U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* MELISSA L. MAMUDI ET AL. (AC 42415)

DiPentima, C. J., and Keller and Norcott, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant M. The property was transferred several times via quitclaim deed and was eventually deeded to the defendants W Co. and P. Following the trial court's granting of the plaintiff's motion for judgment of strict foreclosure and the setting of law days, W Co. twice filed for bankruptcy under chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 701 et seq.), and both petitions were dismissed by the Bankruptcy Court. Thereafter, the plaintiff filed a motion, to which W Co. and P did not object, for an order of no bankruptcy stay, alleging that, pursuant to statute (11 U.S.C. § 362), because W Co. had filed two bankruptcy proceedings within the previous year, which had both been dismissed, a stay would not automatically be imposed if W Co. filed a third petition for bankruptcy. After the trial court granted the plaintiff's motion to reset the law days following W Co.'s second bankruptcy filing, W Co. filed a third petition for bankruptcy four days before the law days were set to commence. The plaintiff then filed a second motion for order, to which W Co. and P did not object, seeking to establish that the law days had commenced and title to the subject property had vested in the plaintiff. Specifically, the plaintiff alleged that, pursuant to state statute (§ 49-15) and federal statute, 11 U.S.C. § 362, there was no automatic stay provision in effect following the filing of W Co.'s third petition for bankruptcy. The court granted both of the plaintiff's motions for order. Thereafter, the court granted the motion to intervene filed by the purchasers of the property, A and M, and A and M filed an application for an execution of ejectment to remove W Co. and P from

the property. Thereafter, W Co. and P filed motions to reargue the court's granting of the plaintiff's motions for order, which the court denied as untimely, and W Co. and P appealed to this court. *Held* that there was no practical relief the trial court could have afforded W Co. and P, as title to the property had vested absolutely in the plaintiff after the passing of the law days: W Co. and P failed to redeem before the passing of the law days and they were not deprived of the right to appeal concerning the law days, as the twenty day period pursuant to the rules of practice (§ 11-12) to appeal from the trial court's granting of the plaintiff's motions for order expired before the law days commenced; moreover, W Co. and P's motions to reargue were filed approximately eight months after title in the property had vested in the plaintiff; accordingly, the trial court should have rendered judgment dismissing W Co. and P's motions to reargue as moot rather than denying those motions.

Argued January 14—officially released April 21, 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 Danbury, where the court, *Mintz*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Pavia*, *J.*, rendered judgment of strict foreclosure; subsequently, the court, *Pavia*, *J.*, granted the motion to cite in Wellsville Properties, LLC, as a defendant filed by the defendant Laurie J. Pastor; thereafter, the court, *Russo*, *J.*, granted the motions to be cited in as a defendant and to open and extend the law days filed by John C. Pastor; subsequently, the defendant Wellsville Properties, LLC, filed a notice of bankruptcy, which was dismissed; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motion to reset the law days; subsequently, the defendant Wellsville Properties, LLC, filed a notice of bankruptcy, which was dismissed; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motion to reset the law days; subsequently, the defendant Wellsville Properties, LLC, filed a notice of bankruptcy and the plaintiff filed a motion for order of no bankruptcy stay; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motions for order; subsequently, the court, *Mintz*, *J.*, granted the motion to intervene

filed by Armando Bernado et al.; thereafter, the court, *Russo*, *J.*, denied the motions filed by the defendant Wellsville Properties, LLC, et al. to reargue the court's granting of the plaintiff's motions for order, and the defendant Wellsville Properties, LLC, et al. appealed to this court. *Improper form of judgment*; *judgment directed.*

Christopher G. Brown, for the appellants (defendant Wellsville Properties, LLC, et al.).

Tara L. Trifon, with whom, on the brief, was *Melanie Dykas*, for the appellee (plaintiff).

Scott M. Harington, for the appellees (intervenors).

Opinion

NORCOTT, J. In this appeal, which stems from a fourteen year old foreclosure action, the defendants Wellsville Properties, LLC (Wellsville), and John C. Pastor (Pastor)[1] appeal from the judgment of the trial court denying, as untimely, their motions to reargue the court's decisions granting two motions for orders filed by the plaintiff, U.S. Bank, National Association, as Trustee for RASC 2005-AHL1.[2] On appeal, the defendants claim that (1) the court abused its discretion in denying their motions to reargue as untimely where,

[1] The other defendants in this action are Melissa L. Mamudi, Bridgewater Partners, LLC, Laurie J. Pastor, Mendim Mamudi and SROTSAPNEVES-NLS, Inc. Because those parties are not involved in this appeal, we refer in this opinion to Pastor and Wellsville collectively as the defendants and individually by name where necessary.

[2] In the summons, the plaintiff was named as "U.S. Bank, National Association, as Trustee." In a motion to substitute the plaintiff in this action, which the plaintiff filed on August 23, 2013, and was granted by the court on September, 10, 2013, the plaintiff alleged that due to a scrivener's error, it was not properly named in the action, and that its proper name was "U.S. Bank, National Association, as Trustee, Successor in Interest to Bank of America, National Association, as Trustee, Successor by Merger to LaSalle Bank, National Association, as Trustee for Residential Asset Securities Corporation, Home Equity Mortgage." Thereafter, the plaintiff filed another "Motion to Substitute Plaintiff," alleging that due to a scrivener's error, it was not properly named, and that its correct name is U.S. Bank, National

as here, those motions asserted mistakes of law in the court's rulings on the plaintiff's motions for orders, (2) the court erred in ruling that the law days were not "automatically vacated" pursuant to General Statutes § 49-15 (b) as a result of a bankruptcy petition filed by Wellsville on February 20, 2018, (3) the court improperly determined that the bankruptcy stay was eliminated by 11 U.S.C. § 362 (c) (4) (A) (i) (2012),[3] and (4) even if § 49-15 (b) does not apply, pursuant to federal law, 11 U.S.C § 108 (b) (2012),[4] Wellsville's bankruptcy petition extended the law days by up to sixty days to April 17, 2018, a date well past the February 20, 2018 date set forth in the foreclosure judgment. This action resulted in harm to the defendants in that they lost the right to move to open the judgment and to further extend the law days when the court ruled on the motions for orders on March 12, 2018, before the commencement of the extended law days on April 17, 2018. We conclude that there is no practical relief available to the defendants and, therefore, that the court should have dismissed as moot, rather than denied, their motions to reargue.

Association, as Trustee for RASC 2005-AHL1. On February 9, 2015, the court, *Russo*, *J.*, granted the plaintiff's motion to substitute. Our references in this opinion to the plaintiff are to U.S. Bank, National Association, as Trustee for RASC 2005-AHL1.

[3] Section 362 (c) of title 11 of the United States Code provides in relevant part: "Except as provided in subsections (d), (e), (f), and (h) of this section . . . (4) (A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707 (b), the stay under subsection (a) shall not go into effect upon the filing of the later case . . . ."

[4] Section 108 (b) of title 11 of the United States Code provides in relevant part: "[I]f . . . an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 60 days after the order for relief."

The record reveals the following undisputed relevant facts and procedural history. In June, 2005, Melissa L. Mamudi (Mamudi) had executed and delivered to Accredited Home Lenders, Inc., a note for a loan in the original principal amount of $880,000. As security for the note, Mamudi executed a mortgage on certain property she owned that was located at 148 North Lake Shore Drive in Brookfield (property). The mortgage subsequently was assigned to the plaintiff. After Mamudi defaulted on the note, the plaintiff, as the holder of the mortgage and note, elected to accelerate the balance due on the note and provided Mamudi with written notice of the default, which Mamudi neglected to cure. The plaintiff thereafter commenced the present action on December 1, 2006, seeking to foreclose the mortgage on the property. The trial court, *Mintz*, *J.*, granted the plaintiff's motion for summary judgment as to liability in May, 2007.

Pursuant to a quitclaim deed dated August 21, 2007, Mamudi deeded the property to SROTSAPNEVES-NLS, Inc., which, in turn, quitclaimed the property to Laurie J. Pastor on August 26, 2008. Laurie J. Pastor further deeded the property to herself and Wellsville via a quitclaim deed dated June 3, 2011. Thereafter, Laurie J. Pastor quitclaimed her interest in the property to Pastor, which was recorded on the land records on November 6, 2012. Wellsville and Pastor have since been co-owners of the property. The plaintiff amended its complaint to reflect the ownership interests of Wellsville and Pastor.

On July 9, 2012, the court, *Pavia*, *J.*, rendered a judgment of strict foreclosure and determined the fair market value of the property to be $833,000, the amount of the debt as of that date to be $1,456,804.12, and certain other fees and costs. The court set law days to commence on November 13, 2012. As a result of bankruptcies filed by multiple defendants, the law days were reset multiple times. Relevant to this appeal, in

response to a motion to open and extend the law days filed by Pastor, the court, *Russo*, *J.*, on March 14, 2017, ordered that the law days be extended for the final time to April 18, 2017. On April 17, 2017, prior to the commencement of the law days, Wellsville filed a petition under chapter 7 of the United States Bankruptcy Code; see 11 U.S.C. § 701 et seq. (2012); which was dismissed on August 4, 2017. Also, on July 13, 2017, the Bankruptcy Court had entered an order granting Pastor a bankruptcy discharge related to a chapter 7 bankruptcy petition that he had filed. Accordingly, on October 4, 2017, the plaintiff filed another motion to reset the law days, which the court granted on October 16, 2017. Specifically, the court found that the Bankruptcy Court had issued an order of discharge on July 13, 2017, allowing the plaintiff to proceed with the foreclosure. The court further determined the fair market value of the property and the amount of the debt, and set new law days to commence on December 12, 2017. On December 11, 2017, one day prior to the commencement of the law days, Wellsville filed a second bankruptcy petition, which was dismissed on January 2, 2018.

Thereafter, on January 8, 2018, the plaintiff filed a "Motion for Order of No Bankruptcy Stay," in which it alleged that because Wellsville had filed two bankruptcy proceedings that were pending within the previous year, both of which had been dismissed, if and when Wellsville filed a third bankruptcy proceeding, a stay would not automatically be imposed upon the filing of such a proceeding pursuant to 11 U.S.C. § 362 (a) (2012).[5] Therefore, the plaintiff alleged that

[5] Section 362 (a) of title 11 of the United States Code provides in relevant part: "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5 (a) (3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."

with no automatic stay imposed, the law days would be permitted to commence as scheduled. On January 22, 2018, the court granted the plaintiff's motion to reset the law days following the bankruptcy filing, and made updated findings regarding the fair market value of the property and the amount of the debt and appraiser fees. It then set the law days to commence on February 20, 2018. Wellsville subsequently filed its third bankruptcy petition on February 16, 2018, as of which time the trial court had not yet acted on the plaintiff's motion for order. The plaintiff, in turn, filed a second motion for order on February 27, 2018, seeking an order that the law days had commenced and that title had vested in the plaintiff on February 23, 2018. Specifically, the plaintiff alleged that (1) the automatic stay provision of § 49-15 (b) did not apply because Wellsville was not a mortgagor under § 49-15 (b), which applies only if a mortgagor files a bankruptcy petition, and (2) there was no automatic stay pursuant to 11 U.S.C. § 362 (c) (4) (A) (i) (2012), where, as here, Wellsville had filed two bankruptcy proceedings that were pending within the previous year and had been dismissed. Accordingly, the plaintiff alleged that because no automatic stay was in effect, with the passing of the law days title vested absolutely in the plaintiff. The defendants did not file objections to either of the plaintiff's motions for orders.

The Bankruptcy Court entered an order dismissing Wellsville's third bankruptcy petition on March 8, 2018, and notice of that dismissal was filed on March 13, 2018. On March 12, 2018, the trial court granted both of the plaintiff's motions for orders with orders that simply stated, "Granted." The plaintiff thereafter filed a proposed execution of ejectment on May 2, 2018, to which the defendants filed an objection, which was overruled by the court. The plaintiff subsequently filed a new application for execution of ejectment on July 5, 2018, to which the defendants again objected, claiming that title had not passed and noting that they had

filed a writ of error[6] concerning the trial court's order overruling their objection to the execution of ejectment. The court never ruled on that objection, and an execution of ejectment issued on September 4, 2018. Subsequently, the purchasers of the property, Armando Bernardo and Maria Bernardo,[7] filed a motion to intervene in the action, which the court, *Mintz*, *J.*, granted on October 29, 2018. Afterward, the intervenors filed an application on November 1, 2018, for an execution of ejectment to remove the defendants from the property, to which the defendants objected. On December 3, 2018, the defendants filed two motions to reargue the court's March 12, 2018 decisions granting the plaintiff's motions for orders. The court, *Russo*, *J.*, denied as untimely both motions to reargue on December 6, 2018, and the defendants appealed to this court challenging the denials of their motions to reargue.

After this appeal was filed, the plaintiff filed a motion to dismiss the appeal, claiming that it was frivolous and that it was moot in that absolute title to the property had vested in the plaintiff when the defendants failed to redeem on the passing of the law days that were scheduled to commence on February 20, 2018. This court denied the motion to dismiss the appeal without prejudice and permitted the parties to brief the merits of the mootness issue in their appellate briefs. In their brief, the defendants argue that the appeal is not moot because title never vested in the plaintiff and that, even if it did, dismissing the appeal as moot would deprive them of their due process right to appeal the orders confirming that title vested in the plaintiff. According to the defendants, "[s]ince a party cannot be deprived of the right to appeal a judgment setting law days, it follows that a party cannot be deprived of the

[6] The writ of error was rejected pursuant to Practice Book § 72-3 (c) (3) and (d) for the defendants' failure to include the signed writ of error and the signed marshal's return.

[7] The property was purchased by Armando Bernardo and Maria Bernardo on September 12, 2018.

right to appeal an order confirming that those law days have already passed." The plaintiff claims that the trial court lacked jurisdiction to consider the motions to reargue after title vested absolutely in the plaintiff.

Before turning to the merits of the appeal, we must first address the mootness issue. "Our standard of review regarding mootness is well settled. Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; internal quotation marks omitted.) *New Image Contractors, LLC* v. *Village at Mariner's Point Ltd. Partnership*, 86 Conn. App. 692, 698, 862 A.2d 832 (2004). "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Friedman* v. *Gomez*, 172 Conn. App. 254, 259, 159 A.3d 703 (2017). Our review of the question of mootness is plenary. See, e.g., *State* v. *Rodriguez*, 320 Conn. 694, 699, 132 A.3d 731 (2016).

A review of the basic legal principles governing mortgages and foreclosures will aid in our discussion of this issue. "In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. The qualified title which the plaintiff had previously held under his mortgage had become an absolute one. . . . In other words, if the defendant's equity of redemption was extinguished by the passing of the law days, we can afford no practical relief by reviewing the rulings of the trial court now challenged on appeal, as doing so would have no practical effect or alter the substantive rights of the parties." (Citations omitted; internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 97, 172 A.3d 1263 (2017). "The question this court must address, therefore, is whether the law days have run so as to extinguish the defendant's equity of redemption and vest title absolutely in the plaintiff. If this has occurred, no practical relief [could] follow from a determination of the merits of this case . . . ." (Internal quotation marks omitted.) *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 167, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989).

Generally, pursuant to § 362 (a) of title 11 of the United States Code, "the filing of [a] bankruptcy petition operate[s] as an automatic stay of the plaintiff's foreclosure action."[8] *U.S. Bank National Assn.* v. *Works*, 160 Conn. App. 49, 52, 124 A.3d 935, cert. denied, 320 Conn. 904, 127 A.3d 188 (2015); see also *Bank of New York* v. *Savvidis*, 174 Conn. App. 843, 846, 165 A.3d 1266 (2017). In *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 208, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004), however, this court held that the filing of the defendant's bankruptcy petition did not invoke the automatic stay provision of 11 U.S.C. § 362 (a) (2012) but, rather, extended the time for her to redeem only by sixty days from the day the defendant filed her petition, pursuant to 11 U.S.C. § 108 (b) (2012). A discussion of this court's holding in *Provident Bank* is necessary to our analysis of this issue.

In *Provident Bank*, the plaintiff bank brought a foreclosure action that resulted in a judgment of strict foreclosure. Id., 206. After that judgment was opened sev-

[8] The defendants also claim that the filing of the bankruptcy petition by Wellsville triggered an automatic stay pursuant to § 49-15 (b). We reject this claim. Pursuant to § 49-15 (b), "[u]pon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court . . . ." The statute does not define the term "mortgagor." Where a statute does not define a term, "[w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 191 Conn. App. 648, 657, 216 A.3d 847, cert. granted on other grounds, 333 Conn. 926, 217 A.3d 994 (2019). Black's Law Dictionary defines mortgagor as "[o]ne who, having all or some part of title to property, by written instrument pledges that property for some particular purpose such as security for a debt. The party who mortgages the property; the debtor. That party to a mortgage who gives legal title or a lien to the mortgagee to secure the mortgage loan." Black's Law Dictionary (6th Ed. 1990) p. 1012. The defendants clearly do not meet that definition. The mortgagor in the present case was Mamudi. Accordingly, § 49-15 (b) is not applicable to this case.

eral times and the law day was set for January 13, 2003, the defendant filed a chapter 7 bankruptcy petition on January 9, 2003. Id. "Although not required to do so by any rule, the plaintiff filed a notice of the extension of the law day until March 10, 2003, with the clerk of the Superior Court in response to the defendant's filing of her bankruptcy petition." Id. When the defendant failed to redeem by that extended law day, title vested in the plaintiff. Id. The defendant appealed to this court, claiming that "the filing of her chapter 7 bankruptcy prior to her law day indefinitely stayed her redemption period by invoking the automatic stay provision of 11 U.S.C. § 362 (a)." Id. This court disagreed, stating: "We recognize that Connecticut courts consistently have held that the indefinite automatic stay provisions of § 362 (a) apply in strict foreclosure cases where a chapter 7 bankruptcy petition was filed after the judgment but prior to the passing of the final law day. See, e.g., *Citicorp Mortgage, Inc.* v. *Mehta*, 39 Conn. App. 822, 824, 668 A.2d 729 (1995). We conclude that we no longer can follow such authority in light of the holding of the United States Court of Appeals for the Second Circuit in *In re Canney*, 284 F.3d 362 (2d Cir. 2002). In general, we look to the federal courts for guidance in resolving issues of federal law. . . . [T]he decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. . . . *Krondes* v. *O'Boy*, 69 Conn. App. 802, 808, 796 A.2d 625 (2002).[9]

"*In re Canney* involved a mortgage foreclosure brought in Vermont under the Vermont statutes. See 12 Vt. Stat. Ann., c. 163, subchapter 6. In *In re Canney*, the Second Circuit determined that the sixty day stay period set forth in § 108 (b) [of title 11 of the United States Code] applied to the passing of the law day rather

[9] See also *Thomas* v. *West Haven*, 249 Conn. 385, 392, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Knutson Mortgage Corp.* v. *Salata*, 55 Conn. App. 784, 787, 740 A.2d 918 (1999).

than the indefinite stay period prescribed in § 362 (a) [of title 11 of the United States Code] when a petitioner filed a bankruptcy petition after judgment had entered but prior to the passing of the law day in a strict foreclosure action. *In re Canney*, supra, 284 F.3d 370–73. Agreeing with the United States Courts of Appeal in the Sixth, Seventh and Eighth Circuits, the court held that § 108 (b), which provides for only a sixty day delay in the running of the law day, is the applicable provision because the automatic stay provision of § 362 (a) prevents only certain affirmative acts taken by a creditor, and the running of time is not one of those acts. . . .

"Although *In re Canney* concerned strict foreclosure under Vermont's statutes, our statutory procedures are similar. Strict foreclosure is the normal method of foreclosure only in Connecticut and Vermont. . . . When a strict foreclosure rather than a sale is ordered, it entails a foreclosure judgment in favor of the mortgagee that results from a proceeding against the debtor and leaves the mortgagor with a right to redeem within a specified time frame, ending with the law day. . . . Because Connecticut and Vermont both allow redemption during a specified time period after which title automatically passes to the mortgagee, the reasoning in *In re Canney*, arising out of the Vermont foreclosure, applies to this Connecticut foreclosure with equal force.

"We conclude that the defendant's period of equitable redemption was not stayed when she filed a chapter 7 bankruptcy petition, although it was extended by sixty days after the filing of the petition. The defendant's bankruptcy petition was filed on January 9, 2003. The practical effect of § 108 (b) is that the time in which a trustee (or if the bankruptcy petition is dismissed, the mortgagor) may cure a default or perform any other similar act expires at the end of the period settled for redemption or sixty days after the order for relief. The commencement of a voluntary bankruptcy case through the filing of a petition constitutes an order for relief.

11 U.S.C. § 301. In this case, the equity of redemption was foreclosed on March 10, 2003, when the sixty day extended period lapsed without redemption by the defendant. Title became absolute in the plaintiff on March 13, 2003, the date the certificate of foreclosure was recorded on the land records. Thus, because the defendant failed to redeem during this period, she no longer had any right or interest in the property and title passed to the plaintiff." (Citations omitted; footnote added and footnotes omitted; internal quotation marks omitted.) *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 207–209.

Recently, this court addressed a similar issue in *Seminole Realty, LLC* v. *Sekretaev*, 192 Conn. App. 405, 415, 218 A.3d 198, cert. denied, 334 Conn. 905, 220 A.3d 35 (2019),[10] and rejected a claim that, due to a bankruptcy filing, § 49-15 (b) operated to automatically open and indefinitely extend the law days. This court, relying on *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 204, concluded that 11 U.S.C. § 108 (b) (2012) operated to extend the time for redemption by only sixty days and that, because the defendant had failed to redeem by the end of the sixty day extension period, absolute title had vested in the plaintiff. *Seminole Realty, LLC* v. *Sekretaev*, supra, 415, 418–20. Therefore, the defendant's claims on appeal that were predicated on the validity of the underlying mortgage were moot given that title to the property had vested in the plaintiff. Id., 407 n.2.

In the present case, after the judgment was opened several times due to numerous bankruptcy filings by various defendants in this case, a new foreclosure judgment was rendered on January 22, 2018, and the law

[10] On September 10, 2019, after the briefs in this case were filed, this court released its decision in *Seminole Realty, LLC* v. *Sekretaev*, supra, 192 Conn. App. 405. The parties, thus, did not address *Seminole Realty, LLC*, in their briefs but were notified to be prepared to address the impact, if any, of that decision at oral argument.

days were reset to commence on February 20, 2018. On February 16, 2018, Wellsville filed its third bankruptcy petition. Pursuant to *Provident Bank* and *Seminole Realty, LLC*, we conclude that the period of equitable redemption was not stayed when Wellsville filed its third bankruptcy petition, although it was extended by sixty days after the filing of the petition. Accordingly, the law days commenced on April 17, 2018. The defendants do not dispute that they did nothing during the sixty day extension to exercise their right of redemption. Because the defendants failed to redeem before the passing of the law days, they no longer had any interest in the property and title passed to the plaintiff. Thus, there was no practical relief that the trial court could have afforded the defendants with respect to their motions to reargue.

This court has explained that "it is not within the power of appellate courts to resuscitate the mortgagor's right of redemption or otherwise to disturb the absolute title of the redeeming encumbrancer. . . . Simply put, once title has vested absolutely in the mortgagee, the mortgagor's interest in the property is extinguished and cannot be revived by a reviewing court." (Internal quotation marks omitted.) *Citigroup Global Markets Realty Corp.* v. *Christiansen*, 163 Conn. App. 635, 641, 137 A.3d 76 (2016). "[I]f the defendant's equity of redemption was extinguished by the passing of the law days, we can afford no practical relief by reviewing the rulings of the trial court now challenged on appeal, as doing so would have no practical effect or alter the substantive rights of the parties." *Sovereign Bank* v. *Licata*, supra, 178 Conn. App. 97. "[T]he effect of strict foreclosure is to vest title to the real property absolutely in the mortgagee and to do so without any sale of the property. A judgment of strict foreclosure, when it becomes absolute and all rights of redemption are cut off, constitutes an appropriation of the mortgaged property to satisfy

the mortgage debt. . . . In *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 163, the defendant mortgagor appealed from the denial of his motion to open a stipulated judgment of strict foreclosure. . . . In that case, this court stated: The question this court must address . . . is whether the law days have run so as to extinguish the defendant's equity of redemption and vest title absolutely in the plaintiff. If this has occurred, no practical relief [could] follow from a determination of the merits of this case . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 323–24, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); see id., 324 ("because the law days had run and title had vested absolutely in the plaintiff, the defendant's appeal was moot"). In the present case, because title to the property absolutely had vested in the plaintiff after the passing of the law days, the motions to reargue were moot when they were filed approximately eight months after the vesting of title, as there was no practical relief that the court could have afforded the defendants via their motions to reargue at that time. See *Deutsche Bank National Trust Co.* v. *Fritzell*, 185 Conn. App. 777, 786, 198 A.3d 642 (2018), cert. denied, 330 Conn. 963, 199 A.3d 1080 (2019). The court, therefore, should have dismissed as moot, rather than denied, the motions to reargue. See id.; see also *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 569–70, 953 A.2d 868 (2008) (after title had vested absolutely in plaintiff, court should have dismissed, rather than denied, late motion to open); *Thompson Gardens West Condominium Assn., Inc.* v. *Masto*, 140 Conn. App. 271, 274, 59 A.3d 276 (2013) (although court properly determined that it lacked jurisdiction to grant motion to open judgment of strict foreclosure filed nearly six months after title had vested in plaintiff, court should have dismissed motion to open instead of denying motion).

The defendants attempt to distinguish *Seminole Realty, LLC*. At oral argument before this court,[11] they claimed that, in *Seminole Realty, LLC*, the trial court was correct that the law day had passed, although it was wrong as to the day on which it passed, as the court did not account for the sixty day extension in 11 U.S.C. § 108 (b) (2012). Whereas, in the present case, they claimed that the court was wrong that the law day had passed and that its decisions of March 12, 2018, granting the plaintiff's motions for orders deprived the defendants of the right to move to open the judgment and extend the law days.[12] They also claimed at oral argument that because there were errors of law in the court's decisions, the court, in ruling on their motions to reargue, should have revisited those prior rulings. In their brief, they claim further that "[t]his court can correct the rulings on the motions for order because it is necessary to effect justice." Specifically, they allege that "the orders granting the motions for order were contrary to law at the time they were rendered and still are. If upheld despite the judicial error, it would deprive Wellsville and . . . Pastor of their equity of redemption. The circumstances suggest that this court should go beyond reversing the rulings on the reargument motions and reverse the rulings on the motions for order." We are not persuaded by the defendants' claims.

If the defendants believed that the court's March 12, 2018 decisions were incorrect, they could have timely filed their motions to reargue within twenty days of those decisions as required by Practice Book § 11-12.[13]

[11] See footnote 10 of this opinion.

[12] We note that, in light of the sixty day extension of 11 U.S.C. § 108 (b) (2012), there was no need for the law days to be reset. See *Seminole Realty, LLC* v. *Sekretaev*, supra, 192 Conn. App. 418–20; *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 207–209. Therefore, the defendants' claim that the court's rulings prejudiced them by depriving them of the right to be able to file a motion to reset the law days fails.

[13] "[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misappre-

They have not demonstrated how or why they were prevented from doing so, especially given that they did, eventually, file such motions approximately nine months later. Instead, they claim, without authority, that they were prejudiced by the court's rulings and that, with respect to their motions to reargue, it's a matter of "correcting an error of law." We disagree. Although a trial court has discretion to grant an untimely motion to reargue; see *Torres* v. *Carrese*, 149 Conn. App. 596, 616, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014); if a defendant could file a motion to reargue at *any* time after a judgment is rendered to correct a claimed error of law, there would be no finality of judgments. "Generally, courts recognize a compelling interest in the finality of judgments which should not lightly be disregarded. Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined. The law favors finality of judgments . . . . 46 Am. Jur. 2d 543–44, Judgments § 164 (2017). This court has emphasized that due consideration of the finality of judgments is important and that judgments should only be set aside or opened for a strong and compelling reason. See *Lewis* v. *Bowden*, 166 Conn. App. 400, 403, 141 A.3d 998 (2016); see also *Brody* v. *Brody*, 153 Conn. App. 625, 631–32, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014), and cases cited therein. It is in the interest of the public as well as that of the parties [that] there must be fixed a time after the expiration of which the controversy is to be regarded as settled and the

hension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citations omitted; internal quotation marks omitted.) *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001).

parties freed of obligation to act further in the matter by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . *Bruno* v. *Bruno*, 146 Conn. App. 214, 229, 76 A.3d 725 (2013). [T]he modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments . . . ." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, 180 Conn. App. 818, 828, 184 A.3d 1254 (2018); see also *Federal National Mortgage Assn.* v. *Farina*, 182 Conn. App. 844, 853–54, 191 A.3d 206 (2018). If this court were to accept the defendants' proposition, it would "invite uncertainty in our system of property conveyance." *Citibank, N.A.* v. *Lindland*, 131 Conn. App. 653, 665, 27 A.3d 423 (2011), rev'd in part on other grounds, 310 Conn. 147, 75 A.3d 651 (2013).

Finally, the defendants, in arguing that the appeal is not moot, claim that "a foreclosure defendant cannot be deprived of the right to appeal concerning the law days" and that they would be deprived of due process if the appeal were found to be moot. In support of this claim, they rely on *Continental Capital Corp.* v. *Lazarte*, 57 Conn. App. 271, 274, 749 A.2d 646 (2000), for the proposition that "[a] party may not effectively be deprived of the right to appeal within the twenty days by having the law day pass within that time, thereby causing a loss of the right of redemption." The defendants, however, were never deprived of this right, as the twenty day period to appeal from the court's March 12, 2018 decisions expired before the law days commenced on April 17, 2018. This court's decision in *Sovereign Bank* v. *Licata*, supra, 178 Conn. App. 82, is instructive here. In *Sovereign Bank*, this court held: "Because no appeal was filed from the judgment of strict foreclosure in this case, any initial appellate stay of execution that arose when the judgment was rendered expired after the appeal period for that judgment

had run, which was long before the law days set by the court passed. . . . Accordingly, because there was no appellate stay in effect when the law days began to run . . . absolute title to the property transferred to the plaintiff as a matter of law after all law days expired.

"It is true that the record reflects some later confusion by the parties, the trial court and this court regarding whether the foreclosure judgment had been subject to an appellate stay and whether the law days needed to be reset. Any such misstatements or errors, however, did nothing to alter the legal reality—*law days passed and title to the property became absolute in the plaintiff*. . . . Accordingly, if there was any ambiguity in the record regarding the status of this foreclosure action, it has existed with the knowledge and acquiescence of the defendant. It was not until the plaintiff sought to sell the property during the pendency of its bankruptcy action that the defendant claimed any need for clarification." (Emphasis added.) Id., 100–101. Likewise, in the present case, it was not until the intervening defendants sought to gain possession of the property through an execution of ejectment that the defendants filed their motions to reargue seeking to correct alleged errors of law by the court that occurred approximately nine months prior. Because the motions to reargue were filed approximately eight months after title in the property vested in the plaintiff, the claims raised therein were moot and the court, therefore, should have dismissed the motions.[14]

The form of the judgment is improper, the judgment denying the defendants' motions to reargue is reversed and the case is remanded with direction to render judgment dismissing the motions as moot.

In this opinion the other judges concurred.

[14] In light of this conclusion, we need not reach the merits of the claims raised on appeal.

KEITH MANSON *v.* DANIEL CONKLIN ET AL. (AC 41672)

Lavine, Prescott and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendant police officer, C, and the defendant city of New Haven for, inter alia, negligence in connection with injuries he sustained when he collided with C's police cruiser while riding his dirt bike on a municipal street. In response to the plaintiff's complaint, the defendants alleged a number of special defenses, including that the plaintiff's claims were barred by governmental immunity because C was engaged in discretionary acts at the time of the accident. Prior to trial, the defendants filed a motion in limine to preclude the admission of any impeachment evidence relating to prior alleged misconduct by C. The plaintiff filed an objection to which he attached copies of three internal affairs reports authored by the New Haven Police Department, which described three instances in which C had engaged in misconduct and dishonesty during interactions with the public and then had misrepresented the nature of those interactions in official police reports or in response to internal affairs investigations. The trial court granted the defendants' motion in limine with respect to the internal affairs reports and the information contained therein. Following trial, the jury returned a verdict in favor of the defendants. On the verdict form, the jury indicated that the plaintiff had failed to prove by a fair preponderance of the evidence that C or the city was negligent. Thereafter, the trial court rendered judgment in accordance with the verdict, and the plaintiff appealed to this court. *Held*:

1. Contrary to the plaintiff's claim, the trial court properly precluded the admission of the findings and conclusions by the police department in the internal affairs reports that C had engaged in misconduct and was dishonest; those findings and conclusions constituted extrinsic evidence of alleged prior misconduct because they reflected the opinions of the police department that C had acted untruthfully, and, therefore, pursuant to our Supreme Court's decision in *Weaver* v. *McKnight*, (313 Conn. 393), they were inadmissible and properly excluded.
2. The plaintiff could not prevail on his claim that the trial court improperly submitted the issue of governmental immunity to the jury, which was based on his contention that the question of whether C's actions were ministerial or discretionary was not a factual question for the jury but, rather, was a legal issue to be decided by the court; it was unnecessary for this court to reach that question, as the plaintiff could not demonstrate that he suffered any harm by the submission of the issue of governmental immunity to the jury because the jury found that C was not negligent and, therefore, it was not necessary for the jury to reach that issue.

Argued December 4, 2019—officially released April 21, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle*, *J.*, granted the defendants' motion to preclude certain evidence; thereafter, the matter was tried to the jury before *Markle*, *J.*; verdict and judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Matthew D. Popilowski, with whom, on the brief, was *John F. Riley*, *Jr.*, for the appellant (plaintiff).

Alyssa S. Torres, assistant corporation counsel, for the appellees (defendants).

Opinion

PRESCOTT, J. The plaintiff, Keith Manson, appeals from the judgment of the trial court, rendered following a jury trial, in favor of the defendants, Daniel Conklin and the city of New Haven (city). The plaintiff brought the underlying negligence action against the defendants seeking compensation for damages he allegedly sustained when he collided with Conklin's police cruiser while riding his dirt bike on a municipal street. On appeal, the plaintiff claims that the court improperly (1) precluded him from impeaching Conklin about findings regarding his veracity made by his employer during unrelated internal affairs (IA) investigations and (2) submitted the issue of governmental immunity to the jury. We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts that the jury reasonably could have found are relevant to the plaintiff's claims on appeal. On April 1, 2013, at approximately 10:49 a.m., the plaintiff was riding his dirt bike east on Flint Street in New Haven. At the same time, Conklin, an on-duty New Haven police officer, was driving his marked police cruiser west on Flint Street, in

the opposite direction in which the plaintiff was traveling. As Conklin drove down Flint Street, he observed a father with his young child playing in the street. To provide sufficient space to safely pass the child and his father, Conklin pulled his cruiser away from them toward the middle of the road.

As Conklin slowly was maneuvering his cruiser toward the middle of the road, the plaintiff continued east on Flint Street at a high rate of speed, eventually cresting a hill at the top of the street. Shortly after cresting the hill, the plaintiff collided with the front fender of Conklin's cruiser, and the plaintiff fell off of his bike, bleeding and in pain. Conklin called an ambulance. He then approached the plaintiff and placed him in handcuffs because he was combative. The ambulance transported the plaintiff to Yale New Haven Hospital where he required immediate surgery for a fractured kneecap, which required the removal of a rod in his leg from a prior car accident.

On April 1, 2015, the plaintiff commenced the present action against the defendants. The plaintiff filed, on November 15, 2017, the operative three count amended complaint. In count one of that complaint, the plaintiff alleged negligence against Conklin; in count two, he sought indemnification from the city pursuant to General Statutes § 7-465;[1] and, in count three, he alleged negligence against the city pursuant to General Statutes § 52-577n.[2]

[1] General Statutes § 7-465 allows an action for indemnification against a municipality in conjunction with a common-law action against a municipal employee; *Gaudino* v. *East Hartford*, 87 Conn. App. 353, 356, 865 A.2d 470 (2005); and provides in relevant part: "Any town, city, or borough . . . shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded . . . if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment . . . ."

[2] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable

In response, the defendants, on February 1, 2018, filed their operative answer and special defenses. The defendants alleged by way of special defenses that (1) the plaintiff's injuries were caused by his own comparative negligence, (2) Conklin, as a government employee, is entitled to qualified immunity, (3) as to Conklin, the accident was unavoidable, and (4) the plaintiff's claims were barred by governmental immunity pursuant to § 52-557n because Conklin was engaged in discretionary acts.

The case was tried to a jury over the course of two days. Following the close of evidence and prior to the submission of the case to the jury, the parties met with the court to review proposed jury instructions. The parties disagreed on whether Conklin's actions were discretionary or ministerial for purposes of a jury charge on the doctrine of governmental immunity. The court concluded that it was appropriate to charge the jury on the doctrine of governmental immunity by providing the jury examples of duties that were ministerial and discretionary because doing so would help the jury understand the charge.

Thereafter, the court charged the jury, and the case was submitted to the jury for a verdict. In addition to a verdict form, the court provided the jury with interrogatories. The interrogatories asked, in relevant part: "Did the plaintiff prove by a fair preponderance of the evidence that . . . Conklin was negligent in one or more of the ways as alleged?" The jury was instructed to respond either yes or no.

for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . ."

On the same day, the jury returned a verdict in favor of the defendants. With respect to the interrogatory asking whether the plaintiff had established that Conklin was negligent, the jury answered no, and it did not answer any other interrogatories in accordance with the instructions on the form. The jury then completed the verdict form, indicating that the plaintiff had failed to prove by a fair preponderance of the evidence that Conklin or the city was negligent. The court rendered judgment in favor of the defendants in accordance with the jury's verdict. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court improperly precluded him from impeaching Conklin about the findings and conclusions contained in unrelated IA investigative reports regarding alleged misconduct and dishonesty he previously had engaged in as a police officer and his lack of veracity in responding to those allegations. Although we conclude that the court properly excluded this evidence, we do so for somewhat different reasons than those stated by the court.[3]

The following facts and procedural history are relevant to this claim. Prior to the commencement of trial, the defendants filed a motion in limine to preclude the admission of any impeachment evidence relating to prior alleged misconduct by Conklin. Specifically, the defendants, citing to §§ 4-3, 4-4, and 4-5 of the Connecticut Code of Evidence, sought to preclude the plaintiff from asking questions or admitting evidence regarding alleged misconduct engaged in by Conklin unrelated to the present case.

[3] If evidence would have been admissible or excludable on a ground other than that relied on by the trial court, we may affirm the evidentiary ruling on that alternative ground. See, e.g., *State* v. *Vines*, 71 Conn. App. 359, 366–67, 801 A.2d 918 ("even if the trial court did not engage in the proper inquiry as to the admissibility of evidence, we are mindful of our authority to affirm a judgment of a trial court on a dispositive alternat[ive] ground

The plaintiff filed an objection to the motion in limine and appended to his objection copies of the three IA investigative reports authored by the New Haven Police Department (department).[4] In general, these reports describe three instances in which Conklin had engaged in misconduct and dishonesty during interactions with the public and then had misrepresented the nature of those interactions in official police reports or in response to the IA investigations. By way of example only, in one of the IA reports, Conklin is alleged to have improperly tampered with the driver's license of a suspect by removing the change of address sticker on the back of the license. In another report, Conklin is alleged to have illegally detained a person sitting in a parked car and to have misrepresented the facts regarding the detention in a police report.

The record is somewhat muddled regarding the precise evidentiary use the plaintiff hoped to make of these reports or the information contained in them. In the plaintiff's written objection to the defendants' motion in limine, the plaintiff at times appears to have argued that he intended to ask Conklin about the specific acts of misconduct in which Conklin allegedly engaged. In other words, the plaintiff's objection suggested that he merely sought to question Conklin about whether he, in fact, had engaged in the specific misconduct described in the IA reports such as removing the change of address sticker from the license of a driver. In doing so, the plaintiff referred to § 6-6 (b) (1) of the Connecticut Code of Evidence, which provides that "[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative for the witness' character for untruthfulness."

for which there is support in the trial court record" (internal quotation marks omitted)), cert. denied, 261 Conn. 939, 808 A.2d 1134 (2002).

[4] Although the plaintiff never asked the court to mark the reports as exhibits for identification purposes, the reports are contained in the trial court record.

Throughout his written objection, however, the plaintiff suggested that his true intent was to have admitted the actual findings and conclusions of the department regarding whether Conklin had engaged in misconduct and had lied about it. The plaintiff in his objection referred repeatedly to the "determinations" and "findings" made by the department regarding Conklin's conduct.

On April 26, 2018, the court heard argument on the motion in limine. During the hearing, the plaintiff's counsel and the court engaged in a colloquy regarding the IA reports and the uses the plaintiff wanted to make of the reports or the information contained within them. Counsel informed the court that he wanted to question Conklin about the IA reports, specifically, the investigator's findings of dishonesty. During the same colloquy, counsel further stated that "[t]he bad behavior, *in and of itself*, isn't something I necessarily need to or plan to get involved in. It's as you read the full order for the findings of the IA board, implicit in there is an understanding that [Conklin] was not exactly truthful in his explanations of his behavior. . . . When the IA board *makes a conclusion*, which inherent in that decision is that they don't believe . . . Conklin, to me that certainly is fair game as far as truthfulness of the party who will be a witness." (Emphasis added).

The plaintiff's counsel conceded that he was not offering the IA reports themselves: "I don't think under the law I would be allowed to offer them as extrinsic evidence. I just want to be allowed to inquire. . . . I'm assuming he's going to be honest when I ask him has he been, for instance, *disciplined* by his department for destroying evidence." (Emphasis added.)

During its colloquy with the plaintiff's counsel, the court appears to have understood his argument to be that he had a right to question Conklin about the findings and conclusions of the department, rather than

asking Conklin directly whether he had engaged in the misconduct. The court stated in part: "It's the IA board making fact findings . . . it's just finding one person's statement more credible than the other." Counsel then rebutted the court's statement by claiming that the board was "[m]aking a conclusion." After the colloquy, the court reserved its ruling on the motion in limine until May 1, 2018, indicating that it would review the exhibits and the relevant rules of evidence.

On May 1, 2018, the morning on which the evidentiary portion of the trial was set to begin, the court granted the motion regarding the IA reports and the information contained within them. The court stated: "[A]fter reviewing the alleged misconduct evidence, I find that insufficient to be probative of the witness' truthfulness . . . in this action wherein the allegations simply involve negligence. I also find that the probative value, after taking into consideration the nature or the type of proceedings and the findings that were made, including the findings that certain training and rules were not abided to, I [find] that the probative value is outweighed by the unfair prejudice in the sense that it would unduly [arouse] the emotions or prejudice against the defendant in this case and . . . I believe in addition . . . that we are going [to] get off track and get into minitrials about what those hearings were about, who made the allegations, who were the supporting witnesses, and we are going to get off the path."[5]

On appeal, the plaintiff, in his brief, again asserts that the court improperly precluded the admission of the

[5] We understand the court's ruling, therefore, to hinge on its conclusion that the IA reports did not describe misconduct that bore on Conklin's veracity. Although we differ with that assessment, the court's decision to exclude the evidence was proper, albeit for different reasons that we discuss herein. We also disagree with the court's ruling to the extent that it may be read to suggest that, because the case only involved allegations of negligence, Conklin's veracity was somehow not at issue. Conklin was obviously a critical eyewitness to the accident and, as one of the defendants, had a substantial stake in the outcome of the case.

conclusions and findings by the department that Conklin had engaged in misconduct and was dishonest, rather than evidence of the misconduct itself. The plaintiff does not argue that the court improperly prevented him from asking Conklin whether he had engaged in certain misconduct or dishonesty but, instead, he argues that the court should have permitted him to ask Conklin whether the department had so found. On the basis of this record, we conclude that the sole issue before us is whether the findings and conclusions of the department that Conklin had engaged in misconduct and was dishonest should not have been precluded by the court.

We first set forth our standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law of evidence], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

Although not relied on by the court or the defendants on appeal, we conclude that our Supreme Court's decision in *Weaver* is dispositive of this question. In *Weaver*, the mother of a stillborn infant brought a negligence action against her gynecologist and his medical group.

Id., 396. During trial, the court allowed the defendants to question the plaintiffs' expert witness regarding a censure that he had received from a voluntary membership organization. Id., 418. The censure included the organization's determination that the expert had violated the organization's rules of conduct. Id., 427. Our Supreme Court concluded that the determinations in the censure amounted to extrinsic evidence of alleged prior misconduct and, thus, were inadmissible. Id., 432.

In so concluding, our Supreme Court recognized that although the Connecticut Code of Evidence generally prohibits the use of character evidence to prove that a person has acted in conformity with a character trait on a particular occasion, one significant exception permits the admission of evidence of a witness' character for untruthfulness to impeach the credibility of the witness. Id., 426. "One method for impeaching a witness' credibility allows a party to cross-examine a witness about the witness' prior misconduct (other than a felony conviction, which is governed by other rules), subject to certain limitations: First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance upon the issue of veracity . . . . Second, [w]hether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court. . . . Third, extrinsic evidence of such acts is inadmissible. . . . Conn. Code Evid. § 6-6 (b) (2). Under these limitations, the only way to prove misconduct of a witness for impeachment purposes is through examination of the witness. . . . The party examining the witness must accept the witness' answers about a particular act of misconduct and may not use extrinsic evidence to contradict the witness' answers." (Citation omitted; internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 426–27.

After citing these general principles, the court turned to the more difficult issue presented in *Weaver*, namely,

"whether the prohibition on extrinsic evidence precludes cross-examination of the witness about another's determination that the witness acted untruthfully." Id., 427–28. Our Supreme Court indicated that it had "not been pointed to, and [was] not aware of, any [appellate] cases from this state directly addressing this question," but that "[c]ommentators and courts in other jurisdictions have addressed this question and generally have concluded that 'counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.' S. Saltzburg, 'Trial Tactics: Impeaching the Witness: Prior "Bad Acts" and Extrinsic Evidence,' 7 Crim. Just. 28, 31 (Winter 1993)." *Weaver* v. *McKnight*, supra, 313 Conn. 428.

The court in *Weaver* noted that the Federal Rules of Evidence and cases interpreting them do not permit a party to introduce findings or determinations by a third party that a witness has engaged in misconduct or dishonesty. "The Third Circuit Court of Appeals squarely addressed this issue in *United States* v. *Davis*, 183 F.3d 231, 257 n.12 (as amended by slip opinion, 197 F.3d 662, 663 n.1 (3d Cir.1999), and concluded that, during cross-examination of a police officer, the government cannot make reference to [the witness'] forty-four day suspension or *that Internal Affairs found that he lied about the* [*prior*] *incident.* The government needs to limit its [cross-examination] to the facts underlying those events. . . . If he denies that such events took place, however, the government cannot put before the jury evidence that he was suspended *or deemed a liar by Internal Affairs.* . . .

"Professor Colin C. Tait and Judge Eliot D. Prescott, in their treatise about Connecticut evidence law, also agree that a witness cannot be asked about the opinions of others regarding the alleged misconduct. C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008)

§ 6.32.5, p. 362. They refer to this court's decision in *State* v. *Bova*, [240 Conn. 210, 690 A.2d 1370 (1990)], as an example. In *Bova*, the court upheld a trial court's decision to preclude a party from asking a police officer about another case in which a judge commented that another witness was more credible than the police officer. . . . This court concluded that the judge's comment in the other case did not meet the first requirement for admitting misconduct testimony because the judge made no express finding that the officer lied, and therefore the comment did not sufficiently relate to the officer's credibility. . . . Professor Tait and Judge Prescott go further in their treatise, explaining that counsel could not have asked the officer about the judge's comment [e]ven if the judge had found that the officer lied as a witness [because] that finding is not a conviction of perjury. Such conduct, not being a conviction, can be proved only by questions addressed to the witness, i.e., Did you lie in case X? If the witness denies such misconduct, the questioner must take the [witness'] answer and cannot introduce extrinsic evidence. C. Tait & E. Prescott, supra, p. 362." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 429–30.

In the present case, the conclusions and findings contained within the IA reports constitute extrinsic evidence of alleged prior misconduct because they reflect the opinions of the department that Conklin acted untruthfully. Although the plaintiff would have been permitted to question Conklin about his misconduct, he would have been precluded from offering extrinsic evidence of that misconduct if denied by Conklin. The plaintiff could not circumvent these rules by questioning Conklin about the conclusions and findings contained in the reports. Although the court in the present case appears to have precluded the evidence proffered by the plaintiff on somewhat different grounds, we conclude that the exclusion of the evidence was dictated

by our Supreme Court's decision in *Weaver*, and we affirm the ruling on that basis.[6]

II

We next address the plaintiff's claim that the court improperly submitted the issue of governmental immunity[7] to the jury. Specifically, the plaintiff argues that the dispute over whether the actions of Conklin were ministerial or discretionary was not a factual question for the jury but, instead, was a legal issue to be decided by the court.

We conclude that it is unnecessary to reach this question because the plaintiff cannot demonstrate that he suffered any harm by the court's submission of the issue of governmental immunity to the jury. Before deciding whether governmental immunity applied, the jury first had to determine whether the municipal employee was negligent. Here, the jury did not find Conklin negligent. During oral argument before this court, the plaintiff conceded that he cannot show harm because the jury found that Conklin was not negligent and, thus, it was not necessary for the jury to reach the question of whether the defendants enjoyed immunity for negligent acts. Accordingly, this claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

[6] In light of this conclusion, it is unnecessary to address the plaintiff's claim that the court improperly relied on § 4-3 of the Connecticut Code of Evidence by finding that the evidence's probative value was outweighed by the danger of its unfair prejudice before determining under which section of the Connecticut Code of Evidence the evidence should have been classified.

[7] "The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, 280 Conn. 310, 318, 907 A.2d 1188 (2006).

CAROLYN H. LONGBOTTOM *v.* RICHARD H. LONGBOTTOM (AC 42274)

Prescott, Bright and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her motions to open and to modify the court's previous judgment modifying an educational support order. The parties' separation agreement, which was incorporated into the dissolution judgment, included a section pertaining to the division of costs for educational support for their daughter. That section did not contain terms setting forth a specific allocation of responsibility between the parties with regard to the educational expenses but provided that the court would retain jurisdiction over the issue and that the judgment would remain modifiable. The defendant filed a postjudgment motion to modify the educational support order, seeking to establish each party's responsibility regarding their daughter's college costs and expenses, which the court granted, ordering that the plaintiff was responsible for 45 percent of the college costs and expenses for the 2017-2018 school year. Thereafter, the plaintiff filed a motion to open the judgment and a motion to modify the educational support order, alleging fraudulent nondisclosure on the part of the defendant with regard to his income. The court denied the plaintiff's motions, concluding that the plaintiff had the defendant's accurate financial information, and the plaintiff appealed to this court. *Held*:

1. The trial court did not fail to determine whether the plaintiff had met her burden of proof to establish the existence of probable cause that the defendant committed fraud by nondisclosure; the trial court's memorandum of decision explicitly set forth the definition of fraud and the legal standard for opening a judgment when fraud is alleged before it ultimately denied the plaintiff's motions and it was implicit in the court's rejection of the plaintiff's claim that the court considered the facts as applied to the appropriate legal framework and made a determination on that basis.
2. The trial court did not abuse its discretion in denying the plaintiff's motions to open and to modify the judgment on the basis of fraud; in light of the evidence before the court in ruling on the plaintiff's motion to open, it was not an abuse of discretion for the court to conclude that the plaintiff failed to establish the existence of probable cause that the defendant had fraudulently concealed certain financial information during the proceedings on his motion to modify the educational support order, the stock option sale proceeds were reflected in the defendant's 2016 W-2, and, although listed in a separate section of his financial affidavit, were on the affidavit, not omitted or concealed, and the defendant testified that his financial affidavit was truthful and honest, testimony which the court could have credited, and, in concluding that the

plaintiff had failed to meet her burden of fraudulent nondisclosure, the court had no basis on which to modify, on the basis of fraud, its judgment on the educational support order.

3. This court declined to review the plaintiff's claims attacking the court's understanding, interpretation and application of the defendant's financial affidavits and tax documents; the plaintiff's claims regarding whether the trial court properly understood the defendant's financial information were not properly before this court because this question was unrelated to the question of whether the defendant fraudulently concealed information from the court and the plaintiff, which was the sole basis for the plaintiff's motions open and to modify.

Argued January 14—officially released April 21, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Carbonneau*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Nastri*, *J.*, granted the defendant's postjudgment motion to modify educational support; subsequently, the court, *Nastri*, *J.*, denied the plaintiff's motions to open the judgment modifying the educational support order and to modify the educational support order, and the plaintiff appealed this court. *Affirmed.*

Carolyn H. Mackenzie, self-represented, the appellant (plaintiff).

Greg C. Mogel, with whom, on the brief, was *P. Jo Anne Burgh*, for the appellee (defendant).

Opinion

HARPER, J. The self-represented plaintiff, Carolyn H. Longbottom, appeals from the judgment of the trial court denying her motions to open and to modify the court's previous judgment modifying an existing educational support order on the basis of the alleged fraudulent nondisclosure of the defendant, Richard H. Longbottom. On appeal, the plaintiff claims that the court erred by concluding, inter alia, that she had failed to

prove that there was sufficient probable cause of fraud by nondisclosure to permit the court to open the judgment and allow for discovery, which would have established the merits of her motion for modification. We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff and the defendant were married in Johannesburg, South Africa, in 1994, and two children were born of the marriage. In October, 2011, the plaintiff initiated dissolution proceedings. Thereafter, the parties entered into a dissolution of marriage agreement (agreement), which was incorporated into the judgment of dissolution rendered on October 12, 2012. Section six of the agreement pertained to the division of costs for educational support of their daughter. At the time the agreement was incorporated into the judgment, its terms did not include a specific allocation of responsibility between the parties with regard to these education expenses, but it provided that the court would retain jurisdiction over the issue and that the judgment would remain modifiable in accordance with state statutory law regarding modification of support orders.[1]

The defendant filed a postjudgment motion to modify the educational support on January 4, 2017, in order to establish each party's responsibility regarding their daughter's college costs and expenses. During a hearing on the defendant's motion, held on June 28, 2017, the

[1] Section 6.1 of the agreement provides in relevant part: "The Court shall retain jurisdiction over the issue of the amount of each party's financial obligation for [their daughter's] educational expenses, pursuant to section 46b-56c of the . . . General Statutes. . . ."

Section 6.4 of the agreement provides: "The provisions of this section [6] shall be subject to modification in the same manner as is provided by the Statutes for any support order and the Court shall retain jurisdiction for such purpose. In determining whether to modify this order, the Court shall consider all relevant circumstances at that time, as such are defined in section 46b-56c of the Statutes."

court instructed the parties to exchange tax returns and financial documents in order to determine whether either side had any issues pertaining to the information contained in the other party's documents. The plaintiff notified the court that she had concerns about the defendant's documents and, specifically, brought to the attention of the court her concern that the income listed on the defendant's financial affidavit did not account for the value of certain stock option sale proceeds that the defendant had received.[2] Accordingly, the court heard argument from the self-represented plaintiff and the defendant's counsel on that issue, and admitted the tax returns of both parties and the defendant's 2016 W-2 into evidence.

On July 12, 2017, the court granted the defendant's motion to modify the educational support order. In its decision, the court made findings regarding each party's net weekly income, assets, and liabilities. Specifically, the court found that "[t]he plaintiff has a net weekly income of $1307, including alimony. She has assets of $1,217,276 and liabilities of $5200. . . . The defendant has a net weekly income of $3466. He has assets of $1,548,512.60 and liabilities of $6700." (Footnote omitted.) Ultimately, the court concluded that "[t]he plaintiff shall pay 45 percent and the defendant 55 percent of the cost of [their daughter's] 2017–2018 . . . tuition, room, board, dues, registration and routine fees—including but not limited to books and laboratory fees—after those costs are offset by all scholarships, grants and loans."

On November 13, 2017, the plaintiff, alleging fraudulent nondisclosure on the part of the defendant, filed a motion to open the July 12, 2017 judgment modifying the educational support order and a motion to modify

[2] The defendant had been earning stock options from Caterpillar, his employer, since he began working for Caterpillar approximately eighteen years prior to the June 28, 2017 hearing on his motion to modify.

the educational support order. The plaintiff alleged in her motions that the defendant had materially misrepresented his income on his financial affidavit submitted in connection with his motion to modify, such that the court should open the judgment on the basis of fraud in order to permit further discovery and then modify the educational support order. Specifically, she alleged that the defendant had fraudulently misled the court by including $100,429, the amount he describes as proceeds from the sale of stock options, under his assets but not under his income.

At the hearing on the plaintiff's motions, held on September 7, 2018, the plaintiff presented an expert witness who testified that income was omitted from the defendant's financial affidavit. The defendant testified in rebuttal and explained that the stock sale proceeds were accounted for under his assets in his affidavit and that he indeed had disclosed that amount to the court prior to the court's July 12, 2017 decision on his motion for modification.

On October 22, 2018, the court rendered judgment denying the plaintiff's motions to open and to modify. The court stated: "The defendant's gross income and the proceeds from the sale of his stock options were disclosed in his financial affidavit, albeit in two different places. They were disclosed in the same place on his 2016 Form 1040 and his 2016 W-2. Consequently, the plaintiff had the defendant's accurate financial information during the hearing." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff raises nine issues that she argues constitute error on behalf of the trial court in rendering its judgment denying her motions to open and to modify. Upon careful review, her claims can be summarized and condensed into three: (1) the court failed to determine whether the plaintiff had met her burden of proof to establish the existence of probable

cause that the defendant committed fraud by nondisclosure; (2) to the extent that the court actually determined that the plaintiff had failed to meet her burden of proof, the court nonetheless abused its discretion in making that determination and in denying the plaintiff's motions to open the judgment and to modify the educational support order; and (3) the court failed to understand the implications of its factual determinations and holding.[3]

In response, the defendant argues that the court did determine that the plaintiff had failed to meet her burden of proof in establishing probable cause of fraudulent nondisclosure and that the court did not abuse its discretion in denying the plaintiff's motions to open

[3] This third category of claims is in reality an attack on the court's understanding, interpretation and application of the defendant's financial affidavits and tax documents provided to the court in connection with its July 12, 2017 educational support order. Specifically, the plaintiff asks this court to review in relevant part: "Whether the trial court was correct in holding that '[a]t the evidentiary hearing [regarding the educational support order] the defendant provided the plaintiff with a financial affidavit showing 2016 gross income of $244,148.' " "Whether the trial court understood the implication in holding that: '[o]n the 2016 Form 1040, the defendant's gross wages and the proceeds from the sale of his stock options were combined on line [22].' " And, "Whether the trial court understood the argument that, '[t]he defendant's counsel pointed out in his closing argument at the evidentiary hearing [regarding the educational support order] that the stock options were included as assets on the financial affidavit and as income on his tax returns.' "

Whether the court properly understood the defendant's financial information is wholly unrelated to the question of whether the defendant fraudulently concealed information from the court and the plaintiff, which was the sole basis for the plaintiff's motions to open and to modify. To the extent that the plaintiff believes that the information contained in the defendant's financial documents does not support the court's July 12, 2017 educational support order, her remedy was to appeal from that judgment, something she did not do. Her motions to open and to modify, based solely on alleged fraudulent nondisclosures, which we conclude properly were denied by the court, cannot be used to resurrect arguments that she wished she had made before the court issued its educational support order or in an appeal from that judgment. Thus, we decline to review these claims as they are not properly before us.

and to modify. We agree with the defendant and affirm the judgment of the trial court.

I

The plaintiff claims first that the court failed to determine whether she had met her burden of proof to establish the existence of probable cause that the defendant committed fraud by nondisclosure. We disagree with the plaintiff.

"The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . An implication is defined as an inference of something not directly declared, but arising from what is admitted or expressed. . . . It is used where the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language or the conduct of the parties." (Citations omitted; internal quotation marks omitted.) *Gorelick* v. *Montanaro*, 94 Conn. App. 14, 30, 891 A.2d 41 (2006).

The court's memorandum of decision set forth in explicit terms the definition of fraud and the legal standards for establishing probable cause of fraud and for opening judgments in the context of alleged fraud. After a thorough overview of the applicable legal principles that guided its decision, the court ultimately denied the plaintiff's motions to open and to modify. Implicit in the court's analysis, when construed as a whole; see id.; is the court's finding that the plaintiff, before the

court rendered its July 12, 2017 judgment granting the defendant's motion to modify the educational support order, had received the financial information from the defendant that she claims was fraudulently withheld and that she, therefore, failed to establish probable cause of fraudulent nondisclosure.[4] Though the court does not state this in explicit terms, it is implicit in its rejection of the plaintiff's claim that the court considered the facts as applied to the appropriate legal framework and made a determination on that basis. Accordingly, we conclude that the court did determine that the plaintiff failed to establish probable cause of fraudulent nondisclosure.

II

Next, the plaintiff claims that, even if the court determined that she failed to establish probable cause of fraudulent nondisclosure, it improperly denied her motions to open and to modify the judgment on that basis. We disagree with the plaintiff.

We first set forth the legal principles that guide our review of a court's denial of a motion to open a judgment based on alleged fraud. "It is a [well established] general rule that . . . a judgment rendered by the court . . . can subsequently be opened [after the four month limitation set forth in General Statutes § 52-212a and Practice Book § 17-43] . . . if it is shown that . . . the judgment . . . was obtained by fraud . . . ." (Footnote omitted; internal quotation marks omitted.) *Terry*

[4] As a matter of fact, the plaintiff, herself, argues in her reply brief: "In the hearing on June 28, 2017, the plaintiff alerted the trial court to the fact that the defendant did not disclose income from all sources, and specifically, that he had not disclosed income from stock options on his financial affidavit. This was evident in plain sight by looking at the defendant's financial affidavit. This was also evident by comparing the earnings shown on the defendant's W-2 and his tax returns, to the income disclosed on his financial affidavit." This statement demonstrates an acknowledgment that this information was available to the plaintiff at the time of the hearing on the defendant's motion for modification and that the trial court was aware of the information before it rendered judgment granting the defendant's motion.

v. *Terry*, 102 Conn. App. 215, 222, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007). "Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court . . . to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of 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. . . .

"In considering a motion to open the judgment on the basis of fraud, then, the trial court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 5–6, 164 A.3d 787, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017); see also *Sousa* v. *Sousa*, 173 Conn. App. 755, 765, 164 A.3d 702, cert. denied, 327 Conn. 906, 170 A.3d 2 (2017).

"Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker;

(3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud." (Internal quotation marks omitted.) *Spilke* v. *Spilke*, 116 Conn. App. 590, 595, 976 A.2d 69, cert. denied, 294 Conn. 918, 984 A.2d 68 (2009).

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment. . . . In a marital dissolution case, the requirement of a duty to speak is imposed by Practice Book § [25-30], requiring the exchange and filing of financial affidavits . . . and by the nature of the marital relationship." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014).

In the present case, the plaintiff presented the court with evidence that the proceeds from the sale of the defendant's stock options should have been listed as a part of his income in addition to his assets on his financial affidavit. The plaintiff proffered an expert witness, William Murray. In the expert disclosure, it was expected that he would testify "[t]hat it is likely that the [defendant's] financial affidavit submitted in connection with the July 17, 2017 hearing omitted certain income from the husband's employer compensation plan, so as to be materially false and misleading." On direct examination, Murray indeed testified that his understanding "is that income received from shares is

also includable income on a financial affidavit." During cross-examination, however, Murray acknowledged that the stock amount in fact had been disclosed on the defendant's affidavit as an asset, and he further conceded that the defendant's 2016 W-2, which was presented to the court during the initial hearing on the defendant's motion to modify, reflected an income amount that accounted for the stock option sale proceeds that had not been included as income on his affidavit.

In response, the defendant testified that the value of his stock options, both vested and unvested, were listed on his financial affidavit as assets and that his financial affidavit was truthful and honest.[5] In his closing argu-

[5] The following exchange occurred between the defendant's counsel and the defendant:

"Q. And sir, on your financial affidavit under stocks, bonds, mutual funds—

"A. Uh-huh.

"Q. —do you show that you have Caterpillar stock of about $90,000?

"A. I do.

"Q. And do you have vested stock of another $4,000?

"A. Yes.

"Q. And you have unvested stock that you list at $147,000. Is that correct?

"A. Unvested—

"Q. Right there, the line under—

"A. Yes, I do.

"Q. Okay. And sir, do you also show an E*TRADE various account?

"A. Correct.

"Q. How much was in there?

"A. 268,000.

"Q. Okay. Can you tell me when your stocks vest with Caterpillar, where do they go?

"A. They go to my E*TRADE account.

"Q. Okay.

"A. And they go into capital shares.

"Q. Okay, and those stocks when they vest, they . . . just automatically vest. Right?

"A. Automatically vest, as I said, into [Caterpillar] stock.

"Q. Okay, on a certain day?

"A. Correct.

"Q. Okay. So, you do nothing to make that occur?

"A. Nothing at all.

"Q. And it just transfers into your E*TRADE account. Is that correct?

"A. Correct."

ment, the defendant further emphasized the fact that the court had been provided with the defendant's 2016 W-2 and tax returns, all of which accounted for the stock option sale proceeds, and argued that the plaintiff could not establish probable cause of fraudulent nondisclosure because the information she claimed was misrepresented had been readily provided to the court at the appropriate time.

In assessing whether, on the basis of this evidence, the court abused its discretion in denying the plaintiff's motion to open, we are mindful of our standard of review, which requires us to make every reasonable presumption in favor of the court's action. The court's memorandum of decision states: "The defendant's gross income and the proceeds from the sale of his stock options were disclosed in his financial affidavit, albeit in two different places. . . . Consequently, the plaintiff had the defendant's accurate financial information during the hearing." The court acknowledged that, although the stock sale income and proceeds were in different places, they *were indeed listed* on the affidavit, and not omitted or concealed. The court also had the defendant's 2016 W-2 and tax returns, which showed the stock options he received as income. The court was aware of these facts prior to rendering judgment on the defendant's motion to modify, because they were raised by the plaintiff and addressed by both parties during the hearing on the defendant's motion to modify. See also footnote 4 of this opinion.

Additionally, "[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . As such, the trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility." (Citation omitted; internal quotation marks omitted.) *State* v. *Sandra O.*, 51 Conn. App. 463, 468, 724 A.2d 1127 (1999). In the

present case, the court reasonably could have credited the defendant's testimony during the hearing on the plaintiff's motions that his financial affidavit was "truthful and honest to the best of [his] knowledge and belief." Particularly, the court reasonably could have credited the defendant's candor with the court in pointing the court to the exact location of the amount claimed by the plaintiff to be materially misrepresented in the affidavit, and in submitting his relevant W-2 form and tax returns to the court and to the plaintiff. In light of the evidence before the court in ruling on the plaintiff's motion to open the judgment on the basis of fraudulent nondisclosure, it was not an abuse of discretion for the court to conclude that the plaintiff had failed to establish the existence of probable cause that the defendant had fraudulently concealed information during the proceedings on his motion for modification of the parties' educational support order. In concluding that the plaintiff had failed to meet her burden to establish probable cause of fraudulent nondisclosure, the court also had no basis on which to modify, on the basis of fraud, its judgment on the educational support order. Accordingly, on the basis of the record and the facts before us, we cannot conclude that the court abused its discretion in denying the plaintiff's motions to open and to modify the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PETER E. NUSSER (AC 41937)

Lavine, Prescott and Harper, Js.

Syllabus

The defendant, who had been convicted, on guilty pleas, of the crimes of larceny in the first degree, burglary in the third degree, and criminal violation of a restraining order, appealed to this court from the judgment of the trial court denying his second motion for presentence confinement

credit. The court had granted the defendant's first motion for presentence confinement credit and, thereafter, issued a revised mittimus. Subsequently, the defendant filed a second motion for presentence confinement credit and, at the hearing on that motion, defense counsel informed the court that the Department of Correction had found the revised mittimus problematic and would not credit the defendant's sentence. The court denied the defendant's second motion, and this appeal followed. On appeal, the defendant claimed that the court abused its discretion in denying his second motion for presentence confinement credit, that his sentence was illegal because it breached his plea agreement with the state, and that the failure of the department to implement the revised mittimus resulted in structural error and fundamental unfairness in the sentencing process. *Held* that the trial court lacked subject matter jurisdiction to hear the defendant's second motion for presentence confinement credit: a petition for a writ of habeas corpus, rather than a motion directed at the sentencing court, is the proper method to challenge the application of presentence confinement credit; the defendant never argued that there was an illegal sentence, illegal disposition, or that the sentence was imposed in an illegal manner, and he did not argue or present evidence demonstrating that his second motion fell within the narrow grant of jurisdiction provided by the applicable rule of practice (§ 43-22).

Argued January 6—officially released April 21, 2020

Procedural History

Informations charging the defendant, in the first case, with the crimes of larceny in the first degree, burglary in the third degree, and criminal mischief in the third degree, and, in the second case, with seventeen counts each of the crimes of criminal violation of a restraining order and harassment in the second degree, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Hon. Susan Reynolds*, judge trial referee, on a plea of guilty to larceny in the first degree, burglary in the third degree, and one count of criminal violation of a restraining order, and the court rendered judgments in accordance with the pleas; thereafter, the court denied the defendant's motion for presentence confinement credit, and the defendant appealed to this court. *Improper form of judgment*; *judgment directed.*

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky*, state's attorney, and *Warren Murray*, supervisory assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Peter E. Nusser, appeals following the trial court's denial of his second motion for presentence confinement credit. On appeal, the defendant claims that (1) the court abused its discretion in denying his second motion for presentence confinement credit, (2) the sentence he received, following the denial of his second motion, was illegal because it breached his plea agreement with the state, and (3) the failure of the Department of Correction (department) to implement the court's revised mittimus resulted in structural error and fundamental unfairness in the sentencing process. Because we conclude that the court lacked subject matter jurisdiction to hear the defendant's second motion, we remand the case to the trial court with direction to dismiss the motion.

The following facts and procedural history are relevant to our disposition of this appeal. On or about August 20, 2016, the defendant was arrested and charged with larceny in the first degree, burglary in the third degree, and criminal mischief in the third degree.[1] In conjunction with those charges, the court also issued a restraining order precluding the defendant from contacting the victim of those crimes. Because the defendant was unable to post bond, he remained incarcerated pending the resolution of the charges. During the month of September, 2016, the defendant violated the restraining order by telephoning the victim approximately sixteen times and by writing her a letter. The

[1] The facts and circumstances involving these arrests and subsequent charges are not relevant to this appeal.

defendant was arrested for violating the restraining order on or about January 18, 2017, while he was still incarcerated pending the resolution of the initial charges.

On April 5, 2017, the defendant pleaded guilty to larceny in the first degree, burglary in the third degree and one count of violation of the restraining order, pursuant to a plea agreement. On that same day, in accordance with that agreement, the defendant was sentenced to 2 years and 1 day of incarceration, followed by 2 years and 364 days of special parole, with all sentences to run concurrently.

On August 15, 2017, the defendant filed a motion[2] with the court claiming that he was entitled to presentence confinement credit that should be applied to his sentence, which he was serving at the time the motion was filed. The defendant's motion was heard on October 18, 2017. During that hearing, the defendant asked the court to order the presentence confinement credit to run from September 2, 2016, the date on which he first violated the restraining order, rather than January 18, 2017, when he was arrested for that offense. After hearing little to no argument from either side, the court, *Hon. Susan Reynolds*, judge trial referee, agreed that the defendant, who was incarcerated at the time of the restraining order violation, should not "pay the price for the delay in the service of the warrant" for the restraining order. The court granted the defendant's request and issued a new mittimus ordering that the defendant "gets credit to [September 2, 2016], absent any adverse action, per [department] rules."

Approximately six months later, the defendant filed a second motion for presentence confinement credit. On May 23, 2018, during the hearing on that motion, defense counsel informed the court that the department

[2] Although the defendant labeled his pleading a petition, we treat it as a motion for presentence confinement credit.

found the language in the October 18, 2017 revised mittimus to be problematic and, as a result, would not credit the defendant's sentence back to September 2, 2016. Specifically, according to defense counsel, the language "absent any adverse action, per [department] rules" was problematic because "[i]n [the department's] book that was enough to stop [it] from giving [the defendant] credit." Defense counsel further asserted that, "[i]f that phrase wasn't in [the mittimus], [the department would] . . . still be able to . . . give him the credit he's asking for." Hearing no argument against the motion from the state, the court said it would contact the department to better understand the problem. Later that day, the court denied the motion. This appeal followed.

"Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . If it becomes apparent to the court that such jurisdiction is lacking, the [the matter before it] must be dismissed. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law . . . [over which] our review is plenary . . . .

"Our Supreme Court has held that the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Practice Book § 43-22 is a narrow exception to this general rule. It provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. . . .

"Connecticut has recognized two types of circumstances in which the [sentencing] court has jurisdiction

to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, namely, when the sentence either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within the relevant statutory limits . . . but [is] imposed in a way which violates [the] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Montanez*, 149 Conn. App. 32, 38–39, 88 A.3d 575, cert. denied, 311 Conn. 955, 97 A.3d 985 (2014).

In the absence of either of the foregoing circumstances, this court previously has determined that "a petition for a writ of habeas corpus, rather than a motion directed at the sentencing court, is the proper method to challenge the Commissioner of Correction's application of presentence confinement credit." *State* v. *Riddick*, 194 Conn. App. 243, 244–45, 220 A.3d 908 (2019); see *State* v. *Montanez*, supra, 149 Conn. App. 41 (holding that court properly dismissed for lack of subject matter jurisdiction motion to revise judgment mittimus raising claim of misapplication of presentence confinement credit); *State* v. *Carmona*, 104 Conn. App. 828, 832–33, 936 A.2d 243 (2007) (habeas proceeding, rather than motion to correct illegal sentence, was proper method to assert claim concerning presentence confinement credit where "the defendant attacks not the legality of the sentence imposed by the court during the sentencing proceeding but, rather, the legality of his sentence as subsequently calculated by the department"), cert. denied, 286 Conn. 919, 946 A.2d 1249 (2008).

In the present case, the defendant submitted two motions to the court requesting presentence confinement credit. Both motions were submitted several months after the defendant had been sentenced pursuant to his plea agreement and after he had begun serving his agreed upon sentence. Despite having granted the first motion, the court subsequently denied the second motion without explanation. It is the court's action on the second motion that is the subject of the present appeal.[3]

In his representations to the trial court, the defendant never argued that there was an illegal sentence, illegal disposition, or that the sentence was imposed in an illegal manner. See *State* v. *Montanez*, supra, 149 Conn. App. 38. To the contrary, the defendant simply asserted the fact that (1) there was an issue with the language of the mittimus, (2) he was already incarcerated—because he could not post bond for the charges of larceny, burglary, and criminal mischief—when he violated the restraining order, and (3) he was not arrested for that violation until four months after the violation occurred.[4]

The defendant never argued or presented evidence demonstrating that his motion fell within the narrow grant of jurisdiction provided for in Practice Book § 43-22. Therefore, his second motion for presentence confinement credit should have been pursued through a

[3] The fact that the court may have improperly exercised jurisdiction over the first motion has no bearing on whether it had jurisdiction over the second.

[4] Moreover, the defendant's second written motion included only the following, brief, request: "Last October the defendant requested an order addressed to [the department] to give him credit concurrently for both of these charges. The [c]ourt . . . granted that request on October 18 . . . . [The department] has since told counsel it cannot follow this order because it contains the words, 'absent any adverse actions per [department] rules.' The defendant therefore requests new mitts with those words deleted." Of note, even the defendant's first motion provided only the following: "The defendant, Peter Nusser, through his attorney, requests that this [h]onorable [c]ourt give him jail credit. Information to support this petition will be provided at the time this motion is heard." Neither of his written motions included argument or any legal analysis relating to the exceptions provided in Practice Book § 43-22.

petition for a writ of habeas corpus rather than a motion directed at the sentencing court. Put another way, the defendant's claims were pursued in the wrong forum. *State* v. *Montanez*, supra, 149 Conn. App. 41. Accordingly, we conclude that the court lacked subject matter jurisdiction over the defendant's motion.[5]

The form of the judgment is improper, the judgment denying the defendant's second motion for presentence confinement credit is reversed and the case is remanded with direction to render judgment dismissing the defendant's motion.

In this opinion the other judges concurred.

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[5] Additionally, to the extent that the defendant's brief can be read to be raising a claim that his plea agreement was breached, his counsel clarified at oral argument before this court that he was not challenging his sentence on that basis but, rather, that the sentence was illegal because it violated the agreement for credit. In accordance with our own jurisprudence, "[i]t is not appropriate to review an unpreserved claim of an illegal sentence for the first time on appeal. . . . Underlying this reasoning is our recognition that, pursuant to Practice Book § 43-22, the trial court may correct an illegal sentence at any time. . . . Consequently, the defendant has the right to file a motion to correct an illegal sentence with the trial court at any time." (Citations omitted; internal quotation marks omitted.) *State* v. *Crump*, 145 Conn. App. 749, 766, 75 A.3d 758, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). Because he never raised his claim before the trial court that his sentence was illegal, it would be inappropriate for this court to review this claim raised for the first time on appeal.