2014 WL 8771287 (Conn.App.) (Appellate Brief)
Appellate Court of Connecticut.

US BANK NATIONAL ASSOCIATION TRUSTEE FOR WACHOVIA MORTGAGE LOAN TRUST ASSET BACKED CERTIFICATES SERIES 2006-AMNI, Plaintiff-Appellant,

v.

Louise WORKS, Defendant-Appellee.

No. 36707.
December 17, 2014.

**Brief of Defendant-Appellee**

Janine M. Becker, Esq., Janine M. Becker, Law Offices of Becker & Zowine, LLC, 3296 Main Street, Bridgeport, CT 06606, 203-374-1173 (Telephone), 203-371-0498 (Facsimile), CT Federal Bar No. CT 12827, email jbecker@beckerzowine. com, for the defendant-appellee:.

Patricia Moore, Law Offices of Becker & Zowine, LLC, 3296 Main Street, Bridgeport, CT 06606, 203-374-1173 (Telephone), 203-371-0498 (Facsimile), CT Federal Bar No. CT 15381, email pmoore@beckerzowine.com, for the defendant-appellee:.

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***1 I COUNTERSTATEMENT OF FACTS**

The Appellee-Defendant is presently 79 years of age (Appendix of Appellant-Plaintiff page A-43 paragraph number"1", Appendix 1 of Appellee-Defendant A-17). She was 71 years old, a widow, and working part time as a substitute teacher when she qualified for the mortgage which is the subject of this appeal. (Appendix of Appellant-Plaintiff page A-43).

The Appellee-Defendant had a mortgage with Bank of America and was current with her payments when she was approached by a broker with First Choice Mortgage acting on behalf of American Mortgage Network, Inc, (AMN) who came to her house and offered her a refinance. (Appendix of Appellant-Plaintiff page A-43 paragraph number "2", Appendix of Appellee-Defendant page A-17). She was advised the mortgage terms were much better than her current mortgages. (Appendix of Appellant-Plaintiff page A-43). The total encumbrances on the property at that time were $361,652.68 comprised of two mortgages (Appendix of Appellee-Defendant page A-17 paragraph 3 and A-30). Based upon the appraisal conducted by Ameriquest Mortgage Co, there was approximately $218,347.32 in equity in the house prior to the refinance and $145,700.00 in equity after the refinance. The Appellee-Defendant was charged $15,535.29 in closing costs by Ameriquest Mortgage Co. (Appendix of Appellant-Plaintiff

page A-97 lines 21 to 27, Appendix of Appellee-Defendant page A-18 paragraph 8). The property at that time was appraised at $528,000.00. (Appendix of Appellant-Plaintiff page A-96 lines 12 to 14).

Approximately four months later, on February 27, 2006, the same broker, now with Templeton Mortgage Group initiated contact with the Appellee-Defendant and ***2** encouraged her to enter into a 30 year note with American Mortgage Network, Inc. in the amount of $462,000.00 (Appendix 1 of Appellant-Plaintiff page A-12 paragraph number "3") with a ten year adjustable interest rate at an initial adjustable rate of 6.876%. The Appellee-Defendant was advised that the prior loan was no good and that this loan was a better deal. The broker fee for the transaction totaled $9,604.88 and the consultant received a special premium for selling this loan. (Appendix of Appellant-Plaintiff page A-64 lines 807 and 811).

Ms. Works paid, in a matter of a four month period, on the two loans that were sold to her, approximately $30,000.00 in closing fees. (Appendix of Appellant-Plaintiff page A-98 lines 1 to 4, A-64 lines 807 and 811, Appendix 1 of Appellee-Defendant A-18 (first mortgage).

The loan application which is subject of foreclosure states that the appraised value of the property was $725,000.00 which was an increase of $145,000.00 in four short months. (Appendix of Appellant-Plaintiff page A-96 lines 15 to 18 Appendix of Appellee-Defendant page A-19 paragraph 11 and A-56),

Upon information and belief, the note with American Mortgage Network, Inc. was thereafter assigned on June 8, 2011 to U.S. Bank National Association as Trustee for Wachovia Mortgage Loan Trust Asset Backed Certification Service 2006. (Appendix of Appellant-Plaintiff page A-12 paragraph 4).

Appellant-Plaintiff commenced this action by writ, summons and complaint dated February 7, 2010. (Appendix of Appellant-Plaintiff page A-10 to A-14).

Ms. Works promptly filed her pro se appearance in this action within a day of the complaint being returned to court and actively participated in the mediation process ***3** (Appendix of Appellant-Plaintiff page A-115 lines 10 to 14), until the bank determined that they could not modify her loan based upon her income, which was the same income provided at the time they approved her loan. (Appendix of Appellant-Plaintiff page A-98 lines 18 to 21). The facts will show that Ms. Works could never afford this mortgage. (Appendix of Appellant-Plaintiff page A-98 lines 21 to 22, Appendix 1 of Appellee-Defendant page A-19 paragraphs 13 and 14).

In that she was representing herself, Ms. Works was unaware of the pleading rules. The matter went to judgment, and again representing herself, Ms. Works filed a chapter 13 bankruptcy. She tried for eight (8) months to get a plan of reorganization confirmed but unfortunately the chapter 13 case was ultimately dismissed. Thereafter, the Appellant-Plaintiff waited seven (7) months to reset the law date, at which time Ms. Works retained counsel who assisted her with a chapter 7 bankruptcy. On July 23, 2013, the Appellee-Defendant filed for Chapter 7 bankruptcy.

On January 10, 2014, the Appellant-Plaintiff filed a notice of relief of stay from bankruptcy (Appendix of Appellant-Plaintiff page A-39) and reclaimed the motion to reset the law days after filing of bankruptcy petition.

The Appellee-Defendant moved to set aside default judgment which matter come before the court on January 27, 2014. The body of the Appellee-Defendant's motion requested the court to "open the judgment and set aside the default." (Appendix of Plaintiff-Appellant page A-43 first 2 lines of motion). A reading of the entire court transcript makes clear that the intent of the Appellee-Defendant was clearly known to the Court ( Mintz J.) and the Plaintiff-Appellant. The Appellee-Defendant sought to have the judgment of strict foreclosure vacated and default set aside. The need to amend the ***4** motion was discussed (Appendix of Plaintiff-Appellant page A-117 lines 13 to 20) at which time the court read the plain language of 49-15b and determined the judgment was automatically vacated. The court marked the entire matter over to February 10, 2014 to discuss the motion to open the default and allow additional time for the parties to brief the issues before the court. (Appendix of Plaintiff-

Appellant page A-122 lines 1-2). The motions were then set down for a hearing on February 10, 2014 only to be continued and heard on March 17, 2014.

Rather than brief the law with respect to C.G.S. §49-15(b) for the hearing on the motion on March 17, 2014, the Appellant-Plaintiff served only a written objection which speaks to the authority of the court to open the default for failure to plead. (Appendix of Appellant-Plaintiff page A-55 to A-57). The objection fails to make any reference to C.G.S. § 52-212 and C.G.S. § 52-212a and refers only to Practice Book Section 17-42 which does not contain a four month time constraint to vacate defaults. In fact, Attorney Knickerbocker concedes that any reference to C.G.S. § 52-212 and C.G.S. § 52-212a speaks only to the motion to open the judgment of strict foreclosure. [1] Now, for the first time, the Appellant-Plaintiff attempts to argue on appeal [2] , that C.G.S. § 52-212a and C.G.S. § 52-212 applies to the motion to set aside the default for failure to plead, an issue not raised before the trial court.

Viable defenses exist and were submitted in a proposed answer which was filed as an attachment to Appellee-Defendant's memorandum of law (Appendix 1 of ***5** Appellant-Plaintiff page A-94 lines 26-27, A-95 lines 1-9), Appendix 1 of Appellee-Defendant Pages A1-13. The Appellee-Defendant was a targeted consumer based upon her age, race and widow status (Appendix of Appellant-Plaintiff page A-96 lines 9 to 21, See also, Appendix of Appellant-Plaintiff page A-95 lines 3 to 9). American Mortgage Network, Inc. convinced her to refinance when there was little to no benefit to her. American Mortgage Network, Inc. took advantage of the legally unsophisticated and vulnerable Appellee-Defendant to secure refinancing by misrepresentation and predatory practices.

In this case, the trial court using its discretion under Connecticut Practice Book Section 17-42, which is the proper legal standard on a motion to set aside a default, found that the default could be set aside. It was never necessary for the Court to open the judgment, as undisputedly and concededly, the judgment was already opened pursuant to C.G.S. § 49-15(b). In this case, the Trial Court had two motions before it. The Plaintiff's motion to set new law days and the Defendant's motion to open the default judgment. The Court made the determination that the judgment was automatically opened but not the default. The Court concluded a separate motion was necessary and proceeded to act upon the Appellee-Defendant's motion to set aside the default. (Appendix of Appellant-Plaintiff, page 127, Articulation). The Court gave the Appellant-Plaintiff time to brief the issue. The Appellate-Plaintiff never raised the issue of the trial court having no power to act upon the motion to set aside the default until the appeal.

***6 II ARGUMENT**

**A. The Appellate Court may only consider issues briefed.**

As a preliminary matter, the Appellee-Defendant notes that Appellant-Plaintiff has identified issues in its “Statement of Issues,” to wit:
A. The Appellate Court has jurisdiction to hear this matter as a final judgment.

B. The Court cannot sua sponte claim a default judgment is opened by filing of a bankruptcy as the court lacks jurisdiction to entertain such a claim once the four month period provided under Connecticut General Statutes Section 52-212 and /or Connecticut General Statutes Section 52-212a expires.

To the extent the Appellant-Plaintiff has failed to brief additional issues contained in the preliminary statement of the issues, those issues should not be addressed by this court. The Appellate Court is not required to review issues that have not been properly presented to the Court. Outside the scope of those issues identified, the appellant should be precluded under the Appellate Rules, *State v. Klinger*, 103 Conn.App. 163, 170 (2007) (precluding issues not included in the statement of issues

presented in the defendant's appellate brief); *see also, Elm Street Builders, Inc. v. Enterprise Park Condominium Assn., Inc.* 63 Conn. App. 657, 659 n.2, (2001).

The Appellant-Plaintiffs failure to brief issues three (3)[3] and four (4)[4] of the preliminary statement of issues, deems those issues abandoned. *In re Brandon W.*, 56 Conn. App. 418, 425(2000).

***7 B. Standards of Appellate Review**

**1. The Appellate Court does not have jurisdiction to hear this matter as there is no final judgment.**

As a preliminary matter, the Appellate Court needs to determine if there is appellate jurisdiction over an appeal of a motion to set aside the default, wherein there is no judgment in place. The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. The Appellate Court has plenary review over a determination of subject matter jurisdiction which is a question of law. *Moran v. Morneau,* 129 Conn. App. 349, 353-54 (2011). "As our Supreme Court has explained: To consider the [plaintiff's] claims, we must apply the law governing our appellate jurisdiction, which is statutory.... The legislature has enacted General Statutes § 52-263, which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim.... Further, we have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings." (Citation omitted; internal quotation marks omitted.) Id. at 353-54, 19 A.3d 268 (2011). *J&E Investment Co. LLC v. Athan,* 131 Conn. App. 471 (2011).

There is no judgment in this case, as the judgment was automatically opened by operation of C.G.S. § 49-15(b) upon the filing of the bankruptcy on May 4, 2014. ***8** Before the Court is an appeal of the order setting aside the default. Our Supreme Court has set forth the test for determining when an otherwise interlocutory order or ruling of the Superior Court constitutes an appealable final judgment. As stated by the Supreme Court in *State v. Curcio,* 191 Conn. 27, 31, 463 A.2d 566 (1983), "[a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (hereinafter referred to as the *Curcio* test).

The first prong of the Curcio test requires a determination of whether or not the order being appealed is severable from the central cause to which it is related so that "the main action can proceed independent of the ancillary appeal proceeding." (Internal quotation marks omitted.) *Douglas-Mellers v. Windsor Ins. Co.*, 68 Conn. App. 707, 714 (2002). In the present case, the vacated judgment and motion to open the default was made within the context of the pending civil action. The underlying action has not terminated but has been placed on the trial calendar. A decision rendered on this appeal could potentially render a trial on the merits moot. Therefore, the decisions are not severable. The first prong of the Curcio test has not been met.

The second prong of the *Curcio* test focuses on the potential harm to the appellant's rights and permits an interlocutory order to be deemed final for purposes of appeal if it involves a claimed right the legal and practical value of which would be destroyed if it were not vindicated before trial. *Rustici v. Mallo,* 60 Conn. App. 47, 54-55 *cert. denied* 254 Conn. 952 (2000). This interlocutory order of the court is not final because the Appellant-Plaintiff still may pursue strict foreclosure. Since a right has not ***9** been destroyed, the interlocutory appeal is not final. In order for there to be appellate jurisdiction, the Appellate Court would have to be satisfied, and the appellant would have to show, that the trial court's order threatens the preservation of a right already secured to them, which in this case would be the judgment which, by operation of C.G.S. 49-15(b) was already opened, and that the right will be irretrievably lost and the appellants irreparably harmed unless they may immediately appeal. The right, however, which in this case is the foreclosure judgment, is not irretrievably lost as it may still enter if the Appellant-Plaintiff can defeat the defenses.

Even if the Appellate Court was to consider this appeal to be of an order opening judgment, it is well established that an order opening a judgment ordinarily is not a final judgment within C.G.S. § 52-263. *See, Sasso v. Aleshin,* 197 Conn. 87 at 90-91 (1985), and cases cited therein; *State v. Phillips,* 166 Conn. 642, 646 (1974); *Ostroski v. Ostroski,* 135 Conn. 509, 511, 66 A.2d 599 (1949). An exception to this rule exists where the appellant makes a colorable challenge to the power of the court to act (emphasis added) to set aside the judgment. *Connecticut Light & Power Co. v. Costle,* 179 Conn. 415, 418 (1980); 4 Am.Jur.2d, Appeal and Error § 126, No such challenge exists in this matter.

C.G S. § 49-15(b) states that upon filing of bankruptcy, any judgment of strict foreclosure shall be opened automatically, No action by any party or the court is necessary. The Appellant-Plaintiff concedes that the judgment is automatically opened under C.G.S. § 49-15(b) [5] and by making such an admission also concedes that there ***10** exists no colorable challenge to the power of the court to set aside the judgment. The Court did not set aside the judgment, the judgment was automatically set aside.

The Appellant-Plaintiff argues that the Court misinterpreted C.G.S. § 49-15(b) when it decided the motion to open the default judgment filed by the Appellee-Defendant. As such this appeal concerns a challenge that the trial court misconstrued its statutory authority. Such a challenge raises a claim of statutory construction that is not jurisdictional. See *Amodio V. Amodio,* 247 Conn, 724, 727-28 (1999); *Kim v. Magnotta,* 249 Conn. 94, 102-104 (1999). In this case, there is no claim that the Court lacked the power to consider the Appellee-Defendant's motion to set aside the default judgment. Thus, the Appellate Court does not have jurisdiction to hear this matter as a final judgment.

**2. The Standard for Granting Motion to Set Aside a Default**

In the event this Court determines that the order which is subject to appeal is a final order subject to review, the appropriate standard of review regarding the Trial Court's granting of the Motion to Open the Default is **abuse** of discretion. "Whether to grant a motion to open rests in the discretion of the trial court." *Rzaveva v. 75 Oxford Street, LLC,* 111 Conn. App. 77, 78 (2008). "A motion to open...is addressed to the [trial] court's discretion and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear **abuse** of it discretion." (Internal quotation marks omitted.) *Rino Gnesi Co. v. Sbriglio,* 83 Conn. App. 707, 711 (2004). The court may look at the totality of the circumstances in determining whether to vacate a default for failure to plead. *Snowden v. Grillo,* 114 Conn. App. 131 (2009). "In reviewing claims that the trial court **abused** its discretion, great weight is given to the trial court's decision ***11** and every reasonable presumption is given in favor of its correctness...We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted) *Langewisch v. New England Residential Services, Inc.,* 113 Conn. App. 290, 295 (2009).

**C. The judgment of strict foreclosure upon filing of a bankruptcy petition is automatically opened as clearly stated in the plain language of Connecticut General Statutes Annotated Section 49-15(b)**

When construing a statute, the fundamental objective of the court is to ascertain and give effect to the apparent intent of the legislature. *State v. Drupals,* 306 Conn. 149, 159 (2012). It is axiomatic that the function of the court is to "look at the law as drafted, not at its purported aim." *State v. Smith,* 194 Conn. 213, 222 (1984). The place to begin any search for the meaning of a statute is with the language of the act chosen by the legislature. *White v. Burns,* 213 Conn 307, 311 (1990). Indeed the primary rule of statutory construction has always been that "[i]f the language of the statute is clear, it is assumed that the words themselves express the intent of the legislature ... Where [a] statute presents no ambiguity [a court] need look no further than the words themselves." (Internal quotation marks omitted.) Id. Moreover, absent some clearly expressed intent to the contrary, the words of the statute are to be given their ordinary and common meanings. *State v. Dupigney,* 295 Conn. 50, 58 (2010). These time honored principles of statutory construction were reinforced in 2003 with the adoption of what is now codified as C.G.S. § 1-2z.

C.G.S. § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text

is ***12** plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

There is no dispute that C.G.S. §49-15 (b) states that the judgment of strict foreclosure is opened upon the filing of bankruptcy as evidenced by the reading of the plain language of the statute combined with Appellant-Plaintiff's admission. [6] It is also not disputed that the statute states that the "provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection." (emphasis added). In this case, the Court (Mintz, J.) interpreted that the statute allowed for the modification of other provisions of the prior judgment under other subsections. Here, there was a motion pending under Practice Book Section 17-42, which the court was within its discretion to decide as the judgment was opened. If this were not part of the legislative intent, there would be no purpose for the language "under this subsection."

**D. In the absence of a final judgment, Connecticut General Statutes Sections 52-212 and 52-212a do not apply.**

Under C.G.S. § 49-15(b), the judgment of strict foreclosure is deemed automatically opened. Since there is no longer a final judgment, C.G.S. § 52-212 and C.G.S. § 52-212a should not be applied in determining whether or not to open the default. The language of C.G.S. § 52-212 and C.G.S.§ 52-212a speaks to vacating final judgments not defaults. "(T)here is a clear distinction between a default, sometimes loosely referred to as a judgment of default, and a judgment upon default. A default is not a judgment. It is an order of the court the effect of which is to preclude the defendant from making any further defense in this case so far as liability is concerned. ***13** A judgment upon default, on the other hand, is the final judgment in the case which is entered after the default and a hearing in damages." *Automotive Twins, Inc. v. Klein*, 138 Conn. 28, 33 (1951). Since the final judgment was vacated pursuant to C.G.S. § 49-15(b), C.G.S. §52-212 and C.G.S. § 52-212a, and any alleged four month time constraint contained therein, do not apply.

When a final judgment has not been rendered, C.G.S. § 17-42 applies [7] . Under C.G.S. § 17-42, a motion to set aside the default can be made at any time, for good reason shown. C.G.S. § 17-42 which reads as follows:

A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose....

Since the judgment was open under C.G.S. § 49-15(b), under C.G.S. § 17-42, the trial court has the authority to open the default for failure to plead.

The Appellant-Plaintiff is unclear whether they seek to apply C.G.S. § 52-212 and C.G.S. § 52-212(a) to a judgment of strict foreclosure, default judgment or both. The case law is clear, however, a motion to open a judgment of strict foreclosure is governed by C.G.S. §49-15. TD Banknorth, N.A. v. White Water Mountain Resorts of Connecticut, Inc., 133 Conn. App. 536, 544 footnote 9, (2012) citing Citibank, N.A. v. Lindland, 131 Conn. App 653, cert. granted on other grounds, 303 Conn 906, (2011) and Falls Mill of Vernon Condominium Assn., Inc. v. Sudsbury, 128 Conn. App 314, 15 A.3d 1210 (2011) see also, HSBC Bank USA v. McLaughlin, 2007 WL 1599033, Superior Court, Judicial District of Tolland Docket No. C030082276S, (2007, Sferrazza, J.), ("the opening of a judgment of strict foreclosure is governed by 49-15(a) rather than ***14** General Statutes Annotated Section 52-212 or Connecticut General Statutes Annotated Section 52-212(a).) See also, Citimortgage v. Warner, 2012 WL 3871947, Superior Court, Judicial District of New London Docket No. CV 106003555 (2012, Levine, J.). Therefore, the Court was correct in finding C.G.S. §52-212 did not govern the matter.

In addition to the preceding, consideration of this issue should be denied as it was not raised at the trial court level. The objection to Appellee-Defendant's Motion to Set Aside default judgment filed by the Appellant-Plaintiff fails to make any reference C.G.S. § 52-212 and C.G.S. § 52-212a and only refers to Practice Book Section 17-42 which does not contain a four month time constraint to vacate defaults. In fact, Attorney Knickerbocker concedes that any reference to C.G.S. § 52-212 and C.G.S. § 52-212a speaks only to the motion to open the judgment of strict foreclosure. When addressing the Court on January 27, 2014,

Attorney Knickerbocker stated that reference to C.G.S. § 52-212 goes to the motion to open judgment (Plaintiff Appellant brief page A-121 lies 3 to 4.). Now, on appeal, this issue is inappropriately raised for the first time.

**E. The trial court was correct in finding that the time constraints contained in C.G.S. § 52-212 and C.G.S. § 52-212a do not preclude the opening of a default after the expiration of four months.**

The Appellant-Plaintiff refers to C.G.S. § 52-212 and C.G.S. § 52-212a loosely without explaining the distinguishing factors between the statutes and proper application thereof.

In this case, the judgment of strict foreclosure was rendered after a default. C.G.S. § 52-212a imposes a mandatory four month limitation on opening civil judgments other than default judgments. Since this is a judgment rendered after a default, C.G.S. § 52-212a does not apply. *Strong v. Collier,* 1982 WL 195406, Superior Court of ***15** Connecticut, Housing Session, Judicial District of Hartford-New Britain at Hartford, CV-H-8104-520 (1982, Maloney, J.).

Section 52-212 of the Connecticut General Statutes refers specifically and solely to default judgments [8]. The language of the statute and its use of the word "may" rather than restrictive language of C.G.S. § 52-212(a) [9] has been held to permit the court to entertain a motion to open a default filed four months after it was rendered. *Strong v. Collier, id,* 1982 WL 195406, Superior Court of Connecticut, Housing Session, Judicial District of Hartford-New Britain at Hartford, CV-H-8104-520 (1982, Maloney, Jr.). The language of the section C.G.S. §52-212 does not prohibit granting a motion to open a default solely because the motion is made more than four months after the judgment was entered. Therefore, the Court would have been within his discretion to open the default judgment, even if the Appellate Court concludes there was no authority to do so under C.G.S. § 49-15(b), by considering the Appellee-Defendant's motion as one to open judgment and set aside the default.

The reliance by the trial court on *Merry-Go-Round Enterprises, Inc. v.* Molnar, 10 Conn. App. 160 (1897) is not misplaced as alleged by the Appellant-Plaintiff. The Appellate *Court in Merry-Go-Round Enterprises, id,* was faced with an appeal of a trial court decision denying the Appellee-Defendant's motion to open a judgment of strict foreclosure after the expiration of the law days and vesting of absolute title in the ***16** plaintiff. Whether or not the motion needed to be made within four months was not in issue since pursuant to C.G.S. § 49-15 no motion can be made after title has vested. Of significance to the Court (Mintz, J.) was that in deciding the matter, the court looked to the provisions of C.G.S. § 49-15 rather than C.G.S. § 52-212 and C.G.S. § 52-212a. The case made clear that the provisions of C.G.S. § 52-212 and C.G.S. § 52-212a must give way to the specific provisions of C.G.S. §49-15.

Finally any alleged limitation of four months to open a default judgments as prescribed in C.G.S. § 52-212 is also impractical in a bankruptcy/foreclosure setting. The filing of a petition under any chapter of the Bankruptcy Code automatically stays all actions against the debtor, including foreclosure actions. 11 U.S.C § 362(a)(5). The Plaintiff would need only to wait four months to seek a relief of the bankruptcy stay to effectively squash any ability of the debtor to open a motion for judgment. Such tactics would severely prejudice the rights of a debtor attempting to save his home.

The reliance of the Appellant-Plaintiff on *G.F. Construction v. Cherry Hill Construction.,* 42 Conn. App. 119, 122-124 (Conn. App. Ct. 1996) is misplaced as that case involved a breach of contract to perform excavation and not a strict foreclosure as is the case herein. Thus, C.G.S. § 49-15 does not come into consideration at all.

**F. The trial court properly exercised it equitable powers in this matter.**

Even if this court were to hold that Connecticut General Statutes Section 49-15(b) did not open the final judgment other than to set law days, the court properly exercised its equitable powers. It is generally recognized that the court has broad equitable powers in the foreclosure context. *Reynolds v. Ramos,* 188 Conn. 316, 320 (1982). A reading of the entire court transcript makes clear that the intent of the ***17** Appellee-Defendant was clearly known to the Court ( Mintz J.) and the Appellant-

Plaintiff. The Appellee-Defendant sought to have the judgment of strict foreclosure vacated and default set aside. The need to amend the motion was discussed (Appendix of Appellant-Plaintiff page A-117, lines 13 to 20) at which time the court read the plain language of C.G.S. §49-15(b) and determined the judgment was automatically vacated. As express language of C.G.S. §49-15(b) provides that provisions may not be set aside under "this subsection," and the Appellee-Defendant had filed a motion to set aside the default, the Court (Mintz, J.) concluded that it could rule on that motion. However, the Court could have accepted the motion to open the default under C.S.G. §49-15, as well.

The Appellant-Plaintiff would like this Court to elevate form over substance. Assuming, arguendo, the judgment was only opened for the limited purpose of extending the law days, the intent of the Appellee-Defendant's motion was clear. The Court is reminded that under C.G.S. § 49-15(a) (1), the court may exercise its equitable powers and vacate a judgment of strict foreclosure, upon written motion of any person having an interest in the judgment. The Appellee-Defendant did have a written motion before the Court to set aside the default judgment, which motion specifically requested the judgment be opened and the default set aside. At the end of the day, the trial court determined that this matter should be tried on the merits.

Furthermore, despite the language of C.G.S. § 49-15(b ) the Uniform Foreclosure Standing Orders (JD-CV-104, Rev. 4-11) provides that

> At a hearing on a motion to open judgment after bankruptcy in order to set a new sale or law date after receiving relief from the automatic bankruptcy stay, a bankruptcy dismissal or any other bankruptcy order or law that allows the plaintiff to proceed with its ***18** foreclosure action, the plaintiff must present to the court an updated affidavit of debt that the court will use to make a new finding of the judgment debt as of the date of the hearing. Additionally, if the last finding made by the court as to the fair market value of the premises is more than 120 days old, then the plaintiff must present to the court an updated appraisal for the court to make an updated finding of the fair market value of the premises on the date of the hearing, (See Appendix 2 of Appellee-Defendant A-65 Paragraph F).

Therefore as a practical matter all the "provisions" of the judgment are set aside. The Appellee-Plaintiff acted under that premises too in that it filed an updated affidavit of debt, update appraisal and affidavit of the attorney fees.

The action of the Court could be supported by C.G.S. § 49-15(b) or C.G.S. § 49-15(a).

**G. Good cause was shown to grant motion to set aside the default judgment.**

The Appellant-Plaintiff has failed to establish clear **abuse** of discretion. The **elderly** unsophisticated Appellee-Defendant filed an appearance in this matter and participated in mediation. The Court, in looking at the totality of circumstances, concluded that any alleged prejudice suffered as a result of a further delay in the proceedings is without merit as the Appellant-Plaintiff was responsible for substantial delays in this matter. (Appendix of Appellant-Plaintiff's Brief at p. A107) Moreover, viable defenses exist which became readily apparent upon discussion of work out options with counsel retained in November of 2013, obtaining of closing documents, and review of the affidavit of debt.

**H. Bankruptcy only requires debtor to list all causes of actions that can be brought by debtor not affirmative defenses asserted in defense of an action.**

***19** The Appellee-Defendant has not asserted a counterclaim in her answer nor has she asserted a cause of action against the appellant-plaintiff. Rather, the Appellee-Defendant only asserts affirmative defenses as against the Appellant-Plaintiff. Affirmative defenses are not "assets" within the meaning of the bankruptcy code. *Robenshein v. Kleban* 918 F. Supp 98, 102 (S.D.N.Y. 1996). Any claim that the Appellee- Defendant has waived such affirmative defenses because they were not set forth in her list of assets filed in bankruptcy is without merit, and not relevant to the issue on appeal.

**CONCLUSION AND RELIEF REQUESTED**

The Trial Court appropriately and with authorization determined the judgment of strict foreclosure was open and the default could be set aside. As such, the appeal should be denied and the underlying court decision upheld.

Footnotes

1 When addressing the court on January 27, Attorney Knickerbocker stated that reference to 52-212 goes to the motion to open judgment (Appellant-Plaintiff brief page A-121 lies 3 to 4.)

2 Point B page 9 of Appellant-Plaintiff's Brief.

3 Did the court err in opening the default when the Defendant did not provide a good faith defense to warrant the opening of the defense?

4 Did the court err in opening the default when the Defendant did not provide a non-negligent reason for delaying the filing of a pleading?

5 The Appellant-Plaintiff requests the court re-enter the judgment. See Motion to Reset Law Days and Reenter Judgment attached to Appellant-Plaintiff's Appendix pages A-33 and A-34.

6 The Appellant-Plaintiff filed a motion to reset the law days, the title and body of which, recognizes the judgment as open. (See Motion to Reset Law Days and Reenter Judgment contained in Appellant-Plaintiffs Appendix pages A-33 and A-34)

7 The Appellant-Plaintiff in its Objection to Appellee-Defendant's Motion to Open Default concedes that the motion to open the default is governed by Practice Section 17-42 (Appellant-Plaintiff's Appendix A-56 lines 12 to 15)

8 Connecticut General Statutes Annotated Section 52-212 entitled “Opening judgment upon default or nonsuit” states,(a)ny judgment rendered... upon a default...may be set aside, within four months.

9 Connecticut General Statutes Annotated Section 52-212a entitled “Civil judgment or decrees opened or set aside within four months only” states ....a civil judgment...may not be opened or set aside unless the motion to open or set aside is filed within four months.

**End of Document**