JOSEPH KOLASHUK *v.* KYLE HATCH
(AC 41571)

Lavine, Alvord and Lavery, Js.

Syllabus

The plaintiff in error, A, who was the attorney for the defendant, H, filed a writ of error, challenging the imposition of sanctions and the award of attorney's fees against him by the trial court. In the underlying personal injury action, the defendant in error, K, by and through his mother and next friend, sought to recover damages from H for, inter alia, negligence in connection with personal injuries sustained by K when K, who was riding his bicycle, and a motor vehicle operated by H collided. The complaint alleged, inter alia, that H was operating his vehicle while typing, sending, and/or reading text messages from his cell phone. During the discovery phase, H testified at his deposition that, minutes before the collision, he had sent a text message on a cell phone. H stated that the cell phone was a company work phone and that the account was in the name of his employer, H Co. Subsequently, the law firm representing K filed a motion to compel production of the relevant cell phone records from the date of the collision, which the trial court granted. A did not provide the requested cell phone records, and K's attorney, R, filed motions for sanctions for A's alleged violation of the court's order. In response to R's motions, A claimed that he had fully complied with the court's order to the best of his abilities because A's client, H, did not own the cell phone records requested by R, and that it would have been illegal and unethical for him to provide R with records that H did not own. Prior to the hearing on R's second motion for sanctions, R obtained the relevant cell phone records from an attorney representing H Co., but the court, nevertheless, granted R's second motion for sanctions against A. Thereafter, R filed a request for attorney's fees, which the trial court granted in part. Subsequently, A filed a writ of error in our Supreme Court, which transferred the matter to this court. *Held*:

1. K could not prevail on his claim that this court lacked subject matter jurisdiction, which was based on his claim that A's writ of error should be dismissed because it was not taken from a final judgment in that the sanctions and the attorney's fees against A did not terminate a distinct and separate proceeding because the relevant orders were issued during the discovery phase of his personal injury case, the requested cell phone records were necessary to resolve K's case, and those records were inextricably intertwined with K's case: although the requested records may have been integral to K's personal injury action against H, those records were the property of H Co., and, thus, neither A nor his client, H, owned or had possession of the cell phone records, and K's reliance on the general rule that an interlocutory order requiring a witness to

submit to discovery is not a final judgment and, therefore, is not immediately appealable was unavailing, as A was neither a witness nor a party to the underlying personal injury action but, rather, was an attorney representing H, the defendant in the underlying action; moreover, K could not prevail on his claim that the imposition of sanctions and attorney's fees against A did not terminate a distinct and separate proceeding because the trial court did not find A to be in contempt, as our Supreme Court previously has concluded that a law firm that was not a party need not wait to be found in contempt for its good faith failure to comply with a discovery order to seek appellate review of that discovery order, and, in the present case, A did not comply with the trial court's discovery order on the basis of his good faith belief that to do so would violate a statute because H did not own the cell phone records, and, thus, A did not have to be found in contempt to seek judicial review of the sanctions and the attorney's fees awarded against him; accordingly, the imposition of sanctions and the award of attorney's fees against A, a nonparty to the underlying personal injury case, terminated a separate and distinct proceeding, and, thus, the writ of error was filed pursuant to a final judgment.

2. The trial court erred as a matter of law by ordering A to produce cell phone records that neither he nor H owned or possessed, issuing sanctions against A and awarding attorney's fees to counsel for K, as the court's orders regarding the imposition of sanctions and the award of attorney's fees against A constituted an abuse of discretion; this court has previously determined that a party may not be ordered to produce documents owned by or in the possession of third parties, and, in the present case, the trial court's order that A, a nonparty, turn over the relevant cell phone records that belonged to H Co., a separate, nonparty entity, constituted an abuse of discretion, and although R claimed that H's parents owned H Co. and that H, therefore, easily could have obtained the relevant cell phone records had A instructed him to do so, H and H Co. were separate legal entities, and A was sanctioned for failing to do something that he, in good faith, believed would violate a statute because H did not own or possess the cell phone records.

Argued October 15, 2019—officially released January 7, 2020

Procedural History

Writ of error from the orders of the Superior Court in the judicial district of New London, *Bates*, *J.*, granting the motion for sanctions filed by the defendant in error against the plaintiff in error, and *Calmar*, *J.*, awarding attorney's fees to the attorney of the defendant in error, brought to the Supreme Court, which transferred the

matter to this court. *Writ of error granted*; *remanded with direction.*

Maury M. Garrett, *Jr.*, with whom was *Lawrence H. Adler*, self-represented, for the plaintiff in error (Lawrence H. Adler).

Kelly E. Reardon, with whom, on the brief, was *Laura A. Raymond*, for the defendant in error (Joseph Kolashuk).

Opinion

LAVINE, J. The plaintiff in error, Lawrence H. Adler, the attorney for the defendant, Kyle Hatch, filed a writ of error with our Supreme Court,[1] challenging the sanctions issued against him by the trial court, *Bates*, *J.*, and the imposition of attorney's fees ordered by the trial court, *Calmar*, *J.* The case of *Bank of New York* v. *Bell*, 142 Conn. App. 125, 63 A.3d 1026, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013), and cert. denied, 310 Conn. 901, 75 A.3d 31 (2013), which stands for the proposition that a party may not be ordered to produce documents owned by or in the possession of third parties, is dispositive of Adler's claims. We, therefore, grant the writ of error.

The following facts, as found in the record, underlie Adler's claims. On March 5, 2016, the minor plaintiff/defendant in error, Joseph Kolashuk, was riding his bicycle on Raymond Hill Road in Oakdale when he and a motor vehicle operated by Hatch, collided. Kolashuk suffered injuries and, by and through his mother and next friend, Danielle Kolashuk, commenced a personal injury action against Hatch. The complaint sounded in negligence and statutory and common-law recklessness. It alleged, in relevant part, that Hatch was operating his motor vehicle while typing, sending, and/or

[1] Our Supreme Court transferred the writ of error to this court pursuant to Practice Book § 65-1.

reading text messages "from" his cell phone (phone) and operating his motor vehicle at a high rate of speed while using a phone in his hand.[2] The Reardon Law Firm, P.C. (firm), represented Kolashuk. Adler entered an appearance on behalf of Hatch.

On March 6, 2017, the firm noticed Hatch's deposition duces tecum, requesting that he produce at the deposition (1) any and all phone records of March 5, 2016, including bills, invoices, text messages and e-mails; and (2) the actual phone he used on March 5, 2016. On March 15, 2017, Hatch objected to both production requests and moved for a protective order, stating in part that the records were not within his knowledge or possession.[3]

On March 7, 2017, Attorney Robert I. Reardon, Jr., noticed the depositions of and issued subpoenas to the keepers of records for Verizon Wireless (Verizon) and AT&T, Inc., commanding that they produce "[a]ny and all . . . phone . . . records from March 5, 2016 between [10] and [11 a.m.] for phone number [for Hatch] including call details, text details, phone calls made and/or received, text messages sent and/or received, and [e-mails] sent and/or received." Hatch filed motions

[2] Hatch denied the material allegations of the complaint and alleged several special defenses, in part, that Kolashuk's injuries were due to his own carelessness and negligence in that he suddenly rode his bicycle into the street directly into the path of oncoming traffic.

[3] Hatch's objection to the records request stated in pertinent part: "*The information is not directed to the proper entity nor within* [*Hatch's*] *knowledge or possession.*

"[Kolashuk's] notice of deposition is simply being used as a way to circumvent the rules of discovery. This case is a standard motor vehicle accident case and, therefore, 'unless upon motion, the judicial authority determines that such interrogatories are inappropriate in the particular action,' only the standard form interrogatories are allowed. Practice Book § [13-6] (b). Here, [Kolashuk] has attached a production request which goes far beyond the standard discovery requests to the deposition notice, and seeks documentation that is not allowed for in the standard discovery requests, and is inappropriate for discovery in this matter." (Emphasis added.)

to quash the subpoenas duces tecum issued to the service providers and motions for a protective order, stating in relevant part that the request for production was not valid in that it violated General Statutes § 16-247u (b).[4]

During his deposition on March 17, 2017, Hatch testified, in part, that minutes before the collision, he had sent a text message on a phone with service provided by Verizon. On the record, Reardon articulated his efforts to obtain the phone records from the service providers and that he had been unsuccessful in doing so. He produced a facsimile received from Verizon, indicating that it had no records for the number in Hatch's name. Adler reviewed the facsimile and stated: "I will help you because I think you and I can probably agree, because it's ultimately going to be a nonissue, but I think the reason is because it's not in the account name of . . . Hatch. That is his number, but it's not in his name." Reardon asked Hatch whose name was on the account. Hatch stated that the phone was a company work phone and that the account is in the name of R & W Heating Energy Solutions, LLC (R & W Heating), his employer.[5] Following a discussion between counsel, Adler stated to Reardon: "You and I can probably, early next week, work out a parameter of a production. I can probably get you what you need."

At a point later in the deposition, Reardon asked Hatch if he had brought the phone with him. He had not; the phone's screen had broken, and although he

[4] General Statutes § 16-247u (b) provides in relevant part: "No person shall: (1) Knowingly procure, attempt to procure, solicit or conspire with another to procure a telephone record of any resident of this state without the authorization of the customer to whom the record pertains . . . (3) receive a telephone record of any resident of this state with the knowledge such record has been obtained without the authorization of the customer to whom the record pertains or by fraudulent, deceptive or false means."

[5] Hatch's parents are the owners of R & W Heating.

had it repaired, he did not know whether the phone still contained data. Reardon asked Hatch to give the phone to Adler to preserve. Adler agreed to hold the phone in escrow. Hatch's counsel filed a motion for a protective order regarding the phone on the ground that, pursuant to Connecticut statute, one may not request phone records from one to whom such records do not belong and that it is impermissible for a party to provide phone records belonging to third parties. Hatch's counsel invited Reardon to subpoena the phone records from R & W Heating or to subpoena the records from R & W Heating's service provider.

On March 23 and April 26, 2017, Reardon sent a letter to Adler requesting Hatch's phone records.[6] By motion dated April 13, 2017, the firm sought to compel production, asking the court to order Hatch to produce the phone records as requested in the notice of Hatch's deposition, among other things. On May 9, 2017, Judge Bates issued an order stating that "[t]he . . . phone records shall be produced for the time requested, which appears to the court to be reasonably limited in time."

Hatch did not produce the records, and by motion dated May 2, 2017, the firm filed a motion for a protective order for certain individuals whose depositions Adler had noticed and for sanctions against Hatch for his continued refusal to provide the phone records, "which is the subject of a pending motion to compel filed" on April 13, 2017. The firm also sought a sanction of $380.96 for the expenses the firm had incurred in

[6] In the March 23, 2017 letter, Reardon stated in relevant part: "Finally, we are still waiting for the documentation we requested from . . . Hatch regarding his cell phone usage and text message usage on the day of the incident. Please provide it at once, as you indicated you would during . . . Hatch's deposition."

In the April 26, 2017 letter, Reardon stated in relevant part: "In addition, pursuant to our telephone conversations and correspondence to you, you still have not . . . provided [Hatch's] cell phone records and the inspection of the cell phone that was in use at the time of the accident."

its effort to obtain the phone records of a third party whom Hatch allegedly called on the morning of the collision.[7] There was a further exchange of correspondence between counsel for the parties in which Joseph M. Barnes, an attorney at the firm, stated that during a status conference, Adler had confirmed "that [he] had the records we were requesting and could get them to my office by Monday, [May 22, 2017]." Adler replied by letter stating, "my client does not have possession or control of any records for the phone at issue. I also did not represent that I had them in my possession, but simply indicated what I believed they showed. I have asked repeatedly and will ask again, that you confirm that if I can obtain the records that you seem to be seeking and provide them to you, you withdraw any further requests for possession of my client's or his [parents'] business . . . phone or any broader requests for phone records beyond the time limit specified by Judge Bates. Once I receive this confirmation, I will make the arrangements for what I understand you are looking for with the appropriate parties."

On June 12, 2017, Reardon filed a motion for default and sanctions for violation of Judge Bates' order. In

[7] The motion to compel sought "an order that . . . Hatch produce the requested information himself or consent to the production of the information by Verizon. Specifically . . . any and all cellular phone records from March 5, 2016 including bills, invoices, text messages and e-mail; and the actual cellular phone [Hatch] used on March 5, 2016; or an order that [Hatch] consent to Verizon producing any and all cellular phone records from March 5, 2016 between [10] and [11 a.m.] for phone number [860-***-****] including call details, text details, phone calls made and/or received, text messages sent and/or received, and e-mails sent and/or received."

The firm represented that Adler promised to produce the records at issue and attached a portion of Hatch's deposition transcript. The transcript of Hatch's deposition, however, indicates that Adler stated to Reardon: "I'm sure [that] we can work something out. I don't have an objection to you getting any records. It was just as phrased. So, we'll try to work something out. . . . You and I can probably, early next week, work out a parameter of a production. I can probably get you what you need."

addition to a default against Hatch, Reardon sought attorney's fees, costs and a sanction of $5000 against Hatch for the time the firm spent attempting to obtain his phone records. Reardon also moved for an order of contempt against Adler for his wilful refusal to comply with the court's order.

On June 14, 2017, Reardon and Attorney Andrew B. Goodwin,[8] representing Hatch, appeared before Judge Bates. At that time, Goodwin stated in part: "I have stated to you repeatedly that my client does not have cell records, and you have heard from both me and from Verizon that the cell records are not in my client's name. It is only recently that you have been willing to limit the time period, as the court mandated, which was a significant portion of my objection. I also have a dispute about your entitlement effort to have access to the actual cell phone that has extensive unrelated material and, likely, attorney-client privileged material.

"Here, once again, is my suggestion. I will discuss with my client's employer turning over the cell records—my client's employer turning over the cell records with the limitations placed by the judge in terms of date and time period, in accordance with the order, of course. I will do that voluntarily if, and only if, they do not satisfy you with the parameters that you defined, which is, according to your May 31, 2017 letter, that the records produced are sufficient to determine when your—that's Mr. Hatch—client was on the phone from 10 a.m. to 11 a.m. on March 5, 2016.

"If you cannot make that determination after reviewing the records, I will agree to a judicial review of the phone to the extent this information is still on there, only for the date and time periods referenced. For rea-

[8] Goodwin is associated with the Adler Law Group, LLC.

sons stated above, I will not simply turn over the phone if I can obtain it from my client's employer."[9]

During the June 14, 2017 hearing, Judge Bates asked whether the order should be restructured because the owner of the phone is not a party to the action. Thereafter, the court stated: "I'm going to issue a clarification that when I referred to his cell phone records, I was referring, if unartfully, to the records of the cell phone he was using. I understand that . . . the record of the calls is in the hands of the attorney representing [Hatch], and *I order the attorney to turn those records over*. Again, it's for the two hour interval. And I'm not going to make a limit. You know, I'm not going to prevent counsel, if there is reason to get more cell phone records down the line, to request those. It's not going to be a condition of this order, but the order is only affecting that . . . two hour period of time. So, that will be a clarification. As to whether or not the difference which I referred to as being . . . *a difference without a* [*distinction*], I think that's going to be part of the sanctions argument that we'll have to have." (Emphasis added.) The court also ordered that the records be produced within five business days.[10]

[9] In Kolashuk's brief to this court, he represented that Hatch's counsel disclosed for the first time at the June 14, 2017 hearing that the phone and corresponding records were owned by Hatch's employer. As noted previously, during the March 17, 2017 deposition, Adler stated that the account was not in Hatch's name, and Hatch testified that the phone belonged to his employer, R & W Heating, a business owned by his parents.

[10] During the June 14, 2017 hearing, Reardon represented to the court that Adler had the records, i.e., "if you take a look at the letter from Mr. Adler, it says he has possession," referring to an exhibit attached to the motion. We, however, have reviewed Adler's letters that are attached to the motion in the court files. The letters reveal no representation that Adler was in possession of the records. A letter signed by Adler, dated June 5, 2017, states in part: "You are well aware that I represented to you that our position is in response to the Judge's order, that have nothing to comply with. The Judge ordered that my client . . . turn over *his* cell records for the time period identified. I have stated to you repeatedly that my client does not have cell records, and you have heard both from me and from Verizon that the cell records are not in my client's name." (Emphasis in original.) In a

By motion dated July 12, 2017, Reardon filed a second motion for sanctions due to what he termed Adler's "deliberate defiance" of the court's orders. The motion sought a sanction of $5000 against Adler, a finding of contempt against Adler, and a default against Hatch for wilful violation of a court order. On July 27, 2017, Judge Bates held an evidentiary hearing on Reardon's motion for sanctions. At the hearing, Hatch testified that his phone number is connected to whatever phone he is using, the phone he was using on the date of the collision belongs to R & W Heating, and he could not remember whether he had seen the phone records. In addition, his parents are the owners of R & W Heating. He presumed that the phone records are in his mother's possession. He also testified that he had turned the phone at issue over to his parents, as he and his parents decided that "it was better for them to keep it safe." He further testified that he and his parents had no objection to turning over the phone records to Reardon. The court opined that Hatch had constructive possession of the phone and that the defense was "*hiding behind a sort of legal technicality*" as to who owned the phone. (Emphasis added.) Adler argued that the phone is not what is at issue, the phone records are at issue. He also argued that Hatch never had possession of the phone records, which are in the possession of the owners of R & W Heating. The following colloquy transpired:

"[Adler]: Your Honor, the only thing I've been talking about in the entire [proceeding] is Your Honor's order, which is about the records. The phone is not the subject of anything pending.

letter dated May 18, 2017, to Barnes of the firm, Adler stated in part: "As I advised you, my client does not have possession or control of any records for the phone at issue. I also did not represent that I had them in my possession, but simply indicated what I believed they showed."

"[Judge Bates]: The phone—when I refer to the phone, I'm talking about the phone records. . . .

"[Adler]: We never had them. We didn't turn them over to the parents. We've never had the phone records. The parents get the bills, they pay the bills, they have them at their business." The hearing was continued.

On July 28, 2017, Ronald Goldstein, an attorney representing R & W Heating, gave Reardon the phone records.

Judge Bates continued the hearing on the motion for sanctions on August 2, 2017, and ordered Reardon to file time sheets and billing rates for an award of attorney's fees. On September 1, 2017, Judge Bates issued a memorandum of decision on Reardon's motion for sanctions, from which we quote in part. The court stated that Reardon had filed a motion for sanctions against Adler "on the basis that he failed to turn over or even seek to turn over [Hatch's] . . . phone records from the cell phone that [Hatch] used on the date of the subject collision. This court ordered [Hatch] on May 9, 2017 . . . to make those cell phone records available.

"[Adler] did not comply with the order of the court until July 28, 2017, when arrangements were made with attorneys for the owners of the company, R & W Heating, independently to turn over the requested cell phone logs. As a result of the delay over the requested documents, [Reardon] is seeking attorney's fees and costs in obtaining these documents and a sanction of $5000 against Attorney Adler for his alleged failure to comply with the court order.

"In response to [Reardon's] motions, [Adler] argues that [Hatch] has fully complied with the court's order to the best of his abilities because Adler's client . . . Hatch, did not own the cell phone records requested by [Reardon] and ordered produced by the court, and, therefore, had no obligation to comply.

"The court notes that in a deposition of . . . Hatch on March 17, 2017 . . . Adler, when asked if he could produce the cell phone records, assured . . . Reardon, 'I'm sure we can work something out. I don't have any objection to you getting any records, so we will try to work something out.' Adler, on that date, also said to Reardon, 'You and I could probably, early next week, work out a parameter of production. I can probably get you what you need.' It is undisputed that Adler failed to follow through on his commitment until outside counsel provided the necessary documentation several months later."[11]

The court continued: "[Kolashuk] submits that [Adler] needlessly and intentionally prolonged the discovery process by refusing to provide the requested cell phone records. However, [Adler] argues that it would have been illegal and unethical for him to provide [Reardon] with records that [Hatch] did not own. Specifically, [Hatch] relies solely on . . . § 16-247u (b), which provides in relevant part: 'No person shall: (1) Knowingly procure, attempt to procure, solicit or conspire with another to procure a telephone record of any resident of this state without the authorization of the customer to whom the record pertains . . . or (3) receive a telephone record of any resident of this state with the knowledge such record has been obtained without the authorization of the customer to whom the record pertains . . . .'

"However, § 16-247u (c) provides in relevant part: 'The provisions of this section shall not apply to any person acting pursuant to a valid court order . . . .'[12] This court's order . . . made clear that the cell phone

[11] On the basis of our review of the deposition transcript quoted by the court, we conclude that Adler did not state that he had possession of the records or that he himself would turn them over.

[12] In light of our discussion in part II of this opinion, we need not address § 16-247u (b) and (c) to resolve the present writ of error.

records were to be produced for the time requested by [Reardon], which was from 10 . . . to 11 a.m. on March 5, 2016, the date and time of the accident. Despite [Adler's] assurance in the deposition that he would arrange to have the cell phone records produced, he reneged on this assurance, stating [that] the cell phone records were owned by R & W Heating—a company owned by [Hatch's] parents, not by [Hatch] himself. Therefore, according to [Adler, Hatch] could not deliver on his promise to work things out and produce the records. However, [Adler] offered no evidence that he asked [Hatch] or the owners of R & W Heating to allow counsel to fulfill his assurance and provide access to cell phone records. Instead, [Adler] tried to use the production of the cell phone records as a lever to limit discovery, for example, seeking a quid pro quo that there would be no further request to examine the cell phone. . . .

"In the discovery context . . . the factors in imposing sanctions to be considered include: '(1) whether noncompliance was caused by inability, rather than wilfulness, bad faith or other fault; (2) whether and to what extent noncompliance caused prejudice to the other party, including the importance of the information sought to that party's case; and (3) which sanction would, under the circumstances of the case, be an appropriate judicial response to the noncomplying party's conduct.' *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [257 Conn. 1, 15, 776 A.2d 1115 (2001)].

"Here, [Adler's] failure to respond to [Reardon's] discovery request and the violation of the court's order . . . were not caused by inability to comply. Rather, the correspondence between [counsel for the parties] demonstrates the contrary. . . . [Adler's May 18, 2017] letter demonstrates that, at the very least, [he] could have inquired with R & W [Heating] regarding its willingness to provide the records or sign a release, allowing

[him] to obtain the records in compliance with this court's order. There is no evidence that he did so.

"Furthermore, the information that was sought by [Reardon] is central to the . . . claims. Specifically, [Kolashuk] has alleged that [Hatch] was using a cell phone at the time of the collision on March 5, 2016. [Adler's] failure to comply with the court's order prejudiced [Reardon's] ability to fully investigate [Kolashuk's] claims against [Hatch]. . . .

"Having found that [Adler] is in violation of Practice Book § 13-14 (a), [Adler] will pay [Kolashuk] $2500 in sanctions within thirty days of this order. [Reardon] is also invited to present the court with an accounting of time spent by [the firm] seeking the cell phone records and a request for payment of legal fees based on counsel's customary hourly rate plus costs." (Citations omitted; footnote added.)

Reardon, thereafter, filed a request for attorney's fees in the amount of $41,277.26; the request was later reduced to $40,800. Adler objected, arguing that the request was not allowed pursuant to the rules of practice, was duplicative, and was unreasonable. On November 22, 2017, Judge Calmar held a hearing to determine the amount of attorney's fees Adler was to pay. Judge Calmar issued a memorandum of decision on January 30, 2018, in which he determined that attorney's fees in the amount of $5000 was reasonable and ordered Adler to pay Reardon that amount in addition to the sanction imposed by Judge Bates.

In February, 2018, Adler filed the present writ of error, in which he alleged, among other things, that the court improperly sanctioned him for failing to abide by an order that the court never gave Hatch,[13] and ordered

[13] Adler alleged that "the order directed that [Kolashuk's] time period was reasonable, while ignoring that the time period the court was referring to was contained in a subpoena of Verizon, not any subpoena directed at [Hatch]."

him to commit an illegal act in violation of a statute. He further alleged that it was inappropriate for the court to sanction him for failure to engage in an act that he believed, in good faith, would violate the statute. Moreover, he claimed that the court abused its discretion in finding that there was bad faith or misconduct on his part, erred in finding that he had a duty to engage in efforts to procure discovery from third parties, erred in placing the burden on him to secure discovery from third parties, rather than on Kolashuk, and abused its discretion in granting attorney's fees for his failure to provide documents and things belonging to third parties.

During oral argument before us, Adler's counsel, Maury M. Garrett, Jr., argued that *Bank of New York* v. *Bell*, supra, 142 Conn. App. 125, was controlling of the issues in the writ of error. Thereafter, we sua sponte ordered counsel to file supplemental memoranda addressing what effect, if any, the case of *Bank of New York* has on our analysis of the writ of error.

I

Before addressing the merits of the writ of error, we address Kolashuk's claim that this court lacks jurisdiction. We disagree.

Kolashuk claims that Adler's writ of error should be dismissed because it was not taken from a final judgment. "The statutory right to [a writ of error] is limited to appeals by aggrieved parties from final judgments. General Statutes §§ 52-263, 51-197a; see Practice Book § [72-1].[14] Because our jurisdiction over appeals, both criminal and civil, is prescribed by statute, we must always determine the threshold question of whether

[14] Practice Book § 72-1 (a) provides in relevant part: "Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Supreme Court in the following cases: (1) a decision binding on an aggrieved nonparty . . . ." See footnote 1 of this opinion.

the [writ of error] is taken from a final judgment before considering the merits of the claim." (Footnote added; internal quotation marks omitted.) *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 750–51, 830 A.2d 711 (2003). "The lack of a final judgment implicates the authority of this court to hear [a] writ of error because it is a jurisdictional defect." Id., 750. "A challenge to the jurisdiction of the court presents a question of law." (Internal quotation marks omitted.) *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 337, 951 A.2d 632 (2008). Our review of questions of law is plenary. *State* v. *Parrott*, 262 Conn. 276, 286, 811 A.2d 705 (2003).

Final judgment questions are decided pursuant to *State* v. *Curcio*, 191 Conn. 27, 463 A.2d 566 (1983). Our Supreme Court has "determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. In the present case, we conclude that the imposition of sanctions and the award of attorney's fees against Adler, a nonparty to the underlying personal injury case, terminated a separate and distinct proceeding, and, thus, the writ of error was filed pursuant to a final judgment.

Kolashuk, however, contends that Adler fails to meet the first prong of the *Curcio* test because the sanctions and the attorney's fees against Adler do not terminate a distinct and separate proceeding, as the orders were issued during the discovery phase of his personal injury case. Moreover, he continues, the phone records were necessary to resolve his case; see *Niro* v. *Niro*, 314 Conn. 62, 71 n.4, 100 A.3d 801 (2014); and are inextricably intertwined with it. See *McConnell* v. *McConnell*, 316 Conn. 504, 513, 113 A.3d 64 (2015). We disagree. The facts and the discovery at issue in the present case are distinguishable from those in *Niro* and *McConnell*.

In *Niro*, a dissolution action, the plaintiff wife sought the financial records of businesses and trusts in which the defendant husband and his brother, a plaintiff in error, were partners. *Niro* v. *Niro*, supra, 314 Conn. 64–65. She sought the records to determine her share of the marital assets in the face of allegations that the assets of the businesses and trusts had been misappropriated. Id., 65. The brother objected to the disclosure of certain records and filed a motion to quash a subpoena duces tecum and a motion for a protective order. Id. Following a hearing, the trial court ordered the brother to produce certain records. Id., 66. The brother filed a writ of error, which our Supreme Court dismissed, concluding that the trial court's order to produce was an interlocutory order that did not arise out of a separate and distinct proceeding because the trial court needed the information in the records to distribute equitably the marital assets in the dissolution action. Id., 69–70, 73. The husband's brother was in possession of records that were integral to a central issue in the divorce action, i.e., the value of the marital assets. Id., 70. The records, therefore, were integral to the resolution of the dissolution matter in *Niro*. In the present case, the phone records may be integral to Kolashuk's case, but Adler did not own them and was not in possession of them. Hatch, Adler's client, also did not own the phone or its records, and was not in possession of them. The phone records at issue are the property of R & W Heating.

McConnell was a probate appeal. *McConnell* v. *McConnell*, supra, 316 Conn. 507. The issue before our Supreme Court was whether a trial court's order directing "attorneys who [were] not parties and who [were] not representing parties to underlying litigation to appear in court and subject themselves to examination, was a final judgment that may be challenged by way of a writ of error." Id. The plaintiff claimed that he did

not receive notice of a Probate Court hearing regarding family trust funds pursuant to an application for an accounting of a family trust filed by one of his sisters, which resulted in a distribution of significant trust funds primarily to the plaintiff's two sisters. Id., 508. The trial court ordered the lawyers who represented the sister in the Probate Court to appear at a hearing to show cause. Id., 507, 509. The lawyers, the plaintiffs in error, were ordered "to appear in court so that they could be examined about certain events that took place during the Probate Court proceedings on [the sister's] application. Because [the sisters] had invoked their fifth amendment right not to testify at the hearing on the order to show cause, the [lawyers] for the parties to the Probate Court proceedings were a critical source of information regarding the failure to give notice of those proceedings to [the plaintiff brother]. Thus, the discovery order was directed at materials that were required by the trial court in order to resolve the issues raised in [the probate] appeal, and, therefore, the order was inextricably intertwined with the underlying proceeding." Id., 512–13. Our Supreme Court determined that the writ of error was not taken from a final judgment. Id., 513. The discovery order was directed at materials that were required by the trial court to resolve the issues raised in the plaintiff's probate appeal, and, "therefore, the order was inextricably intertwined with the underlying proceeding." Id. The discovery order "did not constitute a final judgment under the first prong of *Curcio* merely because the [lawyers] were not parties to [the brother's] appeal." Id. In the present case, Adler was not present at the time of the collision, nor was he the owner of the phone or the phone records. Although the phone records in the present case may be integral to Kolashuk's personal injury action against Hatch, Adler did not represent the owner of the phone and its records, a fact that Judge Bates acknowledged.

Moreover, unlike the plaintiffs in error in the *Niro* and *McConnell* cases, Adler was found in violation of the court's order.

Kolashuk also argues that "[t]he general rule established by our [Supreme Court] case law is that an interlocutory order *requiring a witness* to submit to discovery is not a final judgment and, therefore, is not immediately appealable." (Emphasis added.) *Presidential Capital Corp.* v. *Reale*, 240 Conn. 623, 625, 692 A.2d 794 (1997). That argument fails because Adler is neither a witness, nor a party, to the underlying action. See part II of this opinion. He is a lawyer representing Hatch, a defendant in the underlying action.

Kolashuk asserts, citing *Green Rock Ridge, Inc.* v. *Kobernat*, 250 Conn. 488, 498, 736 A.2d 851 (1999), that the imposition of sanctions and attorney's fees against Adler did not terminate a distinct and separate proceeding because the trial court did not find Adler to be in contempt. In *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 48 A.3d 16 (2012), our Supreme Court concluded that a law firm that was not a party need not wait to be found in contempt for its good faith failure to comply with a discovery order to seek appellate review of the discovery order. Id., 757, 762–69. In the present case, Adler did not comply with Judge Bates' discovery order on the basis of his good faith belief that to do so would violate a statute because Hatch did not own the phone records. Pursuant to *Woodbury Knoll, LLC*, he did not have to be found in contempt to seek judicial review of the sanctions and attorney's fees awarded against him.

In *Woodbury Knoll, LLC*, our Supreme Court analyzed the final judgment question pursuant to *Abreu* v. *Leone*, 291 Conn. 332, 968 A.2d 385 (2009). In *Abreu*, to determine "[w]hether there was subject matter jurisdiction, [our Supreme Court] reviewed its final judgment jurisprudence regarding appeals from discovery

orders and identified three points salient to determining whether a discovery order could be considered an appealable final judgment. First, the court's focus in determining whether there is a final judgment is on the *order* immediately appealed, not [on] the underlying action that prompted the discovery dispute. . . . Second, determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly. . . . Third, although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 760–61.

Applying the three *Abreu* points to the facts of the present case, we conclude that Adler's writ of error emanates from a final judgment. Adler challenges the sanctions and attorney's fees imposed on him, a nonparty, which are entirely unrelated to Kolashuk's personal injury action. Moreover, Reardon and Kolashuk received the phone records they were seeking before the sanctions and attorney's fees were imposed on Adler. The sanctions are unrelated to the prosecution of the personal injury action, which we assume is proceeding apace now that the firm has the records. The imposition of the sanctions, therefore, terminated a distinct and separate proceeding from the personal injury case.

As our Supreme Court held in *Woodbury Knoll, LLC*, there are policy considerations that militate against Adler's having to wait until there is a judgment in Kolashuk's case before he challenged the sanctions and attorney's fees. Our Supreme Court concluded "that a counterbalancing factor exists to justify not subjecting [an

attorney] to the ordinary rule that one must be held in contempt in order to challenge a trial court's discovery order, namely, the concern of requiring an attorney, as an officer of the court, to violate a court order and otherwise to behave inconsistently with the Rules of Professional Conduct in order to bring an appeal." Id., 757. Adler was representing Hatch, the defendant, and believed that he was prohibited by statute from turning over the phone records, which, more significantly, neither he nor his client owned or possessed. Adler further argues that it would be profoundly prejudicial to a defendant client if the attorney were forced to continue to refuse to comply with discovery until the court found the attorney to be in contempt. It would create a conflict of interest whereby an attorney must be subjected to professional scorn and reputational harm to protect a client's right to appeal a discovery order. We find this argument persuasive.

For the foregoing reasons, we conclude that Adler's writ of error was taken from a final judgment and that this court has subject matter jurisdiction.

II

As noted, the principal issues presented by the writ of error are whether the trial court erred as a matter of law by (1) ordering Adler to produce records that neither he nor his client owned or possessed and (2) issuing sanctions against Adler and awarding attorney's fees to Kolashuk's counsel.[15] We grant the writ of error.

[15] In his brief on appeal, Adler claimed that the trial court (1) abused its discretion by sanctioning him for failing to comply with a court order, (2) improperly sanctioned him for purportedly not following a vague, ambiguous, and fatally flawed order, (3) abused its discretion by finding that there was bad faith or misconduct on his part, (4) erred by finding that he had a duty to engage in efforts to procure discovery from third parties he did not represent, (5) erred in awarding attorney's fees against him, and (6) erred in awarding attorney's fees for activities beyond the drafting of the motion for sanctions itself. Following the submission of the parties' supplemental briefs, Adler refined the issues.

As previously stated, the present case is controlled by *Bank of New York* v. *Bell*, supra, 142 Conn. App. 125, which held that it was improper for the trial court to order the plaintiff in that case to turn over documents that belonged to a separate, nonparty entity. Id., 133–34. *Bank of New York* involved the following facts. The trial court found the plaintiff, Bank of New York, as trustee for BS ALT A 2005-9, to be in contempt for failing for more than one year to respond fully to the defendant Jonathan S. Bell's interrogatories and requests for production. Id., 127. The court found that the failure constituted a wilful violation of its prior orders, which met the requirements of *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18.[16] Bell sought to obtain documents regarding all of the mortgage foreclosure cases relating to assets transferred by JPMorgan Chase Bank, N.A., to Bank of New York. *Bank of New York* v. *Bell*, supra, 128. The plaintiff appealed, claiming in part that the court "had no authority to order it to turn over documents that belonged to Bank of New York or that belonged to Bank of New York as trustee for any trust other than BS ALT A 2005-9. The plaintiff argue[d] that it is a separate entity from Bank of New York and that the court, therefore, improperly ordered it to turn over documents belonging to that separate entity, which ultimately led to the court's improper finding of contempt." Id., 131. This court agreed for the following reasons.

"Bank of New York was never a party to this action. Practice Book §§ 13-6[17] and 13-9[18] permit parties to an

[16] "[T]he requirements set by our Supreme Court in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [supra, 257 Conn. 17–18], of reasonable clarity, a trial court finding based on the record of actual violation and that the sanction imposed was proportional to the violation . . . ." *Bank of New York* v. *Bell*, supra, 142 Conn. App. 127.

[17] Practice Book § 13-6 is titled "Interrogatories; In General."

[18] Practice Book § 13-9 (a) provides in relevant part: "In any civil action . . . any party may serve . . . upon *any other party* a request to afford the party submitting the request the opportunity to inspect, copy, photograph . . . designated documents or to inspect . . . any tangible things in the

action to serve interrogatories and requests for production only on other parties to that action. Despite Bank of New York's nonparty status, the court broadened the scope of the interrogatories and requests for production to include the entire transaction between JPMorgan Chase [Bank, N.A.] and Bank of New York, a nonparty. Thus, pursuant to Practice Book §§ 13-6 and 13-9, the court had no authority to order the plaintiff to turn over documents that belonged to Bank of New York, a separate nonparty entity, nor did it have any authority in the circumstances of this case to order the plaintiff as trustee for BS ALT A 2005-9 to turn over documents from other trusts. The court had the authority to order the plaintiff to respond to discovery requests relating to BS ALT A 2005-9." (Footnotes added and omitted.) Id., 134.

In his supplemental brief in the present case, Adler argues that Judge Bates' order that he turn over the phone records that belonged to R & W Heating, a separate, nonparty entity, constituted an abuse of discretion, as the court was without authority to do so. It goes without saying that Adler is not a party to the personal injury litigation. See Practice Book § 13-9. Although *Bank of New York* concerned a finding of contempt, the orders of the judges in the present case flow from the same underlying abuse of discretion by issuing a discovery order against a nonparty—Adler—and punishing the nonparty for failing to comply with a court discovery order that violated our rules of practice. Moreover, Adler's client, Hatch, did not own or possess the phone records. Reardon argued in the trial court that Hatch's parents owned R & W Heating, and that Hatch easily could have obtained the phone records had Adler instructed him to do so. The relationship between Hatch and his parents is beside the point. The

possession, custody or control *of the party* upon whom the request is served . . . ." (Emphasis added.)

fact remains that Hatch and R & W Heating are separate legal entities and that Adler was sanctioned for failing to do something he believed would violate a statute. We conclude that the orders regarding the imposition of sanctions and the award of attorney's fees against Adler constitute an abuse of discretion. We, therefore, grant the writ of error and remand the case to the trial court.

The writ of error is granted and the case is remanded with direction to vacate the sanctions and the award of attorney's fees against Adler.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SHOTA MEKOSHVILI (AC 42144)

Lavine, Devlin and Beach, Js.

Syllabus

Convicted, following a jury trial, of the crime of murder in connection with the stabbing death of the victim, the defendant appealed, claiming, inter alia, that the trial court erred by admitting certain testimony from the victim's wife and the victim's business partner, A. The victim, a taxi cab driver, was stabbed to death during his evening shift on a Tuesday night, and money was stolen from the taxi's glove compartment. During the trial, the victim's wife stated that on the night of the victim's murder, he returned home briefly to retrieve money to pay for his portion of a certain taxi fee and to send money to his family overseas. A testified that the victim regularly placed his portion of the taxi fee in the glove compartment on Tuesday nights for A to pay the following day. *Held:*

1. The defendant could not prevail on his claim that the wife's testimony regarding statements made to her by the victim was irrelevant as to whether the defendant killed the victim or whether he acted with criminal intent; the wife's testimony regarding the victim's statements reasonably could have made it more likely that the defendant had a financial motive in killing the victim and less likely that the killing was the result of self-defense, as claimed by the defendant, and the defendant's claim that the victim's statements to his wife were self-serving and backward looking and, thus, did not satisfy the state of mind exception to the

hearsay rule was unavailing, as the victim's statement to his wife indicated his intention to take money to pay the taxi company in the immediate future, and although the part of the statement indicating that he had taken money for that purpose was retrospective, it provided context as for the expression of his intention to pay his taxi fees and send money to his family, and at the time the victim made those statements to his wife, no crime had been committed nor was one foreseeable.

2. The defendant could not prevail on his claim that the trial court improperly allowed testimony from A, pursuant to the habit exception of the hearsay rule, regarding the victim's customary habit of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights, as A's testimony was relevant to the issue of motive for the defendant to kill the victim; the jury reasonably could have inferred from A's testimony that the victim had placed money in the glove compartment of the taxi that was, thereafter, taken by the defendant, and that financial gain could have been the motive for murder, and the defendant's claim that the state failed to provide an adequate foundation for the admission of A's testimony regarding habit evidence was unavailing, as there is no particular numerical threshold that must be met in order for a person's conduct to rise to the level of habit, and A's testimony established that the victim's specific conduct of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights constituted a sufficiently regular practice.

3. The trial court properly instructed the jury with a general unanimity charge and did not err in failing to grant the defendant's request for a specific unanimity charge as to the claim of self-defense; the jury instructions, viewed in their totality, were correct in law and fairly presented the case to the jury, as each of the four elements of a claim of self-defense were explained in detail and in accordance with the model jury charge, the factual scenario in the present case was not especially complex and the defendant's course of conduct did not comprise separate incidents, and because the trial court did not sanction a nonunanimous verdict, a unanimity instruction on the claim of self-defense was not required.

Argued September 23, 2019—officially released January 7, 2020

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Stamford and tried to the jury before *Blawie, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Norman A. Pattis, with whom, on the brief, was *Kevin Smith*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *James Bernardi*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Shota Mekoshvili, appeals from the judgment of conviction, rendered on a jury verdict of murder in violation of General Statutes § 53a-54a. He claims that the trial court erred by (1) admitting testimony under the state of mind exception to the hearsay rule, (2) admitting testimony regarding the victim's habit, and (3) refusing to include in the jury instructions a unanimity charge as to whether the state had disproven an element of the defendant's self-defense claim. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found from the evidence presented and the reasonable inferences drawn therefrom, and procedural history are relevant on appeal. The victim, Mohammed Kamal, operated a taxi with his business partner, Jean Antoine. Antoine worked the day shift, generally from 6 a.m. to 6 p.m., and the victim worked the night shift, generally from 6 p.m. to 6 a.m. The cab was registered with Stamford Taxi (company), and the partners paid a weekly fee totaling $475 to the company. The fee was due on Wednesdays at noon. The victim customarily placed his share of the fee in the glove compartment of the vehicle during his Tuesday night shift, and Antoine removed the money and delivered it to the company on Wednesday mornings.

On the evening of Tuesday, August 26, 2014, the victim left home for his shift in the taxi between 9 p.m. and 10 p.m. At approximately 12:30 a.m. on August 27, the victim briefly returned home and told his wife that he had forgotten to take the money for his share of the fee that he needed to leave in the taxi; he said he also

planned to send some money to his family in Bangladesh. The victim's wife observed him take money out of an armoire, after which the victim returned to his shift. At approximately 3 a.m., the defendant hailed the victim's taxi and directed the victim to drive to Doolittle Road, in Stamford. While on Doolittle Road, the defendant began to stab the victim repeatedly. At some point, the defendant opened the glove compartment, stole the money that the victim had set aside for the taxi fee and for his family in Bangladesh, took the victim's credit card, and fled the scene toward the defendant's apartment.

While fleeing from the scene, the defendant called a friend, Eugene Goldshtyen, several times and offered Goldshtyen $100 to pick him up. Goldshtyen met the defendant at the defendant's apartment and asked whether the defendant received his injuries during a burglary. The defendant falsely replied "yeah" and explained that he encountered the homeowner during the burglary and started fighting with the homeowner, whom he stabbed multiple times. The defendant said that "[w]hen the homeowner 'kept yelling' despite the defendant's order to 'shut up,' the defendant 'just kept stabbing him and stabbing him.' " Not believing the defendant's story, Goldshtyen called the police.

Later that morning, Stamford Police located the victim's body and the taxi at 150 Doolittle Road. The victim's body was found on the ground, and an autopsy revealed that the victim had been stabbed 127 times. The taxi's glove compartment was open and no money was found inside. The victim's and the defendant's blood was found on the rear driver's side passenger seat and door. The police arrested the defendant and charged him with murder in violation of § 53a-54a. The money, which the state claimed had been stolen, was not recovered.

Prior to trial, the state filed a motion in limine seeking to introduce the testimony of two witnesses: (1) testimony from the victim's wife that when the victim returned home briefly from his shift at 12:30 a.m., she saw him retrieve money from the armoire, and the victim then told her that "he intended to use this money to pay his dispatch fees and to send money home to Bangladesh"; and (2) testimony from the victim's taxi partner, Antoine, that it "was [the victim's] habit and custom to leave his share [of the taxi fee] in the glove compartment" for Antoine to give to the company the next morning. The trial court held a hearing on the matter and subsequently admitted the testimony of both witnesses.

The jury returned a verdict finding the defendant guilty of murder in violation of § 53a-54a. Thereafter, the court imposed a total effective sentence of sixty years of incarceration. The defendant filed an appeal in our Supreme Court, and the appeal was transferred to this court on September 24, 2018.

"Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Russo*, 62 Conn. App. 129, 133, 773 A.2d 965 (2001). In reviewing for an abuse of discretion, "the ultimate issue is whether the court could reasonably conclude as it did." *DiPalma* v. *Wiesen*, 163 Conn. 293, 299, 303 A.2d 709 (1972).

I

We first address the defendant's claim that the trial court erred in allowing testimony from the victim's wife

that the victim told her, after briefly returning home during his shift, that he was getting money to leave inside the taxi to pay his share of the taxi fee and to send to his family in Bangladesh after his shift. Specifically, the defendant claims that such statements (1) were irrelevant and (2) did not satisfy the state of mind exception to the hearsay rule because they were self-serving and backward looking. We disagree.

The following additional facts are relevant to this issue. At trial, the state called the victim's wife as a witness. She testified about statements that the victim had made to her when he briefly returned home during his night shift. She testified: "He took the money and he told me that he had to take the money because the next day, he had to make the taxi payment. The taxi payment was done once a week. The payment for the taxi was done once a week. And he also said to me that he needed more money to send to Bangladesh and the banks were closed at night, when he was on duty, so he was taking the money at night, so that the next day, when he got off duty, he was going to go to the bank and send some money to Bangladesh."

The defendant first claims that the victim's statements to his wife "had no relevant connection to a fact in issue." According to the defendant, the only facts at issue were whether the defendant had killed the victim and, if he had done so, whether he acted with criminal intent and without justification. He further asserts that "whether [the victim] had intended or planned to pay taxi related expenses the next day was simply inapposite to the matters to be decided by the jury, and to admit such evidence could only lead to confusion and speculation." We disagree.

The Connecticut Code of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the constitution of the United States,

the constitution of the state of Connecticut, the Code, the General Statutes or the common law." Conn. Code Evid. § 4-2. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. "The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law." Conn. Code Evid. § 4-1, commentary. "The trial court is given broad discretion in determining the relevancy of evidence and its decision will not be disturbed absent a clear abuse of that discretion." *State* v. *Holliman*, 214 Conn. 38, 50, 570 A.2d 680 (1990).

In the state's motion in limine, the state addressed the relevancy of the statements and claimed that it sought to introduce this evidence to controvert the defendant's claim of self-defense. The state explained: "[The defendant] claims he was fending off the aggressive sexual overtures of the victim. In such case the unexplained absence of valuables is of utmost relevance. The state intends to offer the [victim's] statements concerning his intent to bring sufficient money to satisfy his cab fees in order to show robbery as the motive." The proffered statements reasonably could have tended to make it more likely that the defendant had a financial motive in killing the victim and to make it less likely that the killing was a result of self-defense.

The defendant next claims that the statements by the victim to his wife were both backward looking and self-serving and, therefore, did not satisfy the state of mind hearsay exception. The Connecticut Code of Evidence provides exceptions to the hearsay rule, among them: "A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate

future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed." Conn. Code Evid. § 8-3 (4). "The hearsay statements of an unavailable declarant, made in good faith and not for a self-serving purpose, that express his or her present intentions to [do something] in the immediate future are admissible and allow the trier of fact reasonably to infer that the declarant's expressed intention was carried out." *State* v. *Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987). "[F]orward-looking statements of intention are admitted while backward-looking statements of memory or belief are excluded because the former do not present the classic hearsay dangers of memory and narration." *State* v. *Saucier*, 283 Conn. 207, 225, 926 A.2d 633 (2007), citing 2 C. McCormick, Evidence (6th Ed. 2006) § 276, p. 279.

In its ruling on the motion in limine, the trial court explained that the victim's statement was "a declaration of an intention casting light upon the future, it is distinguishable from any declaration of memory pointing backward to the past and this is not the case here." We agree. The victim's statement to his wife indicated his intention to take money to pay the taxi company in the immediate future. It is true that part of the statement, to the effect that the victim *had* taken the money for that purpose, was retrospective, but his having taken the money only provided context for the expression of his intention. We also are unpersuaded by the defendant's claim that the victim's statement was self-serving. At that point, no crime had been committed nor was one foreseeable.

The trial court did not abuse its discretion in admitting the wife's testimony as to statements made to her by the victim pursuant to the Connecticut Code of Evidence § 8-3 (4).[1]

[1] The state also claimed in its brief on appeal that any error in introducing the evidence was harmless. In light of our conclusion that the evidence was

II

We next address the defendant's claim that the trial court improperly allowed testimony from the victim's business partner, Antoine, pursuant to the habit exception to the hearsay rule, that the victim routinely put his share of the taxi fees in the glove compartment of the vehicle before Antoine's day shift on Wednesdays. The defendant claims that such evidence was (1) irrelevant and (2) insufficient to establish a "habit" pursuant to the hearsay exception.

The following facts, as previously set forth, are relevant to this issue. Antoine testified about his business relationship with the victim and their arrangement for payment of the taxi fees to the company that were due weekly. According to Antoine, he and the victim jointly owned and operated a cab beginning approximately a year and a half to two years prior to the victim's murder, and that they paid a weekly fee to the company. He explained that they would each contribute $237.50 for the fees every week. Antoine further testified that the victim would always leave his half of the fees in the glove compartment, and when Antoine picked up the car on Wednesday mornings, he would take the money from the glove compartment and drop it off at the company, along with his half.

The defendant claims that Antoine's testimony was not relevant to any material issue; the only material issues were whether the victim was murdered by the defendant and, if so, whether the defendant was justified in killing the victim. The defendant contends that Antoine's testimony allowed the state to "confuse the jury and inject the specter of robbery into a case where it had charged none." The state, however, asserts that

properly admitted, we need not discuss harmless error. See *State* v. *Scott*, 191 Conn. App. 315, 320 n.4, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019).

"evidence that the victim's habit was to leave money in the taxi's glove compartment for pick up on Wednesday mornings, coupled with the fact that the murder took place early Wednesday morning inside the taxi and that, after the murder, the glove compartment was found open without any money . . . allowed the jury to infer that the motive for the murder was to take the victim's money." We are persuaded by the state's claim that Antoine's testimony was relevant to the issue of motive for the defendant to kill the victim.

In *State* v. *Williams*, 90 Conn. 126, 96 A. 370 (1916), our Supreme Court upheld a trial court's admission of habit evidence regarding the victim's habit of carrying money in his pocketbook to show the defendants' motive for murdering the victim. Id., 130. It concluded that, based on the habit evidence, "the jury would be justified in presuming that [the victim] had his pocketbook where he usually carried it, in his pocket . . . and it was there found, and thence taken by the [defendants]." Id. In the present case, the jury reasonably could have inferred from Antoine's testimony that the victim had placed money in the glove compartment of the taxi that was thereafter taken by the defendant. Although robbery was not charged, financial gain could well have been the motive for murder. Accordingly, we conclude that the trial court properly found that such evidence was relevant.

Next, we turn to the defendant's claim that the state failed to provide an adequate foundation for the admission of the habit evidence. Specifically, he claims that the proffered evidence did not rise to the level of habit because there was insufficient evidence as to the number of times that the victim engaged in the conduct. According to the defendant, "[it] was not truly evidence of the decedent's personal habit of leaving money in the shared glovebox, so much as it was evidence of

Antoine's personal experience of having regularly paid taxi related expenses on a certain day of the week."

The Connecticut Code of Evidence provides that "[e]vidence of the habit of a person . . . is admissible to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . ." Conn. Code Evid. § 4-6. "[H]abit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct. . . . [H]abit . . . refer[s] to a course of conduct that is fixed, invariable, and unthinking, and generally pertain[s] to a very specific set of repetitive circumstances." (Citations omitted.) Conn. Code Evid. § 4-6, commentary.

We are unpersuaded by the defendant's contention that there is a particular numerical threshold that must be met in order for a person's conduct to rise to the level of a habit. Here, Antoine's testimony established that the victim's specific conduct of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights constituted a sufficiently regular practice. As such, we conclude that the trial court properly admitted Antoine's testimony regarding the victim's habit, pursuant to Connecticut Code of Evidence § 4-6.[2]

III

Finally, we address the defendant's claim that the trial court improperly refused to instruct the jury that it could not reach a verdict of guilty unless it was unanimous as to the basis for rejecting the defendant's self-defense claim. He claims that the general unanimity instruction was insufficient and that the trial court's charge violated his state constitutional right to be convicted by the unanimous verdict of the jury. We disagree.

[2] See footnote 1 of this opinion.

"[I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." *State* v. *Berrios*, 187 Conn. App. 661, 705–706, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019).

The following additional facts are necessary for our discussion. The defendant testified at trial and presented a claim of self-defense. The following is the defendant's account of the events that transpired on the night of the murder. The victim invited him to ride along for free while he picked up another fare. The victim then instructed him to move into the front seat to allow the paying fare to ride in the back. At some point, the victim stopped the car and indicated to the defendant that he wanted to "have some fun." The victim subsequently grabbed the defendant's genitalia, and the defendant reacted by punching the victim in the face. The victim then grabbed a knife and began attacking the defendant. A struggle between them ensued, and the victim threatened to kill the defendant.

The defendant managed to wrestle the knife away from the victim and stabbed him repeatedly.

On May 10, 2017, the defendant's attorney filed a request to charge, requiring unanimity on whichever element of self-defense the jury might find to have been disproven.[3] The trial court held a hearing on the matter and denied the defendant's request.[4] In the course of its instructions, the court explained in detail each of the four elements of self-defense, pursuant to General Statutes § 53a-19, and in accordance with the model jury charge. See Connecticut Criminal Jury Instructions § 2.8-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited November 1, 2019). The elements were: (1) the defendant actually believed that the victim was using or about to use physical force against him; (2) the defendant's belief was reasonable; (3) the defendant actually believed that the degree of force he used was necessary to repel the attack; and (4) the defendant's belief was reasonable. Subsequently, the court explained that "the state can defeat the defense of self-defense by disproving any one of

[3] The defendant requested the court to charge as follows: "The state has the burden of disproving self-defenses, as I have instructed. To meet its burden as to this disproof, the state must persuade you unanimously as to any of the four elements on which I have instructed you. Thus, it is not enough for some of you to find the first element disproved while others find a different element disproved. Unless you unanimously agree that the state has disproven the same element, the state has failed to disprove self-defense."

[4] The court ruled: "I am going to be delivering a general unanimity charge instructing the jury that its verdict must be unanimous. And as in *Bailey* and *Diggs*, the court had serious reservations about the applicability of the unanimity requirement to self-defense.

"I believe the general instruction as drafted is sufficient to ensure that a unanimous verdict is reached. The encounter here between the defendant and the cab driver was a single incident which took place within a small area. While there are, obviously, some conflicts in the testimony, I don't believe that the issues this jury has to resolve with respect to what happened are so complicated that jury confusion would result if I did not give a specific unanimity charge."

the four elements of self-defense beyond a reasonable doubt to your unanimous satisfaction."

The defendant relies, in part, on the holdings in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), and *State* v. *Diggs*, 219 Conn. 295, 592 A.2d 949 (1991), to support his claim that a more specific unanimity instruction was required. Where alternative ways to commit an offense are alleged, *Gipson* set out a "conceptual distinctiveness" criterion, specifying that a charge requiring unanimity as to the specific act found proved by the jury is required only if the alternative acts are conceptually distinct from each other. See *United States* v. *Gipson*, supra, 458.

Applying *Gipson* to this case, the defendant claims that each "element" of self-defense is analogous to a conceptually distinct basis of liability. Noting that the unanimity challenge in *Gipson* was raised as to an offense charged, as opposed to a defense, our Supreme Court, in *State* v. *Bailey*, 209 Conn. 322, 334–35, 551 A.2d 1206 (1988), declined to require an instruction that the jury must agree unanimously on the element it found disproved in rejecting a claim of self-defense. Our Supreme Court did, however, leave open the possibility that, under certain circumstances, such an instruction may be warranted even in the context of self-defense. Id., 336. "Despite serious reservation about the applicability of the unanimity requirement to self-defense, we do not, at this juncture, express the opinion that a specific unanimity charge would never be required for claims of self-defense, for it is clear that the requirement as refined by case law in the wake of *Gipson* does not apply to the facts of the present case." Id., 336.

Our Supreme Court was presented with the same issue in *State* v. *Diggs*, supra, 219 Conn. 302, and concluded: "As in *Bailey*, the defendant here is unable to provide us with any authority for the proposition that

a unanimity instruction was required as to the factual basis for the jury's rejection of his self-defense claim, nor have we been able to locate any. A determination of that issue, however, is not necessary for the resolution of the instant case." Our Supreme Court noted that "the encounter between the victim and the defendant was a single incident, which was brief and took place within a small area. . . . We do not perceive in the record a complexity of evidence or any other factors creating jury confusion and a consequent need for a specific unanimity charge. . . . We are, therefore, not persuaded that the trial court was required to deliver such an instruction concerning the statutory exemptions to the defendant's self-defense claim." (Citations omitted.) Id., 302–303.

The defendant addresses the notion of complexity and the policy considerations arising therefrom. First, he suggests that the determining consideration is not necessarily the complexity of the case or its underlying facts, but the complexity of the instructions. He contends that analyzing the four different "elements" involved in a self-defense claim is a complex task for a jury to undertake. As such, the defendant claims that the best policy is to require a specific unanimity charge to guide the jurors and to ensure that they fully understand the state's burden, and, further, that they must be unanimous in finding which element(s) of the defense the state has disproven. He highlights the risk that, absent the instruction, individual jurors may find different elements of the defense disproven. "Simply put, it would be intellectually dishonest, logically inconsistent, and factually incoherent to say that a jury was unanimous as to the factual basis of the offense, and the conduct committed by the defendant, if some jurors concluded that the defendant did not actually believe that he was under attack, while other jurors concluded that the defendant actually believed he was under attack

but that such belief was unreasonable. Similarly, it would be no less problematic if some jurors concluded that the defendant reasonably believed he was under attack but that he either did not actually believe the degree of force he used was necessary, or that such belief was unreasonable." He notes the well established law that only the state has a burden of persuasion regarding a self-defense claim; it must disprove the defense beyond a reasonable doubt. *State* v. *Pauling*, 102 Conn. App. 556, 571, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007). The defendant posits a logical inconsistency in explicitly requiring unanimity on each element of a state's charged offense, but not the "elements" of a defense that the state must disprove, given that it has the same burden of persuasion.

Our Supreme Court held in *State* v. *Rivera*, 221 Conn. 58, 76, 602 A.2d 571 (1992), however, that "where, as here, the trial court did not sanction a nonunanimous verdict, a unanimity instruction on self-defense is not required." At oral argument, the defendant conceded that the trial court did not sanction a nonunanimous verdict. As *Rivera* makes clear, because the trial court in this case did not sanction such a nonunanimous verdict, "that ends the matter." Id.

In light of *Rivera*, we cannot, then, hold that a specific unanimity charge should have been given. The jury instructions, viewed in their totality, were correct in law and fairly presented the case to the jury. As in *Diggs*, the factual scenario was not especially complex; as in *State* v. *Bailey*, supra, 209 Conn. 336, the defendant's course of conduct did not comprise "separate incidents."[5] Accordingly, we conclude that the trial

[5] *Bailey* may be read to suggest a reasonable distinction between the need for a specific unanimity instruction when separate incidents are material and the lack of need for the instruction when only one course of conduct is considered. Id.

court properly instructed the jury with a general unanimity charge and did not err in failing to grant the defendant's request for a specific unanimity charge as to the claim of self-defense.

The judgment is affirmed.

In this opinion the other judges concurred.

HSBC BANK USA, NATIONAL ASSOCIATION, TRUSTEE *v.* GERARD M. KARLEN ET AL.
(AC 41432)

Elgo, Bright and Devlin, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant C, who, together with the defendant K, had executed a certain promissory note in 2006, which was secured by a mortgage on the subject property. In its complaint, the plaintiff alleged, inter alia, that the note was affected by a 2010 loan modification agreement, that the mortgage was assigned to the plaintiff in 2012, that the plaintiff was the holder of the note, that the note was in default for nonpayment, and that the plaintiff had elected to accelerate the balance due on the note and to declare the note due in full. Thereafter, the plaintiff filed a motion for summary judgment as to liability and attached an affidavit from D, the vice president for loan documentation for the plaintiff's servicing agent, who attested concerning the history of the 2006 note, including averring that the defendants had defaulted on the note by failing to make their May, 2013 payment or any payment thereafter. D attached to her affidavit a copy of the 2006 note and mortgage, the 2012 assignment and a notice of default letter sent by the plaintiff to the defendants in November, 2013, but she did not mention or attach the 2010 loan modification agreement. The defendants did not file an objection to the motion for summary judgment. The trial court granted the plaintiff's motion for summary judgment as to liability and, thereafter, rendered a judgment of foreclosure by sale, from which the defendants appealed to this court. *Held* that the trial court improperly granted the plaintiff's motion for summary judgment as to liability, the plaintiff having failed to establish an undisputed prima facie case for foreclosure: despite the allegations in the plaintiff's complaint, D's supporting affidavit and the attached documents regarding the defendants' default on the 2006 loan, the plaintiff pleaded that a 2010 loan modification agreement affected the 2006 note but, thereafter, failed to provide the trial court

with a copy of that agreement or any evidence of its terms, and, therefore, that court had no way to assess whether the agreement had a substantive effect on the 2006 note or to ascertain whether the agreement modified any conditions precedent to foreclosure, whether the defendants were in default of the agreement or whether the plaintiff was in compliance with its terms, and although the defendants did not file an objection to the motion for summary judgment or raise an issue concerning the absence of the agreement via a special defense or otherwise before the trial court, it was the plaintiff's burden to establish its prima facie case; moreover, there was no merit to the plaintiff's contention that it presented evidence that the defendants defaulted on the loan as modified in 2010, as the notice of default letter was not proof of any default, D did not aver in her affidavit to a default on the modified note, and the fact that the plaintiff provided the trial court with an affidavit averring to a default without producing evidence of the underlying obligation that is in default was insufficient to establish entitlement to summary judgment.

Argued October 25, 2019—officially released January 7, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant Carla Rivers Karlen, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Randolph*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Genuario*, *J.*, rendered a judgment of foreclosure by sale, from which the named defendant et al. appealed to this court. *Reversed*; *further proceedings*.

Thomas P. Willcutts, with whom, on the brief, was *Michael J. Habib*, for the appellants (named defendant et al.).

Sean R. Higgins, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendants Gerard M. Karlen and Carla Rivers Karlen[1] appeal from the judgment of foreclosure by sale rendered by the trial court in favor of

[1] The Internal Revenue Service has an interest in the subject property and was named as a defendant in this case, but has not participated in this appeal. We, therefore, refer to Gerard M. Karlen and Carla Rivers Karlen as the defendants throughout this opinion.

the plaintiff, HSBC Bank USA, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-2. On appeal, the defendants claim that the trial court improperly granted the plaintiff's motion for summary judgment as to liability.[2] We reverse the judgment of the trial court.

In 2014, the plaintiff commenced the underlying foreclosure action against the defendants with regard to property located at 10 Pheasant Lane in Westport. The plaintiff alleged the following facts in its complaint. On November 2, 2006, the defendants executed and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for Wall Street Mortgage Bankers, Ltd., doing business as Power Express, a note for a loan in the original principal amount of $800,000, which was secured by a mortgage on the property.[3] The note was thereafter affected by a loan modification agreement dated effective November 17, 2010. The mortgage subsequently was assigned to the plaintiff by virtue of an assignment of mortgage dated February 2, 2012, and the plaintiff is the holder of the note. The note was in default, and the plaintiff elected to accelerate the balance due and declared the note to be due in full. When payment was not made, the plaintiff filed this action to foreclose the mortgage that secured the note.

[2] The defendants also had claimed that the court erred in failing to grant their motion for a continuance. During oral argument before this court, however, the defendants' counsel acknowledged that he could not demonstrate prejudice flowing from the trial court's failure to grant the defendants' motion for a continuance. Accordingly, the defendants cannot succeed on this claim, and we afford it no review. See *Bove* v. *Bove*, 93 Conn. App. 76, 84, 888 A.2d 123 ("[a]bsent a showing of actual prejudice, the court will not be found to have abused its discretion when denying the defendant's motion for a continuance" [internal quotation marks omitted]), cert. denied, 277 Conn. 919, 895 A.2d 788 (2016).

[3] On July 6, 2012, Carla Rivers Karlen became the owner of the property by way of a quit claim deed.

In their answers and in a later disclosure of defenses, the defendants denied the essential allegations of the plaintiff's complaint and alleged defenses, including lack of jurisdiction, lack of standing, misapplied payments, and the lack of a contract between the parties.

On May 17, 2016, the plaintiff filed a motion for summary judgment as to liability. Attached to the plaintiff's motion was the affidavit of Diane F. Duckett, the vice president of loan documentation for Wells Fargo Bank, N.A., the servicing agent for the plaintiff. Duckett averred that the defendants executed a promissory note dated November 2, 2006, in the amount of $800,000, with the first payment being due on or about January 1, 2007, and the final payment being due on December 1, 2036. She further averred that the note was endorsed in blank and that the plaintiff was in possession of the note when this foreclosure was commenced in 2014. Duckett averred that the defendants executed a mortgage, also on November 2, 2006, conveying the property to Mortgage Electronic Registration Systems, Inc., as nominee for Wall Street Mortgage Bankers, Ltd., doing business as Power Express, which thereafter was assigned to the plaintiff in an assignment dated January 31, 2012. Duckett averred that the "unpaid balance of the note [was] $846,894.50 plus interest from [April 1, 2013]," and that the defendants had failed to make their May 1, 2013 payment or any payment thereafter. Duckett attached a copy of the November 2, 2006 note and mortgage to her affidavit. She also attached the January 31, 2012 assignment and a default letter sent by the plaintiff to the defendants on November 26, 2013, notifying them that they had past due payents of $50,602.86.[4] She did not mention or attach the November 17, 2010 loan modification agreement. Nevertheless, the plaintiff's memorandum of law in support of

[4] The 2006 note attached to Duckett's affidavit demonstrates that the defendants' monthly payments were $4990.96. Duckett averred that the defendants were "in default under the terms of the [n]ote and [m]ortgage

its motion for summary judgment did state that the note "was modified by virtue of a [m]odification [a]greement dated effective November 17, 2010."

On August 11, 2017, the defendants filed a motion for an extension of time to respond to that plaintiff's motion for summary judgment so that they could pursue additional discovery, which the court granted, extending the filing deadline for the defendants' opposition to October 10, 2017. The defendants, however, did not file a response to the plaintiff's motion. The court scheduled the short calendar hearing on the plaintiff's motion for summary judgment as to liability for December 18, 2017. On December 15, 2017, the defendants filed a motion for continuance of the December 18, 2017 hearing on the ground that their counsel was unavailable on that date; they requested a one to two week continuance. Despite the defendants' request for a continuance and the plaintiff's acknowledgment to the court that such a motion had been filed, the court stated that it did not have the motion for continuance in front of it, and it granted the plaintiff's motion for summary judgment, without argument and in the defendants' absence.

On February 7, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, to which the defendants objected. On February 20, 2018, the court rendered a judgment of foreclosure by sale, setting a sale date of April 28, 2018. This appeal followed.

On appeal, the defendants claim that the court improperly granted the plaintiff's motion for summary

by failing to make the payment due for [May 1, 2013] and every payment thereafter." The default letter attached to Duckett's affidavit, dated November 26, 2013, states that the defendants owe past due payments of $50,602.86 and other fees of $2855, for a total delinquency as of that date of $53,457.86. If the defendants had failed to make seven successive monthly payments of $4990.96, it appears that their past due amount would be $34,936.72. Neither the default letter nor Duckett's affidavit explains the significant difference in these amounts.

judgment as to liability. Specifically, they argue that although the plaintiff readily acknowledged in both its complaint and in its memorandum of law in support of its motion for summary judgment that the parties had entered into a loan modification agreement on November 17, 2010 (2010 modification agreement), neither the plaintiff nor its affiant, Duckett, ever alleged that the defendants were in default of the 2010 modification agreement; the only allegation of default was as to the original November 2, 2006 promissory note (2006 note), which, the plaintiff acknowledges in its complaint, was "affected" by the 2010 modification agreement. The defendants further argue that the plaintiff also failed to provide a copy of the 2010 modification agreement to the court or to set forth its terms. Accordingly, they argue, the court improperly rendered summary judgment because it had no way of ascertaining whether the defendants were in default of the 2010 modification agreement or whether the plaintiff, itself, was in compliance with the terms of that agreement. We agree.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit

documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly [render] summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Citations omitted; internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

In the present case, the plaintiff, in its complaint, alleged that it was the holder of the 2006 note that was secured by the defendants' mortgage on the property. See *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 744, 196 A.3d 328 (2018) ("[a] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes § 49-17]" [internal quotation marks omitted]). This allegation is supported by the

affidavit of Duckett and by copies of the 2006 note and mortgage attached to her affidavit. The plaintiff also alleged in its complaint that the defendants were in default of the 2006 note and mortgage; this allegation also is supported by Duckett's affidavit in which she attests that the defendants have failed to make their May 1, 2013 payment on the 2006 note and that they failed to make every payment thereafter. The plaintiff also alleged in its complaint that it complied with the conditions precedent to foreclosure, as established by the 2006 note and mortgage; this allegation also is supported by Duckett's affidavit and her supporting documents.

Nevertheless, despite these allegations and the supporting affidavit and documents, the plaintiff's complaint also alleged that the 2006 note was the subject of a modification agreement in 2010; Duckett's affidavit, however, contains no mention of the 2010 modification agreement or its terms. The complaint also failed to set forth the terms of the 2010 modification agreement and what effect that agreement had on the 2006 note. Additionally, there is no copy of the 2010 modification agreement in the record, which may have allowed the court to assess whether the agreement had a substantive effect on the 2006 note on which the defendants were alleged to have defaulted. The trial court also had no way of assessing whether the 2010 modification agreement modified any conditions precedent to foreclosure. See id. (to establish prima facie case in foreclosure action, plaintiff must prove, among other things, that it satisfied all conditions precedent to foreclosure).

Although the plaintiff argues that the defendants did not file an objection to its motion for summary judgment or raise an issue concerning the absence of the 2010 modification agreement via a special defense or otherwise before the trial court, because it is the plaintiff's burden to establish its prima facie case before it is

entitled to summary judgment, this argument is not persuasive. See *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 795, 218 A.3d 717 (2019) (trial court, before granting motion for summary judgment as to liability in foreclosure action, first must determine whether plaintiff has established prima facie case, even if defendant has not filed opposition). The plaintiff pleaded the existence of a loan modification agreement that "affected" the 2006 note and, thereafter, failed to produce that agreement or to provide any evidence of its terms.

Alternatively, the plaintiff argues that it did present evidence that the defendants defaulted on the loan as modified in 2010. In particular, the plaintiff argues that Duckett averred that the defendants defaulted on their obligations in May, 2013, more than two years after the modification and that the notice of default attached to Duckett's affidavit is dated November 26, 2013, more than three years after the modification. We are not persuaded.

The default notice is nothing more than an allegation of a default. It is not proof of any default. Furthermore, Duckett's affidavit avers that the defendants "are in default under the terms of the [n]ote and [m]ortgage . . . ." The affidavit defines the note as "a [p]romissory [n]ote . . . dated [November 2, 2006] . . . ." Nowhere in Duckett's affidavit does she aver a default on the modified note. Finally, there is little question that merely providing the court with an affidavit averring to a default without producing evidence of the underlying obligation that is in default would be insufficient for the court to render summary judgment.

Accordingly, in the present case, the plaintiff did not establish an undisputed prima facie case, and we conclude that the court improperly granted the plaintiff's motion for summary judgment as to liability. See *U.S.*

Bank National Assn. v. *Eichten*, supra, 184 Conn. App. 744 (court properly may grant motion for summary judgment as to liability in foreclosure action only if complaint and supporting affidavits establish undisputed prima facie case).

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

In this opinion the other judges concurred.