CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

WELLS FARGO BANK, N.A. *v.* SANDRA CALDRELLO (AC 41074)

Keller, Elgo and Harper, Js.

Syllabus

The plaintiff bank, W Co., sought to foreclose a mortgage on certain real property owned by the defendant, who had executed a promissory note in the amount of $480,000 in favor of S Co., which was secured by a mortgage on the subject property. In its complaint, W Co. alleged that it was entitled to collect the debt evidenced by the note and to enforce the mortgage as S Co.'s successor by merger, that the defendant was in default on her obligations under the note and that it had exercised its right to accelerate the debt. The defendant filed an answer and a thirty-two count revised counterclaim, alleging, inter alia, violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.). The trial court granted the plaintiff's motion to strike the revised counterclaim, striking the CUTPA and TILA counts on ground that the applicable statutes of limitations barred those claims. Thereafter, W Co. filed a motion for summary judgment as to liability and presented to the court the original promissory note, which had not been endorsed and remained payable to S Co., and the recorded mortgage. In support of its motion, W Co. submitted an affidavit from S, its vice president for loan documentation, who, on the basis of her examination of W Co.'s business records, averred that following the execution of the note and mortgage, S Co. merged and changed its name to M Co., that M Co. converted to F Co. and that F Co. merged into W Co., thereby making W Co. the successor by merger to S Co. and the holder of the subject note. S attached to her affidavit supporting documentation. The plaintiff also submitted an affidavit of H, its implementation consultant, who, on the basis of his examination of W Co.'s business records, averred that W Co. was properly identified on the loan transfer history as the investor entity that

owned the defendant's note. The defendant filed an objection to the motion for summary judgment asserting that W Co. failed to provide any documents that proved that it had met its burden to prove standing. The defendant's primary argument concerned a transaction whereby S Co. transferred or sold the note to its subsidiary, L Co. She asserted that M Co. could not have reacquired ownership of the note without L Co. having first endorsed the note and that there was no endorsement attached to the note at the time W Co. commenced the foreclosure action. In her affidavit in support of her objection, the defendant averred, inter alia, that she had personal knowledge of W Co.'s lack of standing. The trial court granted W Co.'s motion for summary judgment as to liability, concluding that W Co.'s affidavits and attached documentation had established that it was the successor to S Co. and entitled to enforce the note, and that the defendant's submissions in opposition to the motion lacked an adequate evidentiary foundation. Thereafter, W Co. filed a notice of supplemental document production that included a copy of the note with an allonge blank endorsement. The defendant then filed a motion for summary judgment, challenging W Co.'s standing on the basis of the note endorsed in blank. She renewed her claim that L Co. could not have transferred the note back to M Co. without an endorsement. The trial court denied the defendant's motion for summary judgment, treating it as a motion to reargue. The defendant subsequently filed a cross motion for summary judgment and a motion for a new trial, again requesting that the court address the reasons for W Co.'s endorsement of the note in blank, which she considered to be newly discovered evidence that undermined W Co.'s standing as the holder of the note at the time the foreclosure action was commenced. The defendant also filed an application for issuance of subpoenas for two witness, who had signed affidavits of debt on behalf of W Co., stating that she was seeking information related to the blank endorsement. Thereafter, the trial court, held a hearing on W Co.'s motion for a judgment of strict foreclosure, during which it marked off the defendant's cross motion for summary judgment, motion for a new trial and application for subpoenas. The trial court then rendered a judgment of strict foreclosure, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that the trial court erred in concluding that no genuine issue of material fact existed with respect to W Co.'s standing and in rendering summary judgment as to liability in W Co.'s favor: W Co. met its evidentiary burden and raised the presumption that it was the holder of the note and rightful owner of the debt, as the production of the original note, W Co.'s detailed affidavits, and statutory and case law established that W Co. was the successor to S Co. and entitled to enforce the note, the undisputed evidence having indicated that after L Co. converted to a limited liability company and transferred the note back to M Co., M Co. maintained its status as holder

of the note when it reacquired the note pursuant to statute (§ 42a-3-207), and the later possession of the note by any successor in title to S Co., including W Co., entitled the successor to stand in the shoes of S Co. and to assume its rights as holder of the note, and, under federal banking law (12 U.S.C. § 215a [e]), all of S Co.'s rights in the note automatically transferred to W Co. without the need for any endorsement; moreover, the defendant's submissions in opposition to W Co.'s motion for summary judgment failed to satisfy her burden to rebut, with competent evidence, the presumption that W Co., as the holder of the note, was also the rightful owner of the debt and had standing to bring the action, as she failed to establish an adequate foundation to support the admission of her personal interpretation of the various banking documents that she referred to in her affidavit or that were submitted by her in opposition to the motion, and she presented no evidence that some entity other than W Co. owned the note at the time this action was commenced or at any time thereafter.

2. This court declined to review the defendant's claim that, after the trial court granted W Co.'s motion for summary judgment with respect to liability but prior to the time that it rendered the judgment of strict foreclosure, it deprived her of her right to conduct additional discovery and her right to a new trial: the record was inadequate to review the defendant's claim that she was denied a new trial, as the trial court marked off her cross motion for summary judgment and her motion for a new trial, and, therefore, there was no ruling on the motion for a new trial for this court to review, and the defendant failed to provide this court with a transcript of the proceedings related to the trial court's denial of her motion for summary judgment; moreover, the defendant failed to adequately brief or to provide an adequate record for review of her claim that she was denied discovery in order to properly undermine W Co.'s claim of standing as a result of the attachment of the blank endorsement to the subject note after summary judgment was rendered in favor of W Co.

3. The defendant's claim that the trial court erred in striking the counts of her counterclaim alleging CUTPA and TILA violations was not reviewable, the defendant having failed to brief that claim adequately; the portions of the defendant's principal and reply briefs that address the stricken counts of her counterclaim under CUTPA and TILA failed to address, much less analyze, the standard of review with respect to motions to strike, the application of the second limitation to the rule that a statute of limitations must be pleaded as a special defense, or the precise nature of the allegations pleaded in her revised counterclaim that rendered her claims legally sufficient to refute the court's conclusion that the statutes of limitations relevant to her TILA and CUTPA claims had expired, and she improperly alluded to additional facts concerning an alleged denial of her right to a mortgage modification or other relief programs as a violation of CUTPA, which were not alleged in the revised counterclaim.

Argued February 5—officially released August 20, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendant filed a counterclaim; thereafter, the court, *Cosgrove*, *J.*, granted the plaintiff's motion to strike the defendant's revised counterclaim; subsequently, the court granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, denied the defendant's motion for summary judgment; subsequently, the court, *Calmar*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, the court, *Calmar*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Sandra Caldrello, self-represented, the appellant (defendant).

William J. Hanlon, with whom, on the brief, was *David M. Bizar*, for the appellee (plaintiff).

Opinion

KELLER, J. The self-represented defendant,[1] Sandra Caldrello, appeals from the judgment of strict foreclosure rendered in favor of the plaintiff, Wells Fargo Bank, N.A. The defendant claims that[2] (1) the court erred in concluding that a genuine issue of material fact did not exist with respect to the plaintiff's standing to foreclose the mortgage and rendering summary judgment as to liability in favor of the plaintiff, (2) after the court granted the motion for summary judgment with respect

[1] The defendant was self-represented during the proceedings at trial and during the present appeal.

[2] The defendant makes four separate claims of error in her appellate brief, but we have combined her first two claims, as they both relate to whether the plaintiff had standing to initiate the foreclosure action.

to liability but prior to the time that it rendered judgment of strict foreclosure, the court deprived her of her right to conduct additional discovery and her right to a new trial related to the fact that, following the rendition of summary judgment, the plaintiff attached a blank endorsement to the note at issue in this action, and (3) the court erred in granting the plaintiff's motion to strike two counts of her counterclaim alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Truth in Lending Act (TILA),[3] 15 U.S.C. § 1601 et seq. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On September 12, 2012, the plaintiff commenced this foreclosure action. The complaint alleged that on February 9, 2007, the defendant signed a promissory note in the amount of $480,000 in favor of the World Savings Bank, FSB (World Savings). The note was secured with a mortgage on property owned by the defendant known as 939 Pequot Avenue in New London. The plaintiff alleged that it was the party entitled to collect the debt evidenced by the note and the party entitled to enforce the mortgage, as it is the successor by merger to the original mortgagee, World Savings, that the defendant was in default on her obligations under the note, and that it had exercised its right to accelerate the debt and to commence this action.

Prior to rendering summary judgment as to liability in favor of the plaintiff, the court, *Cosgrove, J.*,[4] granted

[3] "[TILA], as amended in particular by the Truth-in-Lending Simplification Reform Act of 1980, was enacted as part of the Consumer Credit Protection Act of 1968, and is codified at 15 U.S.C. § 1601 et seq. The purpose of TILA is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. See 12 C.F.R. § 1026.1." *Cheshire Mortgage Services, Inc.* v. *Montes*, 223 Conn. 80, 96–97, 612 A.2d 1130 (1992). In order to carry out this purpose, "Regulation Z," codified at 12 C.F.R. 226.1 et seq., was promulgated. Id., 97.

[4] Several judges issued relevant rulings in this case. We are identifying them by name for purposes of clarity.

the plaintiff's motion to strike the defendant's revised counterclaim. The circuitous procedural journey to the striking of the defendant's counterclaim commenced on February 11, 2015, when the defendant filed her first of many sets of counterclaims and associated "supplements" and "addenda." On May 20, 2015, after the plaintiff had previously filed a series of requests for the defendant to revise her counterclaim, the defendant filed a revised counterclaim containing thirty-two counts.

On August 4, 2015, the plaintiff moved to strike all thirty-two counts of the revised counterclaim. On October 23, 2015, the defendant filed a "Defendant's Addendum to Counterclaims." The plaintiff moved to strike the addendum, arguing that the defendant had failed to satisfy the requirements of Practice Book § 10-60 and had improperly amended her revised counterclaim. Judge Cosgrove granted the plaintiff's motion to strike the addendum on December 4, 2015, simultaneously overruling the defendant's objection to the plaintiff's motion to strike her addendum.

On January 5, 2016, Judge Cosgrove issued a memorandum of decision striking the defendant's revised counterclaim. On January 20, 2016, the defendant filed a counterclaim containing thirty-one repleaded counts. The plaintiff again moved to strike all of the counts of the counterclaim. On May 3, 2016, Judge Cosgrove granted in part the plaintiff's motion, striking all but one of the defendant's repleaded counts as legally insufficient or as asserting claims on which relief may not be granted in the form of a judgment on a counterclaim. The court did not strike count twenty-nine, however, which alleged breach of contract.[5]

In its January 5, 2016 memorandum of decision, the court agreed with the plaintiff's argument that in ruling

[5] Judge Cosgrove ultimately rendered summary judgment in favor of the plaintiff on the defendant's counterclaim alleging breach of contract.

on the motion to strike, it could address the plaintiff's argument that the statutes of limitations applicable to the CUTPA and TILA causes of action barred those claims. Although a claim that an action is barred by the lapse of the statute of limitations usually must be pleaded as a special defense, and not raised by a motion to strike; see *Forbes* v. *Ballaro*, 31 Conn. App. 235, 239, 624 A.2d 389 (1993); see also Practice Book § 10-50; the court determined that the issues in this case met one of the two limited situations where the use of a motion to strike to raise the defense of the statute of limitations is permissible. See *Forbes* v. *Ballaro*, supra, 239–40 ("where a statute gives a right of action which did not exist at common law, and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone" [internal quotation marks omitted]).

Noting that the execution of the note and mortgage occurred on February 9, 2007, Judge Cosgrove, after reviewing the defendant's myriad allegations pertaining to violations of the two statutes,[6] determined that "[c]ounts eight through ten [of the counterclaim] allege inaccurate material disclosures, as opposed to a failure to provide material disclosures [and], therefore, the defendant's right to rescind expired three years from the date of consummation or delivery of all material disclosures. While counts eight through ten allege inaccurate material disclosures, count seven alleges that the closing agent failed to provide copies of the signed closing documents. Even taking this fact in the light most favorable to the defendant—that the closing agent is an agent of the plaintiff and the closing documents are material disclosures as defined by 12 C.F.R. § 1026.23 (a) (3) (ii)—the defendant's claim is still

[6] See paragraphs 7, 8, 9, 10 and 30 of the defendant's revised counterclaim.

barred by 15 U.S.C. § 1635 (f)'s statute of limitation[s].[7] The [defendant] fails to allege any facts in [counts] seven or thirty regarding the transfer of all of the defendant's interest in the property or the sale of the property, so the date of consummation remains the time measure. More than three years elapsed between February 9, 2007 and August 31, 2012. Further, while the defendant alleged that she has the right of rescission under recoupment pursuant to TILA, she has not alleged recoupment as a matter of defense, pursuant to 15 U.S.C. § 1640 (e), but rather, as a counterclaim. Finally, equitable tolling does not apply to [count] thirty because '[§] 1635 (f) completely extinguishes the right of rescission at the end of the [three] year period.' *Beach* v. *Ocwen Federal Bank*, [523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998)]." (Footnote added.) Judge Cosgrove concluded that the statute of limitations pursuant to TILA expired on February 9, 2010. He applied the same expiration date in striking counts eight through ten alleging CUTPA violations, noting that CUTPA, a statutory cause of action that did not exist at common law, also has a limitation period of three years after the occurrence of a violation. See General Statutes § 42-110g (f). Judge Cosgrove further concluded that the defendant had failed to plead facts sufficient to demonstrate fraudulent concealment, which might otherwise toll the statute of limitations.

On January 20, 2016, the defendant filed a thirty-one count amended counterclaim, which she corrected by

[7] Civil liability under TILA is codified at 15 U.S.C. § 1640 (e), which limits actions under this section to within one year from the date of the occurrence of the violation, except in an action to collect the debt that was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action. The right of a person to bring a civil action for liability against a creditor that does not comply with the requirements imposed by TILA is not a right that existed at common law. Therefore, Judge Cosgrove concluded that he could consider the plaintiff's statute of limitations arguments regarding TILA as to counts seven through ten and thirty of the counterclaim on its motion to strike.

changing a date, on January 25, 2016. The plaintiff again moved to strike the counterclaim. Judge Cosgrove struck all of the counts of the amended counterclaim except a single breach of contract claim, agreeing with the plaintiff that the legal insufficiencies in the defendant's prior counterclaim had not been cured and that the defendant improperly had used her opportunity of pleading over pursuant to Practice Book § 10-44 to add additional claims.[8]

On June 15, 2016, the plaintiff filed a motion for summary judgment as to liability on its complaint and as to the defendant's counterclaim for breach of contract. In its memorandum of law in support of the motion, the plaintiff argued that there were no genuine issues of material fact regarding the defendant's liability under the note and the mortgage, and that summary judgment was proper because the defendant's counterclaim was legally insufficient.

During the course of this litigation, the plaintiff presented to the court and to the defendant the original promissory note and the recorded mortgage. The original note is an adjustable rate mortgage note, "pick-a-payment" loan signed by the defendant and payable to World Savings. Prior to the rendering of summary judgment, the original note had not been endorsed in any manner and remained payable by its express terms to "[World Savings], a federal savings bank, its successor and/or assignees, or anyone to whom this Note is transferred." The recorded mortgage references this promissory note.

In support of its motion for summary judgment as to liability, the plaintiff submitted an affidavit from Shae Smith, the vice president for loan documentation for the plaintiff. In her affidavit, Smith averred that she is

[8] Judge Cosgrove also noted that the defendant had misapprehended the distinction between counterclaims and special defenses.

familiar with the business records maintained by the plaintiff, which records were made at or near the time of the event recorded by the plaintiff, that it was a regular practice for the plaintiff to make those records and that her knowledge was acquired from the examination of these business records. Smith stated that the defendant executed and delivered an adjustable rate mortgage note dated February 9, 2007, in the amount of $480,000 to World Savings. She further stated that the plaintiff is the successor by merger to the mortgagee. Specifically, Smith stated that on December 31, 2007, ten months after the making of the note and mortgage, World Savings merged and changed its name to Wachovia Mortgage, FSB (Wachovia). This transaction is documented by correspondence annexed to Smith's affidavit from the Office of Thrift Supervision within the United States Department of the Treasury. Smith further stated, on the basis of her examination of the plaintiff's business records, that, on November 1, 2009, Wachovia converted to a National Bank named Wells Fargo Bank, Southwest, N.A., and that on the same date Wells Fargo Bank Southwest, N.A., merged into Wells Fargo Bank, N.A., the plaintiff in this action. These conversions of corporate names and status were documented by correspondence from the Office of the Comptroller of the Currency annexed to the affidavit. Smith further averred that the plaintiff's attorney was in possession of the note at the time this litigation was commenced and that the note had been in default since December, 2011. Also annexed to Smith's affidavit was a copy of a "Notice to Cure and Intent to Accelerate" document sent to the defendant. Finally, Smith stated that the plaintiff had not received funds sufficient to cure the default on the defendant's promissory note.

Given that the plaintiff claimed to hold the note by virtue of a series of corporate mergers, name changes and conversions, the plaintiff provided an additional

affidavit from Paul Hoff, the plaintiff's implementation consultant, to support its motion for summary judgment. Hoff averred that his affidavit was based on his examination of the business records maintained by the plaintiff and, specifically, his interpretation of the electronic records relating to the defendant's February 9, 2007 note and mortgage to World Savings. Hoff concluded that the plaintiff is properly identified on the loan transfer history as the investor entity that owned the defendant's note.

In its memorandum of law in support of its motion for summary judgment, the plaintiff argued that it had established with competent evidence a prima facie case of liability in a mortgage foreclosure action through the affidavits of Smith and Hoff, and the documentation attached to them, which established that (1) there was a loan, evidenced by the note, payable to World Savings; (2) the plaintiff was and, since prior to the commencement of the foreclosure action, had been the party entitled to collect the debt evidenced by that note; (3) the defendant was in default; and (4) the indebtedness due under the note had been accelerated. The plaintiff asserted that it had standing to foreclose on the mortgage because, as evidenced by the Hoff affidavit and its supporting exhibits, the plaintiff not only was in possession of the original note, but had the rights of the original holder of the note, World Savings, by operation of the federal merger statute, 12 U.S.C. § 215a (e) 2006.[9]

[9] Title 12 of the United States Code, § 215a (e) provides in relevant part: "The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and

In her objection to the plaintiff's motion for summary judgment, relevant to standing, the defendant argued that the plaintiff failed to provide any documents that proved it was the owner of the note and had not met its burden to prove standing. She claimed that the plaintiff was defrauding the court with false assertions of ownership of the note. She questioned whether the affiants, Smith and Hoff, actually had personal knowledge of the facts to which they had attested.[10] Her primary argument concerned a transaction whereby World Savings transferred or sold the note to its subsidiary, World Loan Company (World Loan), on May 3, 2007. She asserted that Wachovia, which formerly was known as World Savings, could not have reacquired ownership of the note without World Loan having first endorsed the note, and that there was no endorsement attached to the note at the time the plaintiff commenced the foreclosure action. She also claimed that there was no evidence that World Savings or Wachovia had transferred the note. She further argued that the Federal Home Loan Bank of San Francisco took title to and

enjoy all rights of property, franchises, and interests . . . in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger . . . ."

[10] The defendant filed a motion to strike the affidavits of Smith and Hoff that were submitted by the plaintiff in support of its motion for summary judgment. The court denied this motion to strike, citing "settled law" in Connecticut that affidavits based on a review of business records are properly relied on by a court to resolve summary judgment issues. See *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 235–36, 32 A.2d 307 (2011) ("[u]nder General Statutes § 52-180, to be competent to testify, the affiant need only have personal knowledge of the relevant business records . . . and not the act, transaction or occurrence recounted therein" [citation omitted; footnote omitted]), overruled in part by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.8, 71 A.3d 494 (2013); *American Home Mortgage Servicing, Inc.* v. *Reilly*, 157 Conn. App. 127, 136, 117 A.3d 500 ("it is well established that a court may rely on an affidavit when the affiant acquired personal knowledge from a review of underlying business records"), cert. denied, 317 Conn. 915, 117 A.3d 854 (2015). The denial of the defendant's motion to strike these affidavits is not challenged on appeal.

owned the note by virtue of a Uniform Commercial Code financing statement, which was filed to establish a security interest in the assets of World Loan. The defendant argued, as well, that she had received a letter on May 2, 2012, from the plaintiff's counsel, stating in relevant part: "This office has been retained by Wachovia Mortgage, a Division of [the plaintiff], the mortgage servicer of the above-referenced mortgage loan, to commence a foreclosure." On the basis of this letter, the defendant claimed that the plaintiff did not own the note because "the foreclosure was requested by Wachovia . . . with [the plaintiff] named as the servicer."

The plaintiff argued that the transfers between World Savings and its subsidiary, World Loan, did not affect its standing to enforce the note because after World Loan converted from a corporation to a limited liability company, World Loan Company, LLC, it transferred the note back to World Savings, which was renamed Wachovia, in 2009. Thus, the plaintiff argued, Wachovia maintained World Savings' status as a holder upon reacquiring the note from World Loan under Connecticut law pursuant to General Statutes § 42a-3-207.[11] The plaintiff also argued that when Wachovia, the renamed original payee of the note, converted and changed its name to Wells Fargo Bank Southwest, N.A., and on the same day, Wells Fargo Bank Southwest, N.A., merged into the plaintiff, the plaintiff, under the federal merger statute, obtained all of World Savings' rights in the note without need of an endorsement.

[11] General Statutes § 42a-3-207 provides: "Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel endorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An endorser whose endorsement is cancelled is discharged, and the discharge is effective against any subsequent holder."

After considering the defendant's objection to the plaintiff's motion for summary judgment as to liability, Judge Cosgrove granted the motion, concluding that "[i]n this case, the plaintiff has provided to the court . . . the original note executed by the defendant. It is not endorsed but it need not be endorsed if the plaintiff can demonstrate that [it] is the corporate successor to the original mortgage[e], [World Savings]. The plaintiff's affidavits and cited statutes and case law establish that it is the successor to [World Savings] and entitled to enforce the note. . . . There is no dispute that the note has not been paid in accordance with it terms and that the defendant was give[n] notice of the intent to accelerate the debt." The court observed that the defendant's submissions in opposition to the motion for summary judgment, despite lacking an adequate evidentiary foundation to be considered, nonetheless "would be consistent with the plaintiff's affidavits."[12] (Emphasis omitted.)

Before the court rendered the judgment of strict foreclosure, the plaintiff filed a "Notice of Supplemental Document Production" on June 22, 2017, that included a copy of the note with an allonge blank endorsement dated February 8, 2017. The defendant, asserting that this recent endorsement was an attempt by the plaintiff to circumvent what she considered to be a valid objection to its standing (based on her allegation that the note, as a matter of law, needed an endorsement because at one point it had been sold by World Savings to its subsidiary, World Loan), filed a motion for summary judgment. Therein, she renewed her claim that World Loan Company, LLC, could not have transferred the note back to Wachovia without an endorsement.[13]

[12] In the same memorandum of decision, the court also rendered summary judgment in favor of the plaintiff on the defendant's counterclaim for breach of contract. The propriety of the court's summary judgment ruling on the counterclaim for breach of contract is not a subject of this appeal.

[13] In its appellate brief, the plaintiff discusses, at length, the defendant's vigorous and extensive discovery pursuits in which she sought information

In this motion, relative to standing, she referred to an affidavit of debt supplied by Diane F. Duckett, which was filed in court on April 20, 2017, and which indicated that the note was now endorsed in blank. She accused the plaintiff of fraud and deceit in order to fabricate a ground on which it had standing. The plaintiff filed an objection on June 22, 2017, noting that after Judge Cosgrove had rendered summary judgment in its favor, the plaintiff recalled the note from its foreclosure counsel, endorsed it in blank and returned it to foreclosure counsel. This sequence of events is described in an amended affidavit of debt by Kimberly A. Mueggenberg that was attached to the plaintiff's objection. The plaintiff also argued that all of the issues raised in the defendant's motion for summary judgment dated May 8, 2017, already had been adjudicated by Judge Cosgrove in that they had been raised in the defendant's objection to the plaintiff's motion for summary judgment as to liability or in a motion for reconsideration of his order filed by the defendant on December 22, 2016, which had been denied by Judge Cosgrove on January 9, 2017.

from it related to sale of the note five years before the plaintiff commenced this action. The plaintiff maintains that, prior to moving for summary judgment, it complied with these efforts by producing documentation as to the note's history. Several months prior to the date on which the court heard the plaintiff's motion for summary judgment, the court sustained the plaintiff's objection to the defendant's supplemental requests for documents and its objection to two motions filed by the defendant to compel discovery. In its first order, the court concluded: "There has been good faith compliance with the defendant's discovery request relating to the financial transaction at issue." In its memorandum of decision granting the plaintiff's motion for summary judgment, the court, in denying the defendant a continuance requested by affidavit for additional discovery as to the sale of the note in order to oppose the motion, stated: "The defendant raises as an additional issue that the plaintiff has not complied with discovery that she had filed. This dispute was the subject of numerous motions and hearings before the court. The court previously indicated that it was satisfied that the plaintiff had complied with the discovery requests and provided the defendant with the documentation as to the ownership of her loan. The defendant has not made a persuasive case now or in the hearings on the prior discovery motions that information was being withheld improperly."

On August 17, 2017, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, denied the defendant's motion for summary judgment dated May 8, 2017, stating, "[t]he motion termed 'Motion for Summary Judgment' is denied. A previously granted motion to reargue occasioned the hearing of August 17, 2017, at which it became apparent that the self-represented defendant's motion was in reality an attempt to reargue a summary judgment granted by *Cosgrove*, *J.*, in favor of plaintiff . . . . Notwithstanding the procedural irregularities, the court heard extensive presentations from both parties. The court is of the opinion that the motion for summary judgment was correctly decided the first time."

Subsequent to Judge Koletsky's decision, the defendant filed a cross motion for summary judgment and a motion for a new trial, again demanding that the court address the reasons for the plaintiff's endorsement of the note in blank, which she considered to be newly discovered evidence that undermined the plaintiff's standing as the holder of the note at the time the foreclosure action was commenced.

Prior to the hearing on the plaintiff's motion for a judgment of strict foreclosure, the defendant applied, pursuant to Practice Book § 7-19, for issuance of subpoenas directed at the plaintiff's lawyers. Before the plaintiff could file its objection to the defendant's subpoena request, the court granted it. The plaintiff sought reconsideration and moved to quash the subpoenas. The court, *Nazzaro*, *J.*, conducted a hearing on April 24, 2017, and granted the plaintiff's motions to reconsider and to quash on May 8, 2017.

After the plaintiff reclaimed its motion for a judgment of strict foreclosure, the court set a hearing date of August 14, 2017. The defendant filed another request to subpoena the plaintiff's lawyers. Judge Cosgrove denied her subpoena request but rescheduled the August 14

hearing for September 11, 2017. On September 6, 2017, the defendant filed a third application for the issuance of subpoenas directed at two out-of-state witnesses, Duckett and Mueggenberg, who both signed affidavits of debt on behalf of the plaintiff, and which were filed in support of its motion for a judgment of strict foreclosure. The defendant stated that she was seeking information on the "surprise" blank endorsement that was first mentioned in Duckett's affidavit that had been filed in court on April 20, 2017.

During the hearing on the plaintiff's motion for a judgment of strict foreclosure on September 11, 2017, counsel for the plaintiff represented to the court, *Calmar*, *J.*, that the plaintiff had "[p]ulled back" the note from counsel, endorsed it in blank, and returned it to counsel, and that counsel had informed Judge Koletsky about the endorsement before he denied the defendant's motion for summary judgment. Judge Koletsky determined that the defendant's motion for summary judgment was, in reality, an attempt to reargue the summary judgment that had been rendered in the plaintiff's favor by Judge Cosgrove. The defendant claimed she had not become aware of the endorsement until June 22, 2017.[14] After determining that Judge Koletsky had been made aware of the issue concerning the newly attached endorsement to the note, Judge Calmar marked the defendant's cross motion for summary judgment and her motion for a new trial off, ruling, "[a]s to the cross motion for summary judgment and the motion for a new trial, no action is necessary because

[14] The Duckett affidavit, filed on April 20, 2017; the defendant's motion for summary judgment dated May 8, 2017; the plaintiff's objection to it on June 22, 2017; and the plaintiff's notice of supplemental document production, also filed on June 22, 2017, clearly demonstrate that the defendant was on notice that there had been a blank endorsement attached to the note well before Judge Koletsky considered her motion for summary judgment. The plaintiff maintains that the endorsement did nothing to change the plaintiff's status as the holder of the note.

there is no issue. First of all, Judge Koletsky had denied essentially a motion to reargue, so [the issue of liability is] resolved. And there's, therefore, no basis to have a motion for summary judgment pending. And whereas [the motion for a new trial] also was a motion to reargue effectively as to the issue of liability, he essentially denied a motion to retry the issues." Judge Calmar also marked off as moot the defendant's application for subpoenas for Duckett and Mueggenberg because the application was part of an effort to explore the issue of the creation of the blank endorsement, which he believed Judge Koletsky had addressed.

Judge Calmar then proceeded to conduct an evidentiary hearing on the plaintiff's motion for a judgment of strict foreclosure. He granted the plaintiff's motion on September 11, 2017.

On September 21, 2017, the defendant filed a motion to open the judgment of strict foreclosure. The court denied the motion, noting that the "[d]efendant lacks good cause to open and vacate this court's judgment of strict foreclosure. She asserts the same arguments that this court has repeatedly rejected in denying [the] defendant's motion to dismiss, three motions for summary judgment, as well as in a myriad of other motions and filings. [The] defendant cannot challenge issues that have already been decided."[15] This appeal followed.

Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that the court erred in concluding that a genuine issue of material fact did not exist with respect to the plaintiff's standing to foreclose

[15] The defendant has not appealed from the denial of her motion to open the judgment.

the mortgage and the rendering of summary judgment as to liability in its favor. We disagree.

We begin with our standard of review. "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.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 620, 72 A.3d 394 (2013). "In deciding a motion for summary judgment, the trial court must view evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material fact which, under applicable principles of substantive law, entitle him to judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 190–91, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014). This court's review of a trial court's decision to grant a motion for summary judgment is plenary. Id., 191.

Evidence, for the purposes of a summary judgment motion, means affidavits made upon personal knowledge of "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Practice Book § 17-46. Any other material submitted in support of or opposition to the motion must demonstrate that

the proffer would be admissible under the rules of evidence. "The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 358, 143 A.3d 638 (2016).

To make out a prima facie case in a mortgage foreclosure action, the foreclosing party must show "that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 758, 6 A.3d 726 (2010). "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.) *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 730, 205 A.3d 716 (2019).

The original note before Judge Cosgrove was unendorsed and payable to the plaintiff's predecessor, World Savings. The defendant asserts that five years before this action was commenced, the note was sold by the World Savings to its subsidiary, World Loan. According to the defendant, the plaintiff bore the burden of proving that it owned the note when it commenced this action by presenting evidence that the original note was sold back to its parent corporation. This would have required the attachment of a specific endorsement from World Loan Company, LLC, back to one of the plaintiff's merged predecessors, World Savings, Wachovia, or Wells Fargo Bank Southwest, N.A., or the plaintiff, or by the attachment of a blank endorsement.

The defendant cites to a variety of different cases in her appellate brief in an attempt to support her argument. For example, the defendant cites to a decision of the Florida Supreme Court, *Wright* v. *JPMorgan Chase Bank, N.A.*, 169 So. 3d 251 (Fla. 2015), in support of her contention that ownership of a note by a subsidiary does not give a parent corporation, *which is a distinct legal entity*, the right to enforce the note absent evidence that the parent corporation acquired such a right through, for example, a purchase or servicing agreement. The facts of that case, however, are markedly different from the present case. In *Wright*, the court concluded that there was no evidence of any transfer from the wholly owned subsidiary of JPMorgan Chase Bank, N.A., Chase Bank, USA, N.A., back to its parent corporation. Id. Here, however, the plaintiff presented undisputed evidence of a transfer from the subsidiary, World Loan Company, LLC, back to the parent corporation, Wachovia.

The affidavit of the plaintiff's implementation consultant, Hoff, filed with the plaintiff's motion for summary judgment, explains the history of the note subsequent to its February 9, 2007 execution and refers to exhibits

annexed to Hoff's affidavit. Hoff reviewed the plaintiff's business records and established the corporate and transactional history—a history that the plaintiff claims the defendant failed to rebut with any admissible evidence of her own.

Hoff discussed the history of both the note and the mergers that resulted in the plaintiff's right to assert ownership of the note, averring: "The note was assigned loan number *******4985. . . . In the regular course of business, [the plaintiff] maintains an electronic record relating to the note called the Loan Transfer History and it is [the plaintiff's] practice to update this record at or near the time of the event recorded.[16] . . . In the regular course of its business, [the plaintiff] maintains the Investor/Category Matrix, which is used to code events recorded in the Loan Transfer History.[17] . . . On November 19, 2007, [World Savings] changed its name to [Wachovia]. On November 1, 2009, [Wachovia] changed its name to Wells Fargo Bank Southwest, FSB, and merged into [the plaintiff]. These entities were consistently coded as investor '010' on the Investor/Category Matrix. . . . On the Investor/Category Matrix, [World Loan] and its successors in interest have been assigned the Asset Investor Number of '050'. . . . [O]n December 31, 2008, [World Loan] converted from a corporation to a limited liability corporation. These entities were consistently coded as investor '010' on the Invertor/category Matrix. . . . On the Investor/Category Matrix, the assignment of an asset investor number indicates that the investor has maintained ownership of the loan. Similarly, the entity and its successor in interest identified in the 'Risk' column indicate

[16] A screenshot of the "Loan Transfer History" is annexed to Hoff's affidavit as exhibit B.

[17] A copy of the "Investor/Category Matrix," redacted to show only title, headings and the investors identified on the "Loan Transfer History," is attached to Hoff's affidavit as exhibit C.

ownership of the loan. 'Non-asset investor numbers' are assigned when the loan is securitized or transferred to a non-affiliated third party. . . . On May 3, 2007, [World Savings] transferred the note to [World Loan]. This transfer was recorded in the Loan Transfer History relating to the Note on the line marked '5/03/07' and bearing the description 'sale to [World Loan]' in the field for 'additional transfer information.' The entry on the Loan Transfer History dated 05/03/07 shows an old investor ('Old INV') of '010' and a new investor ('New Inv') of '050', i.e. a transfer from [World Savings] to [World Loan]. . . . *The 1/23/09 entry reversed the 05/03/07 transfer*. The 01/23/09 entry on the Loan Transfer History shows an old investor . . . of '050' and a new investor . . . of '010, i.e., a transfer from World Loan Company LLC, [formerly known as World Loan][18] to [Wachovia]. The 01/23/09 entry also displays the notation 'Maint Investor' in the field for 'additional transfer information,' which means the Loan Transfer History record is being maintained, and the field of the Loan Transfer History being maintained is the identity of the investor. . . . The 01/28/09 entry 'Maint Service Fee and Investor Loan' indicates the elimination of a servicing fee, which is consistent with the transfer of ownership from the World Loan Company [LLC] subsidiary to its corporate parent/servicer. . . . On the Loan Transfer History record each of the entries following 01/23/09 identify the investor as '010', which is [World Savings] and its successors in interest. [The plaintiff] has been [World Savings'] successor in interest since November 1, 2009. . . . [The plaintiff] is properly identified on the Loan Transfer History as the 'investor', which is the entity that owns the note." (Emphasis added; footnotes added.)

In Judge Cosgrove's memorandum of decision on the plaintiff's motion for summary judgment, he noted that

[18] There was evidence that, on December 31, 2008, World Loan was renamed to World Loan Company, LLC.

the plaintiff previously had produced for the court's review the original unendorsed note, which was made payable to its corporate predecessor, World Savings. Smith's affidavit stated that, on or about May 2, 2012, the plaintiff transferred possession of the note to its attorney in order to initiate this action. In its complaint, the plaintiff alleged that on or before May 2, 2012, it "became and at all times since then has been the party entitled to collect the debt evidenced by said note and is the party entitled to enforce said mortgage."

With respect to the defendant's documentary submissions in opposition to summary judgment, in an affidavit dated August 15, 2016, the defendant claimed to have personal knowledge of the plaintiff's lack of standing as "the note was clearly sold and transferred to numerous parties all the while lacking endorsement essential to prove ownership." Appended to her affidavit, but not specifically referenced therein, are numerous other documents. The defendant appended the acceleration and notice of default letter that she received prior to the commencement of this action. She asserted that the letter, written on behalf of "Wachovia Mortgage, a Division of Wells Fargo Bank, NA, the mortgage servicer," proved that the plaintiff did not own the note because the foreclosure was requested by Wachovia with the plaintiff named as the servicer. The letter, apparently sent to the defendant by the plaintiff's counsel, however, is not evidence concerning whether the plaintiff owned the note. Moreover, by its terms, the letter clearly reflects that "Wachovia Mortgage, a Division of Wells Fargo Bank, N.A.," was the entity initiating the foreclosure action. The defendant also alleged that the plaintiff did not acquire the assets of World Loan, but this is not material because Hoff's affidavit states that the plaintiff had acquired the assets of Wachovia on November 1, 2009, after World Loan Company, LLC, formerly known as World Loan, transferred the note

back to Wachovia on January 23, 2009. There was evidence that, on November 1, 2009, about nine months after the transfer of the note back to Wachovia, Wachovia merged into the plaintiff.

The defendant also presented evidence to demonstrate that the Federal Home Loan Bank of San Francisco (Federal Home) took title to and owned the note, which she claims had been securitized, by virtue of a Uniform Commercial Code financing statement, but such a statement is filed to establish a security interest in the assets of World Loan. The defendant is unable to demonstrate that having a security interest in collateral is the equivalent of taking title to the underlying collateral. See *Fidelity Mutual Life Ins. Co.* v. *Harris Trust & Savings Bank*, 71 F.3d 1306, 1309 (7th Cir. 1995) ("[a] security interest is not only not title; it is not a possessory interest"). The financing statement serves as notice to third parties of Federal Home's security interest in World Loan's assets, but it is not a transfer of assets or a prohibition on transfer. There is no persuasive evidence to support the defendant's claim that World Loan sold the note to Federal Home.

The defendant also claims, in the alternative, that, absent an endorsement, World Loan Company, LLC, retained title to the note sold to World Loan by Wachovia, and that World Loan Company, LLC, had gone out of business. The plaintiff's proof of this fact is a copy of a "Certificate of Termination" from the Office of the Secretary of State of Texas, which is an attachment to her objection to the plaintiff's motion for summary judgment. This certificate provides that World Loan Company, LLC, was "terminated" in 2012. As Judge Cosgrove noted, some of the defendant's submissions were consistent with the plaintiff's position. This document, if legitimate, merely establishes that it is

quite unlikely that World Loan Company, LLC, will make any claim that it currently owns the note.[19]

Having thoroughly reviewed the affidavits and other documentation submitted by the plaintiff in support of its motion for summary judgment, we are satisfied that the plaintiff met its evidentiary burden and raised the presumption that it is the rightful owner of the debt. The plaintiff demonstrated its standing through affidavit testimony, documentation of regulatory approvals of the mergers, and the history of transfers related to the note, as well as the production of the original note itself. In showing that it was the successor by merger to the payee on the note, World Savings, the plaintiff also became the payee by operation of law and was the holder and presumptive owner of the note.

The undisputed evidence before the court reflects that, in 2007, World Savings transferred the note to its subsidiary, World Loan. After World Loan converted to a limited liability company, it transferred the note back to World Savings, then renamed Wachovia, in 2009.[20] Wachovia maintained its status as holder because it reacquired the note pursuant to the Uniform Commercial Code, § 42a-3-207. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." If the entity that was the original named payee on the note reacquires it, there is no cloud on that entity's title. See General Statutes Annotated § 42a-3-207, comment (West 2018). This statute applied to reestablish

[19] The defendant also attached case law, articles and federal regulations to her objection to the plaintiff's motion for summary judgment, which she asked the court to use in the adjudication of the motion for summary judgment. It suffices to observe that none of these submissions gives rise to a genuine issue of material fact as to whether the plaintiff is entitled to summary judgment in its favor.

[20] As a result of the name change, any interest that World Savings had in the defendant's note "inure[d] to the association under its new name [Wachovia]." 12 U.S.C. § 31 (2017).

Wachovia, as the holder following the intercorporate transfer from World Loan Company, LLC, which resulted in Wachovia's reacquisition of the note. It allows a prior holder of a negotiable instrument to become a person entitled to enforce the instrument upon reacquiring such instrument without having to be burdened with any endorsements that might have occurred between the time of the first undertaking of liability and the reacquisition of the instrument. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." "Holder" is defined in General Statutes § 42a-1-201 (21) (A) as "[t]he person in possession negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

As the comment to the Uniform Commercial Code explains, § 42a-3-207 implements "a rule of convenience" that relieves the reacquirer, a former holder, of "the burden of obtaining an indorsement that serves no substantive purpose." General Statutes Annotated § 42a-3-207, comment (West 2018); see also *Wells Fargo Bank, N.A.* v. *Sheikha*, 221 So. 3d 657, 659 (Fla. App. 2017).

Under the circumstances here, the later possession of the note by any successor in title to World Savings, including the plaintiff, entitled the successor to stand in the shoes of World Savings and to assume to the rights of a holder of the note. Under federal banking law, all of World Savings' rights in the note automatically transferred to the plaintiff without the need for any endorsement. See 12 U.S.C. § 215a (e). A federal bank merger transfers to and vests in the surviving bank "[a]ll rights, franchises and interests . . . in and to every type of property (real, personal, and mixed) and choses in action . . . by virtue of such merger with any deed or other transfer." Id. These broad transfers by merger of all rights and interests "in and to every type of property" included World Savings' rights as the note's

holder. "[S]uch receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger." Id. After a merger with a creditor bank, the surviving corporation stands in the shoes of the original creditor under § 215a (e) and becomes the note's owner. By operation of federal law, the plaintiff became the owner and holder of both the note and mortgage at the time it merged with Wachovia,[21] which then held the note. No assignment, document transfer, or court action was necessary for the plaintiff or Wachovia to acquire the loan and to enforce it. "[A]fter a merger with a creditor bank, the surviving corporation . . . *is* the original creditor." (Emphasis in original.) *Dues* v. *Capital One, N.A.*, Docket No. 11-CV-11808 (CEB) (E.D. Mich. August 8, 2011); see also *Sprague* v. *Neil*, United States District Court, Docket No. 1:05-CV-1605 (SHR) (M.D. Pa. October 19, 2007) ("By way of merger, Universal Bank transferred all of its rights and property to Citibank, including its property interest in [p]laintiff's debt. Citibank assumed all rights and property, including [p]laintiff's debt, as its own and thus stands in the shoes of the previous two banks."). As the successor to the bank named as the original payee on the note, the plaintiff is considered its owner. Hence, the plaintiff, as the original creditor under the note, has standing to enforce it and standing to foreclose the mortgage under General Statutes § 49-17.[22]

[21] Prior to merging with the plaintiff, Wachovia was converted into Wells Fargo Bank, Southwest, N.A., which retained Wachovia's interest in the note pursuant to 12 C.F.R. § 5.24 (i) (2019).

[22] The record reflects that the mortgage has not been assigned to the plaintiff. Section 49-17, however, "codifies the well established common-law principle that the mortgage follows the note, pursuant to which only the rightful owner of the note has the right to enforce the mortgage. . . . Our legislature, by adopting § 49-17, created a statutory right for the rightful owner of a note to foreclose on real property regardless of whether the mortgage has been assigned to him." (Citations omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 230, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 325 n.8, 71 A.3d 492 (2013).

Applying merger principles, numerous courts have rejected claims similar to that raised by the defendant and have concluded that the plaintiff is the successor to Wachovia and World Savings. See, e.g., *Park* v. *Wells Fargo Bank*, United States District Court, Docket No. C 12-2065 (PHJ) (N.D. Cal. August 13, 2012).

As a result of the plaintiff's having proven its status as a holder of the note, the burden shifted to the defendant, as the maker of the note, to rebut the presumption that the plaintiff, as the holder of the note, was also the rightful owner of the debt. See *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 146–47, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). "That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that might give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must prove that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis omitted; footnote omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150–51, 125 A.3d 262 (2015).

The defendant's submissions to counter the plaintiff's status as the holder of the note and, therefore, its status as the presumptive owner of the debt, fall short, as she failed to establish an adequate foundation to support the admission of her personal interpretation of the various banking documents she referred to in her affidavit or that were submitted by her in opposition to the plaintiff's motion for summary judgment. She also presented

no evidence that some entity other than the plaintiff owned the note at the time this action was commenced or at any time thereafter.

In summary, the prior production of the original note, the plaintiff's detailed affidavits, and statutory and case law establish that the plaintiff is the successor to World Savings and entitled to enforce the note. For all the foregoing reasons, we conclude that the court properly found that the plaintiff had standing to foreclose on the note and mortgage in granting the motion for summary judgment as to liability. The defendant's submissions in opposition to summary judgment fail to satisfy her burden to overcome, with competent evidence, the presumption that the plaintiff, as the holder of the note, is also the owner and is entitled to enforce the note.

II

Next, the defendant claims that, after the court granted the plaintiff's motion for summary judgment with respect to liability but prior to the time that it rendered the judgment of strict foreclosure, it deprived her of her right to conduct additional discovery and her right to a new trial related to the fact that, following the rendition of summary judgment, the plaintiff attached a blank endorsement to the note at issue in this action. We will address each aspect of this claim separately.

A

We first address the defendant's claim that she was denied a "new" trial, which we decline to review because the record is inadequate for review.[23]

[23] The defendant's motion for a new trial is inaptly named because there never was any trial at all. Moreover, the defendant, in her appellate brief, asserts that she was denied a new trial on the basis of newly discovered evidence under General Statutes § 52-270, but she did not file a proper petition pursuant to that statute.

The following additional facts are relevant to this claim. The defendant filed a motion for summary judgment on May 8, 2017, in which she focused on the significance of the fact that the note was not endorsed in favor of the plaintiff. On June 22, 2017, the plaintiff filed a notice of supplemental document production, in which it included a copy of the note with an allonge blank endorsement dated February 8, 2017. When Judge Koletsky subsequently considered the defendant's motion, he treated it as a motion to reargue and, after a hearing, denied it on August 17, 2017, indicating that he had heard "extensive presentations from both parties."

The defendant later filed a motion for a new trial on September 8, 2017, and a cross motion for summary judgment on August 24, 2017, both of which focused on the issue of whether the blank endorsement that the plaintiff had added to the note, postsummary judgment, was newly discovered evidence material to the issue of the plaintiff's standing. As she did before the trial court, she asserts on appeal that the emergence of the blank endorsement raised the suspicion that the plaintiff was not the holder of the note when it commenced the action.

On September 11, 2017, prior to ruling on the plaintiff's motion for a judgment of strict foreclosure, Judge Calmar addressed the defendant's motion for a new trial and her cross motion for summary judgment. After concluding that Judge Koletsky had been made aware of and considered the defendant's claim regarding the new blank endorsement that had been added to the note, Judge Calmar marked both the defendant's cross motion for summary judgment and her motion for a new trial off, ruling, "[a]s to the cross motion for summary judgment and the motion for a new trial, no action is necessary because there is no issue. First of all, Judge Koletsky had denied essentially a motion to reargue,

which he termed a motion to reargue, so liability's resolved. And there's, therefore, no basis to have a motion for summary judgment pending. And whereas [the motion for a new trial] also was a motion to reargue effectively as to the issue of liability, he essentially denied a motion to retry the issues."

As a result of Judge Calmar's marking these two motions off, there is no ruling on the motion for a new trial by Judge Calmar that we can review. The law of the case, as determined by Judge Calmar, was the decision of Judge Koletsky denying the defendant's motion for summary judgment. The defendant has failed to provide this court with a transcript of the proceedings before Judge Koletsky. Whether Judge Calmar was correct in determining that Judge Koletsky had considered the defendant's claim of newly discovered evidence on the basis of the blank endorsement, or whether Judge Koletsky properly heard and rejected that claim, cannot be determined without reviewing the transcript of the proceedings before Judge Koletsky prior to August, 17, 2017, the date on which he denied the defendant's motion. Accordingly, the record is inadequate to review this particular claim.

B

The defendant also claims that she was denied "discovery" in order to properly undermine the plaintiff's claim of standing as a result of the attachment of the blank endorsement to the plaintiff's note after summary judgment was rendered in favor of the plaintiff. We decline to review this claim because it is inadequately briefed and unsupported by an adequate record.

In the context of this claim, which is related to the denial of the defendant's right to discovery and a new trial, the defendant refers only to Judge Calmar's denial of her application for issuance of subpoenas by a self-represented party. The plaintiff, in its appellate brief,

has interpreted the defendant's claim as being related to this ruling. Presumably, out of an abundance of caution, the plaintiff has briefed the issue of whether the court abused its discretion in not permitting the defendant to subpoena its attorneys prior to the hearing on the motion for a judgment of strict foreclosure. The denial of those applications, however, are not encompassed in the defendant's stated claim or discussed in her brief. Moreover, it was two different judges, Judge Nazzaro, in granting the plaintiff's motion to quash, and Judge Cosgrove, in denying her second application for subpoenas, who denied the defendant's request to subpoena the plaintiff's attorneys.

In addressing her claim for a denial of "discovery," the defendant briefly refers to the court's failure to allow her to issue subpoenas "for interrogatories" and then specifically refers only to the transcript of the hearings on the motion for a judgment of strict foreclosure before Judge Calmar on October 30, 2017, as the source for this ruling. First, we note that subpoenas are not used for discovery or for the purpose of posing interrogatories. Judge Calmar, during the hearing on the motion for a judgment of strict foreclosure, denied the defendant's application to subpoena Duckett and Mueggenberg as witnesses as "moot" because the defendant's request was relevant to the issue concerning the blank endorsement, which he determined Judge Koletsky already had addressed.

Construing the defendant's "discovery" claim to encompass Judge Calmar's ruling on her September 6, 2017 application for subpoenas, we note that the rationale for his ruling—that Judge Koletsky had fully considered her claims as to the late emergence of a blank endorsement to the note—is not referred to in the defendant's brief. The issue of whether Judge Calmar's ruling on her application for subpoenas was an abuse of discretion is not even discussed except for her bare conclusory assertion that "the court, in an abuse of

discretion, denied the defendant discovery on the blank endorsement . . . .'' We, therefore, conclude that any claim with respect to the denial of her application for subpoenas has been inadequately briefed. ''Although we are solicitous of the rights of pro se litigants . . . [s]uch a litigant is bound by the same rules . . . and procedure as those qualified to practice law. . . . [W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.'' (Citation omitted; internal quotation marks omitted.) *Thompson* v. *Rhodes*, 125 Conn. App. 649, 651, 10 A.3d 537 (2010); see also *Packard* v. *Packard*, 181 Conn. App. 404, 405 n.3, 186 A.3d 795 (2018).

In addition, as we previously determined relative to the defendant's claim regarding the denial of her motion for a new trial, whether Judge Calmar's denial of her application for subpoenas as moot was an abuse of discretion would necessitate a review of the transcript of the proceedings that occurred before Judge Koletsky, and the defendant has failed to provide us with a transcript of those proceedings. Because the defendant has failed to adequately brief her claim or to provide this court with an adequate record to review it, we are unable to consider its merits.

III

The defendant's final claim is that the court erred in striking two counts of her counterclaim alleging CUTPA and TILA violations.[24] Relying on the reasons explained and the authority set forth in part II B of this opinion,

[24] The defendant also claims that the court improperly ''dismissed'' her special defenses. Although she filed a series of counterclaims, she never filed any special defenses, only a disclosure of defenses on February 2, 2015. There are no special defenses included in her answer to the complaint. Moreover, she does not identify any particular ruling wherein the court ''dismissed'' her special defenses.

we decline to review this claim because it is inadequately briefed.

"Claims are . . . inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Citation omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208, cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

Those portions of the defendant's principal and reply briefs that address the stricken counts of her counterclaim under CUTPA and TILA fail to address, much less analyze, the standard of review with respect to motions to strike, the application of the second limitation to the rule that a statute of limitations must be pleaded as a special defense, as set forth in *Forbes* v. *Ballaro*, supra, 31 Conn. App. 239, on which the trial court relied, or the precise nature of the allegations pleaded in her revised counterclaim that rendered her claims legally sufficient to refute the court's conclusion that the statutes of limitations relevant to her TILA and CUTPA claims had expired. In her principal and reply briefs, the defendant also improperly alludes to additional facts concerning an alleged denial of her right to a mortgage modification or other relief programs as a violation of CUTPA, which were not alleged in the operative revised counterclaim.[25]

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.

[25] The defendant also failed to include copies of the relevant pleadings and the court's memorandum of decision striking her counterclaim in her appendices, in violation of Practice Book § 67-8 (b) (1).

NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD AND SONS, INC., ET AL.
(AC 41464)

Lavine, Keller and Elgo, Js.

Syllabus

The petitioner, N Co., filed a petition for a writ of habeas corpus on behalf of three elephants that it alleged were being illegally confined by the named respondents, C Co., a zoo, and C Co.'s president, W. N Co. alleged that elephants are autonomous beings who live complex emotional, social and intellectual lives, and possess complex cognitive abilities that are sufficient for common-law personhood. N Co. challenged the respondents' detention of the elephants and sought the common-law right to bodily liberty for them, but did not challenge the conditions of their confinement or the respondents' treatment of them. The habeas court declined to issue a writ of habeas corpus pursuant to the applicable rule of practice (§ 23-24 [a] [1] and [2]). The court concluded that it lacked subject matter jurisdiction because N Co. lacked standing to bring the habeas petition on behalf of the elephants. The court also determined that N Co., which failed to allege that it possessed any relationship with the elephants, did not satisfy the prerequisites for establishing next friend standing, and that the petition was wholly frivolous on its face. On N Co.'s appeal to this court, *held*:

1. The habeas court properly concluded that it lacked subject matter jurisdiction over N Co.'s habeas petition and declined to issue a writ of habeas corpus; because the elephants, not being persons, lacked standing to file a habeas petition in the first instance, N Co. could not establish that it had next friend standing to file a petition for a writ of habeas corpus on behalf of the elephants, as the real party in interest for whom a next friend seeks to advocate must have standing, and there was no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in interest.

2. The habeas court properly declined to issue a writ of habeas corpus, as elephants do not have standing to file a habeas petition, they have no legally protected interest that can be adversely affected, and they are incapable of bearing legal duties, submitting to societal responsibilities or being held legally accountable for failing to uphold those duties and responsibilities: there are profound implications for a court to conclude that an elephant, or any nonhuman animal, is entitled to assert a claim in a court of law, as there is a lack of authority for recognizing a nonhuman animal as a person for purposes of habeas corpus, which would upend this state's legal system, our habeas corpus jurisprudence contains no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics, there is no instance in our common law in

which a nonhuman animal or representative for it has been permitted to bring a lawsuit to vindicate the animal's own purported rights, and animals under Connecticut law, as in all other states, have generally been regarded as personal property; moreover, because an elephant is incapable of bearing duties and social responsibilities, as required under the social compact theory of article first, § 1, of the state constitution, and the legislature has statutorily (§ 52-466 [a]) authorized only a person to file an application for a writ of habeas corpus when the person claims to be illegally confined or deprived of liberty, and the term person has never been defined in our General Statutes as a nonhuman animal, this court would not disturb the common law concerning who may seek habeas relief in light of habeas corpus legislation, the lack of any indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, and the lack of precedent recognizing that animals can possess their own legal rights.

Argued April 22—officially released August 20, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the court, *Bentivegna*, *J.*, rendered judgment declining to issue a writ of habeas corpus, from which the petitioner appealed to this court; thereafter, the court, *Bentivegna*, *J.*, denied the petitioner's motion to reargue and for leave to amend its petition, and issued an articulation of its decision. *Affirmed.*

Steven M. Wise, pro hac vice, with whom were *David B. Zabel* and, on the brief, *Barbara M. Schellenberg*, for the appellant (petitioner).

Thomas R. Cherry filed a brief for Laurence H. Tribe as amicus curiae.

Thomas R. Cherry filed a brief for Justin Marceau et al. as amici curiae.

Mark A. Dubois filed a brief as amicus curiae.

Jessica S. Rubin filed a brief for The Philosophers as amici curiae.

Opinion

KELLER, J. The petitioner, Nonhuman Rights Project, Inc., appeals from the judgment of the habeas court declining[1] to issue a writ of habeas corpus that it sought on behalf of three elephants, Beulah, Minnie, and Karen (elephants), who are alleged to be confined by the named respondents, R.W. Commerford & Sons, Inc. (also known as the Commerford Zoo), and its president, William R. Commerford, at the Commerford Zoo in Goshen.[2] The petitioner argues that the court erred in (1) dismissing its petition for a writ of habeas corpus on the basis that it lacked standing, (2) denying its subsequent motion to amend the petition, and (3) dismissing the habeas petition on the alternative ground that it was "wholly frivolous." For the reasons discussed herein, we agree with the habeas court that the petitioner lacked standing.[3] Accordingly, we affirm the judgment of the habeas court.

On November 13, 2017, the petitioner filed a verified petition for a common-law writ of habeas corpus on behalf of the elephants pursuant to General Statutes § 52-466 et seq. and Practice Book § 23-21 et seq. The petitioner alleged that it is a not-for-profit corporation with a mission of changing "the common law status of at least some nonhuman animals from mere things,

[1] Although the habeas court stated in its memorandum of decision that it was dismissing the petition, it explicitly relied on Practice Book § 23-24 in doing so. Because that provision authorizes the habeas court to decline to issue the writ, we construe the court's disposition of the petition to be a decision to decline to "issue the writ." See *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 80 n.3, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

[2] The named respondents are not parties to the action. The petitioner alleged in its petition: "As this action is instituted ex parte pursuant to Practice Book § 23-23, respondents have not been served with this petition. The [petitioner] will promptly serve the petition upon the respondents upon the issuance of the writ or as otherwise directed by the court." (Emphasis omitted.)

[3] Given our resolution of the petitioner's first claim, we need not address the petitioner's other claims. See footnote 7 of this opinion.

which lack the capacity to possess any legal rights, to persons, who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." (Internal quotation marks omitted.) The petitioner alleged that the named respondents are illegally confining the elephants.

The petition makes clear that it "challenges neither the conditions of [the elephants'] confinement nor [the] respondents' treatment of the elephants, but rather the fact of their detention itself . . . ." It is "not seeking any right other than the common-law right to bodily liberty" for the elephants. The petition states that determining "[w]ho is a 'person' is the most important individual question that can come before a court, as the term person identifies those entities capable of possessing one or more legal rights. Only a 'person' may invoke a common-law writ of habeas corpus, and the inclusion of elephants as 'persons' for that purpose is for this court to decide." The petition further alleges that "[t]he expert affidavits submitted in support of [the] petition set forth the facts that demonstrate that elephants . . . are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives, and who possess those complex cognitive abilities sufficient for common-law personhood and the common-law right to bodily liberty protected by the common law of habeas corpus, as a matter of common-law liberty, equality, or both."

On December 26, 2017, the habeas court issued a memorandum of decision. Therein, pursuant to Practice Book § 23-24 (a) (1),[4] it declined to issue a writ of habeas corpus because it concluded that the petitioner lacked

[4] Practice Book § 23-24 provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

standing to bring the petition on behalf of the elephants. The court concluded that the petitioner failed to satisfy next friend standing "[b]ecause the petitioner . . . failed to allege that it possesses any relationship with the elephants . . . ." (Emphasis omitted.) Additionally, pursuant to Practice Book § 23-24 (a) (2), the court declined to issue a writ for the elephants because it concluded that the petition was wholly frivolous on its face. On January 16, 2018, the petitioner filed a motion to reargue and for leave to amend its petition. The court denied those motions in a memorandum of decision dated February 27, 2018. This appeal followed.[5]

I

The petitioner first claims that the court erred in concluding that it lacked subject matter jurisdiction on the ground that the petitioner did not have standing to bring the petition on behalf of the elephants. It contends that "Connecticut law permits even strangers to file habeas corpus petitions on another's behalf," and neither § 52-466 (a) (2) nor Practice Book § 23-40 (a) limit who may bring a habeas corpus petition. It argues that although the "court correctly stated that '[o]utside the context of child custody, a petitioner deemed to be a "next friend" of a detainee has standing to bring a petition for [a] writ of habeas on the detainee's behalf,' "

"(1) the court lacks jurisdiction; [or]

"(2) the petition is wholly frivolous on its face . . . ."

As we explained in *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 82–83, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018), "Practice Book § 23-24 is intended to permit a habeas court to conduct a preliminary review of a petition prior to further adjudication of the writ to weed out those petitions the adjudication of which would be a waste of precious judicial resources either because the court lacks jurisdiction over it, the petition is wholly frivolous, or it seeks relief that the court simply cannot grant."

[5] After commencing this appeal, the petitioner filed with the habeas court a motion for articulation, which the court denied in part on May 23, 2018. The petitioner filed a motion for review with this court on June 5, 2018. On July 25, 2018, this court granted review but denied the relief requested by the petitioner.

the court erroneously relied on our Supreme Court's decision in *State* v. *Ross*, 272 Conn. 577, 597, 863 A.2d 654 (2005), which cited to *Whitmore* v. *Arkansas*, 495 U.S. 149, 163, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990), concluding that the petitioner could not serve as next friend to the elephants because it had failed to allege a "significant relationship" with the elephants. In the petitioner's view, Connecticut has neither adopted the second prong of the next friend test set forth in *Whitmore*, nor its dicta regarding "significant relationship."

We begin by setting forth our standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . 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.) *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 127–28, 836 A.2d 414 (2003).

On the basis of our plenary review of the issue of standing in this case, we conclude that the trial court's determination that the petitioner lacked standing to file a petition for a writ of habeas corpus on behalf of the elephants was correct. We need not, however, reach the issue of whether the court correctly determined that the petitioner was required, and failed, to allege a significant relationship with the elephants because we conclude that the petitioner lacked standing for a more fundamental reason—the elephants, not being persons, lacked standing in the first instance.[6] We briefly explain.

[6] Although we resolve the legal issue of standing on a slightly different basis than that on which the habeas court relied, we nonetheless are satisfied that, in its appellate brief, the petitioner extensively has addressed the ground on which we rely. Indeed, the petitioner addresses in at least ten pages of its brief why the elephants, which it argues are autonomous beings, should be afforded personhood status for purposes of habeas corpus.

Next friend standing essentially allows a third party to advance a claim in court on behalf of another when the party in interest is unable to do so on his or her own. See *Phoebe G.* v. *Solnit*, 252 Conn. 68, 77, 743 A.2d 606 (1999) ("the general rule is that a next friend may not bring an action for a competent person"); see also *El Ameen Bey* v. *Stumpf*, 825 F. Supp. 2d 537, 559 (D. N.J. 2011) ("[u]nder the 'next friend' doctrine, standing is allowed to a third person so this third person [can] file and pursue a claim in court on behalf of someone who is unable to do so on his or her own"). The "next friend" does not himself become a party to the action in which he participates, but simply pursues the action on behalf of the real party in interest. See *State* v. *Ross*, supra, 272 Conn. 597 ("a person who seeks next friend status by the very nature of the proceeding will have no specific personal and legal interest in the matter"); see also *Whitmore* v. *Arkansas*, supra, 495 U.S. 163 ("[a] 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest"). Thus, it is apparent that the real party in interest for whom the "next friend" seeks to advocate for, must have standing in the first instance. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 603 (4th Cir. 2002) (noting that "a person who does not satisfy Article III's standing requirements may still proceed in federal court if he meets the criteria to serve as next friend of someone who does"). As we will discuss in part II of this opinion, we conclude that the elephants do not have standing to file a petition for a writ of habeas corpus. It follows inexorably that the petitioner cannot satisfy the prerequisites for establishing next friend standing, for there is no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in inter-

est.[7] Accordingly, we conclude that the court properly determined that it lacked subject matter jurisdiction.

II

We explained in part I of this opinion that the petitioner could not establish next friend status without first demonstrating that the elephants had standing in the first instance. We now address why the elephants lack standing.

Our Supreme Court has long held that "[s]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for

[7] Because we conclude that the petitioner cannot establish next friend standing on the ground that the elephants lacked standing in the first instance, we need not address whether the petitioner met the other two prerequisites our Supreme Court has said are necessary to establish next friend status. In *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 653, 659, 866 A.2d 542 (2005), our Supreme Court explained that it evaluated the evidence in the case according to the standards set forth in *Whitmore* v. *Arkansas*, supra, 495 U.S. 163–64, which establishes two prerequisites for demonstrating next friend status. In particular, our Supreme Court explained: "In *Whitmore* v. *Arkansas*, [supra, 149], the United States Supreme Court noted that, to establish next friend status, a person: (1) 'must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . [and] must have some significant relationship with the real party in interest'; id., 163–64; and (2) 'must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.' Id., 163." *In re Application for Writ of Habeas Corpus by Dan Ross*, supra, 659–60 n.7.

As we explained in footnote 3 of this opinion, we need not address the petitioner's claims that the court erred (1) in denying its motion to amend its petition, and (2) dismissing the habeas petition for being wholly frivolous. Even had the petitioner been given the opportunity to amend its petition to add an allegation that the petitioner had a significant relationship with the elephants or that the elephants had no significant relationships to allege, such amendment would not have overcome the fact that the elephants lack standing in the first instance.

determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 207, 994 A.2d 106 (2010).

Only a limited number of courts have addressed the issue of whether a nonhuman animal who allegedly has been injured has standing to bring a claim in a court of law. There are even fewer cases addressing whether a nonhuman animal can challenge its confinement by way of a petition for a writ a habeas corpus. The petitioner asserts that this case "turns on whether [the elephants] are 'persons' solely for the purpose of the common-law right to bodily liberty that is protected by the common law of habeas corpus." In its view, the elephants are entitled to a writ of habeas corpus as a matter of common-law liberty because the writ of habeas corpus is deeply rooted in our cherished ideas of individual autonomy and free choice. It essentially invites this court to expand existing common law. This case, however, is more than what the petitioner purports it to be. Not only would this case require us to recognize elephants as "persons" for purposes of habeas corpus, this recognition essentially would require us to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law. At this juncture, we decline to make such sweeping pronouncements when there exists so little authority for doing so.

Our examination of our habeas corpus jurisprudence, which is in accord with the federal habeas statutes and English common law; see *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 815, 786 A.2d 1091 (2002); reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, 124 App. Div. 3d 148, 150, 998 N.Y.S.2d 248 (2014) ("animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law"), leave to appeal denied, 26 N.Y.3d 902, 38 N.E.3d 828, 17 N.Y.S.3d 82 (2015). Further, a thorough review of our common law discloses no instance in which a nonhuman animal, or a representative for that animal, has been permitted to bring a lawsuit to vindicate the animal's own purported rights. Instead, animals under Connecticut law, as in all other states, have generally been regarded as personal property. See, e.g., *Griffin* v. *Fancher*, 127 Conn. 686, 688–89, 20 A.2d 95 (1941) (recognizing dogs as property and right of action against one who negligently kills or injures them, so long as dog was properly registered).

Although the lack of precedent in support of the petitioner's action is not necessarily dispositive of this claim, we note, as has another court in addressing a similar claim, that "ascription of rights has historically been connected with the imposition of societal obligations and duties." *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 151. Indeed, article first, § 1, of the Connecticut constitution describes our constitution as a "social compact . . . ." Our Supreme Court has noted that "[t]he social compact theory posits that all individuals are born with

certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.' J. Locke, 'Two Treatises of Government,' book II (Hafner Library of Classics Ed. 1961) ¶ 123, p. 184; see also 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) pp. 12–13." *Moore* v. *Ganim*, 233 Conn. 557, 598, 660 A.2d 742 (1995). One academic has also remarked: "Our society and government are based on the ideal of moral agents coming together to create a system of rules that entail both rights and duties. Being . . . subject to legal duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government." R. Cupp, "Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals," 33 Pace Envtl. L. Rev. 517, 527 (2016). Despite the petitioner's asseverations for why the elephants should be afforded liberty rights, it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities required by such social compact.

Moreover, it would be remiss of this court not to acknowledge that "[a]lthough the writ of habeas corpus has a long common-law history, the legislature has enacted numerous statutes shaping its use . . . ." (Footnote omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 565–66, 153 A.3d 1233 (2017). Our Supreme Court has stated that "statutes are a useful source of policy for common-law adjudication, particularly when there is a close relationship between the statutory and common-law subject matters. . . . Statutes are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time . . . ." (Internal quotation marks omitted.) Id., 566, quoting *C & J Builders & Remodelers, LLC* v. *Geisenheimer*, 249 Conn. 415, 419–20, 733 A.2d 193 (1999).

Section 52-466, which governs the litigation of the writ as a civil matter, provides in relevant part: "(a) (1) An application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the *person* whose custody is in question is claimed to be illegally confined or deprived of such *person's* liberty." (Emphasis added.) Thus, § 52-466 (a) (1) unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus in the judicial district in which that *person* whose custody is in question is claimed to be illegally confined. We have found no place in our General Statutes where the term "person" has ever been defined as a nonhuman animal.[8] See, e.g., General Statutes § 53a-3 (1) (" '[p]erson' means a human being, and, where appropriate, a public or private corporation, a limited liability company, an unincorporated association, a partnership, a government or a governmental instrumentality").

In light of both established habeas corpus legislation and the recent legislative activity in the field; see *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn. 567–69; id., 566 (noting that "the legislature recently

[8] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

Black's Law Dictionary (11th Ed. 2019) defines "person" as "[a] human being," "[t]he living body of a human being," or as "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." Id., pp. 1378–79.

General Statutes § 1-1 (k) instructs: "The words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations."

We note that entities to which personhood has been ascribed by law are formed and governed for the benefit of human beings. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 152 (noting that "[a]ssociations of human beings, such as corporations and municipal entities, may be considered legal persons, because they too bear legal duties in exchange for their legal rights").

engaged in comprehensive habeas reform"); which contain no indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, in addition to the lack of precedent recognizing that animals can possess their own legal rights, we stay our hand as a matter of common law with respect to disturbing who can seek habeas corpus relief. See id., 568 ("given recent legislative activity in the field with no indication that the General Assembly intended to eliminate the use of the common-law habeas corpus remedy to vindicate the statutory right under [General Statutes] § 51-296 (a) . . . we stay our hand as a matter of common law with respect to disturbing the availability of that remedy").

There are profound implications for a court to conclude that an elephant, or any nonhuman animal for that matter, is entitled to assert a claim in a court of law. In the present case, we have little difficulty concluding that the elephants—who are incapable of bearing legal duties, submitting to societal responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities—do not have standing to file a petition for a writ of habeas corpus because they have no legally protected interest that possibly can be adversely affected. See *Gold* v. *Rowland*, supra, 296 Conn. 207 ("[a]ggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected" [internal quotation marks omitted]). Accordingly, we conclude that the court properly declined to issue a writ of habeas corpus on standing grounds.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] Our conclusion that the petitioner in this case lacks standing, however, does not restrict it, or others, from advocating for added protections for elephants or other nonhuman animals at the legislature. We acknowledge that elephants are magnificent animals who naturally develop social structures and exhibit emotional and intellectual capacities. They are deserving of humane treatment whether they exist in the wild or captivity. Our law

STATE OF CONNECTICUT *v.* KRIS MARSAN (AC 40396)

Prescott, Elgo and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crimes of burglary in the third degree and larceny in the sixth degree, the defendant appealed to this court. The defendant, who had worked for the elderly victim as a home aide, assisting her with various daily activities, was convicted in connection with her conduct in taking money and jewelry from the victim's bedroom, while the victim was away at a facility rehabilitating injuries that she had sustained in a fall in her home. During that time, the victim's son had placed a hidden camera in the victim's bedroom, which recorded the defendant rummaging through the victim's dressers and removing cash from an envelope and a tin. The son filed a complaint with the police and provided them with a copy of the video recording. Thereafter, T and M, detectives, visited the defendant at her home to discuss the complaint and the video recording. The defendant invited the detectives into her home, and her minor son who was present was asked to leave the room before they discussed the matter. The detectives then proceeded to play the video on a laptop computer for the defendant, who immediately identified herself as the person depicted in the victim's bedroom removing money from the envelope and the tin, and, thereafter, admitted to taking jewelry from the victim's home. At trial, the defendant filed a motion to suppress all statements she made to T and M at her home on the ground that the statements were the result of a custodial investigation without her being provided with warnings pursuant to *Miranda* v. *Arizona* (384 U.S. 436). Following an evidentiary hearing, the trial court denied the motion to suppress, concluding that the defendant was not in custody for purposes of *Miranda* when she was questioned by the detectives at her home. *Held*:

recognizes—as any pet owner knows—that animals are sentient beings and an entirely different kind of property than a chair or a table. We note that our legislature has enacted comprehensive laws prohibiting abusive behaviors toward animals, which carry penalties that are based on the severity of the abuse and the abuser's intent. See, e.g., General Statutes § 53-247. With respect to elephants, the legislature has passed legislation that gives the Commissioner of Energy and Environmental Protection regulatory power to adopt regulations to regulate trade in Connecticut if such trade of elephant ivory or products manufactured or derived from elephant ivory contributes to the extinction or endangerment of elephants. See General Statutes § 26-315. Whether, as a matter of public policy, nonhuman animals, such as elephants, should possess individual rights and be permitted to bring a claim in a court of law are issues for the legislature to address, if it is so inclined.

1. There was insufficient evidence to support the defendant's conviction of burglary in the third degree, as she was licensed and privileged to be in the victim's home at the time she committed the crime of larceny and at no time was the license either explicitly or implicitly revoked, and this court declined the state's invitation to extend to the facts of this case the narrow exception that a license to remain in a premises is implicitly revoked upon the commission of a crime in a manner that is likely to terrorize its occupants; although the state relied on that exception in support of its contention that there was sufficient evidence for the jury to conclude that the defendant's license to remain in the victim's home was implicitly revoked the moment she committed the larceny, to extend the exception would enlarge the crime of burglary to an untenable degree, and the state presented no evidence from which the jury reasonably could have concluded that that the defendant committed larceny in a manner likely to terrorize the victim or occupants in the victim's home, which evidence was necessary to prove that the defendant's license to be in the victim's home had been revoked and that she had remained in the home unlawfully, as it was undisputed that only the defendant was present in the victim's home when she committed the larceny, and she could not have committed a larceny in a manner likely to terrorize a victim who was not in the home at the time.
2. The defendant could not prevail on her claim that the trial court improperly denied her motion to suppress the statements she made to T and M while watching the video recording in her home, that court having reasonably concluded that the defendant was not in custody for purposes of *Miranda* when she was questioned by the detectives; no reasonable person in the defendant's position would have felt that she was in custody for purposes of *Miranda*, as the record revealed that throughout her encounter with T and M, the defendant was in her home, free to move around and not restrained, that T and M were dressed in plain clothes and were invited by the defendant into her home to discuss the complaint, that although there was a dispute as to who asked the defendant's son to leave the room, the defendant continued to engage in small talk with the detectives in her kitchen as she put away her groceries, that there were no threats of arrest at any point during the encounter, which lasted no more than one hour, and that the defendant remained in the home after the detectives left, and the fact that the defendant was a suspect at the time of the encounter did not transform the encounter into a custodial interrogation.

Argued March 11—officially released August 20, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of burglary in the third degree and with the crime of larceny in the third degree, brought to the Superior Court in the judicial district

of Fairfield, geographical area number two, where the court, *Holden*, *J.*, denied the defendant's motion to suppress certain statements; thereafter, the matter was tried to the jury; verdict and judgment of guilty of one count of burglary in the third degree and of the lesser include offense of larceny in the sixth degree, from which the defendant appealed to this court. *Reversed in part*; *judgment directed; further proceedings*.

James B. Streeto, senior assistant public defender, with whom was *Declan J. Murray*, former certified legal intern, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Richard L. Palumbo*, *Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Kris Marsan, appeals from the judgment of conviction, rendered after a jury trial, of one count of burglary in the third degree in violation of General Statutes § 53a-103, and one count of larceny in the sixth degree in violation of General Statutes § 53a-125b. On appeal, the defendant claims that (1) the evidence was insufficient to establish that she "unlawfully remained" on the victim's property with respect to burglary in the third degree, and (2) the trial court improperly denied her motion to suppress statements she had made to police officers during an interview in her home without being provided with *Miranda*[1] warnings. We agree with the defendant's first claim and, therefore, reverse in part the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. The defendant began working as a home aide for the widowed eighty-six year old victim, Eleanor Beliveau,

[1] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

in May, 2014. The defendant was hired to assist the victim with grocery shopping, cleaning, laundry, and various other daily activities. The victim's long-term insurance plan required that she first pay the defendant directly before seeking reimbursement from her insurer by submitting a form detailing the defendant's work. At all relevant times, the victim's son, Ronald Beliveau,[2] had power of attorney over his mother's affairs and continued to assist with his mother's finances.

In January, 2015, the victim sustained serious injuries from a fall in her home. After her hospitalization, the victim subsequently began her rehabilitation at a facility for the elderly where she would remain until February 13, 2015. As a result, the defendant's work hours were reduced. Nevertheless, she continued to perform tasks at the victim's home and remained in frequent contact with Beliveau. The defendant, however, soon became concerned about the reduction in her hours. At first, she asked Beliveau to submit reimbursement request forms to the victim's provider to frontload her hours so that she could be paid up front. Beliveau declined the offer, believing that to do so would amount to fraud. Frustrated with his answer, the defendant threatened to quit.

From those conversations, Beliveau became suspicious of the defendant's behavior and grew concerned about the valuables that remained in the victim's vacant home. In late January, 2015, his suspicions intensified after he noticed both a discrepancy in the amount of money that the victim kept in an envelope for emergencies and missing jewelry from her dresser. That discovery prompted Beliveau to set up a hidden camera, known as a nanny cam, in the victim's bedroom to capture a dresser containing an envelope with exactly $100 in twenty dollar bills.

[2] For clarity, in this opinion we refer to Eleanor Beliveau as the victim, and to her son, Ronald Beliveau, as Beliveau.

On January 30, 2015, the defendant entered the victim's home and notified Beliveau that she intended to perform various chores. Later that same day, Beliveau and the defendant signed the required insurance form to provide to the victim's insurance provider, which reflected that the defendant had worked from 10:00 a.m. to 1:00 p.m. that day. The following day, Beliveau entered the victim's home to check on the envelope of cash and immediately noticed that $40 was missing. Upon reviewing the nanny cam footage, Beliveau observed the defendant rummaging through the victim's dressers and removing cash from both the envelope in question and a tin in a separate dresser drawer. With this evidence in hand, Beliveau filed a complaint with the Fairfield Police Department and provided the police with a copy of the video recording.

On February 2, 2015, Detectives Jason Tackacs and Kevin McKeon visited the defendant's house to discuss Beliveau's complaint and the footage he had provided to them. When the defendant answered the door, the detectives asked whether she would be willing to speak about the complaint they had received. The defendant agreed and invited Tackacs and McKeon into her home. Upon entering, Tackacs, McKeon, and the defendant eventually made their way into her kitchen, where Tackacs played the recording to the defendant on a laptop computer. As Tackacs played the nanny cam footage, the defendant immediately identified herself as the person depicted in the victim's bedroom removing money from the envelope and the tin, providing various explanations for doing so. Initially, the defendant explained that she was taking the money for the victim to use at the rehabilitation facility. After Tackacs dismissed her account, the defendant next claimed that she took the money because she was upset over not receiving a Christmas bonus. The defendant then offered a third explanation, stating that she was upset over her hours

being cut as a result of the victim's temporary stay at the rehabilitation facility.

As the conversation progressed, the defendant admitted to taking jewelry from the victim's home, including a pin, a necklace and a bracelet, but claimed to have returned the necklace and bracelet after feeling remorseful. When Tackacs asked whether the pin could be located, the defendant claimed to have sold it to a consignment shop that was owned by a friend. Upon leaving the defendant's house, Tackacs provided her with his contact information.

Sometime after the encounter at her home, the defendant contacted Tackacs by telephone to arrange for the return of $80 that she claimed was the total amount taken from the victim's home and the pin she had recovered from the consignment shop. On February 8, 2015, the defendant arrived at the Fairfield Police Department and met with Tackacs in his office. The defendant turned over a money order in the amount of $80 and the pin she claimed belonged to the victim. Thereafter, Tackacs met with Beliveau to discuss his encounter with the defendant and to ascertain whether the pin could be identified. Beliveau was provided with the $80 money order but was unable to identify the pin as belonging to the victim.

On October 31, 2016, the state charged the defendant with two counts of burglary in the third degree in violation of § 53a-103 and a third count of larceny in the third degree in violation of General Statutes §§ 53a-119 and 53a-124. A jury trial was held on November 7, 8, 9, 10, and 14, 2016. On November 7, 2016, the defendant filed a motion to suppress all statements, admissions and confessions made by her to the police and any evidence of the $80 and the pin she returned to the Fairfield Police Department. Following an evidentiary

hearing, the court denied that motion. The jury thereafter found the defendant guilty of one count of burglary in the third degree and the lesser included offense of larceny in the sixth degree. The court sentenced the defendant to a total effective term of five years of incarceration, execution suspended after eighteen months, followed by three years of probation. This appeal followed.

I

The defendant first claims that there was insufficient evidence adduced at trial to support her conviction of burglary in the third degree. Specifically, she argues that she was licensed and privileged to be in the victim's home at the time she committed the crime of larceny and that at no time was the license either explicitly or implicitly revoked. In response, the state argues that there was sufficient evidence for the jury to conclude that the defendant's license to remain in the victim's home was implicitly revoked the moment she committed larceny. We agree with the defendant.

A

Although the defendant characterizes this issue as a claim of insufficient evidence, the critical question is the viability of the legal theory advanced by the state. Therefore, before we can address whether the evidence was sufficient to sustain the defendant's conviction, we must first resolve the legal issue raised by the state regarding the elements of the offense of burglary. Because that issue presents a question of law, our review is plenary. See *State* v. *Hayward*, 116 Conn. App. 511, 515, 976 A.2d 791, cert. denied, 293 Conn. 934, 981 A.2d 1077 (2009).

A person is guilty of burglary in the third degree when he or she "enters or remains unlawfully in a building with intent to commit a crime therein." General Statutes

§ 53a-103 (a). "A person 'enters or remains unlawfully' in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so." General Statutes § 53a-100 (b). "[T]o remain unlawfully means that the initial entering of the building . . . was lawful but the presence therein became unlawful because the right, privilege or license to remain was extinguished." (Internal quotation marks omitted.) *State* v. *Stagnitta*, 74 Conn. App. 607, 612, 813 A.2d 1033, cert. denied, 263 Conn. 902, 819 A.2d 838 (2003).

"A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. . . . Generally, a license to enter premises is revocable at any time by the licensor. . . . It is exercisable only within the scope of the consent given. . . . The term, privilege, is more general. It is a right or immunity granted as a peculiar benefit, advantage, or favor; special enjoyment of a good or exemption from an evil or burden; a peculiar or personal advantage or right esp. when enjoyed in derogation of common right; prerogative. . . . The phrase, licensed or privileged, as used in [our burglary statutes], is *meant as a unitary phrase, rather than as a reference to two separate concepts.*" (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Grant*, 6 Conn. App, 24, 29–30, 502 A.2d 945 (1986).

On appeal, the defendant asserts that the nonviolent nature of her criminal conduct inside the home did not constitute an implicit waiver of her license. It is undisputed that the defendant had permission to be in the victim's home. The state contends that the defendant's license or privilege to remain in the victim's home was implicitly revoked once she engaged in larcenous

conduct, thus constituting "unlawful remaining" for purposes of third degree burglary. In particular, the state contends that the defendant's larcenous conduct went beyond the scope of the consent granted to her and, therefore, constituted an implicit revocation of her privilege to remain in the victim's home. According to the state, because the defendant did not have permission to steal items from the victim's home, she exceeded the scope of her license and, consequently, that license was implicitly revoked by operation of law.[3]

In support of its novel legal theory, the state relies heavily on a narrow exception carved out in a handful of cases that hold that a license to remain within a premises is implicitly revoked upon the commission of a crime committed in a manner that is likely to terrorize its occupants. See *State* v. *Allen*, 216 Conn. 367, 384, 579 A.2d 1066 (1990); *State* v. *Bharrat*, 129 Conn. App. 1, 25–26, 20 A.3d 9, cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011); *State* v. *Morocho*, 93 Conn. App. 205, 218–19, 888 A.2d 164, cert. denied, 277 Conn. 915, 895 A.2d 792 (2006); *State* v. *Reyes*, 19 Conn. App. 179, 192–93, 562 A.2d 27 (1989), cert. denied, 213 Conn. 812, 568 A.2d 796 (1990); *State* v. *Grant*, supra, 6 Conn. App. 29–31. The state is correct that there is support for the proposition that "even if one is lawfully admitted into a premises, the consent of the occupant may be implicitly withdrawn if the entrant terrorizes the occupants." *State* v. *Henry*, 90 Conn. App. 714, 726, 881 A.2d 442, cert. denied, 276 Conn. 914, 888 A.2d 86 (2005). Such

[3] As we understand its argument, the state would have this court rule that *any* larceny committed by a person who is lawfully permitted to be in a building would constitute a felony, irrespective of the manner in which the underlying crime was committed. For instance, a person who takes an unattended $100 bill during a friend's dinner party would mean that her license would have been implicitly revoked by operation of law, and she would therefore be subject to felony prosecution. We decline the state's invitation. To hold otherwise would enlarge the crime of burglary to an untenable degree.

cases, however, are inapposite to the underlying facts of the present matter. Significantly, the factual circumstances in each of the cases relied on by the state concern a defendant who—while lawfully on the premises—committed a crime in a manner that was likely to terrorize its occupants.

For instance, in *State* v. *Reyes*, supra, 19 Conn. App. 191–92, this court rejected the defendant's argument that he had not unlawfully remained where, after being invited into the victim's home, the defendant drew a gun on the victim and stole a radio from her bedroom. This court noted that "[a] drawn gun creates an inherently threatening situation. Evidence that a defendant subsequently pointed a gun at one who had the right to admit him to the premises, and did admit him to the premises, clearly can form the basis for the inference that consent to remain was implicitly withdrawn and thus that the individual 'unlawfully remained' within the meaning of the [burglary] statute." Id., 192–93.

In *State* v. *Allen*, supra, 216 Conn. 380–81, our Supreme Court rejected the defendant's argument that he had not unlawfully remained in a condominium after accompanying an assailant who had been invited by the victim. When the defendant accompanied the assailant into the victim's condominium, the defendant encountered the victim upstairs, naked, gagged, and tied up. Id., 381–82. Our Supreme Court explained that even if he was privileged to be in the victim's home, "it is clear that consent to remain was implicitly withdrawn and thus that the [defendant] unlawfully remained within the meaning of the statute." (Internal quotation marks omitted.) Id., 382, citing *State* v. *Reyes*, supra, 19 Conn. App. 193.

Similarly, in *State* v. *Bharrat*, supra, 129 Conn. App. 3–4, this court rejected the defendant's argument that because he had been invited into the victim's home

before viciously stabbing him in his sleep, he was licensed to be on the premises and, therefore, had not "unlawfully remained" for purposes of his burglary conviction. In rejecting this assertion, this court noted that "even if one is lawfully admitted into a premises, the consent of the occupant may be implicitly withdrawn if the entrant terrorizes the occupants. . . . Here, there was ample evidence that the defendant, having entered the victim's residence lawfully, had engaged in the type of conduct likely to cause terror to an occupant." (Citations omitted; internal quotation marks omitted.) Id., 25–26.

In *State* v. *Morocho*, supra, 93 Conn. App. 208–209, 217, this court rejected the argument that because the defendant received a key and permission from the landlord to enter a basement where another tenant was living, he was licensed to be there when he sexually assaulted the tenant in the middle of the night. In rejecting that assertion outright, the court noted that "[t]he original and basic rationale of the crime [of burglary] is the protection against invasion of premises likely to terrorize occupants. . . . [W]hatever possible license the defendant thought he had to enter the victim's bedroom . . . that license was withdrawn when he refused to identify himself, charged toward the victim, lay on top of her and attempted to kiss and to touch her all over her body." (Citations omitted; internal quotation marks omitted.) Id., 218–19.[4]

[4] As many of these cases have noted, the rationale of the burglary statute concerning likelihood of terror "does not mean . . . that an initial lawful entry followed by an unlawful remaining would be excused. For example, A enters an office building during business hours—a lawful entry since the building is open to the public—and remains, perhaps hidden, after the building is closed with intent to steal. A is guilty of burglary." (Internal quotation marks omitted.) *State* v. *Morocho*, supra, 93 Conn. App. 218–19; see *State* v. *Allen*, supra, 216 Conn. 384 (analyzing purposes of revised burglary statutes); *State* v. *Thomas*, 210 Conn. 199, 207–208, 554 A.2d 1048 (1989) (same). It is undisputed in the present case, however, that the conduct at issue occurred during a time at which the defendant was properly within

In each case cited by the state, a defendant's privilege to remain lawfully on the premises was implicitly revoked because the nature of the defendant's conduct was inherently likely to terrorize occupants.[5] There is a strong rationale for this limited but important exception, because a victim is either unlikely or incapable of withdrawing consent in the face of potential or actual harm. As the state candidly acknowledged at oral argument before this court, to apply the exception to the facts in this case would broaden its application. We decline the state's offer.

Alternatively, the state argues that, notwithstanding the absence of terrorizing conduct, the defendant had exceeded the scope of the consent granted to her because her larceny "was demonstrably outside the scope of the defendant's employment." According to the state, this constituted a separate and distinct basis on which the defendant's license was implicitly revoked.

This court has stated, in dictum, that even if a defendant's conduct was not likely to cause terror to the victim, "the jury could consider the scope of the license or privilege that the victim granted the defendant and, specifically, whether the defendant's remaining in the premises became unlawful because he had exceeded the scope of the victim's consent to remain in the prem-

the victim's residence, as evidenced by the insurance documentation Beliveau submitted to the victim's insurance provider.

[5] See *State* v. *Berthiaume*, 171 Conn. App. 436, 447–48, 157 A.3d 681 (defendant unlawfully remained in victim's home after physically attacking victim), cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017); *State* v. *Stagnitta*, supra, 74 Conn. App. 615–16 (defendant remained unlawfully in his place of employment after displaying large knife and demanding money from his superior, thus satisfying "terror element"); *State* v. *Gelormino*, 24 Conn. App. 563, 571–72, 590 A.2d 480, (even if victim's implicit consent allowed defendant onto premises, that privilege was extinguished upon his vicious assault on victim), cert. denied, 219 Conn. 911, 593 A.2d 136 (1991).

ises."[6] *State* v. *Bharrat*, supra, 129 Conn. App. 26, citing *State* v. *Allen*, supra, 216 Conn. 380. For the reasons already discussed with respect to the state's first argument, we decline to extend this doctrine to the facts presented here.

B

Having resolved the standard to be applied to the element in dispute, we now turn to the defendant's claim of insufficient evidence. "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 816, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the

[6] In *State* v. *Bharrat*, supra, 129 Conn. App. 26, the court relied solely on *Allen* for this proposition. On closer reading, the court in *Allen* simply reiterated the analysis set out in *Grant*, outlining the differences between "privilege" and "license" within the context of property law. See *State* v. *Allen*, supra, 216 Conn. 380, quoting *State* v. *Grant*, supra, 6 Conn. App. 29–30. In particular, this court in *Grant* noted that unlike a privilege, a license "is exercisable only within the scope of the consent given." *State* v. *Grant*, supra, 6 Conn. App. 29–30. In contrast, "licensed or privileged" as used in our burglary statutes was meant "as a unitary phrase, rather than as a reference to [these] two separate concepts." Id., 30. Therefore, it seems more plausible that the "scope of consent" theory was specific to the distinct concept of a license, and not necessarily the "unitary" concept of "licensed or privileged." Although we have declined to extend the "scope of consent" theory for abrogating a license or privilege as applied to the facts in this case, we do not reach whether this theory is well-founded.

basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011). "We also note that our sufficiency review does not require initial consideration of the merits of [the defendant's evidentiary claims] . . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.) *State* v. *Coyne*, 118 Conn. App. 818, 825–26, 985 A.2d 1091 (2010).

"Review of any claim of insufficiency of the evidence introduced to prove a violation of a criminal statute must necessarily begin with the skeletal requirements of what necessary elements the charged statute requires to be proved. . . . Once analysis is complete as to what the particular statute requires to be proved, we then review the evidence in light of those statutory requirements." (Citation omitted; internal quotation marks omitted.) *State* v. *Berthiaume*, 171 Conn. App. 436, 445, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017).

Viewing the evidence in the light most favorable to sustaining the verdict, the state has adduced no evidence from which a jury reasonably could conclude

that the larceny committed by the defendant was undertaken in a manner likely to terrorize the victim or any occupants in the victim's home.[7] Rather, the evidence established quite the contrary. Undermining the state's argument is the undisputed fact that no one but the defendant was present in the home at the time she committed the larceny at issue. Although we acknowledge the fact specific nature of this inquiry, it is, nevertheless, difficult to imagine a scenario where a person could be terrorized by a defendant's conduct absent the person's presence in the home at the time the crime is committed. On the basis of the facts of this case, we conclude that the defendant could not have committed a larceny in a manner likely to terrorize the victim who was not home at the time of the crime.

In sum, for her license to have been implicitly revoked in order to have "remained unlawfully" for purposes of burglary, the defendant must have committed larceny in a manner likely to terrorize occupants of the victim's home. The state has presented no evidence that such circumstances existed here. Accordingly, we conclude that there was insufficient evidence to sustain the defendant's conviction of burglary in the third degree.[8]

II

The defendant also claims that the court improperly denied her motion to suppress the inculpatory statements she made to Tackacs and McKeon in her home

[7] The state argues in the alternative that "[e]ven if some level of terror is necessary, it is difficult to imagine a more terrifying event for such a victim to have a trusted employee steal from her home while the victim was admitted to a medical facility." Although we do not diminish the seriousness of the defendant's crime of stealing from an elderly person's unattended home that she was entrusted to maintain, surely her conduct does not rise to the level of stabbing a victim in his sleep; *State* v. *Bharrat*, supra, 129 Conn. App. 3–4, 20; pointing a gun at a victim; *State* v. *Reyes*, supra, 19 Conn. App. 192–93; or sexually assaulting a victim in the middle of the night. *State* v. *Morocho*, supra, 93 Conn. App. 218–19.

[8] On appeal, the defendant also claims that the court improperly instructed the jury that her larcenous conduct exceeded the scope of her privilege and

on February 2, 2015. Specifically, she argues that her statements made to the detectives while watching the recording of her larceny were the result of a custodial interrogation without her being provided with *Miranda* warnings. The court rejected this argument, finding that the defendant was not in custody for purposes of *Miranda*. We agree with the court.

The following additional facts are relevant to this issue on appeal. On November 7 and 8, 2016, the court held an evidentiary hearing on the motion to suppress and heard testimony from Tackacs, McKeon, the defendant, and the defendant's minor son, D. Tackacs testified that he and McKeon approached the defendant's home on February 2, 2015 dressed in plain clothes with their guns and badges displayed on the outside of their attire. When the defendant answered the door, Tackacs and McKeon identified themselves and asked whether she would be willing to speak to them about Beliveau's complaint. The defendant agreed and invited Tackacs and McKeon inside. Upon entering, Tackacs and McKeon noticed D, and, according to their testimony, suggested to the defendant that D leave the room. Tackacs and McKeon explained that they made the suggestion to make the defendant more comfortable considering the nature of what they intended to discuss with her. The defendant and D both testified that D was ordered to leave as soon as Tackacs and McKeon entered the home. Notwithstanding this point of contention, D did leave the home near the beginning of the encounter. The defendant, Tackacs, and McKeon eventually made their way into the defendant's kitchen. The three engaged in small talk and discussed Beliveau's complaint while the defendant continued to put away her groceries. After McKeon finished setting up

constituted an implicit revocation of her status as a licensee. Because we agree with the defendant that the evidence was insufficient to sustain her burglary conviction, we need not address that issue.

the laptop computer to play the video recording, the defendant sat down next to Tackacs.[9] Upon Tackacs playing the video, the defendant immediately identified herself in the recording, admitted to taking $80 from the victim, and further admitted to taking jewelry from the victim's home.

Before leaving, Tackacs provided the defendant with his contact information in the event she had any more questions about the complaint. The entire encounter lasted no more than one hour, during which the defendant was not given *Miranda* warnings. At no point was the defendant restrained, placed in handcuffs, had her movements restricted, or subjected to any type of force. According to Tackacs and McKeon, they did not make any threatening comments to the defendant, and the defendant did not seem nervous at any time during the encounter. The defendant would thereafter contact Tackacs on a number of occasions with questions, and she eventually returned $80 and the pin to Tackacs at the Fairfield Police Department on February 9, 2015. Tackacs testified that he found the defendant to be very cooperative and pleasant to deal with throughout the process.

We begin by setting forth the applicable standard of review. "On appeal, we apply a familiar standard of review to a trial court's findings and conclusions in connection with a motion to suppress. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . The conclusions drawn by the trial court will be upheld unless they are legally and logically inconsistent with the evidence." (Internal quotation marks omitted.) *State* v. *Janulawicz*, 95 Conn. App. 569, 574, 897 A.2d 689 (2006).

[9] Because there were only two seats available at the defendant's kitchen table, McKeon remained standing to allow the defendant to sit down with Tackacs.

"Our Supreme Court has set forth the following principles regarding the requirement of *Miranda* warnings . . . . Although [a]ny [police] interview of [an individual] suspected of a crime . . . [has] coercive aspects to it . . . only an interrogation that occurs when a suspect is *in custody* heightens the risk that statements obtained therefrom are not the product of the suspect's free choice. . . . Consequently, police officers are not required to administer *Miranda* warnings to everyone whom they question . . . rather, *they must provide such warnings only to persons who are subject to custodial interrogation*. . . . To establish entitlement to *Miranda* warnings, therefore, the defendant must satisfy two conditions, namely, that (1) he was in custody when the statements were made, and (2) the statements were obtained in response to police questioning." (Emphasis in original; internal quotation marks omitted.) *State* v. *Castillo*, 165 Conn. App. 703, 713–14, 140 A.3d 301 (2016), aff'd, 329 Conn. 311, 186 A.3d 672 (2018).

"A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. . . . The ultimate inquiry [therefore] is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (Internal quotation marks omitted.) *State* v. *Richard S.*, 143 Conn. App. 596, 614, 70 A.3d 1110, cert. denied, 310 Conn. 912, 76 A.3d 628 (2013).

"Among the factors that a court may consider in determining whether a suspect was in custody for purposes of *Miranda*, are the following: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview;

(6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 165 Conn. App. 715. "The defendant bears the burden of proving custodial interrogation." (Internal quotation marks omitted.) Id., 716.

We conclude that, in light of the court's subordinate findings and the testimony provided at the evidentiary hearing, it was reasonable for the trial court to conclude that the defendant was not in custody for purposes of *Miranda* when she was questioned by Tackacs and McKeon at her home. After a careful review of the record, there is scant evidence suggesting that the defendant was questioned in a manner that amounted to a custodial interrogation. The court found that throughout the encounter, the defendant was in her home, free to move about, and at no point restrained. Tackacs and McKeon, both dressed in plain clothes, were invited into the defendant's home after she agreed to respond to questions about Beliveau's complaint. Although there is a dispute as to who asked D to leave, the defendant continued to engage in small talk with the detectives in her kitchen as she put away her groceries. There were no threats of arrest at any point during the encounter, which lasted no more than one hour, and the defendant remained in the home after the detectives left. Simply because the defendant was a suspect at the time of the encounter does not transform it into a custodial interrogation. See *State* v. *Turner*, 267 Conn. 414, 440, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004). We therefore conclude that no reasonable person in the defendant's position would have felt that she was in custody for purposes of *Miranda*.

The judgment is reversed only as to the conviction of burglary in the third degree and the case is remanded with direction to render a judgment of acquittal on that charge and for resentencing according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.