IN RE BROOKLYN O.*
(AC 43360)

Lavine, Devlin and Sheldon, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court denying his motion to revoke the commitment of his minor child to the custody of the petitioner, the Commissioner of Children and Families. The minor child had previously been adjudicated neglected and had been committed to the custody of the petitioner. The father claimed that the trial court improperly found that he failed to prove that commitment of the minor child was no longer warranted. *Held* that the trial court properly denied the respondent father's motion to revoke commitment, the father having failed to claim that the trial court's decision was not legally and logically correct, and, in fact, the father's brief was devoid of any legal analysis; moreover, although the father asked this court to adopt an alternative view of the evidence presented to the trial court that was favorable to him, that is not the role of this court, the trial court considered the evidence, including seventeen exhibits that were admitted into evidence and the testimony of several witnesses, and, on the basis of that evidence, determined that the father failed to meet his burden of proving that the cause for commitment of the minor child no longer existed, and this court, on the record before it, could not conclude otherwise.

Argued February 28—officially released March 19, 2020**

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** March 19, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the minor child neglected, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, where the court, *Ginocchio*, *J.*, adjudicated the minor child neglected and committed the minor child to the custody of the petitioner; thereafter, the case was transferred to the judicial district of Middlesex, Child Protection Session at Middletown, where the court, *Burgdorff*, *J.*, denied the respondent father's motion to revoke commitment, and the respondent father appealed to this court. *Affirmed*.

Raymond O., self-represented, the appellant (respondent father).

Benjamin Zivyon, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent father appeals from the judgment of the trial court denying his motion to revoke the commitment of the minor child, Brooklyn O., to the custody of the petitioner, the Commissioner of Children and Families (the commissioner).[1] On appeal, the respondent contends that the court erred in finding that he failed to prove that commitment of the minor child was no longer warranted. We affirm the judgment of the trial court.

The trial court set forth the following relevant procedural and factual history. "[O]n May 26, 2016, [the petitioner] invoked a [ninety-six] hour hold on behalf of [the minor child]. A petition of neglect and a motion for order of temporary custody (OTC) was filed by [the petitioner] on May 27, 2016. The OTC was denied on

[1] The mother of the minor child also filed a motion to revoke the commitment, but withdrew it during trial. Because the mother is not a party to this appeal, any reference herein to the respondent refers to the father.

May 27, 2016. A second OTC was filed on June 2, 2016, and granted by the court. On June 8, 2016, the OTC was sustained by agreement of the parties. [The minor child] was adjudicated neglected and committed to the care and custody of [the petitioner], and was placed with [her] mother at a rehabilitation facility. Specific steps were ordered by the court, including orders that [the] mother remain compliant with the program and her specific steps. On January 8, 2016, a motion to open and change disposition to commitment with protective supervision with [the] mother was granted. The protective supervision expired on August 8, 2017. A third OTC and a second neglect petition was filed on August 10, 2017, due to [the] mother testing positive for cocaine and oxycodone in addition to [the] mother's reports of [the respondent's] controlling and coercive behaviors. The OTC was vacated by the court on August 29, 2017, and [the minor child] was returned to [the] mother's care. . . . On November 26, 2017, [the respondent] reported . . . that [the] mother was under the influence of drugs, along with her boyfriend, in [the minor child's] presence. [The respondent] did not return [the minor child] to [the] mother after a visit. [The mother] tested positive for amphetamines on November 15, 2017. [The respondent] was ordered by the court to return [the minor child] to [the Department of Children and Families' (department)]] office on December 1, 2017, due to a violation of the visitation order. On December 1, 2017, [the petitioner] invoked an administrative hold on the basis that returning her to mother's care would be unsafe. A fourth OTC was filed on December 4, 2017, and consolidated with the trial on the pending neglect petition. On April 5, 2018, the court . . . issued a written decision adjudicating the minor child . . . neglected on the grounds that she [was] being denied proper care and attention, physically, educationally, emotionally or morally; or she [was] being permitted to live under conditions injurious, circumstances or associations injurious to her well-being."

"[The respondent] filed a motion to revoke [the] commitment on June 19, 2018. A motion for contempt filed by the [respondent] on February 6, 2019, was ordered consolidated with the motion to revoke by the court . . . on March 18, 2019."

Following a six day trial, at which the respondent represented himself,[2] the court denied the respondent's motion to revoke the commitment.[3] In denying the respondent's motion to revoke the commitment, the court noted that "[his] issues at the time of the neglect adjudication on April 5, 2018 were his unstable mental health concerns, history of domestic violence, ongoing anger issues and his impulsive and manipulating behaviors. He also presented with an inability to maintain boundaries with the service providers." The court found, inter alia, that, since April 5, 2018, the respondent had "demonstrated an unwillingness or inability to benefit from reunification efforts" and had not been fully compliant with his court-ordered specific steps. The court determined that the respondent "continues to present with the same concerns of manipulations, anger, unstable and controlling behaviors that existed prior to the adjudication date." The court concluded that the respondent had not proved by a fair preponderance of the evidence that the initial cause for commitment no longer exists. The court reasoned: "Specifically, [the respondent's] ongoing anger issues and threatening behaviors cause this court serious concern.

[2] The respondent was appointed standby counsel.

[3] As for the respondent's motion for contempt, the court found, contrary to the respondent's allegations, that the department had complied with its mandate to act on the respondent's application, pursuant to the Interstate Compact Placement for Children, General Statutes § 17a-175, by continuing to consider the appropriateness of potential out of state resources, in addition to other family resources, for the minor child. Although the respondent purports to claim that the court erred in so ruling, he did not list the court's denial of his motion for contempt on his appeal form. Any challenge to that order is thus not properly before this court. See *State* v. *Misenti*, 112 Conn. App. 562, 563–64 n.1, 963 A.2d 696, cert. denied, 291 Conn. 904, 967 A.2d 1220 (2009).

This conduct also presents a potentially dangerous situation for [the minor child], both physically and emotionally. [The respondent] continues to demonstrate a lack of parenting skills including effective discipline and appropriate interaction with [the minor child]. The credible evidence illustrates that [the respondent] does not comprehend the gravity of his conduct and its adverse effect on [the minor child]. Therefore, the court cannot presently find that [the respondent] has achieved the degree of personal rehabilitation that would warrant revocation of [the minor child's] commitment."[4] This appeal followed.

"A motion to revoke commitment is governed by [General Statutes] § 46b-129 (m) and Practice Book § 35a-14A. Section 46b-129 (m) provides: 'The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. No such motion shall be filed more often than once every six months.'

Practice Book § 35a-14A provides in relevant part: "Where a child or youth is committed to the custody of the [c]ommissioner . . . the commissioner, a parent or the child's attorney may file a motion seeking revocation of commitment. The judicial authority may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth. Whether to revoke the commitment is a dispositional question, based on the prior adjudication, and the judicial authority shall determine whether to revoke the commitment upon a fair preponderance of the evidence. The party seeking revocation of commitment has the burden of proof that no cause for commit-

[4] The court further found that it was not in the minor child's best interest to revoke the commitment. The respondent does not challenge this finding on appeal.

ment exists. If the burden is met, the party opposing the revocation has the burden of proof that revocation would not be in the best interests of the child. . . .'' See *In re Zoey H.*, 183 Conn. App. 327, 344–45, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

"On appeal, our function is to determine whether the trial court's conclusion was legally correct and factually supported. We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses. . . . The determinations reached by the trial court that the evidence is clear and convincing will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous." (Internal quotation marks omitted.) *In re Krystal J.*, 88 Conn. App. 311, 314–15, 869 A.2d 706 (2005).

Here, the respondent first takes issue with the need for the commitment of the minor child and certain factual findings set forth in the trial court's April 5, 2018 adjudication of neglect. Because the respondent did not appeal from that judgment, he may not challenge it now.

As to the denial of his motion to revoke the commitment of the minor child, the respondent has not claimed that the court's decision was not legally and logically correct. In fact, the respondent's brief is devoid of legal analysis. Rather, the respondent urges this court to adopt an alternative view of the evidence presented to the trial court, a view that is favorable to him. It is not the role of this court to do so. The trial court considered the evidence presented, including seventeen exhibits that were admitted into evidence, and the testimony of a department program manager, a department program director, a department case supervisor, two department social workers, the respondent's counselor, psychologist and court-appointed clinical psychologist, and the

respondent himself. On the basis of its thorough and careful examination of that evidence, the court determined that the respondent failed to meet his burden of proving that the cause for commitment of the minor child no longer exists. On this basis of the record before us, we cannot conclude otherwise.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* RICKY BUNN, JR.
(AC 42915)

Prescott, Moll and Eveleigh, Js.

Syllabus

Convicted, following a jury trial, of the crimes of murder, conspiracy to commit murder, and possession of a pistol without a permit, the defendant appealed. At trial, during cross-examination of the defendant, the prosecutor asked a question that referenced the defendant's consultation with his counsel. Defense counsel did not object but the trial court, sua sponte, issued a cautionary instruction to the jury. On appeal, the defendant claimed that the prosecutor's question constituted prosecutorial impropriety that deprived him of his due process right to a fair trial. *Held* that the defendant could not prevail on his claim that the prosecutor's question to the defendant, even if it was assumed to be an impropriety, deprived him of his due process right to a fair trial, as any impact of that alleged impropriety was sufficiently cured by the trial court's strong curative instruction; the state presented a strong case, the severity of the alleged impropriety was low, the alleged impropriety was limited to one question that was qualified in nature, and, although the alleged impropriety was not invited by defense counsel, and the alleged impropriety would have been central to the issues before the jury as it involved the defendant's testimony in a criminal trial, any impact the alleged impropriety had on the central issue of credibility was sufficiently cured by the trial court's strong curative instruction to the jury that was specifically directed at the question.

Argued December 2, 2019—officially released March 24, 2020

Procedural History

Information charging the defendant with the crimes of murder, conspiracy to commit murder, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven and tried to the

jury before *Vitale*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Gary A. Mastronardi, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom were *John P. Doyle*, *Jr.*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Ricky Bunn, Jr., appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the prosecutor engaged in prosecutorial impropriety that deprived him of a fair trial. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In April, 2014, the defendant and the victim, Torrence Gamble, were both sixteen years old and members of Piru, a street gang affiliated with the Bloods, which had a local presence in New Haven. Piru had a hierarchical structure, and Jaquwan Burton was one of the Piru leaders in New Haven. At approximately 6:45 a.m. on April 3, 2014, the police arrested Jaquwan Burton, who had been staying at the home of his girlfriend, Laneice Jackson. Jackson called the defendant at 7:08 a.m. and continued to exchange phone calls with him throughout the day.

At approximately 4:40 p.m. that day, Jaquwan Burton called Jackson from the facility in which he was being held and, while on speaker phone, indicated that "somebody set [me] up." Jackson, Jackson's mother, and her boyfriend, Ricky Freeman, a member of a different sect of the Bloods who gave advice to young Piru members,

all thought that the victim had informed the police of Jaquwan Burton's location.[1] Freeman stated that the victim "had to go," and Jaquwan Burton agreed with Freeman that the victim needed to be killed. Freeman instructed John Helwig to "get in contact" with Otis Burton,[2] who was a member of Piru, and the defendant because "they know what to do." Freeman also instructed Helwig to "[g]et up with them and . . . handle it." Helwig was closely associated with Piru but was not a member, and would drive Piru members to "stash houses" and to locations where Piru members would commit crimes.

Helwig contacted the defendant, who, in turn, contacted Otis Burton. When Helwig arrived at the defendant's house, Otis Burton and the defendant, who was dressed in black and carrying a gun, entered Helwig's truck. Helwig informed the defendant and Otis Burton that, according to Freeman, "[the victim] had to die and [the defendant] was supposed to do it." The defendant called Paul Hill, who stated that the victim was at Hill's house, and the defendant instructed Helwig to drive to that location.

Once at Hill's house, the defendant and Otis Burton exited the truck. The defendant and Otis Burton joined the group inside Hill's house, and, after the group dispersed, the victim, the defendant, and Otis Burton walked to a nearby store. While on Daggett Street on the return route from the store, the defendant lagged behind, stating that he needed to tie his shoe, and fired one fatal shot to the back of the victim's head. Helwig received an urgent call from the defendant telling him to "come quick" to retrieve him and Otis Burton. After entering Helwig's truck, the defendant told Helwig to "go, go, go, go." The defendant was crying and Otis

[1] The information that the police received that led to Jaquwan Burton's arrest did not, in fact, come from the victim.

[2] Jaquwan Burton and Otis Burton are not related.

Burton was "choked up." The defendant was holding a nine millimeter handgun that smelled of gun smoke, which, at Helwig's instruction, he placed in a compartment in the back seat of the truck. The defendant admitted to Helwig that he had shot the victim in the back of the head.

Sometime after Helwig drove him home, Otis Burton texted the defendant, questioning if the victim had survived and if he would accuse them, to which text message the defendant responded, "chill, we got it." The defendant and Helwig visited Freeman, and the defendant explained to them how he and Otis Burton lured the victim from Hill's house and how he shot the victim in the back of the head after lagging behind while pretending to tie his shoe.

When the police interviewed the defendant in August, 2014, he stated that, at the time of the incident, he was with Miquel "Quel" Lewis in the Newhallville area of New Haven. According to phone records, the defendant's cell phone connected to cell towers located near the defendant's home around 9 p.m., to cell towers in the Hill neighborhood where the murder occurred from 9:30 to 9:43 p.m., and to cell towers in the Newhallville area of New Haven from 9:50 to 9:52 p.m. The defendant, Otis Burton, and Helwig were arrested in connection with the murder.

While in prison, the defendant wrote a letter "to the love of my life," stating that "you need to tell Quel this. I got a buried blick in my backyard behind my old crib near the garage. . . . I never told anyone in the world w[h]ere it was or I had it. Tell him he needs to go and get it and don't lose my shit." The police understood the word "blick" to be a street term for a firearm and "Quel" to refer to Lewis.

Prior to the start of evidence, the state moved for a sequestration order of potential witnesses, and the court granted the motion. Helwig and Otis Burton both

pleaded guilty to conspiracy to commit murder and testified for the state pursuant to their respective plea agreements. The defendant was the only witness to testify for the defense, and he testified on direct examination to the following version of events. Piru had a positive impact on him by making sure that he stayed in school and did well in sports. On the morning of April 3, 2014, he received a phone call from Jackson, who informed him that Jaquwan Burton had been arrested. That evening, while he was in Helwig's truck with Otis Burton, Helwig mentioned that he thought the victim had informed the police of Jaquwan Burton's location and that "we got to make sure something gets done," but he did not indicate that anything should be done that night. The defendant was "very close" with the victim, with whom he shared a bond due to having been initiated into Piru together. He learned from social media that there was a gathering at Hill's house where everyone was together "smoking . . . [c]hilling . . . whatever," and he called Hill regarding the gathering. He suggested that Helwig drive to Hill's house so that he and Otis Burton could attend. After spending some time at Hill's house smoking marijuana, he, Otis Burton, and the victim left. Otis Burton and the victim went to a nearby store while he urinated behind Hill's house. While on his way to meet up with the victim and Otis Burton, the defendant heard a gunshot and saw someone running from Daggett Street. He began running and saw Otis Burton, who instructed him to call Helwig. While in Helwig's truck, Otis Burton gave Helwig a gun and stated that he had shot the victim.

During cross-examination of the defendant, the following colloquy occurred:

"[The Prosecutor]: So, good afternoon . . . . So, . . . you had the benefit of over the last four days of sitting here throughout this entire trial, isn't that correct?

"[The Defendant]: Yes.

"[The Prosecutor]: And you heard the testimony of everybody that came before you, isn't that correct?

"[The Defendant]: Yes.

"[The Prosecutor]: Including . . . Helwig and [Otis] Burton, correct?

"[The Defendant]: Yes. Yes.

* * *

"[The Prosecutor]: And again—Now, by the way, you were able to sit here and listen to all the testimony that was presented here in this courtroom, right?

"[The Defendant]: You're right.

"[The Prosecutor]: And over there, I'm sure you got a folder and a binder, and you've seen all the reports and all the statements and everything that the New Haven Police Department and the FBI has done and everybody has done in this case, and you've been reading them and you've been analyzing them, isn't that correct?

"[The Defendant]: Yeah. I read them. Yeah. Yeah, I read them.

"[The Prosecutor]: You've—you've been reading them, is that correct . . . ?

"[The Defendant]: Yeah. That's correct. Yeah.

"[The Prosecutor]: And without getting into conversations with your lawyer but you—about—you talked to your lawyers about what's in those statements and those reports, right?

"[The Defendant]: Yeah.

"[The Prosecutor]: So, walking in here, okay, you know everything that's in the documents or the reports prior to hearing the testimony here today?

"[The Defendant]: Uh-huh.

"[The Prosecutor]: Okay. But you, sir, are the only one that got to hear everybody's testimony, isn't that correct?

"[The Defendant]: You're right."

The defendant was the last witness to testify before the close of evidence. The following morning, the court stated on the record that an in-chambers discussion with counsel had occurred regarding the court's proposed jury instructions. The court stated that it would provide the jury with a cautionary instruction. The court inquired of defense counsel, "before we get to the cautionary instruction . . . did you wish to be heard at all? Any objections with respect to the court's proposed instructions?" Defense counsel responded: "No, Your Honor." The court then explained the instruction[3] and asked defense counsel: "[D]id you wish to be heard at

[3] The court stated: "Okay. Regarding the cautionary instruction the court intends to deliver, the court is informed by *State* v. *Santiago*, [100 Conn. App. 236, 917 A.2d 1051, cert. denied, 284 Conn. 933, 935 A.2d 153 (2007)]. . . . Although factually the situation presented here is some[what] different, the state during its cross-examination of the defendant yesterday did question the defendant several times about the fact, essentially, that his presence in the courtroom provided him with the opportunity to tailor his testimony, along the lines of the argument. That is permitted in such cases as *State* v. *Adeyemi*, [122 Conn. App. 1, 998 A.2d 211, cert. denied, 298 Conn. 914, 4 A.3d 833 (2010)]. The court's concern is that the single follow-up question, which incorporated the defendant's review essentially of discovery material with his attorney, may be misconstrued by the jury as somehow being probative of the defendant's guilt. However, I want to be clear that I do not believe it was the state's intention to do so by that question. It was an isolated inquiry among a series of questions on that general topic that mentioned the involvement of counsel, and I don't think that the question itself undeniably or openly hinted to the jury that the fact that the defendant consulted with counsel was probative of his guilt. In fact, the court views the absence of an objection to the question by the defendant as a tacit understanding that it was not the state's intention to do so, and [defense counsel] has not made that claim. However, to avoid even the remote possibility that the isolated question could be viewed in an impermissible manner by the jury, the court intends to instruct the jury to disregard that specific question and answer, and that they are to draw no negative or unfavorable inference from the defendant's exercise of his constitutional right to counsel. And the state obviously is not going to mention that in its closing argument."

all?" Defense counsel answered: "No, Your Honor. I'm in . . . agreement with the court."

During closing argument, the state mentioned the defendant's opportunity to tailor his testimony and did not mention the defendant's consultation with counsel. During its instructions to the jury, the court gave the following cautionary instruction: "Now, ladies and gentlemen, I'm going to provide you with a specific instruction to address an improper question that was asked by the state during its cross-examination of the defendant. I am speaking specifically about a question by the state that generally referenced whether the defendant had consulted with his attorneys when reviewing the police reports and statements connected with this case. I am instructing you specifically that the specific question asked by the state in this regard was improper, and you are to completely disregard it. The question and answer are stricken from the record and may play no role in your deliberations in this case. I want you to be clear that every defendant has a constitutional right to the assistance of counsel, which necessarily means the ability to consult with his attorney. I am therefore instructing you that you may draw no negative or unfavorable inferences from the defendant's exercise of his constitutional right to consult with his counsel when reviewing documents connected to this case. As I have told you repeatedly, the defendant is presumed innocent, and the burden of proof rests entirely with the state to prove the defendant's guilt beyond a reasonable doubt." After completing the jury instructions and outside the presence of the jury, the court asked defense counsel if he wanted to be heard, to which defense counsel responded: "No, Your Honor. I have no exceptions."

The defendant was convicted of murder, conspiracy to commit murder, and carrying a pistol without a permit, and was sentenced to forty-seven years of incarceration. This appeal followed.

The defendant claims that the prosecutor engaged in prosecutorial impropriety by asking him during cross-examination the following question regarding the police and FBI documents: "And without getting into conversations with your lawyer but you—about—you talked to your lawyers about what's in those statements and those reports, right?" The defendant argues that, by asking this question, the prosecutor implied that he contrived his testimony on direct examination using knowledge that he had acquired from two sources: his presence in court during trial; and from the police and FBI documents. He contends that because the prosecutor linked the defendant's consultation with counsel to the latter of the two sources, the prosecutor implied that he had tailored his direct examination testimony with the assistance of counsel. He argues that this impropriety deprived him of his due process right to a fair trial.[4] We disagree.

We review the defendant's unpreserved claim of prosecutorial impropriety under a two step analytical process. "We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"[T]he touchstone of due process analysis in cases of alleged [harmful] prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's

[4] The defendant does not argue on appeal that the alleged impropriety infringed on a specifically enumerated constitutional right. See, e.g., *State* v. *Payne*, 303 Conn. 538, 565, 34 A.3d 370 (2012). Accordingly, the burden is on the defendant to establish that the alleged impropriety deprived him of his due process right to a fair trial. Id.

[actions at trial] so infected [it] with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial . . . we must view the prosecutor's [actions] in the context of the entire trial. . . .

"[I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . [A] determination of whether the defendant was deprived of his right to a fair trial . . . must involve the application of the factors set out . . . in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). As [the court] stated in that case: In determining whether prosecutorial [impropriety] was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case. . . .

"Regardless of whether the defendant has objected to an incident of [impropriety], a reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The application of the *Williams* factors, therefore, is identical to the third and fourth prongs of [*State* v.] *Golding*, [213 Conn. 233, 239–40, 567 A.2d 823 (1989)] namely, whether the constitutional violation exists, and whether it was harmful. . . . Requiring the application of both *Williams* and *Golding*, therefore, would lead . . . to confusion and duplication of effort. . . . Application of the *Williams* factors provides [the appropriate] analysis, and the specific *Golding* test, therefore, is superfluous." (Citations omitted; internal quotations marks

omitted.) *State* v. *Fauci*, 282 Conn. 23, 32–34, 917 A.2d 978 (2007).

It is not improper for a prosecutor to comment on a defendant's opportunity to fabricate or to tailor his testimony as a result of the defendant's presence in the courtroom and his ability to hear the testimony of other witnesses. See *State* v. *Alexander*, 254 Conn. 290, 294–300, 755 A.2d 868 (2000). "Defense counsel are not immunized from being spoken about during criminal trials. . . . If reference to a defendant's decision to consult with counsel is focused and pertinent to a proper issue, rather than part of an invitation to infer guilt, it is not improper. . . . [P]rosecutors tread on extremely thin ice when they comment on a defendant's decision to consult with counsel . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 100 Conn. App. 236, 247, 917 A.2d 1051, cert. denied, 284 Conn. 933, 935 A.2d 153 (2007).

Turning to the present case, even if we assume, without deciding, that the prosecutor's question that referenced the defendant's consultation with counsel was improper, we are unconvinced that the defendant was denied a fair trial. Applying the first *Williams* factor, we conclude that the prosecutor's impropriety was not invited by defense conduct or argument. No question raised by defense counsel on direct examination invited the prosecution to mention his consultation with counsel.

We next examine the second *Williams* factor regarding the severity of the impropriety. In determining whether the prosecutorial impropriety was severe, "it [is] highly significant that defense counsel failed to object to . . . the improper [remark], [to] request curative instructions, or [to] move for a mistrial. . . . A failure to object demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's

right to a fair trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 51. In the present case, the defendant did not object to the prosecutor's question, request a curative instruction, or move for a mistrial. Furthermore, the prosecutor's question did not directly ask the jury to infer guilt from the defendant's consultation with counsel. We conclude that the severity was low.

Next, we examine the third *Williams* factor regarding the frequency of the alleged impropriety. The alleged impropriety was isolated to one question that was qualified in nature, specifying that the prosecutor was not inquiring into conversations with counsel, and was ambiguous as to its meaning. We disagree with the defendant that the alleged impropriety "echoed throughout" all of the prosecutor's proper questions that attacked the defendant's credibility on the ground that he tailored his testimony after having listened to the evidence presented at trial. It is not reasonable to assume that the jury, after hearing the prosecutor's single question pertaining to the defendant's pretrial review of certain documentary evidence with the assistance of counsel, inferred from the defendant's consultation with his counsel that he had tailored his testimony according to the testimony he had heard at his trial. Therefore, we conclude that the allegedly improper comment was infrequent and that this *Williams* factor weighs heavily in the state's favor.

The fourth *Williams* factor is the centrality of the impropriety to the critical issues before the jury. The defendant's argument that the one question at issue called into question the entirety of his version of events by suggesting that it was tailored with the assistance of counsel attributes a larger impact than the narrow focus of the question, which concerned the defendant's review of New Haven Police Department documents with the assistance of counsel. Assuming that one question implicated the defendant's credibility as to his version of events, that issue was not central to the critical

issues in the case. We note that the case did not involve a credibility contest between two witnesses. See, e.g., *State* v. *A. M.*, 324 Conn. 190, 211–12, 152 A.3d 49 (2016) (determining that credibility was central issue that was critical in sexual assault case in which physical evidence was lacking and there were no corroborating witnesses). Although Otis Burton and the defendant were the only two witnesses present at the scene of the murder, Helwig's testimony that he drove the defendant and Otis Burton to Hill's house, that the defendant called Helwig to retrieve him and Otis Burton following the murder, that the defendant was crying and holding a recently discharged firearm when he returned to Helwig's truck following the murder, and that the defendant stated to Helwig that he had shot the victim, corroborated Otis Burton's testimony. Helwig's and Otis Burton's testimony was also corroborated by phone records showing that the defendant had called Helwig around the time of the murder and that the defendant's cell phone connected to cell towers within the vicinity of the murder. Nevertheless, because the defendant's testimony in a criminal trial is often central to the outcome of the case, we conclude that this factor, in the absence of a strong curative instruction, would weigh in favor of the defendant.

The fifth *Williams* factor, the strength of the curative measures adopted, strongly weighs in favor of the state. "[A] prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant. . . . Moreover, [i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions. . . . [A] general instruction does not have the same curative effect as a charge directed at a specific impropriety, particularly when the misconduct has been more than an isolated occurrence." (Citations omitted; internal quotation marks omitted.) *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003).

In the present case, despite the fact that defense counsel did not object to the prosecutor's question, the court, sua sponte, gave a curative instruction. The defendant was the final witness to testify, and the court gave the curative instruction the following day. The curative instruction was specifically directed to the prosecutor's question that underlies the defendant's appeal; the court directed the jury to disregard the question and answer and instructed the jury regarding a defendant's right to consult with counsel. When asked by the court if he wished to be heard regarding the cautionary instruction, defense counsel stated that he agreed with the instruction. The trial court's specific instruction that was directed at the prosecutor's question was sufficient to cure any impropriety.

The defendant contends that the prosecutor's question at issue casts doubt on the entirety of the defendant's testimony on direct examination regarding his version of the events. He argues therefore, that, the curative instruction was insufficient and that the court, instead, should have stricken all of the prosecutor's cross-examination of the defendant that pertained to the defendant's having tailored his testimony. Even if such taint had occurred, the court's narrowly tailored curative instruction that the jury should draw no negative inferences from the defendant's exercise of his right to consult with counsel, was sufficient to cure it. Given the court's thorough instruction, which the jury is presumed to have followed, there is no reasonable possibility that the jury based its verdict on the fact that the defendant had consulted with counsel and tailored his testimony in line with the documents according to the advice of counsel.

We turn now to the final *Williams* factor, concerning the strength of the state's case. Our Supreme Court has "never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defen-

dant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 596, 849 A.2d 626 (2004). In any event, the evidence in the present case was strong. There was evidence that Freeman told Helwig to contact Otis Burton and the defendant and to have them "handle" the situation. Otis Burton testified that the defendant shot the victim in the back of the head. The defendant entered Helwig's truck holding a gun. Around the time of the murder, the defendant telephoned Helwig to retrieve him and Otis Burton, and the defendant, after entering Helwig's truck with a gun that smelled of gun smoke, was crying and instructed Helwig to "go, go, go, go." The defendant explained to Helwig and Freeman how he gave the excuse that he needed to tie his shoe and then shot the victim in the back of the head. Additionally, in response to Otis Burton's text message questioning whether the victim had survived and would accuse them, the defendant responded, "chill, we got it." The defendant's phone records showed that he placed a cell phone call to Helwig at 9:43 p.m. while he was in the vicinity of the murder scene. The police did not recover the murder weapon, and the defendant wrote a letter stating that he had buried a gun in his backyard and requested its removal. The testimony of the other witnesses coupled with the defendant's confession presented a strong case on behalf of the prosecution.

Therefore, we conclude that the *Williams* factors weigh in favor of the state. Any impact the alleged impropriety had on the central issue of credibility was sufficiently cured by the excellent curative instruction given by the trial court. The defendant, therefore, was not deprived of his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

BRENT PLATT, TRUSTEE OF THE VIRGINIA D'ADDARIO SPRAY TRUSTS *v.* TILCON CONNECTICUT, INC.

(AC 41735)

Prescott, Bright and Moll, Js.

Syllabus

The plaintiff, trustee of the V Trust, sought to recover damages from the defendant asphalt production company for, inter alia, breach of contract for the defendant's failure to remit rental payments in accordance with two lease agreements. In May, 1974, the defendant's predecessor in interest entered into separate, twenty year leases with D for two asphalt production plants. The leases were set to expire on December 31, 1993, but provided for an opportunity to extend the terms of the leases. As trustee, the plaintiff owns a 12.5 percent interest in both plants. Trusts for three other individuals each own 12.5 percent and the estate of D owns 50 percent for a total of 87.5 percent interest in the plants. In 1993, the holders of the 87.5 percent interest agreed to amend the leases with the defendant to reduce the amount of rent. The plaintiff did not agree to the amendments. On April 1, 1993, the holders of the 87.5 percent interest executed amendments to the two leases. The amendments made clear that the plaintiff's 12.5 percent interest was not a part of the agreement. After execution of the amendments, the plaintiff considered the defendant a holdover tenant. The defendant continued to remit rental payments to the plaintiff, calculated pursuant to the lease amendments rather than the original lease agreements. The plaintiff accepted and deposited these payments. The defendant twice exercised its rights to extend the amendments to the leases for an additional ten years but did not do so with respect to the plaintiff's 12.5 percent interest. The plaintiff's breach of contract claims were based on the defendant's failure to remit rental payments for the plants in accordance with the terms of the original leases. The trial court found in favor of the defendant, concluding that the original leases expired on December 31, 1993, and, thus, the plaintiff could not prevail on his breach of contract claims. On appeal, the plaintiff claimed, inter alia, that the trial court improperly concluded that the original leases expired on December 31, 1993. *Held* that the trial court properly concluded that the plaintiff could not prevail on his breach of contract claims because the original leases expired on December 31, 1993, and the plaintiff and the defendant did not form an agreement to extend the terms of the original leases beyond the expiration of the primary term; the defendant did not exercise the option to extend the original lease terms with respect to the plaintiff's 12.5 percent interest, the defendant's rent payments, after the expiration of the original leases' primary terms, were formulated commensurate with the provisions of the lease amendments, supporting the conclusion that

the original leases were no longer enforceable contracts between the plaintiff and the defendant and the defendant held over, creating a month-to-month tenancy with the plaintiff's 12.5 percent interest in the plants.

Argued December 11, 2019—officially released March 24, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Wiese, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

F. Dean Armstrong, pro hac vice, with whom was *Edward C. Taiman, Jr.*, for the appellant (plaintiff).

Kevin J. McEleney, with whom were *Matthew K. Stiles*, and, on the brief, *Christopher A. Klepps*, for the appellee (defendant).

Opinion

MOLL, J. The plaintiff, Brent Platt, in his capacity as Trustee of the Virginia D'Addario Spray Trusts (VST),[1] appeals from the judgment of the trial court rendered in favor of the defendant, Tilcon Connecticut, Inc., on, inter alia, two counts of breach of contract.[2] On appeal, the plaintiff claims that the trial court erred by (1) concluding that the original leases between the parties expired on December 31, 1993, (2) determining that the plaintiff's breach of contract claims were barred by the statute of limitations, and (3) concluding that the plaintiff's breach of contract claims also were barred by the doctrine of res judicata. We conclude that the trial court properly determined that the original leases expired in 1993, and, as a result, the plaintiff could not

[1] A "spray trust," also termed a "sprinkle trust," is "[a] trust in which the trustee has discretion to decide how much will be given to each beneficiary." Black's Law Dictionary (11th Ed. 2019) p.1824.

[2] The trial court also rendered judgment in favor of the defendant on the remaining claims, specifically, two counts of unjust enrichment. The plaintiff has not appealed from that portion of the judgment.

prevail on his breach of contract claims.[3] Accordingly, we affirm the judgment of the trial court.

The trial court's comprehensive memorandum of decision sets forth the following findings of fact that are relevant to our resolution of this appeal.[4] "The plaintiff . . . is the successor trustee of the [VST]. Virginia D'Addario is the VST's sole beneficiary. . . . In May, 1974, Virginia D'Addario's father, F. Francis D'Addario (Mr. D'Addario), owned two asphalt production plants (plants). The plants are located in Danbury and Newtown. On May 13, 1974, Mr. D'Addario, as landlord, and Ashland Oil, Inc. (Ashland Oil), as tenant, entered into separate leases for the two plants (original leases). . . . [The defendant] is the successor in interest to Ashland Oil and is the tenant for the two plants located in Danbury and Newtown. . . . [The defendant] is the largest producer of asphalt in the United States. . . .

"In 1976, Mr. D'Addario conveyed fractional interests in the two plants aggregating 50 percent to the 'Spray Trusts' that Mr. D'Addario established for the benefit of his then living children, David, Larry, Marylou, Lisa, and Virginia D'Addario. Mr. D'Addario retained 50 percent interest to himself. In 1990, Lisa D'Addario died and her fractional interest vested in the Spray Trusts of her remaining four siblings. The Spray Trusts for each of Mr. D'Addario's four surviving children, David, Larry, Marylou, and Virginia now each own 12.5 percent of the Danbury and Newtown plants . . . . Mr. D'Addario died on March 5, 1986. From 1986 to the present, the estate of Mr. D'Addario (estate) has owned 50 percent interest in the plants. The estate remains open and pending. . . .

"The original leases . . . are dated May 13, 1974. The term of the Danbury lease was for 'twenty (20) years,

[3] In light of this conclusion, we need not address the plaintiff's second and third claims.

[4] The trial court separated its factual findings into sixty-five individually numbered paragraphs. For the ease of the reader, we omit the court's use of paragraph numbers, as well as the court's references to the record.

beginning on the first day of the calendar month immediately following the month in which erection of the asphalt plant on the premises is accomplished . . . .' The term of the Newtown lease was specified as 'for twenty (20) years beginning on January 1, 1974 and ending on December 31, 1993 . . . subject to earlier termination or further extension . . . .' Briefly stated, and as is relevant to the present dispute, the rent for the original leases was calculated as 'the sum of [15] percent of the gross sales price of each ton of bituminous concrete produced and sold by lessee from the operation of the asphalt plant located on the premises.' . . .

"Pursuant to the terms of the original leases, Ashland Oil and its successor, [the defendant], were granted the option to extend the initial twenty year terms for an additional three ten year periods. If the lessee elected to exercise the options to extend the leases, it was required to provide written notice to the lessor not less than one year prior to the expiration of the preceding term. The original leases provided that, '[i]n the event any of said options are exercised, said extended term or terms shall be upon all of the same terms and conditions . . .' of the original leases. This would include the specified rent based upon 15 percent of the gross sale price of each [ton of] bituminous concrete produced and sold. Pursuant to the terms of the original leases, [the defendant] had the right and obligation to purchase the plants if it chose not to exercise the option to extend the leases. Unless purchased earlier, [the defendant] had the obligation to purchase the plants at the end of the final term in 2024. The purchase price would be calculated as the fair market value pursuant to the process set forth in the original leases. . . . The original leases specified that there could not be any 'amendment, modification, or waiver . . .' from the terms of the lease unless it was in writing and signed. . . .

"From prior to 1993, through 1999, Stanley Ferber, as VST's trustee, was 12.5 percent owner of the plants.

Since approximately 1999, [the plaintiff], as VST's trustee, is 12.5 percent owner of the plants. At all relevant times to date, Nicholas Vitti has been the trustee for the Spray Trusts in favor of David, Larry, and Marylou D'Addario, and in his capacity as trustee he owns 37.5 percent interest in the plants. . . . From 1986 to date, the estate has owned 50 percent of the plants. The current executors of the estate are David and Larry D'Addario. . . . The trusts of these individuals, along with the estate, are the plants' owners.

"Through letter dated January 19, 1993, [the defendant], through its attorney, notified the landlords that it intended to purchase the plants. The letter identified an appraiser retained for the purpose of determining fair market value of the plants. . . . This occurred prior to the expiration of the original leases. . . . Pursuant to the original leases, it was [the defendant's] absolute right to purchase the plants. There was no requirement under the original leases that [the defendant] obtain the landlords' consent prior to purchasing the plants.

"In 1993, [the defendant] was prepared to exercise its right to purchase the plants and had engaged an appraiser. . . . On or about the time that [the defendant] made the notification of purchase, David D'Addario met with Angelo Tomasso. . . . Angelo Tomasso had participated along with Mr. D'Addario in the drafting of the original leases' terms. Mr. D'Addario and Tomasso had a long-standing personal and business relationship. David D'Addario indicated to Angelo Tomasso that he represented all of the D'Addario family landlords, with the exception of Virginia D'Addario, and they did not want to sell the plants. . . . Instead, they wanted the leases renewed. . . . Angelo Tomasso wanted a reduction in the rent, because it was no longer economically feasible to pay the rent specified in the original leases. The price of liquid asphalt had substantially increased, thus, reducing the profit margin in the finished product produced. Angelo Tomasso was very

much aware of the fact that the VST's 12.5 percent interest did not agree with what was being requested of [the defendant]. . . . David D'Addario informed Angelo Tomasso that if there was a problem with the VST, he would handle it. . . .

"Angelo Tomasso contacted Virginia D'Addario in the spring of 1993, by telephone. He asked her if she would consent to an amended lease containing a reduced rent. She told him that she would not consent. This discussion took place prior to the lease amendments being signed. In a letter dated January 14, 1993, Allan Cane, the attorney for the VST, notified the trust landlords and other interested individuals 'that this is a formal notice that the [VST] elects not to renew the lease under the terms expressed by David D'Addario, at this time.' . . . The reference in the letter to 'under the terms expressed' was to a proposal to reduce the rent on the plants.

"In a letter dated January 29, 1993, Lawrence Schwartz, the attorney for Vitti and the estate of Mr. D'Addario, wrote to [the defendant]. He advised [the defendant] that his clients owned 87.5 percent of the plants and that to his clients' 'dismay and surprise,' they learned that the VST does not want to renew the leases. . . . He indicated that the owners of the 87.5 percent are willing to renew the leases 'along the lines of the discussions that David D'Addario has had with Tomasso and request you disregard the communication from Virginia D'Addario's attorney.' . . . The attorney concluded his remarks by stating, 'it is only a [12.5 percent] ownership that is in dispute and that the other owners will clean this matter up on their own.' . . . On February 15, 1993, the attorney for VST wrote a letter to [the defendant's] attorney inquiring as to [the defendant's] intentions regarding the plants. . . . He stated, '[a]t this time, my client would like to know the present status of your intentions as the [e]state has since advised us on January 29, 1993, that it would be attempting to buy

my client out or seek partition . . . and then extend the existing lease.' . . . [The defendant's] attorney responded by letter dated February 18, 1993, and stated, '[t]his is to advise you that my client is proceeding with entering into a lease extension with the Trustee and the [e]state [87.5 percent].' . . . In response, VST's attorney wrote in the March 1, 1993 letter, that [the defendant] 'at least in regard to [VST] . . . is waiving and relinquishing any right to purchase [the plants]' and would be considered a holdover tenant. . . .

"On April 1, 1993, David D'Addario, Lawrence D'Addario, and Albert Paolini (as coexecutors of the estate), and Vitti, as trustee of the Spray Trusts of David, Larry, and Marylou D'Addario, executed an amendment to lease for the Danbury Asphalt Plant. . . . On July 1, 1993, David D'Addario, Lawrence D'Addario, and Albert Paolini (as coexecutors of the estate), and Vitti as trustee for the Spray Trusts of David, Larry, and Marylou D'Addario, executed an amendment to lease for the Newtown Asphalt Plant. . . . Ferber, then trustee for the VST, did not execute the amendments to the Danbury or Newtown plant leases.

"The Danbury and Newtown 'Amendment to Lease' provides in relevant part: 'The [e]state [of Mr. D'Addario] and Vitti are involved in an owners' dispute with the . . . [VST] concerning the lease and related issues.' . . . 'The parties hereto now desire to amend and extend the lease as provided hereafter. NOW THEREFORE, the parties hereto agree that all of the terms and conditions of the lease shall remain in full force and effect subject only to the following specific amendments which shall be incorporated into and become part of the lease.' . . . Among the provisions of the original leases amended was the lease term. In the lease amendments, it was specified that the 'primary term' commenced on April 1, 1975, and terminated on December 31, 2004. . . . The method for calculating rent was also substantially altered. . . . The net result of the

amendments pertaining to rent was a reduction in the amount paid to the landlords.

"The amendment to the original leases included a 'Quiet Enjoyment' provision, which provided: 'The parties acknowledge that the estate and Vitti represent only 87.5 percent of the landlord's interest in the Premises and that [*VST*] *is not a party to this amendment to lease.* [The estate of Mr. D'Addario] and Vitti hereby, jointly and severally, indemnify and agree to defend and hold Tenant harmless from and against any and all loss, cost, liability and expense, including without limitation reasonable attorneys' fees, incurred by Tenant and arising out of or in any way connected with the Owners' dispute or any challenge to the enforceability of this amendment to lease. [The estate of Mr. D'Addario] and Vitti agree to pursue resolution of the Owner's Dispute with all due diligence by purchasing of the interest of the [VST], or by means of a judicial partition action (and subsequent purchase at auction) or otherwise. . . .' (Emphasis added.)

"The estate of Mr. D'Addario and Vitti have not taken steps to resolve the 'owner's dispute' with the VST by purchasing its 12.5 percent interest, or by means of a judicial partition action. There are sufficient funds in the estate to purchase the 12.5 percent VST interest in the plants. . . . Pursuant to the terms of the 'Option to Extend' contained within the lease amendments, [the defendant] exercised its option on two occasions for each plant through December 31, 2024. . . .

"In 1995, Ferber, then VST's trustee, brought suit against [the defendant] in an action captioned *Ferber* v. *Tilcon Connecticut, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-95-0322399-S (*Ferber* lawsuit). This lawsuit was filed by Ferber at the direction of Virginia D'Addario, in response to the lease amendments. . . . The initial complaint in the *Ferber* lawsuit is dated March 31, 1995. . . . The first count

pertains to the Danbury plant, and the second count pertains to the Newtown plant. . . . In each count, the plaintiff alleged that, 'the defendant has neglected and refused to undertake to perform its obligations and covenants under the leasing agreement, but instead has entered into an [a]mendment to that leasing agreement with the [e]state of [Mr.] D'Addario, and [the] other remaining Spray Trusts, but without the plaintiff . . . .' The 'leasing agreement' referred to are the 1974 leases. . . . The plaintiff sought specific performance forcing the purchase of the plants and monetary damages in excess of $15,000. . . .

"In response to the initial complaint, [the defendant] filed its answer and special defense on June 2, 1995. . . . In the answer, [the defendant] denied that it breached the original leases. . . . The special defenses included the allegation that VST had accepted rental payments under the lease amendments. In the trial brief, the VST's attorney argued that [the defendant] breached the original leases by entering into the lease amendments, and failing to purchase the plants. . . .

"VST's acceptance of rental payments was an issue litigated at [the trial in] the *Ferber* lawsuit . . . . The Superior Court, *Grogins*, *J.*, in a memorandum of decision dated August 29, 1996, stated: 'This case turns on whether the language contained in paragraphs sixteen and eighteen [in the original leases] obliges the defendant to purchase a one-eighth interest in the plants. Specifically, the court must determine whether "the premises and the structures and improvements located thereon" can be interpreted to mean one-eighth of the premises, one-eighth of the structures and one-eighth of the improvements, being a fractional share of the total premises.' . . . The court ruled that 'because the leases do not oblige the lessee to purchase a fractional interest in the asphalt plants, the plaintiff's request for specific performance is denied.'

* * *

"'[T]he court enter[ed] judgment for the defendant on all counts.' . . .

"The Appellate Court affirmed the Superior Court's judgment on November 10, 1998. *Ferber* v. *Tilcon Connecticut, Inc.*, 51 Conn. App. 20, 719 A.2d 921, cert. denied, 247 Conn. 952, 723 A.2d 324 (1998). . . .

"Since approximately July, 1993, [the defendant] has paid rent to VST for both plants pursuant to the rent formula in the lease amendments, as opposed to the rent formula contained in the original leases. The VST's trustees have received and deposited the rent payments under the lease amendments since July, 1993. A number of these checks were endorsed 'without recourse' or 'without prejudice.' . . . Over the years, [the defendant] has provided the VST and other landlords with documentation that demonstrates how rent payments have been calculated in accordance with the lease amendments. . . . Initially, and for a period of time, [the defendant] paid the rents on the plants directly to the estate. The estate would then pay the VST and other landlords. During this period of time, [the defendant] would not have the opportunity to know how the VST would endorse the checks, because they would be returned to the estate. . . . At some point in time, the VST requested that [the defendant] pay it directly. These checks were paid to the order of 'Brent A. Platt Trustee.' . . . [The defendant] was of the belief that the dispute over the rent with the VST ended with its conclusion of the *Ferber* lawsuit.

* * *

"From 1994, going forward, [the defendant] provided the VST with accurate data on how many tons of asphalt were sold at each plant at the fixed rate used to generate an income stream. Virginia D'Addario hired a forensic accountant to examine and verify the data. This examination confirmed the accuracy of the data provided

to VST. Virginia D'Addario calculated the monetary difference between the rents due under the original leases and the lease amendments. She examined a six year period of time from April 28, 2009 through April 28, 2015. In order to perform these calculations, she hired a forensic accountant, Steve Pednault, who performed a portion of the work. . . . The calculations are contained in a document prepared for this litigation. . . . The document shows a 'net rental shortfall owed to [VST]' in the amount of $1,435,267.94. . . .

"In 2004, Virginia D'Addario was aware of the fact that [the defendant] had exercised its rights to extend the amendments to the leases for the period of January 1, 2005 through December 31, 2014. . . . However, despite that knowledge, she did not authorize [the plaintiff] as VST's trustee to bring a suit for rent claimed due on the plants. In August, 2013, [the plaintiff] and Virginia D'Addario were aware that [the defendant] exercised its rights to extend the amendments to the leases for an additional ten years through December 31, 2024. . . . Since 1993, the VST has received millions of dollars in rent from [the defendant]." (Citations omitted.)

On September 1, 2015, the plaintiff commenced this action against the defendant. The complaint alleged two counts of breach of contract with respect to the purported failure of the defendant to remit rental payments for the plants in accordance with the terms of the original leases, and two counts of unjust enrichment to recover fair market value of the rental payments in the event of a finding that the original leases were no longer in effect. On May 14, 2018, following a bench trial, the trial court rendered judgment for the defendant on all counts. Specifically, the trial court concluded as follows: The defendant had not exercised its option to extend the original leases with the plaintiff when it entered into the lease amendments with the other holders of the 87.5 percent interest in the plants. The plaintiff's acceptance of the defendant's rental payments in

accordance with the terms of the lease amendments did not imply a contract between them. The court found that "there was no mutual understanding between the plaintiff and the defendant as to the contracts' terms and the amount of rent owed for the plants, and, as a result, the VST notified the defendant and stated that the defendant would be considered 'a holdover [tenant]' upon expiration of the original leases."[5] Accordingly, the court held that "the applicable contracts between the plaintiff and the defendant expired on December 31, 1993, and, therefore, there [were] no enforceable contract[s] between the plaintiff and the defendant." This appeal followed. Additional facts will be set forth as necessary.

The dispositive issue on appeal is whether the trial court properly concluded that the original leases expired on December 31, 1993, such that the plaintiff cannot recover contract damages for a purported shortfall in rent for the period April 28, 2009 to April 28, 2015. The plaintiff maintains that the original leases between the parties did not expire on December 31, 1993. Moreover, the plaintiff asserts that the original leases remain in effect until 2024, subject only to the defendant's prior purchase of the plants. In essence, as was made clear during oral argument before this court, the plaintiff views the original leases not as leases, but as contracts to purchase the plants whereby the defendant could postpone the date of purchase only by exercising its option to extend the lease terms of the

[5] The trial court also concluded that the plaintiff's breach of contract claims were otherwise barred by the six year statute of limitations for contract actions set forth in General Statutes § 52-576 (a) and that the unjust enrichment counts were barred by the doctrine of laches. The court further concluded that all of the plaintiff's claims were barred by the doctrine of res judicata. Because the plaintiff has not appealed from the judgment on the unjust enrichment counts, and our conclusion set forth in this opinion would render any discussion of the defendant's special defenses dicta, we do not address the plaintiff's claims regarding the statute of limitations or res judicata.

agreements.[6] In response, the defendant argues that the original leases were not automatically extended and that, under their express terms, the original leases could be extended only if it exercised the written option to extend them. The defendant contends that because it did not exercise this option with respect to the VST's 12.5 percent interest, the original leases expired at the end of their respective primary terms in December, 1993.[7] We agree with the defendant.

We begin by setting forth the standard of review and the law applicable to our resolution of this appeal. "[A] lease is a contract, and, therefore, it is subject to the same rules of construction as other contracts. . . . The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . .

"In construing a written lease . . . three elementary principles must be [considered]: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instru-

[6] We note that the position of plaintiff's counsel at oral argument that the original leases are not, in fact, leases, is belied, not only by the plaintiff's own references to the "leases" in the complaint and his briefing to this court, but also, more importantly, by the express language of the original contracts, each titled "Indenture of Lease," which are replete with references to "this Lease" and to the parties as "Lessor" and "Lessee."

[7] The record does not appear to indicate the precise date that the Danbury lease took effect. The trial court discussed the Danbury and Newtown leases as both expiring on December 31, 1993, as a result of the expiration of the twenty year primary terms contained therein. The plaintiff also maintains that the primary term of both leases ran through December 31, 1993. The defendant contends that the Danbury lease expired in 1994, and the Newtown lease expired on December 31, 1993. This discrepancy has no impact on our analysis.

ment; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. . . . Furthermore, when the language of the [lease] is clear and unambiguous, [it] is to be given effect according to its terms. A court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [lease] must emanate from the language used in the [lease] rather than from one party's subjective perception of [its] terms." (Citations omitted; internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7–8, 931 A.2d 837 (2007).

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages. . . . In order to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties. . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, to prove the formation of an enforceable agreement, a plaintiff must establish the existence of a mutual assent, or a meeting of the minds . . . ." (Citations omitted; internal quotation marks omitted.) *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 44–45, 145 A.3d 266 (2016).

Although the background of this case is factually complex, our resolution of the plaintiff's claim is relatively straightforward. We first examine the relevant language of the original leases, which are both dated May 13, 1974. Each lease provides for a twenty year primary term.[8] The original leases contain parallel provisions titled "Option to Extend," which provide in relevant

[8] See footnote 7 of this opinion.

part: "Lessor does further grant unto [l]essee the right and option to extend this [l]ease for an additional term of ten (10) years at the expiration of the twenty (20) year [p]rimary [t]erm hereof." The original leases allow for two additional such extensions for a total maximum extension of thirty years. This option may only be exercised by the lessee by providing the lessor with "written notice . . . not less than one (1) year prior to the expiration of the preceding term." In the event the lessee chose not to extend the terms, the leases provided an alternative obligation, namely, a requirement to purchase the leased premises. To that end, the original leases contain matching "[r]equired [p]urchase" provisions, which provide in relevant part: "At the end of the [p]rimary [t]erm of this [l]ease if [l]essee elects not to exercise its option to extend this [l]ease . . . or at the termination of this [l]ease after the . . . options to extend . . . have been exercised, [l]essee shall be obligated to purchase the [p]remises and the structures and improvements located thereon . . . ."[9] Additionally, the original leases each contain a "termination" provision, which provides in relevant part: "In the event during the term of this [l]ease any laws, ordinances or regulations are enacted which have the effect of prohibiting the operation of said asphalt plant . . . [l]essee shall have the right, at its option, to elect to terminate this [l]ease . . . . In addition, [l]essee shall have the right, at its option, to elect to terminate this, [l]ease in the event [l]essor is in violation of [the ingress and egress, and quiet enjoyment provisions without said violation being cured]."[10]

[9] As this court concluded in the appeal in the *Ferber* action, "the only reasonable interpretation of the lease[s] is that the defendant's obligation to purchase becomes mandatory only if 100 percent of the property is sold. The defendant is not required to purchase a fractional share of the properties." *Ferber* v. *Tilcon Connecticut, Inc.*, supra, 51 Conn. App. 23. In this appeal, the plaintiff does not claim that the defendant is required to purchase the VST's fractional share of the leased properties.

[10] The last sentence of the termination provision of the Danbury lease provides: "In addition, [l]essee shall have the right to elect to terminate this [l]ease in the event [l]essor is in violation of [the ingress and egress, and quiet enjoyment provisions without said violation being cured]."

Our review of these original lease provisions reveals that the defendant had two options as the end of the primary terms drew near in December, 1993. First, it could have extended the leases by providing notice to the lessor in the manner required by the terms of the option to extend. Second, if it declined to exercise that option, it had the option to purchase the entirety of the leased property. The defendant chose this second option and did not extend the leases pursuant to their terms. After further negotiations, however, all of the interest holders, with the exception of the VST, agreed to the extensions on modified terms. The VST expressly rejected those terms and did not enter into any other agreement with the defendant.

On the basis of our review of the record, we conclude that the trial court properly held that the plaintiff and the defendant did not form an agreement to extend the terms of the original leases beyond the expiration of the primary term. "In order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make." (Internal quotation marks omitted.) *MD Drilling & Blasting, Inc.* v. *MLS Construction, LLC*, 93 Conn. App. 451, 456, 889 A.2d 850 (2006). The evidence adduced at trial demonstrated that, in 1993, the VST's attorney inquired into whether the defendant intended to purchase the plants. When the defendant informed the VST's attorney that it was entering into lease amendments with the holders of the other 87.5 percent ownership interest of the plants, the VST's attorney explained that, in his view, the defendant waived its right to purchase the plants and would be considered a holdover tenant at the expiration of the original term. In short, there was no meeting of the minds between the parties

with respect to extending the terms of the original leases.

Consequently, the plaintiff's contention that the original leases expire in 2024 and, a fortiori, the defendant has been obligated to pay the plaintiff rent in accordance with the terms of the original leases, is without merit. In support of this claim, the plaintiff emphasizes the trial court's factual finding that, "[u]nless purchased earlier, [the defendant] had the obligation to purchase the plants at the end of the final term in 2024." That finding does not support the plaintiff's position. To be sure, the trial court also found—and the plaintiff does not dispute—that the defendant entered into the lease amendments through 2024 with the holders of the remaining 87.5 percent interest in the plants exclusive of the VST's 12.5 percent interest. Pursuant to the terms of the quiet enjoyment provisions of the lease amendments, the VST was expressly designated as a nonparty to those amendments. Therefore, the lease amendments for each plant through December 31, 2024, have no bearing on the plaintiff's interests in the plants. Rather, the finding of fact relied on by the plaintiff is entirely consistent with this court's prior holding that the defendant was not required to purchase a fractional interest in the plants. See *Ferber* v. *Tilcon Connecticut, Inc.*, supra, 51 Conn. App. 23.

The fact that the defendant held over with respect to the VST's 12.5 percent interest at the expiration of the original leases' primary term, yet paid rent pursuant to the formulation set forth in the lease amendments, supports the conclusion that the original leases no longer formed enforceable contracts between the plaintiff and the defendant. "The mere act of holding over does not create a new tenancy." *FJK Associates* v. *Karkoski*, 52 Conn. App. 66, 68, 725 A.2d 991 (1999). Upon examining the conduct between the parties at the time of the original leases' expiration, it is evident that the plaintiff continued, through the time of trial,

to accept from the defendant newly calculated rental payments in accordance with the terms of the lease amendments after the defendant held over, creating a month-to-month tenancy with the plaintiff's 12.5 percent interest in the plants.[11] See id.; see also *Bellini* v. *Patterson Oil Co.*, 156 Conn. App. 158, 164, 111 A.3d 987 (2015). Therefore, in the absence of contrary evidence, the original leases between the parties were not renewed by virtue of the month-to-month tenancy. See *United Social & Mental Health Services, Inc.* v. *Rodowicz*, 96 Conn. App. 34, 39, 899 A.2d 85, cert. denied, 280 Conn. 920, 908 A.2d 546 (2006); see also *Welk* v. *Bidwell*, 136 Conn. 603, 608, 73 A.2d 295 (1950) ("where the parties are in definite dispute as to any of the essential terms of a new tenancy, certainly no lease can be implied from the fact that the tenant holds over").

Finally, the plaintiff maintains that because the defendant did not exercise the "[t]ermination" provisions of the original leases, those leases automatically extended beyond December 31, 1993. We do not agree. The termination provisions allowed the defendant to terminate the leases in the event that "any laws, ordinances or regulations [were] enacted which [had] the effect of prohibiting the operation of [the] asphalt plant[s]" or if the lessor violated the ingress and egress and quiet enjoyment provisions contained within the leases, and the violation was not cured. Applying the well established principles of contract interpretation to the original leases, we discern that the parties' use of the terms "termination" and "expiration" in distinct provisions of the leases evinced an intent for those terms to connote different meanings. Generally speaking, a contract is *ter-*

[11] A holdover tenant will be considered either a tenant at sufferance if it merely holds over; see *FJK Associates* v. *Karkoski*, supra, 52 Conn. App. 68; or a month-to-month tenant if the lessor continues to accept the lessee's monthly rental payments following the lease's expiration. See *Bellini* v. *Patterson Oil Co.*, 156 Conn. App. 158, 164, 111 A.3d 987 (2015).

minated when "an action [is] taken to end the contract before the end of its anticipated term." (Internal quotation marks omitted.) *Avis Rent-A-Car System, Inc.* v. *Dayton*, 581 Fed. Appx. 479, 483 (6th Cir. 2014). As indicated by the language of the "[t]ermination" provisions, the leases would terminate only by the happening of the stated conditions, which, by their very nature, could have occurred at any time during the lease term. In contrast, a lease typically *expires* when it reaches the end of its anticipated term. The original leases provided an option to extend the lease for an additional term "at the *expiration* of the twenty . . . year [p]rimary [t]erm hereof." (Emphasis added.) Although the option to extend could have been exercised at any time, the extended term would begin only after the twenty year primary term expired. Therefore, the plaintiff's argument improperly conflates the distinction between the termination and the expiration of the original leases.

In sum, during the operative period for which the plaintiff seeks contract damages, the original leases were no longer in effect. Evidenced by the plaintiff's acceptance of rental payments made subsequent to the expiration of the original leases and commensurate with the lease amendments, the parties entered into a month-to-month tenancy. See *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 579, 548 A.2d 744, cert. denied, 209 Conn. 826, 552 A.2d 432 (1988). Because our law "does not impose the original lease terms upon parties who have not agreed that such terms apply to a holdover tenancy"; *Meeker* v. *Mahon*, 167 Conn. App. 627, 638 n.5, 143 A.3d 1193 (2016); the trial court properly concluded that the plaintiff could not prevail on his breach of contract claims.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIA HAMANN ET AL. *v.* BERNARD CARL
(AC 41608)

Lavine, Bright and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, civil theft and unjust enrichment in connection with a $150,000 payment she made on the defendant's line of credit account. The defendant was in the business of collecting rare cars and worked with R, a broker, to find classic cars, purchase them, and, at times, resell them. The plaintiff's former husband, T, was also a broker of classic cars. At one point, the defendant was having cash flow problems and owed $150,000 on his line of credit. R asked T to loan the defendant the money and promised that it would be repaid within seven days. T, who was interested in cultivating a business relationship with the defendant, asked the plaintiff for the funds and the plaintiff, with the understanding that the money would be repaid in seven days, wired the funds directly to the defendant's line of credit account on September 1, 2015. The defendant did not learn until one week after the money had been received that it was from the plaintiff. T contacted the defendant in early January, 2016, seeking repayment of the $150,000, and the defendant refused to repay the money. The defendant filed a motion to dismiss the plaintiff's action for lack of personal jurisdiction, which was denied by the trial court. After a trial to the court, the court rendered judgment in favor of the plaintiff and awarded damages, including treble damages for the civil theft claim pursuant to statute (§ 52-564), and prejudgment interest, from which the defendant appealed to this court. On appeal, the defendant claimed that the trial court erred in denying his motion to dismiss, in finding that he committed civil theft and awarding treble damages, in awarding prejudgment interest on the trebled punitive portion of the damages and in setting the start date for the prejudgment interest on the unjust enrichment award. *Held*:

1. This court declined to review the defendant's jurisdictional challenge on the merits as the defendant waived his right to challenge the trial court's personal jurisdiction because he failed to file a supporting memorandum of law with his motion to dismiss as required by a rule of practice (§ 10-30).
2. The trial court erred in finding that the defendant committed civil theft and in awarding treble damages pursuant to § 52-564; the plaintiff's tort claim could not arise from an implied in law contract because she had no right to possess specific identifiable money once the payment on the defendant's debt was made, which is required to establish a valid claim of civil theft for money owed.
3. In light of this court's determination that the trial court erred in finding that the defendant committed civil theft and awarding treble damages

pursuant to § 52-564, the award of prejudgment interest on that portion of the judgment also failed.

4. The trial court improperly set the start date for the commencement of prejudgment interest on the unjust enrichment damages award; the court set the start date for the prejudgment interest as September 8, 2015, based on the plaintiff's intent to make a loan to the defendant to be paid within one week, however, there was no evidence that the defendant agreed to borrow money from the plaintiff or to repay it within one week and, therefore, the proper start date for the prejudgment interest was January 14, 2016, the date that T first made a demand for repayment on the defendant.

Argued November 20, 2019—officially released March 24, 2020

Procedural History

Action to recover damages for, inter alia, unjust enrichment and civil theft, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the court, *Hon. David R. Tobin*, judge trial referee; subsequently the matter was withdrawn as to the plaintiff Thomas Hamann; judgment for the named plaintiff, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Jeffrey R. Babbin, with whom was *Richard Luedeman*, for the appellant (defendant).

Karen L. Dowd, with whom was *Kenneth J. Bartschi*, for the appellee (named plaintiff).

Opinion

FLYNN, J. The defendant, Bernard Carl, appeals from the judgment of the trial court rendered in favor of the plaintiff, Maria Hamann,[1] on one count of unjust enrichment in the amount of $150,000 and one count of civil theft pursuant to General Statutes § 52-564,[2]

[1] Although the original action was brought by Maria Hamann and Thomas Hamann, Thomas Hamann later withdrew as a plaintiff. Accordingly, we refer to Maria Hamann as the plaintiff.

[2] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

awarding the plaintiff treble damages totaling $450,000, inclusive of the $150,000, and prejudgment interest on both the unjust enrichment and civil theft damage awards. In this appeal, the defendant claims that the trial court erred in (1) denying his motion to dismiss the case for lack of personal jurisdiction, (2) finding that he committed civil theft and consequently awarding treble damages to the plaintiff, (3) awarding prejudgment interest on the punitive portion of the civil theft award, and (4) setting the start date for prejudgment interest on the unjust enrichment award. We conclude that the court properly determined that the defendant had waived any claim of lack of jurisdiction over his person. We agree, however, with the defendant's claims regarding the judgment of civil theft, its consequential treble damages, and prejudgment interest on those damages, as well as the commencement date for the prejudgment interest on the unjust enrichment damages; therefore, we affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our disposition of the appeal. The defendant, Carl, served as a law clerk for Judge David Bazelon, the chief judge of the United States Court of Appeals for the District of Columbia Circuit and later as a law clerk for United States Supreme Court Justice Thurgood Marshall. Following his clerkships, he practiced law and served in governmental and business positions, including as assistant secretary of the United States Department of Housing and Urban Development. Upon his retirement, the defendant maintained a car collection, sometimes selling cars to finance the purchase of more desirable cars of greater value. He agreed to do business with Richard Edwards, a broker, offering him classic cars for sale, despite the fact that he did not entirely trust Edwards.

In November, 2013, the defendant sent a document to Edwards proposing an arrangement that he believed

would minimize his risk, wherein Edwards would find classic cars and, if he deemed them acceptable, the defendant would purchase them. Edwards then would have an exclusive marketing period of sixty days following the purchase to find a buyer for the car at a price acceptable to the defendant. If such a sale took place, the profits would be divided evenly between the defendant and Edwards. The agreement required that all sales of cars be made to buyers who were willing to pay a nonrefundable deposit of 20 percent of the purchase price. If the buyer failed to make the balance of the payment in thirty days, the deposit would be forfeited and retained by the defendant. The agreement also placed limitations on Edwards' ability to act on the defendant's behalf, significant among them that "[n]o agreement not executed by [the defendant] shall be binding upon [him]."

Between 2013 and 2015, the defendant purchased a number of cars that Edwards had located. Several of them were resold when Edwards, acting as a broker, found buyers for them. In the summer of 2015, the defendant believed that he owned an inventory of eight classic cars, which were stored at a dealership known as Specialist Cars of Malton, England (dealership). His investment in the cars in Malton was financed by Ferrari Motor Services (Ferrari). The cars remained at the dealership until they were either resold or delivered to the defendant. After Edwards' exclusive right of sale had expired in May, 2015, the defendant decided to retrieve his cars from the dealership and take personal possession of them.[3]

[3] The defendant testified at trial that, after repeated attempts to obtain possession of his cars failed, he obtained an order from a British directing the dealership and Edwards to deliver the defendant's cars to him. He further testified that Edwards "appeared in the British court on the day the cars were to be turned over to him and testified that the cars had been taken from [the dealership] the previous day when a number of 'burly men' arrived at the dealership and took the cars. [The defendant] further testified that he later learned that four of the eight cars were not even [at the dealership] on the day of the alleged theft."

It was around this time that the plaintiff's former husband, Thomas Hamann (Thomas), became involved. Thomas also acted as a broker in the purchase and sale of classic cars. In 2013, Edwards invited Thomas to meet the defendant, whom Edwards described as his partner. Thereafter, Edwards and Thomas kept in communication. By the end of the summer of 2015, the defendant was facing cash flow problems. On September 1, 2015, the defendant owed an interest payment due on his line of credit with Ferrari. On or before that day, Edwards, who was still brokering deals for the defendant, asked Thomas for a loan of $150,000 on behalf of the defendant, which, he represented, would be repaid by the defendant within one week. Thomas, who was interested in cultivating a business relationship with the defendant, asked the plaintiff for the requisite funds as a loan to the defendant, which Edwards had directed should be paid directly to the defendant's account at Ferrari. Accordingly, at Thomas' request, the plaintiff, with the understanding that the money would be repaid in seven days, wired the funds to Ferrari, crediting the defendant's account.

On September 4, 2015, the defendant received confirmation from Ferrari that a payment of $150,000 had been made to his account. One week later, the defendant learned for the first time that the money was from the plaintiff. Not until early 2016 did Thomas initiate contact with the defendant in an effort to obtain repayment. When the defendant refused to repay the $150,000, the plaintiff commenced the present action, originally sounding in four counts, namely, unjust enrichment, breach of contract, civil theft, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq.

On March 24, 2016, the defendant filed a motion to dismiss for lack of personal jurisdiction, which the court, *Povodator*, *J.*, denied on September 29, 2016. The defendant thereafter filed an answer denying all

essential allegations of the complaint and later filed an amended answer, asserting three special defenses, namely, unclean hands, statute of frauds, and equitable estoppel.[4]

The case was tried to the court, *Hon. David R. Tobin*, judge trial referee, from January 10 through 12, 2018. At the conclusion of evidence, the plaintiff withdrew the second and fourth counts of the complaint, leaving only the unjust enrichment and civil theft counts. On April 25, 2018, the court issued its memorandum of decision, finding in favor of the plaintiff on both the unjust enrichment and civil theft counts. It rejected all of the defendant's special defenses and awarded damages in the amount of $150,000 on the unjust enrichment count and trebled damages pursuant to § 52-564 on the civil theft count, rendering a total judgment of $450,000.[5] Additionally, the court awarded prejudgment interest at a rate of 6 percent per year on the award of $150,000, commencing September 8, 2015, and continuing until January 14, 2016, and prejudgment interest on the $450,000 at a rate of 6 percent per year from January 14, 2016 to the date of judgment. This appeal followed. Additional facts will be set forth as necessary.

[4] The allegations in the special defenses capsulize the defendant's proffered reasons for not returning the plaintiff's $150,000. The allegations, in part, recite that "when the dealership . . . refused [the defendant's] request return the cars to his possession, Edwards reported to [the defendant] that he had a potential buyer for one of his cars, an orange Lamborghini Miura. After [the defendant] refused Edwards' request to delay reclaiming his cars, Edwards is alleged to have offered [the defendant] a $150,000 nonrefundable deposit in return for a two week opportunity to sell the Miura. [The defendant] alleges that he instructed Edwards to wire the $150,000 deposit to his account at [Ferrari] to cover an interest payment on his line of credit. [The defendant] further alleges that when Edwards did not produce a buyer for the Miura he advised Edwards that he was keeping his deposit and renewing his demand for the return of all of his cars."

[5] The trial court provided in its memorandum of decision: "Damages on the unjust enrichment count are included in the $450,000 awarded on the civil theft count. See *Rogan* v. *Rungee*, 165 Conn. App. 209, 222–25, [140 A.3d 979] (2016)." Nonetheless, the court appears to have awarded prejudgment interest on both the $150,000 and the $450,000 multiple of that sum.

I

We first address the defendant's claim that the trial court lacked personal jurisdiction over him, citing the fact that he was not a Connecticut resident and had no contacts with the state relevant to this dispute. For reasons that follow, we conclude that the defendant waived his right to challenge the court's personal jurisdiction and, thus, do not evaluate the claim on its merits.

"Because a challenge to the personal jurisdiction of the trial court is a question of law, our review is plenary." (Internal quotation marks omitted.) *General Electric Capital Corp.* v. *Metz Family Enterprises, LLC*, 141 Conn. App. 412, 419, 61 A.3d 1154 (2013). Additionally, the issues raised necessarily involve interpretation of various Practice Book sections, for which our review is also plenary. *Wells Fargo Bank, N.A.* v. *Treglia*, 156 Conn. App. 1, 9, 111 A.3d 524 (2015).

Additional procedural facts are relevant to this claim. The plaintiff commenced this action on February 1, 2016, by service by a Connecticut state marshal of the nonresident defendant, by service of the writ of summons and complaint on the Secretary of the State of Connecticut pursuant to General Statutes § 52-59b, and by mail service postage prepaid and certified, return receipt requested, on the defendant at 2340 Wyoming Avenue NW, Washington, D.C. 20008. The writ bore a return day of February 23, 2016. It was filed with the Superior Court clerk's office on February 8, 2016. The defendant appeared by counsel on February 22, 2016, two weeks after the plaintiff filed the writ of summons and complaint with the clerk's office, but one day prior to the February 23 return day.

On March 24, 2016, the defendant, through counsel, filed a motion to dismiss the plaintiff's complaint and, on the same date, a motion for extension of time, in which he prayed for a "thirty day extension of time, up

to and including April 23, 2016, to file a responsive pleading to the complaint bearing a return date of February 23, 2016." The defendant never obtained a ruling from the court on his motion for extension of time, and he did not file a memorandum in support of his motion to dismiss at the time he filed the motion. Rather, he filed his supporting memorandum on April 12, 2016. The plaintiff objected to the defendant's motion to dismiss on April 14, 2016, on the grounds that it was untimely because it was not filed within thirty days of the return day and because the memorandum of law in support of the defendant's motion to dismiss was untimely.

Judge Povodator denied the defendant's motion to dismiss, noting that the motion for extension of time to plead was never granted and, as filed, the defendant's motion to dismiss merely stated that there was a challenge to personal jurisdiction without any specific claims to put the opposing party on notice. The court observed: "The motion filed by the defendant merely states that there is a challenge to personal jurisdiction, which could range from an improper return date, improper service, through what ultimately was being claimed here, lack of minimum contacts with the State of Connecticut." The court indicated that there must be some "indication of the precise basis for the motion" and that a "placeholder" motion was not legally sufficient. The court also noted that the issue of the defendant's lack of contacts with the state was not raised in a timely manner, an obvious reference to the defendant's late memorandum, which was not filed with the motion to dismiss, as required by Practice Book § 10-30 (c).

The plaintiff, on appeal, contends that the court properly denied the defendant's motion to dismiss on two grounds: first, because the defendant failed to file it within thirty days of his appearance on February 22, 2016, and second, because the defendant filed the

motion to dismiss without a supporting memorandum of law as required by Practice Book § 10-30 (c), with both grounds serving as independent bases for the defendant's waiver of his personal jurisdiction claim. The defendant argues that his motion was timely made and thus not waived, citing *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 74–75, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012), for the proposition that when a defendant chooses to appear before the return day, as this defendant did by one day, he has thirty days from the return day rather than thirty days from the date of his appearance within which to file a motion to dismiss. We agree with the plaintiff that the defendant effectively waived his jurisdictional challenge because he failed to file a supporting memorandum of law with his motion to dismiss and, therefore, do not reach the merits of the plaintiff's claim that the motion was untimely because the defendant failed to file it within thirty days of his appearance.

Practice Book § 10-32 provides in relevant part: "Any claim of lack of jurisdiction over the person or insufficiency of process or insufficiency of service of process is waived if not raised by a motion to dismiss filed . . . within the time provided by Section 10-30." Practice Book § 10-30 (b) requires a motion to dismiss to be filed within thirty days of the filing of an appearance. In addition to the time limitation prescribed by subsection (b), the defendant's motion to dismiss also is governed by subsection (c) of § 10-30. The language of Practice Book § 10-30 (c) clearly states, as to a motion to dismiss: "This motion shall *always* be filed with a supporting memorandum of law . . . ." (Emphasis added.)

"[I]n attempting to discern the meaning of a particular section of our Practice Book, we look first to the language of the provision." *State* v. *Angell*, 237 Conn. 321, 327, 677 A.2d 912 (1996). We apply the rules of statutory interpretation when interpreting rules of practice. *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586,

594, 181 A.3d 550 (2018). "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citations omitted, internal quotation marks omitted.) Id. "[W]e follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Internal quotation marks omitted.) Id., 595.

Pursuant to Practice Book § 10-30 (c), a motion to dismiss "shall always be filed with a memorandum of law . . . ." This expresses a clear mandate, putting all on notice, that such a motion shall *always* be filed with an accompanying memorandum. The language of the provision is clear and unambiguous. Its plain meaning does not lead to either absurd or unworkable results. Instead, it serves to provide timely notice of the basis for the motion to the party against whom dismissal is sought. Although the court did not expressly find that the defendant's memorandum was untimely, it is clear from its "placeholder" language and its ruling that there must be some indication of the precise basis for the motion, that it concluded that a memorandum was necessary.

The defendant concedes that he was required to submit a memorandum of law with his motion to dismiss but he argues that he attempted to do so by filing a

motion for extension of time.[6] We are not persuaded. The defendant, in his motion for extension of time, requested an additional thirty days, up to and including April 23, 2016, to file a responsive pleading, but he did not mention that the request included an extension of the time to file a memorandum of law in support of his motion to dismiss. In essence, the defendant contends that even though the memorandum originally was not filed with the motion on March 24, 2016, if the court had granted his motion for extension of time until April 23, 2016, then the memorandum that he filed on April 12, 2016, would have been considered filed with the motion to dismiss because it would have been within the responsive pleading period.

The defendant then proceeds to challenge the trial court's denial of the motion for extension of time. "A trial court's decision not to consider a motion properly before it is the functional equivalent of a denial . . . ." (Internal quotation marks omitted.) *Gong* v. *Huang*, 129 Conn. App. 141, 148, 21 A.3d 474, cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011). The defendant claims that the court erroneously ruled that the motion for extension was also untimely. He argues that, "[a]lthough a trial court is ordinarily not *required* to grant a timely motion for extension of time to plead, the trial court articulated no reason for denying the motion other than the court's mistaken determination that it was untimely." This is a mischaracterization of the record. Although Judge Povodator stated in his order denying the defendant's motion to dismiss that the motion for extension of time was untimely, he notes in the same sentence that it "in any event was never granted." This indicates that untimeliness was not necessarily the basis upon which the court failed to rule on the motion. Therefore, we can-

[6] He states in his brief: "[The defendant] understood this requirement, and so on the same day as the motion . . . also filed a motion for extension of time to plead in response to the complaint, so he could timely perfect the dismissal motion."

not review whether the court's denial of the motion for extension of time was proper because the record does not reveal the court's reasoning, and the defendant failed to seek articulation of such reasoning. See *Blum* v. *Blum*, 109 Conn. App. 316, 331, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008). "It is a well established principle of appellate procedure that the appellant has the duty of providing this court with a record adequate to afford review. . . . Accordingly, [w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will, in the absence of a motion for articulation, assume that the trial court acted properly." (Internal quotation marks omitted.) Id. Without the extension of time, the defendant's filing of the supporting memorandum of law occurred outside of the responsive pleading period.

We conclude that the record is clear that the supporting memorandum of law was not filed with the defendant's motion to dismiss on March 24, 2016. In fact, it was not filed until nineteen days later on April 12, 2016, more than thirty days after the defendant filed his appearance on February 22, 2016, and also more than thirty days from the return day of February 23, 2016. Because the memorandum was not filed within the time period prescribed by Practice Book § 10-30 (b), whether calculated from the return day or date of appearance, and the trial court did not grant the defendant's motion for extension of time to file his responsive pleadings, the defendant's motion is deemed filed without a supporting memorandum of law. Therefore, pursuant to Practice Book § 10-32, the defendant waived any claim of lack of personal jurisdiction. See *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 655, 203 A.3d 645 (defendant "clearly waived" lack of personal jurisdiction claim on independent grounds that (1) it failed to file timely motion to dismiss and (2) it failed to file supporting memorandum of law with its motion), cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019); see also

Executive Rental & Leasing, Inc. v. *Gershuny Agency, Inc.*, 36 Conn. Supp. 567, 569–70, 420 A.2d 1171 (1980) (trial court erred in granting movant's motion for summary judgment when movant failed to submit supporting memorandum of law). As such, we decline to review the defendant's jurisdictional challenge on its merits.

II

We next address the defendant's claim regarding whether treble damages for civil theft are allowable under the facts of this case. The defendant claims that Judge Tobin erred in finding that he committed civil theft and, consequently, in awarding treble damages. Specifically, he argues that the plaintiff had no grounds to pursue treble damages for civil theft because her claim rested solely on the defendant's implied in law obligation to pay her money. The plaintiff claimed treble damages on a legal theory that the defendant's withholding of the return of her $150,000 deposited to his Ferrari account constituted civil theft, which entitled her to treble damages pursuant to § 52-564. We agree with the defendant.

"The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law and our review, therefore, is plenary." *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 734, 830 A.2d 228 (2003). Section 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." Civil theft is synonymous with larceny under General Statutes § 53a-119; see *Stuart* v. *Stuart*, 297 Conn. 26, 41, 996 A.2d 259 (2010). Section 53a-119 provides in relevant part that "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ."

Section 53a-119, in relevant part, recognizes the following as one form of larceny: "Acquiring property lost, mislaid or delivered by mistake. A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of larceny if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to it." General Statutes § 53a-119 (4). Therefore, civil theft requires the intent to deprive another of his property, an element which must be proved by the plaintiff. See *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 359, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016). The plaintiff claims that once the defendant became aware that it was the plaintiff who had made the $150,000 payment on his Ferrari account balance, and demand was made for repayment, he wrongfully withheld that payment.

The court found that the defendant was unjustly enriched by the $150,000 payment made by the plaintiff to the defendant's Ferrari account.[7] Additionally, citing to § 53a-119 (4), the court concluded that, although the defendant had received the money by mistake, this did not relieve him from civil theft liability when, "on January 14, 2016, having been fully informed of the facts establishing that he had no legal or equitable right to retain the $150,000, [the defendant] refused to return [it] to [the plaintiff]."[8] The trial court did not find credible the defendant's explanations of why he believed

[7] On appeal, the defendant does not challenge the award of $150,000 to the plaintiff, an amount by which the court found that the defendant was unjustly enriched. The defendant states in his brief that he "does not seek in this appeal to overturn the finding that he cannot equitably retain the money."

[8] "On January 14, 2016, [Thomas] left a detailed voicemail on [the defendant's] mobile phone and followed up with an e-mail to [the defendant] that evening. The e-mail referred to a telephone conversation which Thomas had with [the defendant] a few weeks ago in which [the defendant] allegedly acknowledged that he was indebted to the Hamanns for the $150,000 which

he was entitled to retain the $150,000. It stated in its memorandum of decision: "The court cannot credit [the defendant's] claim that he was entitled to retain the $150,000 . . . as a nonrefundable deposit made by Edwards on a purported sale of the Lamborghini Miura for $650,000. There is no record of any agreement (written or otherwise) which characterized the $150,000 as a nonrefundable deposit . . . ." The court then concluded that, "rather than providing a justifiable reason for his retention of the $150,000, [the defendant's] claims amount to nonviable excuse for his indefensible actions." Consequently, the court found that the defendant's actions constituted civil theft, entitling the plaintiff to treble damages under § 52-564.

On appeal, the plaintiff argues that the court properly determined that the defendant's withholding of the $150,000 constituted civil theft and correctly applied § 52-564 in awarding her treble damages. She argues that civil theft occurs when the plaintiff had possession of or legal title to the money at issue, and the money later is acquired by and subsequently improperly retained by another. She asserts in her brief that "all the plaintiff had to prove, and the trial court had to find, was that the defendant intentionally and without authorization deprived the plaintiff of her funds. There is sufficient evidence to support a finding that as of January 14, 2016, the defendant was aware that he had no basis to retain the funds, yet he refused to repay

had been deposited in [his] account with [Ferrari]. Thomas also conveyed to [the defendant] his shock upon finding that [the defendant], in an e-mail to Edwards, had informed him that he intended to keep the $150,000 as a penalty. Thomas requested that [the defendant] repay the $150,000 to avoid litigation. . . . In [his response to Thomas' e-mail], [the defendant] insisted that the funds deposited to his account with [Ferrari] were a loan [from the plaintiff] to Edwards for which he had no responsibility. He denied having acknowledged his debt to the Hamanns, claiming that what he said was 'if [Edwards] had met his obligations to me, I would have agreed to have the $150,000 of the promised $650,000 proceeds of the sale of [a car] go to you. Sadly, [Edwards] decided to steal that car rather than sell it.' "

them." We disagree with the plaintiff and hold that the trial court erred in applying § 52-564 to the facts of this case.

In *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 804 A.2d 180 (2002), our Supreme Court set forth the general rule that, although money may be the subject of civil theft, "[a]n action for conversion of funds may not be maintained to satisfy a mere *obligation* to pay money." (Emphasis added; internal quotation marks omitted.) Id., 650. "[I]n order to establish a valid claim of . . . [civil] theft for money owed, a party must show ownership or the right to possess specific, identifiable money, rather than the right to the payment of money generally." *Mystic Color Lab, Inc.* v. *Auctions Worldwide, LLC*, 284 Conn. 408, 421, 934 A.2d 227 (2007). "Thus, [t]he requirement that the money be identified as a specific chattel does not permit as a subject of conversion [or civil theft] an indebtedness which may be discharged by the payment of money generally. . . . A mere obligation to pay money may not be enforced by a conversion [or civil theft] action . . . and *an action in tort is inappropriate where the basis of the suit is a contract, either express or implied.*" (Emphasis added; internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 772, 905 A.2d 623 (2006).

Applying both the *Macomber* and *Deming* rules to the case at hand, we conclude that the plaintiff's claim of civil theft fails as a matter of law. Here, the plaintiff's civil theft claim is an action in tort, as it is a civil wrong. Black's Law Dictionary (11th Ed. 2019) p. 1792, defines a "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained . . . ." "We may . . . define a tort as a civil wrong for which the remedy is a common-law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." Id. According to *Deming*, the basis of such

claim, then, cannot be an implied in law contract. "[A]n implied in law contract is another name for a claim for unjust enrichment"; *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 574, 898 A.2d 178 (2006); which is what we have in this case.

Apart from the general legal impediment to recovery of civil theft damages arising out of contract or implied contract, like unjust enrichment, the plaintiff's claim suffers from the same impediment our Supreme Court identified in *Mystic Color Lab, Inc.* v. *Auctions Worldwide, LLC*, supra, 284 Conn. 421–29, namely, that she had no right to possess specific identifiable money. In the present case, as in *Mystic*, the plaintiff did not and could not show a right to possess specific identifiable money to support a claim in tort once she had used her $150,000 to pay the defendant's debt to Ferrari. See id., 427–28 (no evidence in record of intent to form trust, requirement of segregation of funds, or other means of establishing identifiable funds). The plaintiff made a partial payment on a debt owed by the defendant to Ferrari by wiring money, which was directly credited to the defendant's Ferrari account. Although the plaintiff testified that she intended her payment to be a loan that the defendant eventually would repay, there was no evidence that the defendant ever agreed to borrow money from the plaintiff. The trial court found that the defendant did not know that it was the plaintiff who had made the payment on his Ferrari account until one week later. Upon the defendant's refusal to repay the $150,000 after being made aware that the plaintiff had made the payment, the trial court found that the defendant was unjustly enriched, a finding that we leave undisturbed.[9]

[9] The plaintiff was left a creditor of the defendant by this unjust enrichment. "A debtor-creditor relationship arises from a debt owed by one party to another. The debt owed arises from an obligation, often contractual, on the part of the debtor, not from a preexisting property interest of the creditor." *Mystic Color Lab, Inc.* v. *Auctions Worldwide, LLC*, supra, 284 Conn. 419.

We conclude as a matter of law that the court erred in finding that the defendant committed civil theft because the plaintiff's tort claim cannot arise from an implied contract of unjust enrichment and because the plaintiff had no right to specific identifiable money once it was paid to Ferrari. Having concluded so, we find no need to address the defendant's claim that the plaintiff failed to establish the element of malicious intent. On the facts of this case, a claim in tort is improper and, as such, the trial court erred in applying § 52-564. We conclude that the judgment finding the defendant liable for civil theft and treble damages in the amount of $450,000 must be reversed.

III

We next turn to the defendant's claim that prejudgment interest may not be awarded on the trebled punitive portion of the damages award. "The decision to grant interest pursuant to [General Statutes] § 37-3a is reviewed under an abuse of discretion standard." *Whitney* v. *J.M. Scott Associates, Inc.*, 164 Conn. App. 420, 438, 137 A.3d 866 (2016). "To award § 37-3a interest, two components must be present. First, the claim to which the prejudgment interest attaches must be a claim for a liquidated sum of money wrongfully withheld and, second, the trier of fact must find, in its discretion, that equitable considerations warrant the payment of interest." (Internal quotation marks omitted.) Id.

The trial court awarded prejudgment interest on the $450,000 award at a rate of 6 percent per year commencing January 14, 2016. Because we have concluded that the award of trebled punitive damages was improper and should be reversed, the award of interest on that portion of the judgment falls with it.

IV

Finally, we turn to the defendant's claim that the court incorrectly set the commencement date for prejudgment interest on the unjust enrichment award. The

court set the start date for prejudgment interest on the $150,000 award as September 8, 2015. The defendant argues that the proper start date of interest should have been January 14, 2016—the date that Thomas first made demand on the defendant to repay the $150,000 to the plaintiff. We agree with the defendant.

Section 37-3a provides in relevant part that "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable." We review an award of prejudgment interest under the abuse of discretion standard. "The allowance of prejudgment interest as an element of damages is an equitable determination and a matter lying within the discretion of the trial court." (Internal quotation marks omitted.) *Tang* v. *Bou-Fakhreddine*, 75 Conn. App. 334, 346, 815 A.2d 1276 (2003). "Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Hirsch*, 170 Conn. App. 439, 458, 154 A.3d 1009 (2017).

The defendant does not challenge the trial court's authority to award the prejudgment interest but takes issue with the court's setting of the date from which to start calculating that interest. He argues that the proper commencement date should have been January 14, 2016, because it was not until then that the defendant's failure to repay the plaintiff could have become wrongful. He contends that "there was no 'wrongful detention of money' to start the interest clock . . . until Thomas asked [the defendant] to repay [the plaintiff] the $150,000."

We agree with the defendant that the date selected by the trial court for the beginning of the interest period was improper. The court awarded prejudgment interest

on the $150,000 unjust enrichment award commencing September 8, 2015, based on the plaintiff's intent to make an interest-free loan to the defendant, which was to be repaid within one week. Although the plaintiff had characterized her payment of $150,000 to the defendant's Ferrari account as a loan to the defendant, the record is devoid of evidence that the defendant ever agreed to borrow money from the plaintiff, much less to repay it within one week. This was made clear in the trial court's own findings of fact. The court noted that the funds were wired by the plaintiff "in the mistaken belief that she was making a short term interest-free loan to [the defendant]"—thereby suggesting that the defendant did not intend for such to occur—and that "neither the plaintiff nor Thomas notified [the defendant] of their expectation that he would repay the funds." It further found that no demand for repayment of the $150,000 was made until January 14, 2016, but, for a variety of reasons that the trial court found not credible, the defendant refused to pay.

We conclude that, although the court was well within its discretion to award prejudgment interest, the interest should not have commenced until demand for payment was made on the plaintiff's behalf on January 14, 2016. See General Statutes § 37-3a ("interest at the rate of ten per cent a year . . . may be recovered . . . as damages for the detention of money *after it becomes payable*" [emphasis added]). We reverse the portion of the prejudgment interest award from September 8, 2015 through January 14, 2016, and affirm its award commencing from January 14, 2016.

The judgment is reversed as to the civil theft count and the interest awarded thereon, and the award of prejudgment interest from September 8, 2015 through January 14, 2016, on the unjust enrichment count, and the case is remanded with direction to render judgment in favor of the defendant on the civil theft count, and to recalculate, beginning January 14, 2016, the prejudgment interest on the $150,000 damage award for unjust

enrichment; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MICHAEL HALPERIN *v.* RONDA HALPERIN
(AC 40934)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the postjudgment order of the trial court ordering him to include income derived from two entities, C Co. and I Co., in the calculation of his unallocated support obligation. Pursuant to a provision in the parties' separation agreement, which was incorporated into the dissolution judgment, the plaintiff was required to pay the defendant unallocated support, which was to be calculated using a decreasing percentage of the plaintiff's gross base income and quarterly bonuses over a twelve year schedule. That provision also provided that income for purposes of the calculation was the parties' respective total income that had "historically been listed" on line 22, or the equivalent, of their joint 1040 federal tax returns, and expressly included all employment, business and partnership income, but specifically excluded any income received by the plaintiff from patents or inventions that he created or obtained. Following the dissolution of the parties' marriage in 2010, the plaintiff acquired ownership interests in C Co. and I Co. Thereafter, the defendant filed an amended motion for contempt, arguing that the plaintiff had underpaid her unallocated support for the years 2010 through 2013. At the hearing on the motion, the central issue before the trial court was whether, pursuant to the unallocated support provision, income that the plaintiff had earned from C Co. and I Co. and similar future income was to be included in the calculation of the unallocated support. The trial court found that the provision was ambiguous and, crediting the defendant's testimony regarding the meaning of the phrase "historically been listed" as used in the provision, determined that the parties intended to include the income at issue in the plaintiff's total income for purposes of determining his unallocated support obligation. *Held* that the plaintiff could not prevail on his claim that the trial court improperly interpreted the subject provision of the separation agreement in determining that income received from C Co. and I Co. was included in the definition of total income for purposes of calculating the plaintiff's unallocated support obligation: that court's determination that the parties intended to include the income at issue in the plaintiff's total income for purposes of determining his unallocated support obligation was not clearly erroneous, as the term "historically," as used in the provision's income definition, modified "total income," which referenced income on line 22 of

form 1040, total income under the provision expressly included all employment, business and partnership income, the plaintiff characterized his income from C Co. and I Co. as partnership income on his federal tax returns and the plaintiff recognized that his profits from C Co. were reflected on line 22 of form 1040, and the plaintiff's contention that the phrase "historically been listed" should be construed as referring only to how he had historically earned income as a physician was unavailing, as that construction would render the provision's specific exclusion of income derived from the plaintiff's patents and inventions superfluous; moreover, there was no merit to the plaintiff's argument that, because his interests in C Co. and I Co. were purchased with cash assets awarded to him at the time of the dissolution, the income received from his investment of the cash assets should not be redistributed again, as his argument confused an award of assets with a support award based on the income stream derived from an asset, and the cases relied on by the plaintiff were distinguishable from the present case; furthermore, this court was not persuaded by the plaintiff's argument that equitable principles required that his income from C Co. and I Co. be excluded from the calculation of unallocated support.

Argued November 13, 2019—officially released March 24, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New London at Norwich, where the court, *Boland*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the defendant filed a motion for contempt; subsequently, the court, *Carbonneau*, *J.*, issued an order regarding the plaintiff's unallocated support obligation, and the plaintiff appealed to this court. *Affirmed.*

Cody A. Layton, with whom, on the brief, was *Drzislav Coric*, for the appellant (plaintiff).

Campbell D. Barrett, with whom, on the brief, was *Johanna S. Katz*, for the appellee (defendant).

Opinion

ALVORD, J. In this marital dissolution action, the plaintiff, Michael Halperin, appeals from the trial court's postdissolution order resolving the motion for contempt filed by the defendant, Ronda Halperin. On

appeal, the plaintiff claims that the court erred in interpreting the provision of the parties' separation agreement governing unallocated alimony and child support, namely, that income derived from certain investments made by the plaintiff is includable in his total income for purposes of determining his unallocated support obligation. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The parties were divorced on March 11, 2010. The dissolution judgment incorporated by reference a separation agreement executed by the parties on the same date. Section 8 of the separation agreement[1] gov-

[1] Section 8 of the separation agreement provides in relevant part: "Unallocated Support: The plaintiff husband shall pay the defendant wife unallocated support per the following:

- For the time period commencing on the date of Judgment and continuing until 8/11/12, the plaintiff shall pay the following:
  i. An amount equal to 38% of his gross base income in a manner as defined infra.
  ii. An amount equivalent to 38% of his quarterly bonuses payable as described infra.
- For the time period commencing on 8/11/12 and continuing until 5/11/21, the plaintiff shall pay the following:
  i. An amount equal to 32.5% of his gross base income payable as described infra.
  ii. An amount equivalent to 32.5% of his quarterly bonuses payable upon receipt as described infra.
- For the time period commencing on 5/11/21 and continuing until March 11, 2022, the plaintiff shall pay the following:
  i. 25% of his base bi-weekly gross income payable as set forth infra.
  ii. 25% of his quarterly gross bonuses payable as described infra.
- For federal and state income tax purposes, the unallocated support shall be deductible to the plaintiff and included as income for the defendant.
- Income for purposes of this calculation shall be the parties' respective 'total income' that has historically been listed on line 22 (or the equivalent) of their joint 1040 federal tax returns. This shall include all employment, business, partnership, consulting or real estate income, whether received in cash or not, but shall specifically exclude all interest, dividend and capital gains income realized from assets divided as part of the property distribution component of this dissolution Judgment and any income received by the plaintiff husband as the result of patents or inventions which he has created and obtained. Capital losses, for whatever purpose, shall not serve as a reduction of a parties' income. By way of example, if the numbers contained on the parties' joint 2008 return were used as part of his calculus, the plaintiff's unallocated support obligation would be based on $1,205,113.00 in income (the amount listed on line 22 ($1,216,295,00) plus capital loss ($3,000.00) minus interest $11,527.00) minus ordinary dividends ($2,655.00)). In the event that the plaintiff's

employment income is replaced or supplemented by disability insurance payments, those disability insurance payments shall be considered income for purposes of the plaintiff's support obligation(s). This disability provision shall not prevent the plaintiff from seeking a modification of the support orders.

- In the event that the plaintiff husband does not receive a bonus in any year in which he has a support obligation, and has received two bonuses in either the immediately preceding or immediately subsequent year, the plaintiff agrees to include one of said bonuses in each year for purposes of establishing and calculating his support obligation(s).
- The plaintiff husband shall take no action for purposes of defeating the defendant wife's unallocated support, and, shall take no action to reduce, divert, or defer income or increase business expenses or deductions for the purpose of reducing his support obligation to the defendant wife except in the ordinary and reasonable course of business. Without limitation, except as aforestated, items which are taxable to the plaintiff husband because he receives a benefit therefrom shall be included, to the extent they are taxable, for purposes of determining his income.
- For so long as the plaintiff husband has a support obligation hereunder, the parties shall exchange complete individual year-end pay stubs and complete state and federal tax returns (including all schedules, W2, K1 and 1099 forms and the like) that the parties file individually or that is filed by any entity in which the parties' possess an ownership interest on a yearly basis within 14 days of filing.
- The unallocated order shall terminate upon the death of either party and shall terminate upon the remarriage of the defendant wife whereupon the parties shall determine the amount of child support to be paid by the plaintiff husband to the defendant wife for the support of each of the minor children until each child attains the age of 18, graduates from high school, whichever later occurs, but in no event beyond age 19. In the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of unallocated alimony and child support. The award shall be further be subject to modifications, suspensions or termination pursuant to Conn. Gen. Statute Sec. 46b-86(b), in the event the defendant cohabitates as contemplated by the statute and its attending decisional law.
- The plaintiff's unallocated obligation shall have a twelve year term and shall be non-modifiable as to duration. The term shall commence on the date of Judgment and shall terminate on the twelve year anniversary of that date. The plaintiff shall pay his obligation on a weekly or biweekly basis, via direct deposit. Historically, the plaintiff has been paid by way of a weekly/biweekly draw and periodic bonuses. The defendant shall be paid her percentage share of the plaintiff's gross income at the time the income is received by the plaintiff. In other words, the defendant shall receive a percentage of the draw as well as a percentage of any bonus payment. All payments shall be received by the defendant wife within seven days of receipt of said compensation by the plaintiff husband.
- The defendant wife shall have a safe harbor to earn up to $50,000.00 per year before the plaintiff husband shall have the right to file a motion for downward modification of his support obligation.

* * *

erns unallocated support and requires the plaintiff to pay to the defendant a decreasing percentage of his "gross base income" and "quarterly bonuses" over a twelve year schedule ending on March 11, 2022. Section 8 further provides: "Income for purposes of this calculation shall be the parties' respective 'total income' that has historically been listed on line 22 (or the equivalent) of their joint 1040 federal tax returns. This shall include all employment, business, partnership, consulting or real estate income, whether received in cash or not, but shall specifically exclude all interest, dividend and capital gains income realized from assets divided as part of the property distribution component of this dissolution [j]udgment and any income received by the plaintiff . . . as the result of patents or inventions which he has created and obtained. Capital losses, for whatever purpose, shall not serve as a reduction of a [party's] income. By way of example, if the numbers contained on the parties' joint 2008 [tax] return were used as part of his calculus, the plaintiff's unallocated support obligation would be based on $1,205,113.00 in income (the amount listed on line 22 ($1,216,295.00) plus capital loss ($3,000.00) minus interest $11,527.00) minus ordinary dividends ($2,655.00))."

Section 12 (a) of the separation agreement provides, inter alia, for the sale of certain real property owned

• The plaintiff husband shall provide wife with copies of his quarterly pay statements for the period ending March 30th, June 30th, September 30th and December 31st each year, all W-2's, K-1's, 1099's from the entities which employ him upon receipt as soon as they are available. The defendant wife shall contemporaneously provide copies of her pay stubs to the plaintiff husband on a quarterly basis. The parties shall review their financial information on or before March 31st or sooner availability of records each year to verify that the plaintiff husband paid alimony in accordance with this Agreement. The parties agree that an accountant designated by the defendant wife, shall audit, at the wife's expense, the above documents to determine if the defendant wife has received the monies due her from the plaintiff husband in accordance with the terms of this Agreement. If the plaintiff husband disagrees with the defendant wife's auditor, he shall have the right to choose his own auditor to verify the amount of alimony payable, at his expense."

by the parties. Under that provision, the plaintiff was entitled to the first $2,105,000 from any sale or sales in exchange for the defendant's receiving, at the time of the dissolution, certain other real property owned by the parties. After the first $2,105,000, the parties were to divide the remaining net proceeds of any sale or sales on an equal basis.

After preparing the separation agreement, the parties, both represented by counsel, appeared before the court, *Boland*, *J.* The plaintiff and the defendant were both canvassed by their counsel.[2] Following the individual canvasses by counsel, the court sought clarification, "given the complexity of th[e] agreement." The following colloquy occurred:

"The Court: [A]s to the total income which is the basis for calculation of how much the plaintiff is going to pay to the defendant, I note that you specify line 22 on federal form 1040. I don't have that form in front of me. My recollection is that that line is distinct from the adjusted gross income line—which is around line 31 or something like that—and the difference between the two is the subtraction of certain items such as a taxpayer's contributions to a 401 (k) plan, cost of self-employed health insurance, and other items. Are you with me so far?

"[The Defendant's Counsel]: Yes.

"The Court: And so, I just want to clarify that the understanding of both parties is that those items are to be disregarded with respect to the alimony and child support payments. Correct?

[2] The plaintiff's counsel asked the plaintiff: "And we've described in some detail the definition of income. And that would be what you've historically listed on line 22 or the equivalent on your joint 1040 tax returns; and that's all your employment, business, partnership, consulting, or real estate income, no matter how—what form that comes in. And—but it will exclude any interest, dividends, gains that you receive from assets as part of this property settlement. And it will also not include any income received as a result of patents and inventions which you have created and obtained. Correct?" The plaintiff responded: "Yes."

"[The Plaintiff's Counsel]: That's the—that's your understanding?

"[The Plaintiff]: Yes.

"[The Plaintiff's Counsel]: I've explained that to you.

"The Court: Okay.

"[The Defendant's Counsel]: And that's your understanding as well, ma'am?

"[The Defendant]: Yes.

"The Court: And that's set forth in the agreement. The only reason that I raise it as an issue is that sometimes an agreement such as this will refer to adjusted gross income, and I wanted to make sure that this was deliberate and not accidental."

The court stated that it had examined the agreement, found it fair and equitable, and incorporated it into the divorce decree.

On February 26, 2014, the defendant filed a motion for contempt, arguing that the plaintiff had underpaid unallocated support for the years 2010 through 2012. On June 12, 2014, the defendant filed an amended motion for contempt, arguing that the plaintiff also had underpaid unallocated support for 2013. The parties appeared before the court, *Carbonneau*, *J.*, on June 20 and September 24, 2014. The central dispute as framed by counsel involved the interpretation of the term "historically" as used in § 8 of the separation agreement.[3] Specifically, following the dissolution of the parties' marriage, the plaintiff had acquired ownership interests in two entities, Constitution Surgery Center East

[3] Although both parties testified, the defendant objected to questioning regarding the plaintiff's understanding of the meaning of the word "historical," as used in the income definition provision of the separation agreement. The court sustained the objection on the basis that it had not yet found that the language of the separation agreement was unclear. The court took judicial notice, however, of the March 11, 2010 canvass before Judge Boland.

(CSCE)[4] and International Spine and Orthopedic Institute (ISOI). The issue before the court was whether profits received from the plaintiff's ownership interest in such entities were to be included in the unallocated support calculation. The parties filed briefs and reply briefs in December, 2014.

On December 19, 2014, the court sua sponte ordered the matter returned to court for "a further evidentiary hearing concerning latent ambiguities in the parties' [separation] agreement . . . ." Specifically, the court requested evidence regarding "whether the language of the [separation agreement] is plain and unambiguous and if the meaning is clear." On March 30 and August 28, 2015, the parties appeared before the court and offered testimony as to their understanding of the separation agreement provision at issue. The parties filed supplemental briefs on September 30, 2015, and the plaintiff filed a reply brief on October 7, 2015.

On January 20, 2016, the court issued a memorandum of decision. It found, in relevant part, as follows: "[The] plaintiff is a successful spine surgeon. He is inventive, innovative and entrepreneurial. [The] defendant is an attorney, but she does not now, and has not practiced law for some time. The court observed these parties to be highly educated, articulate, thoughtful and discerning individuals. . . . During the marriage [the] plaintiff created a 'TFAS' device to be implanted in a person's back. He received income from Globus Corporation for this implant, first through Norwich Orthopedic Group and later directly. He also received consulting income for teaching other doctors how to use and implant the device. . . . The parties declared income or losses from S corporations and partnerships during their marriage. [The] plaintiff continued to report such income

[4] The trial court identified CSCE as Constitution East Surgical Center and noted that it previously had been known as Constitution Eye Surgical Center. The plaintiff, in his appellate brief, identifies the entity as Constitution Surgery Center East, and we use that name for purposes of this opinion.

after the marriage through 2013. . . . [The] defendant kept two real properties from the marital estate. To compensate [the] plaintiff for this, he received the first $2.1 million from the sale of other marital real estate. . . . [The] plaintiff placed these proceeds in a [new] Fidelity . . . account that he [opened after] the divorce. . . . He used a portion of this money to buy a house for $950,000. From February, 2011 to the end of 2013, he made several purchases totaling $558,488 from the Fidelity account to buy a 10.6222 [percent] interest in [CSCE] and a 1 [percent] interest in [ISOI]. . . . ISOI has yet to generate significant profit, but, in 2011, his interest in [CSCE] earned [the] plaintiff $2357; in 2012, $69,923; and in 2013, $425,467. . . . [The] plaintiff reported this income on '[s]chedule E' of his federal tax returns. . . . The [Internal Revenue Service (IRS)] provides different schedules to set out the details of different types of income. These schedules are appended to the standard 1040 form when required. Schedule B is used for taxable interest and ordinary dividends; [s]chedule C for business income or loss; [and] [s]chedule D for capital gain or loss. Schedule E is used to list supplemental income and loss from rental real estate, royalties, partnerships, S corporations, estates, trusts, and the like. . . . [The] plaintiff did not include money he earned from [CSCE] or ISOI in this calculation of unallocated support owed to [the defendant] in 2012 or 2013 under the terms of the agreement." (Footnotes omitted.)

The court declined to find the plaintiff in contempt, on the basis that any noncompliance with the dissolution judgment was not wilful. Exercising its broad discretion to make whole a party who has suffered as a result of another party's failure to comply with a court order, however, the court ordered the plaintiff to include within the calculation of the defendant's unallocated support the income he earned and now earns from CSCE and ISOI and similar future income during the contracted support term.

The court addressed each of the plaintiff's arguments in turn. It first rejected the plaintiff's argument premised on fairness; see *Dan* v. *Dan*, 315 Conn. 1, 105 A.3d 118 (2014); as misplaced, stating that "[w]hile it might not be 'fair' for an ex-spouse to share in the former spouse's *postjudgment* income that the spouse did not in any way help create, that spouse should not be deprived of the benefit of an insightful *prejudgment* bargain even as it extends to such income." (Emphasis in original.) The court likewise disagreed with the plaintiff's argument that the separation agreement excludes from the unallocated support calculation any partnership income earned from CSCE and ISOI because his interests in those entities are a conversion of the assets he received in the dissolution property settlement. The court, noting that the plaintiff himself had characterized what he had received from CSCE and ISOI as "partnership income" on schedule E of his federal income tax returns, concluded that the income received from CSCE and ISOI is not a conversion of marital assets.[5]

Turning to the central issue, the court credited the defendant's testimony and explanation of the meaning of the phrase "historically been listed," which it found "was intended by the parties to fix in time the categories of income includable in the calculation of [the] plaintiff's unallocated support obligation to [the] defendant and their children." Specifically, the court accepted the defendant's explanation that income "correspond[ed]

[5] The plaintiff also had argued that inclusion of CSCE and ISOI income would result in "double-dipping," in that he had used assets awarded to him in the separation agreement to purchase his interests in CSCE and ISOI and that including income from those interests to calculate the unallocated support would be counting the same basis twice. The court rejected this argument, stating: "This would be so if [the] defendant claimed a portion of the equity [the] plaintiff holds in these companies. She does not. Her claim is only to the partnership income they generate. This is a new, separate basis from the asset awarded to [the] plaintiff at the time of the dissolution or purchased by him with such assets afterward."

to the categories used by the IRS to make up line 22 of the 1040 form." In accepting this explanation, the court noted that "[f]uture changes in tax law or IRS Form 1040 could fundamentally alter the interpretation of the agreement [and] undo their intentions." The court rejected the plaintiff's construction of "historically been listed," which was that the term referred to "the specific sources and/or types of income," and "clearly show[ed] the parties looking backward in time, not forward, for sources and/or types [of income] to be included in the income calculation."

Lastly, the court determined that the defendant was entitled to statutory interest. Because the parties had not submitted any evidence as to how the defendant would have used, invested, or conserved the funds owed to her, the court declined to specify a rate of interest. It instead ordered the parties to calculate an appropriate award of interest and to submit any resulting dispute to the court for determination, if necessary. Subsequently, the parties agreed to a 5 percent interest rate, and the court adopted the defendant's calculation of the unallocated support due to her from the plaintiff. This appeal followed.

On appeal, the plaintiff claims that the court improperly interpreted the separation agreement to determine that income received from CSCE and ISOI is includable within the definition of total income for purposes of calculating the plaintiff's unallocated support obligation. In support of this claim, the plaintiff argues that (1) the separation agreement unambiguously excludes income from CSCE and ISOI from the defendant's unallocated support, (2) the plaintiff's conversion of cash assets awarded at the time of dissolution to shares of a surgery center does not create income for purposes of calculating unallocated support, and (3) equitable principles require that the plaintiff's income from CSCE

and ISOI be excluded from the unallocated support calculation.[6] We address each argument in turn.

The plaintiff argues that the separation agreement "is unambiguous to the extent income from CSCE and ISOI is excluded from [the] defendant's unallocated support." We disagree.

[6] The plaintiff also argues that there was never a "meeting of the minds" regarding § 8 of the separation agreement. He emphasizes his testimony, which he describes as "undoubtedly credible," that he "believed the term 'historically' in § 8 of the agreement referred to income from the time the parties were married, which consisted substantially of his biweekly salary and quarterly bonuses." We conclude that this argument, that there was never a meeting of the minds, is inapposite. "The essence of [a stipulated] judgment is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has entered judgment conforming to the terms of the agreement. . . . It necessarily follows that if the judgment conforms to the stipulation it cannot be altered or set aside without the consent of all the parties, unless it is shown that the stipulation was obtained by fraud, accident or mistake. . . . For a judgment by consent is just as conclusive as one rendered upon controverted facts." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, 301 Conn. 361, 368–69, 21 A.3d 791 (2011). The plaintiff never filed a motion to open and vacate the dissolution judgment. Cf. *Magowan* v. *Magowan*, 73 Conn. App. 733, 735–37, 812 A.2d 30 (2002), cert. denied, 262 Conn. 934, 815 A.2d 134 (2003).

Moreover, the plaintiff was represented by counsel at the time of the separation agreement's negotiation, he executed the lengthy and detailed agreement, he was canvassed by his counsel regarding the terms of that agreement, and the court, after finding it fair and equitable, incorporated the terms of it into the dissolution judgment. Thus, his argument that an enforceable contract did not exist is unconvincing. See *Tedesco* v. *Agolli*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6016130-S (June 21, 2016) ("[w]hen an agreement is reduced to writing and signed by all parties, the agreement itself is substantial evidence that a meeting of the minds has occurred") (reprinted at 182 Conn. App. 294, 308, 189 A.3d 676), aff'd, 182 Conn. App. 291, 308, 189 A.3d 672, cert. denied, 330 Conn. 905, 192 A.3d 427 (2018).

Lastly, the court credited the defendant's testimony as to the intention of the parties and, thus, implicitly found a mutual understanding of the relevant terms as articulated by the defendant, a finding the plaintiff has not demonstrated is clearly erroneous. See *M.J. Daly & Sons, Inc.* v. *West Haven*, 66 Conn. App. 41, 48, 783 A.2d 1138 ("[w]hether a meeting of the minds has occurred is a factual determination"), cert. denied, 258 Conn. 944, 786 A.2d 430 (2001).

"It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction.* . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"The threshold determination in the construction of a separation agreement, therefore, is whether, examining the relevant provision in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . The proper inquiry focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation. . . . It must be noted, however, that the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the

language is ambiguous. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Finally, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180–82, 972 A.2d 228 (2009).

In the present case, after initially declining to hear evidence regarding the parties' understanding of the disputed term, the court sua sponte opened the evidence to accept extrinsic evidence. It thereafter considered the extrinsic evidence, including the parties' testimony, in interpreting the separation agreement and made factual findings regarding the parties' intent. Thus, it is apparent that the court determined that the disputed provision was ambiguous, a conclusion with which we agree. Both parties offer plausible interpretations of the disputed provision. See, e.g., *Russell* v. *Russell*, 95 Conn. App. 219, 222–23, 895 A.2d 862 (2006) (parties' intent not clear and certain from language itself where parties used term "expenses . . . for completion" of son's treatment at medical facility and included another provision referencing payment of "all college expenses" of other son (internal quotation marks omitted)). Accordingly, the court properly considered extrinsic evidence to ascertain the intent of the parties as expressed in the language of the separation agreement.

Because we have determined that the relevant contract language is ambiguous, "[t]he determination of the intent of the parties to a contract . . . is a question of fact subject to review under the clearly erroneous

standard. . . . This court has stated frequently that [a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . While conducting our review, we properly afford the court's findings a great deal of deference because it is in the unique [position] to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us." (Citation omitted; internal quotation marks omitted.) *Bijur* v. *Bijur*, 79 Conn. App. 752, 761–62, 831 A.2d 824 (2003).

In construing the phrase "historically been listed," the court stated that the parties' predissolution tax returns showed income or losses from S corporations and partnerships. Because this income historically had been listed, it reasoned that future partnership income should be included in the unallocated support calculation, with the exception of certain categories of income the parties had specifically excluded from the definition of total income in the separation agreement. The court referenced the exclusion for "any income received by the plaintiff . . . as the result of patents or inventions which he has created and obtained." In the absence of this exclusion, the court found, postdissolution patent and invention income would be includable in the plaintiff's income for purposes of determining his unallocated support obligation. Additionally, the absence of an exclusion that would encompass the CSCE and ISOI income supported the determination that the parties intended such income to be included in the unallocated support calculation.

The court further found that the "parties purposely and specifically selected line 22 of IRS Form 1040 as a starting point for their definition of income," which finding is supported by the parties' responses to that effect during the canvass at the time of the dissolution. The court, recognizing that "[f]uture changes in tax law or IRS Form 1040 could fundamentally alter the interpretation of the agreement and undo their intentions," found that the phrases "historically been listed" and "or the equivalent" "both seek to fix the agreement's definition of income in time to make certain that their obligations and expectation of each other would not significantly change during the term of the agreement."[7]

Examining the parties' tax returns in evidence, the court noted that IRS Form 1040 contained "seventeen separate lines including alphabetical subdivisions (8a and 8b, for example) that precede line 22. Each line is for different categories of income, such as taxable and nontaxable interest (lines 8a and 8b), ordinary and qualified dividends (lines 9a and 9b), capital gain or loss (line 13). There is a separate line for business income or loss (line 12) and another for partnership income (line 17). Line 22 is the sum of lines 7 through 21. It represents the 'total income' of the filer from all sources listed by the IRS.

[7] The plaintiff contends that future changes in IRS Form 1040 were fully addressed by the reference in § 8 to "line 22 (*or the equivalent*) . . . ." (Emphasis added.) Thus, according to the plaintiff, the court failed to give effect to the clear meaning of the word "historically" and, in doing so, rendered it superfluous. He maintains that if the defendant's interpretation of the parties' intent was correct, "it would have been much easier to simply draft the agreement with the following language, 'Income for the purposes of this calculation is what the IRS requires on line 22 (or the equivalent) of a joint 1040 tax return." We are not persuaded that the court erred in determining that *both* phrases "historically been listed" and "or the equivalent" were necessary to explicate the separation agreement's definition of total income. The word "historically" ensures that the categories of income that comprised line 22 at the time of the dissolution judgment would remain the categories of income from which the plaintiff's future support obligation would be calculated. The phrase "or the equivalent" accounts for the possibility that, at some point in time, the IRS may alter Form 1040 such that line 22 is renumbered.

" 'Total income' in the operative sentence of the [separation] agreement refers to line 22. It is no coincidence that the exclusions from income in the parties' agreement correspond to specific earlier lines in the [IRS Form] 1040 like interest, capital gains and dividends. It makes no sense that [the] plaintiff would carve out these specific exclusions from his income—including future patents and inventions—and then rely on the broad and vague phrase 'historically been listed' to shield any other future income."[8] Accordingly, the court

[8] During the hearing on March 30, 2015, the following exchange occurred with respect to the exclusion for patent income:

"The Court: And you didn't earn any patent income until after the dissolution; is that correct?

"[The Plaintiff]: I still haven't earned any patent income.

"The Court: If your definition—

"[The Plaintiff]: So, I've never earned any patent income.

"The Court: Understood. But the demarcation here is the line drawn by the dissolution.

"[The Plaintiff]: Yes.

"The Court: Prior to the dissolution, you made no patent income?

"[The Plaintiff]: Right.

"The Court: At the time of the dissolution, you excluded patent income?

"[The Plaintiff]: Right.

"The Court: So, patent income would never have been included in the historical category—

"[The Plaintiff]: Right.

"The Court: —to derive line 22. If that's the case, why did you need the page 7 exclusion if historically you had never earned any patent income?

"[The Plaintiff]: Well, I think the reason is because at the time, throughout the years, I had been thinking about some devices and actually went to a company on a couple of occasions with device ideas for patenting, and it never came to fruition.

"The Court: I understand that . . . [b]ut my question is, if the definition of historical never included patent income because you hadn't earned any patent income—

"[The Plaintiff]: Right.

"The Court: —why did you need this second exclusion I'll call it because by your definition, if I'm understanding you correctly, historically would exclude patent income and yet you included a second sentence to specifically exclude patent income.

"[The Plaintiff]: Well, if it was put to me that way, I probably wouldn't have requested it, but what happened was that while we were marking—going through this, I had mentioned to my attorney that, you know, I kind of have an inventive mind and I think at some point, I might do this, am I protected here, and so she added it in, and I think that they didn't have any problem with that, so it never came up. But if you put it to me as well, you know, patent income, it's not part of your historic so it wouldn't make a difference, then I probably wouldn't—it wouldn't have mattered to me."

credited the defendant's testimony regarding the meaning of the phrase "historically been listed," which it found "was intended by the parties to fix in time the categories of income includable in the calculation of [the] plaintiff's unallocated support obligation to [the] defendant and their children."[9]

We conclude that the court's determination that the parties intended to include the income at issue in the plaintiff's total income for purposes of determining his unallocated support obligation is not clearly erroneous. "Historically," as used in the income definition modifies "total income," which references income on line 22 of IRS Form 1040. Further support for this conclusion is found in the inclusions and exclusions that immediately follow the disputed phrase. Notably, total income under the separation agreement expressly includes "*all* employment, business, [and] partnership . . . income . . . ." (Emphasis added.) As the trial court found, the plaintiff characterized his income from CSCE and ISOI as partnership income on schedule E of his federal tax returns, and the plaintiff himself recognizes that his profits from CSCE are reflected on line 22 of IRS Form 1040.

The plaintiff argues that "a fair reading of [§] 8 [of the separation agreement] as a whole requires that the income used to calculate [the] defendant's unallocated

[9] The testimony before the court included the defendant's testimony that "historically defined what was required to be listed as income on the 1040 tax return." The plaintiff, in contrast, testified as follows: "It was my understanding that my obligation to pay unallocated support was based upon my historical income. Basically, all the income that I had earned in the past while we were married, it says here on the joint 1040 federal tax returns and to me, my interpretation is we were married and so the money that I had earned during those years was filed on our joint returns." The plaintiff further testified: "So, at the time of the divorce, I had been married for somewhere around [twenty] years, and I had only received one form of income—well, one basic form of income and that was I received biweekly paychecks and quarterly bonuses. So, at the time of the divorce, that was my interpretation of my historical income."

support under the agreement can only be viewed in a context that is retrospective." This retrospective view, according to the plaintiff, encompassed how "the plaintiff 'historically' earned money as a physician," i.e., his biweekly salary and quarterly bonuses. Total income under the agreement, however, expressly excludes "all interest, dividend and capital gains income realized from assets divided as part of the property distribution component of this dissolution [j]udgment and any income received by the plaintiff . . . as the result of patents or inventions which he has created and obtained." Were the plaintiff's construction of the disputed provision to be correct, namely, that the phrase "historically been listed" referred only to how the plaintiff had historically earned money as a physician, this exclusion would be superfluous. "[I]n construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *Isham* v. *Isham*, supra, 292 Conn. 182.

The plaintiff points to other provisions of § 8 of the separation agreement that he contends support his interpretation. First, he points to the statement that, "[h]istorically, the plaintiff has been paid by way of a weekly/biweekly draw and periodic bonuses." That language, however, is positioned within a paragraph discussing the timing and duration of the support payments. Specifically, the statement directly follows language stating that "[t]he plaintiff shall pay his obligation on a weekly or biweekly basis, via direct deposit," and immediately precedes language stating that "[t]he defendant shall be paid her percentage share of the plaintiff's gross income at the time the income is received by the plaintiff." Accordingly, we do not interpret this language as controlling the sources of income from which the support is calculated. Second, the plaintiff directs this court's attention to language in § 8 that

provides for the plaintiff's payment of decreasing percentages of his "gross base income," "base bi-weekly gross income," "quarterly bonuses," and "quarterly gross bonuses." Although this language appears to focus on the plaintiff's earnings as a physician, we cannot conclude that it amends the parties' express definition of total income for purposes of determining his unallocated support obligation.

The plaintiff next argues that his interests in CSCE and ISOI were purchased using cash assets awarded to him at the time of the dissolution and, therefore, the income received from his investment of the cash assets "should not be redistributed yet again." In support of his argument, he cites *Gay* v. *Gay*, 266 Conn. 641, 835 A.2d 1 (2003), *Schorsch* v. *Schorsch*, 53 Conn. App. 378, 731 A.2d 330 (1999), and *Denley* v. *Denley*, 38 Conn. App. 349, 661 A.2d 628 (1995), a line of cases that he concedes is "factually distinguishable" but that he suggests evidences a "modern trend" in our courts of reluctance to "designate as income for purposes of support, funds received as a result of the conversion of assets awarded at the time of the dissolution." The defendant responds that "[t]he plaintiff's argument confuses an award of assets with a support award based on the income stream derived from an asset." We agree with the defendant.

An analysis of the cases relied on by the plaintiff leads us to conclude that the holdings in those cases are inapplicable here. The plaintiff cites *Schorsch* v. *Schorsch*, supra, 53 Conn. App. 380, in which the defendant sought a postdissolution modification of his alimony obligation. The issue on appeal was whether the trial court improperly had included in the calculation of the defendant's monthly income certain principal payments that he was receiving pursuant to a purchase money mortgage that he held on real property that had been awarded to him in the dissolution decree. Id., 384. This court held that the trial court improperly included

as income the *principal* portion of the mortgage payment generated from the sale because "[t]he mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income." (Internal quotation marks omitted.) Id., 385–86. The court in *Schorsch* addressed only the principal portion of the mortgage payments, which constituted the liquid form of the asset the defendant received in the dissolution decree, and the interest portion of the payments were not at issue.

In *Denley* v. *Denley*, supra, 38 Conn. App. 350, the plaintiff sought a postjudgment modification of alimony, arguing that, because he had lost an important client, his income had decreased substantially. The trial court concluded that the plaintiff had not met his burden of proving a substantial change in circumstances. Id. In determining whether the plaintiff's income had decreased substantially, the court included in income the profit that the plaintiff had received through the redemption of stock options that had been awarded to him as property in the dissolution decree. Id., 350, 353. On appeal, this court agreed with the plaintiff that, "because he was awarded the stock options as property in the dissolution decree, any money that he received from the exercise of those stock options was simply a conversion of an asset and should not have been considered income by the trial court for purposes of assessing whether there had been a substantial change in circumstances." Id., 353. This court concluded that the trial court should not have included the profit that the plaintiff generated by exercising his stock options in determining whether there had been a substantial change of circumstances because the exercise of the stock options resulted in a conversion of the asset to cash and did not transform the property into income. Id.

In *Gay* v. *Gay*, supra, 266 Conn. 642, our Supreme Court considered whether the trial court properly

ordered a modification in alimony payments based in part on the court's determination that capital gains realized by the plaintiff from the sale of assets constituted income. Our Supreme Court concluded that "capital gains are not income for purposes of modification of an order for continuing financial support if those gains do not constitute a steady stream of revenue. This is true without regard to whether the assets from which those gains are derived were acquired before or after the dissolution." Id., 647–48. Underlying this conclusion was the court's recognition that, "[a]t least where, as is generally the case, capital gains do not represent a steady stream of revenue, the fact that a party has enjoyed such gains in a particular year does not provide a court with an adequate basis for assessing that party's long-term financial needs or resources." (Footnote omitted.) Id., 647. It found persuasive Judge Schaller's reasoning expressed in his dissenting opinion in the Appellate Court, which stated that "a conversion of an asset from one form to another does not constitute the creation of income. Implicit in this conclusion is the underlying concept that the growth in value of the asset distributed at dissolution is not income when it is converted to another form. Rather, the growth, and resulting cash value when converted, simply represents the accrual in value of that asset itself. In other words, the category the item falls into, namely, either capital asset or income, does not change because the asset has appreciated in value and then is converted as a matter of form." (Internal quotation marks omitted.) Id.; see *Gay* v. *Gay*, 70 Conn. App. 772, 788–89, 800 A.2d 1231 (2002) (*Schaller*, *J.*, dissenting).

Each of the cases relied on by the plaintiff is distinguishable from the present case. *Schorsch* and *Denley* both involved the conversion of assets awarded in a dissolution to cash. In the present case, the defendant is not seeking a portion of the plaintiff's ownership interest in CSCE and ISOI but, rather, seeks a portion

of the income stream generated by those ownership interests, which, pursuant to the terms of the separation agreement, is required to be included as total income for the purposes of calculating the plaintiff's unallocated support obligation. *Gay* is likewise inapplicable, given that it addressed the question of whether capital gains, which did not constitute a steady stream of revenue, constituted income for purposes of alimony modification. In the present case, the court properly found that the plaintiff's income received from CSCE and ISOI was not a conversion of marital assets and was not excluded from total income under the parties' separation agreement. In support of this conclusion, the court found that the income was "something more and different from the original asset, the 'converted' asset, interest, dividends or capital gains." We agree. Accordingly, the plaintiff's argument fails.

The plaintiff's final argument on appeal is one resting on equitable principles. He maintains that "the court should be mindful that the cash assets the plaintiff invested in CSCE are net, after tax, cash assets that he has from the property distributed to him as part of his marital dissolution property settlement and/or yearly postdissolution postdistribution property settlement (net, after tax, cash assets after he has made his required unallocated support payments)." He argues that the general risks accompanying investments "become compounded if [the] plaintiff is required to give part of his return to [the] defendant, especially if that is before he recoups his net, after tax, cash assets utilized in the investment." He also points to the separation agreement's provision that "[c]apital losses, for whatever purpose, shall not serve as a reduction of a parties' income," in support of his argument that it is "unquestionably unjust that [the] defendant could be allowed to sit back, completely insulated from any risk, and profit while [the] plaintiff is the only one who takes on any risk with his investments."

The plaintiff, recognizing that *Dan* v. *Dan*, supra, 315 Conn. 1, is distinct because it involves modification of alimony, nevertheless contends that the principles and logic of that decision apply. He points to language from *Dan* stating that, "when the *sole* change in circumstances is an increase in the income of the supporting spouse, and when the initial award was and continues to be sufficient to fulfill the intended purpose of that award, we can conceive of no reason why the supported spouse, whose marriage to the supporting spouse has ended and who no longer contributes anything to the supporting spouse's income earning efforts, should be entitled to share in an improved standard of living that is solely the result of the supporting spouse's efforts." (Emphasis in original.) Id., 14–15. Our Supreme Court held that, in the absence of certain exceptional circumstances, an increase in a supporting spouse's income, standing alone, will not justify the granting of a motion to modify an alimony award. Id., 4, 10.

The guidance of *Dan* is inapplicable. The present case does not involve a party seeking to modify an alimony award on the basis that the supporting spouse's income has increased. Rather, the question in the present case is whether the plaintiff's income from CSCE and ISOI is includable in the plaintiff's income for purposes of determining his unallocated support obligation pursuant to the terms of the separation agreement. Moreover, "[i]t is hornbook law that courts do not rewrite contracts for parties. . . . [A] court simply cannot disregard the words used by the parties or revise, add to, or create a new agreement." (Internal quotation marks omitted.) *Hammond* v. *Hammond*, 145 Conn. App. 607, 612–13, 76 A.3d 688 (2013). As the trial court stated in the present case, "[the] plaintiff may have been under a great deal of pressure to settle, and he may not now like the deal he struck with [the] defendant over [five] years ago, but she is entitled to the benefit of her bargain. The court cannot and will not undo or rewrite their agreement with the benefit of hindsight."

We conclude that the court properly determined that, pursuant to the separation agreement, the plaintiff's income received from CSCE and ISOI was required to be included in the plaintiff's total income for purposes of calculating his unallocated support obligation.

The judgment is affirmed.

In this opinion the other judges concurred.

CHANDRA BOZELKO *v.* COMMISSIONER OF CORRECTION
(AC 42699)

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

Syllabus

The petitioner, who had been convicted of various crimes, sought a writ of habeas corpus, claiming that her prior habeas counsel had provided ineffective assistance. The habeas court rendered judgment dismissing the petition because the petitioner failed to appear at a status conference. Thereafter, the court denied the petitioner's motion to open the judgment of dismissal in which she argued that she did not receive notice of the status conference. The petitioner subsequently filed two motions to reargue, seeking an opportunity to present evidence that she did not receive notice of the status conference, which the habeas court denied and, thereafter, on the granting of certification, the petitioner appealed to this court. On appeal, the petitioner claimed that the habeas court abused its discretion in dismissing her habeas petition, in denying her motion to open, and in denying her motions to reargue. *Held* that the habeas court abused its discretion in denying the petitioner's motion to open the judgment of dismissal on the sole ground that notice of the status conference was sent properly without having conducted a proper hearing; although the court had issued a JDNO notice regarding the status conference and the petitioner was listed as a party to the action, creating a rebuttable presumption that the petitioner received notice pursuant to the mailbox rule, the petitioner was entitled to an opportunity to rebut this presumption, which she attempted to do by filing the motion to open the judgment, a supporting affidavit and motions to reargue, the petitioner should have been afforded a hearing in which she could present evidence to rebut the presumption that she received notice and, accordingly, the case was remanded for a factual determination as to whether the petitioner knew or should have known of the status conference and, thus, whether the judgment of dismissal should be reopened.

Argued December 5, 2019—officially released March 24, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter, the court denied the petitioner's motion to open the judgment; subsequently, the court denied the petitioner's motions to reargue, and the petitioner, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Chandra Bozelko, self-represented, the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, former state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. In this habeas action, the petitioner, Chandra Bozelko, appeals from the judgment of the habeas court dismissing her second petition for a writ of habeas corpus, which alleged that her first appointed habeas counsel rendered ineffective assistance. On appeal, the petitioner claims that the habeas court (1) abused its discretion by dismissing her habeas petition for failing to appear at a status conference, (2) abused its discretion in denying her motion to open the judgment of dismissal, and (3) abused its discretion in denying her motions to reargue. We agree with the petitioner's second claim and, accordingly, reverse the judgment of the trial court denying her motion to open the judgment of dismissal.

The following facts and procedural history are relevant to our disposition of the petitioner's appeal. On March 14, 2014, the petitioner filed a petition for a writ of habeas corpus alleging that her first habeas corpus

counsel, James Ruane, rendered ineffective assistance.[1] A pretrial hearing was scheduled to take place on August 9, 2018. On August 9, 2018, the habeas court, *Hon. George Levine*, judge trial referee, rendered judgment in favor of the respondent, the Commissioner of Correction, and dismissed the matter, stating in its order: "This case is dismissed for [the] petitioner's failure to appear for pretrial."[2]

On September 4, 2018, the court, *Newson*, *J.*, vacated the August 9, 2018 dismissal sua sponte, stating: "It has come to the attention of the court that the petitioner did appear for the pretrial as requested and therefore this case was dismissed in error. The judgment is opened and this case will proceed in due course." That same day, two notices were issued, one advising the parties that the dismissal had been vacated and the other advising the parties that a status conference was scheduled for November 2, 2018, at 10 a.m.

[1] The petitioner was convicted, after a jury trial, of attempt to commit larceny in the first degree in violation of General Statutes §§ 53a-122 and 53a-49; larceny in the third degree in violation of General Statutes § 53a-124; two counts of larceny in the fifth degree in violation of General Statutes § 53a-125a; identify theft in the first degree in violation of General Statutes § 53a-129b; three counts of identity theft in the third degree in violation of General Statutes § 53a-129d; two counts of attempt to commit illegal use of a credit card in violation of General Statutes §§ 53a-128d and 53a-49; two counts of illegal use of a credit card in violation of § 53a-128d; and two counts of forgery in the third degree in violation of General Statutes § 53a-140. She received a total effective sentence of ten years of incarceration, execution suspended after five years, and four years of probation. These convictions were affirmed on direct appeal. *State* v. *Bozelko*, 119 Conn. App. 483, 486–87, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010).

Subsequently, the petitioner filed her first petition for a writ of habeas corpus claiming ineffective assistance of her criminal trial counsel, which was denied by the habeas court. The petitioner appealed the habeas court's judgment, claiming that it had erred in denying her claim that her criminal trial counsel was ineffective for failing to investigate effectively. See *Bozelko* v. *Commissioner of Correction*, 162 Conn. App. 716, 717, 133 A.3d 185, cert. denied, 320 Conn. 926, A.3d 458 (2016). The petitioner filed a second habeas petition, which is at issue before us, alleging ineffective assistance of her first habeas counsel.

[2] The proceedings were not conducted on the record.

On November 2, 2018, the petitioner did not appear for the status conference. Counsel for the respondent orally moved for dismissal. The habeas court granted the motion.[3] By order dated November 5, 2018, the habeas court, *Newson*, *J.*, rendered judgment in favor of the respondent and dismissed the case on the basis of the petitioner's failure to appear at the November 2, 2018 status conference.

On November 28, 2018, the petitioner filed a motion to open the judgment of dismissal, arguing, inter alia, that she did not receive notice of the November 2, 2018 status conference. By order dated November 28, 2018, the court, *Newson*, *J.*, denied the motion to open the judgment. On December 7, 2018, the petitioner filed a motion to reargue, seeking reconsideration of the court's denial of the motion to open and requesting an opportunity to present evidence to the effect that she did not receive notice of the November 2, 2018 proceeding. On December 10, 2018, the court denied the motion to reargue. The petitioner then filed a second motion to reargue on December 20, 2018, again seeking the opportunity to introduce evidence in support of her motion to open. Additionally, the petitioner filed a sworn affidavit with the motion attesting to the fact that she had not received written notice of the November 2, 2018 hearing. On December 21, 2018, the court denied the petitioner's second motion to reargue.[4]

[3] The following colloquy occurred:

"[The Respondent's Counsel]: [The petitioner] has [been] fully discharged. She's not on probation. She's not on parole. She is out. She did not appear last time and we gave her the benefit of the doubt by continuing her matter one month. May I move for dismissal?

"The Court: Give me one moment. Okay. Again, court's reviewing the file. Doesn't appear that there, at least any correspondence in the file. Anything that the clerk is aware of?"

"The Clerk: There are no new filings since September, Judge.

"The Court: Okay. Okay. Again, given the standard notification that goes out, the court will order the matter dismissed based on the petitioner's failure to appear."

[4] The court treated the second motion to reargue as a request for reconsideration of the judgment of dismissal, the denial of the motion to open the judgment, and the denial of the first motion to reargue.

On January 16, 2019, the petitioner filed a motion for permission to file a late appeal, which the habeas court granted. Thereafter, the petitioner filed a petition for certification to appeal, which the court granted. This appeal followed. Additional facts will be set forth as necessary.

Because we agree with the petitioner as to her second claim and remand the case accordingly, we address only that claim that the trial court abused its discretion in denying her motion to open the judgment of dismissal.

"Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 98, 168 A.3d 617 (2017). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Housing Authority* v. *Goodwin*, 108 Conn. App. 500, 506, 949 A.2d 494 (2008).

A civil judgment rendered on a default or nonsuit may be opened within four months of the date that the judgment was rendered upon "written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment . . . and that the [petitioner] was prevented by mistake, accident or other reasonable cause from prosecuting the action . . . ." General Statutes § 52-212 (a). "A motion to open in order to a permit a party to present further evidence need not be granted

where the evidence offered is not likely to affect the [prior judgment]." *Steve Viglione Sheet Metal Co.* v. *Sakonchick*, 190 Conn. 707, 712, 462 A.2d 1037 (1983).

The petitioner claims in her appellate brief that she called the clerk's office in the Superior Court, judicial district of Tolland at Rockville, on September 11, 2018. During the phone call, she was informed that the court's dismissal was vacated but was not notified that another hearing date had been set for November 2, 2018. After the court rendered the second judgment of dismissal, the petitioner filed a motion to open the judgment, in which she asserted that she "had no notice of that November 2, 2018 status conference and she had been advised that the case was on the trial list but no date had been set yet." The petitioner argued the following in her motion: "If the November 2, 2018 date was set down when the case was reopened on September 4, 2018, no notice [was] issued to [the petitioner] and [the petitioner] was not present to learn of this date. Indeed, there is a notation, entry [number] 109 on the case detail that indicates that all dates were erased. Perhaps the status of this case not needing another status conference, at least not yet, was deleted and no notice sent. [The] petitioner doesn't use the system so it is unclear what the date erasure notation means. . . .

"There are documented problems with mail delivery at 183 Wild Rose Drive, Orange, CT, 06477. [The petitioner's] father takes painstaking care of the incoming mail to [that address] to assure that all mail is [received]. He is aware of the problems with the [Superior Court, judicial district of Tolland at Rockville] and his daughter's petition and found no incoming mail from [that court] since the summer of 2018. . . .

"The only information that [the] petitioner had was through [assistant state's attorney] Tamara Grosso, with whom [the] petitioner spoke on August 9, 2018. . . . Grosso informed [the] petitioner that [assistant

state's attorney] Angela Macchiarulo would be in touch with possible trial dates in July, 2020. Since the matter was being placed on a trial docket, [the] petitioner had no reason to believe that another status conference was necessary so she would not have been awaiting another court date, outside of an agreed upon trial date for July, 2020."

On appeal, the petitioner argues that the habeas court abused its discretion in denying her motion to open the judgment of dismissal, in which she asserted that she did not receive notice of the November 2, 2018 status conference. The respondent counters that the mere existence of evidence of lack of notice does not by itself mandate the opening of the judgment. We agree with the respondent in this respect. "[W]hile it is true that a judgment may be opened on the grounds of lack of notice or accidental failure to appear . . . it does not follow that such circumstances mandate the opening of a judgment." (Internal quotation marks omitted.) *Eremita* v. *Morello*, 111 Conn. App. 103, 106, 958 A.2d 779 (2008).

The petitioner also advocates, however, the more limited position that the court abused its discretion by declining to consider evidence of a reasonable cause for her failure to appear at the November 2, 2018 proceeding, namely, that she never received notice of such hearing.[5] In her brief, the petitioner notes that she "filed an affidavit that has never been challenged nor has there been any other evidence that contradicts it.[6] Yet, the trial court has ignored this evidence that should be

[5] Although the petitioner does not phrase her argument in this manner, the arguments and assertions put forth by the petitioner in her main appellate brief and reply brief—"[p]etitioner moved several times for the opportunity to present evidence against that presumption and was not allowed to do so"—make clear she is challenging the lack of an opportunity to present evidence.

[6] The affidavit contains largely the same assertions as those included in the petitioner's motion to open the judgment.

held against the presumption that notice was received." (Footnote added.) In essence, the petitioner procedurally challenges the habeas court's decision not to afford her an opportunity to present evidence regarding her motion to open the judgment.

The respondent contends that the court did not abuse its discretion because the evidence offered by the petitioner, even if true, would not have been sufficient to warrant opening the judgment, nor would such evidence have precluded the court from "conclud[ing] that the petitioner had actual notice of the court date because: (1) as of September 11, 2018, she was aware that the August [9, 2018] dismissal had been vacated and the case was active; and (2) information concerning the scheduled court dates was publicly available on the judicial website." The respondent suggests that the habeas court properly denied the petitioner's motion because, ultimately, it still reasonably could have concluded that the petitioner's failure to appear actually was due to inattention or negligence, and not lack of notice. The respondent cites to *Eremita* v. *Morello*, supra, 111 Conn. App. 103, and *Moore* v. *Brancard*, 89 Conn. App. 129, 133, 872 A.2d 909 (2005), as examples of instances in which, after conducting a hearing, the court denied the motion to open the judgment because it found no good cause for the movant's failure to appear. The habeas court in the present case denied the motion to open on the sole ground that notice was properly sent.[7] The petitioner, nonetheless, contends that notice was never received.

The issue of notice of the November 2, 2018 proceeding, then, hinges on the applicability of the mailbox rule. The mailbox rule "provides that a properly stamped and addressed letter that is placed into a mailbox or

[7] The order denying the motion to open stated that "[a]ll notices for the [November 2, 2018] status conference were properly addressed to the petitioner's current address." All further attempts by the petitioner to show lack of receipt were summarily denied by the court.

handed over to the United States Postal Service raises a rebuttable presumption that it will be received." *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418, 880 A.2d 882 (2005). This court has specifically stated that a JDNO notation, which is "used to indicate that a judicial notice of a decision or order has been sent by the clerk's office to all parties of record . . . raises a presumption that notice was sent and received *in the absence of a finding to the contrary*." (Emphasis added; internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 808 n.2, 138 A.3d 935 (2016).

"Because the presumption is rebuttable, it follows that the plaintiff is entitled to a hearing to have an opportunity to present such rebuttal evidence. When the trial court is required to make a finding that depends on issues of fact [that] are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Internal quotation marks omitted.) *Morelli* v. *Manpower, Inc.*, 34 Conn. App. 419, 423–24, 642 A.2d 9 (1994).

Here, the court issued a JDNO notice regarding the November 2, 2018 status conference on September 4, 2018, and the petitioner is listed as a party to the action.[8] As such, there is a rebuttable presumption that the petitioner received notice of the conference scheduled for November 2, 2018. The petitioner was entitled to an opportunity to rebut this presumption, however, and she attempted to do so by filing the motion to open the judgment and the subsequent affidavit and motions to reargue pursuant to § 52-212 (a). The respondent argues

[8] The notice provided in relevant part the following: "[November 2, 2018] at 10 a.m. Counsel and self-represented petitioners are ordered and required to attend a status conference on the above date and time at 20 Park [Street], Rockville, [Connecticut], to discuss the status of the pleadings. . . . Counsel's failure to appear or self-represented petitioner's failure to appear via video may result in sanctions, judgment of dismissal or default."

that this court "may assume that the habeas court considered and rejected the affidavit offered by the petitioner in support of her alleged lack of notice . . . ." In this case, however, whether there was reasonable cause for the petitioner's failure to appear depends on whether she received written notice of the November 2, 2018 proceeding. The petitioner should have been afforded a hearing, in which she could present evidence to rebut the presumption that she did receive notice. We, therefore, conclude that the habeas court improperly denied the petitioner's motion to open the judgment of dismissal without conducting a proper hearing. Accordingly, we remand the case for a factual determination as to whether the petitioner knew or should have known of the November 2, 2018 status conference and, thus, whether the judgment of dismissal should be opened.

The habeas court's denial of the motion to open is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

MTGLQ INVESTORS, L.P. *v.* KEVIN HAMMONS ET AL.
(AC 42750)

Alvord, Moll and Beach, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant H. The plaintiff moved for summary judgment as to liability only to which H objected, arguing that the plaintiff had failed to comply with the statutory (§ 8-265ee (a)) notice requirement of the Emergency Mortgage Assistance Program, which requires a mortgagee to provide certain specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage. H argued that this failure deprived the trial court of subject matter jurisdiction. The plaintiff argued that this requirement was satisfied and relied on the notice sent prior to the commencement of a previous foreclosure action brought

by its predecessor in interest, that was later dismissed for failure to prosecute. Although the trial court acknowledged the plaintiff's failure to comply with the notice requirement and its attempts to import the notice from the previous action, it granted the motion for summary judgment. The trial court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which H appealed to this court. *Held* that the trial court lacked subject matter jurisdiction because the plaintiff failed to comply with the notice requirement § 8-265ee (a), a jurisdictional necessity; as a matter of first impression, the notice requirement of § 8-265ee (a), when applicable, is a condition precedent to the commencement of a foreclosure action and the failure to comply deprives the trial court of subject matter jurisdiction; moreover, the plaintiff could not prevail on its claim that it was entitled to rely on the notice sent in a separate foreclosure action by its predecessor in interest.

Argued January 22—officially released March 24, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Capital One Bank (USA), N.A. et al., were defaulted for failure to appear; thereafter, the defendant Ameridge Condominium Association, Inc., was defaulted for failure to plead; subsequently, the court, *Bruno*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the court, *Bruno*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *judgment directed.*

Kevin Hammons, self-represented, the appellant (named defendant).

Jason E. Brooks, with whom, on the brief, was *Denise L. Morelli*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant Kevin Hammons[1] appeals from the judgment of strict foreclosure rendered by the

[1] The plaintiff also brought this action against Ameridge Condominium Association, Inc. (Ameridge), Capital One Bank (USA), N.A. (Capital One), Portfolio Recovery Associates, LLC (Portfolio), and the Department of Reve-

trial court in favor of the plaintiff, MTGLQ Investors, L.P. On appeal, the defendant claims that (1) the plaintiff's failure to comply with General Statutes § 8-265ee (a), the notice provision of the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq., left the court without subject matter jurisdiction to entertain the foreclosure action, (2) the court abused its discretion in rendering summary judgment without holding oral argument on his objection to the motion, and (3) the court improperly denied his motion for reconsideration with respect to the issue of standing. We agree with the defendant's first claim and conclude, as a matter of first impression, that the EMAP notice requirement contained in § 8-265ee (a), when applicable, is a subject matter jurisdictional condition precedent to the commencement of a foreclosure action, such that the failure of the plaintiff (as the original plaintiff in the present action) to mail an EMAP notice to the defendant (as the mortgagor) deprived the court of subject matter jurisdiction.[2] Accordingly, we reverse the judgment of the trial court and remand the case with direction to dismiss the action.

The record reveals the following facts and procedural history. Prior to the commencement of the present action, on or about August 4, 2005, the defendant executed a promissory note with American Mortgage Network, Inc., for $140,000, secured by a mortgage on real property located at 585 Glendale Avenue in Bridgeport (property). The principal amount of the loan was later modified to reflect an increased amount. Following an assignment not relevant to this appeal, the mortgage was assigned on December 4, 2013, to Fed-

nue Services (DRS). Capital One, Portfolio, and DRS were defaulted for failure to appear. Ameridge was defaulted for failure to plead. Therefore, our references to the defendant are only to Kevin Hammons.

[2] In light of our conclusion, we need not address the defendant's other claims.

eral National Mortgage Association (Fannie Mae). On April 3, 2014, the defendant's loan servicer sent a letter to the defendant notifying him that the loan was in default and providing him with the opportunity to cure. Accompanying that letter was the notice prescribed by EMAP. Thereafter, Fannie Mae commenced a foreclosure action against the defendant. See *Federal National Mortgage Assn. Fannie Mae* v. *Hammons*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6046100-S (Fannie Mae action). On August 8, 2017, however, the trial court, *Bellis*, *J.*, dismissed the action pursuant to Practice Book § 14-3 on the ground that Fannie Mae failed to prosecute the action with reasonable diligence.[3] Meanwhile, on June 28, 2017, Fannie Mae had assigned the mortgage to the plaintiff. The record does not reflect that a motion to substitute the plaintiff was filed in the Fannie Mae action.

On November 24, 2017, the plaintiff commenced this foreclosure action, bearing Docket No. CV-18-6069305-S, alleging that the note was in default and that the default had not been cured by the defendant. The plaintiff sought, among other things, foreclosure of the mortgage and possession of the property. In his answer, the defendant denied having received from the plaintiff written notice of the default. On August 29, 2018, the plaintiff moved for summary judgment as to liability only, arguing that it had established a prima facie case for foreclosure and that it had standing to bring the action. In his memorandum in opposition to the plaintiff's motion for summary judgment, the defendant argued, in part, that the plaintiff failed to comply with the EMAP notice requirement of § 8-265ee (a), thus depriving the court of subject matter jurisdiction over the foreclosure action. In its reply, the plaintiff, in arguing that § 8-265ee (a) was satisfied, exclusively

[3] On August 29, 2017, Fannie Mae filed a motion to open the judgment of dismissal. The trial court denied that motion.

relied on the April 3, 2014 EMAP notice sent prior to the commencement of the Fannie Mae action.[4]

On January 18, 2019, after conducting an evidentiary hearing on the EMAP notice issue, the trial court, *Bruno*, *J.*, granted the plaintiff's motion for summary judgment.[5] The court determined that the plaintiff had established a prima facie case for foreclosure, yet noted "the glaring exception of compliance with the requirement of EMAP notification."[6] While expressing concern over the plaintiff's attempt to import the EMAP notice from the Fannie Mae action into the present foreclosure action, the court nonetheless concluded that the defendant's challenge to the plaintiff's compliance with the EMAP notice requirement was dilatory in nature and that the absence of an EMAP notice by the plaintiff was not prejudicial to the defendant in any way. On January 29, 2019, the defendant filed a motion for reconsideration wherein he again urged the court to dismiss the action for lack of subject matter jurisdiction. The court denied the motion for reconsideration. On March 21, 2019, the court rendered a judgment of strict foreclosure. This appeal followed.

The defendant claims that the trial court was without subject matter jurisdiction because the plaintiff failed

[4] Indeed, on October 18, 2018, the plaintiff filed an affidavit of compliance with EMAP, relying exclusively on the April 3, 2014 EMAP notice and stating incorrectly that *it* had mailed such notice.

[5] The propriety of the trial court's conducting an evidentiary hearing on the plaintiff's motion for summary judgment is not a subject of this appeal. See *Wells Fargo Bank, N.A.* v. *Ferraro*, 194 Conn. App. 467, 470, 221 A.3d 520 (2019) (reversing summary judgment on basis that "the trial court improperly permitted, considered and relied on live testimony from witnesses at an evidentiary hearing on the plaintiff's motion for summary judgment"); *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 585–86, 193 A.3d 700 (2018) (concluding that trial court improperly permitted and considered defendant's live testimony during hearing on motion for summary judgment).

[6] The court did not expressly analyze whether the notice requirement of § 8-265ee (a) implicated its subject matter jurisdiction.

to comply with the EMAP notice requirement of § 8-265ee(a), which the defendant contends was a condition precedent to the commencement of this foreclosure action. The plaintiff counters that § 8-265ee (a) was satisfied by virtue of the EMAP notice that was sent on April 3, 2014, by Fannie Mae's loan servicer prior to the Fannie Mae action.[7] According to the plaintiff, the change in mortgagees following the April 3, 2014 EMAP notice, as well as the intervening dismissal of the Fannie Mae action, are of no moment.[8] We agree with the defendant.

Our resolution of the defendant's claim requires us to determine whether the EMAP notice requirement of § 8-265ee (a) is subject matter jurisdictional and, if so, whether the mailing of the April 3, 2014 EMAP notice prior to the commencement of the Fannie Mae action satisfies the EMAP notice requirement in the present case. These are questions of statutory interpretation over which we exercise plenary review. See *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 851, 222 A.3d 1025 (2019). "When construing a statute,

[7] The plaintiff does not contend that § 8-265ee (a) is not subject matter jurisdictional.

[8] We note that the plaintiff also argues that the defendant did not properly raise the issue of subject matter jurisdiction before the trial court by way of a motion to dismiss pursuant to Practice Book § 10-30 (a) (1). This argument is unavailing. "[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Machado* v. *Taylor*, 326 Conn. 396, 402, 163 A.3d 558 (2017). Although the defendant did not properly raise the issue of subject matter jurisdiction in a motion to dismiss, the trial court "was required to resolve the question of whether it had jurisdiction over the subject matter irrespective of the propriety of the procedural vehicle by which it was raised." Id.

The plaintiff also suggests that the defendant had waived his EMAP related objection. Given our conclusion that the notice requirement pursuant to § 8-265ee (a) implicates the court's subject matter jurisdiction, the plaintiff's argument in this regard is without merit. See *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) (subject matter jurisdiction requirement may not be waived).

[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 302–303, 140 A.3d 950 (2016).

Furthermore, "[i]n determining whether a court lacks subject matter jurisdiction, the inquiry usually does not extend to the merits of the case. . . . In order to establish subject matter jurisdiction, the court must determine that it has the power to hear the general class [of cases] to which the proceedings in question belong. . . . In some cases, however, it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear." (Citations omitted; internal quotation marks omitted.) *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989). Such an examination was required in the present action.

It is well settled that the Superior Court is authorized to hear all causes of action, except those over which the probate courts have original jurisdiction. General Statutes § 51-164s. There is no question that the Superior Court is authorized to hear foreclosure cases. For the reasons that follow, however, the jurisdiction of the Superior Court in certain foreclosure cases is subject to a condition precedent. That is, before the court can entertain a foreclosure action, the mortgagee who wishes to commence a foreclosure of any mortgage encompassed by General Statutes § 8-265ff (e) (1), (9), (10), and (11) must send, by certified or registered mail, an EMAP notice to the mortgagor.

We begin by examining the language of the statute. Section 8-265ee (a) provides: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to the mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. *No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice.* Such notice shall advise the mortgagor of his delinquency or other default under the mortgage and shall state that the mortgagor has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the [Connecticut Housing Finance Authority (authority)] with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the mortgagor and mortgagee are unable to resolve

the delinquency or default."[9] (Emphasis added.) Pursuant to § 8-265cc, the term "[m]ortgagee" is defined, for purposes of §§ 8-265cc through 8-265kk, as follows: "(4) 'Mortgagee' means the original lender under a mortgage, or its agents, successors, or assigns . . . ."

The first sentence of § 8-265ee (a) creates a notice requirement applicable to any "mortgagee who desires to foreclose upon a mortgage" that satisfies the standards in § 8-265ff (e) (1), (9), (10), and (11). The second sentence then provides that "[*n*]*o such mortgagee* may commence a foreclosure of a mortgage prior to mailing such notice." (Emphasis added.) General Statutes § 8-265ee (a). By its use of the phrase "such mortgagee," the second sentence necessarily refers to the particular mortgagee in the preceding sentence, i.e., the one that desires to foreclose upon a mortgage. Stated differently, the second sentence makes clear that it is directed—not to *any* mortgagee in the chain of assignment but—to *the mortgagee* that wishes to "commence a foreclosure" of an applicable mortgage. In other words, the second sentence is directed to the original plaintiff in a foreclosure action. Such statutory provision then provides that such mortgagee may not commence a foreclosure "prior to mailing such notice," namely, the notice described in the first sentence. In this regard, the second sentence makes clear that it is *the mortgagee* that wishes to commence a foreclosure that has the obligation of mailing an EMAP notice. These provisions are

[9] As this court has explained, "the obligation to give notice pursuant to § 8-265ee before commencing a foreclosure action applies only if the plaintiff is seeking to foreclose a mortgage that satisfies certain standards enumerated in § 8-265ff (e)." *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 290, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016); see id. (in light of its conclusion that defendants were not entitled to notice pursuant to § 8-265ee, court left open question of whether failure to comply with notice requirement under § 8-265ee implicates subject matter jurisdiction). Unlike the circumstances in *Coughlin*, there is no claim in the present action that the mortgage does not fall within § 8-265ff (e) (1), (9), (10), and (11). Rather, the issue here is whether the plaintiff complied with the EMAP notice requirement, which the parties do not dispute is applicable.

clear and unambiguous. Their plain terms indicate that, in applicable cases, a mortgagee may not commence a foreclosure action without first mailing the mortgagor the prescribed notice. In the absence of such notice, a foreclosure action may not be commenced.

On the basis of the foregoing, we conclude that the EMAP notice requirement set forth in § 8-265ee (a), when applicable, is a condition precedent to the commencement of a foreclosure action. As such, the failure to comply with the notice requirement deprives the trial court of subject matter jurisdiction.[10] See *Lampasona* v. *Jacobs*, supra, 209 Conn. 729–30 (collecting cases for proposition that certain statutory notice requirements constitute jurisdictional conditions precedent to commencement of actions). In the present case, a previous mortgagee, Fannie Mae, through its loan servicer, had mailed an EMAP notice to the defendant prior to the commencement of a separate foreclosure action that was subsequently dismissed. Thereafter, the plaintiff commenced a *new* foreclosure action against the defendant. There is no dispute that the plaintiff—as the original plaintiff in the present action—did not mail the defendant an EMAP notice as required by § 8-265ee (a).

There is nothing in the plain language of § 8-265ee (a) to support the plaintiff's argument that it may satisfy the statute by relying on a prior mortgagee's EMAP notice sent prior to a previously dismissed foreclosure action. Moreover, in suggesting that it may rely on an EMAP notice sent by a prior mortgagee in connection with a separate foreclosure action, the plaintiff's reliance on the definition of "[m]ortgagee," which includes

[10] Our conclusion is further supported by the great weight of Superior Court authority, which has concluded that the EMAP notice requirement is subject matter jurisdictional. See, e.g., *M&T Bank* v. *Wolterstorff*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029152-S (September 10, 2018) (67 Conn. L. Rptr. 45, 46); *West Coast Servicing, Inc.* v. *Feaster*, Superior Court, judicial district of New London, Docket No. CV-14-6021726 (November 20, 2017) (65 Conn. L. Rptr. 527, 529–30); *People's United Bank* v. *Wright*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6004126-S (March 30, 2015) (60 Conn. L. Rptr. 69, 70).

an original mortgage lender's "agents, successors, or assigns"; General Statutes § 8-265cc (4); is misplaced, for it ignores the plain meaning of the text of § 8-265ee (a), which is carefully directed to a particular mortgagee in time.[11]

In sum, we conclude that a mortgagee that wishes to commence a foreclosure of an applicable mortgage must provide the prescribed EMAP notice in accordance with § 8-265ee (a) prior to the commencement of a foreclosure action, and the failure to do so deprives the trial court of subject matter jurisdiction. Because the plaintiff, as the original plaintiff in the present action, failed to comply with this jurisdictional necessity, the trial court lacked subject matter jurisdiction.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

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[11] It would be a wholly different matter had the plaintiff been substituted in the Fannie Mae action, in which case it would not have had to mail the defendant a new EMAP notice.