclosed as of the date title vests in the mortgagee and to award the difference between that value and the amount of the debt as established by the foreclosure judgment. . . . Therefore, because [i]n a deficiency proceeding . . . the judgment of foreclosure has already determined that a debt is owed and the amount of that debt . . . [t]hose issues are not relitigated in the deficiency hearing." (Citation omitted; internal quotation marks omitted.) Id.

the court challenged counsel's reliance on *TD Bank, N.A.*, and posited that it could consider any evidence of payment made by the borrower, after strict foreclosure, toward the mortgage debt.[7] In sum, we understand from this exchange that the court was challenging counsel's

The following colloquy occurred after counsel's assertion:

"The Court: I cannot believe that that's what the case says, cannot believe. It doesn't make any sense.

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

"The Court: That's ridiculous. It's ridiculous. [Brant's counsel] is ready to stand up and offer an expert from [the plaintiff], okay, and the evidence is going to show that a certain gentleman who happens to be related to [Brant's counsel's] client called up the [plaintiff] and asked them to open up and to have a special proceeding and open up on January 1, 2016, at which time that gentleman asked that his checking account balance be verified by the officer who'd opened up the bank on a legal holiday, and that gentleman asked that that part of that bank account be withdrawn for the purpose of applying it toward this loan. You're telling me that the Appellate Court says that that gentleman's efforts on January 1, 2016, to use all his influence with [the plaintiff] is for naught and should not be countenance by me. I should not allow the dastardly act of someone paying off a mortgage after the debt has been determined. I should not allow that.

"[The Plaintiff's Counsel]: Your Honor, that's what I'm telling you. While I can tell you factually as counsel, that never happened, but—

"The Court: Well, I'm telling you that there's going to be evidence to that effect, and you're telling me that that case prevents that evidence from coming in.

"[The Plaintiff's Counsel]: That is what I'm telling you, Your Honor.

"The Court: Well, I can't believe that that could be the situation."

[7] The colloquy during this debate reveals that the plaintiff's counsel considered, as parallel, the facts of the court's hypothetical scenario with the facts in *TD Bank, N.A.* v. *Doran*, supra, 162 Con App. 460. See footnote 6 of this opinion. For example:

"The Court: Was there any evidence at all that after the judgment entered in *that* case [*TD Bank, N.A.*] that there was a payment made by the—by the borrower?

"[The Plaintiff's Counsel]: I would welcome the defendants to put on that evidence.

"The Court: Well, you said that *that* case [*TD Bank, N.A.*] prevents that from being credited. That's what you've just argued.

"[The Plaintiff's Counsel]: I didn't know, Your Honor. I didn't say—

"The Court: Yes, you did. I went through the whole thing and you said, no, that had nothing to do with it. Judge Mintz's number is the number and that's the number that we use for the mathematical calculations regardless of the events that happened on January 1, 2016, in the closed offices of [the

reading of the *TD Bank, N.A.* decision and positing, instead, under the scenario it outlined, that the court could credit against the deficiency any payments made to the plaintiff by a member of Brant's family, after the judgment of strict foreclosure, but prior to the deficiency hearing, in order to calculate the remaining balance owed on the mortgage debt.[8] Because there was no such evidence adduced at the hearing, it is reasonable to conclude that the court, in this exchange, was testing the contours of the *TD Bank, N.A.* decision as an exercise and not positing that payments toward the debt had actually been made.

Allied to the plaintiff's claim that the court wrongly attributed an ulterior motive to it for seeking a deficiency judgment against the defendants is the claim that the court improperly made reference to its own personal knowledge of the area in which the subject

plaintiff] in which a certain gentleman who is known to [Brant's counsel] made a payment.

"[The Plaintiff's Counsel]: Your Honor, if they have evidence they wish to proceed about that, they can attempt to introduce it. I will likely object to it. Your Honor will rule on any such objections. But from our position, the judgment debt is what established the baseline for what we are seeking for a deficiency judgment." (Emphasis added.)

Subsequently, the plaintiff's counsel corrected his error:

"[The Plaintiff's Counsel]: Your Honor, I might have misspoken. Had there been such a payment, the bank would credit.

"The Court: I told you there was such a payment. They opened up the bank on January 1, 2016, and ordered that the money be swept from his checking account that he held at [the plaintiff].

"[The Plaintiff's Counsel]: Well, in that—

"The Court: The man has enough money in the checking account to pay off his whole mortgage. It's in his regular checking account.

"[The Plaintiff's Counsel]: I don't believe he has any obligation to do that however. Your Honor, if there had been any such payment, it would be credited."

[8] We note the hypothetical scenario posited by the court solely to put the plaintiff's argument of judicial bias in context. Whether any payment was made to decrease the debt after judgment by strict foreclosure was not an issue at the deficiency judgment hearing, not an issue raised on appeal, and not addressed by any party or the court as a purported occurrence in fact. See footnotes 6 and 7 of this opinion.

property is located and to the Brant family which the court stated owns real estate nearby. In its principal brief, the plaintiff states that "[t]he transcript of the hearing clearly reflects that the court has vast personal knowledge of the area in which the property is located as well as the surrounding area and market conditions. The court, instead of employing its obvious knowledge to make a determination of value of the property as required under [§] 49-14, appears to have elected to attribute an ulterior motive to [the] plaintiff's pursuit of a statutory right to seek a deficiency judgment due to its own knowledge of the property holdings and finances of [Brant's] family." As claimed by the plaintiff, the court's knowledge of the area is reflected in its memorandum of decision in which the court stated: "This property is immediately adjacent to real property owned by the family of [Brant], and in this court's opinion would be a natural acquisition by the Brant family of this additional two acres."[9] Although we agree that reference to an adjacent property not owned by either defendant was unnecessary to the court's decision, we do not read in this reference a bias against the plaintiff's quest for a deficiency judgment. Indeed, it amply reveals that the court had familiarity with the area and with Brant's family and that the court, albeit distractingly, shared this information with the parties during the hearing.[10] It should be noted, as well, that during the hearing,

[9] The defendant testified that Brant's father "told me that he was going to give me the down payment towards a house. It wasn't that we got a down payment towards any house as our choosing. We got a down payment towards this house which he was in negotiations to purchase Lion Share Farm next door."

[10] For example, during the March 1, 2017 hearing, the following exchange occurred:

"The Court: Are you familiar with the zoning map of the town of Greenwich?

"[The Defendant's Counsel]: I'm not intimately, Your Honor, no.

"The Court: You're not? Well I am. I've lived in town my whole life. It's a long, long way. This is in the four acre zone immediately adjacent. This is a two acre piece of property. The acreage immediately adjacent to it is a four acre zone and a four acre zone is some distance away. I don't know

the plaintiff's counsel may have in fact perceived the court's knowledge of the area in which the property is located as a benefit to the parties. In his closing argument, the plaintiff's counsel stated in regard to the court's familiarity with the property: "That's why . . . Your Honor, with your background and understanding of this particular market, was assigned this case. I think it's a benefit to all parties to have had Your Honor assigned."

where Cat Rock Road is. I lived in three houses on Cognewaugh Road which is a similar street old Indian Road, and that is the back country of North Mianus. It's not quite the back country because its south of the parkway. But this is the zoning map and that shows where the four acre zones are. So if he wants to be critical, he needs to know what the zoning regulations are.

"I don't know the distance of how far it is and how far he's claiming. Roads wind around so it may very well be three miles by the way the road goes, but by the way the crow flies, it's not three miles to Cat Rock Road, but it's well over a mile before you even get to the first two acre zone in Greenwich. So if someone is trying to use a comparable for the two acres, that would be a reasonable thing to do to find it in the two acre zone. It would be a little hard to find [two] acres in a four acre—four acre zone.

"[The Defendant's Counsel]: That is true, Your Honor.

"The Court: It's possible to do that, but it will be [a] little hard to do it. It would be easier to find two acres that would be—and that area of Cat Rock Road would be primary to be looking for, but—okay.

"The Witness: Am I allowed to respond to that just where I got my—

"The Court: No, you may not. You may not.

"The Witness: Okay. Sorry.

"The Court: I'm just telling you that I have experience on it my own. How can I say that I don't know what's happening in Greenwich when he comes in and he says something about it when I've—the house that I was born in is right next to Cat Rock Road. I know the—I know the town rather well, okay.

"[The Defendant's Counsel]: Thank you, Your Honor. I will—

"The Court: I even played golf in Lion's Farms property.

"[The Defendant's Counsel]: I under—

"The Court: That's how far back it goes.

"[The Defendant's Counsel]: I understand it has a slope of some—

"The Court: A what?

"[The Defendant's Counsel]: A slope of some portion? It's rather large and slopes down? Is that—I haven't seen it in a long time.

"The Court: Yeah. I lost some golf balls there, all right.

"[The Defendant's Counsel]: Was is it a zone? Was it a course?

"The Court: Play on both sides. Played where [Peter] Brant's house is and that was part of the golf course, so I played on the golf course a number of times."

In response to the plaintiff's claims of judicial bias, the defendant contends that none of the plaintiff's allegations of bias can reasonably be tied to the court's finding that the plaintiff failed to meet its burden of proof as to the value of the property. We agree. Although the court's comments regarding the Brant family and the expression of the court's knowledge of the area and property in question should not have been stated, we do not find bias in the court's many asides and digressions. In sum, a review of the hearing transcripts reveals that throughout the proceedings, the court often made lengthy anecdotal comments, engaged in tangential musings, and pondered detailed hypotheticals not relevant to the issues at hand.[11] Additionally, although, as noted, the court also made several comments reflecting a knowledge of the parties' immediate family which were not pertinent to the issue confronting the court, we do not believe that the court's multiple, unhelpful interjections reflected a hostility toward the plaintiff's claims or against the plaintiff itself. Thus, although the transcripts of the proceedings reveal that the court offered extended asides on matters not at issue, the analysis in its memorandum of decision was thorough, well reasoned, and based on valid legal principles reasonably applied to the admissible and credible evidence presented before it. See footnote 3 of this opinion. Although we recognize that throughout the hearing the court made remarks referencing knowledge derived from extrajudicial sources, which *may* support a claim

[11] For example, the court made lengthy commentary on various topics, including, but not limited to, counsel's use of the phrase "for the record" during his introductory identification; the court's personal schedule and availability; explanation and recitation of "enclaves" around the world; the court's previous real estate transactions in the Stamford/Greenwich area; the court's current work load; a lengthy discourse on e-filing, notices, and Practice Book § 10-13; the court's familiarity with the area around the property and Greenwich; and the court's caseload as a judge trial referee and his vacation schedule. The court's commentary can be fairly characterized as asides and nihil ad rem.

of judicial bias; *Schimenti* v. *Schimenti*, supra, 181 Conn. App. 395; such references were not relied upon by the court in its analytical decision-making process in denying the plaintiff's motion for a deficiency judgment. Although the court repeatedly made unnecessary and/or unhelpful comments throughout the hearing, the plaintiff has not demonstrated that it suffered manifest injustice such that would constitute plain error requiring reversal.

II

The plaintiff next claims that the court abused its discretion by "improperly admitting and relying on irrelevant evidence; drawing improper inferences of current value from the original loan amount; and failing to consider the uncontroverted evidence of value presented during the hearing." Because all the claims are reviewed under an abuse of discretion standard, we discuss them collectively.

"[A] trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness. . . . A request for a deficiency judgment is part of a foreclosure action. . . . We review mortgage foreclosure appeals under the abuse of discretion standard. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *MTGLQ Investors, L.P.* v. *Egziabher*, 134 Conn. App. 621, 623–24, 39 A.3d 796 (2012).

The plaintiff first asserts that the court abused its discretion by admitting into evidence a January 11, 2006 appraisal report of the property (January, 2006 report) and then referencing the report in its memorandum of decision. The defendant testified that the plaintiff ordered the January, 2006 report, which appraised the property to have a fair market value of $1,565,000 on January 9, 2006. The plaintiff argues that the January, 2006 report is irrelevant because it "had absolutely no legal, logical, or factual relationship to the value of the property as of December 11, 2015 . . . ."

As support, the plaintiff relies on *First Federal Bank, FSB* v. *Gallup*, 51 Conn. App. 39, 42–44, 719 A.2d 923 (1998), for the proposition that a deficiency hearing under § 49-14 concerns the fair market value of the subject property as of the date title vests in the foreclosing plaintiff. The value of the property at any other time is irrelevant. See id., 42. In this setting, the plaintiff's reliance on *Gallup* is misplaced. In *Gallup*, unlike the situation at hand, the trial court relied on a two year old appraisal in its valuation of the subject property.

In the present case, the court wrote that it was "merely using the [January, 2006] appraisal for two points; the dichotomy between the large value in 2006 with the change to a 54 [percent] lesser value according to [Glucksman's] [December, 2015 report] and the failure of [Glucksman] to utilize Greenwich properties for comparables."[12] The court therefore did not utilize the

[12] During the March 1, 2017 hearing, the following exchange occurred between the defendant's counsel and Glucksman:

"Q. Okay. And when you chose comparable properties to do your [December, 2015] appraisal, you selected all properties that are located in Stamford; is that correct?

"A. Yes.

"Q. Now, is there a reason why you did not use any Greenwich properties in your comparisons?

"A. I'm trying to compare apples to apples.

"Q. And so you feel even though this has a Greenwich address, that it would not be a useful comparison?

"A. It would not."

January, 2006 report to determine the current fair market value of the property; rather, the court made reference to the January, 2006 report as further reason to find Glucksman's appraisal an unreliable indicator of the fair market value of the property.

Second, the plaintiff asserts that the court abused its discretion by improperly considering the defendants' original loan amount. Specifically, it asserts that "the court impermissibly relied on and drew inferences from the original [loan] amount . . . to determine the value of the property at the time of title vesting." In its decision, the court wrote: "Of overarching consideration was the fact that [the defendants'] loan had been furnished by the plaintiff . . . on January 19, 2006, in the amount of $1,252,000. Therefore, the fair market value of this real property as of January 19, 2006, had to have exceeded by some percentage of $1,252,000. . . . Yet it is that same entity, [the plaintiff], that is now claiming that the fair market value of the same real property is $725,000. That dichotomy demands that the appraisal opinion be examined with careful scrutiny."

The plaintiff's assertion, however, ignores the court's numerous recitals, based upon the evidence submitted during the hearing, for its conclusion that the December, 2015 report was not reliable. The court explained that it believed that the substantial errors and lack of explanation thereof, as highlighted by the defendant's expert witness, culminated in an unreliable appraisal. The court's decision does not reference the original loan amount beyond mentioning it as background information. Nor does the court rely on the original loan amount in its analysis or determine that the fair market value of the property was an amount based on the original loan amount. Accordingly, the court did not abuse its discretion in referencing the original loan amount.

Third, the plaintiff contends that the court improperly relied on appraisal reports of the property that Glucksman conducted in March, 2015 and September, 2015. The court's decision references the prior appraisal reports as a comparison to the December, 2015 report, notably highlighting discrepancies between the reports, even when the reports utilized some of the same comparable homes. Again, the court appears to have utilized the prior appraisal reports as part of its basis for determining that the plaintiff's evidence was not credible or accurate. The record does not support the plaintiff's claim that the court relied on the prior appraisal reports to determine the present value of the property.

Fourth, the plaintiff claims that the court abused its discretion by "engaging in a hypertechnical analysis" of the comparables in the December, 2015 report and the prior appraisal reports, thereby failing to make a determination of value "based on the other sufficient evidence" presented. To further its argument, the plaintiff recites portions of the court's decision and statements made by the court during the hearings.

We reiterate that the determination of value "is the expression of the court's opinion aided ordinarily by the opinions of expert witnesses, and reached by weighing those opinions in light of all the circumstances in evidence bearing upon value and its own general knowledge of the elements going to establish it. . . . [T]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotation marks omitted.) *Brownstein* v. *Spilke*, supra, 117 Conn. App. 766. Furthermore, when we review claims for an abuse of discretion, "the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to

whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005).

We agree with the general principle that during a deficiency judgment hearing, a trial court is not permitted to rely on irrelevant evidence to determine the fair market value of the subject property. We also agree that a trial court is *not required* to make a fair market value determination if it does not find the evidence presented at the deficiency judgment hearing credible or reliable. Within this parameter, the defendant presented ample evidence for the court, in the exercise of its discretion, to determine that the plaintiff failed to satisfy its burden of demonstrating the fair market value of the property as of the date title vested in the plaintiff. Accordingly, we cannot conclude that the court abused its discretion in utilizing the prior appraisal reports, or examining the December, 2015 report in detail, to weigh against the opinion of the plaintiff's expert. Because ultimately it was the plaintiff's burden to demonstrate the fair market value of the subject property in a deficiency judgment, the court's decision to find no credible valuation on the basis of the plaintiff's failure to meet this burden was within the reasonable bounds of its discretion.

III

Lastly, the plaintiff claims that the court abused its discretion by denying the plaintiff's motion for a protective order in response to the defendant's notice of deposition. "Practice Book § 13-5 provides in relevant part: Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the follow-

ing . . . that the discovery may be had only on specified terms . . . .'' (Internal quotation marks omitted.) *Coss* v. *Steward*, 126 Conn. App. 30, 46, 10 A.3d 539 (2011). ''[T]he [trial] court's inherent authority to issue protective orders is embodied in Practice Book § 13-5 . . . . The use of protective orders and the extent of discovery is within the discretion of the trial judge. . . . We have long recognized that the granting or denial of a discovery request . . . is subject to reversal only if such an order constitutes an abuse of that discretion.'' (Citation omitted; internal quotation marks omitted.) Id. We reiterate that ''[i]n determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action.'' (Internal quotation marks omitted.) *MTGLQ Investors, L.P.* v. *Egziabher*, supra, 134 Conn. App. 624.

Nonetheless, the plaintiff fails to explain how the denial of its protective order caused harm, beyond the general assertion that the denial ''impermissibly allowed the relitigation of issues that were irrelevant to the stance of the proceedings and had previously been disposed of by the judgment of strict foreclosure.'' The plaintiff fails to identify which issues were irrelevant and caused harm and, more importantly, fails to explain how the defendant's notice of deposition adversely affected the underlying proceeding on the motion for a deficiency judgment.[13] Accordingly, we

[13] No evidence of the deposition was submitted during the deficiency judgment hearings. The record is unclear as to whether a deposition was actually conducted. On February 14, 2017, the defendant filed a motion for continuance, stating that the deposition was stayed and ''cannot be rescheduled prior to [the] hearing date.'' That motion was denied on the same day, with the court instructing that ''[t]he deposition must be completed before the hearing . . . .'' During the March 1, 2017 hearing, the court remarked: ''I have heard nothing about any deposition completed or not completed. There's no motion. There's nothing to do with me. I don't have anything to do with that matter. That's between the two of you. I'm not asking for any status report as to any deposition or lack of deposition or anything of that nature because there's nothing before me. Nobody's raised any issue before me, okay?''

cannot conclude that the court abused its discretion in denying the plaintiff's motion for a protective order. See *Coss* v. *Steward*, supra, 126 Conn. App. 47 (affirming court's granting of motion for protective order when plaintiffs failed to demonstrate how they were harmed by protective order).

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER L. STARBLE *v.* INLAND WETLANDS COMMISSION OF THE TOWN OF NEW HARTFORD ET AL.
(AC 39332)

Alvord, Bright and Lavery, Js.

Syllabus

The plaintiff appealed to the trial court from the decision by the defendant Inland Wetlands Commission of the Town of New Hartford granting the application of the defendant applicants, R and L, for a permit to build a driveway on certain of their real property located partially in a wetlands area. The trial court rendered judgment, dismissing the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to this court. The plaintiff claimed that the trial court incorrectly concluded that the requirement of presenting feasible and prudent alternatives under statute (§ 22a-41 [a] [2] and [b] [2]), and the applicable regulation (§ 7.5) of the commission was directory rather than mandatory, and that the trial court improperly applied the substantial evidence test to review the record of the proceedings before the commission. *Held:*

1. The trial court improperly concluded that the applicants' burden of proof to present feasible and prudent alternatives under § 7.5 was directory rather than mandatory: in making that determination, the trial court failed to consider the effect on § 7.5 of § 22a-41 (b), which places the burden of proof on the applicant to present feasible and prudent alternatives, as it was clear from the applicable regulation (§ 1.5) of the commission that § 7.5 (f), which sets forth application requirements for permits, operates in consonance with § 22a-41 (b), and even if the requirements to produce drawings of alternatives was directory, that determination did not alter an applicant's burden to present feasible and prudent alternatives, as an applicant's burden to prove the absence of a feasible

and prudent alternative was reflective of the legislature's intent to protect the inland wetlands and, thus, a matter of substance; accordingly, because the regulations require the commission to grant or deny applications pursuant to the statutory scheme of § 22a-41, § 7.5 (f), which necessarily implements the burden of proof set forth in §22a-41 (b), deals with a matter of substance and is, therefore, mandatory and not directory, and the absence of express language invalidating noncompliance of § 7.5 (f) did not militate against the mandatory nature of the requirement that the applicants present feasible and prudent alternatives.

2. The trial court improperly applied the substantial evidence test to review the record of the proceedings before the commission for substantial evidence as to whether the applicants had proven that no feasible and prudent alternative existed; in light of the fact that the commission stated its reasons for approving the application and supported its decision with several explicit findings, it was improper for the trial court to search the record and go beyond those stated reasons even though they were contrary to settled law and the court found them to be inadequate, which invaded the fact-finding mission of the commission, as our Supreme Court has rejected such an approach of reviewing the record for evidence in support of something other than the commission's explicit findings and has limited review of the record only to the specifically stated reasons of an agency.

Argued January 3—officially released July 10, 2018

Procedural History

Appeal from a decision by the named defendant granting the application of the defendant Roger J. Schiffert et al. for a permit to conduct certain regulated activities within a designated wetlands area, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Pickard, J.*; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Jonathan M. Starble, for the appellant (plaintiff).

John R. Williams, with whom, was *David M. Cusick*, for the appellees (defendant Roger J. Schiffert et al.).

Opinion

LAVERY, J. The plaintiff, Jennifer L. Starble, appeals from the judgment of the Superior Court dismissing

her appeal from the decision of the Inland Wetlands Commission of the Town of New Hartford (commission) granting Roger J. Schiffert and Linda Schiffert's (applicants)[1] application for a permit to build a driveway across wetlands on their property. On appeal, the plaintiff contends that the court incorrectly (1) concluded that the requirement of presenting feasible and prudent alternatives under General Statutes § 22a-41 (a) (2) and (b) (2), and under § 7.5 (f) of the Town of New Hartford Inland Wetlands and Watercourses Regulations (regulations) was directory rather than mandatory, and (2) applied the substantial evidence test to review the record of the proceedings before the commission.[2] We agree with both claims, and, accordingly, reverse the judgment of the Superior Court.[3]

[1] As the Schifferts' codefendant, the commission filed a notice adopting their brief. This opinion will refer to the Schifferts as the applicants and to the Schifferts and the commission collectively as the defendants.

[2] General Statutes § 22a-41 (a) provides in relevant part: "In carrying out the purposes and policies of sections 22a-36 to 22a-45a, inclusive, including matters relating to regulating, licensing and enforcing of the provisions thereof, the commissioner shall take into consideration all relevant facts and circumstances, including but not limited to . . . (2) The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses . . . ."

General Statutes § 22a-41 (b) (2) provides: "In the case of an application which is denied on the basis of a finding that there may be feasible and prudent alternatives to the proposed regulated activity which have less adverse impact on wetlands or watercourses, the commissioner or the inland wetlands agency, as the case may be, shall propose on the record in writing the types of alternatives which the applicant may investigate provided this subdivision shall not be construed to shift the burden from the applicant to prove that he is entitled to the permit or to present alternatives to the proposed regulated activity."

Section 7.5 of the regulations provides in relevant part: "All applications shall include the following information in writing or on maps or drawings . . . f. alternatives, including low impact development practices, which would cause less or no environmental impact to wetlands or watercourses and why the alternative as set forth in the application was chosen; all such alternatives shall be diagramed on a site plan or drawing . . . ."

[3] Because we agree with the plaintiff's first two claims, we do not reach her third claim, raised in the alternative, that there was no substantial evidence to support the commission's approval of the application.

The following facts are relevant to this appeal. The applicants' property is a 25.9 acre parcel of land on the eastern side of Town Hill Road in New Hartford. The property has only 305 feet of road frontage, remains narrow for approximately 1000 feet and broadens to over 650 feet in width at its far eastern end. The property also includes a watercourse and wetlands. On July 2, 2014, the applicants filed an application with the commission seeking a permit to build a single-family dwelling (house) at the eastern end of the property, with a driveway that would run through a section of the wetlands. The commission determined that the proposed plan could significantly impact the wetlands and held public hearings on the application. Thereafter, the applicants submitted revised plans that reduced the area of disturbance to the wetlands from 3400 square feet to 3015 square feet. At a public hearing on October 1, 2014, the plaintiff, along with other abutting owners, not party to this appeal, objected to the applicants' proposed plan.[4] The plaintiff presented to the commission a report from Marc Goodin, an engineer, stating that the proposed plan would disturb the wetlands and that there were other feasible and prudent alternatives that the applicants had failed to present to the commission. The report also stated that "the most obvious feasible and prudent alternative" was to build the house on the western section of the property. Because the western section was close to the road, the report stated, it would obviate the need to build a driveway through the wetlands. Goodin, however, was not available to testify at the public hearing.

The commission also heard testimony from three expert witnesses, David Whitney, Tom Pietras, and Clint Webb, on behalf of the applicants. All three experts stated that constructing a house on the eastern section

[4] The plaintiff also filed a notice of intervention pursuant to General Statutes § 22-19.

of the property was prudent because that section had better draining soils for the septic system and gentler slopes that required fewer cut and fill operations. Webb, the expert qualified to evaluate wetlands and watercourse impacts, concluded that the proposed activities would have no or de minimis impact on the function of the wetlands resources on the property. As to the alternative proposed by the plaintiff's expert, Webb testified that building a house on the western side of the property required significant cutting and filling as well as a cut into the ground water that fed the wetlands. He also testified that building on the western side would be more expensive, would require a more substantial area for a septic system than on the eastern side and would result in more storm water runoff. Webb therefore concluded that building on the western side as the plaintiff had suggested, although feasible, would not be prudent.

The commission found the testimony of the applicants' experts credible and adopted their conclusions as to the impact of the proposed construction on the wetlands. The commission then approved the application, making the following relevant findings: "The central claim of the intervenors is that a feasible and prudent alternative exists, namely, construction of the single-family dwelling on the western, rather than eastern, portion of the property, obviating the need for a wetlands crossing. . . . The intervenors have failed to prove that [the] applicants are proposing activities that are reasonably likely to unreasonably pollute, impair, or destroy the public trust in the air, water, or other natural resources of the State of Connecticut. . . . Even if the intervenors proved that the proposed activities will unreasonably pollute, impair or destroy the public trust in the air, water, or other natural resource of the State of Connecticut, they have failed to prove that requiring the applicants to develop on the western

portion of the property is a feasible and prudent alternative to the proposed activities." The commission thereafter approved the applicants' plan.

The plaintiff appealed to the Superior Court claiming that the commission had (1) misinterpreted and misapplied the feasible and prudent standard under § 22a-41, and under §§ 7.5 (f) and 10.3 of the regulations, and (2) failed to follow reasonable and acceptable procedures for deliberations, voting and use of legal opinions during deliberations. As to the first claim, the Superior Court concluded that although the commission initially had been advised of the incorrect standard, that advice subsequently was corrected and the commission properly applied the "feasible and prudent" standard under § 22a-41. With regard to the second claim, the Superior Court concluded that the commission implicitly had found that there was no feasible and prudent alternative but that it had provided inadequate reasons in support of this finding. The Superior Court then undertook a review of the record and concluded that the commission's "implicit findings" were supported by substantial evidence. This appeal followed.

On appeal to this court, the plaintiff claims that the Superior Court incorrectly (1) concluded that the requirement of presenting feasible and prudent alternatives under § 22a-41 (a) (2) and (b) (2), and under § 7.5 (f) of the regulations was directory rather than mandatory, and (2) applied the substantial evidence test to review the record of the proceedings before the commission.

I

The plaintiff claims that the Superior Court incorrectly concluded that the requirement of presenting feasible and prudent alternatives under § 22a-41 (a) (2) and (b) (2), and under § 7.5 (f) of the regulations was

directory rather than mandatory. Specifically, the plaintiff argues that § 7.5 (f) implements the applicants' statutory burden under § 22a-41 (b), and that it, therefore, cannot merely be directory. In response, the defendants contend that the language of § 7.5 (f) cannot be read as mandatory in light of this court's decision in *Weinstein* v. *Inland Wetlands Agency*, 124 Conn. App. 50, 3 A.3d 167, cert. denied sub nom. 107 *Longshore Lane, LLC* v. *Inland Wetlands Agency*, 299 Conn. 903, 10 A.3d 520 (2010). The defendants also argue that even if they did not comply with § 7.5 (f) of the regulations, the purpose behind that provision was satisfied because the commission considered the alternative of building on the western side of the property and heard expert testimony as to its viability. Consequently, the defendants argue that the commission's decision should only be set aside if the noncompliance with § 7.5 (f) resulted in "material prejudice" to the plaintiff. We agree with the plaintiff.

At the outset we note that the "[r]esolution of the issue presented requires us to review and to interpret the relevant statutory provisions and town regulations. Because the interpretation of . . . [statutes and] regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes." (Citation omitted; internal quotation marks omitted.) *Weinstein* v. *Inland Wetlands Agency*, supra, 124 Conn. App. 55. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General

Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, 293 Conn. 93, 105–106, 977 A.2d 127 (2009).

"The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words. . . . Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply. . . . A reliable guide in determining whether a statutory provision is directory or mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision." (Citations omitted; internal quotation marks omitted.) *Weinstein* v. *Inland Wetlands Agency*, supra, 124 Conn. App. 56–57.

Section 7.5 (f) of the regulations provides in relevant part: "All applications shall include the following information in writing or on maps or drawings . . . f. alternatives, including low impact development practices, which would cause less or no environmental impact to wetlands or watercourses and why the alternative as set

forth in the application was chosen; all such alternatives shall be diagramed on a site plan or drawing . . . .''

In declining to read § 7.5 (f) of the regulations as mandatory, the Superior Court reasoned that ''[t]here is no language in § 7.5 (f) which expressly invalidates any action after nonconformance. Also, the requirement that alternatives be diagramed on a site plan or drawing is clearly designed for the convenience of the commission 'to secure order, system and dispatch' rather than as a matter of substance. For these reasons, the commission's decision is not invalid simply because the applicants did not diagram any alternatives on a site plan or drawing as required by § 7.5 (f).'' Although the Superior Court correctly concluded that the requirement to diagram alternatives does not render § 7.5 (f) mandatory, it did not assess the effect of § 22a-41 (b) on § 7.5 (f). In this regard, § 1.5 of the regulations is particularly instructive. That section provides that ''[t]he Agency shall enforce the Inland Wetlands and Watercourses Act and shall issue, with terms, conditions, limitations or modifications, *or deny permits for all regulated activities in the Town of New Hartford pursuant to sections 22a-36 to 22a-45, inclusive, of the Connecticut General Statutes, as amended.*'' (Emphasis added.) Thus, § 1.5 makes clear that § 7.5 (f), which sets forth application requirements for permits, operates in consonance with § 22a-41 (b).

In *Weinstein*, this court reiterated that the ''test to be applied in determining whether a statute is mandatory or directory is . . . whether it relates to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory.'' (Internal quotation marks omitted.) *Weinstein* v. *Inland Wetlands Agency*, supra, 124 Conn. App. 56. In the present case, the matter of substance relative to § 7.5 (f) is the burden of proof for inland wetlands applications that is set forth in § 22a-41 (b) (2). Section

22a-41 (b) (2) provides in relevant part that "this subdivision shall not be construed to shift the burden from the applicant to prove that he is entitled to the permit or to present alternatives to the proposed regulated activity." Our case law is clear that the "evidentiary burden imposed on the applicant to demonstrate that its proposal is the only feasible and prudent alternative will ordinarily require an affirmative presentation to that effect. If only one alternative is presented, the inland wetlands agency can approve the application for a permit only if no other feasible and prudent alternatives exist. In practical terms, this will usually require that the applicant present evidence of more than one alternative to the local agency." (Internal quotation marks omitted.) *Tarullo* v. *Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 580, 821 A.2d 734 (2003); *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 593, 628 A.2d 1286 (1993); see also *River Sound Development, LLC* v. *Inland Wetlands & Watercourses Commission*, 122 Conn. App. 644, 663–64 (commission correctly concluded that applicant had not sufficiently established absence of prudent and feasible alternative), cert. denied, 298 Conn. 920, 4 A.3d 1228 (2010). Additionally, even if the requirements to produce drawings of alternatives is considered directory, that determination does not alter an applicant's burden to present feasible and prudent alternatives. See *Hoffman* v. *Inland Wetlands Commission*, 28 Conn. App. 262, 265 (although applicant need not submit plans or drawings for all possible alternatives, burden of proof concerning feasible and prudent alternatives lies with applicant), cert. denied, 223 Conn. 925, 614 A.2d 822 (1992).

Moreover, our review of the legislative history of Number 87-533, of the 1987 Public Acts, which added subsection (b) to § 22a-41, reveals that the purpose of that subsection was to strengthen the regulatory framework "for the protection of inland wetlands." 30 S.

Proc., Pt. 9, 1987 Sess., pp. 3114–15, remarks of Senator Michael Meotti.[5] Specifically, the addition of subsection (b) was meant to establish "a standard, an explicit standard for the first time for DEP and local inland wetlands agencies' decisions, that they must find that a feasible and prudent alternative to the intrusion of the wetland does not exist. . . . [That] . . . standard . . . goes a long way towards codifying protection of inland wetlands so that they will not be intruded upon as long as a feasible and prudent alternative to the intrusion on the wetlands exists. . . ." Id., pp. 3115–16. It is clear to us, therefore, that the applicant's burden to prove the absence of a feasible and prudent alternative is reflective of the legislature's intent to protect the inland wetlands of this state and thus a matter of substance. In the present case, because the regulations require the commission to grant or deny applications pursuant to the statutory scheme of § 22a-41; see § 1.5 of the regulations; § 7.5 (f) of the regulations necessarily implements the burden of proof set forth in § 22a-41 (b). Consequently, § 7.5 (f) deals with a "matter of substance" in that it carries an applicant's burden of proof under General Statutes § 22a-41 (b); it is, therefore, mandatory

[5] "Our prior cases have looked to a number of factors in determining whether such requirements are mandatory or directory. These include: (1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) *whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement;* (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance." (Emphasis added.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 758–59, 104 A.3d 713 (2014).

and not directory. Additionally, the use of the word "shall" in both § 7.5 (f) and § 1.5, further strengthens our conclusion. "[A]lthough we have often stated [that] [d]efinite words, such as must or shall, ordinarily express legislative mandates of a nondirectory nature . . . we also have noted that the use of the word shall, though significant, does not invariably establish a mandatory duty. . . . [T]he test to apply in determining whether the use of the word shall connotes a mandatory duty, or is merely directory, is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or convenience. . . . If it is a matter of substance, the statutory provision is mandatory." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 169 Conn. App. 527, 536–37, 151 A.3d 404 (2016), aff'd 328 Conn. 586, A.3d (2018); see also *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 320, 984 A.2d 676 (2009). Given our conclusion that § 7.5 (f) relates to a matter of substance, the use of the word "shall" in that section further accentuates its mandatory nature.

The Superior Court correctly noted that there is no express language in § 7.5 (f) of the regulations that would invalidate any action taken after noncompliance; that, however, is only one of several factors that reviewing courts have, in the past, considered in determining whether a provision is mandatory or directory. See *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 758–59, 758 n.10, 104 A.3d 713 (2014) (listing six factors; see footnote 5 of this opinion; and noting "[a]lthough we have referred to some of these considerations as 'tests,' we generally have not treated any one consideration as dispositive, and in most cases we have evaluated the relevant language, structure, history, and purpose of the statute in

determining whether the duty at issue was mandatory or directory"). In the present case, the absence of express language invalidating noncompliance with § 7.5 (f) does not militate against the mandatory nature of the requirement that the applicants present feasible and prudent alternatives.

Finally, the defendants' argument that the commission essentially considered the alternative of building on the western side of the property misses the point that it was the applicants' burden to propose less harmful alternatives and to prove that the proposed plan, nonetheless, should be approved. See General Statutes § 22a-41 (a) (2) (alternative must be *less* harmful to wetlands than proposed activity). Because this burden constitutes a matter of substance, the Superior Court incorrectly concluded that the requirement to present alternatives in § 7.5 (f) is directory.

II

The plaintiff also claims that the Superior Court incorrectly applied the substantial evidence test to review the record of the proceedings before the commission because the commission's approval contained explicit, rather than implicit, findings that had been made using an incorrect legal standard. Specifically, the plaintiff argues that our Supreme Court's holding in *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 941 A.2d 917 (2008), forbids, on appeal, a review of the record when an inland wetlands agency makes explicit findings. Because the commission's improper findings in the present case were explicit, the plaintiff argues that the Superior Court erroneously searched the record for substantial evidence in support of what the commission properly should have found.

In response, the defendants contend that the commission did not make an explicit finding, rather its approval of the application constituted an implicit finding under

§ 22a-41 (b), that a feasible and prudent alternative did not exist. Because that finding was implicit, the defendants argue, the Superior Court did not err in searching the record for substantial evidence in support of it. In so arguing, the defendants rely on our Supreme Court's decision in *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 579, for the proposition that an inland wetlands agency is not required to state explicitly that a reasonable and prudent alternative to the proposed activity does not exist.[6] Consequently, the defendants contend that the Superior Court was entitled to search the record for substantial evidence and to infer a finding that no other feasible and prudent alternative existed.

The defendants also argue that this case is different from *Gibbons*, in which our Supreme Court declined, on appeal, to review the record for substantial evidence in support of a completely different reason from that which the commission had stated. They assert that, unlike *Gibbons*, the only testimony in the present case in support of the commission's implicit finding was regarded by the commission to be credible. The defendants therefore argue that relying on that testimony to reach the finding the commission properly should have made does not invade the commission's fact-finding mission.

The precise question before us, then, is whether the Superior Court properly reviewed the record for substantial evidence in light of the stated findings of the commission. We conclude that it did not.

"Whether the substantial evidence test was applied properly by the trial court in its review of an inland

[6] In *Samperi* v. *Inland Wetlands Agency*, supra, 266 Conn. 595–96, our Supreme Court stated: "As long as a search of the record reveals the basis for the agency's decision . . . the reviewing court must infer that the local wetlands agency made a finding that the applicant's alternative was the feasible and prudent alternative."

wetlands agency's decision is a question of law over which our review is plenary. . . . [T]he reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. . . . The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Inland Wetlands & Watercourses Agency*, 130 Conn. App. 69, 75, 22 A.3d 37, cert. denied, 303 Conn. 908, 32 A.3d 961, 962 (2011). "When an administrative agency specifically states its reasons, the court should go no further because it could reasonably be inferred that this was the extent of its findings. To go beyond those stated reasons invades the factfinding mission of the agency by allowing the court to cull out reasons that the agency may not have found to be credible or proven." (Internal quotation marks omitted.) *Gibbons* v. *Historic District Commission*, supra, 285 Conn. 771.

We disagree with the defendants that the present case, like *Samperi*, involves an implicit finding by the commission. In *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 580–81, the inland wetlands zoning commission approved the building of a residential subdivision on a wetlands area. The commission did not, however, state expressly that there was no feasible and prudent alternative to the proposed activity. On appeal to our Supreme Court, the plaintiffs claimed that the commission was required under § 22a-41 (b) to create

a record showing that it had considered each and every alternative. The court rejected that argument, noting that "the local inland wetlands agency is required only to manifest in some verifiable fashion that it has made a finding of no feasible and prudent alternative. Although the agency may manifest its finding explicitly, in those cases in which its finding is implicit in its decision, the reviewing court has the responsibility to search the record for substantial evidence in support of the agency's action." Id., 592–93. The court then concluded that "the [commission]'s decision to approve the permit constituted an implicit finding that no other feasible and prudent alternatives existed besides the [proposed activity]." Id., 596.

After carefully reviewing *Samperi* in light of the defendants' argument, we are not persuaded that it controls the present case. Specifically, *Samperi* does not stand for the principle that a reviewing court may examine the record when an agency's explicit findings are insufficient. Rather, it clarifies that in "cases in which [an agency's] finding is *implicit in its decision*, the reviewing court has the responsibility to search the record for substantial evidence in support of the agency's action." (Emphasis added.) Id., 593. In *Samperi*, the agency's approval of the permit, in the absence of any other explanation, constituted an implicit finding that there was no reasonable or prudent alternative to the proposed activity. In the present case, by contrast, the commission supported its decision with several express findings. As to reasonable and prudent alternatives, the commission noted first that "[t]he intervenors have failed to prove that [the] applicants are proposing activities that are reasonably likely to unreasonably pollute, impair, or destroy the public trust in the air, water, or other natural resources of the State of Connecticut." The commission then specifically found that the *plaintiff* had "failed to prove that requiring the

applicants to develop on the western portion of the property is a feasible and prudent alternative to the proposed activities." Because these findings were explicit, *Samperi* is inapposite.

Instead, the present case is controlled by our Supreme Court's decision in *Gibbons*. In that case, the court expressly concluded that "[w]hen an administrative agency specifically states its reasons, the court should go no further because it could reasonably be inferred that this was the extent of its findings. To go beyond those stated reasons invades the factfinding mission of the agency by allowing the court to cull out reasons that the agency may not have found to be credible or proven." (Internal quotation marks omitted.) *Gibbons* v. *Historic District Commission*, supra, 285 Conn. 771. More recently, this court has observed that "[a] careful reading of *Gibbons* reveals that a trial court considering a zoning appeal is required to search the entire record to find a legal basis for a zoning board's decision only when *no reason* has been given for granting a variance or special exception." (Emphasis in original.) *Michler* v. *Planning & Zoning Board of Appeals*, 123 Conn. App. 182, 188 n.3, 1 A.3d 1116 (2010).

Here, the commission did state its reasons for approving the application. Specifically, the commission, in its eighteenth enumerated finding, stated that the *plaintiff* had failed to prove that her proposed alternative was feasible and prudent. As we concluded in part I of this opinion, that finding is contrary to settled law that the applicant bears the burden of presenting feasible and prudent alternatives, and then showing why the proposed activity should be permitted.[7] In an effort to harmonize the commission's reasons and its explicit

[7] It appears that the commission conflated the plaintiff's status as both an abutter under § 22a-41 and intervenor under § 22a-19. While intervention pursuant to § 22a-19 might place a burden of proof on the plaintiff, she had no such burden in her status as an abutter under § 22a-41. The applicants' burden under § 22a-41 (b), on the other hand, is mandatory and must be complied with.

findings, the court regarded the reasons as "inadequate" and reviewed the record for substantial evidence in support of what the commission properly should have found—whether the *applicants* had proven that no feasible and prudent alternative existed. To support its review of the record, the Superior Court relied on *Stankiewicz* v. *Zoning Board of Appeals*, 211 Conn. 76, 556 A.2d 1024 (1989), overruled in part, *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 771, 941 A.2d 917 (2008), where our Supreme Court had affirmed this court's decision that a review of the record for substantial evidence is permissible when a commission provides inadequate reasons for its decision.

In *Gibbons*, however, our Supreme Court expressly considered and rejected this approach, limiting review of the record only to the specifically stated reasons of an agency. See *Gibbons* v. *Historic District Commission*, supra, 285 Conn. 771. In doing so, the court expressly overruled *Stankiewicz* to the extent it permitted such review. Id., 771 ("[t]o the extent that our decision in *Stankiewicz* conflicts with this principle, it is hereby overruled"). Consequently, in the present case, the Superior Court should not have searched the record after it found that the commission had provided inadequate reasons. We also are not persuaded by the defendants' argument that the Superior Court's review of the record did not invade the commission's fact-finding mission because the commission already had found credible the only testimony in the record that would support its implicit finding that there was no feasible and prudent alternative. This argument essentially restates the approach that was forbidden in *Gibbons*, i.e., a review of the record for evidence in support of something other than the commission's explicit findings. Because the Superior Court's search of the record for substantial evidence exceeded the scope of review permitted in *Gibbons*, it was improper.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

SHERI SPEER *v.* DEPARTMENT OF AGRICULTURE ET AL.
(AC 39106)

Sheldon, Elgo and Bright, Js.

Syllabus

The plaintiff appealed to the trial court from the final decision of the Commissioner of Agriculture upholding disposal orders regarding the plaintiff's two dogs. The plaintiff did not personally appear at the first scheduled pretrial conference, although her counsel attended and she was available and reached by telephone during the conference. Following the plaintiff's failure to appear, the trial court rendered a judgment of nonsuit. Thereafter, the court denied the plaintiff's motion to open the judgment of nonsuit, and the plaintiff appealed to this court. *Held* that the trial court abused its discretion by denying the plaintiff's motion to open: pursuant to statute (§ 52-212) and the relevant rule of practice (§ 17-43), a plaintiff moving to set aside a judgment of nonsuit must establish that a good cause of action existed at the time judgment was rendered and that the plaintiff was prevented from prosecuting the action by mistake, accident or other reasonable cause, and here, the trial court did not refer to those requirements when it denied the motion to open but, instead, relied solely on the plaintiff's failure to be physically present for the pretrial conference pursuant to the rule of practice pertaining to pretrial conferences (§ 14-13), and although the court, for the first time in an articulation, stated that the plaintiff's motion to open did not comply with § 17-43, the plaintiff's motion to open did satisfy the requirements of that rule of practice and of § 52-212, as it was verified by oath and stated the nature of her claim and the reason for her nonappearance at the pretrial conference; moreover, given that the court's discretion should be exercised mindful of the policy preference of bringing about a trial on the merits of a dispute whenever possible, and that this matter had been pending for approximately seven weeks when the court rendered the judgment of nonsuit as a sanction for the plaintiff's failure to appear for the first scheduled pretrial conference, the trial court abused its discretion in denying the plaintiff's timely motion to open.

Argued March 6—officially released July 10, 2018

Procedural History

Appeal from the decision of the named defendant affirming disposal orders for the plaintiff's dogs, brought to the Superior Court in the judicial district of New London and transferred to the judicial district of New Britain, where the court, *Hon. George Levine*, judge trial referee, rendered judgment of nonsuit; thereafter, the court denied the plaintiff's motion to open, and the plaintiff appealed to this court; subsequently, the court, *Hon. George Levine*, judge trial referee, issued an articulation of its decision. *Reversed; further proceedings*.

Thompson G. Page, for the appellant (plaintiff).

Denise Lillo Vecchio, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Matthew I. Levine*, assistant attorney general, for the appellee (named defendant).

Scott R. Ouellette, for the appellees (defendant city of Norwich et al.).

Opinion

BRIGHT, J. The plaintiff, Sheri Speer, appeals from the judgment of the trial court denying her motion to open the judgment of nonsuit rendered in favor of the defendants, the Department of Agriculture (department), the city of Norwich (city), and Michele Lombardi, an animal control officer employed by the city. On appeal, the plaintiff claims that the court abused its discretion in denying her motion to open. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal.[1] On October 15, 2013, Lombardi,

[1] We note that the administrative record was not filed in the trial court and is not part of the record on appeal. Accordingly, our brief summary of the facts giving rise to the plaintiff's administrative appeal is based solely on the allegations in the plaintiff's complaint and the certified list of papers filed by the department. See Practice Book § 14-7A (b) ("the agency shall

pursuant to General Statutes § 22-358, issued a disposal order to euthanize the plaintiff's two pit bull dogs after finding that the dogs had bitten three people. Thereafter, on October 17, 2013, the plaintiff appealed Lombardi's order to the department, and, following an administrative hearing, the hearing officer for the department issued a proposed final decision recommending that the Commissioner of Agriculture (commissioner) affirm the disposal order to euthanize the plaintiff's dogs. On August 5, 2015, the commissioner issued the final decision affirming the disposal order pursuant to § 22-358 (c).[2]

On September 21, 2015, the plaintiff appealed to the Superior Court from the final decision of the commissioner pursuant to General Statutes § 4-183. On October 29, 2015, the court issued a notice to the parties ordering that they appear for a pretrial conference on November 16, 2015, at 3:30 p.m. The notice provided in relevant part: "If a party is an individual, the party must attend. . . . Failure to comply with the terms of this order may result in sanctions, including nonsuit or default." Plaintiff's counsel appeared on November 16, 2015, but the plaintiff did not. The plaintiff was available by telephone though, and actually spoke to the court. Nevertheless, on that date, the court rendered a judgment of

file with the court and transmit to all parties a certified list of the papers in the record").

[2] "Administrative hearings to consider appeals of disposal orders issued pursuant to § 22-358 (c) are conducted in accordance with the Uniform Administrative Procedure Act . . . General Statutes § 4-166 et seq.; and the department rules of practice, specifically, §§ 22-7-20 through 22-7-38 of the Regulations of Connecticut State Agencies. Pursuant to General Statutes § 4-176e, hearings in contested cases in agency proceedings may be conducted before a hearing officer, who, pursuant to General Statutes § 4-179, renders a written, proposed final decision to the commissioner. After affording each party adversely affected by the proposed final decision an opportunity to file exceptions and present briefs and oral argument pursuant to § 4-179 (a), the commissioner is vested with the authority to render the final decision in matters involving disposal orders under § 22-358 (c)." *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 258 n.3, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016).

nonsuit against the plaintiff "for failure to be present at the scheduled pretrial conference, as required in the pretrial order."

On December 9, 2015, after the expiration of the automatic appellate stay, the plaintiff filed her pro se appearance and a verified motion to open and set aside nonsuit, with a verified memorandum of law in support thereof.[3] In her motion to open, the plaintiff claimed that the court should not have rendered a judgment of nonsuit because her failure to appear "was not contumacious; [p]laintiff's counsel was present at the conference on the scheduled date and at the scheduled time; and [the] [p]laintiff was at all times available by telephone. See [Practice Book] § 14-13 (nonsuit is available at a pretrial conference only if the plaintiff 'fails to attend or to be available by telephone'). The grounds for this motion are set forth in greater detail in the accompanying memorandum of law filed and served herewith." (Emphasis omitted.)

In the plaintiff's memorandum of law in support of her motion to open, she claimed that "the [c]ourt telephoned [the] [p]laintiff and spoke to her during the [pretrial conference]. [The] [p]laintiff explained her absence was due to the fact that she did not recall receiving notice that she personally had to attend. The failure was not due to deliberate disregard of a pretrial order." In addition, the plaintiff set forth the nature of her cause of action. Specifically, she asserted that she has standing to pursue the administrative appeal, and identified her three claims: "(1) that [the] [d]efendants have failed to follow the requirements of . . . § 22-358 for dealing with allegedly dangerous dogs; (2) that [the] [d]efendants have deprived [the] [p]laintiff of procedural and substantive due process; and (3) that [the]

[3] There are two separate verification pages.

[d]efendants have violated the automatic bankruptcy stay."

The court, without holding a hearing, issued an order denying the plaintiff's motion to open on December 11, 2015. The entirety of the court's order is as follows: "Practice Book § 14-13 requires parties to attend a pretrial. The only person who can be 'available by telephone' is an insurance adjuster." Thereafter, on December 31, 2015, the plaintiff filed a motion for reargument and reconsideration of the court's denial, pursuant to Practice Book § 11-12, and the court held a hearing on that motion on March 24, 2016. At the hearing, counsel appeared for the plaintiff, but the plaintiff did not appear. After the hearing, on that same date, the court granted the plaintiff's motion for reargument and reconsideration, but denied the relief requested therein. This appeal followed.

Because the plaintiff filed her motion to open and set aside nonsuit after the automatic appellate stay had expired, the sole issue on appeal is whether the trial court abused its discretion in denying her motion to open the judgment of nonsuit. See *Oliphant* v. *Heath*, 170 Conn. App. 360, 363, 154 A.3d 582, cert. denied, 325 Conn. 921, 163 A.3d 620 (2017).

Following oral argument before this court, we, sua sponte, ordered the trial court "to articulate the factual and legal bases for the court's denial of the plaintiff's December 7, 2015 verified motion to open and set aside nonsuit . . . ."[4] On April 6, 2018, the court issued its articulation. It stated, in relevant part: "As to the plaintiff's motion to open and set aside nonsuit, the motion: (a) does not state reasonable cause for plaintiff's failure to attend the pretrial, (b) does not state that she had a good cause of action, (c) does not state the plaintiff

[4] The plaintiff's verified motion to open and set aside nonsuit is dated December 7, 2015, but it was filed on December 9, 2015.

was prevented by mistake, accident or other reasonable cause from appearing, and (d) does not state particularly the nature of her claim. Because the motion does not comply with any of the requirements of [Practice Book] § 17-43 for opening and setting aside a nonsuit, the motion was denied."[5]

It is well established that we review a court's decision to grant or deny a motion to open a judgment of nonsuit for a clear abuse of discretion. See *Tsitaridis* v. *Tsitaridis*, 100 Conn. App. 115, 118, 916 A.2d 877 (2007). "The court's discretion, however, is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Citation omitted; internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, 163 Conn. App. 725, 735, 137 A.3d 97 (2016); see also *Bridgeport* v. *Grace Building, LLC*, 181 Conn. App. 280, 298–99, A.3d (2018).

General Statutes § 52-212 and Practice Book § 17-43[6] set forth the requirements for a motion to open a

[5] The court also stated: "Because the plaintiff knew she was required to attend the pretrial, but chose not to do so, a nonsuit was entered." The court cited to the transcript of the hearing on March 24, 2016, where the court asked the plaintiff's counsel if the plaintiff knew that her presence was required at the pretrial conference and he responded: "My interpretation of notices and everything was that, yes." That acknowledgment thus appears to be predicated not on firsthand knowledge, but rather an inference counsel drew from the notice issued by the court.

[6] General Statutes § 52-212 provides in relevant part: "(a) Any judgment rendered . . . upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered . . . upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense

judgment of nonsuit. A plaintiff moving to set aside a judgment of nonsuit must establish that (1) a good cause of action existed at the time judgment was rendered, and (2) the plaintiff was prevented from prosecuting the action by mistake, accident or other reasonable cause. *Estela* v. *Bristol Hospital, Inc.*, 165 Conn. App. 100, 108, 138 A.3d 1042, cert. denied, 323 Conn. 904, 150 A.3d 681 (2016); see also General Statutes § 52-212 (a).

In the present case, the court denied the plaintiff's motion to open, but did not refer to the requirements under § 52-212 or Practice Book § 17-43. Instead, it relied solely on the plaintiff's failure to comply with Practice Book § 14-13, by not being physically present for the pretrial conference. Then, in its articulation, the court stated for the first time that it denied the plaintiff's motion to open because it did not comply with any of the requirements under Practice Book § 17-43. Our review of the plaintiff's motion to open, however, reveals that it did, in fact, satisfy *all* of the requirements under § 52-212 and Practice Book § 17-43.

In her motion to open, which was verified by oath, the plaintiff specifically stated that "[t]he grounds for this motion are set forth in greater detail in the accompanying memorandum of law filed and served herewith." In the accompanying memorandum of law in support of her motion to open, which also was verified by oath, the plaintiff claimed that she did not recall

in whole or in part existed at the time of the rendition of the judgment . . . and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.

"(b) The complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear. . . ."

Practice Book § 17-43 (a) contains nearly identical language, but differs in that it provides that a judgment may be set aside within four months "succeeding the date on which notice was sent . . . ."

receiving notice of the pretrial conference and that she did not know that she needed to attend the pretrial conference. The plaintiff set forth the nature of her claim, asserting that she had standing to bring the administrative appeal and identifying her specific claims of error regarding the administrative proceeding. Accordingly, the plaintiff's written motion to open satisfied the statutory requirements because it was verified by oath, stated the nature of her claim and the reason for her nonappearance at the pretrial conference. See General Statutes § 52-212 (b) ("[t]he . . . written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim . . . and shall particularly set forth the reason why the plaintiff or defendant failed to appear"). Consequently, the court, in denying the plaintiff's motion to open, improperly concluded that the motion to open did not satisfy the statutory requirements under § 52-212.

Furthermore, under the circumstances of this case, we cannot conclude that the court properly exercised its discretion. The plaintiff brought this administrative appeal from the commissioner's final decision affirming the disposal order to euthanize the plaintiff's two pit bull dogs. The matter had been pending for approximately seven weeks when the court rendered the judgment of nonsuit as a sanction for the plaintiff's failure to appear for a pretrial conference on November 16, 2015, which was the first time the matter had been calendared. The plaintiff timely filed a motion to open, which satisfied the requirements under § 52-212 and Practice Book § 17-43. Considering that "the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court"; (internal quotation marks omitted) *Multilingual Consultant Associates, LLC* v. *Ngoh*, supra, 163 Conn. App.

735; we are persuaded that the court abused its discretion in denying the plaintiff's motion to open.[7]

[7] In addition, we question the trial court's reliance on Practice Book § 14-13 when it denied the plaintiff's motion to open. Section 14-13, which is titled "Pretrial Procedure" and applies generally to civil matters, provides that several issues shall be considered at a pretrial session, the first of which is the possibility of settlement. Practice Book § 14-7 (d), however, specifically provides that "[a]dministrative appeals are not subject to the pretrial rules, except as otherwise provided in Sections 14-7A and 14-7B." Practice Book § 14-7A (d), which applies to the present case and all administrative appeals brought pursuant to § 4-183 et seq., provides for a conference where the court and the parties will "establish which of the contents of the record are to be transmitted and . . . set up a scheduling order, including dates for the filing of the designated contents of the record, for the filing of appropriate pleadings and briefs, and for conducting appropriate conferences and hearings." Accordingly, a conference pursuant to § 14-7A (d) is intended to address administrative issues, and a client ordinarily would not be required to attend such a conference. Practice Book § 14-7B (c) also provides for a conference to address administrative issues, and § 14-7B (j) requires that certain administrative appeals may only be settled with the approval of the court. That, of course, is not true for the vast majority of cases that have pretrial conferences pursuant to § 14-13, where the parties are free to settle their claims without court approval. Neither § 14-7A nor § 14-7B require that the parties attend a § 14-13 pretrial session.

The structure of the Practice Book in this regard makes sense because a conference pursuant to § 14-7A (d) generally is better suited for administrative appeals than the pretrial conference called for by § 14-13. In fact, this case is a perfect illustration of why the procedure outlined in § 14-13 is ill-suited for many administrative appeals. Here, the trial court clearly viewed the primary purpose of the pretrial conference as trying to settle the case; yet it was extremely unlikely that the parties were going to negotiate a settlement of the commissioner's disposal order to euthanize the plaintiff's two dogs. Instead, a conference pursuant to § 14-7A (d), which would not have required the presence of the clients, would have made more sense. Having said this, we in no way mean to suggest that parties to an administrative appeal are free to ignore a court order to appear at a pretrial conference scheduled pursuant to § 14-13. Instead, we take this opportunity to suggest that trial judges consider whether the circumstances of a particular administrative appeal justify the scheduling of a § 14-13 pretrial conference, and whether a party should be sanctioned for his or her inability to attend or honest error in not attending such a conference. See, e.g., *Faile* v. *Stratford*, 177 Conn. App. 183, 211, 172 A.3d 206 (2017) ("[a] dismissal or a nonsuit as a sanction for the failure of [the plaintiff] to attend [a pretrial conference] when he was ill and in the hospital does not serve justice or in any way vindicate the legitimate interests of the other party and the court" [internal quotation marks omitted]).

The judgment is reversed and the case is remanded with direction to grant the plaintiff's motion to open the judgment of nonsuit and for further proceedings according to law.

In this opinion the other judges concurred.

DAB THREE, LLC *v.* LANDAMERICA FINANCIAL GROUP, INC., ET AL.
(AC 39834)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiff sought to recover damages for breach of contract from the defendant insurance brokers L Co., T Co. and E Co., and from F and M, who were employees or agents of E Co., the entity with which the plaintiff had entered into a contract for a certain insurance policy. The trial court granted the defendants' motion to dismiss the breach of contract claim as against L Co. for lack of subject matter jurisdiction. The plaintiff's claim against L Co. had been extinguished when L Co. was granted a discharge in a bankruptcy case it had filed. The trial court thereafter rendered summary judgment as to all of the remaining defendants except T Co. The court ruled that T Co. was the only corporate defendant that could properly be sued for breach of contract. The court thereafter granted the motion of counsel for the defendants to withdraw its appearance for T Co. on the basis of counsel's representation that T Co. no longer existed because it previously had changed its name to E Co. On appeal to this court, the plaintiff claimed that the trial court improperly dismissed its claim against L Co., and improperly rendered summary judgment in favor of E Co., F and M. *Held*:

1. The trial court properly dismissed the plaintiff's claim against L Co. for lack of subject matter jurisdiction; L Co. previously had filed for bankruptcy, listed the plaintiff's claim against it in its bankruptcy filing and had the plaintiff's claim against it discharged in bankruptcy after the plaintiff failed to file a proof of claim as to that claim with the Bankruptcy Court, and because the plaintiff did not assert any claim for liability against any insurer of L Co., L Co. would bear the cost of defending against the plaintiff's claims against it, which would be in contravention of bankruptcy law.
2. The trial court improperly rendered summary judgment in favor of E Co.; although the plaintiff had abandoned its claim against T Co. on the basis of counsel's representation that T Co. no longer existed, the record did not support the defendants' claim that the plaintiff intentionally

relinquished and waived its claim against E Co., and given that, when the plaintiff decided not to go to trial against T Co., a nonexistent entity, summary judgment already had been rendered in favor of E Co., the existing entity that it had become by change of name, the plaintiff could not have pursued its claim against E Co., and the record was clear that E Co. was the proper party against whom the plaintiff could maintain a claim for breach of contract.

3. The trial court properly rendered summary judgment in favor of F and M; because neither F nor M was a party to the contract between the plaintiff and E Co., they could not be held liable for the alleged breach of the contract.

Argued April 10—officially released July 10, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold*, *J.*, granted the defendants' motion to dismiss as to the named defendant; thereafter, the court, *Wenzel*, *J.*, granted in part the motion for summary judgment filed by the defendant Lawyers Title Corporation et al. and rendered judgment thereon, from which the plaintiff appealed to this court; subsequently, the court, *Bellis*, *J.*, granted the motion to withdraw from representation filed by counsel for the defendant Lawyers Title Environmental Insurance Service Agency, Inc., and rendered judgment dismissing the action as against the defendant Lawyers Title Environmental Insurance Service Agency, Inc.; thereafter, the plaintiff filed an amended appeal with this court; subsequently, this court dismissed the plaintiff's appeal in part. *Reversed in part; further proceedings*.

Laurence V. Parnoff, with whom, on the brief, was *Laurence V. Parnoff, Jr.*, for the appellant (plaintiff).

Jason A. Buchsbaum, with whom were *Jonathan S. Bowman* and, on the brief, *Barbara M. Schellenberg*, for the appellees (named defendant et al.).

Opinion

SHELDON, J. In this action arising from the alleged breach of contract for the procurement of an environmental insurance policy, the plaintiff, DAB Three, LLC, appeals from the judgments rendered in favor of the defendants LandAmerica Financial Group, Inc. (LFG), LandAmerica Environmental Insurance Service Agency, Inc. (LEISA), Sandra Fitzpatrick, and Debra Moser.[1] The plaintiff claims that the trial court erred (1) in dismissing its breach of contract claim against LFG for lack of subject matter jurisdiction, and (2) in rendering summary judgment in favor of LEISA, Fitzpatrick and Moser on the plaintiff's breach of contract claims against them. We agree with the plaintiff that the summary judgment rendered in favor of LEISA cannot stand. We disagree, however, with the plaintiff's claims of error as to the dismissal of its claim against LFG and the rendering of summary judgments in favor of Fitzpatrick and Moser. Accordingly, we reverse in part and affirm in part the judgments of the trial court.

The following procedural history is relevant to the plaintiff's claims on appeal. In 2006, the plaintiff commenced this action against the following seven defendants: LFG, LEISA, Lawyers Title Corporation (LTC), Lawyers Title Insurance Corporation (LTIC), Lawyers Title Environmental Insurance Service Agency, Inc. (LTEISA), Fitzpatrick, and Moser. The plaintiff claimed that the defendants were all licensed insurance brokers or agents with whom it contracted for the procurement of a legal liability insurance policy that would protect

[1] Lawyers Title Corporation and Lawyers Title Insurance Corporation also were named defendants in this action. The plaintiff has made no argument that summary judgment rendered in favor of those entities was improper.

Lawyers Title Environmental Insurance Service Agency, Inc. (LTEISA), also was a named defendant in this action, but is not a party to this appeal. The disposition of the plaintiff's claims against LTEISA is discussed fully herein.

the plaintiff against risk of loss for environmental and pollution cleanup and remediation costs that it might incur in relation to as yet undiscovered environmental hazards that might later be found on a parcel of real property it intended to purchase for the purpose of resale. After the plaintiff purchased the parcel, it discovered certain previously unknown and preexisting solid waste disposal areas on it. The plaintiff subsequently filed a claim with the insurer for the cost of cleanup and remediation of those areas, but its claim was denied on the ground that it was not covered by the policy. The plaintiff's two count complaint alleged breach of contract and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On March 10, 2008, the trial court, *Arnold*, *J.*, rendered summary judgment in favor of all seven defendants with respect to the CUTPA count, which ruling is not contested in this appeal.

On July 31, 2015, the defendants filed a joint motion to dismiss the plaintiff's claim of breach of contract against LFG for lack of subject matter jurisdiction. In support of their motion, the defendants alleged (1) that LFG had filed for bankruptcy in 2008; (2) that LFG had listed the plaintiff's claim against it in this lawsuit in its schedule of assets and liabilities; (3) that the plaintiff had failed, despite notice of the bankruptcy, to file a proof of claim in the bankruptcy case with respect to its present claim; and thus (4) that the plaintiff's present claim against LFG was extinguished, depriving the court of subject matter jurisdiction over it, when LFG was granted a discharge in the bankruptcy case. On September 29, 2015, the trial court issued a memorandum of decision granting the motion to dismiss with respect to LFG.

On April 13, 2016, the remaining defendants filed a joint motion for summary judgment as to the plaintiff's

claim of breach of contract against them. The defendants argued that they were entitled to summary judgment on that claim because "(1) the individual defendants were employees and agents acting on behalf of a disclosed principal and cannot be held liable for corporate contracts as a matter of law; (2) [the] plaintiff was provided exactly what it requested by way of an environmental insurance policy and there was no contract for a specific result; and (3) if there is a contract, there can be no privity of contract between [the] plaintiff and any defendant other than [LTEISA], the only defendant that brokered the policy at issue." On October 14, 2016, the trial court, *Wenzel*, *J.*, granted the motion for summary judgment as to all defendants except LTEISA. The court ruled, more particularly, that, on the basis of the evidence submitted to it, there was no genuine issue of material fact that LTEISA was the "lone broker" on the policy, and thus it was the only corporate defendant that could properly be sued for breach of contract in relation to the policy. The court further found, on the basis of the submitted evidence, that the individual defendants were, at all times, "working on behalf of LTEISA to procure the policy for the plaintiff . . . and [a]s to the corporate defendants other than LTEISA, [the defendants] have established that none of them ever made an agreement to provide brokerage services to [the] plaintiff and that they were not involved in procuring or brokering the policy." On November 22, 2016, the plaintiff filed this appeal from the judgment of dismissal as to LFG and the summary judgments rendered in favor of LEISA, Fitzpatrick and Moser.

On November 8, 2016, counsel for the defendants filed a motion to withdraw their appearance for LTEISA, the only remaining defendant, on the ground that since LTEISA had changed its name to LEISA in 1999,

"LTEISA no longer exists." On that basis, counsel represented that they "no longer ha[d] a client as to LTEISA." On December 5, 2016, the court, *Bellis*, *J.*, granted the motion to withdraw. On December 7, 2016, the plaintiff amended this appeal to include a challenge to the granting of counsel's motion to withdraw their appearance for LTEISA.

On December 14, 2016, the court issued an order dismissing the plaintiff's claim against LTEISA because the plaintiff's counsel had indicated on the record that it was not going forward with trial against that nonexisting entity. This court thereafter dismissed the plaintiff's appeal challenging the granting of the motion to withdraw on the ground that that claim was rendered moot when the plaintiff opted not to proceed to trial against LTEISA and the claims against LTEISA were dismissed.

On appeal, the plaintiff challenges the judgment dismissing its claim against LFG for lack of subject matter jurisdiction, and the summary judgments rendered in favor of LEISA and the individual defendants. We address each of the plaintiff's claims in turn.

I

We begin with the plaintiff's challenge to the judgment dismissing its claim against LFG on the ground that the court lacked subject matter jurisdiction because that claim had been extinguished by the bankruptcy discharge. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Beck & Beck, LLC* v. *Costello*, 178 Conn. App. 112, 116, 174 A.3d 227 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 555 (2018).

The plaintiff does not challenge the factual basis upon which the trial court dismissed its claim against LFG—that LFG filed for bankruptcy, that LFG listed the plaintiff's claim against it in its bankruptcy filing, that the plaintiff, despite notice of the bankruptcy, failed to file a proof of claim as to its present claim with the United States Bankruptcy Court, and thus that the plaintiff's claim against LFG was extinguished upon discharge by the Bankruptcy Court. Instead, the plaintiff argues that the trial court's legal determination that it lacked subject matter jurisdiction by reason of LFG's discharge "is contrary to both applicable law set out in the court's holding in *Lightowler* v. *Continental Ins. Co.*, 255 Conn. 639, 645–46, 769 A.2d 49 (2001) . . . [due to] the fact of the potential liability of a reinsurer and purchaser of [LFG]'s stock." The plaintiff cited *Lightowler* in the trial court in opposition to the motion to dismiss its claim against of LFG, but the trial court rejected that claim, reasoning as follows: "[T]he plaintiff's claim that it should be able to recover against [LFG's] insurance carrier based on the holding in *Lightowler* is incorrect. A significant distinction between *Lightowler* and the present case is that in *Lightowler*, the defendant's insurer was also a named defendant in the lawsuit. There is no insurer for the defendant [LFG] who has been named as a codefendant in this lawsuit. Additionally, the plaintiff cannot identify any insurer or assure the court that such insurance coverage is even available." We agree with the trial court's analysis.

Lightowler was a legal malpractice action brought against the plaintiff's former attorney and that attorney's malpractice insurance carrier. The Supreme Court held that the plaintiff could maintain her action against both parties despite the bankruptcy of the attorney "solely for the purpose of obtaining a judgment against [the plaintiff's former attorney] as a necessary prerequisite to seeking recovery against the [codefendant insurance company]—without subjecting [the plaintiff's

former attorney] to any exposure to personal liability under the policy." *Lightowler* v. *Continental Ins. Co.*, supra, 255 Conn. 651. In so holding, the court in *Lightowler* explained: "The discharge of a debt . . . triggers the operation of the provisions of 11 U.S.C. § 524 . . . which shield the debtor from any personal liability for that debt by affording the debtor the right to an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor . . . . However, 11 U.S.C. § 524 (e) expressly provides that the relief accorded the debtor under the provisions of § 524 does not extend to other parties. Together, the language of these sections reveals that Congress sought to free the debtor of his [or her] personal obligations while ensuring that no one else reaps a similar benefit. . . . Thus, the purpose of [§] 524 of the Bankruptcy Code is to protect the debtor and not to shield third parties such as insurers who may be liable on behalf of the debtor. . . . The fresh-start policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured. . . . Furthermore . . . a claimant is not barred from obtaining a judgment against a discharged debtor solely for the purpose of establishing the debtor's liability when . . . a judgment against the debtor is a prerequisite to recovering against the debtor's insurer. . . . It bears emphasis, however, that [t]his exception to the permanent injunction under [§] 524 (a) is necessarily conditioned upon the debtor's being exempted from any exposure to personal expense or liability, resulting from the creditor's action, which would imperil [his or her] fresh start." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 644–47.

Here, the plaintiff did not assert any claim for liability against any insurer of LFG. In the absence of any such

claim against a third-party insurer, LFG would bear the cost of defending against the plaintiff's claims against it, which would be in contravention of § 524. We thus agree with the trial court that the distinction between *Lightowler* and this case—that LFG's insurer, if any, unlike the insurer in *Lightowler*, was not a named defendant in this action—renders *Lightowler* inapposite to this case. We thus conclude that the trial court properly rejected the plaintiff's argument in opposition to the dismissal of the claims against LFG. Accordingly, the court properly granted the motion to dismiss the plaintiff's claim against LFG for lack of subject matter jurisdiction.

II

The plaintiff next challenges the summary judgments rendered in favor of LEISA, Fitzpatrick and Moser. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Hull* v. *Newtown*, 327 Conn. 402, 407, 174 A.3d 174 (2017).

A

The plaintiff claims, inter alia,[2] that because "the court denied summary judgment for LTEISA on the

[2] Because we agree with the claim addressed in part II of this opinion and reverse the court's judgment on the basis of that claim, we need not address the plaintiff's additional arguments as to why the summary judgment rendered in favor of LEISA was improper.

ground [that] it was the individual defendants' employer, the granting of summary judgment for . . . LEISA, the actual employer of the individual defendants since January 29, 1999," cannot stand. We agree.

In their motion for summary judgment, the defendants argued that "there can be no privity of contract between [the] plaintiff and any defendant other than [LTEISA because LTEISA was] the only defendant that brokered the policy at issue." On the basis of that factual representation by the defendants, the trial court agreed that only LTEISA could potentially be held liable on the plaintiff's claim for breach of contract. Consequently, it rendered summary judgment in favor of the remaining corporate defendants. After the court rendered summary judgment in favor of LEISA, however, as explained previously, counsel for the defendants disclosed that LTEISA had changed its name to LEISA in 1999, during the negotiations for, and before the procurement of, the policy. At oral argument before this court, counsel for the defendants conceded that, in light of that name change, LEISA is the entity with which the plaintiff had entered into a contract to provide the insurance policy at issue.

The defendants nevertheless persist in their claim that the summary judgment rendered in favor of LEISA should be upheld on the ground that the plaintiff later waived its claims against LEISA by declining to proceed to trial against LTEISA.[3] The defendants claim that the plaintiff thereby intentionally relinquished its breach of contract claim against LEISA. See *DeLeo* v. *Equale & Cirone, LLP*, 180 Conn. App. 744, 758, A.3d (2018) (waiver is intentional relinquishment of known right). The defendants did not raise this claim of waiver

[3] The defendants have not claimed on appeal that the summary judgment rendered in favor of LEISA should be upheld because the plaintiff did not file a motion to open that judgment.

in their motion for summary judgment, nor could they have done so because the alleged relinquishment by the plaintiff of its claim against LEISA did not occur until two months after summary judgment was rendered in LEISA's favor. It is difficult to understand how the summary judgment rendered in favor of LEISA could have been proper on a ground not argued by the defendants when they moved for judgment. The defendants claim that the plaintiff had "full knowledge of the fact that LTEISA and LEISA were one and the same, [and] had the opportunity to proceed to judgment against LTEISA" but failed to do so. The defendants argue: "Since LTEISA and LEISA are the same entity, and [the] plaintiff was fully aware of that fact at the time it chose not to proceed to judgment, it has waived all claims against LEISA." We disagree. The defendants' argument not only plainly contradicts their repeated claims that LTEISA no longer existed after 1999, but is unsupported by the record, which did not reveal that LTEISA and LEISA were one and the same entity, or that the plaintiff had such knowledge when it elected not to pursue its claim against LTEISA. Rather, the record reveals only that the plaintiff abandoned its claims against LTEISA on the basis of the representation by the defendants' counsel that that entity "no longer exists." The record does not support the defendants' claim that the plaintiff intentionally relinquished, and thus waived, its claim against LEISA.

Moreover, when the plaintiff decided not to go to trial against a nonexistent entity, summary judgment had already been rendered in favor of the existing entity it had become by change of name, its successor, LEISA. Consequently, the plaintiff could not have pursued its claim against LEISA. The record is clear that LEISA is the proper party against whom the plaintiff may maintain a claim for breach of contract, and the defendants

have so conceded. We therefore reverse the summary judgment rendered in favor of LEISA.

B

The plaintiff also challenges the summary judgments rendered in favor of Fitzpatrick and Moser. Summary judgment was sought, and rendered by the trial court, in favor of the individual defendants, Fitzpatrick and Moser, on the ground that they were not parties to the contract between the plaintiff and LEISA, but, rather, that they were employees or agents working on behalf of LEISA, a disclosed principal, and thus they cannot be held liable for corporate contracts as a matter of law.[4]

The following law, which was cited by the trial court, is applicable to the plaintiff's claim against Fitzpatrick and Moser. "As a general matter, a principal is liable for the acts of its agent. . . . When dealing with a third party, however, the agent may incur personal liability under certain circumstances. . . . [I]t is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only the fact that he is acting in a representative capacity, but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another. . . . If he would avoid personal liability, the duty is on the agent to disclose his principal and not on the party with whom he deals to discover him." (Citations omitted;

[4] It would be reasonable to argue that Fitzpatrick and Moser had not disclosed their true principal, LEISA, until after summary judgment had been rendered in favor of LEISA and, thus, that Fitzpatrick and Moser cannot hide behind that misidentified principal to escape individual liability for their conduct. The plaintiff, however, has not challenged summary judgment in their favor on the ground that they disclosed the wrong principal. Moreover, even if that argument had been advanced by the plaintiff, and we reversed the judgment on that basis, the fact remains that they could not be held liable for acts done on behalf of their now disclosed principal, LEISA, which is indisputably the proper party to respond to the plaintiff's claim for breach of contract.

internal quotation marks omitted.) *Pelletier Mechanical Services, LLC* v. *G & W Management, Inc.*, 162 Conn. App. 294, 305, 131 A.3d 1189, cert. denied, 320 Conn. 932, 134 A.3d 622 (2016). "Accordingly, the agent is not liable where, acting within the scope of his authority, he contracts with a third party for a known principal. . . . Under the rules of agency, [u]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract." (Citations omitted; internal quotation marks omitted.) *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996).

The plaintiff does not dispute that Fitzpatrick and Moser were acting on behalf of LEISA in procuring the subject policy. The plaintiff argues, however, that Fitzpatrick and Moser are individually liable for torts that they committed against the plaintiff. Although the plaintiff is correct that agents may be held liable for torts committed by them when acting on behalf of their principals, the plaintiff has not alleged any tort claims against Fitzpatrick and Moser. Its sole claim against Fitzpatrick and Moser was for breach of contract. Because neither agent was a party to that contract, they cannot be held liable for its alleged breach. We thus conclude that the trial court properly rendered summary judgment in favor of Fitzpatrick and Moser.

The judgment of dismissal as to LFG and the summary judgments in favor of Fitzpatrick and Moser are affirmed. The summary judgment in favor of LEISA is reversed and the case is remanded for further proceedings on the plaintiff's breach of contract claim against it.

In this opinion the other judges concurred.