JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ROGER ESSAGHOF ET AL.

(AC 45109)

Elgo, Suarez and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on the defendants' residential property in Weston after they had defaulted on a loan secured by a mortgage deed. The defendants had executed a promissory note in favor of W Co., secured by the mortgage deed, and, subsequently, the plaintiff acquired W Co. and its assets, including the defendants' loan. Following a bench trial in 2015, the trial court rendered a judgment of strict foreclosure in favor of the plaintiff and the defendants appealed to this court, which affirmed the judgment of the trial court. The defendants, on the granting of certification, appealed to our Supreme Court, which reversed in part the judgment of this court only as to the issue of the reimbursement of certain taxes and insurance premiums and ordered the case remanded to this court, with direction to remand the case to the trial court for the purpose of setting a new law day. On remand, the trial court denied the defendants' motion to dismiss, which was predicated on two alleged deficiencies with the statutory (§ 8-265ee) Emergency Mortgage Assistance Program (EMAP) notice provided by the plaintiff in 2009, a copy of which was introduced into evidence at the trial in 2015. The court then set new law days in accordance with the remand order from the Supreme Court, and the defendants appealed to this court, which held that the trial court properly denied the defendants' motion to dismiss that claimed that the court lacked subject matter jurisdiction over the foreclosure proceeding due to the plaintiff's noncompliance with the EMAP notice requirements set forth in § 8-265ee. The defendants, on the granting of certification, again appealed to the Supreme Court, which vacated the judgment of this court and remanded the case to this court with direction to reconsider its decision affirming the trial court's denial of the defendants' motion to dismiss in light of its decision in *Bank of New York Mellon* v. *Tope* (345 Conn. 662), in which the court concluded that, when the question of whether the plaintiff has standing to bring a foreclosure action turns on questions of fact, namely, whether the plaintiff has been vested with the right to enforce the note, the trial court should provide an opportunity to present evidence and to cross-examine adverse witnesses. *Held*:

1. The trial court properly denied the defendants' motion to dismiss, as the trial court properly declined to reach the merits of a claim that the defendants previously had asserted before the trial court in 2015, but abandoned in their appeal from the 2015 judgment: the record indicated

that the issue of whether the plaintiff complied with the EMAP notice requirements was disputed by the parties during the 2015 trial and the court necessarily rejected the claimed deficiency in the notice when it rendered a judgment of strict foreclosure, and, when the defendants did not raise any claim of error with respect to the issue of the plaintiff's compliance with the EMAP notice requirements in their appeal from the 2015 judgment, they abandoned their claim; moreover, the procedural posture of the present case was distinguished from that of *Tope* because the defendants asserted and litigated their claim regarding EMAP compliance during the trial in 2015, the parties were permitted to present evidence on the question of whether the plaintiff provided proper notice to the defendants and the defendants were able to cross-examine a witness who testified as to the EMAP notice issue, and, accordingly, the concerns that underpinned our Supreme Court's decision in *Tope* were not present; furthermore, although the Supreme Court explained in *KeyBank, N.A.* v. *Yazar* (347 Conn. 381) that the EMAP notice requirement is a condition precedent to the commencement of a foreclosure action, it also expressly held that the notice requirement is not jurisdictional in nature, and, thus, the claim raised by the defendants did not implicate the subject matter jurisdiction of the trial court.

2. The defendants' claim that the plaintiff violated the EMAP notice requirement set forth in § 8-265ee because the notice was sent by W Co., the plaintiff's predecessor mortgagee, and not the plaintiff, was unavailing; the trial court found, and the evidence in the record substantiated, that W Co. provided proper EMAP notice to the defendants prior to the initiation of this foreclosure action; moreover, § 8-265ee requires mortgagees to provide an EMAP notice upon initiation of any foreclosure action, and whether EMAP notice was proper did not turn on the particular entity that sent the EMAP notice, as there was no substantive difference for purposes of the EMAP statutory scheme between a predecessor mortgagee and the plaintiff.

Argued April 25—officially released September 5, 2023

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 Stamford-Norwalk, where the defendant JPMorgan Chase Bank, N.A., was defaulted for failure to appear; thereafter, the case was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment of strict foreclosure, from which the named defendant et al. appealed to this court, *Lavine*, *Mullins* and *Mihalakos*,

Js.; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, granted the plaintiff's motion for reimbursement of property taxes and insurance premiums, and the named defendant et al. filed an amended appeal; thereafter, this court affirmed the judgment of the trial court, and the named defendant et al., on the granting of certification, appealed to the Supreme Court, which reversed in part the judgment of this court; subsequently, the court, *Spader*, *J.*, granted the plaintiff's motion to reset law days and denied the motion to dismiss filed by the named defendant et al., and the named defendant et al. appealed to this court, *Elgo*, *Suarez* and *Bear*, *Js.*, which affirmed the judgment of the trial court, and the named defendant et al., on the granting of certification, appealed to the Supreme Court, which granted the petition, vacated the judgment of this court, and remanded the case to this court for reconsideration. *Affirmed.*

Ridgely Whitmore Brown, for the appellants (named defendant et al.).

Brian D. Rich, for the appellee (plaintiff).

Opinion

ELGO, J. This foreclosure action returns to us on remand from the Supreme Court. In our prior opinion, this court rejected the various claims raised by the defendants, Roger Essaghof and Katherine Marr-Essaghof,[1] who had appealed from the judgment of the

[1] The plaintiff, JPMorgan Chase Bank, National Association, acquired Washington Mutual Bank, F.A., the originator of the note and mortgage from which this foreclosure action arises. Washington Mutual Bank, F.A., also held a junior lien with respect to the mortgage that was foreclosed in this action. As a result, JPMorgan Chase Bank, N.A., also was named as a defendant in this action. Because JPMorgan Chase Bank, N.A., was defaulted for failure to appear as a defendant and is not a party to this appeal in that capacity, we refer to Roger Essaghof and Katherine Marr-Essaghof collectively as the defendants.

trial court granting the motion of the plaintiff, JPMorgan Chase Bank, National Association, to reset the law days in accordance with a previous remand order of our Supreme Court. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 217 Conn. App. 93, 95, 287 A.3d 1124 (2022), vacated, 346 Conn. 909, 288 A.3d 1031 (2023). The defendants thereafter filed a petition for certification with the Supreme Court, in which they challenged only this court's conclusion that the trial court properly had denied their motion to dismiss predicated on the plaintiff's alleged noncompliance with the notice requirement of the Emergency Mortgage Assistance Program (EMAP) set forth in General Statutes § 8-265ee (a).[2]

By order dated February 16, 2023, our Supreme Court granted that petition, vacated the judgment of this court, and remanded the case to us "with direction to reconsider in light of [its] decision in *Bank of New York Mellon* v. *Tope*, 345 Conn. 662, 286 A.3d 891 (2022)."[3] See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 346 Conn. 909, 288 A.3d 1031 (2023). This court then ordered the parties to file supplemental briefs on the impact of that decision on the present appeal and heard argument from the parties on April 25, 2023. On August 1, 2023, our Supreme Court released its decision in *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 297 A.3d 968 (2023), which concerns the proper statutory construction of the EMAP notice requirement codified in § 8-265ee (a). Accordingly, this court ordered the parties to file supplemental briefs on the impact of *KeyBank*,

[2] Although § 8-265ee has been amended since the events underlying this appeal; see, e.g., Public Acts 2009, No. 09-219, § 29; 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.

[3] The Supreme Court's decision in *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 662, was officially released on December 20, 2022—the same day that our decision in *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 93, was released.

N.A. v. *Yazar*, supra, 381, on this appeal. Having considered the defendants' claim in light of the foregoing, we affirm the judgment of the trial court.

The facts relevant to this appeal are not in dispute and were set forth by this court in *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 93. "In May, 2006, the defendants executed an adjustable rate promissory note in favor of Washington Mutual Bank, F.A. (Washington Mutual) in the amount of $1.92 million.[4] The loan was secured by a mortgage deed executed by the defendants on residential property in Weston. On June 24, 2008, the defendants executed a loan modification; they defaulted on the loan shortly thereafter. In September, 2008, the plaintiff acquired Washington Mutual and its assets, including the defendants' loan.

"The plaintiff commenced this foreclosure action in March, 2009. Following a bench trial in 2015, the court rendered a judgment of strict foreclosure in favor of the plaintiff. The court found that the total debt was more than $3.2 million, while the fair market value of the property was $1.65 million, and set the law days. From that judgment, the defendants appealed to this court.

"While that appeal was pending, the plaintiff filed a motion for equitable relief in the trial court, seeking reimbursement from the defendants for property taxes and homeowners insurance premiums paid during the pendency of the appeal. After hearing argument and receiving supplemental briefing from the parties, the court granted the plaintiff's motion. The defendants

[4] "As this court noted in the defendants' prior appeal, 'Roger Essaghof [is] a highly experienced real estate investor who had negotiated numerous residential and commercial mortgages . . . .' *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 177 Conn. App. 144, 148, 171 A.3d 494 (2017), rev'd in part, 336 Conn. 633, 249 A.3d 327 (2020)." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 97 n.3.

then amended their appeal to include a challenge to that determination. As a result, two distinct claims were presented to this court in the defendants' prior appeal: (1) whether the trial court improperly rejected their special defenses of fraudulent inducement and unclean hands; and (2) whether the trial court abused its discretion in ordering them to reimburse the plaintiff for property taxes and homeowners insurance premiums paid by the plaintiff during the pendency of the appeal. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 177 Conn. App. 144, 146, 171 A.3d 494 (2017), rev'd in part, 336 Conn. 633, 249 A.3d 327 (2020). This court rejected those claims and affirmed the judgment of the trial court in all respects. See id., 163.

"Our Supreme Court subsequently granted the defendants' petition for certification to appeal from that judgment, limited to the issue of whether this court properly had affirmed 'the judgment of the trial court ordering the defendants to reimburse the plaintiff for property taxes and homeowners insurance premiums in violation of the provisions of General Statutes § 49-14 . . . .' *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 328 Conn. 915, 915, 180 A.3d 962 (2018). . . .

"With respect to the certified issue, the Supreme Court concluded that 'the trial court abused its discretion because the relief it ordered is inconsistent with the remedial scheme available to a mortgagee in a strict foreclosure.'[5] Id., 635. With respect to the defendants'

[5] "As the court explained, 'when the defendants defaulted on their payment obligations, and the plaintiff elected strict foreclosure as its remedy, the plaintiff chose a remedial scheme that prescribes a specific and exclusive process by which it could be made whole. At the conclusion of this process, assuming the defendants do not redeem, their equity of redemption will be extinguished by the passing of the law days, and absolute title to the property will vest in the plaintiff. If the debt exceeds the value of the property, the plaintiff may then pursue the difference from the defendants in a deficiency proceeding pursuant to § 49-14. The deficiency judgment is the only procedure available to the plaintiff to recover its mortgage debt, including payments advanced to pay real estate taxes and property insurance, in excess of the value of the property.' *JPMorgan Chase Bank, National Assn.* v.

claim of judicial bias, the court refused to consider the merits of that contention, stating: 'We decline to consider the merits of the defendants' second claim because the defendants did not raise the disqualification issue before the trial court or the Appellate Court, and because it is outside the scope of the certified question.' Id., 639. The Supreme Court thus reversed in part the judgment of this court and ordered as follows: '[T]he case is remanded to that court with direction to reverse the trial court's order directing the defendants to reimburse the plaintiff for property taxes and homeowners insurance premiums and to remand the case to that court for the purpose of setting a new law day; the judgment of the Appellate Court is affirmed in all other respects.' Id., 653.

"On August 13, 2021, the plaintiff filed a motion in the trial court to reset the law days in accordance with that remand order. In response, [on August 27, 2021] the defendants filed an objection to that motion as well as a motion to dismiss, in which they argued that the trial court lacked subject matter jurisdiction over the foreclosure action due to the plaintiff's alleged failure to comply with the EMAP notice requirement.[6] The court held a hearing on those motions on October 8, 2021. It thereafter issued a memorandum of decision in which it denied the defendants' motion to dismiss and set new law days in accordance with the remand order from the Supreme Court." (Footnotes in original.) *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 96–99.

Essaghof, supra, 336 Conn. 650." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 98 n.4.

[6] "More specifically, the defendants alleged that the EMAP notice furnished by the plaintiff in the present case (1) was not sent by certified mail and (2) bore the name of Washington Mutual, rather than the plaintiff." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 99 n.5.

In its memorandum of decision, the court emphasized that, although the issue of the plaintiff's compliance with the EMAP notice requirement had been litigated at the trial held in 2015, the defendants did not raise that issue in their appeal from the judgment of strict foreclosure. The court stated: "After judgment entered and the defendants appealed the judgment, the argument of an invalid demand notice and/or EMAP notice from Washington Mutual instead of [the plaintiff] does not appear in their appellate papers. The defendants had a clear opportunity to challenge the notice on substantive (rather than admissibility) grounds at trial in 2015, but did not. They also had the opportunity to include this issue in their appeal but did not. Instead, they waited six years, after decisions from both our Appellate and Supreme Courts affirming the underlying decision after trial, to raise this issue anew. . . . As this is an issue that came up in trial—and was included in the defendants' trial brief—it was ripe for appeal, but the defendants did not preserve the issue for appellate review." Because the defendants' " 'newly raised' jurisdictional argument was previously argued" before the trial court in 2015 but thereafter abandoned on appeal, the court denied their motion to dismiss.

From that judgment, the defendants appealed to this court, which rejected the various claims raised by the defendants. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 95. The defendants then petitioned for certification, challenging only this court's determination that the trial court properly denied their motion to dismiss. Our Supreme Court granted that petition, vacated the judgment of this court, and remanded the case to us "with direction to reconsider in light of this court's decision in *Bank of New York Mellon* v. *Tope*, [supra, 345 Conn. 662]." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 346

Conn. 909. We now revisit that determination in accordance with the remand order.

In this appeal, the defendants claim that the EMAP notice requirement operates as a "condition precedent" to a court's exercise of subject matter jurisdiction over a foreclosure action. Relying on the precept that an issue of subject matter jurisdiction may be raised at any time; see, e.g., *Oxford House at Yale* v. *Gilligan*, 125 Conn. App. 464, 473, 10 A.3d 52 (2010); the defendants claim that the court improperly denied their motion to dismiss. For two distinct reasons, we disagree.

I

At the outset, we note our agreement with the defendants that compliance with the EMAP notice requirement is a condition precedent to the commencement of a foreclosure action. As our Supreme Court recently explained, "[i]f a mortgagee fails to comply with § 8-265ee (a), it has failed to satisfy a mandatory condition precedent and, therefore, has failed to allege a claim on which relief can be granted." *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 394. At the same time, our Supreme Court expressly held that "the EMAP notice requirement is not jurisdictional" in nature. Id., 396. The defendants' claim in this appeal, therefore, is not one implicating the subject matter jurisdiction of the trial court.

The defendants' August 27, 2021 motion to dismiss was predicated on an alleged deficiency with the EMAP notice provided by the plaintiff in 2009, a copy of which was introduced into evidence during the trial in 2015. In that motion, the defendants claimed that the notice furnished by the plaintiff was invalid because it bore the name of Washington Mutual, the plaintiff's predecessor in interest, rather than that of the plaintiff itself.[7]

[7] The defendants also claimed that the notice provided in 2009 was defective because "when one searches the certified number . . . on the United States Postal Service's tracking website, [as the defendants' counsel] did

The record before us indicates that the issue of whether the plaintiff complied with the EMAP notice requirement in this regard was disputed by the parties during the trial. The March 4, 2015 trial transcript contains the testimony of a witness, Wilkin Rodriguez, offered by the plaintiff regarding the notice provided to the defendants and the names used therein.[8] In their July 1, 2015 posttrial brief, the defendants specifically argued that the EMAP notice in evidence "was not from the plaintiff, it was from a nonexistent entity . . . which many months before the January, 2009 notice, had ceased to exist . . . . Its assets were sold to the plaintiff but the entity was gone." Significantly, the defendants at that time alleged that "[t]he notice was deficient for that reason." The defendants further argued that, as a result of that deficiency, "the plaintiff has failed to satisfy a condition precedent to mortgage foreclosure and the case should fail for that reason."

on August 17, 2021, the website responds with a message indicating 'Label created, not yet in system.' " In our prior decision, this court concluded that the trial court properly rejected that claim. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 217 Conn. App. 102–103. In their supplemental briefs filed with this court on March 23 and August 15, 2023, the defendants do not quarrel with that determination and confine their claim to whether the EMAP notice was defective because it "was sent by Washington Mutual, not [the plaintiff]."

[8] The March 4, 2015 transcript contains the following colloquy between the plaintiff's attorney and Rodriguez:

"Q. Can you tell me, after [the plaintiff] purchased the assets of Washington Mutual, whether [the plaintiff] continued to use the name of Washington Mutual for some time after?

"A. Yes. The Washington Mutual name was kept for servicing purposes for a while after the merger. It took a while to integrate the servicing platforms for the two companies so a lot of the customers were still receiving mail under the Washington Mutual name. We had several duplicate loan numbers and things of that nature that had to be straightened out before everybody began being serviced under [the plaintiff's name].

"Q. So, is it your understanding, based on that, that [the January 6, 2009 notice to the defendants] was issued by [the plaintiff] in the name of Washington Mutual?

"A. That's correct."

In rendering a judgment of strict foreclosure in favor of the plaintiff, the court necessarily rejected that claimed deficiency in the notice furnished by the plaintiff. See *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007) (when decision lacks specificity, Appellate Court presumes trial court made necessary findings and determinations supported by record on which judgment is predicated), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). The defendants thereafter did not request an articulation of the court's judgment in that regard. See *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 739 n.25, 937 A.2d 656 (2007) ("in the absence of an articulation . . . [an appellate court will] presume that the trial court acted properly").

Because that claimed deficiency was at issue before the trial court in 2015, it was incumbent on the defendants to raise any claim of error with respect to the court's nonacceptance of that claim in their appeal from the 2015 judgment. That they failed to do. As a result, the defendants abandoned that claim. See *Marlborough* v. *AFSCME, Council 4, Local 818-052*, 309 Conn. 790, 795 n.5, 75 A.3d 15 (2013) (claim raised by party at trial deemed abandoned when trial court did not specifically address claim and party "has not raised that issue on appeal" before either Appellate Court or Supreme Court); *Czarnecki* v. *Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1979) ("claims of error not briefed are considered abandoned").

The defendants' reliance on *Daley* v. *Hartford*, 215 Conn. 14, 574 A.2d 194, cert. denied, 498 U.S. 982, 111 S. Ct. 513, 112 L. Ed. 2d 525 (1990), is unavailing. *Daley* involved a contract dispute in which the trial court directed a verdict in favor of the defendant. Id., 15. This court subsequently determined that the interpretation of the collective bargaining agreement at issue was a question of fact to be resolved by a jury in a new trial,

and thus remanded the matter to the trial court. Id., 16. On remand, the defendant filed a motion to dismiss for lack of subject matter jurisdiction, which the court denied. Id. When the defendant then appealed the propriety of that determination, the plaintiffs argued that the defendant was estopped from asserting such a claim due to its "failure to pursue a jurisdictional defense in the original action" before the matter was remanded for retrial. Id., 26–27, 29.

Our Supreme Court disagreed with the contention that a jurisdictional challenge could not be raised for the first time following a remand to the trial court. The court observed that, in certain circumstances, the principle that subject matter jurisdiction may be raised at any time "must be tempered by the countervailing force of the principle of finality" and noted that "[t]he essential problem is therefore one of selecting which of the two principles is to be given the greater emphasis." (Internal quotation marks omitted.) Id., 28; accord *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013) ("even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal" (internal quotation marks omitted)). The Supreme Court then emphasized that the defendant had *not* raised its jurisdictional claim in the original action or the prior appeal. *Daley* v. *Hartford*, supra, 215 Conn. 30. For that reason, the court concluded that "this [second] appeal . . . represents the first opportunity for an appellate court to rule directly upon the question of subject matter jurisdiction." Id. Accordingly, the court concluded that principles of finality did not preclude review of the defendant's jurisdictional claim.

The procedural posture of the present case is markedly different. This is not a case in which a party is seeking to raise a jurisdictional challenge for the first time on remand from our Supreme Court. See *Noble* v. *White*, 85 Conn. App. 233, 237, 857 A.2d 362 (2004). Here, the defendants contested the issue of the plaintiff's compliance with the EMAP notice requirement before the trial court in 2015, claiming that "the plaintiff ha[d] failed to satisfy a condition precedent to mortgage foreclosure and the case should fail" due to the fact that the EMAP notice to the defendants did not specify the plaintiff's name. The trial court did not agree and rendered a judgment of strict foreclosure in favor of the plaintiff. The defendants appealed from that judgment to this court, which offered the first opportunity for an appellate court to rule directly on that question of subject matter jurisdiction. Although the defendants later amended that appeal to include an additional claim; see *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 177 Conn. App. 150; they nevertheless did not raise any claim with respect to the issue of the plaintiff's compliance with the EMAP notice requirement. Moreover, unlike the defendant's claim in *Daley*, the claim raised by the defendants here does *not* implicate the subject matter jurisdiction of the trial court. See *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 396.

For that reason, the present case more closely resembles *Connecticut Savings Bank* v. *Heghmann*, 193 Conn. 157, 474 A.2d 790, cert. denied, 469 U.S. 883, 105 S. Ct. 252, 83 L. Ed. 2d 189 (1984). In that case, the trial court rendered a foreclosure judgment in favor of the plaintiff bank, and the defendants, against whom judgment was rendered, appealed to our Supreme Court. Id., 158. That appeal later was dismissed, and the trial court thereafter opened the judgment for the purpose of setting a new sale date. Id. The defendants then filed a motion to open the judgment on various grounds,

which the trial court denied. Id. The defendants again appealed to our Supreme Court, claiming that the trial court improperly denied their motion. The court rejected that claim, stating that "the arguments now being advanced by the defendants could have been asserted in that [prior] appeal . . . . [T]he defendants are obliquely attempting to revive an appeal that has succumbed by being abandoned." (Footnote omitted.) Id., 159–60. The defendants in the present case likewise could have challenged the propriety of the trial court's rejection of their claim that the plaintiff had "failed to satisfy a condition precedent to mortgage foreclosure" due to defective EMAP notice in their previous appeal to this court.[9]

The fact that the defendants asserted and litigated their claim regarding EMAP compliance during the trial in 2015 also distinguishes the present case from *Tope*.[10] Following the rendering of a judgment of foreclosure by sale, the defendant in *Tope* moved to open the judgment and, days later, filed a motion for summary judgment, in which he raised a jurisdictional claim regarding the plaintiff bank's lack of standing to bring the foreclosure action. *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 666–67. After hearing argument from the parties, the court denied those motions. Id., 667. The defendant subsequently filed multiple motions to dismiss, as well as a motion to open and vacate the judgment of foreclosure by sale, predicated on that same ground, which were denied without an evidentiary hearing. Id., 667–70.

[9] That prior appeal was filed on December 16, 2015. The defendants filed an amended appeal to raise an additional claim unrelated to the EMAP notice issue on March 14, 2016.

[10] At oral argument before this court on April 25, 2023, the defendants' counsel was asked if "the EMAP issue was raised and litigated" before the trial court in 2015. Counsel answered in the affirmative. In their principal appellate brief, the defendants likewise acknowledge that, although the EMAP notice issue was ripe for appeal in 2015, they did not preserve that issue for appellate review.

On appeal, our Supreme Court considered the question of whether "the trial court properly denied the defendant's motion to open, which challenged the subject matter jurisdiction of the court." Id., 676. In answering that question, the court emphasized that, "[i]n almost every setting [in which] important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Internal quotation marks omitted.) Id., 682. The court thus concluded that, "[b]ecause the question of the plaintiff's standing to bring the foreclosure action in the present case turns on questions of fact, namely, whether the plaintiff has been vested with the right to enforce the note, the trial court should not have denied the motion to open but should have conducted an evidentiary hearing to determine whether the plaintiff had standing to bring the foreclosure action in the present case." Id., 682–83.

In the present case, a trial was held in 2015, at which the parties were permitted to present evidence on the question of whether the plaintiff provided proper notice to the defendants. At that trial, the defendants also were permitted to cross-examine Rodriguez, who testified on behalf of the plaintiff regarding the EMAP notice issue. See footnote 8 of this opinion. Because that issue was raised and litigated at the trial held in 2015, the concerns that underpinned the court's decision in *Tope* are not present here.

In Connecticut, parties generally are not permitted to "revive an appeal that has succumbed by being abandoned." *Connecticut Savings Bank* v. *Heghmann*, supra, 193 Conn. 159–60. In light of the foregoing, the trial court properly declined to reach the merits of a

claim that the defendants previously asserted before the trial court in 2015 but abandoned in their appeal from the 2015 judgment.

II

The defendants' claim suffers an additional infirmity. The defendants argue that the plaintiff "clearly violated" the EMAP notice requirement because "[t]he EMAP notice was sent by Washington Mutual, not [the plaintiff]" and submit that such notice "must be sent by the foreclosing mortgagee, not a previous mortgagee." They are mistaken.

As our Supreme Court has explained, "§ 8-265ee requires mortgagees to provide a new EMAP notice upon initiation of *any* foreclosure action, including a successive foreclosure action predicated on the same default." (Emphasis in original.) *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 402. The court further emphasized that "[t]here is no substantive difference for purposes of the EMAP statutory scheme between [a predecessor mortgagee] and the plaintiff. Our analysis does not turn on the particular entity that sent the EMAP notice; rather, what is of consequence is ensuring that an EMAP notice is sent prior to the initiation of any subsequent foreclosure action, as each foreclosure action must stand on its own EMAP notice." Id., 404. Because the trial court in the present case found, and the evidence in the record substantiates, that the plaintiff's predecessor mortgagee provided proper EMAP notice to the defendants prior to initiating this foreclosure action,[11] the defendants' claim is untenable.

[11] In their August 27, 2021 memorandum of law in support of their motion to dismiss, the defendants averred in relevant part that Washington Mutual "sent the [EMAP] notice" to them. The defendants also appended a copy of that notice as an exhibit to their August 27, 2021 motion to dismiss, which notice previously had been admitted into evidence as a full exhibit at trial on March 3, 2015. In its memorandum of decision, the trial court found that "[t]he EMAP notice was clearly sent by [Washington Mutual to the defendants] on January 6, 2009 . . . ." At oral argument before this court on October 6, 2022, the defendants' counsel was specifically asked if he

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

In this opinion the other judges concurred.

CCI COMPUTERWORKS, LLC *v.* EVERNET CONSULTING, LLC
(AC 44975)

Moll, Cradle and Seeley, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of contract in connection with the defendant's alleged failure to make required payments under an asset purchase agreement. The plaintiff claimed that the defendant breached the agreement by failing to remit to it full monthly payments under the agreement and by crediting certain costs attributed to two of the plaintiff's store locations, which the defendant had acquired, against the payments that it owed. The defendant admitted that it failed to make full payments, but, by way of special defense, alleged that, in January, 2018, although it had tendered two checks for the full amounts due to the plaintiff, including contractual interest and reasonable attorney's fees, the plaintiff had refused to accept the checks. The defendant filed a counterclaim asserting claims of breach of contract, unjust enrichment and indemnification, alleging that the plaintiff was liable for certain unemployment taxes that had been assessed against the defendant by the Department of Labor (department) after the effective date of the agreement. Before trial, the plaintiff filed a motion in limine seeking to exclude evidence, pursuant to the applicable provision (§ 4-8 (b) (1)) of the Connecticut Code of Evidence, relating to the defendant's attempt to settle the contract dispute between the parties, specifically referencing a proposed exhibit that the defendant intended to offer, comprising a letter mailed by B, the defendant's owner, to R, a principal of the plaintiff, dated January 29, 2018, during the pendency of the action, and two accompanying checks, one in the sum of $30,937.97 with the memo line reading "CCICW Settlement" and the other in the sum of $4000 with the memo line reading "Legal Fees—CCICW." The court denied the motion in limine, concluding that the evidence did not constitute a settlement offer, and admitted the evidence in full as exhibit F. Following a trial, the court ruled in favor of the

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was arguing that an EMAP notice "never was sent" to the defendants by Washington Mutual, the predecessor mortgagee. In response, counsel conceded that such notice was furnished to the defendants but argued that said notice was invalid because "it was never mailed by [the plaintiff]."

plaintiff on its breach of contract claim and for the defendant on the plaintiff's unjust enrichment claim. The court found that the parties did not dispute that the defendant had breached the agreement. The court determined, however, that the plaintiff failed to mitigate its damages by rejecting the checks tendered to it by the defendant and, therefore, declined to award the plaintiff contractual interest beyond January 29, 2018. The court also rendered judgment in favor of the plaintiff on the defendant's counterclaim, finding that the department independently determined that the defendant was the successor employer to the plaintiff, that the plaintiff was not responsible for the defendant's post-closing unemployment rating increase and that the defendant should not have deducted $10,016.26 from the payments it made to the plaintiff, which was the amount of the lien imposed on the defendant by the department. On the defendant's appeal and the plaintiff's cross appeal to this court, *held*:

1. The defendant could not prevail on its claim that the trial court improperly rendered judgment for the plaintiff on the counterclaim:

a. This court concluded that the parties' agreement does not attribute liability for the unemployment tax assessment to either party: the trial court incorrectly relied on § 4 (A) of the agreement in determining that the unemployment tax assessment was a post-closing consequence of running the business and was the responsibility of the defendant under the agreement, as this court concluded that, because § 4 (A) is limited in scope and expressly concerns liabilities assumed by the defendant on the closing date that related to the running of the business at each business location,, the unemployment tax assessment had no bearing on that provision; moreover, the trial court correctly determined that § 4 (C) of the agreement did not impose liability for the unemployment tax assessment on the plaintiff because, as the court's decision reflected, the department levied the tax assessment on the defendant after determining that the defendant was the plaintiff's successor employer, which meant that the plaintiff's unemployment liabilities were attributed to the defendant, and whether the defendant's increased unemployment tax liability stemmed from the plaintiff's unemployment liabilities prior to the department's determination that the defendant was the plaintiff's successor employer was of no consequence; furthermore, the court's error that the defendant was liable under the agreement for the unemployment tax assessment did not undermine its judgment as to the counts of the counterclaim asserting breach of contract and indemnification, which were predicated on allegations that the agreement conferred liability on the plaintiff for the unemployment tax assessment.

b. The trial court properly rendered judgment for the plaintiff on count two of the counterclaim asserting unjust enrichment; the plaintiff did not benefit, to the defendant's detriment, by virtue of the defendant's payment of the unemployment tax assessment imposed on it, as the court found that the department independently determined that the

defendant was the successor employer to the plaintiff and that the plaintiff was not responsible for the defendant's post-closing unemployment rating increase.

2. The trial court abused its discretion in denying the plaintiff's motion in limine that sought to prohibit evidence of the defendant's settlement offer mailed to the plaintiff during the pendency of the action, in admitting that evidence in full, and in relying on that evidence to determine that the plaintiff failed to mitigate its damages: this court construed exhibit F, which was comprised of the January, 2018 letter and the two accompanying checks, to constitute an attempt by the defendant to settle the plaintiff's claim, as the letter and checks were mailed by B to R after this action had been commenced, the memo line on the check in the amount of $30,937.97 expressly read "CCICW Settlement," B's letter indicated that the $30,937.97 amount represented the defendant's calculation of the outstanding arrearage, plus interest, and that the check in the amount of $4000 represented the defendant's estimate of the plaintiff's legal fees, and B further wrote that, because the checks brought the defendant's obligations current under the agreement, the defendant would "consider this matter closed"; moreover, exhibit F was not admissible under § 4-8 (b) (1) of the Connecticut Code of Evidence for the purpose of establishing the plaintiff's failure to mitigate its damages because evidence of a settlement offer in support of a mitigation of damages defense speaks to the amount of the claim, and exhibit F was not within the scope of any exceptions contemplated by § 4-8 (b) (1); furthermore, the plaintiff demonstrated substantial prejudice stemming from the court's evidentiary rulings, as the court relied solely on the settlement evidence in determining that the plaintiff failed to mitigate its damages and, as a result of this determination, declined to award contractual interest that accrued beyond January 29, 2018; accordingly, this court remanded the case for a hearing to determine only the amount of contractual interest that accrued beyond December, 2017, to which the plaintiff was entitled, if any.

3. The plaintiff could not prevail on its claim that the trial court failed to adjudicate its claim that the defendant breached the parties' agreement by crediting certain costs charged to two store locations that were purchased by the defendant against the payments that it owed pursuant to the agreement: this court, reading the decision as a whole, concluded that the trial court awarded the plaintiff $10,016.28, plus interest, as part of its adjudication of the plaintiff's breach of contract claim, and it necessarily followed that the trial court considered the discrete claim that the plaintiff maintained that it overlooked, as the plaintiff's requested relief with respect to that claim included a return of the $10,016.28 that was improperly withheld and, thus, this court concluded that the trial court impliedly denied, rather than ignored, the additional costs that the plaintiff asserted were credited improperly and for which it requested relief; moreover, notwithstanding that the trial court discussed

this award in the section of its decision examining the counterclaim, this court did not construe the decision to reflect that the trial court awarded the plaintiff the $10,016.28, plus contractual interest, in damages on the counterclaim, as such an award to the plaintiff, as the counterclaim defendant, would have been procedurally improper.

Argued February 2—officially released September 5, 2023

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendant filed a counterclaim; thereafter, the case was tried to the court, *Jongbloed, J.*; judgment in part for the plaintiff on the amended complaint and judgment for the plaintiff on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

Eric J. Garofano, for the appellant-cross appellee (defendant).

Michael S. Bonnano, for the appellee-cross appellant (plaintiff).

Opinion

MOLL, J. The defendant, Evernet Consulting, LLC, appeals from the judgment of the trial court rendered in favor of the plaintiff, CCI Computerworks, LLC, on the defendant's counterclaim asserting claims of breach of contract, unjust enrichment, and indemnification. On appeal, the defendant claims that the court improperly concluded that (1) the agreement executed by the parties attributed liability to the defendant, rather than to the plaintiff, for unemployment taxes, plus interest and penalties, assessed on the defendant by the Department of Labor (department), or (2) in the alternative, the plaintiff was not unjustly enriched by the defendant's payment of the unemployment taxes, interest, and penalties. We conclude that the court properly rendered judgment in the plaintiff's favor on the defendant's

counterclaim. In addition, the plaintiff cross appeals from the judgment of the court rendered in its favor on count one of its second amended complaint asserting breach of contract. On cross appeal, the plaintiff claims that the court improperly (1) denied its motion in limine seeking to exclude evidence of a settlement offer, (2) admitted the settlement evidence in full into the record, (3) relied on the settlement evidence to conclude that it had failed to mitigate its damages, and (4) failed to adjudicate its claim that the defendant breached the parties' agreement by crediting certain costs against the payments that the defendant owed pursuant to the agreement. We agree with the plaintiff's claims of error regarding the settlement evidence, but we disagree with the plaintiff's contention that the court overlooked one of its claims. Accordingly, we reverse in part the judgment of the trial court rendered on the plaintiff's second amended complaint, and we affirm the judgment in all other respects.

The following facts, as found by the trial court and which are not in dispute, and procedural history are relevant to our resolution of this appeal and this cross appeal. "[The plaintiff] was engaged in the business of providing computer system sales, service, and hardware, including installation, training, repair, and networking. [The plaintiff] maintained two store locations in Quaker Hill and Salem . . . . Edward Branson was one of the principals of [the plaintiff] along with Robert and Joanne Pokrinchak.

"[The defendant], owned by Eric Buhrendorf, was formed in 2007 and is a business supporting [information technology] systems for law firms and Connecticut businesses. In 2015, as Branson was looking toward retirement, the parties entered into an asset purchase agreement [(agreement)] . . . . Under the terms of the agreement, [the defendant] purchased [the plaintiff's] client list and goodwill, as well as the two physical

locations of [the plaintiff's] stores in Quaker Hill and Salem . . . which [the defendant] also acquired. The agreement provided that for a five year period, which ended in November, 2020, [the defendant] was to make monthly payments to Branson calculated at 65 percent of the monthly account profits for [the plaintiff's] former clients. The [agreement] specified a formula for determining the monthly account profits. . . .

"The [agreement] stated that '[i]n the event of default by either [the plaintiff] or [the defendant], reasonable attorney's fees and costs incurred in the enforcement of this [a]greement shall be paid by the defaulting party. If [the defendant] should be in default of any payments due [to the plaintiff], there shall be an additional default rate of 2.5 [percent] per month added to the owed payment.' . . . [The plaintiff's] client list was imported into [the defendant's] business management tool, Autotask. Autotask was used to determine the payments to Branson under the agreement.

"In late 2016 and early 2017, [the defendant] experienced financial difficulties because some of the clients were not paying and/or being billed and the two physical locations of the [plaintiff's] former . . . stores were not bringing in sufficient revenue to cover their overhead expenses. In an effort to keep the business going, Buhrendorf was required to make difficult decisions, including raising rates for clients and terminating employees. He also incurred significant personal debt. As a result of its financial difficulties, [the defendant] sent only partial payments to [the plaintiff] from February . . . through August, 2017, and no payments for the months of September through December, 2017." (Citations omitted.)

The plaintiff commenced the present action against the defendant on September 11, 2017. In its two count second amended complaint, dated March 29, 2021

(operative complaint), the plaintiff pleaded alternative claims of breach of contract and unjust enrichment. The plaintiff alleged in relevant part that the defendant (1) beginning in February, 2017, failed to remit the full monthly payments owed pursuant to the agreement,[1] and (2) violated the agreement by crediting certain costs attributed to the Salem and Quaker Hill stores against the payments that it owed. In its answer to the operative complaint, dated April 28, 2021, the defendant admitted that it had failed to make full payments to the plaintiff from February through December, 2017; however, by way of a special defense, the defendant alleged that it had "tendered to the plaintiff the full payments due under the . . . agreement, including the contractual interest due under the agreement and reasonable attorney's fees and costs, but the plaintiff refused to receive the same and continues to refuse to receive the same despite the defendant having ever since remained, and still is, ready and willing to pay to the plaintiff, but the plaintiff has hitherto refused to receive the same."[2] The defendant also admitted to taking into account certain costs charged to the Salem and Quaker Hill stores when

[1] In support of its breach of contract claim asserted in count one, the plaintiff alleged that the defendant "did not make its full payment for the month of February, 2017, and it has not made a full monthly payment for any month thereafter. The foregoing has resulted in the accrual of a substantial arrearage that remains unpaid to date." In support of its unjust enrichment claim asserted in count two, the plaintiff alleged that the defendant "did not make its full payment for the month of February, 2017, through the rest of that calendar year and for part of 2018. . . . The foregoing has resulted in the accrual of a substantial arrearage that remains unpaid to date and owing to the plaintiff." As the trial court, *Jongbloed, J.*, found in its decision, the defendant made either partial or no payments from February through December, 2017.

[2] The plaintiff did not file a reply to the special defense asserted in the defendant's April 28, 2021 pleading; however, on August 2, 2018, the plaintiff had filed a reply denying an identical special defense asserted alongside an answer filed by the defendant on May 11, 2018. See Practice Book § 10-61 ("[i]f the adverse party fails to plead further [following an amendment to a pleading], pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading").

calculating the payments owed under the agreement, but it denied that the agreement prohibited that practice.

On November 22, 2019, with leave of the court, *Knox*, *J.*, the defendant filed a three count counterclaim asserting claims of breach of contract, unjust enrichment, and indemnification. The defendant alleged that the plaintiff was liable for more than $10,000 in unemployment compensation taxes that had been assessed against the defendant after the effective date of the agreement. On June 26, 2020, the plaintiff filed an answer denying the defendant's substantive allegations.[3]

The case was tried to the court, *Jongbloed*, *J.*, over the course of three days in March and April, 2021. Branson and Buhrendorf testified at trial, and the court admitted several exhibits in full into the record. Following the close of evidence, the parties filed posttrial briefs and reply briefs.

On September 2, 2021, the court issued a memorandum of decision. As to the plaintiff's second amended complaint, the court rendered judgment in the plaintiff's favor on count one asserting breach of contract.[4] The court found that the parties did not dispute that the defendant had breached the agreement by making either partial or no payments from February through December, 2017, with the amounts of missed payments, exclusive of contractual interest, totaling $30,183.89.

[3] The plaintiff also asserted three special defenses to the counterclaim, alleging that, to the extent that it was liable for the unemployment compensation taxes at issue, (1) the defendant was contributorily negligent, (2) the defendant failed to provide timely notice of its claim to the plaintiff, and (3) the defendant had collected the amount that it claimed was owed. The defendant did not file a reply to the plaintiff's special defenses.

[4] After concluding that the plaintiff had met its burden to prove its breach of contract claim, the court determined that the plaintiff had not established its alternative claim for unjust enrichment set forth in count two.

The court determined, however, that the plaintiff had failed to mitigate its damages by rejecting two checks tendered to it by the defendant on January 29, 2018, evidence of which was (1) the subject of a motion in limine filed by the plaintiff on March 24, 2021, which the court denied on the record on March 25, 2021, and (2) admitted in full over the plaintiff's objection. As relief, the court awarded the plaintiff $30,183.89, plus interest and reasonable attorney's fees as provided for in the agreement; however, as a result of the plaintiff's failure to mitigate its damages, the court declined to award the plaintiff any contractual interest accrued "beyond January 29, 2018."

With respect to the defendant's counterclaim, the court rendered judgment in favor of the plaintiff. As the court summarized, "[the defendant] has filed a counterclaim against [the plaintiff] alleging that after the . . . agreement became effective, the . . . [department] made the determination[5] that [the defendant] was the successor [employer] to [the plaintiff] and that, therefore, [the plaintiff's] unemployment liability would be attributed to [the defendant].[6] Thus, [the plaintiff's]

[5] The parties do not dispute that the department made the determination in April, 2017.

[6] General Statutes § 31-223 (a) provides in relevant part that "(2) an employer who acquires substantially all of the assets, organization, trade or business of another employer who at the time of such acquisition was subject to this chapter shall immediately become subject to this chapter as a successor employer . . . ."

General Statutes § 31-225a (i) (2) provides: "The executors, administrators, successors or assigns of any former employer shall acquire the experience rating records of the predecessor employer with the following exception: The experience of a predecessor employer, who leased premises and equipment from a third party and who has not transferred any assets to the successor, shall not be transferred if there is no common controlling interest in the predecessor and successor entities."

Although § 31-225a has been amended since the events at issue in this appeal; see, e.g., Public Acts 2023, No. 23-4, § 1; 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.

experience charges would be added to [the defendant's] new registration number for experience years ending June 20, 2014, through June 30, 2017. This sharply increased [the defendant's] benefit charges, resulting in a significant increase in [the defendant's] contribution rates for the years 2016–2020 and additional unemployment taxes of $930 for 2016, $3606.34 for 2017, $3465 for 2018, $1547.95 for 2019, and $755.23 for 2020. These amounts plus additional interest totaled [$11,883.83]. [The defendant] appealed the decision by [the department] increasing the contribution rates and the appeal was denied. On July 10, 2019, [the department] issued a letter to [the defendant] informing it that a tax lien was filed with the Secretary of the State in Hartford. Thereafter, [the defendant] paid the [department] lien amount and deducted $10,016.28 from its payments to [the plaintiff] under the [agreement]. . . . [The defendant] seeks damages of $1867.55 for the additional unemployment liability not included in the $10,016.28, which [the defendant] had deducted from the . . . payments [to the plaintiff]." (Footnotes added.)

The court further found that "the [department] independently determined that [the defendant] was [the] successor [employer] to [the plaintiff] and that [the plaintiff] is not responsible for [the defendant's] post-closing unemployment rating increase. The evidence established that the [department's] assessment did not occur until after the closing. As such, it was a post-closing consequence of running the business and the responsibility of the [defendant] under the [agreement]." The court then determined that the defendant "should not have deducted the $10,016.28 from payments it made to [the plaintiff] and the additional amount of $1867.55 [sought by the defendant] is not warranted under the evidence. Thus, the court awards $10,016.28, plus contractual interest, in favor of the plaintiff."

In sum, the court rendered judgment (1) in the plaintiff's favor on its breach of contract claim, awarding the plaintiff a total of $40,200.17 in damages,[7] plus contractual interest and contractual attorney's fees, with the amounts of the interest and attorney's fees to be determined at a subsequent hearing, (2) in the defendant's favor on the plaintiff's unjust enrichment claim,[8] and (3) in the plaintiff's favor on the defendant's counterclaim. On September 14, 2021, the plaintiff filed a motion for reargument and reconsideration asserting, inter alia, that the court had failed to address its claim that the defendant had breached the agreement by crediting the costs charged to the Salem and Quaker Hill stores against the payments owed pursuant to the agreement. On September 28, 2021, the court denied the plaintiff's motion for reargument and reconsideration. This appeal and this cross appeal followed.[9] Additional

[7] As we explain in part II B of this opinion, we construe the court's award of $10,016.28, plus contractual interest, to be part of the relief awarded to the plaintiff on count one of its second amended complaint asserting breach of contract.

[8] Although the court did not expressly state that it had rendered judgment in the defendant's favor on the plaintiff's unjust enrichment claim, the decision implies this result. See footnote 4 of this opinion; see also *Russell* v. *Russell*, 91 Conn. App. 619, 638, 882 A.2d 98 ("unjust enrichment and breach of contract are mutually exclusive theories of recovery"), cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005).

[9] On November 12, 2021, after this appeal and this cross appeal had been filed, the plaintiff filed a motion requesting that the trial court determine the amounts of contractual interest and contractual attorney's fees that it had awarded. On February 4, 2022, the court awarded the plaintiff (1) a total of $11,064.79 in contractual interest, comprising (a) $4554.21 in interest accrued on the amount of $30,183.89 between February and December, 2017, with the court declining to award any interest accrued for the month of January, 2018, and (b) $6510.58 in interest accrued on the amount of $10,016.28, and (2) $17,088.32 in contractual attorney's fees. Neither party has appealed from that order.

We note that this appeal and this cross appeal were taken from an appealable final judgment notwithstanding that, at the time that this appeal and this cross appeal were filed, the court had yet to determine the amounts of the contractual interest and the contractual attorney's fees. See *Iino* v. *Spalter*, 192 Conn. App. 421, 456–57, 218 A.3d 152 (2019) ("a judgment that

facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that the trial court improperly rendered judgment in the plaintiff's favor on the defendant's counterclaim. The defendant asserts that (1) the court incorrectly construed the agreement to provide that the defendant, rather than the plaintiff, was liable for the $11,883.83 in unemployment taxes, interest, and penalties that the department assessed on the defendant (collectively, unemployment tax assessment), or (2) in the alternative, if the agreement did not attribute liability for the unemployment tax assessment to either party, then the plaintiff was unjustly enriched by the defendant's payment of the unemployment tax assessment. For the reasons that follow, we conclude that the court properly rendered judgment in the plaintiff's favor on the defendant's counterclaim.

A

We first address the defendant's contention that the court incorrectly construed the agreement in concluding that the defendant, rather than the plaintiff, was liable for the unemployment tax assessment. The defendant asserts that (1) § 4 (A) of the agreement, on which the court relied to conclude that the defendant was liable for the unemployment tax assessment, is inapplicable, and (2) § 4 (C) of the agreement, the applicability of which the court rejected, establishes the plaintiff's

includes an award of attorney's fees, even when those fees are integral to the judgment . . . is an appealable final judgment despite the fact that the amount of those fees has not yet been determined"); see also, e.g., *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 222, 137 A.3d 809 (judgment was final for purposes of appeal notwithstanding that, at time appeal was filed, there remained outstanding issues of contractual prejudgment interest and contractual attorney's fees), cert. denied, 321 Conn. 924, 138 A.3d 284 (2016).

liability for the unemployment tax assessment. The plaintiff argues that the court correctly relied on § 4 (A) of the agreement to conclude that the defendant was liable for the unemployment tax assessment. On the basis of the unambiguous terms of the agreement, exercising our plenary review, we conclude that the agreement does not impose liability for the unemployment tax assessment on either party.

"The law governing the construction of contracts is well settled. When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . [When] there is definitive contract language, [however] the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review. . . .

"We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms. . . . Where the language is ambiguous, however, we must construe those ambiguities against the drafter [sometimes referred to as the contra proferentem rule]. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere

fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *C & H Shoreline, LLC* v. *Rubino*, 203 Conn. App. 351, 356–57, 248 A.3d 77 (2021).

Section 4 of the agreement is titled "ASSUMPTION OF LIABILITIES." Section 4 (A) of the agreement provides: "On the terms and subject to the conditions of this [a]greement, on the [c]losing [d]ate,[10] the [defendant] shall assume and become responsible for, from and after the [c]losing . . . all liabilities and obligations related to [the] running of the business, which as of the date of the closing will be deemed the [defendant's] business activity, at each business location that the [defendant] decides to remain open. This includes but [is] not limited to the following: [(i)] Any and all rental obligations owed to the landlord of any properties that the [defendant] has decided to keep open and remain operational, including all payments of utilities, insurance, taxes or otherwise. The [plaintiff] is no longer responsible for these payments once the [c]losing occurs. [The defendant] has sole discretion and authority as to whether to maintain any of the [plaintiff's] current store locations and keeping any one of

[10] The agreement designated December 1, 2015, as the closing date.

them open is not a requirement under the terms of this [a]greement." (Footnote added.)

Section 4 (C) of the agreement provides: "Under no circumstances shall the [defendant] be obligated to pay, perform or discharge directly or indirectly, any debts, obligations, liabilities or contracts of the [plaintiff] prior to the [c]losing. The [defendant] specifically shall have no liability for the following matters: (i) all financing obligations of [the plaintiff] which create liens or encumbrances on the [p]urchased [a]ssets at the time of [c]losing; (ii) any obligations of the [plaintiff] to the members of the [plaintiff]; (iii) any obligations in regard to wages, retirement plans or benefits for any employee of the [plaintiff] with respect to the period prior to the [c]losing [d]ate; (iv) any income tax obligations applicable to, imposed upon or arising out of the sale and transfer of the [p]urchased [a]ssets to the [defendant]; (v) any action, suit or proceeding brought against the [plaintiff] arising from events occurring prior to the [c]losing [d]ate; (vi) all liabilities incurred by the [plaintiff] in connection with this [a]greement and the transactions contemplated herein; (vii) uninsured health claims incurred prior to the [c]losing [d]ate, and (viii) claims arising out of work performed by [the plaintiff] prior to the [c]losing [d]ate."[11]

[11] Section 4 (B) of the agreement, titled "Employees and Employee Benefits," provides: "Other than [certain] agreements referenced in [§] 2 (C) [of the agreement], the [defendant] will have no obligation to continue to employ any of the [plaintiff's] employees, nor to continue the benefits of such employees. No assets of any 'employee benefit plan' as defined in the Employee Retirement Income Security Act of 1974, as amended, maintained or sponsored by the [plaintiff] shall be transferred as a result of the transactions contemplated by this [a]greement. [The plaintiff] shall have sole responsibility for accrued and unpaid vacation and holidays of their employees to which they are entitled through the [c]losing [d]ate under their vacation and holiday policies in effect on the [c]losing [d]ate. Any decision by the [defendant] to employ former employees of the [plaintiff] will be solely in the discretion of the [defendant]." There are no additional subsections that follow § 4 (C).

In its decision, implicitly relying on § 4 (A) of the agreement, the court determined that the unemployment tax assessment "was a post-closing consequence of running the business and the responsibility of the [defendant] under the [agreement]." In addition, the court implicitly rejected the defendant's reliance on § 4 (C) of the agreement, determining that the defendant's "attempt to describe the increased unemployment liability of [the defendant] as a liability of the [plaintiff] incurred in connection with the agreement and transactions contemplated in the agreement [was] unavailing."

We agree with the defendant that the court incorrectly relied on § 4 (A) of the agreement. Section 4 (A) is limited in scope in that it expressly concerns liabilities and obligations assumed by the defendant on the closing date that "related to [the] running of the business . . . *at each business location that the* [*defendant*] *decides to remain open*." (Emphasis added.) As examples of such liabilities and obligations, § 4 (A) (i) enumerates "[a]ny and all rental obligations owed to the landlord of any properties that the [defendant] has decided to keep open and remain operational, including all payments of utilities, insurance, taxes or otherwise." We cannot discern the unemployment tax assessment to have any bearing on the "running of [the] business . . . at each business location that the [defendant] decides to remain open," such that the unemployment tax assessment falls outside of the ambit of the liabilities and obligations contemplated in § 4 (A). Accordingly, we conclude that the court incorrectly determined that § 4 (A) attributed liability for the unemployment tax assessment to the defendant.

We further conclude that the court correctly determined that § 4 (C) of the agreement did not apply to impose liability for the unemployment tax assessment on the plaintiff. The defendant focuses on subdivision (vi) of § 4 (C), which absolves the defendant of "all liabilities incurred by the [plaintiff] in connection with

th[e] [a]greement and the transactions contemplated [t]herein . . . .'' Section 4 (C) (vi) expressly governs liabilities incurred by the plaintiff. As the court's decision reflects, the department levied the unemployment tax assessment on the defendant after having determined that the defendant was the plaintiff's successor employer, which meant that the plaintiff's unemployment liabilities were attributed to the defendant.[12] Thus, the unemployment tax assessment was incurred by the defendant, not by the plaintiff. Whether the increase in the defendant's unemployment tax liability stemmed from the unemployment liabilities of the plaintiff *prior* to the department's determination that the defendant was the plaintiff's successor employer is of no moment. Accordingly, the defendant's reliance on § 4 (C) is misplaced.

In sum, we conclude that the agreement does not attribute liability for the unemployment tax assessment to either party and, therefore, the court incorrectly concluded that the defendant was liable for the unemployment tax assessment pursuant to the agreement.[13] The court's error, however, does not undermine its judg-

[12] The defendant appears to take issue with the department's determination that it was the successor employer to the plaintiff. As the court stated in its decision, the defendant filed an unsuccessful administrative appeal from the department's determination. The propriety of the department's determination is beyond the scope of this appeal. Accordingly, insofar as the defendant claims error vis-à-vis the department's determination, we decline to review it.

[13] In the portion of its appellate brief responding to the defendant's claims on direct appeal, the plaintiff references § 1 (B) of the agreement in arguing that ''[a]ny taxes accrued post-closing are not the responsibility of [the plaintiff].'' Section 1, titled ''ASSETS,'' identifies the assets to be transferred from the plaintiff to the defendant on the closing date. Section 1 (B) provides in relevant part that ''[t]he [plaintiff] will pay any federal or state taxes and all expenses of the business accrued as of closing. The [defendant] shall reimburse [the plaintiff] for deposits with utility companies, if any. The [plaintiff] shall indemnify and hold the [defendant] harmless from any taxes including sales and employee withholdings not paid by the [plaintiff] and any vendor bills not paid by the [plaintiff].'' We do not construe this language to bear on the issue of liability for the unemployment tax assessment.

Neither party claims that any other portion of the agreement is germane to the issue of liability for the unemployment tax assessment.

ment as to counts one and three of the counterclaim asserting breach of contract and indemnification, respectively, which were predicated on allegations that the agreement conferred on the plaintiff liability for the unemployment tax assessment.[14] Because we conclude that the agreement does not impose liability for the unemployment tax assessment on either party, the defendant's breach of contract and indemnification claims are untenable. Accordingly, insofar as the court rendered judgment in the plaintiff's favor on counts one and three of the counterclaim, we conclude that the judgment was proper. See *Harrigan* v. *Fidelity National Title Ins. Co.*, 214 Conn. App. 787, 821 n.13, 282 A.3d 495 ("[w]e may affirm a judgment of the trial court albeit on different grounds" (internal quotation marks omitted)), cert. denied, 345 Conn. 964, 285 A.3d 388 (2022).

B

We next address the defendant's alternative claim that the court improperly rendered judgment in the plaintiff's favor on count two of the counterclaim asserting unjust enrichment. The defendant maintains that "[the plaintiff] received the benefit of not having to pay over $10,000 in unemployment taxes that [the defendant] had to pay. [The plaintiff's] failure to pay led directly to [the defendant] suffering the detriment of having to pay for [the plaintiff's] unemployment liability." This claim merits little discussion.

"Unjust enrichment is a legal doctrine to be applied when no remedy is available pursuant to a contract. . . . In order for the plaintiff to recover under the doctrine, it must be shown that the defendants were benefited, that the benefit was unjust in that it was not paid for by the defendants, and that the failure of payment operated to the detriment of the plaintiff." (Internal

[14] We address the portion of the court's judgment rendered in favor of the plaintiff on count two of the counterclaim asserting unjust enrichment in part I B of this opinion.

quotation marks omitted.) *Stratford* v. *Wilson*, 151 Conn. App. 39, 49, 94 A.3d 644, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

In its decision, the court found that the department "independently determined that [the defendant] was [the] successor [employer] to [the plaintiff] and that [the plaintiff] is not responsible for [the defendant's] post-closing unemployment rating increase. The evidence established that the [department's] assessment did not occur until after the closing." Simply put, we do not agree with the defendant's position that the plaintiff benefited, to the defendant's detriment, by virtue of the defendant's payment of the unemployment tax assessment imposed on it by the department following the department's determination that the defendant was the plaintiff's successor employer.[15] Accordingly, we conclude that the court properly rendered judgment in the plaintiff's favor on count two of the counterclaim.[16]

II

On cross appeal, the plaintiff claims that the trial court improperly (1) denied its motion in limine seeking

[15] In asserting that the court improperly rendered judgment in the plaintiff's favor on its unjust enrichment claim, the defendant again appears to take issue with the department's determination that it was the successor employer to the plaintiff, as well as the circumstances surrounding that decision. The propriety of the department's determination is not before us in this appeal and, therefore, we decline to consider it. See footnote 12 of this opinion.

[16] For the first time on appeal, the defendant relies on General Statutes § 31-223 (c) to contend that the plaintiff "should have been liable for its unemployment tax through December 31, 2017, under Connecticut law regardless of the . . . agreement." We decline to consider this issue, which was not distinctly raised before the trial court. See, e.g., *United Concrete Products, Inc.* v. *NJR Construction, LLC*, 207 Conn. App. 551, 579, 263 A.3d 823 (2021) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Internal quotation marks omitted.)).

to prohibit evidence of a settlement offer mailed by the defendant to the plaintiff during the pendency of the present action, (2) admitted the settlement evidence in full into the record, (3) relied on the settlement evidence to determine that it had failed to mitigate its damages, and (4) failed to adjudicate its distinct claim that the defendant breached the agreement by crediting the costs charged to the Quaker Hill and Salem stores against the payments owed pursuant to the agreement. We address these claims in turn.

A

The plaintiff raises three claims concerning evidence of a settlement offer that the defendant mailed to the plaintiff after the commencement of the present action. The plaintiff asserts that the settlement evidence was inadmissible pursuant to § 4-8 of the Connecticut Code of Evidence[17] and, therefore, the court committed error in (1) denying its motion in limine, (2) admitting the settlement evidence in full into the record, and (3) relying on the settlement evidence to determine that it had failed to mitigate its damages.[18]

[17] Section 4-8 of the Connecticut Code of Evidence provides: "(a) General Rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

"(b) Exceptions. This rule does not require the exclusion of:

"(1) Evidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution, or

"(2) statements of fact or admissions of liability made by a party."

[18] The defendant argues that, in challenging the court's evidentiary rulings, the plaintiff has failed to comply with Practice Book § 67-4 (e) (3) and (5) and, therefore, we should decline to review the plaintiff's claims regarding the court's denial of the plaintiff's motion in limine and the court's admission of the settlement evidence in full into the record. We are not persuaded.

Practice Book § 67-4 (e) (3) provides: "When error is claimed in any evidentiary ruling in a court or jury case, the brief or appendix shall include a verbatim statement of the following: the question or offer of exhibit; the objection and the ground on which it was based; the ground on which the evidence was claimed to be admissible; the answer, if any; and the ruling."

Practice Book § 67-4 (e) (5) provides: "When the basis of an evidentiary or other ruling referred to in subsection (e) (3) or (e) (4) cannot be understood without knowledge of the evidence or proceeding which preceded or fol-

We agree with the plaintiff.[19]

The following facts and procedural history are relevant to our resolution of these claims. On March 24, 2021, the eve of trial, the plaintiff filed a motion in limine seeking to exclude "evidence, references to

lowed the ruling, a brief narrative or verbatim statement of the evidence or proceeding should be made. A verbatim excerpt from the transcript should not be used if a narrative statement will suffice. When the same ruling is repeated, the brief should contain only a single ruling unless the other rulings are further illustrative of the rule which determined the action of the trial court or establish the materiality or harmfulness of the error claimed. The statement of rulings in the brief shall include appropriate references to the page or pages of the transcript."

Following our review of the plaintiff's principal appellate brief and appendix on cross appeal, we conclude that the plaintiff adequately presented its claims challenging the court's evidentiary rulings. Moreover, assuming arguendo that the plaintiff failed to comply strictly with our rules of practice, we would deem the plaintiff's claims to be reviewable. See, e.g., *State* v. *Gonzalez*, 106 Conn. App. 238, 246 n.7, 941 A.2d 989 ("We note that the defendant's brief did not comply with [the predecessor to Practice Book § 67-4 (e) (3)]. Although we do not condone this failure to follow our rules of practice, we do not consider it fatal to the defendant's claim."), cert. denied, 287 Conn. 903, 947 A.2d 343 (2008); *Florian* v. *Lenge*, 91 Conn. App. 268, 287, 880 A.2d 985 (2005) (notwithstanding defendant's noncompliance with predecessor to § 67-4 (e) (3), "[b]ecause the defendant . . . gives some indication as to what he sought to pursue and cites to relevant portions of the transcript, we will review the defendant's arguments").

[19] The plaintiff also claims that a finding made in footnote 1 of the court's memorandum of decision was clearly erroneous. In the body of the decision, the court found that "[the defendant] does not dispute that it owe[d] [the plaintiff] $30,183.89 . . . . [The plaintiff] agree[s] with the balance as calculated, but takes issue with the interest owed as a result of [the defendant's] default and reasonable attorney's fees as provided in the agreement." (Footnote omitted.) In footnote 1 of the decision, the court stated: "[The plaintiff] now claims the arrearage was actually $35,211.15. However, in view of Branson's testimony that he disagreed only with the attorney's fees portion of the January, 2018 payment, the court finds the arrearage was $30,183.89." The plaintiff does not appear to dispute that $30,183.89 was the arrearage owed by the defendant, exclusive of contractual interest, as of January 29, 2018; however, the plaintiff takes issue with the court's finding that Branson "disagreed only with the attorney's fees portion of the January, 2018 payment," as Branson's testimony indicates that he also disputed the defendant's calculation of contractual interest accrued as of January 29, 2018. On the basis of the decision as a whole, it is apparent that the court recognized that the plaintiff disputed the amount of contractual interest that had accrued by January 29, 2018. Thus, assuming arguendo that the court committed error, we deem the error to be harmless.

evidence, testimony, or argument relating to prior settlements or settlement negotiations between [the] parties to this action." The plaintiff referenced a proposed exhibit that the defendant intended to offer at trial comprising (1) a letter mailed by Buhrendorf to Branson dated January 29, 2018 (January 29, 2018 letter), which was during the pendency of the present action,[20] and (2) two accompanying checks, one in the sum of $30,937.97 with the memo line reading "CCICW Settlement"[21] and the other in the sum of $4000 with the memo line reading "Legal Fees—CCICW." The plaintiff argued that the proposed exhibit was evidence of an offer to compromise or to settle the present action and, therefore, inadmissible pursuant to § 4-8 of the Connecticut Code of Evidence. On March 25, 2021, the defendant filed a written objection, arguing that the proposed exhibit was not evidence of an offer to compromise or settle the present action but, rather, evidence of the defendant's attempt to pay off the outstanding balance owed to the plaintiff as of January 29, 2018, including contractual interest

[20] The January 29, 2018 letter is titled "Re: Asset Purchase Agreement with [the Defendant] dated November 25, 2015." The body of the January 29, 2018 letter states:

"Enclosed please find a check in the amount of $30,937.97 which represents the arrearage owed to [the plaintiff] as agreed including the contractual interest due under the [agreement]. I have also included the supporting documentation to establish the amount owed.

"Also enclosed is a check for [$4000] as payment for the legal fees incurred by [the plaintiff] in connection with the [present action]. If [the plaintiff] has incurred more than [$4000] in legal fees, please provide me with that figure along with documentation supporting the reasonableness of the legal fees incurred.

"Since these payments bring [the defendant's] obligations current under the [agreement], we will consider this matter closed and the agreement of the parties remains in full force and effect. Accordingly, [the defendant] will now resume its monthly payments as they are provided for by the [a]greement.

"Please contact me with any questions or concerns. Thank you for your attention to this matter."

[21] The record reflects that both parties referred to the plaintiff by shorthand as CCICW.

and contractual attorney's fees. The defendant maintained that the proposed exhibit supported its special defense asserting that the plaintiff had failed to mitigate its damages.

On March 25, 2021, prior to the start of the evidentiary portion of trial, the court heard argument on the plaintiff's motion in limine. The plaintiff's counsel iterated that the proposed exhibit was evidence of a settlement offer and, thus, inadmissible. Counsel argued, inter alia, that (1) the two checks that accompanied the January 29, 2018 letter did not reflect the correct amounts owed by the defendant pursuant to the agreement, (2) the check in the amount of $30,937.97 had the word "Settlement" written in the memo line, (3) the January 29, 2018 letter read that the defendant "consider[ed] [the matter] closed" following the tender of the payments, and (4) the plaintiff had mitigated its damages by accepting subsequent payments remitted by the defendant in accordance with the agreement that were not designated as settlement offers. Counsel further argued that the plaintiff's acceptance of the two checks accompanying the January 29, 2018 letter would have resulted in an accord and satisfaction of its claims in the present action, notwithstanding that the plaintiff disputed the amounts offered by the defendant. The defendant's counsel argued in response that the proposed exhibit was not evidence of a settlement offer because, inter alia, (1) the January 29, 2018 letter did not purport to seek the withdrawal of the present action or the release of the plaintiff's claims and (2) Branson had testified at his deposition, taken in 2019, that he had rejected the tendered payments because the agreement did not specify a procedure for accepting late payments. Counsel maintained that the proposed exhibit established that the defendant had attempted to pay the plaintiff the outstanding balance owed

under the agreement as of January 29, 2018, such that the plaintiff had failed to mitigate its damages by rejecting the tendered payments. Following argument, the court reserved its decision on the motion in limine.[22]

Following a luncheon recess later in the day, the court orally denied the plaintiff's motion in limine, stating: "So, I did have an opportunity over the luncheon recess to consider the arguments and the information brought to the court's attention and to consider the context in which this information comes up. And, having all of that in mind, the court is going to deny the motion in limine to preclude [the settlement] evidence. I do find that, although the check [in the sum of $30,937.97] uses the word 'Settlement' right on it, it is more in the nature of a payment of a liability, which the defendant does not dispute it owed. It's not strictly a settlement offer. It's not accompanied by a release of all claims. It does [not] appear to have been accompanied by any kind of qualifying contingency or any type of [letter] saying, [if] you don't accept the check, please [return] it, we'll consider the offer rejected. There's nothing of that nature that accompanies it and . . . I believe that allowing this check into evidence would not run afoul of the primary purposes behind [§ 4-8 of the Connecticut Code of Evidence] as well and it may certainly be relevant to issues of mitigation. The court, of course, will hear from counsel as to that, as to what weight to give it on certain issues that the court needs to decide, but the court is not going to preclude the check from being offered into evidence."

Later in the afternoon, the defendant's counsel offered into evidence the January 29, 2018 letter and the

[22] Following a morning recess later in the day, the court heard additional argument from the parties' respective counsel on the motion in limine. Following the additional argument, the court again indicated that it would reserve its decision on the issue.

two accompanying checks collectively as defendant's exhibit F. While acknowledging that the court had denied the plaintiff's motion in limine, the plaintiff's counsel objected on the basis that exhibit F was inadmissible because it constituted evidence of a settlement offer. The court overruled counsel's objection and admitted exhibit F in full into the record.[23]

In its decision, the court found in relevant part as follows. "By letter of January 29, 2018, Buhrendorf sent Branson two checks: one for $30,937.97 and one for $4000. . . . The letter stated that the $30,937.97 represented the arrearage owed to [the plaintiff] as agreed, including the contractual interest, and the $4000 represented payment for legal fees incurred by [the plaintiff] in connection with the [present action that the plaintiff] brought against [the defendant]. The letter included the following language: 'If [the plaintiff] has incurred more than $4000 in legal fees, please provide me with that figure along with documentation supporting the reasonableness of the legal fees incurred. Since these payments bring [the defendant's] obligations current under the [agreement], we will consider this matter closed and the agreement of the parties remains in full force and effect. Accordingly, [the defendant] will now resume its monthly payments as they are provided for by the agreement.' . . . Thereafter, [the defendant] resumed full payments and continued to make payments as required from that point until the [agreement] terminated in November, 2020, with [the plaintiff] cashing over thirty checks from [the defendant] between March, 2018, and November, 2020. [The plaintiff] never cashed the two checks included with the January 29, 2018 letter, which were instead returned to [the defendant's] attorney. Branson testified that '[m]y estimate

[23] The plaintiff's counsel also objected to the defendant's offer of exhibit F on the basis of hearsay. The court overruled that objection. The plaintiff does not claim error on appeal with respect to that ruling.

of attorney's fees was much different than what [Buhrendorf's] check said and I believe, on advice from my attorney, we sent it back.' . . . [The plaintiff] did not provide any information about its legal fees to [the defendant] and did not advise [the defendant] of any interest it claimed was owed at that time.

"[The defendant] does not dispute that it owes [the plaintiff] $30,183.89 as calculated pursuant to the formula provided in the [agreement] . . . . Indeed, Buhrendorf testified that the money was owed, that the check he sent . . . was his effort to get caught up on back payments, and that he continued to the date of his testimony to be ready, willing, and able to make the payments. [The plaintiff] agree[s] with the balance as calculated, but takes issue with the interest owed as a result of [the defendant's] default and reasonable attorney's fees as provided in the agreement." (Citations omitted; footnote omitted.)

In addressing the defendant's mitigation of damages defense, the court summarized the parties' respective positions as follows. "[The defendant] argues that [the plaintiff's] rejection of the payment of the amount due, plus interest, plus a reasonable attorney's fee, was unreasonable and therefore a failure to mitigate damages. [The defendant] claims that, as a result, [the plaintiff] should not be entitled to any interest on the arrearage or attorney's fees after January 29, 2018. [The plaintiff] claims that it rejected the payment because it disputed the amount for attorney's fees and interest and viewed the language in the [January 29, 2018] letter as an effort to prevent [the plaintiff] from claiming all [of] the damages it believed it was due pursuant to the [agreement]."

The court then determined that the defendant had satisfied its burden of demonstrating that the plaintiff had failed to mitigate its damages, stating that, "as the

[January 29, 2018] letter indicated, if there was a dispute as to whether $4000 was a reasonable attorney's fee, [the plaintiff] would not have been foreclosed from pursuing a greater amount of attorney's fees by accepting the past due $30,183.89. Rather, as the letter . . . stated, [the plaintiff] was free to provide additional information with regard to the fees. Despite the inclusion of the word 'settlement' on the check, [the defendant] was not foreclosing additional discussion or negotiation concerning the attorney's fees, but rather, invited it. Thus, the court finds that [the plaintiff's] failure to accept the check was not reasonable and amounted to a failure to mitigate damages as to the balance due of $30,183.89." Accordingly, the court awarded the plaintiff $30,183.89, plus contractual interest and contractual attorney's fees to be determined at a later date, but the court declined to award the plaintiff any interest that accrued "beyond January 29, 2018."

The following legal principles and standard of review govern our analysis of the plaintiff's claims. "Section 4-8 (a) of the Connecticut Code of Evidence provides that '[e]vidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.' According to the commentary, '[t]he purpose of the rule is twofold. First, an offer to compromise or settle is of slight probative value on the issues of liability or the amount of the claim since a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim. . . . Second, the rule supports the policy of encouraging parties to pursue settlement negotiations by assuring parties that evidence of settlement offers will not be introduced into evidence to prove liability or a lack thereof if a trial ultimately ensues.' . . . Conn. Code Evid. § 4-8, commentary; see *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992) ('[t]he general rule that

evidence of settlement negotiations is not admissible at trial is based [on] the public policy of promoting the settlement of disputes' . . .)." *Kovachich* v. *Dept. of Mental Health & Addiction Services*, 344 Conn. 777, 799–800, 281 A.3d 1144 (2022).

The court's denial of the plaintiff's motion in limine and its admission of exhibit F in full into the record on the basis of its determination that exhibit F did not constitute a settlement offer were evidentiary rulings predicated on the court's "assessment of the nature and purpose of the proffered [exhibit], which is the type of inquiry that require[s] [the] trial court to make [a] judgment call involving determinations about which reasonable minds may . . . differ . . . ." (Internal quotation marks omitted.) Id., 801 n.11. Thus, we review the court's evidentiary rulings for an abuse of discretion. Id., 801. "[T]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) Id. "Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the [appellant] of substantial prejudice or injustice." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 756, 183 A.3d 611 (2018).

We construe exhibit F, comprising the January 29, 2018 letter; see footnote 20 of this opinion; and the two accompanying checks, to constitute an attempt by the defendant to settle the plaintiff's claim that the defendant failed to comply with its payment obligations pursuant to the agreement from February through December, 2017. The January 29, 2018 letter and the two

accompanying checks were mailed by Buhrendorf to Branson approximately four months after the plaintiff had commenced the present action. The memo line on the check in the amount of $30,937.97 expressly read "CCICW *Settlement*." (Emphasis added.) The January 29, 2018 letter indicated that the $30,937.97 amount represented the defendant's personal calculation of the outstanding arrearage, plus contractual interest, owed pursuant to the agreement as of January 29, 2018.[24] The January 29, 2018 letter also provided that the check in the amount of $4000 represented the defendant's own estimate of the plaintiff's legal fees. Buhrendorf further wrote in the January 29, 2018 letter that, "[s]ince [the two accompanying checks] bring [the defendant's] obligations current under the [agreement], *we will consider this matter closed* and the agreement of the parties remains in full force and effect." (Emphasis added.) Our analysis is not altered by the absence of language in the January 29, 2018 letter seeking the withdrawal of the present action or the release of the plaintiff's claims, or by Buhrendorf's invitation for additional discussion regarding attorney's fees if Branson disagreed with the $4000 amount. Accordingly, we conclude that the court abused its discretion in denying the plaintiff's motion in limine and in admitting exhibit F in full into the record on the incorrect premise that the January 29, 2018 letter and the two accompanying checks did not constitute evidence of a settlement offer.

In its cross appellee's brief, the defendant, assuming arguendo that exhibit F constituted settlement evidence, contends that exhibit F fell within the ambit of § 4-8 (b) (1) of the Connecticut Code of Evidence

[24] As the court found, the parties did not dispute that, as of January 29, 2018, the outstanding arrearage, exclusive of contractual interest, owed pursuant to the agreement was $30,183.89. Thus, of the $30,937.97 offered by the defendant, $754.08 was the defendant's calculation of contractual interest. The record reflects that, as of January 29, 2018, the plaintiff claimed in excess of $4000 in accrued contractual interest.

because it sought to admit exhibit F for "another purpose," namely, to support its special defense asserting that the plaintiff had failed to mitigate its damages. This argument is unavailing.

"Under subdivision (1) of § 4-8 (b) of the Connecticut Code of Evidence . . . evidence of an offer to compromise or settle a disputed claim is admissible if it 'is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution . . . .' The 'list of purposes for which such evidence may be introduced is intended to be illustrative rather than exhaustive'; Conn. Code Evid. § 4-8, commentary; and, therefore, 'other reasons will also suffice as long as they are relevant to some issue other than liability or damages.' E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.19.4, p. 203 . . . ." (Citations omitted.) *Kovachich* v. *Dept. of Mental Health & Addiction Services*, supra, 344 Conn. 800.

When "[t]he parties have not cited, and our research has not revealed, any authoritative Connecticut case law that informs our analysis of [a] discrete issue . . . we [may] turn to federal case law for guidance." *Daley* v. *J.B. Hunt Transport, Inc.*, 187 Conn. App. 587, 595, 203 A.3d 635 (2019). In *Pierce* v. *F. R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit considered whether rule 408 of the Federal Rules of Evidence,[25] the federal coun-

[25] Rule 408 of the Federal Rules of Evidence provides: "(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

"(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

"(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

terpart to § 4-8 of the Connecticut Code of Evidence; see, e.g., *Kovachich* v. *Dept. of Mental Health & Addiction Services*, supra, 344 Conn. 805 (deeming federal case law construing rule 408 of Federal Rules of Evidence to be "instructive" to question regarding admissibility of evidence pursuant to § 4-8 (b) (1) of Connecticut Code of Evidence); permitted the admission of settlement evidence to support a mitigation of damages defense. *Pierce* v. *F. R. Tripler & Co.*, supra, 826–27. The court concluded that it did not, reasoning that "[e]vidence that demonstrates a failure to mitigate damages goes to the 'amount' of the claim," such that settlement evidence proffered to support a mitigation of damages defense "is barred under the plain language of [r]ule 408 [of the Federal Rules of Evidence]." Id.; see also *Stockman* v. *Oakcrest Dental Center, P.C.*, 480 F.3d 791, 798 (6th Cir. 2007) (agreeing with holding of *Pierce*).

Guided by the rationales of *Pierce* and *Stockman*, we conclude that exhibit F was not admissible pursuant to § 4-8 (b) (1) of the Connecticut Code of Evidence for the purpose of establishing the plaintiff's failure to mitigate its damages. Section 4-8 (b) (1) permits the admission of settlement evidence offered for "another purpose," meaning for a purpose other than addressing "the issues of liability" *or* "the amount of the claim." Conn. Code Evid. § 4-8 (a); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.19.4, p. 203 ("other reasons will also suffice as long as they are relevant to some issue *other than liability or damages*" (emphasis added)). We agree with the

"(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

Following *Pierce*, rule 408 was amended in 2006 and again in 2011. These amendments do not affect our analysis and, therefore, we refer to the current version of the rule.

reasoning in *Pierce* and *Stockman* that evidence of a settlement offer proffered to support a mitigation of damages defense speaks to the "amount of the claim," and, therefore, we conclude that exhibit F is not within the scope of the exceptions contemplated in § 4-8 (b) (1).[26] Accordingly, the defendant's reliance on § 4-8 (b) (1) is misplaced.

Having concluded that the court abused its discretion in denying the plaintiff's motion in limine and in admitting exhibit F in full into the record, we turn to the question of whether the plaintiff has demonstrated substantial prejudice stemming from the court's evidentiary rulings. See *MacDermid, Inc.* v. *Leonetti*, supra, 328 Conn. 756. The court relied solely on exhibit F in determining that the plaintiff had failed to mitigate its damages as to its claim concerning the defendant's failure to pay the full amounts owed pursuant to the agreement from February through December, 2017. Consequently, we conclude that (1) the plaintiff suffered substantial prejudice as a result of the court's evidentiary rulings, and (2) the court's determination that the plaintiff failed to mitigate its damages cannot stand.

In sum, we conclude that the court committed harmful error in admitting evidence of the settlement offer and in relying on that evidence to conclude that the plaintiff had failed to mitigate its damages, which resulted in the court, in its September 2, 2021 decision, declining to award contractual interest to the plaintiff that accrued "beyond January 29, 2018." In its subsequent decision determining the amount of contractual

[26] At least two federal circuit courts of appeals, in decisions predating *Pierce* and *Stockman*, have concluded that settlement evidence is admissible pursuant to rule 408 of the Federal Rules of Evidence to address a mitigation of damages defense. See *Bhandari* v. *First National Bank of Commerce*, 808 F.2d 1082, 1103 (5th Cir. 1987); *Urico* v. *Parnell Oil Co.*, 708 F.2d 852, 854–55 (1st Cir. 1983). We are not persuaded by the rationale of these decisions. See *Davis* v. *Beling*, 128 Nev. 301, 312 n.5, 278 P.3d 501 (2012) (deeming *Bhandari* and *Urico* to be "unpersuasive" and "unconvincing," respectively, in their analyses of rule 408).

interest awarded to the plaintiff, the court declined to award any contractual interest for the month of January, 2018, because "that was the month in which the plaintiff rejected the defendant's payment." See footnote 9 of this opinion. Thus, we reverse the judgment in part and remand the case to the court for a hearing to determine the amount of contractual interest accrued beyond December, 2017, to which the plaintiff is entitled, if any, with any such interest to be added to the damages awarded to the plaintiff.

B

The plaintiff also asserts that the court committed error in failing to address its distinct claim that the defendant breached the agreement by crediting costs charged to the Salem and Quaker Hill stores against the payments that the defendant owed pursuant to the agreement. This claim is unavailing.

Resolving the plaintiff's claim requires us to interpret the court's judgment. "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations [if any] that the court provides. . . . [W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.)

In re November H., 202 Conn. App. 106, 118, 243 A.3d 839 (2020).

The following additional facts and procedural history are relevant to our disposition of this claim. In its second amended complaint, the plaintiff alleged that the defendant had breached the agreement by, inter alia, crediting costs that it attributed to the Salem and Quaker Hill stores against the payments owed under the agreement. In its principal posttrial brief, the plaintiff asserted that the evidence at trial demonstrated that these costs totaled $20,080.62, with $6160.36 in costs attributed to the Salem store and $13,920.65 in costs attributed to the Quaker Hill store.[27] As the plaintiff recognized, the $13,920.65 amount attributed to the Quaker Hill store included a single charge of $10,016.28, representing the amount of the lien that the department had imposed on the defendant in 2019. As relief vis-à-vis this claim, the plaintiff contended that the "inappropriate reductions should be added to [the] total judgment."

In rendering judgment for the plaintiff on count one of its second amended complaint asserting breach of contract, the court did not expressly refer to the plaintiff's claim regarding the costs credited by the defendant against the payments owed pursuant to the agreement. In the portion of its decision analyzing the defendant's counterclaim, however, the court (1) determined that the defendant improperly had deducted $10,016.28, the amount of the department lien assessed on it in 2019, from its payments owed pursuant to the agreement and (2) awarded the plaintiff $10,016.28, plus contractual interest, in damages. Notwithstanding that the court discussed this award in the section of its decision examining the counterclaim, we do not construe the decision to reflect that the court awarded the plaintiff the

[27] The sum of $6160.36 and $13,920.65 is $20,081.01, rather than $20,080.62. We deem this discrepancy to be immaterial.

$10,016.28, plus contractual interest, in damages on the counterclaim; indeed, awarding such relief to the plaintiff, as the counterclaim defendant, would have been procedurally improper. Rather, reading the decision as a whole, we conclude that the court awarded the plaintiff the $10,016.28, plus contractual interest, as part of its adjudication of the plaintiff's breach of contract claim. It necessarily follows that the court considered the discrete claim that the plaintiff maintains was overlooked, as the plaintiff's requested relief vis-à-vis that claim included a return of the $10,016.28 amount that was improperly withheld. Insofar as the court did not award the plaintiff the additional costs that it asserted were credited improperly by the defendant against the payments owed pursuant to the agreement, we conclude that the court impliedly denied, rather than ignored, that requested relief.

In sum, we conclude that the court addressed the plaintiff's claim that the defendant breached the agreement by crediting costs charged to the Salem and Quaker Hill stores against the payments that the defendant owed pursuant to the agreement, but the court awarded only partial relief as to that claim. Accordingly, the plaintiff's contention fails.[28]

The judgment is reversed only insofar as the trial court declined to award contractual interest on count one of the plaintiff's second amended complaint for the period beyond December, 2017, and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[28] The plaintiff also asserts that the court improperly denied its motion for reargument and for reconsideration insofar as the motion was predicated on the ground that the court failed to address the issue in question. This assertion is untenable in light of our conclusion that the court considered that issue.