CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ROBERT ALEXANDER RICKETTS *v.* JANELLE R. RICKETTS (AC 44298)

Bright, C. J., and Alvord and Suarez, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the postjudgment orders of the trial court denying his motion to transfer this matter to the Regional Family Trial Docket and appointing a guardian ad litem for the parties' minor children. *Held* that the challenged postjudgment orders did not constitute a final judgment and, therefore, the appeal was dismissed for lack of jurisdiction: despite the plaintiff's claim that, pursuant to the parties' divorce degree, he may immediately appeal from the trial court's order denying his motion to transfer the case to the Regional Family Trial Docket, the court's order was entered in the course of continuing postjudgment proceedings on motions that remain pending before the trial court, thus, the order did not terminate any proceeding and did not satisfy the first prong of *State* v. *Curcio* (191 Conn. 27), and, because the right that the plaintiff seeks to vindicate in this appeal is neither statutory nor constitutional, the second prong of *Curcio* also was not satisfied; moreover, insofar as the plaintiff challenged the court's ruling that the plaintiff had agreed on the appointment of a guardian ad litem, this order also was interlocutory and did not constitute an immediately appealable judgment, as the court appointed a guardian ad litem to investigate facts in order to make recommendations concerning the children's best interests, which was a step toward a final judgment resolving the issues concerning education, visitation, and custody that had arisen postjudgment.

Considered December 16, 2020—officially released March 2, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Nguyen-O'Dowd, J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court denied the plaintiff's motion to transfer adjudication of certain postjudgment motions to the Regional Family Trial Docket; subsequently, the court, *Nguyen-O'Dowd, J.*, appointed a guardian ad litem for the minor children, and the plaintiff appealed to this court; thereafter, the court entered certain postjudgment orders, and the plaintiff filed an amended appeal. *Appeal dismissed.*

Robert Ricketts, self-represented, the appellant (plaintiff).

Janelle R. Mallett, self-represented, the appellee (defendant).

Opinion

ALVORD, J. The marriage between the plaintiff, Robert Alexander Ricketts, and the defendant, Janelle R. Ricketts (now known as Janelle R. Mallett), was dissolved in 2018. The plaintiff appeals from the September 17, 2020 orders of the trial court, *Nguyen-O'Dowd, J.*, denying his postjudgment motion to "transfer [this matter] to the Regional Family Trial Docket in accordance with the [parties'] divorce decree" and appointing a guardian ad litem (GAL) for the parties' minor children. On November 13, 2020, this court ordered, sua sponte, that the parties file memoranda giving reasons, if any, why this appeal should not be dismissed for lack of an appealable judgment. On December 16, 2020, we dismissed the plaintiff's appeal and indicated in our order that an opinion would follow. This opinion elucidates our conclusion that this court does not have jurisdiction

to consider the propriety of these postjudgment orders at this time.

The following procedural history is relevant to our discussion. On June 26, 2018, the trial court, *Diana, J.*, rendered judgment dissolving the parties' marriage that incorporated their separation agreement and the parenting plan for their two minor children. Pursuant to the decree, the parents share joint legal custody of the children, who primarily reside with the plaintiff. The agreement and parenting plan include several handwritten addenda, one of which specifies that "the [Regional Family Trial Docket] shall retain jurisdiction over the custody and parenting issues . . . that may arise and need judicial resolution in the future."

On January 9, 2020, the defendant filed a motion for contempt alleging that she had been prevented from picking up the children from school for her scheduled parenting time. She subsequently filed a motion for the appointment of a GAL. Beginning on January 10, 2020, and through August 11, 2020, the plaintiff filed several applications for "emergency ex parte order[s] of custody" and "emergency motion[s]" for a temporary injunction. In these emergency motions, he alleged that the defendant was interfering with the children's education, and sought orders from the trial court limiting her access to the children's educational records and limiting her visitation with the minor children. The plaintiff's requests for emergency and ex parte relief were denied, and a hearing was scheduled on the pending motions.

On September 3, 2020, the parties appeared before the court, *Nguyen-O'Dowd, J.*, and the court ordered that the parties return on September 17, 2020, to confer on the appointment of a GAL.[1] On September 14, 2020, the plaintiff filed a motion to transfer adjudication of these matters to the Regional Family Trial Docket. On

[1] All references to the trial court hereafter are to Judge Nguyen-O'Dowd.

September 17, 2020, with the parties present, the trial court denied the motion to transfer, indicating that the Regional Family Trial Docket "is not accepting this case."[2] The trial court also appointed a GAL, chosen by "agreement of the parties," and continued the matter to October 8, 2020, for the court to "assess duties and fees for the GAL."[3]

On September 28, 2020, the plaintiff filed this appeal challenging the orders that were issued on September 17, 2020. When the appeal was filed, no final order had entered on the defendant's January 9, 2020 motion for contempt or on the plaintiff's motions that sought to modify the defendant's visitation.

On November 13, 2020, we ordered the parties to file memoranda giving reasons, if any, why this appeal should not be dismissed for lack of an appealable judgment. The parties filed their memoranda on November 27, 2020. We conclude that this appeal must be dismissed.

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . In the gray area between judgments that are undoubtedly final and others that are clearly interlocutory . . . [our Supreme Court] has adopted the following test, applicable to both criminal and civil proceedings: An otherwise interlocutory order

[2] The Regional Family Trial Docket is a special session of the Superior Court that handles contested custody and visitation matters when the case meets certain criteria. See Regional Family Trial Docket, available at https://www.jud.ct.gov/external/super/spsess.htm (last visited February 19, 2021).

[3] Also on September 17, 2020, the plaintiff filed an "emergency motion for stay" in the trial court, claiming that the Regional Family Trial Docket has "jurisdiction" over this matter. The trial court denied that motion on October 8, 2020.

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. *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)." (Internal quotation marks omitted.) *Khan* v. *Hillyer*, 306 Conn. 205, 209–10, 49 A.3d 996 (2012). That the present matter arises postjudgment does not affect that analysis: the final judgment rule still applies. See *McGuinness* v. *McGuinness*, 155 Conn. App. 273, 276–78, 108 A.3d 1181 (2015); *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 603–604, 952 A.2d 115 (2008).

We first consider the plaintiff's claim that he may immediately appeal from the trial court's order denying his motion to transfer the case to the Regional Family Trial Docket "in accordance with the parties' divorce decree." We disagree.

This court has held that neither prong of *Curcio* is satisfied when an appellant seeks to challenge an order transferring a case from one judicial district to another when the order "was rendered in the course of the continuing civil litigation . . . did not terminate a separate and distinct proceeding . . . [and did] not, in and of itself, conclude any recognized right of the parties." (Citation omitted.) *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 804–805, 124 A.3d 920 (2015), citing *Felletter* v. *Thompson*, 133 Conn. 277, 281, 50 A.2d 81 (1946). The same is true of an order transferring a case to a special session of the Superior Court. See *In re Justin F.*, 116 Conn. App. 83, 105, 976 A.2d 707 (challenging transfer of case to Child Protection Docket at Middletown), cert. dismissed, 292 Conn. 913, 973 A.2d 660 (2009), and cert. denied, 293 Conn. 913, 978 A.2d 1109 (2009), and cert. denied sub nom. *Albright-Lazzari* v. *Connecticut*, 559 U.S. 912, 130 S. Ct. 1298, 175 L. Ed. 2d 1087 (2010). Here, the order denying the plaintiff's motion to transfer was entered in the course of

continuing postjudgment proceedings on motions that remain pending before the trial court. The order did not terminate any proceeding and does not satisfy the first prong of *Curcio*.

"The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim that some recognized statutory or constitutional right is at risk." (Internal quotation marks omitted.) *McGuinness* v. *McGuinness*, supra, 155 Conn. App. 277.

Here, the plaintiff's claimed right to have the matter transferred to the Regional Family Trial Docket arises from the agreement incorporated into the decree dissolving the parties' marriage. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts." (Internal quotation marks omitted.) *McLoughlin* v. *McLoughlin*, 157 Conn. App. 568, 584–85, 118 A.3d 64 (2015). Because the right that the plaintiff seeks to vindicate in this appeal is neither statutory nor constitutional, the second prong of *Curcio* is also not satisfied.[4] See

[4] Moreover, we firmly reject the notion that the terms of the 2018 divorce decree entitle the plaintiff to have all matters concerning "custody and parenting" resolved by the Regional Family Trial Docket forevermore. In his arguments before this court, the plaintiff maintains that he relied on "the representation" that future matters concerning custody would be heard at the Regional Family Trial Docket, which is "familiar with the factual background and nuance of [this] case," and that, "absent that representation," he would have "bargained differently" in negotiating the separation agreement. We will not read the term in the parties' marital dissolution decree as a limitation on the Superior Court's broad discretion in matters "particularly within [its] province," including "matters involving judicial economy, docket management [control of] courtroom proceedings . . .

Soracco v. *Williams Scotsman, Inc.*, 128 Conn. App. 818, 826, 19 A.3d 209 (claimed contractual right to avoid trial does not satisfy second prong of *Curcio*), cert. denied, 302 Conn. 903, 23 A.3d 1244 (2011).

Insofar as the plaintiff challenges the trial court's "ruling that the plaintiff agreed on the appointment of a GAL," we conclude that this order also is interlocutory and does not constitute an immediately appealable judgment under *Curcio*.

In *Kennedy* v. *Kennedy*, supra, 109 Conn. App. 603–604, as here, proceedings on postjudgment motions to modify custody and visitation were ongoing in the trial court. The trial court in *Kennedy* appointed separate counsel for each minor child pursuant to its authority under General Statutes § 46b-54. Id. The father appealed, and this court determined that "appointing counsel for both daughters is merely a step along the road . . . to a final judgment resolving the custody and visitation issues [and] . . . the [father] has failed to explain why his objection cannot be vindicated on appeal from a final judgment resolving the custody and visitation dispute." (Citations omitted; internal quotation marks omitted.) Id., 592, 604. This court held that an order appointing counsel for the minor children in postjudgment proceedings concerning custody and visitation was not immediately appealable under either prong of *Curcio*. Id., 603–604.

We see no reason to reach a different conclusion here. The trial court appointed a GAL to investigate facts in order to make recommendations to the court concerning the children's best interests. The appointment of a GAL for the minor children pursuant to § 46b-54 is, indeed,

[nor its] reasonable control over its schedule." (Citation omitted; internal quotation marks omitted.) *M.B.* v. *S.A.*, 194 Conn. App. 727, 733–34, 222 A.3d 551 (2019).

a step toward a final judgment resolving the issues concerning education, visitation, and custody that have arisen postjudgment.[5] Because none of the interlocutory orders at issue here is immediately appealable under *Curcio*, we lack jurisdiction to reach their merits at this time.

The appeal as amended is dismissed.

In this opinion the other judges concurred.

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* RUSSELL M. MADISON ET AL.
(AC 43719)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property in Woodbridge owned by the defendants R and M. Following several antecedent assignments, the mortgage was assigned to the plaintiff on the Woodbridge land records, and, subsequently, R defaulted on the note which was secured by the mortgage. The plaintiff provided R and M with written notice of the default, which was not cured, and thereafter commenced this action. The plaintiff appended to its original complaint a copy of the schedule affixed to the mortgage containing a description of the property. The plaintiff subsequently filed an amended two count

[5] On November 27, 2020, the parties filed their memoranda concerning whether the September 17, 2020 orders were final. On December 8, 2020, the plaintiff filed an amended appeal. His amended appeal challenges orders entered by the trial court on December 3, 2020, and purports to belatedly add additional dates of certain interlocutory orders as decisions "being appealed," including September 3 and October 8, 2020. These orders are related to the September 17, 2020 orders and are similarly interlocutory. On December 16, 2020, we dismissed the original appeal and a portion of the amended appeal. Also on December 16, 2020, we ordered the parties to file memoranda as to whether the remainder of the amended appeal, which concerns the orders entered on December 3, 2020, should be dismissed. The parties filed memoranda on January 5, 2021. We have considered the parties' memoranda and conclude that the court's orders are interlocutory and satisfy neither prong of *Curcio*. Therefore, the remainder of the amended appeal also is dismissed.

complaint, alleging, in count one, a claim for foreclosure and appending an amended schedule that described an additional parcel of land that abutted the previously identified parcel. The plaintiff asserted in count two a claim for reformation of the mortgage, which alleged that the property description in the schedule appended to the plaintiff's original complaint was inaccurate, and that the amended schedule set forth the correct description of the property. The court thereafter granted the plaintiff's motion for summary judgment as to liability on its foreclosure claim. Following a hearing, the court granted the plaintiff's motion for judgment of strict foreclosure and, immediately thereafter, the plaintiff's counsel orally moved for judgment on the reformation claim. The court reserved decision on the plaintiff's oral motion for judgment at the hearing, but subsequently granted the motion. From the judgment rendered thereon, R and M appealed to this court. *Held:*

1. The trial court improperly granted the plaintiff's oral motion for judgment on its reformation claim: the plaintiff failed to produce any evidence in support of its reformation claim, R and M were not defaulted as to the plaintiff's amended complaint, and the plaintiff never moved for summary judgment on its reformation claim; accordingly, there was no basis on which the court could have properly rendered judgment in the plaintiff's favor; moreover, this court concluded that, as a result of its reversal of the judgment with respect to the reformation of the mortgage, the judgment of strict foreclosure must also be reversed, because a trial court must adjudicate a reformation claim before or in conjunction with the attendant foreclosure claim.
2. The trial court properly granted the plaintiff's motion for summary judgment as to liability on its foreclosure claim: contrary to R and M's claim that the plaintiff failed to establish that the default notice that it had mailed to R and M complied with the notice requirements of the mortgage, this court concluded that the notice substantially complied with those requirements, insofar as that notice was required to specify a date, not less than thirty days from the date the notice is given to the borrower, by which the default must be cured, as the language of the notice was sufficiently clear and unambiguous so as to alert R and M that the plaintiff was demanding that they cure the default within thirty days of February 22, 2016, the notice in the present case was dated February 22, 2016, included several references to that date, and, read as a whole, sufficiently notified R and M that they had to cure their default within thirty days of February 22, 2016.

Argued October 21, 2020—officially released March 2, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other

relief, brought to the Superior Court in the judicial district of New Haven, where the plaintiff filed an amended complaint; thereafter, the court, *Baio*, *J.*, granted the plaintiff's motion for summary judgment as to liability; subsequently, the court, *Baio*, *J.*, rendered judgment of strict foreclosure; thereafter, the court granted the plaintiff's motion for judgment on count two of the complaint seeking reformation of the mortgage and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Reversed in part; further proceedings.*

Earle Giovanniello, for the appellants (named defendant et al.).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

MOLL, J. In this foreclosure action, the defendants Russell M. Madison and Margit Madison[1] appeal from the judgment of the trial court rendered in favor of the plaintiff, The Bank of New York Mellon, Trustee,[2] on its amended two count complaint asserting claims for foreclosure and reformation of the mortgage. On appeal, the defendants claim that the court improperly granted (1) the plaintiff's oral motion for judgment on itsreformation claim when the plaintiff failed to produce any evidence in support thereof and (2) the plaintiff's motion for summary judgment as to liability only on its foreclosure claim when the plaintiff failed to

[1] The original complaint also named Capital One Bank (USA), N.A., Eric Demander, Jr., Mortgage Electronic Registration Systems, Inc., as nominee for Capital One F.B.S., and Webster Bank, N.A., as defendants, but those parties were defaulted for failure to appear and are not participating in this appeal. For purposes of clarity, we will refer to Russell M. Madison and Margit Madison individually by their first names and collectively as the defendants.

[2] The full name of the plaintiff is The Bank of New York Mellon, formerly known as The Bank of New York, as trustee for the Certificateholders of CWABS, Inc., Asset Backed Certificates, Series 2005-AB2.

establish that the default notice that it had mailed to the defendants complied with the notice requirements of the mortgage. We reverse in part the judgment of the trial court.[3]

The following facts and procedural history are relevant to our resolution of this appeal. In May, 2017, the plaintiff commenced this foreclosure action. The plaintiff's original complaint set forth a single count alleging the following relevant facts. On or about February 25, 2005, Russell executed a promissory note, in the principal amount of $473,400, in favor of Mortgage Capital Group, LLC. The loan was subsequently subjected to several loan modification agreements. To secure the note, the defendants executed a mortgage on certain real property located at 140 Seymour Road in Woodbridge. Appended to the original complaint was a copy of the schedule affixed to the mortgage containing a description of the property encumbered by the mortgage (original schedule). On March 2, 2005, the mortgage was recorded on the Woodbridge land records. Following several antecedent assignments, the mortgage was assigned to the plaintiff by virtue of an assignment recorded on the Woodbridge land records on October 26, 2011, and the plaintiff became the holder of the note. On an unspecified date, Russell defaulted on the note. Thereafter, the plaintiff provided the defendants with written notice of the default, which was not cured. As a result, the plaintiff elected to accelerate the balance due on the note, declare the note to be due in full, and commence this action seeking to foreclose on the mortgage.

On October 19, 2018, the plaintiff filed a request for leave to file an amended complaint.[4] Attached to the

[3] For ease of discussion, we address the defendants' claims in a different order than they are set forth in their principal appellate brief.

[4] On May 24, 2018, pursuant to Practice Book § 14-1, Margit filed a claim for a statutory stay on the basis of a chapter 7 bankruptcy petition filed by Margit on May 23, 2018. On September 14, 2018, the plaintiff filed a notice

request was a proposed two count amended complaint, which was deemed to have been filed by consent, without objection. Appended to the amended complaint was an amended schedule describing the property encumbered by the mortgage (amended schedule). The amended schedule was otherwise identical to the original schedule, except that the amended schedule described an additional parcel of land that abutted the previously identified parcel. Count one of the amended complaint asserted a claim for foreclosure (count one) and mirrored the allegations set forth in the plaintiff's original complaint, except that count one alleged that the *amended* schedule described the property secured by the mortgage, whereas the original complaint alleged that the *original* schedule described the encumbered property. The newly added count two of the amended complaint asserted a claim for reformation of the mortgage (count two). In support of count two, the plaintiff alleged in relevant part that, following a title search completed in relation to the plaintiff's foreclosure claim, it was discovered that the property description affixed to the mortgage (as reflected in the original schedule) was inaccurate, and that the amended schedule set forth the correct description of the property encumbered by the mortgage.

On November 14, 2018, the defendants answered the amended complaint. As to count one, the defendants admitted, inter alia, that they owned and were in possession of the property as described in the amended schedule, but they left the plaintiff to its proof regarding its allegations that, inter alia, the plaintiff was the holder of the note, the note was in default, the plaintiff had properly notified them of the default, and the default had not been cured. As to count two, other than restating their admission that they owned the property as described in the amended schedule, the defendants

reflecting that the United States Bankruptcy Court for the District of Connecticut had closed Margit's bankruptcy case, thereby terminating the stay.

either denied the plaintiff's allegations or left the plaintiff to its proof. The defendants did not plead any special defenses. On November 21, 2018, the plaintiff filed a demand for disclosure of a defense. On November 30, 2018, the defendants filed a disclosure of defense demanding that the plaintiff produce the "original mortgage note" and provide proof that it had a legal right to foreclosure, produce evidence that the assignment of the mortgage to the plaintiff was validly executed, and produce evidence that it had sent a proper default notice to them.

On June 17, 2019, the plaintiff filed a motion, accompanied by a supporting memorandum of law and exhibits, seeking summary judgment as to liability only with respect to count one. The plaintiff claimed that it had established a prima facie case for foreclosure because there was no genuine issue of material fact that (1) it was the holder of the note, (2) a default had occurred, (3) in accordance with the terms of the mortgage, it had mailed a default notice to the defendants, and (4) the default had not been cured. Notably, the plaintiff did not move for summary judgment as to count two or mention the reformation count in its motion. On July 30, 2019, the defendants filed an objection, principally arguing that the default notice mailed to them by the plaintiff did not comply with the notice provisions of the mortgage.

On October 8, 2019, after having heard argument on September 23, 2019, the trial court, *Baio*, *J.*, issued an order granting the plaintiff's motion for summary judgment as to liability only on count one and overruling the defendants' objection. None of the parties nor the court referred to count two or reformation during argument on September 23, 2019, and the court's order granting the motion for summary judgment did not mention count two.

On December 2, 2019, the court held a hearing on a motion for judgment of strict foreclosure that the plaintiff had filed on November 9, 2018. On the record, over the defendants' objection, the court granted the plaintiff's motion and rendered a judgment of strict foreclosure as to count one. Immediately thereafter, the plaintiff orally requested that the court also render judgment in its favor on count two. The defendants objected on the ground that the plaintiff's motion for summary judgment, which was granted by the court on October 8, 2019, did not encompass count two.

After passing the matter to allow the parties an opportunity to review the relevant materials in the record, the court allowed brief argument. The defendants argued that the plaintiff failed to submit evidence in support of its reformation claim, and, therefore, they requested that the court reserve its ruling on the plaintiff's oral motion for judgment as to count two until the plaintiff had met its evidentiary burden. The plaintiff argued that its motion for summary judgment was "generic enough to ask for liability as to the entire [amended] complaint," and that it interpreted the court's granting of the motion for summary judgment as encompassing both counts of the amended complaint. In addition, after conceding that its November 9, 2018 motion for judgment of strict foreclosure was limited to count one, the plaintiff orally moved for judgment with respect to count two. The court reiterated that it had rendered a judgment of strict foreclosure as to count one before stating that it was reserving its decision on the plaintiff's oral motion for judgment on count two.

On December 6, 2019, the court summarily granted the plaintiff's oral motion for judgment as to count two. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendants' claim that the trial court improperly granted the plaintiff's oral motion for judgment on count two. The defendants assert that the court had no ground on which to render judgment in the plaintiff's favor on count two because the plaintiff had failed to produce any evidence demonstrating that reformation of the mortgage was justified. We agree.

We begin by observing that "[r]eformation and foreclosure are both equitable proceedings. . . . We will reverse a trial court's exercise of its equitable powers only if it appears that the trial court's decision is unreasonable or creates an injustice. . . . [E]quitable power must be exercised equitably . . . [but] [t]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . .

"A cause of action for reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other. . . . Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties . . . . Equity evolved the

doctrine because an action at law afforded no relief against an instrument secured by fraud or as a result of mutual mistake. . . . The remedy of reforma-tion is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction. . . . In short, the mistake, being common to both parties, effects a result which neither intended. . . .

"[T]here can be no reformation unless there is an antecedent agreement upon which the minds of the parties have met. The relief afforded in reforming an instrument is to make it conform to the previous agreement of the parties. Therefore a definite agreement on which the minds of the parties have met must have pre-existed the instrument in question. The court cannot supply an agreement which was never made, for it is its province to enforce contracts, not to make or alter them. . . .

"*A court in the exercise of its power to reform a contract must act with the utmost caution and can only grant the relief requested if the prayer for reformation is supported by convincing evidence.* . . . In the absence of fraud, it must be established that both parties agreed to something different from what is expressed in writing, and the proof on this point should be clear so as to leave no room for doubt . . . . If the right to reformation is grounded solely on mistake, it is required that the mistake be mutual, and to prevail in such a case, it must appear that the writing, as reformed, will express what was understood and agreed to by both parties. . . . *A party seeking the reformation of a contract must show proof justifying reformation by clear, substantial and convincing evidence*, meaning evidence that induces in the mind of the trier a reasonable belief that the facts asserted are highly

probably true, [and] that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Perez*, 146 Conn. App. 833, 838–40, 80 A.3d 910 (2013), appeal dismissed, 315 Conn. 542, 109 A.3d 452 (2015).

The record reveals that the court granted the plaintiff's oral motion for judgment on count two, notwithstanding the fact that the plaintiff failed to "show proof justifying reformation by clear, substantial and convincing evidence . . . ." (Internal quotation marks omitted.) Id., 840. The defendants were not defaulted as to the plaintiff's amended complaint; indeed, as to count two, other than admitting that they owned the property as described in the amended schedule, they either denied the plaintiff's allegations or left the plaintiff to its proof. The plaintiff never moved for summary judgment on count two.[5] At no point did the plaintiff produce any evidence before the trial court in support of its reformation claim. Put simply, there was no basis on which the court could have properly rendered judgment

[5] As the plaintiff's counsel conceded during oral argument before this court, the plaintiff's June 17, 2019 motion for summary judgment did not encompass count two. In contrast, during the December 2, 2019 hearing before the trial court, the plaintiff argued that the motion for summary judgment was "generic enough" to include count two. We note that the motion for summary judgment makes no mention of count two, does not contain the term "reformation," and cannot reasonably be construed to be directed to count two. Moreover, we construe the court's ruling on the motion for summary judgment as being limited only to count one, and only as to the issue of liability with respect to that particular claim. Had the court rendered summary judgment as to count two, despite the plaintiff not having moved for summary judgment with regard thereto, such a ruling would have been improper. See *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 589, 193 A.3d 700 (2018) ("[a] court may not grant summary judgment sua sponte, and . . . pursuant to Practice Book § [17-44], a person seeking summary judgment . . . must file an appropriate motion addressed to it" (internal quotation marks omitted)).

in the plaintiff's favor on its reformation claim.[6] Therefore, we conclude that the court committed error in granting the plaintiff's oral motion for judgment on count two.

At this juncture, we must address whether the foreclosure judgment rendered on count one is directly affected by our conclusion that the court improperly rendered judgment in the plaintiff's favor on count two, reforming the mortgage. We conclude that reversing the judgment rendered on count two necessitates reversing the foreclosure judgment rendered on count one.

When pursued together in the same action, a foreclosure claim is oftentimes inextricably intertwined with a reformation claim, such that the foreclosure claim is untenable if the reformation claim fails. See *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 705, 218 A.3d 596 (concluding that trial court did not err in denying foreclosure claim when mortgage, as executed, was nullity because it purported to secure nonexistent debt and reformation of mortgage, as trial court properly determined, was not warranted), cert. granted, 333 Conn. 945, 219 A.3d 375 (2019); *Deutsche Bank National Trust Co.* v. *Perez*, supra, 146 Conn. App. 843 (concluding that reversal of portion of judgment reforming mortgage "necessarily" required reversal of foreclosure judgment predicated on erroneously reformed mortgage); *Century Mortgage Co.* v. *George*, 35 Conn. App. 326, 331, 646 A.2d 226 (concluding that trial court did not err in denying foreclosure claim when property description affixed to mortgage referred to property in different municipality and trial court had

[6] In its appellate brief, the plaintiff argues that the court did not commit error in rendering judgment on count two in the plaintiff's favor "when there was a clear intent by the parties to encumber 140 Seymour [Road in Woodbridge]." The merits of the plaintiff's reformation claim cannot be addressed in this appeal; rather, the claim must be resolved by the trial court in the first instance upon a proper evidentiary record.

concluded that reformation of mortgage was not warranted), cert. denied, 231 Conn. 915, 648 A.2d 150 (1994).

In the present case, the plaintiff's foreclosure claim was not necessarily dependent on its particular reformation claim, which sought to capture an abutting parcel; that is, failure of the reformation claim would not preclude the plaintiff from pursuing a foreclosure on the mortgage, as executed, against the defendants with respect to 140 Seymour Road in Woodbridge. Nevertheless, we conclude that under the circumstances of the present case, where a mortgagee is seeking simultaneously to foreclose on and to reform a mortgage, a foreclosure judgment cannot be rendered, or, if already rendered, cannot stand if the reformation claim remains pending. In other words, under such circumstances, a trial court must adjudicate the reformation claim before or in conjunction with the attendant foreclosure claim. This rule recognizes the interrelation between foreclosure and reformation claims and promotes judicial economy by removing any potential need to open an existing foreclosure judgment to account for a subsequent reformation of the mortgage. Moreover, it is simply more prudent to resolve any ambiguity clouding a mortgage before foreclosing on it. Accordingly, as a result of our reversal of the judgment rendered on count two reforming the mortgage, the judgment of strict foreclosure rendered on count one must be reversed.[7]

[7] To be clear, only the December 2, 2019 judgment of strict foreclosure rendered on count one is being reversed in conjunction with our reversal of the December 6, 2019 judgment rendered on count two. The October 8, 2019 order granting the plaintiff's motion for summary judgment as to liability only on count one is not affected by our conclusions in part I of this opinion. During oral argument before this court, when asked to present the defendants' position on what effect a reversal of the judgment rendered on count two would have on the foreclosure judgment rendered on count one, the defendants' counsel stated: "I think you can affirm on . . . count one, but before the judgment is entered, there's gonna, someone's gonna have to decide what property is being foreclosed. You could say, yes, [Russell] didn't pay the debt, and we're gonna have a judgment of foreclosure, but you can't actually have the judgment until you know what property is being

II

We next turn to the defendants' claim that the trial court improperly granted the plaintiff's motion for summary judgment as to liability only on count one. We disagree.

"The legal principles and standard of review governing our resolution of this claim are well settled. On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Because the trial court rendered judgment for the [plaintiff] as a matter of law, our review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . A material fact is a fact that will make a difference in the outcome of the case. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . The movant has the burden of showing the nonexistence of such issues but

foreclosed." On the basis of counsel's statements, we construe the defendants' position to be that the foreclosure judgment rendered on count one must be reversed if the judgment rendered on count two is reversed, but that the granting of the plaintiff's motion for summary judgment finding the defendants liable under count one should remain undisturbed. In part II of this opinion, we address the defendants' claim challenging the propriety of the order granting the plaintiff's motion for summary judgment.

the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Hudson City Savings Bank* v. *Hellman*, 196 Conn. App. 836, 849–50, 231 A.3d 182 (2020). "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." (Internal quotation marks omitted.) Id., 850–51.

"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 grant 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." (Internal quotation marks omitted.) Id., 850.

The following additional facts are relevant to our disposition of this claim. In its memorandum of law in support of its motion for summary judgment, the plaintiff asserted that it had demonstrated a prima facie case for foreclosure because, inter alia, there was no genuine issue of material fact that it had mailed a default notice to the defendants in compliance with the notice provisions of the mortgage.

Appended to the plaintiff's supporting memorandum of law was a copy of the mortgage. Paragraph 22 of the mortgage provides in relevant part: "Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) *a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured*; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and foreclosure or sale of the Property. . . . If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke any of the remedies permitted by Applicable Law." (Emphasis added.)

Additionally, appended to the plaintiff's supporting memorandum of law was an affidavit of Mhari Holtzclaw, an employee of a company doing business as Shellpoint Mortgage Servicing, the plaintiff's loan servicer. Holtzclaw averred in relevant part that "[t]he [p]laintiff provided written notice of default by letter dated February 22, 2016, and sent to the [d]efendants on or about that date. A true and accurate copy of the notice is attached hereto . . . ." The attached default notice was titled "Notice of Default and Intent to Accelerate" (notice). The first page of the notice was dated "02/22/2016." The notice provides in relevant part: "The loan associated with the . . . Deed of Trust/Mortgage [referenced earlier in the notice] is in default for failure to pay amounts due. To cure this default, you must pay all amounts due under the terms of the Note and Security Instrument. As of 02/22/2016, the total amount necessary to bring the Loan current is $14,173.83 (the

'Amount Due'). For the exact amount you must pay to bring the Loan current after 02/22/2016, please contact our office . . . as interest, payments, credits, fees and/or other permissible charges can continue to cause your loan balance to vary from day to day. . . . If you have not cured the default within Thirty Days (30) days of this notice, Shellpoint [Mortgage Servicing] intends to accelerate the sums evidenced by the Note and Security instruments and declare same due and payable in full and to take other legally and contractually permitted action to collect the same . . . . If such date falls on a Saturday, Sunday or legal holiday then the Due Date shall be the next business day. Any partial payment received by our office on the Loan after the date of this letter may not be applied to the reduction of the Amount Due and may be returned however any such acceptance does not waive the right to proceed with foreclosure and a new demand letter may not be sent."

In their objection, relying on *Fortune Savings Bank* v. *Thibodeau*, Superior Court, judicial district of New Haven, Docket No. CV-92-0330358 (November 17, 1992) (7 Conn. L. Rptr. 611), the defendants argued that the notice was defective because it did not specify the date by which the default had to be cured, as required by paragraph 22 of the mortgage. In granting the plaintiff's motion for summary judgment and overruling the defendants' objection, the court determined that *Thibodeau* was distinguishable because the notice in the present case "[did] indeed contain a specific date as a clear reference point to provide clear notice to the defendants."

The defendants on appeal contend that, in contravention of paragraph 22 of the mortgage, the notice did not specify a date by which the default had to be cured. Accordingly, the defendants claim that the plaintiff did not demonstrate that it had mailed a proper default notice to them, and, therefore, the plaintiff was not entitled to

summary judgment as to liability only on count one.[8] We are not persuaded.

"It is well established that [n]otices of default and acceleration are controlled by the mortgage documents. Construction of a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally, and to deeds particularly. . . . In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Moreover, the words [in the deed] are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended. . . .

"In construing a contract, the controlling factor is normally the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . Where . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous. . . . Ordinarily, such ambiguity requires the use of extrinsic evidence by a trial court to determine the intent of the parties, and, because such a determination is factual, it is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Hudson City Savings Bank* v. *Hellman*, supra, 196 Conn. App. 858–59.

Our precedent instructs that the contents of a default notice need not adhere strictly to the notice requirements of a mortgage; rather, substantial compliance is

[8] The defendants do not claim that they did not receive the notice.

sufficient. See *Saunders* v. *Stigers*, 62 Conn. App. 138, 146–47, 773 A.2d 971 (2001) (rejecting defendant's claim that trial court improperly granted, in part, plaintiffs' motion for summary judgment as to liability only when default notice "substantially complied" with notice provision in mortgage requiring default notice to specify action required to cure default and that failure to cure default within allotted time could result in foreclosure or sale of property); see also *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 713–15, 807 A.2d 968 (citing *Saunders* in concluding that default notice "substantially complied" with notice provision in mortgage requiring default notice to specify that defendants had " 'right to assert in court the [nonexistence] of a default or any other defense of Borrower to acceleration and foreclosure or sale,' " and, thus, trial court properly rendered summary judgment as to liability only in plaintiff's favor), cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002).

Upon a careful review of the notice, we conclude that the notice substantially complied with paragraph 22 of the mortgage insofar as that provision requires the notice to specify "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured." The notice is plainly dated February 22, 2016, and set forth the sum necessary to bring the mortgage loan current "[a]s of 02/22/2016 . . . ." The notice further provides in relevant part that if the default was not cured "*within Thirty Days (30) days of this notice*, Shellpoint [Mortgage Servicing] intend[ed] to accelerate the sums evidenced by the Note and Security instruments and declare same due and payable in full and to take other legally and contractually permitted action to collect the same . . . ." (Emphasis added.) Moreover, the notice provides that "[a]ny partial payment received by [Shellpoint Mortgage Servicing's] office on the Loan *after the date of this letter* may not be applied to the reduction of the Amount

Due and may be returned however any such acceptance does not waive the right to proceed with foreclosure and a new demand letter may not be sent." (Emphasis added.) The language of the notice was sufficiently clear and unambiguous so as to alert the defendants that the plaintiff was demanding that they cure the default within thirty days of February 22, 2016.[9]

In *Federal Home Loan Mortgage Corp.* v. *Bardinelli*, 44 Conn. Supp. 85, 87–89, 667 A.2d 1315, aff'd, 39 Conn. App. 786, 667 A.2d 806 (1995), a foreclosure action, in granting the plaintiff's motion for summary judgment, the trial court concluded that a default notice providing that the defendant's default had to be cured "within thirty . . . days from the date of this letter," substantially complied with a provision in the mortgage requiring that a default notice "shall specify . . . a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured." (Internal quotation marks omitted.) This language mirrors the relevant language in paragraph 22 of the mortgage in the present case. On appeal, this court adopted the trial court's memorandum of decision granting the plaintiff's motion for summary judgment and affirmed

[9] In their appellate briefs, the defendants assert that the notice failed to comply with the mortgage on the additional ground that the notice did not provide them with at least thirty days following their receipt thereof to cure the default. The defendants did not raise this distinct claim before the trial court, and, therefore, we decline to review this unpreserved claim. See *Borg* v. *Cloutier*, 200 Conn. App. 82, 122, 239 A.3d 1249 (2020) ("Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. . . . For that reason, we repeatedly have held that we will not decide an issue that was not presented to the trial court. To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.)). Additionally, in their appellate briefs, the defendants make reference to the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq. During oral argument before this court, the defendants' counsel clarified that the defendants were not relying on the FDCPA in support of their claims on appeal.

the judgment of foreclosure by sale that followed the trial court's rendering of summary judgment. *Federal Home Loan Mortgage Corp.* v. *Bardinelli*, 39 Conn. App. 786, 788, 667 A.2d 806 (1995). Like the mortgagee in *Bardinelli*, the plaintiff substantially complied with the relevant language in paragraph 22 of the mortgage, despite having failed to set forth in explicit terms the date by which the default had to be cured.

The defendants cite *Thibodeau* in support of their argument that the notice was deficient. In *Thibodeau*, the parties executed a mortgage with a notice provision, like that of paragraph 22 of the mortgage in the present case, requiring that a default notice "shall specify . . . a date, not less than 30 days from the date the notice is given to Borrower; by which the default must be cured . . . ." (Emphasis omitted; internal quotation marks omitted.) *Fortune Savings Bank* v. *Thibodeau*, supra, 7 Conn. L. Rptr. 611. In purported compliance with the mortgage, the plaintiff in *Thibodeau* sent a default notice to the defendants providing in relevant part that "[t]his is your thirty . . . day notice to reinstate your loan . . . ." (Internal quotation marks omitted.) Id. Although the trial court in *Thibodeau* noted that the plaintiff had sent the default notice on December 9, 1991, there was no indication that the default notice was dated or otherwise referred to December 9, 1991, as a reference point. Id. In rendering judgment for the defendants, the trial court concluded that the default notice was deficient in two material ways, including that it failed to specify a date by which the default had to be cured, such that it was unclear when the thirty day period to cure the default would expire. Id. Unlike the default notice in *Thibodeau*, the notice in the present case was dated February 22, 2016, included several references to that date, and, when read as a whole, sufficiently notified the defendants that they had to cure their default within thirty days of February 22,

2016. Thus, the defendants' reliance on *Thibodeau* is misplaced.

In sum, the notice substantially complied with the relevant language of paragraph 22 of the mortgage. Therefore, we reject the defendants' claim that the court improperly granted the plaintiff's motion for summary judgment as to liability only on count one.

The judgment is reversed only with respect to the granting of the plaintiff's November 9, 2018 motion for judgment of strict foreclosure as to the first count of the amended complaint and the granting of the plaintiff's December 2, 2019 oral motion for judgment as to the second count of the amended complaint, and the case is remanded with direction to deny those motions and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* LEE MONCHO ET AL.
(AC 43568)

Alvord, Elgo and Albis, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants following their default on a promissory note secured by the mortgage. The defendants filed an answer with five special defenses and a counterclaim. After trial, the defendants filed a posttrial brief claiming for the first time that the court was required to deem all of their special defenses as admitted due to the plaintiff's failure to file a reply. In its reply brief, the plaintiff argued that the defendants were not entitled to implied admissions. The plaintiff then filed its reply to the defendants' special defenses, denying each one in turn. The trial court rejected all of the defendants' special defenses and rendered a judgment of strict foreclosure, from which the defendants appealed to this court. *Held*:

1. The trial court did not err in determining that the defendants were not entitled to implied admissions on their special defenses because the

provisions of Practice Book § 10-19 are not always mandatory: the trial court is not bound by an implied admission pursuant to § 10-19 if the implied admission is not brought to its attention at any stage of the trial proceedings; moreover, the plaintiff's failure to reply did not result in any surprise or prejudice to the defendants, as they were placed on notice of the plaintiff's intent to deny the special defenses by the plaintiff's pretrial brief, which addressed each defense and the grounds on which they were to be challenged, and the special defenses were litigated during trial; furthermore, once made aware of its nonpleading, the plaintiff filed a timely reply.

2. The trial court did not err in concluding that the plaintiff had standing in the action or in rejecting the defendants' special defense that the plaintiff was not a holder in due course because a note holder is presumed to be the rightful owner of a debt, which satisfies the holder's initial burden with respect to standing: the plaintiff was in physical possession of the original note at the time of the commencement of the action and presented credible evidence that an allonge, endorsing the note in blank, was affixed to the note, establishing the presumption that the plaintiff was the rightful owner of the debt; moreover, the defendants' introduction of various other allonges into evidence, without any evidence demonstrating that they were ever affixed to the note, was insufficient to rebut this presumption.

3. The trial court did not err in rejecting the defendants' four remaining special defenses:

   a. The trial court did not err in rejecting the defendants' special defense alleging that any attempt by the plaintiff to seek a deficiency judgment was barred by the statute of limitations, as a court cannot resolve a claimed controversy unless it is justiciable: the plaintiff has not yet filed a motion for a deficiency judgement, so the defendants' statute of limitations defense was premature and not ripe for adjudication.

   b. The trial court did not err in rejecting the defendants' special defense alleging that the plaintiff lacked standing due to its noncompliance with the securitization requirements of a certain securitization document necessary for the note to be part of a certain trust of which the plaintiff was the trustee because the defendants failed to meet their evidentiary burden of proof: the defendants did not present any evidence with respect to the requirements of securitization or the plaintiff's alleged failure to comply with the same; moreover, noncompliance with securitization requirements does not implicate standing.

   c. The trial court did not err in concluding that the defendants received proper notice of default and acceleration, the delivery of which was controlled by the mortgage documents: pursuant to the mortgage documents, the defendants received notice of default and intent to accelerate the loan if the default was not cured within the relevant time period from the loan servicer, which, contrary to the defendants' claim, was not a stranger to the loan; moreover, the fact that the notice came from

the loan servicer instead of the plaintiff did not cause any prejudice to the defendants.

d. The trial court did not abuse its discretion in rejecting the defendants' special defense of unclean hands because the defendants failed to meet their evidentiary burden of proving the facts alleged: the mere presence of additional allonges and assignments of mortgage did not give rise to behavior on behalf of the plaintiff that could be classified as unfair, inequitable, or dishonest.

4. The trial court did not err in admitting the payment history on the note into evidence, as the business records exception to the hearsay rule applies to loan records made by third parties in connection with purchase and sale of debt if it is shown that the records became a part of the business record of the proponent pursuant to a transaction in which the third party had a business duty to transmit accurate information: a witness from the loan servicing company testified that the prior owner of the loan had a duty to provide the servicer with accurate records during the loan transfer process, that the loan servicer reviewed and analyzed the information upon receipt, and that the information provided was used by the loan servicer to create the payment history that was introduced into evidence.

Argued October 8, 2020—officially released March 2, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the named defendant et al. filed a counterclaim; subsequently, the court, *Hon. Michael Hartmere*, judge trial referee, rendered a judgment of strict foreclosure and rendered judgment on the counterclaim for the plaintiff, from which the named defendant et al. appealed to this court. *Affirmed.*

James M. Nugent, for the appellants (named defendant et al.).

Pierre-Yves Kolakowski, for the appellee (plaintiff).

Opinion

ALBIS, J. The defendants Lee Moncho and Karen Moncho[1] appeal from the judgment of strict foreclosure

[1] Hermes Capital, LLC, was also named as a defendant in this action. Because it is not involved in this appeal, our references in this opinion to the defendants are to Lee Moncho and Karen Moncho only.

rendered by the trial court in favor of the plaintiff, U.S. Bank, National Association, Trustee, as successor in interest to Wachovia Bank, N.A., as Trustee for JPMorgan 2005-A7. On appeal, the defendants claim that the court erred by (1) refusing to deem all of the defendants' special defenses as admitted when the plaintiff failed to reply to them prior to trial, (2) concluding that the plaintiff had standing and was entitled to enforce the note, (3) rejecting the defendants' five special defenses, and (4) improperly admitting evidence concerning the payment history of the note as a business record. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion of the claims on appeal. The plaintiff commenced this foreclosure action on July 3, 2017. The plaintiff later filed a revised complaint on May 15, 2018. In its one count revised complaint, the plaintiff sought to foreclose a mortgage on real property owned by the defendants, alleging that it was the holder of the promissory note secured by the mortgage and that it had been assigned the mortgage. The defendants filed their amended answer, special defenses, and a counterclaim on April 24, 2019. A court trial commenced on April 30, 2019, and concluded on May 1, 2019. Thereafter, the plaintiff filed its reply to the defendants' special defenses on June 18, 2019.

In a memorandum of decision dated September 17, 2019, the court made the following factual findings and reached the following conclusions. On July 29, 2005, the defendants executed a note in which they promised to pay JPMorgan Chase Bank, N.A. (JPMorgan), the principal sum of $966,999 with all interest accrued thereon. On that same day, to secure the note, they executed a mortgage in favor of JPMorgan on their real property located at 245 High Meadow Road in Southport, which mortgage was delivered to JPMorgan. JPMorgan endorsed the note in blank, and the mortgage eventually was assigned to the plaintiff. The defendants

later defaulted pursuant to the terms of both the note and the mortgage in that they failed to make the monthly payments of principal and interest due on November 1, 2008, and every month thereafter. Each defendant received a letter dated January 4, 2009, which notified them of their default and advised them that if the amount required to cure the default was not received within thirty-two days, immediate acceleration of all moneys due under the note and mortgage would be declared without further notice or demand. The defendants failed to cure the default, and the total amount of the indebtedness due and owing was accelerated. As of April 30, 2019, the first day of trial, the total amount due under the note was $1,680,018.38.

The court concluded that the plaintiff had established a prima facie claim for foreclosure. Specifically, the court found that the plaintiff had established that it was the holder of the note because the plaintiff was in physical possession of the note endorsed in blank, which endorsement was set forth on an original allonge executed by Alisha Young, an assistant vice president of JPMorgan, and stapled to the note (Young allonge). The court also found that, as required by the terms of the note, the plaintiff had satisfied the conditions precedent to the enforcement of the mortgage and the note by timely mailing notices of default and acceleration warnings to the defendants. Accordingly, the court rendered a judgment of strict foreclosure. This appeal followed. Additional facts will be set forth as necessary.

I

The defendants first claim that the court erred by refusing to deem all of their special defenses as admitted when the plaintiff failed to reply to them prior to trial. Specifically, the defendants argue that the plaintiff never replied to their five special defenses at any time and that, pursuant to Practice Book § 10-19, all of their

special defenses must therefore be deemed admitted. The defendants further contend that the provisions of § 10-19 are mandatory. In response, the plaintiff argues that the court properly rejected the defendants' claims of entitlement to implied admissions. In the plaintiff's view, the defendants are precluded from claiming implied admissions because the defendants failed to challenge the plaintiff's failure to plead at trial. We agree with the plaintiff.

The following additional facts are relevant to this claim. On April 24, 2019, the defendants filed their amended answer, special defenses, and a counterclaim. In their amended pleading, the defendants asserted five special defenses: (1) the Young allonge did not transform the note into bearer paper and the plaintiff was not a holder in due course with the right to prosecute the foreclosure action; (2) the plaintiff was precluded from bringing an action on the note due to the passing of the applicable statute of limitations; (3) the plaintiff failed to establish that it had complied with all of the requirements of the securitization document necessary for the note to be a part of the JPMorgan 2005 A-7 Securitized Trust; (4) the plaintiff failed to provide proper notice of default and acceleration as required under the mortgage; and (5) the plaintiff was barred from recovery due to unclean hands. The plaintiff failed to file a reply to the defendants' special defenses. The plaintiff did, however, submit a twenty-six page memorandum of law prior to trial that addressed each of the defendants' special defenses.

The defendants never advised the court or the plaintiff of the plaintiff's failure to plead prior to or during trial. Instead, the defendants raised this issue for the first time in their posttrial brief, which they filed on June 3, 2019, approximately one month after the trial concluded. Specifically, the defendants claimed that the court was required to deem all of their special defenses

as admitted due to the plaintiff's failure to file a reply. Thereafter, the plaintiff filed its reply to the defendants' special defenses on June 18, 2019, in which it denied each special defense. The plaintiff also filed a reply brief in which it argued that the defendants were not entitled to implied admissions.

In its memorandum of decision, the court, pursuant to *Birchard* v. *New Britain*, 103 Conn. App. 79, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007), concluded that the defendants were not entitled to implied admissions. The court found that "it would be inequitable in the circumstances here to hold that the failure to file an answer to the special defenses should be considered an implied admission. Since the defendants failed to challenge the plaintiff's nonpleading or otherwise make a request for an implied admission at trial, the defendants' claim of implied admissions must fail." The court then considered, and rejected, all of the defendants' special defenses. Accordingly, the court found in favor of the plaintiff and rendered a judgment of strict foreclosure.

We are guided by the following relevant legal principles. "Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise." (Internal quotation marks omitted.) *Birchard* v. *New Britain*, supra, 103 Conn. App. 83. Pursuant to Practice Book § 10-56, the "plaintiff's reply pleading to each of the defendant's special defenses may admit some and deny others of the allegations of that defense, or by a general denial of that defense put the defendant upon proof of all the material facts alleged therein." "According to the law of pleading, what is not denied is conceded." (Internal quotation marks omitted.) *Birchard* v. *New Britain*, supra, 84. Consistent with that principle, Practice Book § 10-19 provides that "[e]very material allegation in any pleading which is not denied by the adverse party shall be deemed to be admitted, unless

such party avers that he or she has not any knowledge or information thereof sufficient to form a belief." "[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Birchard* v. *New Britain*, supra, 83.

In *Birchard*, this court determined that a trial court is not bound by an implied admission pursuant to Practice Book § 10-19 in certain circumstances. Id., 85. We concluded that a trial court is not bound by an implied admission that is not brought to its attention at any stage of the trial court proceedings. Id. Because it is "unfair and unworkable to require the trial court, in each and every civil action before it, to scour the pleadings in search of implied admissions . . . the burden rests with the parties to bring to the court's attention an allegedly implied admission pursuant to . . . § 10-19." (Citations omitted.) Id., 85–86.

We conclude that the trial court did not err in holding that the defendants were not entitled to implied admissions on their special defenses. First, contrary to the defendants' contention, our decision in *Birchard* indicates that the provisions of Practice Book § 10-19 are not always mandatory. Specifically, a trial court is not bound by any implied admissions that are not brought to its attention at any stage of the trial proceedings. Id., 85. Although the defendants eventually brought the plaintiff's nonpleading to the court's attention, they did so only following the conclusion of trial, despite having had ample opportunity to do so beforehand. As we noted in *Birchard*, it would have been unfair and unworkable here to require the trial court to scour the pleadings in search of any implied admissions. Because the burden rests with the parties to bring to the court's attention any allegedly implied admissions and the defendants did not

notify the court of their intention to claim implied admissions until approximately one month following trial, the court may not be bound by any implied admissions that could have resulted from the plaintiff's failure to plead if they were raised timely.[2] Id., 85–86.

Second, both the court and the defendants were on notice of the plaintiff's intention to deny the defendants' special defenses prior to trial. In accordance with a trial management order, the plaintiff submitted a twenty-six page pretrial brief. In its brief, the plaintiff specifically addressed each of the defendants' special defenses and asserted the legal grounds on which it was challenging them. The defendants and the court, therefore, were clearly on notice of the plaintiff's denial of its special defenses and the specific legal grounds for its denial. As previously observed, "[p]leadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise." (Internal quotation marks omitted.) *Birchard* v. *New Britain*, supra,

[2] The defendants argue that the plaintiff's reliance on *Birchard* is misplaced because we based our decision in *Birchard* on the fact that the plaintiff in that case failed to raise the issue of implied admissions until it filed an appeal. In the defendants' view, this makes *Birchard* distinguishable because they "raised the issue during the trial while the trial court still had jurisdiction and was nowhere near ruling" on the case. We do not agree. Although *Birchard* may not be identical to the present case, its reasoning is not limited to cases where a party first raises the issue of implied admissions on appeal. *Birchard* is persuasive authority that provides guidance on the implied admissions issue presently before us. Our conclusions in *Birchard* that it would be unfair and unworkable to require the trial court to scour the record for implied admissions and that the burden rests with the parties to bring an allegedly implied admission to the court's attention, are pertinent to the present case. We conclude that the defendants' belated attempt to satisfy their burden of bringing the issue to the court's attention by raising it for the first time in their posttrial brief did not bind the trial court to accept the implied admissions they sought. Moreover, as further discussed in this opinion, the defendants cannot complain about the plaintiff's failure to file a reply to their special defenses when the defendants were clearly on notice that the plaintiff was denying them. In light of these considerations, we conclude that the defendants' attempt to distinguish *Birchard* is unpersuasive.

103 Conn. App. 83. Because the plaintiff addressed each of the defendants' special defenses in its pretrial brief, the defendants cannot claim any surprise or prejudice due to the plaintiff's failure to reply to their special defenses.

Third, the defendants' special defenses were litigated during trial. After the defendants raised the issue of implied admissions in their posttrial brief, the plaintiff rectified its mistake and filed its reply two weeks later. In its memorandum of decision, the court, after determining that the defendants were not entitled to implied admissions, addressed the defendants' special defenses. The court made findings of fact on each defense and concluded that the defendants had failed to meet their burden of proof on each of them. Under these circumstances, we agree with the plaintiff that the defendants are precluded from claiming implied admissions. The defendants' claim that they are entitled to implied admissions "seeks to elevate form over substance. Such rigid formality with respect to pleadings is not required when the issue is properly argued before the court." *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 643, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013); id. (concluding it was not improper for court to render judgment without formal written amended complaint when oral amendment was argued extensively before court and defendants could not claim surprise).

The defendants contend that our Supreme Court's decision in *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 819 A.2d 773 (2003), supports their claim that the trial court erred in concluding that they were not entitled to implied admissions.[3] We are not persuaded. In *Schilberg*, the parties disputed

[3] The defendants cited to *Schilberg* for the first time at oral argument before this court. Accordingly, we ordered the parties to file supplemental briefs addressing *Schilberg* and its applicability to this appeal.

whether various insurance policies issued by the defendant insurers required them to defend the plaintiff insured in an administrative action. Id., 247. The defendants filed a special defense asserting a pollution exclusion. Id., 250. The plaintiff did not timely file a reply in avoidance of this defense and, instead, asserted for the first time in a motion for summary judgment that the pollution exclusion was unenforceable due to the defendants' failure to file it with the insurance commissioner. Id., 272. The defendants objected to the plaintiff's assertion on the ground that the plaintiff should have raised the issue of the defendants' regulatory noncompliance in a reply as a matter in avoidance rather than in a summary judgment motion. Id. The plaintiff did not file a reply to the defendants' special defenses until after oral argument on the summary judgment motion, which was approximately three months after the defendants had filed their special defenses. Id., 271–72.

The trial court concluded that it was procedurally improper for the plaintiff to have raised the regulatory noncompliance issue in a motion for summary judgment rather than in a reply to the defendants' special defenses and refused to consider the plaintiff's claim. Id., 273. Our Supreme Court affirmed the trial court's decision on the grounds that (1) the defendants objected to the plaintiff's procedural deficiency in a timely manner, (2) the plaintiff failed to file promptly a reply to the defendants' special defenses after the defendants' objection, and (3) the plaintiff failed to offer any explanation for its procedural transgressions. Id., 273–75.

In the present case, the actions of the parties are distinguishable from those of the parties in *Schilberg*. First, the plaintiff in *Schilberg* raised a completely new legal and factual claim in its summary judgment motion. In contrast, the defendants in the present case were on notice of the plaintiff's denial of their special defenses

prior to trial. The defendants, thus, cannot claim any surprise or prejudice from the plaintiff's failure to reply to their special defenses. Second, our courts "have afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency." Id., 273. In the present case, the defendants did not object to the plaintiff's failure to plead in a timely manner, despite having had ample opportunity to do so prior to and during trial. It was thus well within the discretion of the trial court to overlook the plaintiff's failure to file a reply to the defendants' special defenses due to the defendants' failure to timely object. Third, unlike the plaintiff in *Schilberg*, the plaintiff in the present case promptly filed its reply to the defendants' special defenses after becoming aware of its nonpleading and offered an explanation for its procedural transgressions.[4] The plaintiff filed its reply two weeks after it was first put on notice and indicated in its reply brief that its previous failure to file was inadvertent. *Schilberg*, therefore, is distinguishable, and the defendants' reliance on it is misplaced.

In light of these considerations, we agree with the trial court that "it would be inequitable in the circumstances here to hold that the failure to file an answer to the special defenses should be considered an implied admission." Accordingly, we conclude that the court did not err in determining that the defendants were not entitled to implied admissions on their special defenses.

II

Next, the defendants claim that the plaintiff lacked standing to pursue this action. Specifically, the defendants contend that the plaintiff relies on the Young allonge to

[4] Pursuant to Practice Book § 10-8, a party has fifteen days to file a reply to special defenses in an action to foreclose a mortgage.

establish its standing to prosecute this action and that it cannot do so because it was deemed admitted that Young did not execute the allonge and, therefore, the Young allonge did not transform the note into bearer paper. In the alternative, the defendants contend that the evidence indicates that the Young allonge was not attached to the note and that the plaintiff has failed to establish its rights as the owner of the mortgage. In response, the plaintiff claims that by producing the note and the Young allonge at trial, a presumption was created that the allonge was so affixed when the action was commenced. The plaintiff further claims that the defendants have failed to rebut the presumption that the plaintiff was entitled to enforce the note. We agree with the plaintiff.

The following additional facts are relevant. The defendants challenged the plaintiff's standing to pursue this action by way of their first special defense, in which they alleged that the Young allonge did not transform the note into bearer paper and that the plaintiff was not a holder in due course with the right to prosecute the foreclosure action. On the first day of trial, the plaintiff produced the original executed note, mortgage, and assignment of mortgage. The court and the defendants' counsel had the opportunity to examine the documents, and copies were admitted as full exhibits. Later that day, the defendants presented several additional allonges to call into question the validity of the Young allonge and the plaintiff's standing to foreclose. These allonges were admitted into evidence as full exhibits. The defendants also produced two additional assignments of the defendants' mortgage, which were admitted as full exhibits.

In its memorandum of decision, the court indicated that it had examined the note, mortgage, and assignment of mortgage during trial. Thereafter, the court found that JPMorgan endorsed the note in blank and that the mortgage was assigned to the plaintiff. It further

found that the plaintiff "established that it was the holder of the note because the plaintiff is in physical possession of the note endorsed in blank, which endorsement was set forth on an original allonge executed by Alisha Young, assistant vice president of [JPMorgan] and stapled to the note. . . . The plaintiff established that it was in physical possession of the note, with the affixed allonge which endorsed the note in blank, prior to the commencement of this action on July 3, 2017." The court then addressed the additional allonges that the defendants had presented during trial. The court found that "[a]lthough the defendants introduced several other signed and unsigned allonges, no evidence was offered to show that any of these other allonges were ever affixed to the note. The plaintiff did present credible evidence which demonstrated that the Young allonge was affixed to the note several years before the commencement of this action, and remained so affixed right up to and including the date of the trial." Accordingly, the court concluded that the defendants had failed to meet their burden of proving their first special defense and that the plaintiff had standing.

We set forth our standard of review. "It is well established that [a] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of the question of [a] plaintiff's standing is plenary. . . . Furthermore, [t]he scope of review of a trial court's factual decisions related to the issue of standing

on appeal is limited to a determination of whether they are clearly erroneous in view of the evidence and pleadings." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pototschnig*, 200 Conn. App. 554, 561, 240 A.3d 288, cert. denied, 335 Conn. 977, 241 A.3d 130 (2020). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *AS Peleus, LLC* v. *Success, Inc.*, 162 Conn. App. 750, 753–54, 133 A.3d 503 (2016).

"To make out a prima facie case in a mortgage foreclosure action, the foreclosing party must show that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Caldrello*, 192 Conn. App. 1, 20, 219 A.3d 858, cert. denied, 334 Conn. 905, 220 A.3d 37 (2019).

"The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party

shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt has passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must *prove* that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis in original; internal quotation marks omitted.) *Flagstar Bank, FSB* v. *Kepple*, 190 Conn. App. 312, 326, 210 A.3d 628 (2019).

In the present case, we agree with the trial court that the plaintiff had standing to prosecute this action and that the defendants failed to meet their burden of proving their first special defense. Here, the plaintiff produced the original note at trial. The Young allonge, which endorsed the note in blank, was affixed to the original note with staples.[5] Moreover, Diane Weinberger, an

[5] An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." (Internal quotation marks omitted.) *AS Peleus, LLC* v. *Success, Inc.*, supra, 162 Conn. App. 755 n.3. Because the Young allonge was stapled to the note, it became a part of the note. See General Statutes § 42a-3-204 (a) ("[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument"). The Young allonge, which was endorsed in blank, turned the note into bearer paper and, as a result, the note could be negotiated by transfer of possession alone. See General Statutes § 42a-3-205 (b) ("[w]hen endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone"). The holder of the note with the attached Young allonge would thus have standing to initiate an action on the note. See *Flagstar Bank, FSB* v. *Kepple*, supra, 190 Conn. App. 326.

employee from Select Portfolio Servicing (SPS), the loan servicer for the plaintiff, testified at trial that the plaintiff was the holder of the note when the action was commenced. The record before us thus contains documentary and testimonial evidence that substantiates the court's finding that the plaintiff was in physical possession of the note endorsed in blank prior to the commencement of the action. That finding, therefore, is not clearly erroneous. Accordingly, the plaintiff established the presumption that it was the rightful owner of the debt and met its initial burden with respect to standing.[6] See *Deutsche Bank National Trust Co.* v. *Pototschnig*, supra, 200 Conn. App. 565 (plaintiff met initial burden on standing when it produced note endorsed in blank at trial and credible evidence demonstrated that plaintiff possessed note when action was commenced until time of trial).

[6] The defendants assert that the plaintiff has failed to meet its initial burden of proving its standing by claiming that there is significant evidence that the Young allonge was not attached to the note. In support of this contention, the defendants point to the lack of punch holes at the top of the Young allonge and to the Young allonge's absence from the package of documents submitted by the plaintiff on October 13, 2017, to verify the debt. We are not persuaded that this evidence demonstrates that the Young allonge was not attached to the note. Although the Young allonge does not appear to have punch holes at the top of the document like those found on the note, this does not compel a conclusion that it was not affixed to the note. Both the note and the Young allonge have staple holes in the same locations in the top left corner and in the center of the documents, indicating that the Young allonge was indeed attached to the note. As to the absence of the Young allonge from the verification of debt documents, the plaintiff's counsel did not yet have access to the original note and Young allonge when it first sent these documents to the defendants' counsel. When the plaintiff's counsel obtained the original note approximately one month later, counsel sent an updated version of the debt verification documents to the defendants. The Young allonge was included with these documents. The defendants' claim that the Young allonge was not attached to the note is, thus, unpersuasive. In any event, on the basis of our conclusion that the record before us contains documentary and testimonial evidence that substantiates the court's finding that the plaintiff was in physical possession of the note endorsed in blank prior to the commencement of the action, even if there was merit to the defendants' contentions, we conclude that the findings of the trial court concerning the Young allonge still would not be clearly erroneous.

The defendants failed to produce any evidence at trial to rebut the presumption that the plaintiff was the rightful owner of the debt and, thus, had standing. Although the defendants introduced several additional signed and unsigned allonges into evidence during trial, they failed to offer any evidence demonstrating that these allonges, rather than the Young allonge, ever were affixed to the note. Because an allonge must be affixed to a note before it operates as an endorsement of the note; see General Statutes § 42a-3-204; the mere presence of the additional allonges does not rebut the plaintiff's entitlement to enforce the note. See *Flagstar Bank, FSB* v. *Kepple*, supra, 190 Conn. App. 326 (party does not rebut presumption of entitlement to enforce note "merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt" (emphasis in original; internal quotation marks omitted)). The plaintiff, therefore, has met its burden of establishing its status as the holder of the note. Accordingly, we conclude that the trial court did not err in concluding that the plaintiff had standing and that the defendants had failed to meet their burden of proving their first special defense.[7]

[7] The defendants also challenge the plaintiff's entitlement to bring this foreclosure action by arguing that the plaintiff has failed to establish its rights as owner of the mortgage. In support of this argument, the defendants contend that the plaintiff "appears to be a stranger to this loan" because additional assignments that predate the assignment to the plaintiff effectively transferred the mortgage to another party before the plaintiff was able to take ownership of it. The defendants' contentions are unavailing. First, the defendants do not point to any evidence demonstrating the existence of original copies of these assignments, that they were ever completed, or that they were ever recorded. Second, "General Statutes § 49-17 codifies the common-law principle of long-standing that the mortgage follows the note . . . and allows the holder of a note to foreclose on real property even if the mortgage has not been assigned to him." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pototschnig*, supra, 200 Conn. App. 562. Even if we were to assume that the mortgage was never assigned to the plaintiff, because the plaintiff presented evidence that it was the holder of the original note, it would still be entitled to foreclose on the property. Accordingly, the defendants' argument fails.

III

We now turn to the issue of whether the trial court erred in rejecting the defendants' remaining special defenses. The defendants asserted five special defenses: (1) the Young allonge did not transform the note into bearer paper and the plaintiff was not a holder in due course with the right to prosecute the foreclosure action; (2) the plaintiff was precluded from bringing an action on the note due to the passing of the applicable statute of limitations; (3) the plaintiff failed to establish that it had complied with all the requirements of the securitization document necessary for the note to be a part of the JPMorgan 2005 A-7 Securitized Trust; (4) the plaintiff failed to provide proper notice of default and acceleration as required under the mortgage; and (5) the plaintiff was barred from recovery due to unclean hands. We already have determined that the trial court did not err in concluding that the defendants failed to meet their burden of proving their first special defense. As observed in part I of this opinion, we also have determined that the defendants were not entitled to implied admissions on their special defenses. Accordingly, we address the remaining special defenses on the merits.

We are guided by the following principles in addressing the defendants' special defenses. "[T]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marksomitted.) *Bank of New York Mellon* v.

Mangiafico, 198 Conn. App. 722, 727, 234 A.3d 1115 (2020).

A

In their second special defense, the defendants alleged that the plaintiff was precluded from bringing an action on the note and from seeking a deficiency judgment on it due to the passing of the applicable statute of limitations. In response, the plaintiff contends that because it has yet to file a motion for a deficiency judgment, the defendants' statute of limitations defense is premature and, accordingly, not ripe for adjudication. We agree with the plaintiff.

The trial court rejected the defendants' statute of limitations defense. In its memorandum of decision, the court concluded that the defendants' statute of limitations special defense failed because it was premature. Specifically, the court determined that because "the plaintiff has not made a motion for deficiency judgment to this point in the proceedings . . . this defense is premature and may be addressed during any subsequent proceedings."

"A court will not resolve a claimed controversy on the merits unless it is satisfied that the controversy is justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Tavani* v. *Riley*, 160 Conn. App. 669, 676, 124 A.3d 1009 (2015). "[R]ipeness is a sine qua non of justiciability . . . ." (Internal quotation marks omitted.) *Mikucka* v. *St. Lucian's Residence, Inc.*, 183 Conn. App. 147, 165, 191 A.3d 1083 (2018). "[T]he rationale behind the ripeness requirement is to

prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Internal quotation marks omitted.) Id., 165–66. "[B]ecause an issue regarding justiciability raises a question of law, our appellate review is plenary." (Internal quotation marks omitted.) *Tavani* v. *Riley*, supra, 676.

In the present case, we conclude that the defendants' statute of limitations defense is not ripe for review. The plaintiff has not yet filed a motion for a deficiency judgment. The defendants' claim that any attempt by the plaintiff to seek a deficiency judgment is barred by the statute of limitations is thus a "claim contingent upon some event that has not and indeed may never transpire." *Mikucka* v. *St. Lucian's Residence, Inc.*, supra, 183 Conn. App. 166. Accordingly, the court did not err in rejecting the defendants' statute of limitations special defense.

B

In their third special defense, the defendants alleged that the plaintiff has failed to establish that it has complied with all the requirements of the securitization document necessary for the note to be part of the JPMorgan 2005-A-7 Securitized Trust and for the plaintiff to be the proper trustee of that trust. In the defendants' view, the plaintiff's failure to comply with these requirements deprives the plaintiff of standing to prosecute this action. The trial court concluded that the defendants' third special defense failed because the defendants failed to meet their evidentiary burden with regard to their claim and because noncompliance with securitiza-

tion requirements does not implicate standing. We agree with the trial court.

"Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is plenary." (Internal quotation marks omitted.) *Hunter* v. *Shrestha*, 195 Conn. App. 393, 397–98, 225 A.3d 285 (2020). Here, the defendants have failed to present any evidence to establish the requirements of securitization or the plaintiff's alleged failure to comply with those requirements. Because the defendants had the burden of proving the facts alleged in their special defenses; *Bank of New York Mellon* v. *Mangiafico*, supra, 198 Conn. App. 727; the defendants' failure to present any evidence on the allegations in their third special defense prevents them from meeting their evidentiary burden. Moreover, this court has held that noncompliance with securitization requirements does not implicate a party's standing to bring a foreclosure action. See *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 400–401, 89 A.3d 392 (rejecting defendant's argument that plaintiff's noncompliance with securitization agreement undermined plaintiff's standing to bring action and its ability to establish ownership element of its prima facie case), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). Even if we were to assume that the plaintiff failed to comply with the securitization requirements, such noncompliance, thus, would not affect the plaintiff's standing to bring this action. Accordingly, we conclude that the trial court did not err in rejecting the defendants' third special defense.

C

In their fourth special defense, the defendants alleged that the plaintiff failed to provide proper notice of default and acceleration as required under the mortgage. Specifically, the defendants alleged that the notice provided was not sent by the plaintiff but, instead, was

sent by Chase Home Finance, LLC, "a stranger to the loan." The trial court concluded that the defendants received proper notice of default and acceleration and, consequently, rejected their fourth special defense. We agree with the trial court.

The following additional facts are relevant. Section 22 of the mortgage deed provides in relevant part that the "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and foreclosure or sale of the Property." Following the defendants' default, JPMorgan's servicer, Chase Home Finance, LLC, sent each defendant a letter on January 4, 2009. These letters notified the defendants of their default and informed them that if they did not cure their default within thirty-two days from the date of the letters, Chase Home Finance, LLC, would accelerate the maturity of the loan. The defendants did not cure their default, and the debt was accelerated.

The court concluded that the defendants received proper notice of default and acceleration as required under the mortgage. In making this determination, the court noted that, in asserting their fourth special defense, the defendants did not dispute that they had received notice but instead claimed that the notice provided was improper because it was not sent by the plaintiff. The court found that, contrary to the defendants' allegations, the entity that provided them with notice was not a "stranger to the loan" and was, instead, the servicer of the loan. The court also found that the fact that the notice was sent by the servicer of the loan

rather than by the plaintiff resulted in no prejudice tothe defendants. Accordingly, the court rejected the defendants' fourth special defense.

"It is well established that [n]otices of default and acceleration are controlled by the mortgage documents. Construction of a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally, and to deeds particularly. The primary rule of construction is to ascertain the intention of the parties. This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of their transactions. . . . A promissory note and a mortgage deed are deemed parts of one transaction and must be construed together as such." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 264–65, 186 A.3d 708 (2018). "The plain intent of . . . notification requirements set forth in . . . the mortgage deed is to provide notice of a default to a [mortgagor] prior to the commencement of a foreclosure proceeding." Id., 272.

"In construing a contract, the controlling factor is normally the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . Where . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard." (Internal quotation marks omitted.) Id., 265.

We agree with the trial court that the defendants were provided proper notice of their default and acceleration. Here, each defendant received a letter from the servicer of the loan notifying them of their default and of the

note holder's intent to accelerate the debt if the defendants did not cure their default within the relevant time period. The defendants, therefore, received proper notice of default and acceleration pursuant to the terms of the mortgage deed.

The defendants do not dispute that they received notice of default and acceleration. Instead, they challenge the plaintiff's compliance with the notification requirements of the mortgage only on the ground that the alleged notice was not sent by the plaintiff. Such an argument is unavailing. Although the plaintiff did not send the letters notifying the defendants of their default, the entity that sent them, Chase Home Finance, LLC, was hardly a "stranger to the loan" as the defendants allege. The introductory letter provided to the defendants at the closing of the loan on July 29, 2005, directs the defendants to submit their payments to Chase Home Finance, LLC. As the trial court noted in its memorandum of decision, the defendants were thus "made aware from the very start that Chase Home Finance, LLC, was acting as a servicing agent with respect to the loan." The notification requirements in a mortgage are intended to provide notice of default to a mortgagor prior to the commencement of a foreclosure proceeding, and the letters sent to the defendants fulfilled this requirement. See *Aurora Loan Services, LLC* v. *Condron*, supra, 181 Conn. App. 272. Moreover, the fact that the defendants received notice from the servicer of the loan rather than from the plaintiff caused them no prejudice. In light of these considerations, we conclude that the trial court did not err in finding that the defendants received proper notice of default and acceleration and in rejecting the defendants' fourth special defense.

D

In their fifth special defense, the defendants alleged that the "plaintiff comes to court with unclean hands

and therefore it is barred from recovery." We conclude that the court did not err in rejecting the defendants' fifth special defense.

In its memorandum of decision, the court noted that the "defendants' special defense is a conclusory one sentence allegation [that is] completely devoid of any supporting factual representations." The court further noted that the defendants argued in their reply brief that their unclean hands special defense "was proved by the evidence of multiple unexplained allonges and an assignment of mortgage." In light of the court's finding that the Young allonge was attached to the note, the court concluded that the mere existence of other allonges and assignments of the mortgage that were never acted on or recorded did not establish unclean hands on the part of the plaintiff. Accordingly, the court concluded that the defendants had failed to sustain their burden of proof concerning their unclean hands special defense.

"Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands may be applicable. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equi-table relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . . [A]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's]

action." (Citations omitted; internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 710–11, 41 A.3d 1077 (2012).

We conclude that the trial court did not abuse its discretion in rejecting the defendants' special defense of unclean hands. In their posttrial reply brief, the defendants claimed that their unclean hands defense was proven by the evidence of multiple contradictory allonges and assignments of their mortgage. As previously observed in part II of this opinion, however, the defendants failed to produce any evidence suggesting that any of the additional allonges ever were affixed to the note or that the other assignments of the mortgage ever were acted on or recorded. Moreover, the mere presence of additional allonges and assignments hardly can be classified as indicative of behavior on the part of the plaintiff that was unfair, inequitable, or dishonest. See id., 711. Besides their vague claims that the presence of the additional allonges and assignments indicated that the plaintiff acted with unclean hands, the defendants offered no evidentiary support with respect to this defense. We conclude, therefore, that the defendants have failed to meet their burden of proving their special defense of unclean hands. Accordingly, the court did not err in rejecting the defendants' fifth special defense.

IV

Finally, the defendants claim that the court erred by admitting into evidence the note's payment history. In response, the plaintiff contends that the court properly admitted the payment history as a business record. We agree with the plaintiff.

The following additional facts are relevant. During trial, Weinberger[8] testified about the general duties and

[8] As discussed previously in this opinion, Weinberger is an employee of SPS, the plaintiff's loan servicer.

obligations of loan servicers. She testified that servicers take care of the day-to-day activities of a loan. Such activities include collecting and posting payments, providing notices to the borrowers, and maintaining accurate and daily records. Weinberger then testified that all servicers must comply with certain requirements regarding the maintenance of records. Specifically, all servicers have a duty to ensure that they keep completely accurate records. To accomplish this, SPS uses a boarding process to independently verify and analyze the data that it receives. During the boarding process, SPS employees review and analyze documents received in connection with every loan. If there are any questions, discrepancies, or any other issues that need to be straightened out, SPS addresses them prior to the loan boarding and before servicing begins. Weinberger testified that the loan to the defendants went through this process. She also stated that, as the prior owner of the loan, JPMorgan and its servicers had a duty to provide SPS with accurate records during the loan transfer process.

The plaintiff then sought to introduce into evidence the note's payment history that SPS created when it began servicing the defendants' loan in April, 2014. Although SPS was not the original servicer of the loan, Weinberger testified that the SPS payment history included information from JPMorgan's servicer and, thus, contained the detailed transaction history from the inception of the loan. Weinberger further testified that she retrieved the payment history from SPS' business records and that SPS maintained it in its files in the ordinary course of business. The defendants objected to the introduction of the payment history into evidence, claiming that there was no way to verify the loan history that was supplied to SPS by the prior servicer.[9] The

[9] The defendants based their objection on *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 192 A.3d 455 (2018), rev'd in part, 334 Conn. 374, 388, 222 A.3d 950 (2020). After the defendants submitted their

court overruled the defendants' objection on the ground that Weinberger had testified extensively about the boarding process and how SPS checked the records to ensure that they were accurate before they were kept as business records. The payment history was then admitted as a full exhibit.

We are guided by the following relevant legal principles. Section 8-4 (a) of the Connecticut Code of Evidence, colloquially referred to as the business records exception to the hearsay rule, provides that "[a]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." "To the extent [that admissibility] of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay . . . [is a] legal [question] demanding plenary review." (Internal quotation marks omitted.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 388, 222 A.3d 950 (2020).

In *Jenzack Partners, LLC*, our Supreme Court specifically addressed the applicability of the business records exception as it relates to a mortgagee's present servicer that introduces servicing records provided to it from a prior servicer. Our Supreme Court determined in *Jenzack Partners, LLC*, that "[w]hen a party introduces a

brief in this appeal, our Supreme Court overturned the portion of *Jenzack Partners, LLC*, on which the defendants have relied. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 388, 222 A.3d 950 (2020).

document that it did not create but that it received from a third party, the business records exception will apply only if the information contained in the document is based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant. . . . Where the prior owner of the note had a legitimate business duty to provide to the next holder the information used to generate the payment history, the printout of that information was the business record of the present holder." (Citation omitted; internal quotation marks omitted.) Id., 390–91. "If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." Id., 391.

In the present case, the court properly admitted the note's payment history as a business record. Weinberger testified that JPMorgan, the prior owner of the loan, had a duty to provide SPS with accurate records during the loan transfer process. When SPS received this information, it went through SPS' boarding process, whereby SPS reviewed the documents and analyzed them. The information that JPMorgan provided to SPS was used to create the payment history that the plaintiff introduced into evidence at trial. Pursuant to our Supreme Court's decision in *Jenzack Partners, LLC*, the payment history thus qualifies as a business record of SPS. Accordingly, the trial court did not err in admitting the payment history as a business record.

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

In this opinion the other judges concurred.

DONALD G. *v.* COMMISSIONER OF CORRECTION* (AC 42713)

Prescott, Elgo and Pavia, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree, sexual assault in the third degree, and three counts of risk of injury to a child, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance. The petitioner claimed, inter alia, that counsel failed to present testimony from four witnesses, his mother, his stepfather and two family friends, about his alleged presence or absence from a December, 2007 holiday party at which certain of his alleged criminal conduct occurred. Those same four witnesses testified at his criminal trial that they had not seen him at a 2008 holiday party, and the petitioner was acquitted of sexual assault charges stemming from allegations regarding that date. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner failed to establish his claim that trial counsel's decision to refrain from questioning witnesses regarding his attendance at an event on a certain date in 2007 constituted deficient performance; the petitioner presented no evidence at the habeas trial that anyone except his parents would have attested to his absence from the 2007 party, and trial counsel's strategic decision not to question the petitioner's parents about his whereabouts at the December, 2007 holiday party was not objectively unreasonable, as the jury could have deemed them to be biased witnesses seeking to protect their son, especially in light of contradictory evidence at the criminal trial that the petitioner had told a police officer that he had been present at the December, 2007 holiday party.

2. The habeas court properly determined that the petitioner failed to demonstrate that he was prejudiced by any deficient performance of his trial counsel in referring to the complaining witness as the "victim" or by failing to object or to request a curative instruction regarding the prosecutor's use of the same; although both the state and trial counsel inappropriately referred to the complainant as the victim, neither did so consistently, and there was no support for the petitioner's assertion that, but for the use of the word victim, there was a reasonable likelihood that

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to use the petitioner's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the outcome of the trial would have been different, especially in light of the fact that the petitioner was acquitted of one of the charges.

3. The habeas court properly determined that the petitioner's trial counsel did not render ineffective assistance by failing to investigate a claim of uncharged misconduct between the petitioner and the victim; trial counsel testified that the petitioner admitted to having attended a ski trip where the uncharged misconduct was alleged to have occurred and, thus, trial counsel's decision not to pursue a witness who purportedly would have testified that she did not see the petitioner on the ski trip could not be deemed unreasonable or tactically unsound.

Argued October 13, 2020—officially released March 2, 2021

Procedural History

Amended petition for writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Kwak*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Donald G., self-represented, the appellant (petitioner).

Linda F. Currie-Zeffiro, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Angela Macchiarulo* and *Michael Proto*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

PAVIA, J. Following the granting of certification to appeal by the habeas court, the petitioner, Donald G., appeals from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly rejected his claim that his right to effective assistance of counsel had been violated because his trial counsel (1) neglected to present testimony regarding the petitioner's whereabouts for one of the nights in question, (2) referenced the complainant as the "victim" and failed to object or to request a curative instruction when the prosecutor also referred to the complainant as the "victim," and (3) failed to investigate properly an incident

of uncharged misconduct.[1] We disagree and affirm the judgment of the habeas court.

The petitioner was convicted of sexual assault in the first degree, sexual assault in the third degree and three counts of risk of injury to a child. The judgment of conviction for those crimes was affirmed on direct appeal by this court, and our Supreme Court denied his subsequent petition for certification to appeal. See *State* v. *Donald H. G.*, 148 Conn. App. 398, 84 A.3d 1216, cert. denied, 311 Conn. 951, 111 A.3d 881 (2014). The following facts, as set forth by this court in *State* v. *Donald H. G.*, supra, 400–404, are relevant to the petitioner's appeal.

"The minor victim, who was born in October, 1992, is the niece of the [petitioner]. In the time period between May and October, 2003, when the victim was age ten or eleven, she, along with her sister and her friend, went to the [petitioner's] workplace to help him paint the interior of the building. The victim went upstairs to paint the office while her sister and her friend remained downstairs. The [petitioner] entered the office, where he kissed the victim, pulled down his pants, and asked the victim to perform fellatio on him. The victim complied, while the [petitioner], who was standing against the wall, guided her head. Before he ejaculated, the [petitioner] warned the victim and told her to swallow it. The victim again complied. The [petitioner] told the victim she was doing a 'good job.' The [petitioner] then pulled down the victim's shorts and began to perform cunnilingus on her for a couple of minutes, while looking to make sure no one was entering the room. The [petitioner] also penetrated the victim's vagina with his tongue.

"The [petitioner] later took the victim's sister and the victim's friend home, but he returned to his workplace

[1] On appeal, the petitioner does not claim, as he did in the habeas court, that his counsel had a conflict of interest.

with the victim where he continued to sexually assault her by inserting his fingers into her vagina. The [petitioner] told the victim that she was 'grown up and mature,' and he convinced the victim that the sexual assault was their secret. The [petitioner] also asked the victim if she wanted to go to a movie theatre with him. The victim pretended to telephone her mother because she did not want to go with the [petitioner], and she told the [petitioner] that her mother said she could not go with him. On the basis of these facts, the state charged the [petitioner] with one count of sexual assault in the first degree and two counts of risk of injury to a child.

"On or about December 24, 2007, the victim's family had a Christmas party, which the [petitioner] and others attended. During the party, the victim went into the garage, which had an upstairs room with a bar, pool table, television and bathroom, to get a beverage, during which time she encountered the [petitioner]. When the [petitioner] walked by the victim, he slapped her buttocks. '[F]lustered and annoyed,' the victim retreated to her bedroom, where the [petitioner] appeared shortly thereafter. The [petitioner], who had been drinking but did not appear intoxicated, asked the victim to kiss him or to perform fellatio on him. The victim declined, but the [petitioner] began to rub her back and squeeze her buttocks. The [petitioner] also tried to convince the victim to go for a ride with him, but she refused and returned to the party. On the basis of these facts, the state charged the [petitioner] with one count of sexual assault in the third degree and one count of risk of injury to a child.

"On or about [December 22, 2008],[2] the victim's family again was hosting a Christmas party, which the [peti-

[2] The state's third amended information alleged that the second incident actually occurred at a Christmas party held on December 22, 2008, not December 24, 2008.

tioner] and others attended. During the party, the victim was watching television in the room above the garage, when the [petitioner], who appeared to be intoxicated, entered the room and asked the victim to make him a cocktail. As she made the cocktail, the [petitioner] kept trying to get close to the victim, but she kept moving away. The victim was scared and just wanted the [petitioner] to let her go. When she tried to exit the room, the [petitioner], whom the victim described as a 'really big guy [who is] strong,' pinned her against the wall and began to run his hands down her body, kissing her and grabbing her chest, while holding both of her hands with one of his hands. The victim also testified that the [petitioner] digitally penetrated her vagina during this assault. The victim was afraid, especially because of the [petitioner's] size and the fact that she 'was a scrawny kid. . . .' She 'just . . . wanted help . . . [and] didn't want this to happen anymore.' On the basis of these facts, hereinafter referred to as the '2008 Christmas party incident,' the state charged the [petitioner] with one count of sexual assault in the first degree.

"On July 2, 2009, the victim, while staying with a friend's family due to a deterioration in her relationship with her family, confided in her friend's mother that the [petitioner] repeatedly had sexually abused her. A few days later, the friend's mother drove the victim to the police station to report the sexual abuse. The victim made further disclosures to the police on August 27, 2009, and September 5, 2009.

"The [petitioner] was arrested and charged, by way of an amended information, with two counts of sexual assault in the first degree, one count of sexual assault in the third degree, and three counts of risk of injury to a child. The jury found the [petitioner] guilty of all charges with the exception of the count of sexual assault in the first degree that stemmed from the [December 22, 2008] Christmas party incident, for which the jury

returned a verdict of not guilty. The court accepted the jury's verdict, rendered judgment of conviction on five counts, and imposed a total effective sentence of thirty years [of] incarceration, ten years of which were mandatory, followed by five years of parole with special conditions, and lifetime registration as a sexual offender." (Footnote added.) Id., 400–403.

The petitioner appealed from the judgment of conviction, which was affirmed by this court. Id., 400. Thereafter, the petitioner filed a petition for a writ of habeas corpus. The petitioner amended his petition three times and filed his third amended petition on February 20, 2018. In his third amended petition for a writ of habeas corpus, the petitioner asserted that his trial counsel, Attorney Robert Lacobelle, provided ineffective assistance. The following individuals who provided testimony at the habeas trial included: Linda H., the petitioner's mother; Gary H., the petitioner's stepfather; Theresa Charette, a friend of the victim's mother; Charles Stango, a supervising assistant state's attorney and prosecutor at the underlying criminal trial; Daniel Markle, the private investigator that was retained by the petitioner's trial counsel; and the petitioner's trial counsel. Following the trial, the habeas court, *Kwak*, *J.*, in a memorandum of decision, denied the petitioner's habeas petition. In doing so, the court concluded that the petitioner had failed to demonstrate that his trial counsel's assistance was ineffective and found that trial counsel's use of different trial strategies for alternate allegations was "highly reasonable and not indicative of deficient performance." The petitioner filed a petition for certification to appeal, which the habeas court granted. This appeal followed.

On appeal, the petitioner claims that the court improperly failed to conclude that his trial counsel was ineffective for (1) failing to present the testimony of four witnesses regarding the petitioner's whereabouts on one of

the nights in question, (2) improperly referencing the complainant as the "victim" and failing to object or to request a curative instruction when the prosecutor did the same, and (3) failing to investigate properly an incident of uncharged misconduct. We disagree.

We begin by setting forth the applicable standard of review and the law governing ineffective assistance of counsel claims. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013); see also *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 537–38, 217 A.3d 609 (2019).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events

and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

The petitioner first claims that the court improperly rejected his claim that his trial counsel rendered ineffective assistance by failing to question the petitioner's mother, stepfather, and two family friends regarding the petitioner's whereabouts at the time of the December 24, 2007 family Christmas party. We disagree.

The following additional facts are relevant to this claim. The victim's family held two separate Christmas parties annually, one on December 22 for the neighborhood (neighborhood party) and another on December 24 for immediate family and close friends (family party). The petitioner was charged with sexual assault for his alleged conduct at two of these Christmas parties: (1) the 2008 neighborhood party; and (2) the 2007 family party.

During the underlying criminal trial, the petitioner's mother and stepfather, Linda H. and Gary H., as well as two family friends, testified that they had not seen the petitioner at the 2008 neighborhood party. The petitioner subsequently was acquitted of sexual assault in the first degree stemming from the allegations regarding that date. Trial counsel did not question these four witnesses regarding the petitioner's whereabouts on the evening of the 2007 family party. He did, however,

question three of these four witnesses as to the petitioner's whereabouts during the 2007 neighborhood party, despite the fact that no charges stemmed from that date. The petitioner asserts that trial counsel rendered constitutionally ineffective assistance because he failed to question these four witnesses regarding his whereabouts during the 2007 family party, and instead questioned them extensively about the 2007 neighborhood party.

At the habeas trial, the petitioner presented testimony from Linda H. and Gary H., both of whom stated that the petitioner did not attend the 2007 family party, nor any of the other parties in question. Notably, the petitioner did not present testimony from the two family friends, whom he claims should have been questioned at his criminal trial regarding his whereabouts on the day of the 2007 family party.[3] The petitioner speculates that the two family friends would have testified to his absence at the 2007 family party but failed to provide evidence at the habeas trial to support that contention. In addition, the petitioner's claim overlooks another important aspect of the state's case against him. Specifically, at the petitioner's criminal trial, the state presented the testimony of Detective Steven Young, who recounted the petitioner's police interview and detailed the petitioner's admission that he had attended the 2007 family party. Young testified that the petitioner provided an intricate account of the evening and offered an explanation for his allegedly accidental touching of the victim's buttocks, suggesting that he and the victim had been wrestling together. Thus, the petitioner not only acknowledged his presence at the 2007 family party, but his statement to the police also squarely contradicted the very testimony he now contends should have been presented by his trial counsel.

[3] The only testimony that the two family friends provided at the criminal trial was in reference to the neighborhood parties in 2007 and 2008.

At the habeas trial, the petitioner's trial counsel testified that he decided not to question the four witnesses regarding the 2007 family party following the petitioner's acknowledgment to a law enforcement official that he had in fact attended the event. Trial counsel stated that such questioning could have jeopardized the petitioner's defense. Specifically, he feared calling into question the credibility of the witnesses who had testified to the petitioner's absence from the 2008 neighborhood party. Trial counsel testified that he sought to discredit the victim's account of events by highlighting the inconsistencies between her testimony at trial and the statements that she had provided to law enforcement. Trial counsel also testified that he highlighted the purported lapses made by law enforcement officials while they investigated the victim's allegations.

In its memorandum of decision, the habeas court noted that, had trial counsel chosen to examine the four proposed witnesses regarding the 2007 family party, it would have served only to jeopardize the defense by tarnishing the credibility of those much-needed witnesses regarding the events of the 2008 neighborhood party. Moreover, the court found that the petitioner had failed to show that the testimony of the two family friends would have helped with his defense. The court additionally concluded that the testimony of Linda H. and Gary H. regarding the evening of the 2007 family party, as presented at the habeas hearing, left a period of several hours during which no witnesses could account for the whereabouts of the petitioner. This temporal gap on the evening of the 2007 family party, according to the court, would have allowed ample opportunity for the petitioner to attend the party in question unbeknownst to the witnesses.

In essence, the petitioner is claiming on appeal that trial counsel's decision not to have his mother and stepfather attest to his alleged absence from the 2007 family

party was objectively unreasonable; however, this premise is untenable. The petitioner presented no evidence at the habeas trial that anyone except for his parents would have attested to his absence from the 2007 family party. We cannot say that trial counsel's decision not to question the petitioner's parents about the petitioner's whereabouts during the 2007 family party was objectively unreasonable because the jury could have deemed them to be biased witnesses seeking to protect their son, especially when the parents' account would have been contradicted by the petitioner's own statements to law enforcement. A habeas petitioner can demonstrate that a trial counsel's decisions were objectively unreasonable only if there was no tactical justification for the course of action pursued at trial. See *Meletrich* v. *Commissioner of Correctio*n, 178 Conn. App. 266, 277–78, 174 A.3d 824 (2017), aff'd, 332 Conn. 615, 212 A.3d 678 (2019). "[T]he [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 12, 242A.3d. 107 (2020). As such, this court is required to "make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.) *Rivera* v. *Commissioner of Correction*, 70 Conn. App. 452, 456, 800 A.2d 1194, cert. denied, 261 Conn. 921, 806 A.2d 1061 (2002).

"The failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 701, 89 A.3d

426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016). Additionally, "[w]here an alibi defense contains omissions for crucial time periods, the alibi is insufficient, and it is not deficient performance to fail to present that defense." *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 279. In *Jackson* v. *Commissioner of Correction*, supra, 698, a claim of ineffective assistance of counsel was premised on counsel's failure to call several witnesses in support of an alibi defense. In upholding the habeas court's finding that counsel had not rendered deficient performance, this court ruled that if the testimony that counsel allegedly failed to elicit would not have accounted for the petitioner's whereabouts between crucial points in time, immediately before, during and after the alleged criminal incident had occurred, the testimony would have been unhelpful in establishing a complete alibi defense. Id. Thus, we concluded that counsel's failure to call witnesses to provide such testimony was not deficient performance. Id. Our cases instruct that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 281.

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 689. On the basis of the foregoing, the court properly concluded that the petitioner

failed to sustain his burden of overcoming the presumption that counsel's actions were the result of sound trial strategy. We therefore conclude that the court properly determined that the petitioner failed to establish his claim that trial counsel's decision to refrain from questioning witnesses regarding the petitioner's whereabouts on the evening of the 2007 family party constituted deficient performance.

II

The petitioner next claims that the court improperly determined that he had failed to sustain his burden of proving that he was prejudiced by references to the complaining witness as the "victim" by his counsel and the state during his criminal trial. We disagree.

The following additional facts are relevant to our review of this claim. Prior to the commencement of trial, the petitioner's trial counsel filed a motion with the court to prohibit the use of the word "victim" by either party. The court granted the motion in limine and cautioned all parties to refrain from addressing the complainant as the "victim." During the course of the trial, however, both the prosecutor and the petitioner's trial counsel sporadically used the word "victim" when referencing the complainant in the presence of the jury. The prosecutor referred to the complainant as the "victim" on six occasions and trial counsel did so twice. Trial counsel did not object to the prosecutor's violation of the court order or request a curative instruction from the court.

In *State* v. *Cortes*, 276 Conn. 241, 249 n.4, 885 A.2d 153 (2005), our Supreme Court held that the trial court's reference to the complainant as the "victim" was inappropriate, as it implicitly suggested that the complainant had in fact been victimized by the defendant. Id. Later, in *State* v. *Warholic*, 278 Conn. 354, 369–70, 897 A.2d 569 (2006), the Supreme Court expanded its ruling

in *Cortes* by cautioning "*the state* . . . against making excessive use of the term 'victim' to describe a complainant when the commission of a crime is at issue because prevalent use of the term may cause the jury to draw an improper inference that the defendant committed a crime against the complainant." (Emphasis added.) Id., 370 n.7. Although the court in *Warholic* concluded that the prosecutor's use of the word "victim" during closing argument did not amount to prosecutorial impropriety because the jury was likely to understand that the state's terminology was simply a reflection of the state's contention concerning the allegations proffered at the trial, the court clearly admonished the use of such terminology. Id., 370 and n.7; see also *State* v. *Williams*, 200 Conn. App. 427, 435, 238 A.3d 797 (prosecutor's relatively infrequent use of term "victim" did not constitute impropriety), cert. denied, 335 Conn. 974, 240 A.3d 676 (2020); *State* v. *Kurrus*, 137 Conn. App. 604, 621, 49 A.3d 260 (prosecutor's reference to complainant as "victim" on three occasions did not unduly influence jurors), cert. denied, 307 Conn. 923, 55 A.3d 566 (2012); *State* v. *Rodriguez*, 107 Conn. App. 685, 703, 946 A.2d 294 (prosecutor's sporadic use of term "victim" did not amount to impropriety), cert. denied, 288 Conn. 904, 953 A.2d 650 (2008). Thus, where the courts have deemed such behavior to be prevalent and chronic, they have determined that such references have invaded the propriety of the trial proceeding. See *State* v. *Thompson*, 146 Conn. App. 249, 271, 76 A.3d 273 (state's use of word "victim" on seven occasions necessitating repeated court intervention was inappropriate), cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013); *State* v. *Albino*, 130 Conn. App. 745, 762, 24 A.3d 602 (in cases where there is challenge as to whether crime occurred, repeated use of word "victim" is improper), aff'd, 312 Conn. 763, 97 A.3d 478 (2014).

Although the foregoing principles guide our review, the present case encompasses the complicating fact that,

in addition to the state's use of the term "victim," the petitioner's trial counsel also referred to the complainant as the "victim." Although trial counsel appropriately sought a court order preventing such references and, although the majority of the time the complainant was referred to by her initials, as the trial progressed there were admitted transgressions, including by trial counsel. He represented that such references were unintentional but conceded that he neither objected to the state's use of the term nor requested curative instructions from the court.

As previously noted in this opinion, *Gonzalez* is clear that there are two prongs, performance and prejudice, to an analysis of an ineffective assistance of counsel claim. *Gonzalez* v. *Commissioner of Correction*, supra, 308 Conn. 470. "It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); see also *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 606, 103 A.3d 954 (2014). Thus, "[a]lthough a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112 (2017). As such, case law permits us to affirm a habeas court's decision on prejudice without examining the deficiency prong. Id.

In the present case, although both the state and trial counsel inappropriately referred to the complainant as the victim, neither did so consistently. Both parties predominately identified the witness either as the complainant or by use of her initials. There is simply no support for the petitioner's assertion that, but for trial counsel's use of the word "victim" on two occasions

throughout the entirety of the trial proceeding, or his failure to object or to request a curative instruction after the prosecutor made similar references, it is reasonably likely that the outcome of the trial would have been different. This conclusion is buttressed by the fact that the petitioner in fact was acquitted of one of the charges against him. If the jury had been improperly influenced by these references to the victim, presumably it would not have acquitted the petitioner of one of the charges.

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626–27, 212 A.3d 678 (2019); see also *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 538, 198 A.3d 52 (2019). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 265, 112 A.3d 1 (2015). The critical question is "whether there is a reasonable probability that, absent the [deficient performance of counsel], the [fact-finder] would have had a reasonable doubt" concerning the petitioner's guilt. (Internal quotation marks omitted.) *White* v. *Commissioner of Correction*, 145 Conn. App. 834, 842, 77 A.3d 832, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013).

After a thorough review of the entire record, we are not persuaded that the habeas court improperly concluded that the petitioner failed to demonstrate that he was prejudiced by any deficient performance of his trial counsel relating to references to the complainant as the victim because, as noted previously in this opinion, the petitioner was acquitted of one of the charges against him. Accordingly, this claim fails.

III

Finally, the petitioner claims that the court improperly determined that his trial counsel did not render ineffective assistance by failing to investigate a claim of uncharged misconduct between the petitioner and the victim. We disagree.

The following additional facts are relevant to this claim. During the criminal trial and over trial counsel's objection, the state introduced misconduct evidence of additional sexual contact between the petitioner and the victim during a family ski trip at Okemo Mountain.

In light of that evidence, the petitioner claims that trial counsel rendered ineffective assistance by neglecting to interview and to procure the testimony of an alleged witness, Theresa Charette, who claimed that she had not seen the petitioner during the Okemo ski trip. The petitioner argues that, if called to testify, Charette would have so undermined the credibility of the victim's account of this event that the entirety of her trial testimony would have been irreparably tainted in the eyes of the jury.

During the habeas trial, however, trial counsel testified that the petitioner had admitted to him that he had attended the Okemo ski trip. That admission stands in firm opposition to the very testimony that the petitioner now claims trial counsel failed to investigate and to present at trial. As previously noted in this opinion, "[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 149 Conn. App. 701. Furthermore, "[d]efense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness

and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn App. 278–79. The decision of the petitioner's trial counsel not to pursue testimony from a witness in an effort to rebut a claim that the petitioner had readily admitted as true cannot be deemed unreasonable or tactically unsound. We, therefore, conclude that the court properly rejected the petitioner's claim that his trial counsel's performance was constitutionally deficient as it related to the uncharged misconduct admitted against him.

The judgment is affirmed.

In this opinion the other judges concurred.

HELEN SIERANSKI *v.* TJC ESQ, A PROFESSIONAL SERVICES CORPORATION
(AC 43272)

Bright, C. J., and Moll and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, T Co., for, inter alia, the alleged wrongful termination of her employment in violation of the statutory (§§ 3-94h and 53a-157b) public policy against making false statements with the intent to deceive or mislead. The plaintiff was employed by T Co. as a paralegal and reported to G, an attorney. G asked the plaintiff to prepare an affidavit stating something that the plaintiff alleged was not true regarding a litigation matter. The plaintiff drafted the affidavit but refused to notarize it because she knew it was false. G kept asking the plaintiff about the status of the affidavit and the plaintiff repeatedly stated that it was not filed because she would not sign it. T Co. terminated the plaintiff's employment approximately eight days after G first asked her to draft the affidavit. The defendant filed a motion to strike the count of the plaintiff's complaint alleging wrongful termination in violation of public policy, arguing that she failed to allege sufficient facts to establish that T Co.'s conduct at issue contravened the public policy cited. The trial court granted T Co.'s motion to strike, and the plaintiff appealed to this court. *Held* that the

trial court erred in granting T Co.'s motion to strike as to the count of the complaint alleging wrongful termination in violation of public policy, as the plaintiff sufficiently pleaded facts that, if proven, would fall under the public policy exception to the at-will employment doctrine; when read in the light most favorable to the plaintiff, the alleged facts were sufficient to support a finding that the plaintiff's employment was terminated because she refused to assist T Co. in misleading the court and others involved in the subject litigation by notarizing the allegedly false affidavit, and both §§ 3-94h and 53a-157b outline a public policy against knowingly assisting an affiant in submitting false statements to a court.

Argued October 19, 2020—officially released March 2, 2021

Procedural History

Action to recover damages for alleged wrongful termination, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma*, *J.*, granted in part the defendant's motion to strike; thereafter, the court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Megan L. Michaud, for the appellant (plaintiff).

Maria Garcia-Quintner, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Helen Sieranski, brought a three count complaint against her former employer, the defendant, TJC Esq, A Professional Services Corporation, seeking damages for wrongful termination, pregnancy discrimination, and gender discrimination (original complaint). The court granted the defendant's motion to strike the first count of the original complaint, in which the plaintiff alleged common-law wrongful termination in violation of the public policy outlined in General Statutes §§ 3-94h and 53a-157b. Thereafter, the plaintiff filed a revised complaint alleging, in one count,

pregnancy discrimination. After the court rendered summary judgment as to that count, the plaintiff brought the present appeal in which she challenges the court's judgment striking count one of her original complaint. For the reasons set forth below, we reverse in part the judgment of the trial court.

The following procedural history is relevant to this appeal. On November 13, 2017, the plaintiff filed the original complaint against the defendant alleging (1) wrongful termination of her employment in violation of the public policy embodied in §§ 3-94h and 53a-157b, (2) pregnancy discrimination in violation of General Statutes § 46a-60 (b) (7), and (3) gender discrimination in violation of § 46a-60 (b) (1).[1]

The plaintiff alleged the following relevant facts in count one of the original complaint: "The defendant is a law firm . . . . The plaintiff was employed by the defendant as a litigation paralegal. . . . While the plaintiff was employed by the defendant she reported to Attorney Brooke Goff. . . . On or about March 23, 2017, Attorney Goff realized [that] they had missed the time to appeal an arbitrator's decision on a case and asked the plaintiff to prepare an affidavit stating [that they had] never received the arbitrator's decision, which was not true. . . . The plaintiff drafted the affidavit but refused to notarize [it] because she knew it was false. . . . For the rest of the week Attorney Goff kept asking the plaintiff what the status was for the affidavit and the plaintiff repeatedly stated [that] it was not filed because the plaintiff would not sign the affidavit. . . . The defendant terminated the plaintiff's

[1] We note that the plaintiff cited to subsections (a) (1) and (7) of General Statutes (Rev. to 2017) § 46a-60 in her original complaint as support for her allegations of pregnancy and gender discrimination in her termination of employment on March 31, 2017. The legislature amended § 46a-60; see Public Acts 2017, No. 17-118; effective October 1, 2017. Those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

employment on March 31, 2017. . . . The defendant stated the reason for the plaintiff's termination was [that] she was not a good fit." The plaintiff further alleged in relevant part: "The defendant terminated the [plaintiff's employment] in retaliation for refusing to notarize a false affidavit. . . . The defendant's termination of the plaintiff's employment is in violation of the long-standing public policy outlined in . . . § 3-94h and . . . § 53a-157b."

On January 22, 2018, the defendant filed a motion to strike each of the three counts in the original complaint. With respect to count one, the defendant argued that the plaintiff "fail[ed] to allege sufficient facts to establish that the employer's conduct at issue contravenes the public policy cited." The court heard oral argument on the motion to strike on March 12, 2018. The plaintiff argued that it was a violation of public policy "for an attorney to force [her] paralegal to draft a knowingly false affidavit and notarize the same for a submission to a judicial fact-finding body." The defendant argued that §§ 3-94h and 53a-157b did not reflect a general public policy against the conduct alleged by the plaintiff, and that the plaintiff's act of notarizing the affidavit was not prohibited by the statutes.

On July 10, 2018, the court granted the defendant's motion to strike the first and third counts of the original complaint, and it denied the motion as to the second count alleging pregnancy discrimination. The court issued a memorandum of decision on the same date. As to count one, which is the subject of the present appeal, the court concluded that, "[a]ccepting the allegations as true, the plaintiff [failed] to make any allegations that the defendant terminated the plaintiff because she refused to perform an official notary act with the intent to deceive or defraud." The court reasoned that "a notary has the authority to administer oaths, take an acknowledgement, and provide a jurat, but does not

have the power to themselves affirm the truth of the contents of the document signed by another." Instead, the court explained, the affiant herself swears to the truth of the content of the document, while a notary "just affirms that the signer vouched for the truthfulness." The court concluded, therefore, that § 3-94h was inapplicable to the facts alleged and failed to support the plaintiff's claim. Additionally, the court concluded that § 53a-157b was inapplicable because "the plaintiff failed to allege the content of the affidavit, or that anyone made a false statement intended to mislead a public official, or made such a statement under oath. At most, the plaintiff alleges that she prepared a document at the request of Attorney Goff that was not signed or notarized."

Thereafter, the plaintiff did not plead over with respect to counts one or three. Instead, on July 16, 2018, pursuant to Practice Book §§ 61-2 and 61-5, she filed a notice of her intent to appeal, with respect to count one only, the court's decision granting the defendant's motion to strike.[2] On July 31, 2018, the defendant filed a request to revise, requesting that the plaintiff remove all allegations from the original complaint that were immaterial to count two, alleging discrimination on the basis of pregnancy, which was the sole remaining claim in the

[2] We note that parties must file a notice of intent to appeal in two narrow circumstances: "(1) [W]hen the deferred appeal is to be filed from a judgment that not only disposes of an entire complaint, counterclaim or cross complaint but also disposes of all the causes of action brought by or against a party or parties so that that party or parties are not parties to any remaining complaint, counterclaim or cross complaint; or (2) when the deferred appeal is to be filed from a judgment that disposes of only part of a complaint, counterclaim, or cross complaint but nevertheless disposes of all causes of action in that pleading brought by or against a particular party or parties." Practice Book § 61-5 (a). Neither of these circumstances existed when the court granted the defendant's motion to strike counts one and three. Thus, the plaintiff did not have to file a notice of intent to appeal. Nevertheless, the plaintiff's appeal is properly before us because, as we note in footnote 3 of this opinion, it was taken from a final judgment issued on August 6, 2019.

case. On August 6, 2018, in accordance with the defendant's request, the plaintiff filed a revised complaint that removed counts one and three and the allegations that were material only to those counts. On September 5, 2018, the defendant filed its answer and four special defenses. On September 18, 2018, the plaintiff filed a reply to the special defenses.

On December 14, 2018, the defendant filed a motion for summary judgment with respect to the sole count in the revised complaint, alleging pregnancy discrimination, which the court granted on August 6, 2019.[3] The plaintiff filed the present appeal on August 8, 2019.[4]

[3] After granting the defendant's motion for summary judgment, the court issued a judgment file, which states: "This action commenced by writ, summons and complaint, and claiming damages, came to this court on November 13, 2017, and thence to later dates when the parties appeared. The matter thence came to later dates when the defendant . . . filed a motion to strike on January 22, 2018.

"The court, having heard argument, granted the defendant's motion to strike as to the first and third counts of the complaint on July 10, 2018.

"The defendant thence filed a motion for summary judgment as to the sole remaining count of the complaint on December 14, 2018. The court granted said motion on August 6, 2019.

"Whereupon, it is adjudged that judgment shall enter in favor of the defendant." This language can reasonably be interpreted to reflect that on August 6, 2019, the court rendered a final judgment with respect to all of the counts in favor of the defendant.

[4] On September 4, 2019, the defendant filed a motion to dismiss the plaintiff's appeal for lack of a final judgment. It argued that the plaintiff's "failure to move for judgment on count one of the original complaint after the court struck the count and prior to filing the revised complaint constitutes a waiver of the right to appeal the granting of the motion to strike." The defendant also asserted that no final judgment was rendered on the stricken claim. The plaintiff filed an objection to the defendant's motion to dismiss in which she argued that she properly had waited to appeal from the court's decision granting the defendant's motion to strike until there was a final judgment, which did not occur until the court rendered summary judgment in the defendant's favor on the sole remaining count. This court denied the defendant's motion on October 16, 2019.

In footnote 1 of its brief, the defendant invites this court to reconsider the jurisdictional issue raised in the motion to dismiss, stating: "After the plaintiff filed the instant appeal, the defendant moved to dismiss the appeal on the basis that the court lacked jurisdiction. The defendant argued that

Additional procedural history will be set forth as necessary.

The plaintiff claims that the court erred in granting the defendant's motion to strike as to count one of the original complaint, which alleged common-law wrongful termination in violation of the public policy outlined in §§ 3-94h and 53a-157b. We agree.

Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest . . . (1) the legal sufficiency of . . . any one or more counts . . . to state a claim upon which relief can be granted . . . ."

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sempey* v. *Stamford Hospital*, 194 Conn. App. 505, 511, 221 A.3d 839 (2019).

Next, we briefly discuss what constitutes common-law wrongful discharge in violation of public policy. Our

by filing an amended complaint . . . that dropped the [wrongful termination] claims entirely, the plaintiff failed to properly preserve her right to appeal the court's decision to strike such claim. In an order dated October 16, 2019, the Appellate Court denied the motion to dismiss. Given that jurisdictional issues can be raised at any point, the defendant renews and reincorporates the arguments set forth in its motion to dismiss. [Practice Book] § 66-8."

We are not persuaded to revisit the jurisdictional issue previously raised by the defendant in its motion to dismiss.

Supreme Court has recognized "the principle that public policy imposes some limits on unbridled discretion to terminate the employment of someone hired at will." *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 476, 427 A.2d 385 (1980). In creating this public policy exception to the at-will employment doctrine, the court in *Sheets* stated that an employee may have a cause of action when the employee alleges "a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." (Emphasis omitted.) Id., 475.

"Although the court in *Sheets* recognized a public policy limitation on [this] doctrine in an effort to balance the competing interests of employers and employees . . . [it also] recognized the inherent vagueness of the concept of public policy and the difficulty encountered when attempting to define precisely the contours of the public policy exception. In evaluating claims, [courts should] look to see whether the plaintiff has . . . alleged that [her] discharge violated any explicit statutory or constitutional provision . . . or whether [she] alleged that [her] dismissal contravened any judicially conceived notion of public policy. . . .

"Our Supreme Court also repeatedly [has] underscored [that] adherence to the principle that the public policy exception to the general rule allowing unfettered termination of an at-will employment relationship is a narrow one. . . . [C]ourts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation . . . . Consequently, we have rejected claims of wrongful discharge that have not been predicated upon an employer's violation of an important and clearly articulated public policy." (Citation omitted; internal quotation marks omitted.) *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 531, 142 A.3d 363, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

Additionally, the court in *Sheets* stated: "We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. Certainly when there is a relevant state statute we should not ignore the statement of public policy that it represents. For today, it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize [her] continued employment." *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 480.

"[T]he [plaintiff] has the burden of pleading and proving that [her] dismissal occurred for a reason violating public policy." *Morris* v. *Hartford Courant Co.*, 200 Conn. 676, 679, 513 A.2d 66 (1986). Further, a plaintiff must prove the employer's violation of public policy under an objective standard. *Fenner* v. *Hartford Courant Co.*, 77 Conn. App. 185, 196–97, 822 A.2d 982 (2003).

In the present case, like in cases such as *Sheets* and *Fenner*, the plaintiff alleged in her original complaint that she was placed in a situation where she was forced to violate a statute or have her employment terminated. See *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 480; *Fenner* v. *Hartford Courant Co.*, supra, 77 Conn. App. 195. The plaintiff relies, in part, on the public policy embodied in § 53a-157b (a), which states: "A person is guilty of false statement when such person (1) intentionally makes a false written statement that such person does not believe to be true with the intent to mislead a public servant in the performance of such public servant's official function, and (2) makes such statement under oath or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable." The plaintiff argues that § 53a-157b outlines a general policy against making false statements with the intent to deceive or mislead.

The defendant argues that the original complaint fails to allege any affirmative conduct by the defendant that satisfies the elements of § 53a-157b. It asserts that because there was no allegation that Attorney Goff asked the plaintiff to be the affiant, the plaintiff could not have violated the statute merely by preparing the affidavit. The defendant also contends that the original complaint lacks any allegation that Attorney Goff or any employee other than the plaintiff believed the statements in the affidavit to be false. The defendant further argues that § 53a-157b is inapplicable because count one refers exclusively to the plaintiff's alleged refusal to notarize the affidavit. We are not persuaded by the defendant's arguments.

"In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 778, 905 A.2d 623 (2006).

Here, contrary to the defendant's assertion, the allegations, when read as a whole, reasonably can be interpreted to allege that Attorney Goff knew that the statements that she directed the plaintiff to include in the affidavit were false. To reiterate, the original complaint alleged that "Attorney Goff realized they had missed the time to appeal an arbitrator's decision on a case

and asked the plaintiff to prepare an affidavit stating [that they had] never received the arbitrator's decision, which was not true." This allegation reasonably may be interpreted to allege that Attorney Goff knew that she, in fact, had received the arbitrator's decision and did not file a timely appeal within the statutory appeal period, and that she wanted the plaintiff to draft a false affidavit that said otherwise.

The defendant relies on the fact that the original complaint does not name the affiant for whom the plaintiff was asked to prepare the affidavit. However, given that the plaintiff alleged in the original complaint that she was supervised in her employment by Attorney Goff and that Attorney Goff repeatedly asked the plaintiff about the status of the affidavit, it is reasonable to infer from these allegations that Attorney Goff planned to serve as the affiant and would have violated § 53a-157b by signing an affidavit containing statements that she knew to be false. These allegations also allege conduct that is contrary to the public policy in the statute because, by knowingly including in the affidavit statements that the plaintiff also knew to be false, the plaintiff could have faced criminal exposure as an accessory to the affiant's violation of the statute. See General Statutes § 53a-8 (a). Thus, the facts alleged in the original complaint are sufficient to support a claim that the defendant contravened the public policy outlined in § 53a-157b when it terminated the plaintiff's employment for refusing to assist Attorney Goff in making false statements to the court.

We next turn to the plaintiff's reliance on the public policy embodied in § 3-94h. Section 3-94h provides in relevant part: "A notary public shall not (1) perform any official action with intent to deceive or defraud . . . ." The plaintiff argues that the plain language of the statute is "very broad." She asserts that the allegations in her original complaint fall under the statute

because the act of notarizing an affidavit that a notary *knows* to contain false statements, which the affiant intends to file with a judicial body, constitutes performing an action with the intent to deceive or defraud. The defendant, on the other hand, asserts that the *Sheets* exception is narrow, and that a notary's act of notarizing an affidavit that she believes to be false does not objectively violate § 3-94h.[5]

The defendant relies on a 1991 amendment to the statute, which, among other things, deleted a portion of § 3-94h that stated that a notary shall not "notarize any document that contains a statement known by such notary to be false . . . ." Public Acts 1991, No. 91-110, § 4. The trial court also cited this amendment in the memorandum of decision in which it struck count one. The defendant asserts that this revision narrowed, rather than broadened, the statute to limit a notary's liability for the content of the affidavit. To support its argument, the defendant cites two passages from the legislative history of the bill amending the statute. First, Representative Douglas Mintz stated: "The bill also eliminates a notary's liability for the content of the document so they will, under the law as it's written, [they] might actually have to read the document and ask questions about it. That was never the intent of notarizing, taking acknowledgments . . . ." 34 H.R. Proc., Pt. 6, 1991 Sess., p. 2162, remarks of Representative Douglas Mintz. Second, Senator George Gunther stated: "I think . . . the content of the things that they notarize I don't think [notaries] should be held responsible for that and this act takes care of that particular area."

[5] The defendant also argues that § 3-94h does not apply because the original complaint does not allege that the plaintiff was a notary public. Count one of the original complaint states: "The defendant terminated the [plaintiff's employment] in retaliation for refusing to notarize a false affidavit." This statement is sufficient to support the inference that the plaintiff alleged that she was a notary public.

34 S. Proc., Pt. 4, 1991 Sess., p. 1125, remarks of Senator George Gunther.

Additionally, the defendant cites General Statutes § 3-94a (4), which states that a notary's role is only to perform acts such as "taking an acknowledgement, administering an oath or affirmation, witnessing or attesting a signature and completing a copy certification." "Attesting to the accuracy or truthfulness of the content of an affidavit," the defendant contends, "is not within the notary's purview of responsibilities." Instead, the defendant asserts that a notary could engage in deception or fraud only as contemplated by the statute by, for example, "[notarizing] a signature knowing that the person signing was not the person identified as the signer, or without having witnessed the signature being made."

We do not agree that the 1991 amendment narrowed the statute in the way that the defendant posits. The bill left intact the language of § 3-94h prohibiting notaries from "perform[ing] *any official action* with intent to deceive or defraud . . . ." (Emphasis added.) The plain meaning of the phrase "any official action" is very broad and would encompass the alleged action of the plaintiff in preparing an affidavit that she knew to be false. Inherent in this prohibition is a public policy against notaries using their powers to knowingly assist an affiant in lying to a court of law. Given the unambiguous language of the statute, the defendant's and the trial court's reliance on the legislative history of the 1991 amendment is misplaced. See General Statutes § 1-2z; *State* v. *Brown*, 310 Conn. 693, 702, 80 A.3d 878 (2013) ("[t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)). Nevertheless, even if considered, the portions of the legislative history on which the defendant relies do not undermine the plain meaning of the statute. Under the plain language of the statute, the

actions alleged in the original complaint, if performed by the plaintiff, would be considered deceitful.

The statutory scheme governing notaries public supports this public policy. Section 3-94a (8) defines "[o]fficial misconduct" as "(A) a notary public's performance of an act prohibited by the general statutes or failure to perform an act mandated by the general statutes, or (B) a notary public's performance of a notarial act in a manner found to be negligent, illegal or *against the public interest*." (Emphasis added.) Furthermore, General Statutes § 3-94m (a) provides in relevant part: "The Secretary [of the State] may deliver a written, official warning and reprimand to a notary, or may revoke or suspend a notary's appointment, as a result of such notary's official misconduct . . . ." Thus, these statutes place upon notaries an affirmative duty to act in the public interest.

Here, the original complaint not only alleged that the plaintiff knew that the statements in the affidavit were false, but also that she wrote the false statements on Attorney Goff's behalf by drafting the affidavit. This scenario, therefore, is not one in which the plaintiff would have needed to read the document or otherwise go beyond her duties as a notary to discover that the statements within a given document were false. Instead, the statement at issue involved alleged falsehoods of which she had personal knowledge. By notarizing the affidavit that Attorney Goff asked her to prepare, the plaintiff would have performed her notarial duties in a matter that knowingly assisted the affiant in deceiving the court. Notaries serve as public officials appointed by the Secretary of the State. General Statutes § 3-94b (a). Public policy discourages a notary from engaging in the behavior alleged in the original complaint because it would violate § 3-94h, *and* because doing so would call into question the notary's integrity as a public official.

When viewing the original complaint in the light most favorable to the plaintiff, the alleged facts are sufficient to support a finding that the plaintiff's employment was terminated because she refused to assist the defendant in misleading the court and others involved in the subject litigation. Both §§ 3-94h and 53a-157b outline a public policy against knowingly assisting an affiant in submitting false statements to a court. This situation is one where, as in *Sheets*, the defendant allegedly punished the plaintiff for her conduct as a good citizen. See *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 477. Accordingly, we conclude that the plaintiff sufficiently pleaded facts that, if proven, would fall under the public policy exception to the at-will employment doctrine.

The judgment is reversed with respect to the striking of count one of the plaintiff's original complaint, and the case is remanded for further proceedings on that count consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.