CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TOLLAND MEETINGHOUSE COMMONS, LLC *v.* CXF TOLLAND, LLC, ET AL.
(AC 44379)

Moll, Clark and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendant C Co. for breach of contract in connection with C Co.'s failure to make payments due on a commercial lease and from the defendant R for his breach of a guaranty agreement entered into in connection with that lease. Both the plaintiff and R filed motions for summary judgment. The trial court denied R's motion and granted the plaintiff's motion. On R's appeal to this court, *held* that the trial court properly granted the plaintiff's motion for summary judgment; because the court issued a well reasoned memorandum of decision addressing the issues raised in this appeal, this court adopted the trial court's decision as a proper statement of the relevant facts and the applicable law on the issues.

Argued January 18—officially released March 1, 2022

Procedural History

Action to recover damages for, inter alia, breach of a commercial lease agreement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Tolland, where the court, *Farley*, *J.*, denied the motion for summary judgment filed by the defendant Peter A. Rusconi and granted the plaintiff's motion

for summary judgment and rendered judgment thereon, from which the defendant Peter A. Rusconi appealed to this court. *Affirmed.*

Matthew Wax-Krell, with whom, on the brief, was *Denise Lucchio*, for the appellant (defendant Peter A. Rusconi).

Kurosh L. Marjani, with whom, on the brief, was *Daniel B. Brill*, for the appellee (plaintiff).

Opinion

PER CURIAM. The present appeal arises out of an action alleging breach of a commercial lease agreement against the defendant CXF Tolland, LLC (Cardio Express),[1] and breach of a guaranty agreement against the defendant Peter A. Rusconi. Rusconi appeals from the judgment of the trial court rendered in favor of the plaintiff, Tolland Meetinghouse Commons, LLC (Tolland Meetinghouse), granting Tolland Meetinghouse's motion for summary judgment.[2] We affirm the judgment of the trial court.

The record, viewed in the light most favorable to Rusconi for purposes of reviewing the trial court's summary judgment ruling; see *Cefaratti* v. *Aranow*, 321 Conn. 637, 641, 138 A.3d 837 (2016); reveals the following facts. On May 14, 2007, Cardio Express entered into a lease with Tolland Meetinghouse's predecessor in interest (landlord) to lease certain premises in a shopping center[3] to be used as an exercise facility and health club. The term of the lease was from May 1, 2007, until October 31, 2018.

[1] CXF Tolland, LLC, was doing business as Cardio Express.

[2] The court also granted Tolland Meetinghouse's motion for summary judgment against Cardio Express, which did not appeal from the court's judgment.

[3] The premises are located at 200 Merrow Road in Tolland.

On May 10, 2007, Rusconi signed a guaranty agreement. The guaranty agreement provides in part: "Guarantor has requested Landlord to enter into a Lease Agreement dated May 14, 2007 . . . with [Cardio Express] . . . as the Tenant . . . . To induce Landlord to enter into the Lease, the Guarantor hereby agrees to Guaranty, as hereinafter provided, the performance by [Cardio Express] of all [of] the terms, covenants, conditions, obligations and agreements . . . contained in the Lease on the part of [Cardio Express] to be performed thereunder."

Paragraph 2 of the guaranty agreement provides in part that, "[e]ven if the Lease is renewed or its term extended, for any period beyond the original expiration date specified in the Lease, either pursuant to any option to renew granted under the Lease or otherwise at any time, or if [Cardio Express] holds over beyond the term of the Lease, or if the Lease is modified in any way, the obligations hereunder of the Guarantor shall terminate at the expiration of the initial five (5) years of the initial Lease term." Paragraph 11 (j) of the guaranty agreement provides that the "term of this Guaranty Agreement shall be only for the initial first five years of the initial Lease term."

On August 17, 2010, after Tolland Meetinghouse acquired an interest in the premises, it and Cardio Express entered into the first amendment of lease. The first amendment provided in part that "the Lease is hereby ratified and confirmed and shall remain in full force and effect." Rusconi signed the first amendment for Cardio Express as its member/manager. Several years later, Cardio Express failed to pay rent due and Tolland Meetinghouse issued a notice to quit dated March 16, 2016.

In April, 2016, Tolland Meetinghouse and Cardio Express entered into a second amendment to lease.

The second amendment stated in part: "The parties desire to amend the Lease, by restructuring the amounts due under the Lease, as hereinafter set forth. . . .

"1. [Cardio Express] acknowledges that the arrearage under the Lease through March 31, 2016 is $122,275.71, as more fully set forth on the Statement attached to the default letter . . . dated March 7, 2016 . . . .

"2. [Tolland Meetinghouse] agrees to reduce this sum to $100,000.00, conditioned on [Cardio Express'] full compliance with the terms set forth herein.

"3. The $100,000.00 set forth in Paragraph 2 . . . shall be paid in eighteen (18) equal installments of $5,555.55, to be paid with the Base Monthly Rent for April 2016 through September 2017.

"4. If [Cardio Express] fails to timely make any of these payments, time being of the essence, or commits any other Event of Default under the Lease as amended, the Arrears set forth in Paragraph 1 shall immediately become due and payable in full, with credit for any of the $5,555.55 payments already made.

"5. *The Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect.*

"6. Upon execution of this Second Amendment, [Cardio Express] shall pay all April 2016 sums due . . . and the April 2016 arrears payment as set forth above in the amount of $5,555.55.

"7. Upon execution of this Second Amendment and payment of the sums set forth in Paragraph 6 above, the notice to quit served on [Cardio Express] on or about March 16, 2016 will be revoked and [Cardio Express] reinstated to the Lease as hereby amended."

(Emphasis added.) Rusconi signed the second amendment for Cardio Express as its member/manager *and* as Guarantor. Cardio Express paid Tolland Meetinghouse the reduced arrearage in full in 2017.

Tolland Meetinghouse commenced the present action in 2019. In its revised complaint, Tolland Meetinghouse alleged in relevant part that Cardio Express entered into possession of the premises pursuant to the lease as amended and continued in possession until it vacated the premises on or about December 18, 2018, after having held over after the lease expired on October 11, 2018. Pursuant to the lease, Cardio Express agreed to pay monthly rent of $17,410.67 in the tenth year of the lease and $18,498.83 per month for the eleventh year of the lease. The lease also provided that any holding over of the premises entitled Tolland Meetinghouse to recover a use and occupancy charge of 150 percent of the monthly rent. Cardio Express is responsible for holdover charges for November and December, 2018. The revised complaint sounds in five counts against Cardio Express: nonpayment of base rent, nonpayment of common area maintenance charges, nonpayment of water charges, nonpayment of administrative charges, and nonpayment of late fee.

The revised complaint alleged one count of breach of guaranty against Rusconi. More specifically, the count against Rusconi incorporated the allegations against Cardio Express, that, on May 10, 2007, Rusconi executed a separate guaranty agreement providing that he "unconditionally and absolutely Guarantees to Landlord the prompt payment, when due, of the rents and any and all other charges payable under the Lease . . . ." By the second amendment to lease, which Rusconi executed on behalf of Cardio Express and as a personal guarantor in April, 2016, "he reaffirmed his obligations in respect to that Guaranty and acknowledged that it 'shall remain in full force and effect.' " As

a result of Cardio Express' nonpayment, Rusconi owes those sums to Tolland Meetinghouse. In his answer, Rusconi denied, among other things, that he reaffirmed his obligations as guarantor in the second amendment to lease. He pleaded as a special defense that the guarantee agreement "previously expired on its own terms, and is therefore unenforceable."

After the pleadings were closed, on January 30, 2020, Tolland Meetinghouse filed a motion for summary judgment with respect to its claims against Cardio Express and Rusconi. With respect to its breach of guaranty claim against Rusconi, Tolland Meetinghouse argued that it was entitled to judgment as a matter of law because it established that it was owed a debt from a third party, Rusconi signed a guaranty to pay the debt, and the debt had not been paid by either Cardio Express or Rusconi. See *Chase Manhattan Bank, N.A.* v. *Harris*, 899 F. Supp. 64, 67 (D. Conn. 1995) (prima facie case: plaintiff owed debt by third party, defendant guaranteed payment of debt, debt has not been paid by third party or defendant), vacated in part, Docket No. 5:92CV188, 1998 WL 164763 (D. Conn. February 25, 1998). It also argued that, in April, 2016, Rusconi reaffirmed his obligations in the second lease agreement as Cardio Express' guarantor and agreed that the guaranty shall remain in full force and effect. Moreover, Rusconi admitted that he signed the second lease agreement in his personal capacity as guarantor.

On January 31, 2020, Rusconi filed a motion for summary judgment in which he claimed that Tolland Meetinghouse could not prevail against him as a matter of law because the "guaranty at issue had long since expired by its terms." Moreover, "to the extent [he] provided any subsequent guaranty . . . [it] was limited to an amount that was paid in full by [Cardio Express]."

Tolland Meetinghouse objected to Rusconi's motion for summary judgment on March 16, 2020, arguing with

respect to the second amendment to lease that Rusconi admitted that "[t]he Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect." In support of its position, Tolland Meetinghouse appended Rusconi's January 31, 2020 affidavit in which he attested that the attached "[e]xhibit D is a true and accurate copy of the second amendment to lease dated April __, 2016 between Tolland Meetinghouse Commons, LLC and CXF Tolland LLC . . . ."

On June 15, 2020, Cardio Express and Rusconi filed an opposition to Tolland Meetinghouse's motion for summary judgment. They did not contest Cardio Express' liability but requested a hearing in damages as to the amount due Tolland Meetinghouse. Rusconi, however, argued that Tolland Meetinghouse's motion for summary judgment should be denied and that his motion for summary judgment should be granted. In support of his opposition, Rusconi contended that the guaranty had expired prior to the execution of the second amendment to lease, and, therefore, there was nothing to reaffirm. Alternatively, he argued that, to the extent the second amendment includes an enforceable guaranty, it was limited to Cardio Express' obligation to pay the reduced arrearage, which had been paid.

The parties appeared before the court on July 17, 2020, to argue their respective positions with respect to the pending motions for summary judgment. On October 27, 2020, the court issued a memorandum of decision granting Tolland Meetinghouse's motion for summary judgment and denying the motion for summary judgment filed by Rusconi. The court concluded that the "only reasonable construction of paragraph 5 [of the second amendment to lease] that gives that provision any practical meaning is that Rusconi agreed to guarantee Cardio Express' remaining obligations

under the lease at the time the second amendment was executed."

In conclusion, the court found Cardio Express liable to Tolland Meetinghouse for $276,522.77, of which $234,140.14 was recoverable from Rusconi.[4] The court also found that the lease and guaranty obligated Cardio Express and Rusconi to pay expenses, including attorney's fees incurred to enforce the guaranty, which totaled $20,797.26. As a result, the court found Rusconi liable in the amount of $254,937.40.

Rusconi appealed from the judgment of the trial court rendered in favor of Tolland Meetinghouse. He claims that the court erred in granting the motion for summary judgment because (1) his guaranty expired prior to Cardio Express' default and prior to the execution of the second amendment to lease, (2) the second amendment to lease failed to revive the expired guaranty, and (3) if the second amendment to lease included a guaranty it was only as to Cardio Express' payment of the reduced arrearage, which has been paid.

Succinctly, the issue on appeal is whether the trial court properly concluded that there is no genuine issue of material fact that Rusconi is liable to Tolland Meetinghouse under paragraph 5 of the second amendment to lease between Tolland Meetinghouse and Cardio Express. Paragraph 5 of the second amendment to the lease states: "*The Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect.*" (Emphasis added.) Rusconi signed the second amendment to the lease as: "Peter A. Rusconi,

[4] The court found that Rusconi's guaranty was limited to Cardio Express' liability under the lease and did not extend to amounts owed by Cardio Express for holding over beyond the term of the lease. The plaintiff does not contest that finding.

Guarantor." There are no genuine issues of material fact at issue in the present appeal.

"Appellate review of the trial court's decision to grant summary judgment is plenary." (Internal quotation marks omitted.) *Chelsea Groton Bank* v. *Belltown Sports, LLC*, 199 Conn. App. 294, 299, 236 A.3d 265, cert. denied, 335 Conn. 960, 239 A.3d 318 (2020). An appellate court must decide "whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Lopes* v. *Farmer*, 286 Conn. 384, 388, 944 A.2d 921 (2008).

After a careful review of the record, as well as the parties' briefs and relevant law, we are convinced that the trial court properly granted Tolland Meetinghouse's motion for summary judgment against Rusconi. In granting the motion for summary judgment, the court issued a well reasoned memorandum of decision. See *Tolland Meetinghouse Commons, LLC* v. *CXF Tolland, LLC*, Superior Court, judicial district of Tolland, Docket No. CV-19-6017308-S (October 27, 2020) (reprinted at 210 Conn. App. 10, A.3d). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein.[5] See *Citizens Against*

[5] We note one discrepancy in the court's memorandum of decision. In that decision, the court states that Rusconi's alternative construction of the guaranty "would only make him responsible for obligations that had already been satisfied at the time of the second amendment." Rusconi's alternative construction was that he had only guaranteed Cardio Express' obligation in the second amendment to pay *arrearages owed by Cardio Express at the time the second amendment was entered*. This minor discrepancy in the trial court's decision is not material to its analysis or conclusions. Moreover, the trial court properly construed and framed Rusconi's principal and alternative theories elsewhere in the decision.

Overhead Power Line Construction v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Squillante* v. *Capital Region Development Authority*, 208 Conn. App. 676, 682, 266 A.3d 940 (2021).

The judgment is affirmed.

APPENDIX

TOLLAND MEETINGHOUSE COMMONS, LLC *v.* CXF TOLLAND, LLC, ET AL.*

Superior Court, Judicial District of Tolland
File No. CV-19-6017308-S

Memorandum filed October 27, 2020

Proceedings

Memorandum of decision on plaintiff's motion for summary judgment and on defendant Peter A. Rusconi's motion for summary judgment. *Plaintiff's motion granted*; *defendant's motion denied.*

Kurosh L. Marjani and *Daniel B. Brill*, for the plaintiff.

Matthew T. Wax-Krell and *Denise Luccio*, for the defendants.

Opinion

FARLEY, J.

MEMORANDUM OF DECISION

The plaintiff, Tolland Meetinghouse Commons, LLC ("Tolland Meetinghouse"), has brought this action claiming breach of a commercial lease agreement by the defendant CXF Tolland, LLC, d/b/a Cardio Express ("Cardio Express"), and claiming breach of a guaranty agreement by the defendant Peter Rusconi. Tolland Meet-

* Affirmed. *Tolland Meetinghouse Commons, LLC* v. CXF *Tolland, LLC*, 210 Conn. App. 1, A.3d (2022).

ing house and Rusconi have both moved for summary judgment. Tolland Meetinghouse's motion is granted as to both Rusconi and Cardio Express. Rusconi's motion is denied.

FACTS AND PROCEEDINGS

On May 14, 2007, a predecessor in interest to Tolland Meetinghouse entered into a commercial lease agreement with Cardio Express demising premises that were part of a shopping center called Meetinghouse Commons, to be used as an exercise facility and health club. The lease provided for a term of eleven years and six months, commencing on May 1, 2007, and terminating on October 31, 2018. Also in May, 2007, Rusconi, at the time a member of CXF Tolland, LLC, signed an agreement (the "guaranty agreement") dated May 10, 2007, unconditionally guaranteeing the performance of Cardio Express' obligations under the lease for a term of five years, a period that expired on May 1, 2012. In August, 2010, following Tolland Meetinghouse's succession to the original landlord's interests, the lease was amended ("first amendment of lease") to recognize that Tolland Meetinghouse was now the landlord, and the lease was ratified and remained in full force and effect. Thereafter, on May 1, 2012, the guaranty agreement expired by its own terms.

A ledger statement submitted in support of Tolland Meetinghouse's motion for summary judgment indicates that Cardio Express was current on its account as of August 5, 2014, two years after the original guaranty by Rusconi expired. The account was in arrears, however, throughout the rest of 2014, all of 2015, and into 2016. In March, 2016, Tolland Meetinghouse commenced eviction proceedings by serving Cardio Express with a notice to quit. In April, 2016, Tolland Meetinghouse and Cardio Express entered into a "Second Amendment to Lease"

("second amendment"). The purpose of this amendment was to restructure an arrearage under the lease, acknowledged at the time by Cardio Express to be $122,275.71. The notice to quit was revoked and the pending eviction thus avoided by means of the second amendment.

Under the second amendment to the lease, Tolland Meetinghouse agreed to reduce the amount of the arrearage to $100,000 to be paid in eighteen monthly installments of $5555.55 through September, 2017, "conditioned on the Tenant's full compliance with the terms set forth herein." Upon any default in the payments or otherwise under the lease, the original amount of $122,275.71 would become due, subject to credit for any installment payments already made. Importantly, although Rusconi was not a party to the lease, he signed the second amendment as "guarantor" in addition to signing in his status as "member/manager" of Cardio Express. Paragraph 5 of the second amendment provides: "The Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect." Following the execution of the second amendment, Cardio Express made all eighteen of the $5555.55 payments called for in the agreement, although its account never achieved currency again. From June, 2018, through the end of the lease on October 31, 2018, Cardio Express made no payments under the lease as amended, and it held over in the premises until December 18, 2018. According to the ledger, at that time Cardio Express' account was in arrears $291,997.61. In this litigation, however, Tolland Meetinghouse has chosen not to pursue $7687.27 reflected in the ledger because it was not included in the $122,275.71 arrearage agreed upon between the parties in the second amendment. Tolland Meetinghouse has also credited a prorated share of rent for December, 2018, which is not reflected

in the ledger. Thus, the amount sought by Tolland Meetinghouse is an arrearage of $276,552.77, an amount which includes rent and other charges for the month of November, 2018, and part of December, 2018, after the lease expired, totaling $42,412.63.

The principal dispute between the parties concerns the nature and extent of Rusconi's obligations as guarantor. Rusconi contests liability and has moved for summary judgment himself, based principally upon the argument that the original guaranty expired in 2012, and the 2016 second amendment did not create any new obligations beyond those set forth in the original guaranty agreement. Cardio Express acknowledges its default under the lease. As referenced above, Tolland Meetinghouse has supported its motion for summary judgment with evidence of the amounts owed under the lease. Cardio Express and Rusconi submitted no evidence concerning the amounts due. While Cardio Express does not contest liability it does contest the amount of damages sought by Tolland Meetinghouse and, without submitting any evidence contesting damages, requests that the court conduct a hearing in damages "so it may cross-examine the plaintiff's representative regarding the amount of claimed damages, including late fees, charges, and credits."

DISCUSSION

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820–21, 116 A.3d 1195 (2015). "The party seeking summary judgment has the burden of showing

the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) Id., 821.

"To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . 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.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

"Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where

it can be sensibly applied to the subject matter of the contract." Id., 498. "In ascertaining intent, we consider not only the language used in the contract but also the circumstances surrounding the making of the contract, the motives of the parties and the purposes which they sought to accomplish." *Connecticut Co.* v. *Division 425*, 147 Conn. 608, 616, 164 A.2d 413 (1960); *Schlicher* v. *Schwartz*, 58 Conn. App. 80, 85, 752 A.2d 517 (2000). "Every provision of the contract must be given effect if it can reasonably be done, because parties ordinarily do not insert meaningless provisions in their agreements." *Connecticut Co.* v. *Division 425*, supra, 617.

"When there are multiple writings regarding the same transaction, the writings should be considered together to determine the intent of the parties." (Internal quotation marks omitted.) *Frantz* v. *Romaine*, 93 Conn. App. 385, 395, 889 A.2d 865, cert. denied, 277 Conn. 932, 896 A.2d 100 (2006). "[Guarantees] are . . . distinct and essentially different contracts; they are between different parties, they may be executed at different times and by separate instruments, and the nature of the promises and the liability of the promisors differ substantially . . . . The contract of the guarantor is his own separate undertaking in which the principal does not join." (Internal quotation marks omitted.) *1916 Post Road Associates, LLC* v. *Mrs. Green's of Fairfield, Inc.*, 191 Conn. App. 16, 23, 212 A.3d 744 (2019), quoting *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 675–76, 94 A.3d 622 (2014); see also *Wolthausen* v. *Trimpert*, 93 Conn. 260, 265, 105 A. 687 (1919) ("[a] guaranty is a collateral undertaking to pay a debt or perform a duty, in case of the failure of another person, who is in the first instance liable to such payment or performance" (internal quotation marks omitted)). When two agreements, however, are connected by reference and subject matter, both are to be considered in determining the real intent of the parties. See

Massaro v. *Savoy Estates Realty Co.*, 110 Conn. 452, 459, 148 A. 342 (1930). "Where . . . the signatories execute a contract which refers to another instrument in such a manner as to establish that they intended to make the terms and conditions of that other instrument a part of their understanding, the two may be interpreted together as the agreement of the parties." (Internal quotation marks omitted.) *Regency Savings Bank* v. *Westmark Partners*, 59 Conn. App. 160, 165, 756 A.2d 299 (2000), quoting *Batter Building Materials Co.* v. *Kirschner*, 142 Conn. 1, 7, 110 A.2d 464 (1954).

"Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, supra, 252 Conn. 498. When considering a claim of ambiguity, the court does "not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the contract language at issue. If we conclude that the language allows for more than one reasonable interpretation, the contract is ambiguous . . . . Conversely, if the contract is unambiguous, its interpretation and application is a question of law for the court, permitting the court to resolve a breach of contract claim on summary judgment if there is no genuine dispute of material fact." *Salce* v. *Wolczek*, 314 Conn. 675, 683, 104 A.3d 694 (2014).

Of principal concern to the parties is whether Rusconi's signature as "guarantor" on the second amendment, in addition to his separate signature on behalf of Cardio Express, along with the language of paragraph

5 of the second amendment, makes him personally liable for the amounts owed by Cardio Express under the lease. Paragraph 5 states that "[t]he Guarantor hereby reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007, which Guaranty shall remain in full force and effect." Tolland Meetinghouse argues in support of its motion for summary judgment that this language clearly and unambiguously renews or reactivates the terms of the guaranty agreement to cover Cardio Express' lease obligations as of April, 2016, when the second amendment became effective. Rusconi, on the other hand, argues in opposition to Tolland Meetinghouse's motion and in support of his own motion that paragraph 5 clearly and unambiguously fails to impose any obligation upon him beyond the original obligations undertaken in the 2007 guaranty agreement. Under the terms of the original guaranty agreement, Rusconi had no obligations after May 1, 2012.

Rusconi argues it was clear under the guaranty agreement that it expired after five years and that paragraph 5 of the second amendment could not "magically resuscitate an expired guaranty." Acknowledging that Rusconi did "reaffirm" his expired guaranty obligations, Rusconi maintains that he was "reaffirming a nullity." Because it had expired it "could not 'remain' in full force and effect." Perhaps recognizing that the law of contracts presumes contract language is not a "nullity," Rusconi offers the "alternative argument" that he merely guaranteed the arrearage amount referenced in the second amendment. The arrearage payments were made in full and thus, Rusconi argues, he would still owe nothing to Tolland Meetinghouse. Rusconi's alternative argument is actually an alternative construction of the contract. At oral argument he maintained that both constructions of the contract were "reasonable." Rusconi's

arguments, therefore, support a conclusion that the second amendment is ambiguous as it pertains to his personal obligations.[1]

Tolland Meetinghouse's argument that the meaning of paragraph 5 is clear and unambiguous is impaired by the choice of words in that paragraph. Specifically, the phrase "shall remain in full force and effect" would more clearly reflect the intent advocated by Tolland Meetinghouse if, for example, the agreement provided instead that the guaranty "shall be reinstated for the duration of the lease term." It is only by placing the language into the context of the circumstances surrounding the second amendment that the meaning of paragraph 5 becomes clear. "The intention of the parties to a contract is to be determined from the language used *interpreted in the light of the situation of the parties and the circumstances connected with the transaction*." (Emphasis added; internal quotation marks omitted.) *Barnard* v. *Barnard*, 214 Conn. 99, 110, 570 A.2d 690 (1990); *Connecticut Housing Finance Authority* v. *John Fitch Court Associates Ltd. Partnership*, 49 Conn. App. 142, 147, 713 A.2d 900, cert. denied, 247 Conn. 908, 719 A.2d 901 (1998). "The circumstances to be considered are those known to the parties when the [contract] was made." *Hatcho Corp.* v. *Della Pietra*, 195 Conn. 18, 20, 485 A.2d 1285 (1985). The surrounding circumstances in the present case are undisputed and, under the undisputed circumstances, there is only one construction of paragraph 5 that gives it any meaning.[2]

[1] Rusconi would maintain that his two alternative constructions are the only reasonable constructions, and he is entitled to summary judgment because he would owe nothing under either construction. As discussed [subsequently], however, the court disagrees that either of Rusconi's constructions of paragraph 5 are reasonable and concludes that Tolland Meetinghouse's construction is the only reasonable construction when the undisputed circumstances surrounding the making of the agreement are accounted for.

[2] At oral argument, counsel for the defendants was unable to identify any evidence in addition to that in the record on summary judgment concerning the surrounding circumstances, explaining that discovery had not been done.

The arrearages that accumulated prior to the execution of the second amendment began accumulating after the original guaranty expired. They do not constitute obligations that were ever within the scope of the original guaranty agreement. Thus, by "reaffirming" his obligations under that agreement, Rusconi was not acknowledging a preexisting responsibility for the arrearages. Rusconi's argument that paragraph 5 may be read consistently with his position that he undertook no new obligations under paragraph 5, by applying it only to these prior arrearages, is not reasonable because it is inconsistent with the undisputed surrounding circumstances. Instead, the only reasonable construction of the portion of paragraph 5 where Rusconi "reaffirms his obligations in respect to the terms of the Guaranty dated May 10, 2007," is that the substantive terms of that agreement are incorporated into whatever is being agreed to in paragraph 5. Paragraph 5 subsequently provides that the May 10, 2007 guaranty, with those terms, "shall remain in full force and effect." In order for this phrase to have any practical meaning, it must refer to obligations under the Cardio Express lease as to which Rusconi had no responsibility under the original guaranty agreement, but which are now made subject to the terms of that guaranty.

Rusconi leans heavily on the provisions of paragraph 2 of the guaranty agreement that limit his guarantee obligations to the initial five years of the lease. Paragraph 2 of the guaranty agreement states that, "[e]ven if the Lease . . . is modified in any way, the obligations

It appears from the defendants' arguments on summary judgment they believed discovery was unnecessary. If the defendants had believed discovery was necessary to complete the picture as to the surrounding circumstances, it was incumbent upon them to seek an opportunity to pursue discovery prior to an adjudication of the summary judgment motions, in accordance with Practice Book §§ 17-45 and 17-47. The factual record, therefore, is complete for purposes of construing the contract on summary judgment.

hereunder of the Guarantor shall terminate at the expiration of the initial five (5) years of the initial Lease term." It further provides: "In the event that any agreement or stipulation between Landlord and Tenant shall extend the time of performance . . . Guarantor shall continue to be liable upon this Guaranty, except that the obligations hereunder of Guarantor shall terminate at the expiration of the initial five years of the Lease term." Paragraph 11 (j) repeats: "The term of this Guaranty Agreement shall be only for the initial first five years of the initial Lease term." Rusconi argues that any incorporation of the terms of the guaranty agreement into the second amendment must also incorporate these provisions and they clearly limit the term of the guaranty agreement to the initial five years of the lease. Any "reaffirmation" of the guaranty agreement also reaffirms this term limit, according to Rusconi.

These provisions of the original guaranty agreement clearly prevent modifications to the lease and any other agreements reached between Tolland Meetinghouse and Cardio Express in the second amendment from reinstating or otherwise impacting Rusconi's obligations under the guaranty agreement. They do not, however, prevent Rusconi himself from agreeing to modify, renew or reactivate his obligations as guarantor. The question is not whether the lease amendments revived his obligations as a guarantor, but whether by signing the second amendment as "guarantor" and agreeing to the provisions of paragraph 5, Rusconi agreed to revive his obligations as guarantor. Notably, the guaranty agreement does not specify any particular mechanism or other requirements necessary to form an amendment or modification of that agreement. Consequently, notwithstanding the term limitations contained in the original guaranty agreement, the question remains whether paragraph 5 of the second amendment clearly and unambiguously

restored Rusconi to the position of guarantor of Cardio Express' obligations under the lease as amended.

The terms of the original guaranty agreement provide that Rusconi "unconditionally and absolutely Guarantees to Landlord the prompt payment, when due, of the rents and any and all other charges payable under the Lease . . . . Guarantor unconditionally and absolutely covenants to Landlord that, if Tenant shall default at any time in the Covenants to pay rent or any other charge stipulated in the Lease . . . then Guarantor will . . . pay the rent of (sic) other charges or arrears thereof that may remain due . . . and also all damages stipulated in the Lease. Guarantor shall pay to Landlord, on demand, all expenses (including reasonable expenses for attorney's fees and reasonable charges of every kind) incidental to, or relating to, the enforcement of this Guaranty Agreement." These terms apply to the obligations undertaken by Rusconi in paragraph 5 of the second amendment and, according to that paragraph agreed to by Rusconi, they "remain in full force and effect."

Tolland Meetinghouse's position that the terms of the guaranty agreement apply to the outstanding amounts due under the lease as amended in 2016 is not only reasonable, it is the only construction of the agreement stated in paragraph 5 that makes sense under the circumstances. The second amendment was agreed to in the context of eviction proceedings that Tolland Meetinghouse had initiated by serving a notice to quit, as referenced in paragraph 7 of the second amendment, and with the purpose of "restructuring the amounts due under the Lease," as stated in the recitals. The restructuring involved the forgiveness of $22,275.71 in past due rent and eighteen monthly installments to pay off the $100,000 balance, conditioned upon the timely making of those payments, the timely payment of future rent and the performance of all other lease obligations.

Reading paragraph 5 of the second amendment in connection with the terms of the guaranty agreement, the only meaningful construction of paragraph 5 is that, in consideration of the concessions Tolland Meetinghouse made to Cardio Express, Rusconi agreed to guaranty the obligations of Cardio Express under the lease as amended. Granted that the original guaranty agreement had expired, paragraph 5 can only be understood as a new guaranty agreement on the same terms and conditions as were agreed under the original guaranty agreement except that the original five year limit, which was no longer congruous, was superseded by the new promise to guaranty performance.

Rusconi's argument revolves around the use of the word "remain" in paragraph 5. Focusing on the provision that the "Guaranty shall remain in full force and effect," he argues, "But it was no longer in full force and effect at that time, and could not 'remain' in full force and effect, as it had previously expired." While semantically sound, this analysis leads Rusconi himself to the conclusion that paragraph 5 is merely the reaffirmation of a "nullity" because the terms of the guaranty agreement remained in effect only as to obligations that no longer existed. At the time the second amendment was agreed to, Cardio Express' obligations were all future obligations under the lease as amended. Paragraph 5 has no purpose unless it is construed to mean that the terms of the guaranty agreement remain in effect as to those future obligations.

"Parties do not ordinarily insert meaningless provisions in their agreements and, therefore, if it is reasonably possible to do so, every provision must be given effect. . . . We are reluctant to conclude that a contractual provision constitutes a meaningless gesture by the parties." (Citations omitted; internal quotations omitted.) *Dainty Rubbish Service, Inc.* v. *Beacon Hill*

Assn., Inc., 32 Conn. App. 530, 534, 630 A.2d 115 (1993). Rusconi's alternative constructions of paragraph 5 violate this "elementary [principle]." *Hatcho Corp.* v. *Della Pietra*, supra, 195 Conn. 20. Rusconi himself characterizes paragraph five as a "nullity" under his principal construction, and his alternative construction would only make him responsible for obligations that had already been satisfied at the time of the second amendment. The only reasonable construction of paragraph 5 that gives that provision any practical meaning is that Rusconi agreed to guarantee Cardio Express' remaining obligations under the lease at the time the second amendment was executed. To the extent that this agreement conflicts with the five year term limit provisions in the original guaranty agreement, it must be understood that paragraph 5 modifies and supersedes those provisions. "[T]he rules of construction . . . dictate giving effect to all the provisions of a contract, construing it as a whole and reconciling its clauses. . . . Where two clauses which are apparently inconsistent may be reconciled by a reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions." (Citations omitted.) *Dugan* v. *Grzybowski*, 165 Conn. 173, 179, 332 A.2d 97 (1973); see *Dainty Rubbish Service, Inc.* v. *Beacon Hill Assn., Inc.*, supra, 32 Conn. App. 534. The court concludes that Rusconi clearly and unambiguously agreed to guarantee the obligations of Cardio Express under the lease as amended in April, 2016.

Cardio Express does not dispute liability, but does dispute damages. It must be presumed that Rusconi disputes damages as well. Tolland Meetinghouse has documented its damages with an affidavit and support ing documents whose admissibility has not been questioned by the defen-

dants. Neither Cardio Express nor Rusconi, however, has submitted an affidavit, documents or testimony establishing an evidentiary basis for their opposition to Tolland Meetinghouse's damages claim. Once a moving party has met its burden to demonstrate that no genuine issue of fact exists, "the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 228. The materials submitted by Tolland Meetinghouse demonstrate clearly what the damages are, and the defendants have put forward no evidence supporting the existence of a genuine dispute over them. If the defendants wished to "cross-examine the plaintiff's representative" on the plaintiff's evidence before the issue of damages was adjudicated, they were obliged to seek the deposition of that representative, which they did not do.[3] The record as it stands on summary judgment supports not only the construction of the contract as a matter of law, it also supports the determination of damages due to the absence of any factual dispute.

Although the defendants did not create an evidentiary record upon which to dispute the Tolland Meetinghouse's damages claims, they did reference certain case law that bears upon the issue, albeit in the context of Rusconi's arguments opposing liability. In *1916 Post Road Associates, LLC* v. *Mrs. Green's of Fairfield, Inc.*, supra, 191 Conn. App. 25, the court held that a lease guarantor's obligations did not extend beyond the end of the lease term because the guarantee was "limited to the payment and performance of the tenant's obligations under the lease 'effective as of the date hereof.' " See also *Village Linc Corp.* v. *Children's Store, Inc.*, 31 Conn. App. 652, 658, 626 A.2d 813 (1993). The guaranty signed by Rusconi is more explicit in this respect by expressly disclaiming any responsibility on the part of

[3] See footnote 2 of this opinion.np

Rusconi in the event the tenant holds over. Retaining this limitation is not inconsistent with paragraph 5 of the second amendment and, therefore, it remains enforceable. Consequently, the amount of damages sought from Rusconi must be reduced by the amounts attributable to the holdover period. The court has calculated that amount as $42,412.63. Applying that reduction to the total amount of damages documented by Tolland Meetinghouse ($276,552.77) yields recoverable damages in the amount of $234,140.14 on the claim against Rusconi.

The lease and the guaranty agreement further obligate Cardio Express and Rusconi respectively to pay expenses, including attorney's fees, incurred in the enforcement of the guaranty agreement. Tolland Meetinghouse as documented those expenses in the amount of $20,797.26, with no dispute raised by Cardio Express or Rusconi, and therefore this amount will be added to the contract damages.

CONCLUSION

Cardio Express has admitted liability, and there is no genuine issue of material fact concerning Rusconi's obligation to guarantee the performance of Cardio Express under the lease pursuant to the second amendment. Further, there is no genuine issue of material fact concerning the amount of damages Tolland Meetinghouse may recover. Rusconi's motion for summary judgment is denied. Tolland Meetinghouse's motion for summary judgment is granted and judgment shall enter in favor of Tolland Meetinghouse against Cardio Express in the amount of $297,350.03 and against Rusconi in the amount of $254,937.40. So ordered.

JACQUELINE EPRIGHT *v.* LIBERTY MUTUAL INSURANCE COMPANY
(AC 43826)

Alvord, Moll and Sheldon, Js.

Syllabus

The plaintiff appealed to this court after the trial court granted the defendant's motion to disqualify an expert witness. *Held* that the trial court's order was not a final judgment for purposes of appeal because it did not satisfy either prong of the test set forth in *State* v. *Curcio* (191 Conn. 27).

Argued February 8—officially released March 1, 2022

Procedural History

Action to recover underinsured motorist benefits, brought to the Superior Court in the judicial district of Middlesex, where the court, *Frechette*, *J.*, granted the defendant's motion to disqualify an expert witness, and the plaintiff appealed to this court. *Appeal dismissed.*

Mario Cerame, with whom, on the brief, was *Timothy Brignole*, for the appellant (plaintiff).

Thomas P. Mullaney III, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Jacqueline Epright, appeals from the trial court's granting of the motion to disqualify James W. Depuy as an expert witness, filed by the defendant, Liberty Mutual Insurance Company, as a motion for order to show cause. Because such an interlocutory order does not satisfy either prong of the test set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), and, therefore, is not a final judgment for purposes of appeal, the plaintiff's appeal is dismissed.

The appeal is dismissed.

RICHARD QUINT *v.* COMMISSIONER OF CORRECTION (AC 44162)

Prescott, Suarez and Bishop, Js.

Syllabus

The petitioner, who had been convicted previously of operating a motor vehicle while under the influence of intoxicating liquor or drugs, failure to register as a sex offender, and possession of narcotics, sought a writ of habeas corpus, claiming that he received ineffective assistance from his criminal trial counsel. 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's trial counsel did not render ineffective assistance by failing to meaningfully explain the state's plea offer: the habeas court explicitly credited the testimony of counsel that he had sufficiently apprised the petitioner of the contours of the state's plea offer, as he had advised the petitioner about the strength of the state's case, the charges and the elements of each offense that the state would have to prove to secure a conviction at trial, the petitioner's overall maximum exposure in the case, his chances of acquittal at trial, that the plea offer was "phenomenal," and that it was not to the petitioner's advantage to take his case to trial, and counsel discussed potential defenses with the petitioner; moreover, the petitioner made no claim that the habeas court's factual findings were clearly erroneous, and it was the function of that court to weigh the evidence and determine credibility.

2. The habeas court properly determined that the petitioner's trial counsel did not render ineffective assistance by failing to ensure that the petitioner would receive presentence jail credit for the time he had served between his sentencing in a separate proceeding at the Superior Court in the judicial district of New Haven at Meriden and his sentencing in the Superior Court in the judicial district of Fairfield for this case: the petitioner failed to establish a reasonable probability that, if not for his counsel's alleged deficient performance, he would not have pleaded guilty and would have insisted on going to trial, as he testified twice at the habeas trial that he would have pleaded guilty or that he likely would have pleaded guilty regardless of his trial counsel's failure to ensure that he would receive presentence jail credit, and, therefore, he failed to demonstrate that he suffered prejudice as a result of any alleged deficiency in his trial counsel's performance.

Argued November 16, 2021—officially released March 1, 2022

Procedural History

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

Justine F. Miller, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Cornelius Kelly*, former assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. In this certified appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus, the petitioner, Richard Quint, claims that the court improperly concluded that his trial counsel rendered effective assistance. On appeal, the petitioner asserts that the record establishes that his counsel failed (1) to meaningfully communicate the state's plea offer and (2) to ensure that the petitioner would receive presentence jail credit for the time that he was incarcerated between his March 17, 2017 sentencing in the Superior Court in the judicial district of New Haven at Meriden (Meriden) and his April 10, 2017 sentencing in the Superior Court in the judicial district of Fairfield (Bridgeport).[1] We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. On February 10, 2017, in the Superior

[1] Upon our review of the briefs, it is unclear whether the petitioner also asserts a third claim concerning counsel's alleged failure to ensure that the petitioner would receive presentence jail credit, independent of his decision of whether to plead guilty. Nevertheless, even if this claim is being made, this claim is inadequately briefed for our review. See *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 578–79, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

Court in Bridgeport, the petitioner pleaded guilty pursuant to the *Alford* doctrine[2] to multiple criminal charges, including (1) one count of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a, (2) one count of failure to register as a sex offender in violation of General Statutes § 54-252, and (3) two counts of possion of narcotics in violation of General Statutes § 21a-279 (a) (1). During the plea canvass, the court questioned the petitioner and his counsel, Attorney Michael Hillis, as to the knowing, voluntary, and intelligent nature of the petitioner's pleas.[3] The court informed the peti-

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . A defendant often pleads guilty under the *Alford* doctrine to avoid the imposition of a possibly more serious punishment after trial." (Internal quotation marks omitted.) *State* v. *Baldwin*, 183 Conn. App. 167, 169 n.1, 191 A.3d 1096, cert. denied, 330 Conn. 922, 194 A.3d 288 (2018).

[3] During the court's plea canvass, the following colloquy took place:

"The Court: Have you discussed with your attorney what you're pleading guilty to today?

"[The Petitioner]: Yes.

"The Court: Did he go over the elements of each crime charged which the state would have to prove you guilty of beyond a reasonable doubt?

"[The Petitioner]: Yes

"The Court: Did he explain the evidence that would prove each element beyond a reasonable doubt?

"[The Petitioner]: Yes.

"The Court: Did he explain to you the maximum penalty for each charge?

"[The Petitioner]: Yes.

* * *

"The Court: Are you satisfied with how he represented you?

"[The Petitioner]: Yes.

"The Court: Counsel, did you go over all of this with your client?

"[Attorney Hillis]: Yes, Your Honor.

* * *

"The Court: The court finds the pleas are knowingly and voluntarily made with assistance of effective and competent counsel. . . ."

tioner that if he was convicted after a trial, he faced a possible maximum sentence of seven and one-half years of imprisonment, followed by five years of probation and potential fines.

The court found that the petitioner's pleas were knowing and voluntary, accepted the pleas, and scheduled his sentencing for March 3, 2017. The sentencing date was postponed to March 17, 2017, to allow for a hearing concerning the state's seizure of the petitioner's money as a result of the criminal charges.

On March 3, 2017, the petitioner entered a plea under the *Alford* doctrine in the Superior Court in Meriden on the charge of carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[4] The court imposed a total effective sentence of one year to serve, and the court stayed the execution of the sentence until March 17, 2017—the scheduled sentencing date for the petitioner's matters in the Superior Court in Bridgeport. On March 17, 2017, the Superior Court in Meriden lifted the stay, imposing the mandatory minimum sentence of one year to serve; however, the petitioner was not sentenced for the matters in the Superior Court in Bridgeport on this date as originally scheduled because Hillis had requested that the sentencing be continued until April 10, 2017.[5]

The sentencing hearing in the Superior Court in Bridgeport took place on April 10, 2017. At the hearing, the state and the petitioner agreed to split the seized money, each taking $434. With respect to the charge of failure to register as a sex offender, the court imposed a sentence of five years of incarceration, execution suspended after one year and three years of probation.

[4] The petitioner was not represented by Hillis in the Meriden matter.

[5] At the habeas trial, Hillis explained that he was either sick or on another trial as the reason for requesting the change in the sentencing date in the Superior Court in Bridgeport.

With respect to each of the two charges of possession of narcotics, the court imposed a concurrent sentence of one year of incarceration. With respect to the charge of operating a vehicle while under the influence of intoxicating liquor or drugs, the court imposed a concurrent sentence of six months of incarceration. The total effective sentence imposed was five years of incarceration, execution suspended after one year, with three years of probation. Hillis requested that the court indicate on the mittimus that the petitioner should be entitled to jail credit on his sentences dating back to December 22, 2016, the date he was incarcerated for these charges.

Immediately as the court began to announce the sentence, the petitioner indicated for the first time that he thought that the offense of operating under the influence had been nolled at the plea proceeding on February 10. The court and Hillis indicated that the petitioner was incorrect as that charge was not nolled. Hillis twice asked the petitioner whether the petitioner wanted him to ask the court to vacate the plea and the sentence, to which the petitioner declined.

On May 2, 2017, the petitioner filed a petition for a writ of habeas corpus in the Superior Court in the judicial district of Tolland. On December 14, 2018, the petitioner filed an amended petition asserting claims related to the Bridgeport convictions, that Hillis (1) failed to meaningfully explain the plea offer to the petitioner, (2) failed to adequately advise the petitioner of the charges encompassed in the plea offer, (3) failed to ensure that the petitioner understood the consequences of the guilty plea, (4) failed to seek a sentencing date that would minimize or eliminate the petitioner's "dead time,"[6] (5) failed to

[6] "[D]ead time is prison parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time on another sentence." (Internal quotation marks omitted.) *Bagalloo* v. *Commissioner of Correction*, 195 Conn. App. 528, 531 n.2, 225 A.3d 1226, cert. denied, 335 Conn. 905, 226 A.3d 707 (2020).

adequately request jail credit at sentencing, and (6) improperly pressured the petitioner to accept the plea offer. After an evidentiary hearing, the habeas court concluded that the petitioner failed to demonstrate that his trial counsel's performance in the underlying criminal proceedings constituted deficient performance or that he suffered prejudice and denied the petition for a writ of habeas corpus. The petitioner filed a petition for certification to appeal from the habeas court's ruling, which the court granted on February 28, 2020. This appeal followed.

In this certified appeal, the petitioner claims that the habeas court erred in concluding that he had failed to demonstrate that his trial counsel rendered ineffective assistance. We are not persuaded.

We begin by setting forth the relevant standard of review and decisional law that guide our analysis of the petitioner's claims. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. *Strickland* v. *Washington*, [466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the *Strickland* test, when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Id.] 689. Furthermore, the right to counsel is not the right to perfect counsel." (Internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, 142 Conn. App. 267, 271–72, 67 A.3d 293 (2013).

I

The petitioner first claims that his trial counsel rendered ineffective assistance by failing to meaningfully explain the state's plea offer. Specifically, the petitioner claims that his trial counsel should have advised him of the strength of the state's evidence, the elements of the offenses, potential defenses, the chances of acquittal, and the petitioner's total effective exposure had he proceeded to trial. The respondent, the Commissioner of Correction, contends that the petitioner failed to meet his burden of proving that he was denied the effective assistance of counsel and argues that the petitioner's challenge to the habeas court's ruling is based on the erroneous premise that the court credited the petitioner's own testimony in support of each of his claims. The record supports the respondent's argument.

"To determine whether trial counsel's performance fell below an objective standard of reasonableness and whether the petitioner was therefore prejudiced, we

must consider the nature of the underlying claim. . . . Although there had been some debate about whether the constitutional right to the effective assistance of counsel applies to the rejection of a plea offer by the government, it is now well settled that a criminal defendant has the right to the effective assistance of counsel in conjunction with the acceptance or rejection of a plea offer." (Citation omitted; internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, supra, 142 Conn. App. 272.

"[C]ounsel must communicate to the defendant the terms of the plea offer . . . and should usually inform the defendant of the strengths and weaknesses of the case against him . . . . Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because [r]epresentation is an art . . . and [t]here are countless ways to provide effective assistance in any given case . . . . Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial . . . ." (Internal quotation marks omitted.) Id., 274.

Both the petitioner and Hillis testified at the habeas trial, each conflicting with the other's testimony. The petitioner testified that Hillis did not discuss the case with him with particularity. Specifically, he testified that Hillis only "somewhat" discussed the charges and elements of each offense with him, failed to advise him of potential defenses, failed to discuss the chances of acquittal at trial, and failed to advise him of his maximum exposure should he elect to go to trial. To the contrary, Hillis testified that he comprehensively discussed the case with the petitioner during telephone calls and in person, which included discussing the charges and elements of each offense, discovery materials, and the strengths of the defenses to the state's case

against the petitioner. In addition, he testified that he had advised the petitioner that it was not advisable to take the case to trial due to the strength of the evidence involved. He testified further that the petitioner had expressed an understanding of the law and had significant prior experience with the criminal justice system.

Fatal to the petitioner's claim is the fact that the court explicitly credited Hillis' testimony—that he sufficiently apprised the petitioner of the contours of the state's plea offer. Specifically, the court found that Hillis had (1) advised the petitioner about the strength of the state's case, (2) advised the petitioner about the charges and the elements of each offense that the state would have to prove to secure a conviction at trial, (3) discussed the potential defenses with the petitioner, (4) advised the petitioner of his chances of acquittal at trial by advising him that the plea offer was phenomenal and that it was not to his advantage to take his case to trial, and (5) advised the petitioner as to his overall maximum exposure in the Bridgeport disposition, and, in his testimony at the habeas trial, the petitioner demonstrated his understanding of the sentence under the plea agreement in contrast to the fifteen and one-half years maximum exposure for the offenses charged. The court also credited Hillis' testimony that the petitioner "was a good participant in discussions about his case, expressed an understanding of the law and had significant experience with the criminal justice system."

The petitioner makes no claim that the court's factual findings were clearly erroneous. It is the function of the habeas court to weigh the evidence and determine credibility. See *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014) ("[W]e must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The 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." (Internal quotation marks omitted.)). Because the habeas court found credible Hillis' testimony that he meaningfully explained to the petitioner the contours of the state's plea offer, we cannot conclude that the petitioner's counsel rendered deficient performance.[7]

II

Next, the petitioner claims that his trial counsel's failure to ensure that he would receive presentence jail credit for the time he had served between the March 17, 2017 sentencing in the Superior Court in Meriden and the April 10, 2017 sentencing in the Superior Court in Bridgeport was deficient and prejudicial. Specifically, the petitioner argues that Hillis "made no effort to persuade the Meriden public defender to postpone the March 17 sentencing and reschedule it for the April 10 . . . Bridgeport sentenc[ing], or in the alternative, at the April 10 sentencing to implore [the trial judge] to make the start date of the sentence there retroactive to the March 17 date of the commencement of the Meriden sentence" in order to ensure that the petitioner did not serve "dead time." The respondent argues that "the petitioner expressly acknowledged . . . that any delay in his release date due to the Bridgeport sentencing continuance would not have mattered and that he nevertheless still would have accepted the plea offer and entered his *Alford* pleas."

In its analysis, a reviewing court may look to the performance prong or the prejudice prong first. We rely on the prejudice prong.[8] "A petitioner's claim will

[7] In light of our determination that the petitioner failed to establish that Hillis' performance was deficient, we need not address the prejudice prong. See *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 531, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

[8] In the court's memorandum of decision, it noted that "[t]he petitioner testified that he probably still would have accepted the plea deal if his attorneys had not coordinated the sentences to be imposed on the same

succeed only if *both* prongs are satisfied. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unworkable. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on *either* the performance prong or the prejudice prong, whichever is easier." (Emphasis added; internal quotation marks omitted.) *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 531, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

"For effectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, [474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)] which modified *Strickland*'s prejudice prong. . . . To satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . Reasonable probability does not require the petitioner to show that counsel's deficient conduct more likely than not altered the outcome in the case, but he must establish a probability sufficient to undermine confidence in the outcome. . . . A reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Merle S.* v. *Commissioner of Correction*, 167 Conn. App. 585, 599, 143 A.3d 1183 (2016).

The petitioner bore the burden of presenting sufficient evidence to establish that it is reasonably probable that, if not for his counsel's alleged deficient performance, he would not have pleaded guilty but would have insisted on going to trial. See id. The plaintiff failed

date. . . . [H]e testified that . . . Hillis explaining the implications of him serving any dead time would not have had any impact on his entering the pleas. Additionally, the petitioner also testified as to his overall satisfaction with the total effective sentence imposed [concerning the Bridgeport convictions]." On that basis, we focus solely on the prejudice prong.

to meet this burden. At the habeas trial, the petitioner was asked the following question: "[H]ad Attorney Hillis explained to you that you'd be serving dead time because of the way you were sentenced, would that have impacted your decision to plead out in this case?" The petitioner testified that "[i]t wouldn't have had any impact on it at all . . . ." Additionally, the petitioner was asked: "And had you known that you would have to do an extra month in jail, would you have accepted the deal?" The petitioner testified that he "probably would have still accepted the plea deal . . . ." In its memorandum of decision, the habeas court expressly found that the petitioner would not have withdrawn his pleas even if he had been correctly advised of the consequences of the dead time. It therefore found that "[t]he petitioner's testimony demonstrate[d] that he suffered no prejudice." The petitioner has not established a probability sufficient to undermine confidence in the outcome, having twice testified at the habeas trial that he would have pleaded guilty or that he likely would have pleaded guilty regardless of Hillis' alleged failure to ensure that he would receive presentence jail credit. Because the petitioner cannot demonstrate that he has suffered prejudice as a result of any alleged deficiency in Hillis' performance, we conclude that the petitioner's claim of ineffective assistance of counsel fails. See *Merle S.* v. *Commissioner of Correction*, supra, 167 Conn. App. 599.

The judgment is affirmed.

In this opinion the other judges concurred.