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GMAT LEGAL TITLE TRUST 2014-1, U.S. BANK, NATIONAL ASSOCIATION, LEGAL TITLE TRUSTEE *v.* VITO CATALE ET AL.
(AC 45332)

Alvord, Clark and DiPentima, Js.

Syllabus

The original plaintiff, G Co., sought to foreclose a mortgage on certain real property owned by the defendants. The complaint also sought a deficiency judgment. The note and mortgage had been assigned several times prior to the commencement of the present action, and a predecessor in interest to the original plaintiff, C Co., had brought a separate action to foreclose on the mortgage in 2011 that was dismissed for dormancy in 2017. The defendants filed an answer and special defenses in the present action asserting eight special defenses, and G Co. filed a motion to strike all of them. G Co. then filed a motion for summary judgment as to liability. The court granted the motion to strike as to seven of the special defenses, but it could not adjudicate the summary judgment motion because the defendants were permitted to file a revised answer and special defenses. The defendants subsequently amended their answer and special defenses to include five special defenses, including bad faith settlement practices, unclean hands as to C Co. and G Co., that G Co. was not the holder in due course of the note, and the inapplicability of the accidental failure of suit statute. The defendants also appended to their amended answer and special defenses an exhibit purporting to be a mediator's report describing mediation sessions between the defendants and C Co. in the prior foreclosure action. The defendants alleged that the mediation report showed that C Co. flagrantly flouted its mediation obligations in the prior action. G Co. again filed a motion to strike all of the defendants' special defenses, and the court granted the motion to strike as to bad faith settlement practices, unclean hands, and the inapplicability of the accidental failure of suit statute. The court found that, although the allegations described a failed mediation between C Co. and the defendants, the allegations were insufficient to state a defense for bad faith or unclean hands. In addition, the court found that the accidental failure of suit statute did not apply on the basis that the prior foreclosure action was dismissed for dormancy and not on a substantive basis. The court rendered summary judgment for G Co. as to liability. G Co. subsequently assigned the mortgage to R Co., and R Co. was substituted as the plaintiff. R Co. filed a motion for a judgment of strict foreclosure, and the court held a hearing on the motion. At the hearing, R Co. admitted into evidence, over the objection of the defendants' counsel, documents evidencing the history of the note and mortgage, including transactions prior to G Co.'s ownership of the mortgage, under the business records exception to the hearsay rule. After the hearing, the court rendered a judgment of strict foreclosure, and the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court erred in rendering a judgment of strict foreclosure because it relied on inadmissible hearsay evidence to determine the status of the note: pursuant to *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC* (334 Conn. 374), when a party introduces a document that contains data that was provided by another business, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information, and, in the present case, R Co. sufficiently demonstrated that the challenged data became a part of its own business records as part of a transaction with the prior servicer, which had a business duty to transmit accurate information to R Co.'s current loan servicer; accordingly, the trial court did not err in admitting the chal-

lenged documents under the business record exception to the hearsay rule.

2. The trial court properly granted G Co.'s motion to strike with regard to the defendants' special defenses of bad faith settlement practices and unclean hands: even if this court assumed that the alleged misconduct of C Co. during a mediation session in a prior foreclosure action could affect R Co.'s rights in this foreclosure action and that the defendants were not precluded from raising these special defenses because they failed to file a motion for sanctions pursuant to statute (§ 49-31n (c)), the defendants failed to allege facts sufficient to state a defense of unclean hands or bad faith settlement practices, as the facts alleged by the defendants essentially showed a failed mediation, not bad faith on the part of C Co., and the defendants did not sufficiently allege that C Co. engaged in wilful misconduct or in conduct that involved a dishonest purpose or was of such character as to be condemned by honest and fair-minded people.

3. This court reversed the portion of the trial court's ruling that granted the plaintiff's motion to strike as to the defendants' special defense of the inapplicability of the accidental failure of suit statute to the deficiency judgment: on the basis of this court's ruling in *U.S. Bank, National Assn.* v. *Moncho* (203 Conn. App. 28), it is clear that a defendant's special defense regarding the applicability of the savings statute as it pertains to a deficiency judgment becomes ripe for adjudication only after a plaintiff files a motion for a deficiency judgment, and, here, the defense of the inapplicability of the accidental failure of suit statute was not ripe for adjudication because the plaintiff had not yet filed a motion for a deficiency judgment and may never elect to do so; accordingly, the trial court should have dismissed the motion to strike as it pertained to that special defense.

Argued April 12—officially released August 15, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spader, J.*, granted in part the plaintiff's motion to strike the special defenses filed by the named defendant et al.; thereafter, the court, *Spader, J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, RMS Series Trust 2020-1 was substituted as the plaintiff; thereafter, the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the substitute plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Reversed in part*; *judgment directed*; *further proceedings*.

Douglas R. Steinmetz, for the appellants (named defendant et al.).

Paul N. Gilmore, with whom, on the brief, was *Olivia L. Benson*, for the appellee (substitute plaintiff).

Opinion

CLARK, J. This residential mortgage foreclosure action returns to this court for a second time.[1] This time, the defendants Vito Catale (Vito) and Maria Catale[2] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff RMS Series Trust 2020-1.[3] They claim that the judgment of strict foreclosure must be reversed because (1) the plaintiff did not "lay the foundation required to rely on the hearsay evidence of the loan's history provided by the plaintiff's predecessors in interest" and, therefore, the judgment is premised entirely on inadmissible evidence, and (2) the court improperly struck their "key special defenses," including, inter alia, their defenses of unclean hands, bad faith settlement practices, and the inapplicability of the accidental failure of suit statute. For the reasons that follow, we reverse the judgment of the trial court only with respect to the granting of the motion to strike the defendants' special defense claiming the inapplicability of the accidental failure of suit statute because that special defense was not ripe for adjudication. We affirm the judgment in all other respects.

The record reveals the following facts and procedural history. In 2006, Vito executed a promissory note in favor of WMC Mortgage Corporation (WMC) in the original principal amount of $600,000. As security for the note, the defendants executed a mortgage in favor of WMC on property that they own in Monroe. The note and mortgage have been subject to a series of assignments.

In 2011, Consumer Solutions, LLC, one of the plaintiff's predecessors in interest, brought an action to foreclose on the mortgage (first foreclosure action). See *Consumer Solutions, LLC* v. *Catale*, Superior Court, judicial district of Fairfield, Docket No. CV-11-6018401-S. That action, however, was dismissed for dormancy in January, 2017. See id.

On August 1, 2017, GMAT Legal Title Trust 2014-1, U.S. Bank, National Association, as Legal Title Trustee (GMAT), commenced the present action via a one count complaint seeking to foreclose on the mortgage. The complaint also sought a deficiency judgment. With respect to the request for a deficiency judgment, the complaint alleged, inter alia, that the request was not time barred because of the accidental failure of suit statute; see General Statutes § 52-592; or, alternatively, because of the defendant's acknowledgement of the debt within six years of the commencement of the action. See General Statutes § 42a-3-118; see also *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 461, 802 A.2d 887 ("[a] general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute [of limitations]"), cert. denied, 262 Conn. 918, 812 A.2d 861

(2002).

On July 30, 2018, the defendants filed their answer and special defenses in which they asserted eight special defenses, including, inter alia, that Consumer Solutions, LLC, engaged in bad faith settlement practices and had unclean hands stemming from the mediation process in the first foreclosure action and that the accidental failure of suit statute did not apply because the trial court dismissed the first foreclosure action due to the inexcusable failure of Consumer Solutions, LLC, to prosecute the action.

On August 22, 2018, GMAT filed a motion to strike all eight of the defendants' special defenses. It then filed a motion for summary judgment as to liability on November 20, 2018, relying in part on the arguments and authorities set forth in its memorandum in support of its previously filed motion to strike the defendants' special defenses that had not yet been decided.

On March 13, 2020, the court, *Spader*, *J.*, granted the motion to strike as to seven of the defendants' special defenses. The court explained that, although the plaintiff had also moved for summary judgment and the court believed that GMAT had set forth a prima facie case, it could not adjudicate GMAT's summary judgment motion at that time because the defendants were permitted an opportunity to file a revised answer and special defenses pursuant to Practice Book § 10-44.

On April 15, 2020, the defendants filed a substitute answer and special defenses, this time asserting five special defenses, including, inter alia, bad faith settlement practices, unclean hands, and the inapplicability of the accidental failure of suit statute. On April 28, 2020, GMAT filed a motion to strike all of the special defenses of the substitute answer.

On January 28, 2021, the court granted the motion to strike as to the defendants' bad faith settlement practices and unclean hands defenses, explaining that, although the allegations described a failed mediation between the plaintiff's predecessor in interest and the defendants, the allegations were insufficient to state a defense for bad faith or unclean hands. The trial court also struck the defendants' special defense that the accidental failure of suit statute did not apply on the basis that the first foreclosure action "was dismissed for dormancy and not on a substantive basis." The court denied the motion to strike the special defense asserting that GMAT was not a holder in due course of the note because the defendants had, in the court's view, alleged facts sufficient to state such a defense.

On April 16, 2021, the court rendered summary judgment in favor of GMAT as to liability, concluding that it had established a prima facie case for foreclosure and that the defendants had not set forth the existence of a genuine issue of material fact or a viable defense

that would prevent the granting of the motion for summary judgment. The court rejected the defendants' objections that claimed that GMAT's affidavits were defective and contained inadmissible hearsay to which the business record exception did not apply.

The plaintiff, after being substituted for GMAT on August 23, 2021, filed a motion for a judgment of strict foreclosure on September 1, 2021. On December 2, 2021, and February 10, 2022, the court held a hearing on the plaintiff's motion for a judgment of strict foreclosure. On February 10, 2022, the trial court, *Hon. Dale W. Radcliffe*, *judge trial referee*, rendered a judgment of strict foreclosure and set the law day for April 26, 2022. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendants first claim that the court erred in rendering a judgment of strict foreclosure because the court relied on inadmissible hearsay evidence to determine the date of default, the amount due on the note, interest accrued, and penalty calculations. Specifically, the defendants contend that the court incorrectly admitted into evidence certain records of Rushmore Loan Management Services, LLC (Rushmore), the plaintiff's current loan servicer, under the business records exception to the hearsay rule because the plaintiff did not "lay the foundation required to rely on the hearsay evidence of the loan's history provided by the plaintiff's predecessors in interest." They contend that the note and mortgage passed through many hands before they were assigned to the plaintiff and that the plaintiff "has no evidence generated by itself [concerning the defendants' payment history for the period of time prior to when] . . . it took the loan [on] August 4, 2021." In their view, because Rushmore's loan history records contain information premised on information from prior holders or servicers, "controlling case law" required the plaintiff to present evidence from each and every prior owner or servicer of the note in order to demonstrate that each had a duty to transmit accurate information regarding the records to the next holder.

Although the defendants do not clearly identify in their principal appellate brief the specific records or portions of records that they are challenging on appeal, it appears, from their objections in the trial court, that their focus is on the admission of exhibits 18 and 19.[4] Exhibit 18 is a loan activity history for 2014 created by Rushmore. Exhibit 19 is a Rushmore "customer activity statement" for the period January, 2015, to October, 2017.[5] The plaintiff counters that the court properly admitted the business records of its loan servicer and that it was not required to lay a foundation in the manner advanced by the defendants. The plaintiff argues that it satisfied its burden under the business records exception to the rule against hearsay because it sufficiently

demonstrated that the relevant data became part of its own business records through its transaction with the previous servicer, which had a business duty to transmit accurate information. We agree with the plaintiff.

General Statutes § 52-180, which has been incorporated as § 8-4 of the Connecticut Code of Evidence, is colloquially referred to as the business records exception to the hearsay rule. Section 52-180 (a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." "To the extent [that admissibility] of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay . . . [is a] legal [question] demanding plenary review." *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 388, 222 A.3d 950 (2020). "A trial court's decision to admit evidence, if premised on a correct view of the law, however, calls for the abuse of discretion standard of review." (Emphasis omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653, 137 A.3d 1 (2016).

In *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 390–91, our Supreme Court clarified the application of the business records exception in foreclosure actions. The court explained that, "[w]hen a party introduces a document that it did not create but that it received from a third party, the business records exception will apply only if the information contained in the document is based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant. . . . Where the prior owner of the note had a legitimate business duty to provide to the next holder the information used to generate the payment history, the printout of that information was the business record of the present holder. . . . If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." (Citations omitted; internal quotation marks omitted.) Id.

Our Supreme Court further explained "that—regardless of whether supporting documentation or testimony

from the third party is offered—it is the third party's duty to report [the information] in a business context which provides the reliability to justify [the business records exception to the hearsay rule]." (Internal quotation marks omitted.) Id., 392. "This reliability is further strengthened . . . when the entity receiving the information from a third party, with a business duty to report it, subsequently integrates that information into the entity's own business records and has a self-interest in [ensuring] the accuracy of the outside information . . . ."[6] (Internal quotation marks omitted.) Id.

Following *Jenzack Partners, LLC*, this court was presented with a similar claim in *U.S. Bank, National Assn.* v. *Moncho*, 203 Conn. App. 28, 54, 247 A.3d 161, cert. denied, 336 Conn. 935, 248 A.3d 708 (2021). In *Moncho*, the defendants, like the defendants in the present case, "objected to the introduction of the payment history into evidence, claiming that there was no way to verify the loan history that was supplied to [the current loan servicer] by the prior servicer." Id., 55. The trial court "overruled the defendants' objection on the ground that [the employee of the current servicer] had testified extensively about the boarding process and how [the current servicer] checked the records to ensure that they were accurate before they were kept as business records." Id., 56. On appeal to this court, the defendants claimed that the court erred by admitting into evidence the note's payment history. Id., 54.

Relying on *Jenzack Partners, LLC*, this court rejected the defendants' arguments and concluded that the court properly admitted the note's payment history because the employee of the current servicer testified that the prior owner of the loan "had a duty to provide [the current loan servicer] with accurate records during the loan transfer process." Id., 57. This court explained that, "[w]hen [the current loan servicer] received this information, it went through [its] boarding process, whereby [it] reviewed the documents and analyzed them. The information that [the prior owner of the note] provided to [the current loan servicer] was used to create the payment history that the plaintiff introduced into evidence at trial." Id. Accordingly, this court concluded that, pursuant to *Jenzack Partners, LLC*, the payment history in question qualified as a business record. Id.

The defendants' arguments in this case are plainly at odds with our Supreme Court's decision in *Jenzack Partners, LLC*, and this court's decision in *Moncho*. Nothing in those cases, or any other case to which the defendants have directed us, suggests that, in order for the business records exception to the hearsay rule to apply to its servicer's business records, the plaintiff was required to lay a foundation through the presentation of evidence from each and every prior holder or servicer of the note.[7] See, e.g., *New England Savings Bank* v.

Bedford Realty Corp., 246 Conn. 594, 604, 717 A.2d 713 (1998) ("a proponent need not establish a chain of custody in order to authenticate a business record"). To reiterate, "[i]f part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, *the proponent does not have to lay a foundation concerning the preparation of the data it acquired* but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." (Emphasis added.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 391; see also *U.S. Bank, National Assn.* v. *Moncho*, supra, 203 Conn. App. 57.

In the present case, the court properly admitted the challenged documents as business records because the plaintiff introduced evidence that the challenged data became a part of its own business records pursuant to a transaction in which the previous loan servicer had a business duty to transmit accurate information to Rushmore. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 392 ("[t]he key question is whether the records in question are reliable enough to be admissible" (internal quotation marks omitted)). At the hearing, Anthony Younger, an officer of Rushmore, testified about the loan servicing process, including the "boarding process," which he described as the process of taking over the servicing of a loan from another servicer. He testified that the boarding process is comprised of, among other things, reviewing the information received from the previous servicer, mapping that information into Rushmore's computer system, and auditing the information received, including the status of the loan and the amounts shown. Younger further testified that the loans are reviewed and checked to make sure that the status of each loan is correct before the loans become live and Rushmore's servicing begins. He testified that "prior servicers have an obligation to transfer the information—accurate information from their system to [Rushmore] so [it] can input that information in our system."

Younger further testified that exhibits 18 and 19 are Rushmore records that contain information from the prior servicer, in addition to information Rushmore generated after it became the servicer. He made clear that Rushmore relied on the information that the predecessor servicer provided when creating its own records. As the plaintiff correctly notes, this is precisely the scenario contemplated in *Jenzack Partners, LLC*. Because the plaintiff sufficiently demonstrated that the challenged data became a part of its own business records as part of a transaction with the prior servicer, which had a business duty to transmit accurate information to Rushmore, the trial court did not err in admitting exhibits 18 and 19 as business records.[8]

II

The defendants next claim that the court erroneously granted GMAT's motion to strike with respect to their special defenses of unclean hands, bad faith settlement practices, and the "inapplicability of the accidental failure of suit statute." We address their arguments in turn.

"[A]ppellate review of a trial court's decision to grant a motion to strike is plenary." *HSBC Bank USA, National Assn.* v. *Nathan*, 195 Conn. App. 179, 193, 224 A.3d 1173 (2020). That is "[b]ecause a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, 192 Conn. App. 159, 164, 217 A.3d 649 (2019). "In determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense." *County Federal Savings & Loan Assn.* v. *Eastern Associates*, 3 Conn. App. 582, 585, 491 A.2d 401 (1985).

The following additional facts and procedural history are relevant to the defendants' claims. On April 15, 2020, the defendants filed a substitute answer and special defenses, in which they asserted five special defenses: (1) bad faith settlement practices; (2) unclean hands as to the actions of Consumer Solutions, LLC; (3) unclean hands as to the actions of GMAT; (4) that "GMAT is not the holder in due course of the note"; and (5) the "inapplicability of [the] accidental failure of suit statute." With respect to their bad faith settlement practices and unclean hands defenses, the defendants alleged, inter alia, that Consumer Solutions, LLC, one of the plaintiff's predecessors in interest, "committed bad faith settlement practices" and that, "[a]bsent said bad faith, the first foreclosure action would have been successfully resolved via mediation." In support of these broad assertions, the defendants appended to their answer and special defenses an exhibit purporting to be a mediator's report from December 23, 2011, describing four mediation sessions between the defendants and Consumer Solutions, LLC. The defendants alleged that the mediation report showed that Consumer Solutions, LLC, "flagrantly flouted its mediation obligations."

The report itself stated as follows: "The parties have met four times to attempt to negotiate a settlement of

this case on [August 4, September 14, November 10 and December 8, 2011]. The [August 4] and [September 14] mediations were spent soliciting documents from the borrowers for review and updating/completing the submission of those documents.

"The parties met for mediation on [November 10, 2011] in order to determine if the borrowers' financial situation would warrant the bank making a modification offer. The [August 4] and [September 14] submissions indicated that the borrowers now have significantly more income than they had when they fell behind on the loan. Based upon these circumstances, the bank tendered a tentative offer to the borrowers that was conditioned upon the borrowers coming up with a significant contribution. The bank would modify their loan so that their monthly payment would be more affordable. The modification would have a three month trial period along with a significant contribution. The borrowers indicated that they would have no trouble making the trial payments, but they only had 40 [to] 50 [percent] of the down payment on hand. There was the possibility that they could come up with the total amount with the help of a third party. Mediation was adjourned until [December 8, 2011] with the borrower[s] and the servicer's underwriter pledging to continue discussions regarding the timing and amount of the contribution to be paid.

"The parties met again for mediation on [December 8, 2011]. Mediation began with the underwriter informing everyone that the proposed modification was only on the table through [December 10, 2011]. The borrowers indicated [that] they would not have the full amount of the down payment until the second week of January due to their having to acquire it from a third party and the third party's year-end financial obligations. The mediator proposed that, since the offer was to include a trial period anyway, the borrowers could submit [one third] of the down payment plus the scheduled monthly trial payment on each of the scheduled payment dates. This would allow for them to pay the amount they had on hand immediately and allow for the time need[ed] for them to receive assistance from friends/family. This proposal would also place the lender in the same position after the trial period as their initial proposal. The borrower[s] said this would be no problem for them. The underwriter repeatedly and categorically refused to convey this new proposal to the investor. The borrowers attempted to give the lender safeguards against their failure to pay resulting in further delays in the foreclosure process. The underwriter continued to refuse to forward the offer to the investor. The financial [documents] of the borrowers indicate an ability to support a modification if the investor will negotiate with them."

On January 28, 2021, the court granted in part and

denied in part GMAT's motion to strike the defendants' special defenses, striking all the defenses except for the defendants' fourth special defense, which asserted that GMAT was not the holder in due course of the note. The court explained, inter alia, that, although the mediator's report indicated some frustration with Consumer Solutions, LLC, the allegations were "not a bad faith settlement practice as plead[ed]." The court further explained that the facts the defendants alleged showed a failed mediation, not bad faith on the part of Consumer Solutions, LLC. It similarly concluded that the defendants' unclean hands special defenses, which were predicated largely on the same fact pattern as the defendants' bad faith claim, did not set forth facts consistent with the defense of unclean hands against either Consumer Solutions, LLC, or GMAT. The court also rejected the defendants' special defense claiming that the accidental failure of suit statute did not apply, explaining that "the previous matter was dismissed for dormancy and not on a substantive basis."

A

The defendants first claim that the court erroneously granted GMAT's motion to strike the defendant's special defenses of bad faith settlement practices and unclean hands because "[t]hese defenses arose from . . . conduct [by Consumer Solutions, LLC] during the mandatory mediation process, wherein the mediator expressed what appears to be frustration at [the] . . . failure [of Consumer Solutions, LLC] to continue when a deal nearly was at hand." The plaintiff disagrees, arguing, inter alia, that these defenses alleged conduct by a third party in a separate lawsuit and failed to allege facts establishing successor liability, that these defenses were waived because the defendants did not file a motion for sanctions pursuant to General Statutes (Rev. to 2015) § 49-31n (c)[9] during the mediation process in the prior foreclosure action, and, more fundamentally, that these defenses failed to allege facts sufficient to state a defense of bad faith or unclean hands. For the reasons that follow, we agree with the plaintiff.

"[W]e note that an action to foreclose a mortgage is an equitable proceeding. . . . It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrong-

ful by honest and fair-minded people, the doctrine of unclean hands does not apply." (Citations omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310–11, 777 A.2d 670 (2001). Indeed, "[t]he party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked. . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Citation omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 747, 196 A.3d 328 (2018).

Similarly, bad faith generally "implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *J & M Holdings, LLC*, 143 Conn. App. 340, 348, 70 A.3d 156 (2013).

With these principles in mind, and construing the factual allegations in a manner most favorable to the defendants, we conclude that the trial court properly granted GMAT's motion to strike the defendant's bad faith settlement practices and unclean hands special defenses. Indeed, even if we assume, without deciding, that the alleged misconduct of the plaintiff's predecessor in interest (multiple times removed) during a mediation process that occurred in a prior foreclosure action can affect the plaintiff's rights in this foreclosure action and that the defendants were not precluded from raising these special defenses because they failed to file a motion for sanctions pursuant to § 49-31n (c) during the challenged mediation process, the defendants still have not alleged facts sufficient to state a defense of unclean hands or bad faith settlement practices.[10] Simply put, there is nothing in the defendants' special defenses that sufficiently allege that the plaintiff's predecessor in interest engaged in wilful misconduct or in conduct that involved a dishonest purpose or is of such character as to be condemned by honest and fair-minded people. As the trial court correctly observed, what the defendants essentially allege "is a failed mediation." Accordingly, we conclude that the court properly struck the defendants' special defenses of unclean hands and bad faith settlement practices.

B

The defendants' final claim is that the court improperly granted the motion to strike their fifth special defense, which asserted the "inapplicability of the accidental failure of suit statute." They claim that the court applied the incorrect legal standard when it concluded that the plaintiff could avail itself of the savings statute because the first foreclosure action was not dismissed on the merits. They argue that, because their special defense was improperly stricken, "the statute of limitations bars the plaintiff's deficiency claim."

The plaintiff points out that the judgment from which the defendants are appealing is the judgment of strict foreclosure and that the accidental failure of suit statute is irrelevant to the plaintiff's right to foreclose on the mortgage. The plaintiff also argues that the defendants have not specifically pleaded a statute of limitations defense and, therefore, have waived any such defense. It further contends that, even if the defendants had pleaded a statute of limitations defense to the deficiency judgment component of the complaint, that defense would not yet be ripe for adjudication.

We conclude that the motion to strike the defendant's special defense directed at the plaintiff's prayer for relief seeking a deficiency judgment and alleging that such relief was time barred was not ripe for adjudication. As a starting point, "[j]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Emphasis in original.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86, 952 A.2d 1 (2008). Because the plaintiff raises an issue regarding the justiciability of the defendants' fifth special defense, our appellate review is plenary. See *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004) ("because an issue regarding justiciability raises a question of law, our appellate review is plenary").

This court's decision in *U.S. Bank, National Assn.* v. *Moncho*, supra, 203 Conn. App. 28, is relevant for present purposes. In *Moncho*, the defendants asserted a special defense claiming that the applicable statute of limitations barred the plaintiff from obtaining a deficiency judgment. Id., 47. The trial court "determined that because 'the plaintiff has not made a motion for deficiency judgment to this point in the proceedings . . . this defense is premature and may be addressed during any subsequent proceedings.' " Id. On appeal to this court, we agreed with the trial court, explaining that, because the plaintiff in that case had yet to file a motion for a deficiency judgment, "[t]he defendants' claim that any attempt by the plaintiff to seek a deficiency judgment is barred by the statute of limitations

is thus a claim contingent upon some event that has not and indeed may never transpire." (Internal quotation marks omitted.) Id., 48. This court therefore concluded that the trial court correctly declined to adjudicate the defendants' statute of limitations defense prior to the plaintiff filing a motion for a deficiency judgment. Id.

In light of *Moncho*, we conclude that the court in the present case improperly granted the motion to strike the defendants' fifth special defense because the defendants' "inapplicability of the accidental failure of suit statute" defense was not ripe for adjudication. See id. ("[i]n the present case, we conclude that the defendants' statute of limitations defense is not ripe for review"). As in *Moncho*, the plaintiff has not yet filed a motion for a deficiency judgment and may never elect to do so. See id. On the basis of this court's decision in *Moncho*, it is clear that a defendant's special defense regarding the applicability of the savings statute as it pertains to a deficiency judgment becomes ripe for adjudication only after a plaintiff files a motion for a deficiency judgment. Either party can then challenge the court's adjudication of the defense on appeal once the court renders judgment on the motion for a deficiency judgment.[11] Accordingly, the court should have dismissed the motion to strike as it pertains to the defendants' fifth special defense.

The judgment is reversed only with respect to the granting of the motion to strike the defendants' fifth special defense and the case is remanded with direction to render judgment dismissing that portion of the motion to strike and for the purpose of setting new law days; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[1] During the underlying proceedings, the original plaintiff, GMAT Legal Title Trust 2014-1, U.S. Bank National Association, as Legal Title Trustee, filed an amended ex parte application for a prejudgment remedy. On June 2, 2020, the court, *Spader*, *J.*, issued an order granting the ex parte application. The defendants timely appealed that order on June 9, 2020. On July 12, 2022, this court affirmed the trial court's judgment with respect to the court's jurisdiction over the ex parte application and dismissed the remainder of the appeal as moot. *GMAT Legal Title Trust 2014-1*, *U.S. Bank*, *National Assn.* v. *Catale*, 213 Conn. App. 674, 696, 278 A.3d 1057, cert. denied, 345 Conn. 905, 282 A.3d 980 (2022). The disposition of that appeal has no bearing on the claims before us in this appeal.

[2] The foreclosure complaint named the following parties as additional defendants by virtue of an interest held in the mortgaged property subsequent in right to that of the plaintiff: Mortgage Electronic Registration Systems, Inc., as nominee for WMC Mortgage Corp.; WMC Mortgage Corp.; Cavalry SPV I, LLC; Advanced Radiology Consultants, LLC; the Department of Revenue Services; and Connecticut Distributors, Inc. None of these additional defendants is participating in the present appeal, and, thus, all references to the defendants in this opinion are to Vito Catale and Maria Catale only.

[3] On August 4, 2021, RMS Series Trust 2020-1 filed a motion to substitute itself for the original plaintiff, GMAT Legal Title Trust 2014-1, U.S. Bank National Association, as Legal Title Trustee, after the subject note and mortgage were assigned to it. The trial court, *Spader*, *J.*, granted the motion to substitute on August 23, 2021. Accordingly, all references to the plaintiff in this opinion are to RMS Series Trust 2020-1.

[4] Although the defendants suggest in their reply brief that their objections before the trial court encompassed exhibits 18, 19, *and 20*, our review shows

that exhibits 18 and 19 are the only documents to which they objected. With respect to exhibit 18, the defendants' counsel stated: "Perhaps I can expedite the process. Defendants object not to any information on this document that was created by Rushmore in the course of its business. We do object to any information that was onboarded from a previous servicer or holder . . . ." As to exhibit 19, the defendants' counsel objected, stating: "I would ask the same question as to what information on this document is generated by Rushmore from Rushmore's own records as opposed to information [that] is onboarded from a prior servicer, to which we object." With respect to exhibit 20, the plaintiff's counsel stated: "I move for the admission of exhibit 20." The court asked if there was an objection. The defendants' counsel responded: "No objection, Your Honor." We therefore reject any suggestion by the defendants that their objections encompassed exhibit 20. See *Dept. of Social Services* v. *Freeman*, 197 Conn. App. 281, 296, 232 A.3d 27 ("[i]n order to preserve an evidentiary ruling for review, trial counsel must object properly"), cert. denied, 335 Conn. 922, 233 A.3d 1090 (2020).

[5] During the hearing, Anthony Younger, an officer of Rushmore, testified that exhibit 19 is essentially the same type of document as exhibit 18, but that it covers a different period of time. Younger testified that exhibit 19 looks different from exhibit 18 because Rushmore updated its formatting, but he explained that exhibit 18 and exhibit 19 were created and maintained in the same way.

[6] In *Jenzack Partners, LLC*, our Supreme Court found persuasive the analysis by the United States Court of Appeals for the First Circuit in *U.S. Bank Trust, N.A.* v. *Jones*, 925 F.3d 534 (1st Cir. 2019). In *Jones*, the bank "sought to establish the total amount owed on the loan account by introducing a computer printout [maintained by the current loan servicer of the borrower's account] that contained an account summary and a list of transactions related to the loan." Id., 536. The record in *Jones* included "prior entries [that] were created by two other loan servicers . . . and were integrated into [the current loan servicer's] database when [the current loan servicer] succeeded them as servicer." Id., 537. Noting that "there is no categorical rule barring the admission of integrated business records under [the business records exception] based only on the testimony from a representative of the successor business," the court relied on the fact that the previous loan servicers had a business duty to report the mortgage history to the current loan servicer and that the current loan servicer's own financial interests were at stake by relying on the records. Id., 537–38. The court further explained that the borrower "did not dispute the transaction history by claiming overbilling or unrecorded payments, as she surely could have done if the records were inaccurate." (Internal quotation marks omitted.) Id., 538. On those facts, the First Circuit held that the computer printout evidencing the account summary was admissible under the federal business records exception to the hearsay rule. Id., 539–40.

[7] At oral argument before this court, the defendants' counsel was asked whether, had there been twenty prior loan owners or servicers, the plaintiff would be required to present a witness from each and every one of them in order for the business records exception to apply to the records in question. The defendants' counsel responded in the affirmative, stating that he believed that would be required under our Supreme Court's decision in *Jenzack Partners, LLC*.

[8] We note that, even if exhibits 18 and 19 had been improperly admitted into evidence, the admission of those records would not constitute reversible error because they were cumulative of other evidence presented. See *Kovachich* v. *Dept. of Mental Health & Addiction Services*, 344 Conn. 777, 819, 281 A.3d 1144 (2022) ("[i]t is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error" (internal quotation marks omitted)). Indeed, exhibit 20, which is a customer activity statement spanning August, 2016, to November, 2021, was admitted without objection and contains information about the outstanding principal balance, the total amount of escrow advances made by the mortgagee for real estate taxes and hazard insurance, the interest rate charged under the loan throughout the history of loan servicing, and the date on which the defendants stopped making payments. Exhibit 22, which also was admitted without objection, contains the amount of attorney's fees paid.

[9] General Statutes (Rev. to 2015) § 49-31n (c) (2) provides in relevant part: "The court may impose sanctions on any party or on counsel to a party if such party or such counsel engages in intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives

of the mediation program. Any sanction that is imposed shall be proportional to the conduct and consistent with the objectives of the mediation program. Available sanctions shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines. . . ."

Hereinafter, all references to § 49-31n in this opinion are to the 2015 revision of the statute.

[10] We note that, in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 676 n.16, 212 A.3d 226 (2019), our Supreme Court considered a plaintiff's argument claiming that the statutory sanctions in § 49-31n (c) (2) were the only proper remedy to address misconduct during mediation and that mediation conduct could not serve as a special defense in a foreclosure action. Our Supreme Court explained that the facts of that case involved an alleged pattern of misconduct that commenced long before the filing of the foreclosure action and continued during mediation and that it had "no occasion, therefore, to consider whether the availability of [the sanctions set forth in § 49-31n (c) (2)] reflects a legislative intent to occupy the field when the misconduct is limited to the mediation period." Id. We, too, need not decide that question today.

[11] To the extent that the defendants' arguments can be construed as suggesting that the savings statute had some application to the plaintiff's action for strict foreclosure, that suggestion is without merit. It is well known that "[t]he accidental failure of suit statute applies only to actions barred by an otherwise applicable statute of limitations." *McKeever* v. *Fiore*, 78 Conn. App. 783, 795, 829 A.2d 846 (2003). Because there is no applicable statute of limitations for a mortgage foreclosure, the accidental failure of suit statute is inapplicable. See *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 815, 873 A.2d 1003 ("the rule in Connecticut, as far back as the early nineteenth century, is that a statute of limitations does not bar a mortgage foreclosure"), cert. denied, 275 Conn. 902, 882 A.2d 670 (2005); see also *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 42, 257 A.3d 360 ("[t]his court previously has rejected the argument that § 42a-3-118 applies to a mortgage foreclosure"), cert. denied, 338 Conn. 913, 259 A.3d 653 (2021); 2 D. Caron & G. Milne, Connecticut Foreclosures: An Attorney's Manual of Practice and Procedure (12th Ed. 2022) § 32–3:14, p. 666 ("[s]ince a foreclosure is an action sounding in equity, there is no statute of limitations defense to a mortgage foreclosure").