J.E. ROBERT COMPANY, INC. *v.* SIGNATURE PROPERTIES, LLC, ET AL.
(SC 19050)
(SC 19051)
(SC 19052)

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald and Vertefeuille, Js.

Argued February 13—officially released July 16, 2013

Richard J. Buturla, with whom were *Brian A. Lema* and *Benjamin S. Proto, Jr.*, for the named defendant et al. (appellants).

Julie A. Manning, with whom were *Eric S. Goldstein* and, on the brief, *Sheila A. Huddleston*, for the substitute plaintiff (appellee).

Opinion

McDONALD, J. As the securitization of mortgage loans has become increasingly favored by financial lenders, and as arrangements for the administration of these loans have become increasingly complex, the relationship between the debtors/mortgagors and the owners of these debts has become more attenuated. Consequently, in foreclosure actions across the country on loans subject to these arrangements, challenges to the standing of parties other than the lender to bring such actions have been on the rise. Connecticut's appellate courts have never had occasion to address this type of challenge, until today. Specifically, we must determine whether a loan servicer for the owner and holder of a note and mortgage can have standing in its own right to institute a foreclosure action against the mortgagor as a transferee of the holder's rights under the Uniform Commercial Code (UCC), General Statutes §§ 42a-3-203[1] and 42a-3-301.[2]

The defendants Signature Properties, LLC (Signature), Andrew J. Julian (Julian) and Michael Murray[3] appeal from the trial court's judgment ordering strict foreclosure of Signature's property and a deficiency judgment against the defendants predicated on the standing of both the original plaintiff, loan servicer J.E. Robert Company, Inc. (J.E. Robert), and the substitute plaintiff, Shaw's New London, LLC (Shaw's). Julian additionally appeals from the trial court's order granting Shaw's application for a prejudgment remedy. We conclude that the trial court properly determined that, under the facts of this case, J.E. Robert had standing to institute this foreclosure action in its own name and reject the defendants' additional claims. Therefore, we affirm the judgment of the trial court.

Our review of the record in this appeal yields both a factual and procedural history that is not in question. On April 13, 2005, Signature executed a promissory note (note) in the amount of $8.8 million payable to the order of JPMorgan Chase Bank, N.A. (JPMorgan). The loan was secured by a mortgage and security interest (mortgage) on Signature's commercial property at 6 Shaw's Cove in New London, as well as an assignment of the property's leases and rents. The note was a conditional nonrecourse instrument under which Signature's liability for any breach was limited to the mortgaged property, unless Signature breached either of two specified sections of the mortgage agreement. If Signature breached either of those sections, it would be liable to the full extent of the debt. The loan was guaranteed jointly and severally by Signature's members, Murray, Julian, Maureen Julian, and Stephanie Lord Drake (guarantors).

At the time of the closing on the loan, JPMorgan required Signature to record on the New London land

records a "Notice of Parking License Agreement," which memorialized an agreement (parking agreement) between Signature and 280 Atlantic Street, LLC (280 Atlantic), the latter owned by guarantors Julian and Maureen Julian, and their sons, Andrew C. Julian and Jason Julian. Under the parking agreement, Signature was permitted to use a paved portion of a nearby 1.175 acre lot owned by 280 Atlantic for the purpose of parking approximately 120 vehicles for "certain tenants of [its] office building . . . ." The parking agreement, executed on April 9, 2005, was made effective as of January 1, 2002, for an initial term of seven years and two additional five year terms, at Signature's option. Signature's main tenant, General Dynamics Electric Boat (Electric Boat), leased spaces in the lot from Signature to supplement the parking available for its employees at 6 Shaw's Cove.

On July 29, 2005, JPMorgan assigned Signature's note, mortgage and assignment of leases and rents to LaSalle Bank National Association (LaSalle). A pooling and servicing agreement (pooling agreement), also executed on this date, established a mortgage backed security[4] wherein J.P. Morgan Chase Commercial Mortgage Securities Corporation was identified as depositor, LaSalle as trustee and paying agent, and J.E. Robert as special servicer for numerous mortgage loans, including Signature's.[5] On August 15, 2007, several months after Signature had ceased to make payments on the loan, J.E. Robert brought a one count foreclosure action against Signature.[6]

On October 17, 2007, LaSalle assigned the note and related instruments to Shaw's, and, on the following day, J.E. Robert moved to substitute Shaw's as the plaintiff pursuant to Practice Book § 9-22. Signature made no objection, and the court, *Martin, J.*, granted the motion. In January, 2008, the court granted Shaw's permission to file an amended complaint, over Signature's objection, which added the guarantors as defendants and added counts alleging, inter alia, that: Signature had terminated the parking agreement with 280 Atlantic, thereby breaching §§ 4.3 and 8.2 of the mortgage (count two); pursuant to § 10 (a) (i) of the note, such breach caused the conditional nonrecourse note to be converted into a full recourse obligation[7] (count three); and, under the guarantee the guarantors were liable for a deficiency judgment (count four).

On September 14, 2009, Shaw's moved for summary judgment on its amended complaint, which the trial court, *Shapiro, J.*, granted.[8] Observing that it was undisputed that Signature had defaulted on its payment obligations, as alleged in count one seeking foreclosure, the trial court held that only the extent of liability remained to be determined. On count two, the court found no support in the parking agreement for the defendants' assertion that the agreement had lapsed

upon Electric Boat's termination of its tenancy. Additionally, relying principally on a memorandum drafted by 280 Atlantic, the court concluded that: (1) Signature had terminated the parking agreement without the lender's permission, thereby breaching § 8.2 of the mortgage by transferring a property interest; and (2) termination of the parking agreement amounted to Signature's commingling of assets with an affiliate, 280 Atlantic, thereby breaching § 4.3 of the mortgage. Regarding count three, the court concluded that, because Signature had breached §§ 4.3 and 8.2 of the mortgage, Shaw's was not limited to the security interests granted by Signature in seeking recovery after default. Finally, on count four, the court concluded that the guarantors were liable under the terms of the guarantee for Signature's full recourse obligation under the note and mortgage.

Subsequently, Julian and Murray moved to dismiss the action, arguing that it was void ab initio because the original plaintiff, J.E. Robert, as a mere servicer of the loan rather than the holder of the note and mortgage, lacked standing to bring the foreclosure action. Signature later moved to dismiss the action on identical grounds. The court denied both motions. In its memorandum of decision denying Julian and Murray's motion, the trial court concluded that the substitution of Shaw's, the present holder of the note, cured any alleged lack of standing by J.E. Robert. In its subsequent memorandum of decision on Signature's motion to dismiss, the court additionally concluded that J.E. Robert had standing to institute the action in its own name, both as a transferee/nonholder pursuant to §§ 42a-3-203 and 42a-3-301 and as a nominal party in interest for LaSalle. Finally, the court held that, even if J.E. Robert lacked standing and Shaw's substitution could not cure such a defect, the court would retain jurisdiction over the action pursuant to General Statutes § 52-123,[9] because the defendants had notice of the real parties in interest. On November 19, 2010, the court granted Shaw's application for a prejudgment remedy to attach property and assets belonging to the guarantors in the amount of $7,308,400. Subsequently, the trial court, *Bright, J.*, rendered a judgment of strict foreclosure.

Julian appealed from the trial court's decision granting Shaw's application for a prejudgment remedy. Thereafter, in two separate appeals, later consolidated by the Appellate Court, Signature and, jointly, Julian and Murray, appealed from the trial court's judgment of strict foreclosure. After hearing oral argument on both matters, the Appellate Court filed a statement with this court pursuant to Practice Book § 65-2 requesting that we transfer the appeals to this court. We granted the Appellate Court's request, and now address issues stemming from the appeals.

In these consolidated appeals, the defendants claim that: (1) the trial court improperly denied their motions

to dismiss for lack of subject matter jurisdiction because (a) J.E. Robert lacked standing to commence the action, and (b) Shaw's substitution could not cure a judgment that was void ab initio; and (2) the trial court improperly granted Shaw's motion for summary judgment because there were disputed issues of material fact regarding Signature's conduct in relation to the parking agreement and the materiality of that conduct as it pertained to an alleged breach of the mortgage. In his separate appeal, Julian contends that the trial court improperly granted Shaw's application for a prejudgment remedy in the absence of sufficient competent evidence to establish the amount of Signature's debt at the time of judgment.[10]

We conclude that J.E. Robert had standing in its own right to bring this foreclosure action[11] and disagree with the defendants' additional claims. Accordingly, we affirm the judgment of the trial court.

I

Because an absence of subject matter jurisdiction would deprive the court of the opportunity to review any corollary matters raised in this appeal, we first address the issue of standing. The defendants claim that only the owner and holder of the note and mortgage, which at the time of the commencement of this case was LaSalle, has standing to bring a foreclosure action. Because LaSalle neither endorsed the note to J.E. Robert nor assigned the note and mortgage to it, the defendants claim that J.E. Robert lacked standing to commence this action. They contend that, as a loan servicing company, J.E. Robert was merely LaSalle's agent, and, accordingly, could not bring an action in its own name. In response, Shaw's contends that, through the pooling agreement, J.E. Robert had standing as a transferee of LaSalle's right to enforce the note and mortgage, in accordance with §§ 42a-3-203 and 42a-3-301. We agree with Shaw's.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 758, 6 A.3d 726 (2010). "Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *Monroe* v. *Horwitch*, 215 Conn. 469, 473, 576 A.2d 1280 (1990). Our review of this question of law is plenary. See *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

It has long been established at common law that "[t]he mortgage is an incident only to the debt, which is the principal; it cannot be detached from [the debt];

distinct from the debt, it has no determinate value; and the assignee must hold it, at the will and disposal of the creditor, who has the note or bond, for which it is a collateral security." *Huntington* v. *Smith*, 4 Conn. 235, 237 (1822); accord *Lawrence* v. *Knap*, 1 Root (Conn.) 248, 249 (1791). This common-law rule has since been codified; see footnote 17 of this opinion; a matter that we address in greater detail later in this part of the opinion. Therefore, our inquiry necessarily must commence with J.E. Robert's rights vis-á-vis the debt.

A plaintiff's right to enforce a promissory note may be established under the UCC.[12] See *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 230–31, 32 A.3d 307 (2011); *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 577, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010). Under the UCC, a " '[p]erson entitled to enforce' an instrument means [inter alia] (i) the holder of the instrument, [or] (ii) a nonholder in possession of the instrument who has the rights of a holder[13] . . . . A person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument* . . . ." (Emphasis added.) General Statutes § 42a-3-301. The UCC's official comment underscores that a "person entitled to enforce an instrument . . . *is not limited to holders*. . . . *A nonholder in possession of an instrument includes a person that acquired rights of a holder . . . under* [*§ 42a-3-203 (a)*]." (Emphasis added; internal quotation marks omitted.) 6B L. Lawrence, Anderson on the Uniform Commercial Code (3d Ed. Rev. 2003) § 3-301:1R, p. 266. Under § 42a-3-203 (b), "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument . . . ." "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." General Statutes § 42a-3-203 (a). Thus, there are two requirements to transfer an instrument under § 42a-3-203 (a): (1) the transferor must intend to vest in the transferee the right to enforce the instrument; and (2) the transferor must deliver the instrument to the transferee so that the transferee has either actual or constructive possession. 6B L. Lawrence, supra, § 3-203:5R, p. 219. Conveyance of a note, and all the legal rights it represents, is not necessary to effectuate a transfer.[14] See 11 Am. Jur. 2d 578–79, Bills and Notes § 210 (2009) (drawing distinction between *sale* of note by X to Y and *transfer* of note from X to Y).

Because the relationship between these two provisions of the UCC is strikingly clear, the only salient question that remains is whether a loan servicer may qualify as a nonholder transferee entitled to enforce the note it services. While no Connecticut appellate court has construed these provisions on comparable facts, courts in other jurisdictions have recognized that

the servicer of a loan may have standing, in at least some circumstances, to institute legal proceedings against the debtor in its own name. In some cases, these courts have relied specifically on the servicer's status under the UCC. See, e.g., *Wells Fargo Bank, N.A.* v. *Heath*, 280 P.3d 328, 333 (Okla. 2012) (party seeking foreclosure can demonstrate its right to enforce instrument under UCC, including as nonholder who has rights of holder, because mortgage follows note not vice versa); *ORIX Capital Markets, LLC* v. *La Villita Motor Inns, J.V.*, 329 S.W.3d 30, 39–41 (Tex. App. 2010) (concluding that servicer established right to enforce note in breach of contract counterclaim brought in response to mortgagor's action for declaratory judgment to avoid foreclosure following servicer's notice of foreclosure, citing UCC provision for nonholder with rights of holder); see also *Deutsche Bank National Trust Co.* v. *Mitchell*, 422 N.J. Super. 214, 224, 27 A.3d 1229 (2011) (concluding that trustee under loan trust agreement could have standing to bring foreclosure action as nonholder with rights of holder under UCC but lack of possession of note failed to establish transfer); *Wells Fargo Bank, N.A.* v. *Freed*, Docket No. 5-12-01, 2012 WL 6562819, *6 (Ohio App. December 17, 2012) (concluding that trustee under pooling and servicing agreement had standing to bring foreclosure action as nonholder in possession with rights of holder due to intent to transfer under UCC). In other cases, courts have applied similar reasoning without specific reference to the UCC.[15] See, e.g., *CWCapital Asset Management, LLC* v. *Chicago Properties, LLC*, 610 F.3d 497, 501 (7th Cir. 2010) (servicer was effective assignee of legal claim); *Federal Deposit Ins. Corp.* v. *Graham*, Docket No. 2:09-cv-436, 2010 WL 5157108, *4 (S.D. Ohio December 14, 2010) (servicer, not trustee, would have been real party in interest in foreclosure action when pooling and servicing agreement vested servicer with right to sue, pursue foreclosure and settle claims in lieu of foreclosure);[16] *Arabia* v. *BAC Home Loans Servicing, L.P.*, 208 Cal. App. 4th 462, 465–66, 145 Cal. Rptr. 3d 678 (2012) (servicer may initiate foreclosure action in its own name), review denied, Docket No. S205517, 2012 Cal. LEXIS 10193 (Cal. October 31, 2012); *ECF North Ridge Associates, L.P.* v. *ORIX Capital Markets, L.L.C.*, 336 S.W.3d 400, 407 (Tex. App. 2011) (servicer had standing to sue for breach of contract on basis of rights under pooling and servicing agreement); see also *American Home Mortgage Servicing, Inc.* v. *Donovan*, Docket No. 3:10-CV-1936-M, 2011 WL 2923978, *3–4 (N.D. Texas July 20, 2011) (recognizing that servicer could have standing to enforce rights under mortgage loan if it demonstrated that it was assignee or effective assignee of mortgagee's legal claims). In reaching this conclusion, these courts generally have considered the nature of the loan servicer's interest in the proceeding and the authority vested in it by the owner or holder of the instrument. See, e.g., *CWCapital Asset Management, LLC* v. *Chi-*

cago Properties, LLC, supra, 500–502 (concluding that mortgage servicer was "effective assignee" and real party in interest authorized under pooling and servicing agreement to file action in own name; agreement effectively delegated equitable ownership of claim to servicer by providing that servicer had " 'full power and authority, acting alone, to do or cause to be done any and all things in connection with such servicing,' " by requiring trustee to confer on servicer any authority needed to perform servicing duties, including filing action, and by authorizing servicer to sue in own name if action related to loan it was servicing).

The defendants contend, however, that under Connecticut law, even if J.E. Robert would have had standing to sue on the note, only the owner of the note has standing to exercise the equitable power of foreclosure. In support of this principle, the defendants cite *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 230, *Bankers Trust Co. of California, N.A.* v. *Vaneck*, 95 Conn. App. 390, 391, 899 A.2d 41, cert. denied, 279 Conn. 908, 901 A.2d 1225 (2006), and *Fleet National Bank* v. *Nazareth*, 75 Conn. App. 791, 795, 818 A.2d 69 (2003), for the proposition that "[General Statutes §] 49-17 codifies the well established common-law principle that the mortgage follows the note, pursuant to which only the rightful owner of the note has the right to enforce the mortgage." *RMS Residential Properties, LLC* v. *Miller*, supra, 230. The defendants' reliance on this principle is misplaced. This principle is intended to address the situation in which ownership of the note and ownership of the mortgage rest in different hands at the time the foreclosure action commenced. That is not the case here. The defendants have provided no authority to demonstrate that the common-law rule or its codification was intended to provide mortgagors with a shield against a foreclosure action to hinder the intentions of the "rightful owner of the note . . . ." Id.

Moreover, under the plain language of the statute, "the person *entitled to receive the money secured thereby* but to whom the legal title to the mortgaged premises has never been conveyed" has the right to bring a foreclosure action. (Emphasis added.) General Statutes § 49-17.[17] Although this statute's origin long predates the adoption of the UCC; see Public Acts 1855, c. LXXXV, § 1; its language is sufficiently capacious to be fully harmonized with the UCC's provisions that determine a party's right to enforce a negotiable instrument. See *Taylor* v. *Deutsche Bank National Trust Co.*, 44 So. 3d 618, 622 (Fla. App. 2010) ("the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder"); *Wells Fargo Bank, N.A.* v. *Heath*, supra, 280 P.3d 333 (equating ownership necessary to bring foreclosure action with right to enforce note and citing, inter alia, nonholder status under UCC as basis for establishing

right to enforce). Our intention in *RMS Residential Properties, LLC*, was neither to unduly restrict the plain language of § 49-17 nor to expand the statute's application to circumstances in which ownership of the mortgage and note rest in the same hands. Instead, we emphasized that, in defending against an action to enforce a note, a debtor may be able to produce evidence demonstrating that the plaintiff, who might otherwise appear to be entitled to enforce the debt nevertheless lacks standing, perhaps because ownership of the debt has passed to another party. See *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 231–32 ("a holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under § 49-17"); cf. *Waterbury Trust Co.* v. *Weisman*, 94 Conn. 210, 215–16, 108 A. 550 (1919) (wherein originator of notes had assigned rights to another, but subsequently collected moneys from debtors, thereby being paid twice and depriving notes' rightful owner of recompense). Section 49-17 simply requires a party to prove that they are "the person entitled to receive the money secured [by the mortgage]," and such a party may be someone other than the owner of the note.[18] See *Kennedy Funding, Inc.* v. *Greenwich Landing, LLC*, 135 Conn. App. 58, 64, 43 A.3d 664 (holding that plaintiff designated by owners of note as payee and holder of negotiable promissory note had standing in strict foreclosure action), cert. denied, 305 Conn. 914, 45 A.3d 99 (2012). Therefore, even assuming § 49-17 applies in a case in which ownership of the note and mortgage rests in the same party, a loan servicer entitled to receive money and otherwise administer a loan under the terms of a pooling and service agreement would not necessarily need to be the owner or the holder of the note in order to institute a foreclosure action against the debtor. Indeed, limiting such actions when such an intent clearly is expressed would inhibit the commercial pooling of mortgages, which is a common financial tool for lending institutions, and would thereby discourage such institutions from underwriting loans in the state. See *Bank of New York* v. *Raftogianis*, 418 N.J. Super. 323, 333, 13 A.3d 435 (2010) (observing that, in more recent years, "[mortgage] structuring and issuance of private mortgage-based securities [has become] much more complex and widespread"); see also 2 D. Caron & G. Milne, Connecticut Foreclosures (5th Ed. 2011) § 30-2, p. 389 (describing tenfold increase in mortgage backed securities for single-family properties between 1981 and 2001).

The defendants additionally argue, on public policy grounds, that permitting a loan servicer to commence a mortgage foreclosure action could produce deleterious consequences for borrowers, namely, the possibility of having to defend multiple foreclosure actions on a single debt. We are not persuaded, however, and the defendants cite no authority that might convince us that

such a risk exists when, under a pooling and servicing agreement, a loan servicer is authorized to enforce the instrument in the specific context of foreclosure. See footnote 18 of this opinion (explaining plaintiff's burden to prove such authority). Such a result would, in fact, defeat what is presumably one of a pooling and servicing agreement's objectives—to relieve the trustee from having to administer the various loans which are subject to the pooling and servicing agreement. We additionally note that statutory protections exist for a mortgagor whose property already has been foreclosed. See General Statutes § 49-1 ("[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof").

In light of our conclusion that a loan servicer need not be the owner or holder of the note and mortgage in order to have standing to bring a foreclosure action if it otherwise has established the right to enforce those instruments,[19] we now turn to the fact specific question of whether J.E. Robert constituted a transferee entitled to enforce the note as a nonholder with the rights of the holder, LaSalle. We answer this question in the affirmative. As we previously noted, under § 42a-3-203 (a) "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Here, the trial court credited "[un]controverted" evidence establishing that "in February, 2007, [six months before J.E. Robert commenced the foreclosure action] the mortgage loan, evidenced by the note and mortgage, was transferred to J.E. Robert for special servicing and the related mortgage file, including the note were delivered to J.E. Robert."[20] (Internal quotation marks omitted.) In particular, the court pointed to the pooling agreement and the limited power of attorney dated November 9, 2006, effective July 29, 2005, from LaSalle as trustee, in support of its conclusion that "LaSalle vested in J.E. Robert the right to enforce the note and that LaSalle delivered to and J.E. Robert received possession of the note."

Our review of those documents fully supports the trial court's findings and conclusion. Section 3.01 (b) of the pooling agreement designates J.E. Robert as "[s]pecial [s]ervicer," with the "full power and authority . . . to do or cause to be done any and all things in connection with such servicing and administration for which it is responsible which it may deem necessary or desirable." Section 3.01 (b) further requires the trustee, LaSalle, to "furnish, or cause to be furnished, to . . . the [s]pecial [s]ervicer any powers of attorney and other documents necessary or appropriate to enable . . . the [s]pecial [s]ervicer . . . to carry out its servicing and administrative duties . . . ." Section 3.02 of the pooling agreement requires J.E. Robert to "make reasonable efforts to collect all payments called for under the terms

and provisions of the [m]ortgage [l]oans . . . .” The pooling agreement specifically addresses J.E. Robert's right as special servicer to enforce a mortgage by foreclosure. Section 3.09 (a) of the pooling agreement provides that the special servicer “shall . . . exercise reasonable efforts . . . to foreclose upon or otherwise comparably convert . . . the ownership of property securing such [m]ortgage [l]oans . . . as come into and continue in default”; and § 3.09 (g) provides that the special servicer “shall have the right to determine . . . the advisability of the maintenance of an action to obtain a deficiency judgment . . . .” Consistent with these broad grants of discretion, § 3.01 (d) of the pooling agreement explicitly provides that J.E. Robert is *not* an agent, but rather is an independent contractor. Cf. *Second Exeter Corp.* v. *Epstein*, 5 Conn. App. 427, 429–30, 499 A.2d 429 (1985) (concluding that collection agent lacked standing to institute action in its own name), cert. denied, 198 Conn. 802, 502 A.2d 932 (1986). J.E. Robert's rights, vis-á-vis foreclosure, are further underscored in the limited power of attorney executed by LaSalle.[21] These provisions clearly support the trial court's conclusion that it was LaSalle's intention to deliver the note to its special servicer “for the purpose of giving to the person receiving delivery the right to enforce the instrument.”[22] General Statutes § 42a-3-203 (a). These provisions further demonstrate that J.E. Robert would be a party “entitled to receive the money secured [by the note]” in accordance with § 49-17. Accordingly, the trial court properly concluded that J.E. Robert had standing in its own right to institute the present foreclosure action.

II

Next, we address the defendants' claim that the trial court improperly granted Shaw's motion for summary judgment. The defendants' arguments, variously stated, all pertain to the propriety of the trial court's finding that Signature terminated the parking agreement and its related conclusion that this conduct was a breach of the mortgage that rendered the note a full recourse obligation. We conclude that the trial court properly rendered summary judgment.

As we previously noted in our recitation of facts at the outset of this opinion, various members of the Julian family owned and/or managed both Signature and 280 Atlantic. The following additional facts, as found by the trial court in its memorandum of decision granting Shaw's motion for summary judgment not to be in dispute, also are relevant to our resolution of this issue. Several months after Signature mortgaged the property at 6 Shaw's Cove to JPMorgan, an acquisition entity operated by various members of the Julian family, Julian Investments, LLC (Julian Investments), entered into negotiations to erect a Walgreens Pharmacy across the street from 6 Shaw's Cove. In furtherance of this

objective, Julian Investments purchased property at 698 Bank Street, New London, which abutted 280 Atlantic's parking parcel. In June, 2006, 698 Bank Street, LLC, another entity owned by the Julians, entered into a seventy-five year lease with Walgreens, providing for the pharmacy to be built on a parcel that included 698 Bank Street and a significant portion of 280 Atlantic's parking lot. In October, 2006, Signature agreed with 280 Atlantic to terminate its parking agreement as of December 31, 2006, two years before the initial seven year term was to expire. Thereafter, 280 Atlantic embodied that understanding in an October 5, 2006 memorandum addressed to Signature, which referenced Electric Boat's decision to terminate its tenancy as of December 31, 2006.[23] Signature did not obtain its lender's consent before terminating the parking agreement, which was subject to the mortgage on the property. In March, 2007, three entities all owned by members of the Julian family—698 Bank Street, LLC, 668 Bank Street, LLC, and 280 Atlantic—entered into a boundary line agreement in order to facilitate the Walgreens lease. The Walgreens building has since been erected and is located partially on the parking parcel previously leased to Signature for use by its tenants.

In light of these undisputed facts reflected by the evidence and the terms of the relevant documents, the trial court rejected the defendants' contention that the agreement lapsed on its own terms upon Electric Boat's termination of its lease. Ultimately, the trial court concluded that, by terminating the parking agreement, Signature had transferred property to 280 Atlantic without first obtaining its lender's consent in violation of § 8.2 (a) of the mortgage. The court further concluded that "Signature transferred its rights to use 280 Atlantic's parking lot . . . to benefit an affiliated entity in securing the Walgreens lease," which amounted to a commingling of assets in violation of § 4.3 (f) of the mortgage. As a violation of either § 4.3 or § 8.2 of the mortgage rendered the nonrecourse provision of the note null and void, the court concluded that the note had been converted into a full recourse obligation.

Under the applicable standard of review, our review of summary judgment rulings is plenary. *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 154, 61 A.3d 485 (2013). Pursuant to Practice Book § 17-49, summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter

of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

The defendants' principal basis for challenging the decision granting Shaw's motion for summary judgment is the trial court's reliance on the October 5, 2006 memorandum from 280 Atlantic as establishing as an undisputed fact that Signature had terminated the parking agreement. To undermine that conclusion, the defendants have parsed each sentence in the memorandum in isolation and offered an interpretation that they claim could support a different conclusion. They also point to testimony by Jason Julian, the author of the memorandum, which they claim indicates that the memorandum was not sent to Signature. We conclude that the trial court's reliance on this memorandum was proper.[24]

Reading the memorandum in its entirety for context, as is proper and necessary; see footnote 23 of this opinion; its plain terms lead to the inexorable conclusion that, as the trial court determined, the memorandum embodied an accord between Signature and 280 Atlantic regarding termination of the parking agreement. The plain meaning of the memorandum was reinforced by evidence relating to the agreement with Walgreens for the use of the parcel formerly used by Signature's tenant for parking. This meaning was not cast into doubt by any other evidence.[25] Jason Julian simply testified that he could not recall why the memorandum had been generated. Whether the memorandum was actually sent to Signature, a fact that the evidence does not conclusively establish either way, does not negate its significance as evidence of the parties' understanding that the parking agreement had been terminated.

The defendants also dispute an allegation *in Shaw's amended complaint* asserting that Signature entered into a boundary line agreement with a party related to Signature and/or 280 Atlantic, which ultimately resulted in the division of the parcel subject to the parking agreement and the transfer of a portion of the parking parcel. Specifically, they contest the fact that Signature was a party to, or involved with, this boundary line agreement. We cannot see how this allegation has any bearing on the trial court's decision granting summary judgment, as the trial court did not make a finding to that effect but, rather, concluded that various entities controlled by members of the Julian family were parties to that agreement. Accordingly, we see no need to address this claim. See *Douglas* v. *Planning & Zoning Commission*, 127 Conn. App. 87, 107, 13 A.3d 669 (2011) (declining to address issue immaterial to court's conclusion).

The defendants additionally claim that any purported

breach of § 4.3 and/or § 8.2 of the mortgage was immaterial and, therefore, an insufficient basis to render the nonrecourse provision of the note void. We agree with the trial court, however, that the defendants appear to have conflated the conditions that give rise to the right to foreclose on the mortgage and the conditions that negate the nonrecourse provision of the note. The mortgage enumerates numerous "Events of Default," the occurrence of any one of which will permit the lender to, inter alia, initiate foreclosure proceedings. One such event as provided in § 9.1 (a) of the mortgage is failure to pay any portion of the debt within seven days after payment is due; another provided in § 9.1 (b) is the borrower's failure to "comply in all *material* respects with any of the provisions of [a]rticle 8 . . . ." (Emphasis added.) Shaw's alleged the former as the default event in the present case. The note's exculpation provision, however, sets forth different conditions under which the limitation on recourse is rendered void and the note becomes a full recourse obligation. One such condition of the note as provided in § 10 (a) (i) is "a breach or default under [§] 4.3 or [§] 8.2 of the [s]ecurity [i]nstrument . . . ." Neither this condition of the note nor the sections of the mortgage referred to therein require such a breach to be material. Thus, although material noncompliance with any provision in article 8 of the mortgage, including § 8.2, *could* be a basis both to foreclose on the mortgage and to void the nonrecourse provision of the note, such material noncompliance need not be established for both events to occur. Rather, the right to foreclose arises upon the occurrence of any event of default, whereas a full recourse obligation arises upon any violation of the exculpation provision of the note. In the absence of plain language imposing a materiality requirement onto this term of the note, we cannot engraft one where it does not exist.[26]

In one final argument, the defendants claim that the trial court improperly failed to consider evidence put forth by the defendants in their cross motion for summary judgment. We are not persuaded. The record reveals the following additional procedural history relevant to our resolution of this issue. On January 15, 2010, approximately four months after Shaw's filed its motion for summary judgment and approximately two months after the trial court heard argument on that motion, Julian and Murray filed a motion for summary judgment with supporting affidavit, which Signature moved to adopt and join. On February 3, 2010, the trial court issued its decision granting Shaw's motion. On February 23, 2010, the court heard argument on the defendants' motion and thereafter issued a decision denying that motion. The trial court concluded that the defendants' claims were moot, as it previously had granted Shaw's motion for summary judgment on the same counts. We conclude that the trial court did not abuse its discretion in deciding Shaw's motion without concurrently consid-

ering the defendants' motion. Although the defendants are correct that foreclosure is an equitable proceeding, we note that they neither asked the court to hold in abeyance its decision on Shaw's motion pending argument on their motion nor demonstrated that any evidence offered in support of their motion for summary judgment could not have been presented at the hearing on Shaw's motion. Moreover, the defendants have pointed to no evidence offered in connection with their motion that was of such significance that it was likely to have changed the trial court's decision regarding Shaw's motion.

In sum, because Signature had a contractual right, pursuant to the parking agreement, to have its tenants use 280 Atlantic's parking lot for the seven year term plus two optional five year periods, termination of the parking agreement transferred away that contractual right without the consent of the lender. Such unilateral action violated § 8.2 of the mortgage, which required Signature to obtain the lender's consent before permitting any property interest to be transferred. Although the defendants vigorously claim that material facts remain in dispute, they have failed to "provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 306 Conn. 116. Accordingly, the trial court properly granted Shaw's motion for summary judgment.[27]

III

Finally, we consider Julian's appeal challenging the trial court's order granting Shaw's application for a prejudgment remedy. Julian contends that Shaw's did not produce competent evidence of the amount of indebtedness to establish its prima facie case because: (1) it failed to submit the requisite business and computer records, such as the mortgage loan history and a master record report; and (2) Michael F. Cocanougher, managing director of special servicing at J.E. Robert and a vice president of Shaw's, should not have been permitted to testify about the debt because his testimony lacked the proper foundation in the absence of the production of the business records he relied upon and, thus, constituted hearsay. We disagree.

"A prejudgment remedy is available upon a finding by the court that 'there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff . . . .' General Statutes § 52-278d (a) (1)." *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 767–68 n.3, 882 A.2d 653 (2005). "Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance

of the evidence." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008). When reviewing a trial court's order on a motion for a prejudgment remedy, our role is fairly limited. Id., 136–37. We will not upset a prejudgment remedy order in the absence of clear error; id., 138; viewing the evidence in the light most favorable to the plaintiff. Cf. *Winn* v. *Posades*, 281 Conn. 50, 54–55, 913 A.2d 407 (2007) ("In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . In evaluating [the denial of] a motion to dismiss, [t]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." [Internal quotation marks omitted.]).

Generally, "a trial court [must] make a probable cause determination as to both the validity of the plaintiff's claim and the amount of the remedy sought"; *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 145–46; but, in the present case, the sole dispute pertains to the amount of the debt. To make such a probable cause determination, the evidence simply must be sufficient for the court to make "an educated prediction as to the probable amount of the deficiency." *People's Bank* v. *Bilmor Building Corp.*, 28 Conn. App. 809, 823, 614 A.2d 456 (1992); accord *TES Franchising, LLC* v. *Feldman*, supra, 146 ("[a]lthough the likely amount of damages need not be determined with mathematical precision . . . the plaintiff bears the burden of presenting evidence [that] affords a reasonable basis for measuring her loss" [internal quotation marks omitted]). Although this court previously has concluded that a payoff statement and a calculation of the amount of debt were sufficient to meet the plaintiff's initial burden of proof in establishing the amount of indebtedness; see *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 598, 608–609, 717 A.2d 713 (1998); we never have held that the production of any particular form of evidence is required. Although business records often will be used to establish the amount of the deficiency, there is no bar to a party with personal knowledge of relevant facts also testifying to establish those facts. *State* v. *Sunrise Herbal Remedies, Inc.*, 296 Conn. 556, 572, 2 A.3d 843 (2010) (describing competence of witness as being result of witness having personal knowledge on matter).

In the present case, the trial court concluded, after taking into account the defendants' defenses and counterclaims, that "the evidence . . . [was] sufficient for a finding of probable cause that [Shaw's] will recover a deficiency judgment against each of the guarantor defendants." The trial court explained that "Cocanougher . . . credibly testified that [Shaw's] is the holder of the note, mortgage, and guarantee, and that

the debt remains unpaid. Signature defaulted in making payments due under the note in April, 2007, and has remained in default since then." Citing its February, 2010 decision granting Shaw's motion for summary judgment, the trial court noted: "That Signature's default dates from April, 2007, was already established." The trial court then proceeded to calculate the amount of the deficiency judgment on the basis of the following factors: "(1) the undisputed fact of the April, 2007 default, (2) the undisputed testimony that no payment has been made since then, (3) the terms of the note and mortgage, and (4) the appraised value of the property."

We first note that all of the documents on which Cocanougher based his testimony—the note, mortgage, guarantee and assignment—were in fact admitted into evidence as exhibits. Moreover, Cocanougher had personal knowledge, in light of his positions as an employee of both J.E. Robert and Shaw's, to testify as to whether these documents were in the possession of those entities. See *State* v. *Sunrise Herbal Remedies, Inc.*, supra, 296 Conn. 572 (discussing requirement of personal knowledge for witness to be competent to testify). We also note our agreement with the trial court's conclusion that the defendants' failure to contest the allegations relating to the 2007 default at any point during the underlying proceedings rendered that fact undisputed. See *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 144 n.11 (observing that "[i]n arriving at its probable cause determination, the trial court considered evidence presented at both the prejudgment remedy hearing and the earlier temporary injunction hearing, both of which had been conducted by [the same judge], without objection from either party"). At no time did the defendants assert an affirmative defense of payment with regard to count one of the complaint. See *New England Savings Bank* v. *Bedford Realty Corp.*, supra, 246 Conn. 606 n.10 ("[p]ayment is an affirmative defense that must be proved by the defendant").

Thus, viewing the evidence in the light most favorable to Shaw's, we conclude that the evidence, which provided the court with figures on which to base its calculations, was sufficient to generate "an educated prediction as to the probable amount of the deficiency." *People's Bank* v. *Bilmor Building Corp.*, supra, 28 Conn. App. 823. This evidence permitted the court to make the following mathematical calculations: first, the trial court added the three categories of debt (interest, default interest, and prepayment) to the principal amount owed, subtracted the reserve amount, and added one year of projected interest for the estimated time remaining prior to the entry of a deficiency judgment. This calculation resulted in the sum of $13,808,421. On the basis of the appraised market value of the property, the court concluded that a probable deficiency judgment would enter in the amount of

$6,808,421, to which the court added attorney's fees as provided by § 17.2 of the mortgage. This resulted in a total prejudgment remedy in the amount of $7,308,400. The evidence fully supports this order.

The judgment is affirmed.

In this opinion the other justices concurred.

[1] General Statutes § 42a-3-203 provides in relevant part: "(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

"(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course . . . ."

[2] General Statutes § 42a-3-301 provides in relevant part: " 'Person entitled to enforce' an instrument means (i) the holder of the instrument, [or] (ii) a nonholder in possession of the instrument who has the rights of a holder . . . . A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument . . . ."

[3] The original complaint also named 280 Atlantic Street, LLC, as a defendant, and the amended complaint added Maureen Julian and Stephanie Lord Drake as defendants. The complaint against 280 Atlantic Street, LLC, later was withdrawn, and none of these other defendants is a party to this appeal. For convenience, we refer in this opinion to Signature, Julian and Murray collectively as the defendants, and individually by name where appropriate.

[4] "Securitization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. [C.] Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1367 (2010). The investment bank bundles together the multitude of mortgages it purchased into a 'special purpose vehicle,' usually in the form of a trust, and sells the income rights to other investors. Id. A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors. Id." *Anderson* v. *Burson*, 424 Md. 232, 237, 35 A.3d 452 (2011).

[5] The pooling agreement also designates another entity as "[m]aster [s]ervicer," whose general responsibility is to administer mortgage loans other than those designated as specially serviced loans due to certain events such as imminent or actual default.

[6] We note that, in the original complaint, J.E. Robert inaccurately identified itself as the owner of the note, when it should have identified itself as the special servicer or nonholder/transferee in whom the note's owner and holder, LaSalle, had vested the right to enforce the note. See, e.g., *CitiMortgage, Inc.* v. *Claricoates*, Superior Court, judicial district of Tolland, Docket No. TTD-CV-11-6003181-S (September 14, 2011) (wherein plaintiff loan servicer alleged it was *entitled to enforce* defendant's debt, not that it was owner of said debt); *CWCapital Asset Management, LLC* v. *Great Neck Towers, LLC*, 99 App. Div. 3d 850, 851, 953 N.Y.S.2d 89 (2012) (wherein "the complaint identified the [t]rust as the owner of the note and mortgage, [and] the action was expressly maintained in [the plaintiff's] capacity as servicing agent"). Shaw's corrected that inaccuracy, however, in the amended complaint, which was filed before the defendants filed their answer and special defenses and which also specifically identified the pooling agreement as the source of J.E. Robert's authority.

[7] Section 10 (a) (i) of the note provides in relevant part: "[Signature] shall be liable upon the Debt and for the other obligations arising under the Loan Documents to the full extent . . . in the event . . . of a breach or default under Sections 4.3 or 8.2 of the Security Instrument . . . ."

Section 4.3 of the mortgage provides in relevant part: "[Signature] covenants and agrees that it has not and shall not . . .

"(f) commingle its assets with the assets of any of its partner(s), members, shareholders, affiliates, or of any other person or entity or transfer any assets to any such person or entity other than distributions on account of equity interests in [Signature] permitted hereunder and properly accounted for . . . [or]

"(j) enter into any contract or agreement with any shareholder, partner, member, principal or affiliate or [Signature], any guarantor of all or a portion of the Debt (a 'Guarantor') or any shareholder, partner, member, principal

or affiliate thereof, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any shareholder, partner, member, principal or affiliate of [Signature] or Guarantor, or any shareholder, partner, member, principal or affiliate thereof . . . ."

Section 8.2 of the mortgage provides in relevant part: "(a) [Signature] agrees that [Signature] shall not, without the prior written consent of Lender, Transfer the Property or any part thereof or permit the Property or any part thereof to be Transferred. Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon [Signature's] Transfer of the Property without Lender's consent. . . ."

[8] In actuality, Shaw's moved for partial summary judgment because the amended complaint contained two additional counts; Shaw's later withdrew counts five and six. Accordingly, the trial court's ruling on Shaw's summary judgment motion ultimately disposed of all counts brought by the amended complaint.

[9] General Statutes § 52-123 provides: "No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court."

[10] Julian also contends that the trial court acted in excess of its statutory authority by ordering the attachment of limited liability ownership interests for debt unrelated to those limited liability companies. As did the trial court, we decline to review this issue, as it was raised for the first time in the defendants' motion for reargument filed in the trial court. See *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94 n.28, 952 A.2d 1 (2008) ("[a] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple" [internal quotation marks omitted]).

[11] In light of this conclusion, we need not address Shaw's alternative arguments that J.E. Robert had standing as a nominal party in interest for LaSalle, that any purported lack of standing by J.E. Robert was cured by Shaw's substitution as owner of the note and mortgage and that, even if the substitution did not cure the standing defect, the trial court properly could exercise jurisdiction under § 52-123.

[12] The defendants argue that Shaw's should not be permitted to rely on §§ 42a-3-203 and 42a-3-301 because it did not establish in the trial court that the note is a negotiable instrument under the UCC. We first note that any purported deficiencies in Shaw's briefing can be explained by the fact that the defendants never questioned the status of the note as a negotiable instrument until they submitted their reply brief to this court, despite Shaw's express reliance on the UCC as a basis for standing in opposing the defendants' motions to dismiss. Moreover, in light of the authority discussed in this part of the opinion, under which courts have recognized that a loan servicer can have standing to enforce a note under authority vested in it pursuant to a pooling and servicing agreement without relying on the UCC, we see no reason why the result in the present case would differ even if we were to conclude that the note is not a negotiable instrument. The UCC would appear to be one way of establishing standing, but not the only way to do so.

[13] The UCC defines the " '[h]older' " of a negotiable instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . ." General Statutes § 42a-1-201 (b) (21) (A). As we previously have indicated, the defendants agree that LaSalle was the holder of the note at the time J.E. Robert commenced this action.

[14] Consistent with these provisions, our appellate case law has recognized that, to enforce a note, one need not be the owner of the note; see, e.g., *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 7, 746 A.2d 826 (2000) (concluding that plaintiff, who was third transferee in possession of instrument, "had acquired the rights of a holder and was therefore entitled to enforce the note"), cert. denied, 253 Conn. 918, 755 A.2d 215 (2000); or even the holder of the note. See, e.g., *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 709–10, 41 A.3d 1077 (2012) (The court stated that in a case in which the plaintiff was assigned ownership of a mortgage but only the possession of the unendorsed note: "[A] note that is unendorsed still can be transferred to a third party. Although that third party technically is not a holder of the note, the third party nevertheless acquires the right to enforce the note so long as that was the intent of the transferor.").

[15] There is a split of authority among federal bankruptcy courts as to whether a loan servicer has standing to move for relief from a stay in a debtor's bankruptcy proceedings in order to pursue a state action to enforce the note. Compare *In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) ("[o]ther jurisdictions tend to favor the view that a loan servicer is a 'party in interest' and a 'real party in interest' " that may seek relief from stay), with *In re Rosenberg*, 414 B.R. 826, 841 (Bankr. S.D. Fla. 2009) ("[i]n loan securitizations, the real party in interest is the trustee of the securitization trust, not the servicing agent"), aff'd, United States District Court, Docket No. 1:10-cv-24347-KKM (S.D. Fla. September 28, 2011), aff'd sub nom. *DVI Receivables XIX, LLC* v. *Rosenberg*, 472 Fed. Appx. 890 (11th Cir. 2012); *In re Kang Jin Hwang*, 396 B.R. 757, 767 (Bankr. C.D. Cal. 2008) (loan servicer can be party in interest if it is attorney in fact for mortgage holder but it is not real party in interest entitled to seek relief in its own name), rev'd on other grounds, 438 B.R. 661 (Bankr. C.D. Cal. 2010). Because these courts apply a different standard for determining standing; see *In re Neals*, 459 B.R. 612, 616–17 (Bankr. D.S.C. 2011); we do not find this line of cases persuasive.

[16] Some courts have concluded that both the trustee and the loan servicer could have standing to institute legal proceedings on the mortgage loan if such authority is vested in both parties under the terms of a pooling and servicing agreement. See *Wells Fargo Bank, N.A.* v. *Konover*, Docket No. 3:05 CV 1924 (CFD), 2009 WL 2710229, *3–4 (D. Conn. August 21, 2009) (citing cases and providing rationale).

[17] General Statutes § 49-17 provides: "When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies." The language of the statute has remained substantially unchanged since its enactment in 1855. See Public Acts 1855, c. LXXXV, § 1; see also General Statutes (1875 Rev.) tit. XVIII, c. VII, § 5.

[18] The defendants agree with Shaw that LaSalle was the holder and owner of Signature's note and mortgage at the time J.E. Robert commenced the present action. As we explain later in this part of the opinion, the pooling agreement conclusively demonstrates that LaSalle intended to transfer its right to enforce the note to J.E. Robert, along with the authority to institute foreclosure proceedings to recover the debt secured by the note. Our statement in *RMS Residential Properties, LLC* v. *Miller*, supra, 303 Conn. 231–32, that "a holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under § 49-17," was not intended to suggest that mere proof that someone other than the party seeking to foreclose is the owner of the note will require dismissal for lack of standing. Rather, under such circumstances, the burden would shift back to the plaintiff to demonstrate that the owner has vested it with the right to receive the money secured by the note. To the extent that our statement in *RMS Residential Properties, LLC*, can be read otherwise, it is hereby overruled.

With respect to the plaintiff's ultimate burden, however, we note our agreement with other courts that have recognized that "[i]t is a fundamental precept of the law to expect a foreclosing party to actually be in possession of its claimed interest in the note, and have the proper supporting documentation in hand when filing suit, showing the history of the note, so the defendant is duly apprised of the rights of the plaintiff." *Deutsche Bank National Trust* v. *Brumbaugh*, 270 P.3d 151, 155 (Okla. 2012); see also *Anderson* v. *Burson*, 424 Md. 232, 248–49, 35 A.3d 452 (2011) ("A nonholder in possession, however, cannot rely on possession of the instrument alone as a basis to enforce it. The transferee's right to enforce the instrument derives from the transferor [because by the terms of the instrument, it is not payable to the transferee] and therefore those rights must be proved. [Md. Code Ann., Com. Law § 3-203, comment 2 (LexisNexis 2002)]; accord *Leavings* v. *Mills*, 175 S.W.3d 301 [Tex. App. 2004] ['A person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note.'] The transferee does not enjoy the statutorily provided assumption of the right to enforce the instrument that accompanies a negotiated instrument, and so the transferee 'must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.' [Md. Code Ann., Com. Law § 3-203, comment 2 (Lexis

Nexis 2002)]. If there are multiple prior transfers, the transferee must prove each prior transfer. *U.S. Bank* [*National Assn.*] v. *Ibanez*, 458 Mass. 637, [651, 941 N.E.2d 40 (2011)] [citing *In re Parrish*, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)]. Once the transferee establishes a successful transfer from a holder, he or she acquires the enforcement rights of that holder."). Therefore, in cases in which a nonholder transferee seeks to enforce a note in foreclosure proceedings, if the defendants dispute the plaintiff's right to enforce the note, the plaintiff must prove that right. As we explain later in this opinion, in the present case, the record contains such proof, along with a complete history of transfers of the note, from its issuance to JPMorgan to its eventual possession by J.E. Robert.

[19] This area of the law is particularly dynamic as the landscape of financial instruments and securitization continues to adapt to meet the demands of an evolving marketplace. For this reason, it would be imprudent to even attempt to offer a definitive holding on all plausible scenarios under which a loan servicer would have standing to foreclose a mortgage. Instead, we simply note that a plaintiff, in establishing the loan servicer's authority to enforce the instrument, must provide sufficient evidence of such authority to demonstrate that "the principals unequivocally manifested their intention to authorize the [the loan servicer] to exercise [those] rights . . . ." *Kennedy Funding, Inc.* v. *Greenwich Landing, LLC*, supra, 135 Conn. App. 64.

[20] We note that at oral argument before this court, the parties disputed whether and when LaSalle delivered the note to J.E. Robert, and whether such delivery was actual or constructive. Shaw's pointed to the trial court's memorandum of decision denying Signature's motion to dismiss, in which the court credited the affidavit of Michael F. Cocanougher, managing director of special servicing at JPMorgan and a vice president at Shaw's, in which he stated that LaSalle delivered the note to J.E. Robert in February, 2007. While the defendants have challenged on appeal the trial court's reliance on Cocanougher's testimony to establish the amount of the debt; see part III of this opinion; they have made no similar claim as to the February delivery date, and it is well settled that arguments cannot be raised for the first time at oral argument. See *Grimm* v. *Fox*, 303 Conn. 322, 345, 33 A.3d 205 (2012). In the absence of briefing on such a claim, we treat the trial court's finding as to delivery as unchallenged.

[21] The limited power of attorney provided J.E. Robert with the authority to perform certain acts on behalf of LaSalle, including: "[t]he preparation, execution and delivery of any . . . documents or instruments . . . related to foreclosures or rescissions, or court pleadings related to legal action to enforce [LaSalle's] rights or remedies, and all other comparable instruments, with respect to the Mortgage Loans . . . [and the] performance of any and all acts of any kind or nature whatsoever as [J.E. Robert] deems necessary or desirable to effect such . . . foreclosures, rescissions or other legal action."

[22] Although not necessary to determine whether J.E. Robert is a nonholder under the UCC, we note that § 3.11 of the pooling agreement also provides fees for each mortgage and loan that J.E. Robert services based on the principal of the loan, as well as additional fees in connection with certain circumstances arising with respect to such servicing. This factor has been identified as significant in certain cases not relying specifically or solely on the UCC because it provides the requisite concrete injury. See, e.g., *CWCapital Asset Management, LLC* v. *Chicago Properties, LLC*, supra, 610 F.3d 501 ("[t]here is no doubt about Article III standing in this case; though the plaintiff may not be an assignee [of the note], it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services").

The defendants claim that "[Shaw's] reliance on the [pooling agreement] to establish standing is misplaced as the 'relevance of securitization documents on a lender's standing [to foreclose a mortgage] is questionable' . . . ." citing 2 D. Caron & G. Milne, supra, § 30-3, p. 401. This phrase from the treatise, however, appears in the midst of a discussion on a court's ability to "[determine] the owner or holder of a note in a particular case." Id. Because Shaw's does not claim that J.E. Robert is the owner or holder, a status that usually does not depend on another party's intent, we cannot see how this statement has any bearing on the present matter. We are similarly not persuaded by the defendants' argument that, even if the pooling agreement controls the issue of standing, nothing in that document or in the power of attorney "conferred upon [J.E. Robert] any right or authority to commence a foreclosure action *on its own behalf and in its own name*." (Emphasis in original.) In fact, § 3.01 (b) of the pooling agreement provides that the special servicer "shall not, without [LaSalle's] written consent . . . initiate any action, suit or proceeding solely under [LaSalle's] name without

indicating . . . the [s]pecial [s]ervicer's . . . representative capacity . . . ." The logical implication of this language, preceded directly by language seeking to protect the trustee from incurring negligence as a result of actions by the special servicer and viewed in connection with the authority otherwise vested in the special servicer, is that the special servicer may initiate an action in its own name.

[23] The memorandum, written by 280 Atlantic on its letterhead and addressed to "Andrew J. Julian, Signature Properties," recited as its subject heading "Parking Agreement Termination between 280 Atlantic and Shaws 6." It is not disputed that "Shaws 6" refers to Signature's property at 6 Shaw's Cove. The memorandum stated: "Pursuant to your request, [280 Atlantic] will continue to collect rent from [Signature] for the over flow parking, located next door, through December 2006. As you informed us, [Electric Boat] vacated the third floor on December of 2005 and they have given notification to vacate the second floor on or before December 31, 2006. [280 Atlantic] understands your position that Shaws #6 will no longer have the cash flow or the need to continue with the parking arrangement. 280 Atlantic also understands that Shaws #6 is compliant with the parking required by the City of New London and our lot was only required to satisfy the needs of Electric Boat. As of December 31st, 2006, any and all agreements will be terminated and neither party will have any further obligation to each other."

[24] The defendants also argue that the memorandum should not have been admitted because it constituted hearsay evidence. The defendants raised that claim for the first time in their motion to reargue the trial court's decision granting Shaw's motion for summary judgment. Like the trial court, we decline to address a claim under such circumstances. See *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94 n.28, 952 A.2d 1 (2008) ("[a] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple" [internal quotation marks omitted]).

[25] The defendants point to the absence of any evidence that a termination of the parking agreement was recorded on the land records as clear proof that the agreement was, in fact, not terminated. In support of this argument, the defendants point to certain statutes that require the recording of both conveyances of land and leases for a period of more than one year in order to enforce those transfers against third parties, as well as case law dealing with principles as to the priority of interests in recorded transactions. The relationship between this authority and the defendants' argument is not apparent. On this point, the trial court concluded that the defendants' argument was "unsupported by citation to legal authority." We need not address the defendants' argument any further other than to state that a failure to record the termination on public records would have been wholly consistent with the defendants' failure to notify Shaw's of the indisputable fact that the parking area subject to the agreement was, at least in part, being used in connection with the Walgreens development.

[26] Although the trial court concluded that the defendants improperly were relying on the materiality requirement in § 9.1 of the mortgage, it also concluded that "[t]he termination of the [p]arking [a]greement was not immaterial; rather, it was part of a series of events by which, to the detriment of 6 Shaw's Cove, the Julians traded the right to use the parking spaces for a new deal with Walgreens." In light of our conclusion that materiality is not relevant under the nonrecourse provision of the note, we express no opinion as to the trial court's conclusion on this matter.

[27] Because we conclude that the trial court properly granted Shaw's motion for summary judgment on the basis of Signature's breach of § 8.2 of the mortgage, we do not reach the issue of whether Signature additionally breached § 4.3 of the mortgage.