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GRUENDEL, J., dissenting. The majority concludes that the trial court improperly found the plaintiff, the city of Hartford, liable to the defendant Brian McKeever[1] for overpayments made to its trustee prior to the assignment of the promissory note in question from its trustee to it. In so doing, the majority adopts a bright line rule that an assignee, in all circumstances, may be held accountable for the liabilities of an assignor only when the assignee expressly assumes responsibility therefor. I believe that such an absolute rule is unwarranted, particularly in the context of equitable proceedings that demand a more flexible approach. I therefore respectfully dissent from the majority opinion.

The relevant facts, as found by the trial court, are as follows. The defendant owned a building in Hartford known as 206-208 Hamilton Street (property), which consisted of twelve rental units. On May 5, 1983, the defendant borrowed a total of $143,065 in two separate loan transactions with the Community Development Corporation (corporation). Both loan transactions involved a promissory note agreement and a separate agreement entitled "Collateral Assignment of Leases and Rentals" (assignment of rents agreement), pursuant to which the corporation could collect rent from the defendant's tenants if he defaulted on his obligation to tender payment on the notes.

Significantly, the court found that the plaintiff "was involved from the beginning" in those loan transactions. In light of that finding, the court further found that the plaintiff "had an interest from the very beginning and over the years in the execution and administration of the mortgages." Those critical factual findings are supported by the record before us.[2] First and foremost, the plaintiff, prior to trial, admitted both that it was involved in the execution of the notes at issue and that the overpayments giving rise to the defendant's counterclaim were collected on its behalf. In addition, the "Deed of Restrictive Covenants" (deed) signed by the defendant as part of the loan transactions entered into on May 5, 1983, was admitted into evidence at trial as part of plaintiff's exhibit 1.[3] The deed provides that it is granted by the defendant to and for the benefit of, inter alia, the plaintiff and the corporation.[4] The deed states that, in 1982, the plaintiff sold bonds to raise approximately $10 million for the purpose of providing loans to facilitate the rehabilitation of certain residential properties in Hartford. Arthur Greenblatt, a principal of the corporation at all relevant times, testified at trial that the proceeds from the sale of those bonds were delivered directly to the plaintiff's trustee, Colonial Bank (trustee bank).[5] Greenblatt testified that those funds never were furnished to the corporation, nor did

the corporation ever lend any of its own money.[6] Rather, the corporation merely would originate a loan and then immediately assign it to the trustee bank.[7] Indeed, the plaintiff averred in its complaint both that the defendant entered into the loan transactions with the corporation on May 5, 1983, and that the corporation assigned those loans to the trustee bank *that very same day*. For that reason, Greenblatt testified that the corporation "never, ever considered any of these [transactions as its] loans. . . . [The corporation] never treated any of those loans as its asset." Following the immediate assignment of the defendant's loans to the trustee bank, the corporation thereafter continued to service the loans. The aforementioned evidence plainly substantiates the court's factual findings that the plaintiff "was involved" and "had an interest from the very beginning" in the transactions with the defendant.

The court specifically found—and the plaintiff in this appeal does not dispute—that "the accountings and bookkeeping of the [corporation] were a mess." At some point, the corporation believed that the defendant had failed to make payments on the notes.[8] As a result, the corporation began to collect rental payments from the defendant's tenants pursuant to the assignment of rents agreement, rather than exercising the right to declare the notes immediately due and payable. The collection of rental payments from the defendant's tenants gave rise to the overpayments at issue in this litigation. As the court found, "[t]he blame for the overpayment is [on the corporation] for continuing to take rent payments from the tenants under the assignment of rents long after the mortgage was paid off, and then rebuffing the defendant when he complained to it. The corporation was not responsive to him . . . ."

As of July, 2001, the defendant fully had paid one loan in the amount of $28,879. At that time, the trustee bank assigned the note on the second loan to the plaintiff for the sum of one dollar. The plaintiff, mistakenly believing that the defendant had defaulted on his obligations under the second loan, thereafter commenced a foreclosure action against the defendant. Alleging that the defendant had "failed, neglected and/or refused to pay the sums due under the note," the plaintiff sought "(1) [a judgment of] strict foreclosure of its mortgage; (2) immediate and exclusive possession of the mortgaged premises; (3) a deficiency judgment against the [defendant]; (4) interest; (5) reasonable attorney's fees; (6) costs; (7) appointment of a receiver of rents; and (8) such other and further relief as the court deems just and equitable."

In response, the defendant filed a counterclaim that alleged, inter alia, that the plaintiff had received overpayments "in excess of $140,000 from [him], or on his behalf," for which it had not credited him. The defendant further alleged that those payments "were made

to the [plaintiff] by third parties'' pursuant to the assignment of rents agreement and that although he "has requested the [plaintiff] [to] account to him for the payments, [it] has failed, refused or neglected to do so.'' Accordingly, the defendant requested an accounting of said payments, money damages, attorney's fees and other relief deemed just and equitable by the court.

Two years after the filing of the defendant's counterclaim, the plaintiff withdrew its foreclosure action against the defendant and acknowledged that it had received excessive payments collected pursuant to the assignment of rents agreement. It thus offered to pay the defendant $17,397.93 related thereto in exchange for his withdrawal of the counterclaim. The defendant declined that overture, contending that the overpayments on the second loan totaled $195,909.

In paragraph six of his counterclaim, the defendant averred that, pursuant to the assignment of rents agreement, "the [plaintiff] on or after May 5, 1983, collected rents from tenants of [the property] in lieu of [the defendant] making payments on the notes to [the plaintiff].'' In filing its answer on May 18, 2009, more than six years after the counterclaim was filed, the plaintiff pleaded the following with respect to that allegation: "The [plaintiff] admits the rentals were being collected pursuant to a collateral assignment of leases and rentals. The [plaintiff] denies that it was collecting the rentals. Instead, a third party was collecting the rent on behalf of the [plaintiff]."[9]

A court trial followed, at the conclusion of which the court found in favor of the defendant. In its November 9, 2010 memorandum of decision, the court found that the defendant "has proven the overpayment of $195,909 and has proven that the [plaintiff] is liable for said overpayments by being an assignee of the [trustee bank], which in turn was an assignee of the [corporation], and the [plaintiff] took the assignment with all of the obligations it and its predecessors had in these transactions. Additionally, it would be highly inequitable for the [plaintiff], [the corporation] and/or [the trustee bank] to be unjustly enriched by monies paid by [the defendant] that were not in fact due."[10] In addition, the court specifically found that of the $195,909 in overpayments, $56,930 was made "while the [plaintiff] had possession and title to the mortgage.''

Approximately eleven months later, the plaintiff filed a motion for articulation, which the court granted. In its October 26, 2011 articulation, the court stated that without access to the court file, it could not identify the specific count of the counterclaim on which the defendant had prevailed. The court emphasized that the litigation "was an equitable proceeding initiated by the plaintiff'' and stressed that the counterclaim "was brought while the foreclosure action was still pending.'' The court also noted that, pursuant to the assignment

of rents agreement, the defendant was prohibited from interfering with the collection of rental payments from his tenants. The court thus reiterated its earlier finding that "the payments were not voluntary by him." As the majority correctly notes, the plaintiff did not seek a motion for review pursuant to Practice Book § 66-7 to clarify the distinct legal basis of the court's decision, rendering the record inadequate to review its first claim on appeal.

The record is adequate to review the plaintiff's claim that the court incorrectly determined that it was liable for the overpayments collected from the defendant's tenants pursuant to the assignment of rents agreement prior to the July 19, 2001 assignment of the note from the trustee bank to the plaintiff. For the reasons that follow, I disagree with the majority that the court improperly found the plaintiff so liable under the particular facts of this case.

I

A

Preliminarily, I note that it is undisputed that the corporation assigned the notes in question to the trustee bank the very day that they were entered into and, thus, never received any overpayments as a holder thereof. The assignment of the notes from the corporation to the trustee bank, therefore, has little relevance to the issue at hand. Rather, the only assignment relevant to our inquiry is that from the trustee bank to the plaintiff in July, 2001. The trial court in the present case specifically found that $56,930 of the $195,909 in overpayments was made after that assignment.[11] Accordingly, the pertinent inquiry is whether the court properly held the plaintiff liable for the $138,979 in overpayments made while the trustee bank was the holder of the notes.

B

It also bears emphasis that the court found that the present case involves an equitable proceeding "subject to equitable considerations." The parties do not disagree. Indeed, the plaintiff in its appellate brief acknowledges the equitable nature of the proceeding, citing to *Fellows* v. *Martin*, 217 Conn. 57, 64–65, 584 A.2d 458 (1991), for the proposition that "once any equitable claim has been raised, the court retains its equitable jurisdiction to consider all of the equities before it in order to render complete justice . . . even where the equitable jurisdiction was conferred by a defendant's counterclaim."[12] (Citations omitted.) Indeed, the plaintiff in this appeal argues that the court "based on the record, did not act equitably and should be reversed."[13]

The present litigation was commenced by the plaintiff in an attempt to foreclose on the defendant's property. Foreclosure patently is an equitable proceeding. See, e.g., *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143 (2007). Moreover, the

gravamen of the defendant's counterclaim was that the plaintiff unjustly "has received in excess of $140,000" in overpayments. In addition, the defendant in his counterclaim specifically requested equitable relief from the court. In finding the plaintiff liable for the overpayments made to its trustee, the court concluded, inter alia, that "it would be highly inequitable for the [plaintiff] . . . to be unjustly enriched by monies paid by [the defendant] that were not in fact due."

"Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction." (Internal quotation marks omitted.) *Morgera* v. *Chiappardi*, 74 Conn. App. 442, 458, 813 A.2d 89 (2003), citing 2 J. Pomeroy, Equity Jurisprudence (5th Ed. 1941) § 378, pp. 40–41. As our Supreme Court observed, "[e]quity always looks to the substance of a transaction and not to mere form . . . and seeks to prevent injustice." (Citation omitted; internal quotation marks omitted.) *Natural Harmony, Inc.* v. *Normand*, 211 Conn. 145, 149, 558 A.2d 231 (1989). Accordingly, "[t]he governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit." (Internal quotation marks omitted.) *Maruca* v. *Phillips*, 139 Conn. 79, 82–83, 90 A.2d 159 (1952).

"In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 417, 853 A2d 497 (2004).

II

Turning to the merits of the principal issue before this court, I believe the court's finding of liability should stand. The question of an assignee's responsibility for the liabilities of its assignor is one on which the authority of our Superior Court is split. The majority today resolves that division by adopting a bright line rule that an assignee may be held accountable for the liabilities of an assignor only when the assignee expressly assumes responsibility therefor. I disagree and, guided by the precedent of our state and federal supreme courts, as well as persuasive authority from other jurisdictions, respectfully suggest that a more flexible approach is necessary.

A

"It is hornbook law . . . that an assignee stands in the shoes of the assignor. . . . An assignee has no greater rights or immunities than the assignor would have had if there had been no assignment." (Citations omitted; internal quotation marks omitted.) *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, 70 Conn. App. 60, 72, 797 A.2d 1165 (2002). As our Supreme Court explained, "the assignee of a chose in action takes subject to all equities and defenses which could have been set up against the chose in the hands of the assignor at the time of the assignment." *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, 123 Conn. 616, 626–27, 197 A. 766 (1938).

The distinct question presented in this case is whether an assignee of a mortgage note may be held responsible for the liabilities of the assignor, by way of counterclaim, after it commences foreclosure proceedings against a mortgagor. On that issue our Superior Court authority is split. One line of cases, with which the majority here agrees, holds the assignee responsible only when it expressly assumes such liability. See, e.g., *Fremont Investment & Loan* v. *Santiago*, Superior Court, judicial district of New London, Docket No. CV-06-5001151-S (January 13, 2010). Another line of cases holds that when an assignee initiates a foreclosure action against a mortgagor, the assignee in that equitable proceeding is "subject to all counterclaims and defenses that could be asserted against its assignor." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Lobaton*, Superior Court, judicial district of New London, Docket No. CV-09-5009907-S (May 5, 2010). In my view, neither approach properly resolves the question presented in this case. I believe the more reasoned analytical approach, and the one most consistent with the precedent of our supreme courts, is to generally preclude affirmative claims against an assignee arising from the acts or liabilities of the assignor, while at the same time permitting equitable claims that merit exception therefrom.

I thus begin by noting my general agreement with the position adopted by the majority. In the normal case, an obligor "may use defensively against an assignee an offsetting claim against the assignor, although the assignee is not subject to affirmative liability on such a claim unless he contracts to assume such liability." 3 Restatement (Second), Contracts § 336, comment (c), p. 68 (1981). Likewise, in addressing the liabilities of an assignee "generally," Corpus Juris Secundum notes that "[i]n the absence of an express contract provision, an assignee is not required to assume the original responsibilities of the assignor"; 6A C.J.S. 511, Assignments § 115 (2004); and further states that "[*a*]*s a general rule*, unless there has been an express assumption of liability, the assignee is not liable to the debtor for

liabilities incurred by the assignor . . . .” (Emphasis added.) Id., § 117, p. 512.

Some courts, like the majority here, have adopted that general rule as a strict, bright line test. The decision of the Missouri Court of Appeals in *Standard Insulation & Window Co.* v. *Dorrell*, 309 S.W.2d 701 (Mo. App. 1958), exemplifies that approach. At issue in that case was whether an obligor could recover an overpayment made to the assignor of the promissory note in question. Id., 702. In answering that query in the negative, the court stated: “[I]n an action by an assignee, a claim in favor of defendant against the assignor can be allowed as a set-off, counterclaim, or reconvention only to the extent of the claim sued on, and judgment cannot be rendered against the assignee for the excess. Defendant is entitled to use his claim defensively, and not offensively . . . . [The obligor's] claim of payment and overpayment is truly a defense to the negotiable instrument itself rather than a claim against plaintiff, in whose hands the note came to rest. . . . Defendant-maker, by his counterclaim, resisted and completely overcame liability under the negotiable instrument. He has no further valid claim against the plaintiff-assignee.” (Internal quotation marks omitted.) Id., 704–705.

In adopting that view, I respectfully submit that the majority gets it half right. The precedent of this state's highest court instructs that an assignee takes subject not only to all defenses, but also to “all equities” that “could have been set up against the chose in the hands of the assignor at the time of the assignment.” *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, supra, 123 Conn. 626–27; see also *Baker* v. *Wood*, 157 U.S. 212, 216, 15 S. Ct. 577, 39 L. Ed. 677 (1895) (“in respect of the assignment of choses in action, not negotiable, the assignee takes subject to the equities between the debtor and the original creditor subsisting at the time of the assignment”); *Railroad Co.* v. *Howard*, 74 U.S. (7 Wall.) 392, 19 L. Ed. 117 (1868) (“assignees take them subject to every equity affecting them in the hands of the original holder”); *Adams* v. *Leavens*, 20 Conn. 73, 79 (1849) (assignee takes “subject to all the equities existing at the time the assignment was made”); 59 C.J.S. 470, Mortgages § 438 (2009) (“assignee of a mortgage ordinarily takes it subject to all equities and defenses between the original parties which arose out of the mortgage transaction prior to the assignment”); 29 S. Williston, Contracts (4th Ed. 2003) § 74:47, pp. 546–47 (assignee subject to all equities existing in favor of debtor). In holding that an assignee takes subject to defenses alone, the majority effectively excises from our decisional law the aforementioned precept.

Because under our law an assignee takes subject to all defenses *and* all equities that could have been raised by the obligor against the assignor at the time of the assignment, I believe that the proper inquiry into

whether an assignee may be responsible for the liabilities of an assignor entails consideration of whether the obligor's claim is equitable in nature. Only if the obligor's claim is an equitable one should a court depart from the general rule precluding assignee liability and proceed to a determination as to whether, on the facts presented, the equities demand relief therefrom. That analytical approach gives meaning to our precedent recognizing that an assignee is subject to both defenses and equities existing at the time of assignment.

Indeed, other courts confronting this issue have focused their analysis of an assignee's liability on the equitable nature of an obligor's claim against it. In *Irrigation Assn.* v. *First National Bank of Frisco*, 773 S.W.2d 346, 348 (Tex. App. 1989), writ denied (September 13, 1989), the court framed the issue before it as "whether a rule of law that was fashioned as a shield against liability may also be employed as a spear by means of which an affirmative recovery may be secured." The court observed that "[t]here is little authority squarely on point. . . . Nationally, only a limited number of cases in point are to be found and, as might be expected, they do not present a uniform view." Id., 348–49. The court rejected a bright line test prohibiting affirmative suits against an assignee for the recovery of payments to which the assignor was not entitled. Id., 350. Instead, the court considered the equitable nature of the claim against the assignee. It stated: "Claims by the [obligor] demanding that an assignee return money already paid on grounds that the assignor has failed to perform the contract *constitute claims for restitution*. Claims for restitution are governed by *equitable principles*." (Emphasis in original). Id. Accordingly, to determine whether the assignee in that case could be held liable for the overpayments made to the assignor, the court weighed the equities by focusing on "the circumstances here present . . . ." Id., 347. In so doing, the court concluded that "we can find no equitable considerations militating in favor of a judgment that would transfer [the obligor's] loss to [the assignee] and make the loss into assignee's loss. Assignee was every bit as blameless for the loss as was [the obligor], if not more so. . . . We decline to transfer that loss to assignee, an essentially blameless party." Id., 351; see also *Benton State Bank* v. *Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978) (holding assignee bank liable for payment made to assignor, after weighing equities).

Similarly, in considering the equitable nature of a claim against an assignee, the Supreme Court of Montana, in *Massey-Ferguson Credit Corp.* v. *Brown*, 173 Mont. 253, 260–61, 567 P.2d 440 (1977), found "the close relationship and participation between the assignor and assignee" dispositive in imposing liability on the assignee for an overpayment made to the assignor. The issue presented in that case was whether the obligor was "entitled to receive from [the assignee] the value

of the [payment made to the assignor] over and above being absolved from making any payments on the contract"; id., 255; that is, whether the obligor could maintain an affirmative claim against the assignee for a liability of the assignor. The court, upon examination of "these particular facts"; id., 261; concluded that "the close relationship and participation between the assignor and assignee requires a departure from the general rule of law" prohibiting such affirmative claims. Id., 258. The court emphasized that "[t]he evidence shows that [the assignee] participated, at least to some degree," in the underlying transaction. (Internal quotation marks omitted.) Id., 255. The court further emphasized that the "close relationship and participation between the assignor and assignee put [the assignee] on notice of the claims which might arise. Due to this knowledge and participation, [the assignee] was vulnerable to the [obligor's] counterclaim." Id., 260–61. As a result, the court concluded that "[u]nder these particular facts, [the assignee] is more than a mere assignee." Id., 261. The court thus held that "this case requires an exception to the general rule" precluding affirmative claims against an assignee for the liability of the assignor and permitted the obligor to recover his overpayment from the assignee. Id., 261–62. That persuasive authority is consistent with the Restatement (Second) of Contracts, which recognizes that "[t]he conduct of the assignee or his agents may . . . give rise to defenses and claims which may be asserted against him by the obligor," including the situation wherein an obligee who is subject to a claim attempts to evade liability by "assigning the right to an assignee who is not subject to the defense or claim . . . ." 3 Restatement (Second), supra, § 336, comment (h), p. 72; see also 6A C.J.S. 525, supra, § 132 ("the conduct of an assignee, which antedated the assignment, could be used as a defense in an action brought by the assignee on the assigned claim").

I find the reasoning of the aforementioned authorities compelling, particularly in the context of equitable proceedings like the present one, in which the plaintiff commenced a foreclosure action against the defendant despite the collection of almost $200,000 in overpayments on its behalf. Accordingly, although I agree generally with the majority that an obligor, in the normal course, may not maintain an affirmative claim against an assignee arising from the acts or liabilities of the assignor, I would except from that general rule those situations in which said claim was equitable in nature and on which the equities demand relief therefrom.

The present case is a quintessential example of the need for, and the appropriateness of, that exception. As in *Massey-Ferguson Credit Corp.* v. *Brown*, supra, 173 Mont. 255, the plaintiff here was involved in the loan transactions from the beginning, as the trial court specifically found and as the plaintiff admitted in its

answer.[14] The loans furnished to the defendant were funded and issued as part of the plaintiff's rehabilitation program. The deed signed by the defendant as part of those transactions specifically provides that it is granted by the defendant to and for the benefit of, inter alia, the plaintiff. Significantly, the two promissory notes in question were assigned to the trustee bank the very day they were entered into, and thereafter were held at all times by the trustee bank on behalf of the plaintiff.

Moreover, the plaintiff admitted that all overpayments giving rise to the defendant's counterclaim were collected on its behalf, and thus inured to its benefit. It is bedrock law that an admission in an answer to an allegation in a complaint is binding as a judicial admission. *Franchi* v. *Farmholme, Inc.*, 191 Conn. 201, 214, 464 A.2d 35 (1983); *Lutkus* v. *Kelly*, 170 Conn. 252, 257, 365 A.2d 816 (1976); *Bridgeport* v. *Stratford*, 142 Conn. 634, 646, 116 A.2d 508 (1955); 71 C.J.S. 228, Pleading § 195 (2011) (admission in answer binding on party making it and "supports a presumption or inference of such other facts as normally follow from the establishment of such fact"). As this court has explained, "[p]leadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial . . . . Accordingly, [t]he admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader. . . . A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it. . . . [The] admission in a plea or answer is binding on the party making it, and may be viewed as a conclusive or judicial admission . . . . It is axiomatic that the parties are bound by their pleadings." (Citations omitted; internal quotation marks omitted.) *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, 93 Conn. App. 759, 768–69, 890 A.2d 645 (2006).

Paragraph six of the defendant's counterclaim alleged that, pursuant to the assignment of rents agreement, "the [plaintiff] on or after May 5, 1983, collect[ed] rents from tenants of [the property] in lieu of [the defendant] making payments on the notes to [the plaintiff]." In answering that allegation, the plaintiff admitted that "the rentals were being collected pursuant to a collateral assignment of leases and rentals. . . . [A] third party was collecting the rent *on behalf of* [*the plaintiff*]."[15] (Emphasis added.) Significantly, the plaintiff did not assert that the trustee bank was the recipient or beneficiary of those rent payments, which resulted in overpayment—its answer specifically and unequivocally stated that the rent payments were collected *on its behalf*.[16] That admission certainly is understandable

in light of the unique circumstances of this case, in which the assignor, at all times, held the notes as the trustee of the assignee, the plaintiff. The plaintiff's admission thus served to "frame, present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial"; (internal quotation marks omitted) *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 768; in two critical respects. First, it established that, with respect to the collection of overpayments on the notes, there existed no meaningful distinction between the plaintiff and the assignor, its trustee. Second, the plaintiff's admission that the rent payments were collected on its behalf necessarily acknowledges that the plaintiff was the beneficiary of the overpayments made on behalf of the defendant.[17]

More importantly, the plaintiff's judicial admission that all of the overpayments were collected on its behalf substantiates, and appears to underlie, the court's finding that the plaintiff "had an interest from the very beginning and over the years in the execution and administration of the mortgages."[18] In my view, that critical finding pervades the court's memorandum of decision and is essential to its determination that "it would be highly inequitable for the [plaintiff] . . . to be unjustly enriched by monies paid by [the defendant] that were not in fact due." The undisputed evidence before the court indicates that this is not the normal case in which a promissory note and the attendant legal obligations were passed from an assignor to a detached third party assignee. This is the exceptional case where, by the plaintiff's admission, there existed no meaningful difference between the assignor and assignee, as the assignor held the note in question at all times as the plaintiff's trustee. Under those particular facts, I would conclude that the plaintiff is "more than a mere assignee"; *Massey-Ferguson Credit Corp.* v. *Brown*, supra, 173 Mont. 261; and that "the close relationship and participation between the assignor and assignee requires a departure from the general rule of law." Id., 258.

This court's analysis of the issue before us is hampered by the lack of an adequate record to determine the distinct legal basis of the court's decision. Mindful of our obligation to make every reasonable presumption in favor of the court's action in fashioning equitable relief; *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 417; I construe the decision of the trial court as an attempt "to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties." (Internal quotation marks omitted.) *Morgera* v. *Chiappardi*, supra, 74 Conn. App. 458. The court specifically found that the plaintiff "was involved" and "had an interest from the very beginning and over the years in the execution and administration of the [defendant's]

mortgages." Put simply, the court looked to the substance of the transactions and sought to prevent injustice. See *Natural Harmony, Inc.* v. *Normand*, supra, 211 Conn. 149.

The gist of the defendant's counterclaim is that the plaintiff unjustly benefitted from the receipt of almost $200,000 in overpayments collected on its behalf from the defendant's tenants. Upon examination of the circumstances and the conduct of the parties, the court in the present case concluded that "it would be highly inequitable for the [plaintiff] . . . to be unjustly enriched by monies paid by [the defendant] that were not in fact due." I concur. It would be contrary to equity and good conscience for the plaintiff to retain a benefit—in this case the excessive collection of $195,909 on its behalf—which has come to it at the expense of another. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 451, 970 A.2d 592 (2009). In light of those equitable considerations, I therefore would depart from the general rule precluding an affirmative claim against an assignee arising from the acts or liabilities of the assignor. Because the assignor acted at all times as the trustee of the plaintiff assignee and because the overpayments at issue at all times inured to the plaintiff's benefit, "the equities existing at the time the assignment was made"; *Adams* v. *Leavens*, supra, 20 Conn. 79; demand that the defendant be permitted to maintain his counterclaim against the plaintiff for the recovery of the aforementioned overpayments. I, therefore, would affirm the judgment of the trial court.

[1] The plaintiff's complaint also named Webster Bank, Helene Fishman, Trustee and the Metropolitan District as defendants. Because they are not parties to this appeal, I refer to Brian McKeever as the defendant in this opinion.

[2] Although those factual findings are not contested by the plaintiff in this appeal, the majority does not acknowledge them in its recitation of facts. Because in my view they are essential to the analysis of the trial court—in which it ultimately concluded that "it would be highly inequitable" for the plaintiff to be unjustly enriched by its retention of almost $200,000 in overpayments by the defendant—I believe it is necessary to briefly review the evidence in the record that substantiates, in convincing fashion, the aforementioned findings. Notably, that evidence was not disputed by the parties in the trial court or this appeal. See *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 699 n.7, 966 A.2d 188 (2009) ("[w]hen necessary, we supplement the court's findings with facts culled from either undisputed testimony or stipulated exhibits"); *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 453 n.1, 880 A.2d 160 (2005) (supplementing court's findings "with other undisputed facts as appropriate"), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006); *State* v. *Januszewski*, 182 Conn. 142, 144, 438 A.2d 679 (1980) (setting forth recitation of facts predicated on court's memorandum of decision "read in the light of other undisputed facts"), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981), overruled in part on other grounds by *State* v. *Ray*, 290 Conn. 602, 966 A.2d 148 (2009).

[3] Although the court did not explicitly reference the deed in its memorandum of decision, the court did indicate that it evaluated the "documents in evidence as to their consistency or inconsistency with other evidence" and repeatedly referenced plaintiff's exhibit 1, which included the deed. Furthermore, the deed was introduced into evidence by the plaintiff and its substance is not inconsistent with any evidence submitted at trial.

[4] The deed specifically describes the corporation as "the [p]rogram [a]dministrator." Although it does not specifically describe the term "program," it generally concerns the plaintiff's "redevelopment plans," under which the plaintiff issued bonds for the purpose of raising funds to be used

as "[r]ehabilitation [l]oans."

[5] Colonial Bank later became State Street Bank & Trust Company of Connecticut, a distinction without a difference in this case.

[6] Greenblatt testified that "[f]rom the very beginning from back in 1982, months, several months before we originated [the defendant's] loan we knew, the [plaintiff] knew, all the attorneys, everybody involved in the entire transaction knew that [the corporation] was never going to use its own money." In addition to substantiating the finding of the trial court that the plaintiff "was involved" and "had an interest from the beginning" in the transactions with the defendant, Greenblatt's testimony on that issue was undisputed at trial.

[7] Far from disagreeing therewith, the plaintiff in its appellate brief sets forth a narrative largely consistent with the court's finding that it was involved in the transactions with the defendant from the beginning. Its brief states in relevant part: "The two loans were originally part of a redevelopment program involving $10 million in tax exempt revenue bonds. The proceeds from the bonds were paid into an account at [the trustee bank] which in turn used a portion of the money to fund the [defendant's] loans. On the date [the defendant] entered into the two loan transactions, checks were tendered to [the defendant] who executed the two subject promissory notes in favor of [the corporation]. The two notes were immediately assigned to [the trustee bank] . . . ."

[8] In his counterclaim, the defendant refutes that allegation, claiming that "[f]rom May 5, 1983 until April 16, 2003, [the defendant] made payments on the notes according to its tenor to the [plaintiff], their successors or assigns, in the amount of $1705.50 per month."

[9] On March 22, 2012, the plaintiff filed with the trial court a motion to rectify the record to include an amended answer dated June 8, 2010, that contained an identical response to paragraph six of the counterclaim. The court denied that motion.

[10] The court, as sole arbiter of credibility, expressly credited both the defendant's testimony and exhibit YY in finding a total of $195,909 in overpayments. I agree with the majority that the court did not abuse its discretion in crediting that properly admitted evidence.

[11] Although the court specifically found—and the plaintiff on appeal does not dispute—that $56,930 in overpayments was made "while the [plaintiff] had possession and title to the mortgage," the majority opinion does not acknowledge that finding. To the contrary, it asserts that the court did not make a finding related thereto.

[12] As our Supreme Court has explained, "[w]hen a court of equity obtains jurisdiction to determine the rights of the parties, it will retain it and give appropriate relief. . . . [J]urisdiction in equity once acquired is retained for the purpose of giving full relief concerning the subject-matter. . . . Since he who seeks equity must do equity, the [appellant], pressing its claim against the receiver in this action, opened the door to the latter's defense by way of cross-complaint, it being germane to the matter in controversy." (Citations omitted.) *Beach* v. *Beach Hotel Corp.*, 117 Conn. 445, 452, 168 A. 785 (1933).

[13] In his appellate brief, the defendant likewise submits that "the matter involves the application of equity," although he disagrees with the plaintiff's contention that the court failed to act equitably.

[14] Paragraph three of the defendant's counterclaim alleged that "[o]n or about May 5, 1983, the [defendant] executed two promissory notes to [the plaintiff] in exchange for loans of $114,186 and $28,879. Also on said date, the [defendant] executed a mortgage to the [plaintiff] to secure payment of said loans for [the property]." In its answer, the plaintiff admitted that allegation.

[15] The majority curiously characterizes the plaintiff's judicial admission in paragraph six of its answer to the counterclaim that the rental payments were collected on its behalf as an "alleg[ed]" and "putative" admission. It provides no authority for that novel proposition. Contra *Franchi* v. *Farmholme, Inc.*, supra, 191 Conn. 214; *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 768–69.

[16] In light of that admission, I respectfully suggest that the majority is mistaken when it states that the plaintiff's answer denied the essential allegations of the counterclaim.

[17] Although the majority accuses this dissent of making a "proposed" finding "as to the supposed unity of interest" between the plaintiff and the trustee bank, the majority opinion neither acknowledges nor credits the trial court's explicit finding that, because the trustee bank acted at all times as the plaintiff's trustee, the plaintiff "had an interest from the very beginning

and over the years in the execution and administration of the mortgages."

[18] As the majority notes, the plaintiff has not presented this court with an adequate record to determine the distinct legal basis of the court's decision. Accordingly, this court cannot definitively say that the court relied on the plaintiff's admission that the overpayments were collected on its behalf. At the same time, the court in its memorandum of decision expressly found that "it would be highly inequitable for the [plaintiff] . . . to be unjustly enriched by monies paid by [the defendant] that were not in fact due." In reviewing the court's exercise of discretion in an equitable proceeding, "this court must make every reasonable presumption in favor of its action." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 417. When considered in tandem with the fundamental precept that "[t]his court does not presume error on the part of the trial court"; *State* v. *Tocco*, 120 Conn. App. 768, 781 n.5, 993 A.2d 989, cert. denied, 297 Conn. 917, 996 A.2d 279 (2010); accord *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 129–30, 981 A.2d 1068 (2009) (presume court undertook proper analysis of law and facts and acted properly in rendering judgment); we must presume that the court properly considered the plaintiff's admission as conclusive on it, consistent with Connecticut law. See *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, supra, 93 Conn. App. 769.